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Internet Resources

- P. Wielinski, [The Changing Landscape of Coverage Disputes over Defective Work Claims](http://www.irmi.com/Expert/Articles/2000/Wielinski03.aspx), <http://www.irmi.com/Expert/Articles/2000/Wielinski03.aspx>
- J. Berkeley, [When a Breach of Contract Constitutes an Accident](http://www.irmi.com/Expert/Articles/2000/Berkeley07.aspx), <http://www.irmi.com/Expert/Articles/2000/Berkeley07.aspx>
- [California Supreme Court Finally Confirms Coverage For Breach of Contract Claims Properly Based On Nature of Risk and Injury: Not Plaintiff's Choice Of Pleading](http://www.iraharris.com/art-09.htm), <http://www.iraharris.com/art-09.htm>

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Into The Breach: Insurance Coverage For Breach Of Contract Claims

By Lee M. Epstein

If asked, most insurance professionals would say that general liability insurance policies do not cover breach of contract claims. Indeed, numerous courts have held that general liability policies cover only tort liabilities.¹ Those courts premise their holdings on either the insuring agreement (which promises to pay on behalf of an insured all sums the insured becomes “legally obligated to pay as damages”) or the definition of “occurrence” (which is defined, in part, as an “accident”).

This issue arises most commonly in connection with product and work-related claims. In that context, underlying claimants typically assert a broad range of claims for breach of contract, breach of warranty and negligence. Increasingly, insurers are denying coverage by contending that the “gist” of such actions is for breach of contract, which is not covered by general liability policies. Such denials of coverage, however, are not supported by the language of the insurance policies.

There is nothing in the phrase “legally obligated to pay as damages” that precludes coverage for breach of contract claims. As explained by the California Supreme Court:

“The expression ‘legally obligated’ connotes legal responsibility that is broad in scope. It is directed at civil liability...[which] can arise from either unintentional (negligent) or intentional tort, under common law, statute, or contract.” (Malecki & Flitner, *Commercial General Liability* (6th ed. 197) p. 6, italics added.) “The coverage agreement [which] embraces ‘all sums which the insured shall become legally obligated to pay as damages....’ ... is intentionally broad enough to include the insured’s obligation to pay damages for breach of

contract as well as for tort, within limitations imposed by other terms of the coverage agreement (e.g. bodily injury and property damage as defined, caused by an occurrence) and by the exclusions....” (Tinker, *Comprehensive General Liability Insurance-Perspective and Overview* (1975) 25 Fed. Ins. Counsel Q. 217, 265).²

Moreover, the definition of “occurrence” does not necessarily preclude coverage for breach of contract. An “accident” is defined as “[a]n unexpected and undesirable” event or “something that occurs unexpectedly or unintentionally.”³ Here again, there is nothing to indicate that breach of contract claims are not covered.

In contrast to the lack of specific language precluding coverage for breach of contract and warranty claims, general liability policies typically contain language indicating that such coverage is intended. First, general liability policies provide specific coverage for liabilities resulting from the breach of warranties. The Products/Completed Operations Hazard of general liability policies provides specific coverage for liabilities arising out of a policyholder’s “product” and/or “work.” The policyholder’s “product” and “work” are, in turn, defined to include any “[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of” the policyholder’s product or work.

Second, general liability insurance policies contain numerous exclusions for claims arising from breach of contract. “Exclusions, by their very nature, are designed to operate to deny coverage that otherwise would be provided under the definition of an occurrence.”⁴

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There would be no need for these breach of contract exclusions if such claims were not covered in the first instance.

In determining whether claims arising from a policyholder's product or work are covered, the better reasoned decisions do not focus on the contract/tort distinction. As explained by the California Supreme Court, "[c]overage under a CGL insurance policy is not based upon the fortuity of the form of action chosen by the injured party."⁵ Rather, these decisions focus on the nature of the damage, the insured risk and the specific policy language. In the words of the Third Circuit: "What is at issue here, however, is not the distinction between tort and contract liability but a specific insurance contract that must be interpreted according to well-established rules of construction."⁶

Coverage should be found when the policyholder's product or work causes harm to the person or the property of another. This point was best stated by the Supreme Court of Nebraska:

[A]lthough a standard CGL policy does not provide coverage for faulty workmanship that damages only the resulting work product, if faulty workmanship causes bodily injury or property damage to something other than the insured's work product, an unintended and unexpected event has occurred, and coverage exists.⁷

In the end, the proper focus for determining coverage should be on the nature of the injury alleged and not on the claimant's cause of action. To the extent the policyholder's product or work causes harm to the person or property of another, coverage should exist, irrespective of the claimant's choice of a cause of action.

¹ See, e.g., Windt, *Insurance Claims and Disputes*, § 11.7, n.2 (3d ed 1995).

² *Vandenberg v. Superior Court*, 982 P.2d 229, 245-46 (Cal. 1999) (alterations in original).

³ *Kvaerner*, 908 A.2d 888, 897-98 (Pa. 2006) (quoting Webster's II New College Dictionary 6 (2001)).

⁴ *Donegal Mut. Ins. Co. v. Baumhammers*, 893 A.2d 797, 819 (Pa. Super. 2006).

⁵ See, e.g., *Vandenberg*, 982 P.2d at 243.

⁶ *Imperial Cas. and Indem. Co. v. High Concrete Structures, Inc.*, 858 F.2d 128, 134, n.7 (3d Cir. 1988).

⁷ *Auto-Owners Ins. Co. v. Home Pride Cos.*, 684 N.W.2d 571, 578 (Neb. 2004) (citations omitted).



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