

# 'Particular Part' Exclusions Can Mean Trouble For Contractors

By **Finley Harckham, Dennis Artese and Luma Al-Shibib** (March 2, 2020)

Commercial general liability insurance policies are meant to provide broad coverage against liability for, among other things, property damage or bodily injuries resulting from accidents.

These policies typically contain certain standard-form property damage exclusions, referred to as business risk exclusions, the purported purpose of which is to exclude coverage for the costs to repair or replace a policyholder's faulty or defective work, or other supposedly foreseeable risks of doing business which the policyholder theoretically should be able to control.

These business risk exclusions include "that particular part" exclusions, exclusions J(5) and J(6) in standard-form CGL policies, which purport to set the boundaries of damages excluded as a result of "your work." Understanding the scope and application of these exclusions is critical to understanding what will and will not be covered under any particular CGL policy.

This article discusses the two competing interpretations of "that particular part," of which a policyholder in the construction industry should be mindful when assessing the adequacy of CGL coverage that contains these standard-form exclusions.

## What Are "That Particular Part" Exclusions?

"That particular part" exclusions in standard-form CGL policies are contained in exclusion J. Generally, exclusion J applies in instances where property damage occurs while construction of a project is still ongoing and excludes coverage for damage to the policyholder's own work caused by the policyholder's failure to perform the work properly. The exclusion, however, does not exclude coverage for damage to other property caused by the allegedly defective work. "That particular part" exclusions, contained in standard-form policies at J(5) and J(6), exclude coverage for:

### (j) Damage to Property

"Property Damage" to:

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.[1]

The policies also contain the following note:



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Paragraph (6) does not apply to “property damage” included in the “products-completed operations hazard.”[2]

On its face, exclusion J(5) applies only to property damage that occurs while the insured is performing operations. Exclusion J(6) applies to exclude coverage for repairs necessary to correct faulty workmanship on projects that are not yet complete (because property damage included in the products completed operations hazard, i.e., work that has been completed, are exempted from this exclusion).

The interpretation and application of these exclusions in cases involving construction incidents causing property damage can be significant in determining whether a duty to defend and/or indemnify exists to cover the insured contractor’s underlying property damage claims. The plain meaning of these provisions excludes coverage for “that particular part” of property damaged by work performed on it.

By implication, however, these exclusions do not operate to bar coverage of damages for any other property that is damaged by the work performed on the “particular part.”[3] Thus, the issue that arises in connection with the application of these exclusions is what constitutes “that particular part” of the property for which insurance coverage is excluded.

### **Competing Interpretations of the “Particular Part” Exclusions**

There are two competing approaches to the interpretation of these exclusions — a broad interpretation advocated by insurance companies, and a narrower interpretation advocated by policyholders and insurance claimants.

Insurance companies advocating for a broad interpretation of these exclusions argue that “that particular part” of the property on which work is performed should be defined by reference to the scope of the policyholder’s construction project contract. In other words, whatever work the policyholder undertakes in its project contract constitutes “that particular part.”

While this approach has been adopted in some cases,[4] many courts have rejected it and opted for a narrower interpretation. If widely adopted, the approach advocated by insurance companies would have overreaching negative effects on construction contractor-policyholders, particularly general contractors.

Indeed, general contractors with standard “that particular part” exclusions in their policies would never be covered for any property damage claims occurring on the project site that result from their (or their subcontractors’) work because the general contractor’s scope of work (as defined in the project contract) relates to the entire project site, thus any damage occurring anywhere on the project site would be part of “that particular part” of property excluded from coverage.

Thus, it makes sense that the majority of jurisdictions that have considered the scope and interpretation of “that particular part” exclusions have interpreted “that particular part” narrowly.[5] More specifically, these courts view the plain meaning of the exclusionary language as barring coverage for damages only for that particular, divisible part or unit of the project being worked on, as distinguished from the entire project or project site that consists of multiple, divisible parts. As one court observed:

The opening words of the exclusion – namely, “[t]hat particular part” – are trebly restrictive, straining to the point of awkwardness to make clear that the exclusion

applies only to building parts on which defective work was performed, and not to the building generally. And we also agree that “part,” as used in this exclusion, means the “distinct component parts” of a building – things like the “interior drywall, stud framing, electrical wiring,” or, as here, the foundation.[6]

Thus, “where the insured is responsible for assembling many components of a large structure, such as a building, courts have interpreted [“that particular part”] to exclude coverage only for damage to the defective component itself, and not to damage to the remainder of the structure.”[7]

Between these two competing interpretations, the more well-reasoned one is the narrow interpretation of “that particular part.” This is because it comports with general principles of insurance policy analysis, which require insurance policies to be interpreted according to their plain meaning, with exclusions applied narrowly and in favor of coverage.

