

# Insurance Coverage for Rip & Tear Costs

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# Rip and Tear

- “Rip and tear” costs are those costs required to access defective work or property damage.
- Does a CGL policy provide coverage for these costs?

# Policy Language of CGL Insuring Agreement

- A CGL insuring agreement states that an insurance carrier is obligated to “pay those sums that the insured becomes legally obligated to pay as damages because of . . . ‘property damage’ to which this insurance applies.”

## *Lennar Corp. v. Markel American*, 413 S.W.3d 750 (Tex. 2013)

- A homebuilder made a claim for the cost to repair its homes that had been damaged because of EIFS siding that had been installed on the homes. *Id.* at 751.
- Claim involved the removal of EIFS to inspect for wood rot damage.
- Lennar removed forty-eight homes that had not incurred covered property damage from its proof at trial.

## *Lennar Corp. v. Markel American,* 413 S.W.3d 750 (Tex. 2013)

- Court awarded the costs Lennar incurred to determine which areas of the homes had water damage.
- The Court noted the importance that Lennar was seeking these “because of” damages for only houses that suffered covered ‘property damage,’ by stating, ‘We are not confronted with a situation in which the existence of damage was doubtful.’ Markel concedes that each of the 465 homes for which Lennar sought to recover remediation costs was actually damaged.”



*U.S. Metals, Inc. v. Liberty Mut. Group, Inc.*, 490 S.W.3d 20 (Tex. 2016).

- U.S. Metals, Inc. sold ExxonMobil about 350 weld-neck flanges to be installed into diesel processing units at two Exxon refineries.



# *U.S. Metals Facts*

- Several flanges leaked in post-installation testing.
- Extensive investigation revealed that the flanges did not meet industry standards. ExxonMobil decided to replace them to avoid the risk of fire and explosion.
- For each flange, the replacement process involved:
  - 1) stripping the coating and insulation (destroyed in the process),
  - 2) cutting the flange out of the pipe,
  - 3) removing the gaskets (destroyed in the process),
  - 4) grinding the pipe surfaces smooth for re-welding,
  - 5) replacing the flange and gaskets,
  - 6) welding the new flange to the pipes, and
  - 7) replacing the temperature coating and insulation.
- This process delayed operation of the diesel units for several weeks.

# *U.S. Metals* Facts

- ExxonMobil sued U.S. Metals for:
  - a) \$6,345,824 for the cost of replacing the flanges and
  - b) \$16,656,000 for the lost use of the units during the replacement process.
- U.S. Metals settled with ExxonMobil for \$2.2 million
- U.S. Metals claimed indemnification from its CGL carrier, Liberty Mutual.
- Liberty Mutual denied coverage.



*U.S. Metals, Inc. v. Liberty Mut. Group, Inc.*, 490 S.W.3d 20 (Tex. 2016).

- Exclusion K precluded coverage for damages to the flanges themselves.
- Exclusion M precluded coverage for the loss of use of the diesel units because they were restored to use by replacing the flanges.

*U.S. Metals, Inc. v. Liberty Mut. Group, Inc.*, 490 S.W.3d 20 (Tex. 2016).

- “But the insulation and gaskets destroyed in the process were not restored to use; they were replaced. They were therefore not impaired property to which Exclusion M applied, and the cost of replacing them was therefore covered by the policy.”

*U.S. Metals, Inc. v. Liberty Mut. Group, Inc.*, 490 S.W.3d 20 (Tex. 2016).

- Thus, under the Court's *U.S. Metals* analysis, the destruction of the insulation and gaskets in order to "get to" and repair the defective flanges generated new property damage that triggered the CGL policy.

*Travelers Lloyds Ins. Co. v. Cruz Contracting of Texas, LLC*, 2017 WL 5202891 (W.D. Tex. Sept. 7, 2017)

- The Western District of Texas considered rip & tear damages after *U.S. Metals*
- This case involves the construction of a residential development
- D&D, the GC, subbed out utility work to Cruz (sewer and water systems)

## *Cruz FACTS*

- After Cruz's utility work was completed, D&D and other subs performed road work above Cruz's work
- Nearing completion, it was discovered that Cruz's defective work necessitated the removal of the roadway which damaged other subs' work



Prior to discovery of utility leaks -  
this is how the Woods of Boerne looked.

APP000044





Trenching through road to access sewer main and sewer laterals.

EXHIBIT  
7B  
APF000045





Trench through road and parkway.  
Curbs broken under their own weight.

EXHIBIT  
7C  
APP00046

## *Cruz* MEANING

- The Court held that there was coverage for the rip and tear costs to access the defective utility work.
- Seems to be creating insurance coverage when there was no coverage prior to the rip and tear.
- Other courts may follow suit and permit the insured to recover rip and tear expenses even though the defective work is not covered

# Future Issues

- A. Can Rip and Tear Be an “Occurrence”?
- B. Which Policy is Triggered?
- C. Applicability of Exclusion A?
- D. Carriers Respond with Rip and Tear Endorsements

# Occurrence

- CGL policy requires that the property damage is caused by an occurrence
- An “occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
- Is ripping and tearing really an accident?

# Which Policy is Triggered?

- In *Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008), the Supreme Court adopted what is known as the "actual injury" approach—property damage "occurs" when the property is *actually damaged*, not the date when the physical damage is discovered or could have been discovered.
- But how about fortuitous loss?



# Exclusion a.

- Expected or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured.

# Carriers Respond with Endorsements

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **FAULTY WORK EXCLUSION WITH RESULTING DAMAGE COVERAGE**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

In regard only to "your work" in connection with residential structures, **Exclusion I. Damage to Your Work Of Section I - Coverages, Coverage A. Bodily Injury and Property Damage Liability, 2. Exclusions** is deleted and replaced with:

### **I. Faulty, Defective or Poor Workmanship in Your Work**

This insurance does not apply to any claim or "suit" for the cost of repair, replacement, adjustment, removal, loss of use, inspection, disposal, or otherwise making good any faulty, defective or poor workmanship in "your work" for which any insured or any insured's employees, contractors, or subcontractors may be liable.

This exclusion does not include "property damage" sustained by any other property that is caused by the faulty, defective or poor workmanship in "your work".

This exclusion applies only to residential structures for which coverage is not otherwise excluded under this insurance.

# Questions?

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