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Your Product Exclusion, Subcontractor's Faulty Installation, Intentional Acts and Negligent Supervision Coverage Update

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Wisconsin, Nebraska, North Carolina Coverage Cases
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"Your Product" Exclusion – Seventh Circuit (Wisconsin Law)

Haley v. Kolbe & Kolbe Millwork Co.
--- F.3d ---, 2017 WL 3392381 (7th Cir. Aug. 8, 2017)

The U.S. Court of Appeals for the Seventh ruled that the "your product" exclusion was ambiguous and did not exclude coverage for claims against the Kolbe & Kolbe Millwork Company (Kolbe) for leaky windows. A class of plaintiffs filed a class action lawsuit against Kolbe, claiming that windows purchased from Kolbe were defective and allowed air and water to leak into the plaintiffs' homes. The plaintiffs asserted two categories of damages as a result of Kolbe's window products: (1) direct losses (i.e., damages from having to replace the windows), and (2) indirect or consequential losses from injuries to the plaintiffs' homes (such as stained walls and buckled plaster). The parties agreed that Kolbe's windows, which were manufactured by Kolbe, constituted Kolbe's "goods or products." The appellate court then stated "[a]t the very least, the definition of 'your product' is ambiguous, so we must construe the 'your product' exclusion in favor of coverage." The appellate court concluded that "[a]s Kolbe did not supply or request that anyone else supply the drywall and other materials allegedly damaged in the plaintiffs' homes, the damage, though arising from Kolbe's 'product,' was not also to that 'product' – so the 'your product' exclusion does not eliminate coverage for these claims." Accordingly, because there may be coverage for at least one claim, the appellate court held that there was a duty to defend, and reversed the trial court's judgment in favor of the insurer.

Subcontractor's Faulty Installation – Eighth Circuit (Nebraska Law)

McShane Constr.Co. v. Gotham Ins. Co.
--- F.3d ---, 2017 WL 3445118 (8th Cir. Aug. 11, 2017)

The U.S. Court of Appeals for the Eighth Circuit affirmed the dismissal of a suit by a general contractor against Gotham Insurance Co. (Gotham) regarding coverage for remediating a subcontractor's faulty

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installation of a fire protection and suppression system. McShane Construction Co. LLC (McShane) was the general contractor and additional insured on the commercial general liability policy issued to subcontractor Mallory Fire Protection Services (Mallory), which policy was obtained in conjunction with the construction of a $15 million apartment complex. To replace the faulty system, McShane had to remove drywall, causing damages allegedly exceeding $614,000. The appellate court first agreed with the dismissal of McShane's statutory claims under Nebraska's Unfair Insurance Trade Practices Act and Unfair Insurance Claims Settlement Practices Act because "neither of these statutes provides McShane with a private right of action." In regard to the breach of contract and related claims, the appellate court found that McShane did not meet the clear policy language requiring "liability" or "legal obligation to pay" when it remediated the property. Lastly, in regard to McShane's allegations of waiver and estoppel due to the prolonged claim-adjustment process, the appellate court found that "McShane alleges no clear, unequivocal, and decisive acts by Gotham indicating that it intended to waive its right to deny the claim" and likewise failed to "plausibly allege that Gotham assumed or continued defense of any claim against McShane."

Intentional Acts and Negligent Supervision – North Carolina

Plum Props., LLC v. N. Carolina Farm Bureau Mut. Ins. Co.
--- S.E.2d ---, 2017 WL 3254610 (N.C. Ct. App. Aug. 1, 2017)

The North Carolina Court of Appeals determined that there was no insurance coverage available for property damage caused by vandalism. In Plum, the minor insureds vandalized four houses. Thereafter, the homeowner sued the minor insureds for intentionally, willfully and maliciously damaging and destroying the houses. The appellate court determined that vandalism was not an "occurrence" because it was not an "accident." The appellate court noted that an occurrence is "limited to events that are not 'expected or intended from the point of view of the insured.'" "Accordingly, where the potentially damaging effects of an insured's intentional actions can be anticipated by the insured, there is no 'occurrence.'" Furthermore, even if the vandalism fell within the coverage, the expected/intended exclusion would clearly apply to preclude coverage for the minor insureds' intentional, willful and malicious acts. The claimant also argued that coverage should be available for the negligence and negligent supervision claims asserted against the minors' parents. However, the appellate court rejected that argument, reasoning that the insuring agreement "cannot be read to cover intentional damage knowingly caused by insureds, which severally would not qualify as an occurrence, merely because the damages inflicted were not intended by other insureds covered by the Policies." The appellate court thus affirmed the trial court's grant of summary judgment in favor of the insurer.

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