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'That Particular Part': What Does It Mean?

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This article offers an explanation of the term "that particular part" in order to help insureds and insurers understand it, especially since the phrase is a key part of an exclusion that affects coverage for property damage under the commercial general liability (CGL) form.

The phrase "that particular part" is found in exclusion j. (damage to property) in the current CGL form. The form excludes coverage for property damage to "that particular part of real property" on which the named insured is performing operations (j5); and excludes coverage for property damage to "that particular part of any property" that must be restored, repaired, or replaced because the named insured's work was incorrectly performed on it (j6). One of the problems arising out of these exclusions is trying to determine the extent of "that particular part".

For example, if the insured is repairing an electrical panel board in one room and somehow causes the board and electrical outlets throughout the whole building to blow up, what is "that particular part" on which the insured is working? In other words, does the exclusion apply only to property damage done to the panel board, or does it apply to the whole electrical system? As another example: the insured is hired to blast a hole in one section of a huge rock mass to make a space for building purposes. He mistakenly uses too much dynamite and the whole rock mass is destroyed. Was "that particular part" on which the insured was working just that area he had contracted to blast, or did it include the entire rock formation?

At first reading, it would seem that only the damage to that area where the insured is working should be excluded. After all, "that particular part" seems to explicitly limit the scope of the exclusion to that specific, individual part on which the insured is working at the time the damage occurs. Those words could have been deleted from the exclusions, but they are there, and to what purpose but to limit the extent of the exclusion. The words seem to be in keeping with the accepted fact that exclusions are supposed to be interpreted narrowly (and in favor of the insured if any reasonable ambiguity exists). However, as the following judicial decisions show, courts can interpret the exclusionary wording in different ways.

In *Southwest Tank and Treater Manufacturing Company v. Mid-Continent Casualty Company*, 243 F. Supp.2d 597 (E.D. Texas 2003), the insured was hired to make modifications to a large steel storage tank. The insured was to install heating elements, and decided to cut three holes in the tank one at a time, take out the plate, install the heating element, and then weld the plate back onto the tank. While the insured was cutting the second opening, a fire broke out and the tank exploded, resulting in a complete loss of the tank. The owner of the tank filed a lawsuit over the property damage, and the insured sought coverage under its general liability policy. When the insurer denied coverage, the insured filed a declaratory judgment action seeking a declaration that its insurer owed a duty to defend and to indemnify the insured for the property damage claim.

The district court noted that the tank was a self-contained collective unit that constituted a single item of property, and that the insured had been hired to work on the tank as a whole. The court also found that the majority of other jurisdictions that have interpreted the phrase have held that "that particular part" includes the entire piece of property on which the insured was working at the time of the accident. Based on this, the court decided that it could not limit the exclusion to the precise and isolated spot upon which the work was being done. The insured was hired to install heating tubes in the tank and this included the entire tank. The entire tank was "that particular part" of property and the exclusion applied to the claim.

A case from the Fifth Circuit commented on the *Southwest Tank* case. In *Gore Design Completions, LTD. V. Hartford Fire Insurance Company*, 538 F.3d 365 (5th Cir. 2008), the insured was working on the installation of wiring in an aircraft. A claim arose that allegedly improperly installed wiring caused damage to the plane. The insurer contended

that exclusion is applied to the entire aircraft and not just the electrical system. The court noted that the *Southwest Tank* case was cited by the insurer, but said that case was not binding precedent on the court. The court ruled that if the insurer wanted to exclude coverage for the entire property, the exclusion should be reworded so as to accomplish that point.

In *Essex Insurance Company v. McFadden*, 2010 WL 2246293 (E.D.Tex.), the United States District Court also mentioned the *Southwest Tank* case and found it distinguishable from its instant case because in the *Southwest Tank* case, the insured was hired to work on the entire tank, and the tank was a self-contained collective unit constituting a single item or property. In the *Essex* case, the defendants were hired to work on, and claims arose based on damage to, several different units and equipment and not one self-contained unit.

In another case, *American Equity Insurance Company v. Van Ginhoven and Jayne J. Fernandez*, 788 So. 2d 388 (5th Dist. 2001), the insured was hired to make spot repairs and clean a swimming pool. In order to make the spot repairs, the insured had to drain the pool, and as this was being done, the water table pressure caused the pool to pop out of the ground. This resulted in damage to the pool, pump, heating system, deck, screen enclosure, surrounding landscape, and the sprinkler system. The insurer admitted coverage for all this damage except for damage to the pool itself.

The insurer then brought a declaratory judgment action, asserting that damage to the pool was excluded from coverage. The trial court found coverage, saying the exclusion was ambiguous; the insurer appealed.

In the appeals process, the insured argued that "that particular part" would only apply to damage to property that the insured contracted to work on, namely, the specified spot repairs, but not to the entire pool. The appeals court said this argument was untenable. At the time the damage occurred, the insured was not working (or performing operations) on the spots subject to repair; he was draining the entire pool. Therefore, the exclusion was clear and unambiguous and applied to the pool itself.

Perhaps "that particular part" is unambiguous to many courts. However, at the very least, it has to be said that the phrase, and thus the property damage exclusions of which it is a part, still can cause confusion and coverage disputes. For help in understanding this subject, consider the following points.

First, the sections of the damage to property exclusion that contain the phrase "that particular part" apply only to ongoing operations. If work has been completed (and the CGL form itself describes when this occurs), no one need concern himself with the scope of "that particular part".

Second, if an insurer is using the damage to property exclusions to deny coverage, the burden is on the insurer to establish the fact that the exclusions apply. The insurer's simply stating that coverage is excluded is not enough to settle the issue; the insurer must prove its case.

Third, if there is any reasonable doubt as to the applicability of an exclusion, the insured is entitled to the benefit of the doubt. Exclusions are to be construed strictly against the insurer, the cases cited above to the contrary notwithstanding.

Fourth, as something of a guideline to interpret the phrase "that particular part", the *Southwest Tank* case mentioned above may be helpful. The Federal court in that case focused on the fact that the property the insured was working on at the time of the loss was a self-contained unit, a single item of property. So, if the loss occurs while the insured is working on one section or one part of a single, unified, homogenous piece of property, then "that particular part" is to be seen as that one whole unit of property.

Despite all the guidelines and the court cases that may exist, future disputes over the extent of "that particular part" will be decided on a case by case basis, with the specific facts of each case helping the courts make their findings. There simply is no ironclad, bright line rule on the scope of "that particular part" that is accepted by the courts in order to forgo the process.

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