TRAUB LIEBERMAN

INSURANCE LAW BLOG

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Eighth Circuit Finds that "Ensuing Loss" Clause Does Not Restore Coverage for Faulty Subcontractor Work

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In *Bob Robinson Commercial Flooring Inc. v. RLI Ins. Co*., No. 23-2531 (8th Cir. Mar. 19, 2025), the Eighth Circuit Court of Appeals had occasion to determine whether an exception to property insurance exclusions known as the "ensuing loss clause," applied to faulty work of the insured's subcontractor.

By way of background, Nabholz Construction Company ("Nabholz") hired Bob Robinson Commercial Flooring, Inc. ("BRCF") to install a vinyl gym floor with painted volleyball and basketball lines at a middle school in Trumann, Arkansas. BRCF installed the gym floor and subcontracted the painting portion of the project to Robert Liles Parking Lot Services ("Liles"). Liles's painting work was faulty, including crooked lines, incorrect markings, and smudges. Nabholz rejected the gym floor because of the subcontractor's misapplication of the paint. Because the defective painting could not be removed from the vinyl flooring, to correct the project error BRCF had to remove and replace the floor and paint new lines at a total cost exceeding $181,000.

RLI issued Builder's Risk Policy to BRCF that provided Installation Floater Coverage for direct physical loss or damage caused by a covered peril at BRCF's "jobsite." The policy, however, excluded coverage for "loss or damage caused by or resulting from inherent defects, errors, or omissions in covered property (whether negligent or not) relating to:…workmanship or construction…." The exclusion included an exception: "But if a defect, error or omission as described above results in a covered peril, 'we' do cover the loss or damage caused by that covered peril" (the "ensuing loss clause).

While Liles's faulty work fell within the exclusion, BRCF argued the ensuing loss clause restored coverage because the underlying damage to the floor was a covered peril that resulted from Liles's workmanship. The insurer responded that the ensuing loss clause did not apply because Liles's defective painting did not cause or lead to a second, non-excluded peril, like a fire. Instead, the insurer argued the faulty painting "immediately and indistinguishably" damaged the gym floor. The Eighth Circuit, as did the District Court before it, agreed with the insurer.

Finding persuasive an earlier decision form the Fifth Circuit Court of Appeals, the Eighth Circuit held that an ensuing loss clause "is only triggered when one (excluded) peril results in a distinct (covered) peril, meaning there must be two separate events for the Exception to trigger." In this case, BRCF did not identify a second "covered peril," as the ensuing loss clause required, to restore coverage excluded by the faulty workmanship exclusion. According to the Court, all that BRCF argued was that the cost of repainting the gym floor and the cost of replacing the floor are separate "perils." In the Court's view, however, they were not separate "perils." Rather, the cost of repainting the floor and cost of replacing the floor are different types of damage to the covered property. The Court reasoned that "[i]f both types of damage occur at the same time and are solely caused by an excluded peril such as faulty workmanship, the ensuing loss clause does not 'restore' all or any part of the excluded coverage." To paraphrase, "if Liles's faulty workmanship was the sole cause of damage to the gym floor, the faulty painting did not result in a covered peril; the painting 'was itself the peril.'"

The Eighth Circuit interpreted the ensuing loss clause to require a separate covered peril to restore excluded coverage, which it found necessarily flowed from the plain language of the Policy. A covered peril was defined as direct physical loss or damage not caused by an excluded event. The ensuing loss clause restored coverage if an excluded peril results in loss that *is caused by* a covered peril. The Court reasoned that if all the loss is caused by the excluded peril, by applying the ensuing loss clause to restore some but not all of the loss, as BRCF argued, it would require the insurer to pay for loss solely attributable to faulty construction (an excluded peril). This interpretation "nullifies the portion of the policy language" that excludes coverage for loss or damage caused by or resulting from faulty construction or workmanship. As such, the policy required reading the ensuing loss provision as requiring that a separate, non-excluded peril cause a covered loss in order to trigger the exception.

Applying these principles, the Eighth Circuit affirmed the District Court's conclusion that the faulty work exclusion barred coverage for the entire loss and damage to the gym floor resulting from Liles's defective painting. Because faulty workmanship was the sole and exclusive cause of loss which occurred the moment the paint was applied, and BRCH failed to identify a separate "covered peril," the ensuing loss clause did not apply or restore coverage.