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Illinois Court Addresses Rip-And-Tear Coverage And Existence Of An "Occurrence" In Defective Product Suit

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In *Lexington Ins. Co. v. Chi. Flameproof & Wood Specialties Corp.*, 2018 U.S. Dist. LEXIS 135871, 2018 WL 3819109 (N.D. Ill. Aug. 10, 2018), the U.S. District Court for the Northern District of Illinois found that rip-and-tear costs could qualify as covered "property damage," but the court rejected coverage for claims that the insured intentionally sold a noncompliant product as the suit did not allege an "occurrence."

Lexington Insurance Company ("Lexington") issued a CGL policy to Chicago Flameproof & Wood Specialties Corp. ("Flameproof"). During the policy period, a third party ordered fire-retardant-treated lumber from Flameproof for construction in Minnesota. Flameproof instead sent materials that were not tested, certified, or labeled as compliant. The third party installed the materials, discovered the non-compliance, and then removed the materials. Removing the materials allegedly damaged other portions of the building on the project. The third party then sued Flameproof, alleging costs associated with replacing the lumber as well as property damage to the other materials from the removal of the lumber. Flameproof tendered the claim to Lexington seeking a defense. Lexington filed a declaratory action in the Northern District of Illinois.

The court first addressed whether the alleged damage in the underlying lawsuit constituted covered "property damage" as required by the insuring agreement. The court recognized that claims for repair and replacement of Flameproof's own product did not qualify as "property damage." However, because the complaint also alleged that other portions of the building were damaged during the removal of those products (sometimes referred to as rip-and-tear costs), the claim did seek recovery for "property damage."

The court next addressed whether the underlying complaint alleged a covered "occurrence." An "occurrence" includes an "accident" or "unforeseen occurrence." The court explained that the proper inquiry is whether the injury was expected or reasonably anticipated by the insured. The underlying complaint alleged that Flameproof knowingly supplied inadequate material and concealing its actions. In sending non-compliant material, Flameproof should have reasonably anticipated that damage could result. The mere fact that the plaintiff included a claim for negligent representation does not, by itself, satisfy the "occurrence" requirement because Flameproof should have expected the property damage. Because the Complaint did not include allegations of an "occurrence", the court granted Lexington's motion for summary judgment.