Additionally, to the extent that the exclusionary language of “that particular part” is deemed ambiguous and susceptible to two reasonable interpretations (the broad interpretation advocated by insurance companies and the narrow interpretation advocated by policyholders and claimants), well-established canons of legal construction require the ambiguity to be resolved in favor of the insured.

Furthermore, the narrow interpretation is the one advanced and intended by the entity that drafted these exclusions. Specifically, that entity, the Insurance Services Office, explained the narrow scope of “that particular part” in exclusion J(5):

This clause excludes property on which the insured [or its subcontractor] is actually working at the time of the property damage. ... Where the damage caused ... goes beyond damage to the property on which [the insured or its subcontractor] is working, this section limits the exclusion to the particular part on which he is working.[8]

To aid in the interpretation of “that particular part,” ISO offered the following example: where a contractor is in the process of erecting steel beams, and having erected four beams already and while erecting the fifth beam, causes that beam to fall, thereby damaging all five steel beams, “that particular part” of the property is the fifth beam only — and not the other four beams.[9]

Similarly, in connection with exclusion J(6), ISO stated that the exclusion does not preclude coverage for damage to completed, nondefective work caused by defective work. This is because the completed, nondefective work does not fall within the narrow interpretation of “that particular part.”

To illustrate its point, the ISO offered the following example: Where the insured has installed a defective valve on a pressure vessel, and due to the defective valve, the vessel explodes during testing, “that particular part” for which coverage is excluded is the defective valve only — the damage to the rest of the vessel remains covered under the policy.[10] Thus, as between the two competing interpretations, the narrow one advocated by policyholders and insured claimants appears to be the better reasoned approach, and therefore, favored by the majority of jurisdictions.

## **Conclusion**

Despite the fact that the narrow interpretation of “that particular part” comports with the plain meaning of the exclusionary language and is in line with the tenets of insurance policy interpretation, a minority of courts have adopted a broad interpretation defined by the parameters of the construction project contract.

A contractor operating in a jurisdiction susceptible to this broad interpretation faces tremendous potential exposure for damages associated with construction-related property damage claims. Because the law on this issue is not entirely uniform, a construction contractor’s ability to obtain coverage under its commercial general liability policy for property damage claims in construction accident cases could be at risk.

In order to best protect their interests, contractors should familiarize themselves with the terms and exclusions in their CGL policies and discuss the implications of those policies with their insurance brokers or advisors. If contractors have concerns about the inclusion of “that particular part” standard-form exclusions in their CGL policies, it is advisable to consult insurance coverage counsel to determine how these exclusions are (or may be) interpreted and applied in any particular jurisdiction and whether it is advisable to pursue a policy endorsement modifying the scope of these exclusions.

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[1] Commercial General Liability Coverage Form, CG 00 01 04 13, published by Insurance Services Office, Inc. (hereinafter, “ISO Form Policy”), Section I – Coverage A, Exclusions, ¶ 2(j), at p. 5 (2012).

[2] “Products-completed operations hazard” typically is defined to include property damage “occurring away from premises you own or rent and arising out of ‘your product’ or ‘your work’ except: (1) products that are still in your physical possession; or (2) Work that has not yet been completed or abandoned.” ISO Form Policy, Section V – Definitions, ¶ 16a., at p. 15.

[3] See Malecki, Flitner, Trupin, Commercial Liability Risk Management and Insurance, § 3.42 (AICPCU 6th Ed. 2005).

[4] See Ohio Cas. Ins. Co. v. Ferrell Devs. LLC, Case No. 3:10-CV-162-AC, 2011 U.S. Dist. LEXIS 135819, at \*28-\*29 (D. Ore. Jul. 27, 2011) (explicitly noting that it follows the minority approach under which the particular part exclusion “is more broadly construed to include property affected by the services performed by the insured.”); Bituminous Cas. Corp. v. N. Ins. Co. of N.Y., 548 S.E.2d 495, 498 (Ga. App. 2001) (follows minority rule that “particular part” is entire house because general contractor was responsible for entire project); E.H. Spencer & Co., LLC v. Essex Ins. Co., 944 N.E.2d 1094, 2011 WL 1327718, at \*1, n.3 (Mass. App. 2011) (same); Century Indem. Co. v. Golden Hills Builders, Inc., 561 S.E.2d 355, 359 (S.C. 2002) (relies on Bituminous Cas. Corp. to exclude coverage for repairs to substructure that was not defectively constructed under “particular part” exclusion); Vandicort Constr. Co. v. Seattle Tennis Club, 522 P.2d 198, 201 (Wash. App. 1974) (court, in a cursory fashion, concluded that “that particular part” exclusion applied to

bar coverage for damages to entire concrete building under construction sustained as a result of an earthslide on the property's northern property line because, according to the court, the contractor was performing operations on the entire property site and therefore damages to the western wall of the building were part of "that particular part" for which coverage was excluded).

[5] See, e.g., *Fortney & Weygandt, Inc. v. America Manufacturing Mutual Insurance Co.*, 595 F.3d 308, 311 (6th Cir. 2010) (where a contractor was hired to build a restaurant, the "particular part" was the defectively installed restaurant foundation, and coverage for damages to other parts of the restaurant incurred as a result of the defective foundation was not excluded); *Mid-Continent Casualty Co. v. JHP Development, Inc.*, 557 F.3d 207, 215 (5th Cir. 2009) (where a contractor was hired to construct a multi-unit condominium structure, water damage to the interior of the condominium, caused by the general contractor's defective work in waterproofing the exterior of the building, was covered under the policy because the "particular parts" to which the exclusion applied were the building's exterior finishes and retaining walls, and not the interior portions); *Lukes v. Mid-Continent Casualty Co.*, No. CV 12-47-M-DLC, 2013 U.S. Dist. LEXIS 17979, at \*8 (D. Mont. Feb. 11, 2013) (where a general contractor was hired to design and direct the construction of a home, the defective siding of the dwelling was the "particular part," and the general contractor's claim for damages to the house's interior and overall building structure, caused by water seeping through the defective siding, was not barred by the "particular part" exclusions); *Minergy Neenah, LLC v. Rotary Dryer Parts, Inc.*, No. 05-C-118, 2008 U.S. Dist. LEXIS 33814, at \*19 (E.D. Wis. Apr. 24, 2008) ("that particular part" exclusions only barred coverage for damage to the steam tubing of a rotary dryer that was being replaced at the time fire broke out, but the exclusions did not bar coverage for damage to the shell of dryer); *W.E. O'Neil Construction Co. v. National Union Fire Insurance Co.*, 721 F. Supp. 984, 995 (N.D. Ill. 1989) ("that particular part" was the steel mesh that was defectively installed in the concrete levels of a parking garage construction project; the exclusion only barred damages for repair and replacement of the steel mesh, but not for damages to remainder of garage which the contractor was hired to build); *Fejes v. Alaska Insurance Co.*, 984 P.2d 519, 524 (Alaska 1999) (improperly constructed curtain drain, a component of a septic system that the general contract was hired to replace, was the particular part that was excluded from coverage under general contractor's liability policy – remainder of septic system that was damaged as a result of curtain drain's improper installation was not excluded from coverage); *Frankel v. J. Watson Co., Inc.*, 484 N.E.2d 104, 105-106 (Mass. Ct. App. 1985) (where a general contractor was hired to move a farmhouse to a new site and construct a foundation upon which to place the farmhouse, "that particular part" exclusion applied only to the defectively constructed foundation, but did not bar coverage for damages to the superstructure sustained as a result of being placed atop the defective foundation); *Eichler Homes, Inc. v. Underwriters at Lloyd's, London*, 47 Cal. Rptr. 843, 847 (Ct. App. 1965) (where contractor was hired to build a series of homes, only defective radiant heating systems that contractor installed in the homes was excluded by "that particular part" exclusions, structural damage to homes as a result of ruptures in radiant heating system were covered under contractor's liability policy); *Candid Corp. v. Assurance Co.*, CV054008138, 2007 Conn. Super. LEXIS 851, \*14-\*16 (J.D. New Haven at New Haven Mar. 29, 2007) (denying insurer's motion for summary judgment because disputed issues of material fact precluded court from determining whether windowpanes that sustained damage as a result of contractor's work on surrounding steel frames constituted that particular part of the property on which contractor was working).

[6] *Fortney & Weygandt Inc. v. Am. Mfrs. Mut. Ins. Co.*, 595 F.3d 308, 311 (6th Cir. 2010).

[7] *W.E. O'Neil Constr. Co. v. National Union Fire Ins. Co.*, 721 F. Supp. 984, 995 (N.D. Ill.

1989); see also *Minergy Neenah, LLC v. Rotary Dryer Parts, Inc.*, 2008 U.S. Dist. LEXIS 33814 at \*18-\*19 (unlike a swimming pool, which is a single, unitary structure that cannot be separated into divisible parts, where the property upon which work is performed has separate components, "that particular part" excludes coverage only for the defective component).

[8] ISO Circular, Explanatory Memorandum, Broad Form Property Damage Coverage, General Liability GL 79-12 (January 29, 1979) at 5.

[9] *Id.* at 4.

[10] *Id.* at 5.