By Mark E. Mills, Daniel L. Syhre, and Kathryn Naegeli Boling

"Get To" Costs Correctly Understood

The concepts of "get to," "tear out," or "rip and tear" costs have created a quandary of misunderstandings in the construction defect coverage context. This article proposes that coverage for these costs should be based on a straightforward application of remedies law to standard policy language. We will further elaborate on how courts have distorted coverage for tear out costs for the benefit of both insurers and insureds. Claims handlers should be counseled on these risks of either incorrectly accepting or incorrectly denying coverage.

To illustrate the factual context for this inquiry, imagine a defective pipe is hidden behind a wall. Repairing the problem involves more than simply replacing the pipe with a non-defective pipe; the wall must also be taken apart to get access to the pipe and then repaired after the pipe is replaced. In this hypothetical repair job, the "get to" or "tear out" costs refer to the cost of taking apart and then subsequently repairing the wall. An insured contractor responsible for the defective pipe can generally be held liable for both the pipe replacement and the "tear out" costs under either contract or tort law. But liability for these costs is not the same as coverage for these costs. Yet both insurers and insureds have attempted to segregate tear out costs as categories of covered or excluded expenses, regardless of whether they resulted from covered or excluded damage.

Insureds have argued that even when the defect or damage that needs to be repaired is not itself covered, there is nonetheless coverage triggered by the destruction, "tear out," or "rip and tear" done to "get to" the defect. For instance, if a particular pipe is not "physically injured" so as to constitute "property damage," but is instead the wrong material or size, an insured might argue that coverage for "property damage" arises when the adjacent undamaged property is demolished as part of the replacement effort. Or, if a contractor's negligence does cause damage but only to his own work, an insured might argue that the damage done to "get to" the repair is covered because the adjacent parts of the property are not the contractor's own work. Courts and adjusters have been swayed to grant coverage in these settings because of a vague notion that "get to" costs are covered even if the underlying defect is not.

Conversely, insurers have incorrectly argued that when covered damage does exist, only the cost of repairing that covered damage is covered and *not* the costs of "getting to" that covered damage. In other words, the cost of replacing undamaged property that must be demolished to access the damaged property is not covered because it was not damaged.

This article argues that "tear out" costs are not by themselves the subject of any coverage analysis and that instead they are part of an "all or nothing" proposition that focuses on the underlying damage or defect that gives rise to the insured's liability. Standard liability policies cover "sums that the insured becomes legally obligated to pay as damages because of … 'property damage' to which this insurance applies." Under both contract and tort law, "tear out" or "get to" costs can be included as consequential damages that insureds become "legally obligated" to pay if they are found liable for the damage or defect that needs to be repaired. In fact, as a practical matter, this is the *only* way that an insured would become "legally obligated" to pay "tear out" or "get to" costs.

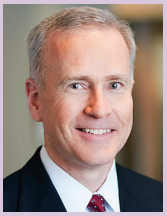
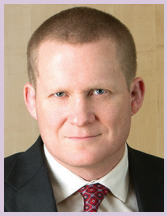
The question for insurance coverage, then, is whether the liability for the underlying damage or defect is covered. If it is, then the consequential damages are covered as well. And if they are not, the tear out costs cannot provide a source of coverage on their own.

Background Assumptions: Modern CGL Language in Place Because Language Matters

Policy language matters. Here, unless we state otherwise, we discuss standard, modern commercial general liability ("CGL") language having the following particulars:

1. Coverage is for "sums that the insured becomes legally obligated to pay as damages because of… 'property damage' to which this insurance applies."
2. "Property damage" is defined as "physical injury to tangible property."
3. The "property damage" must take place during the policy period.
4. The property damage must be caused by an "accident," and there is no coverage for "expected or intended" damage.
5. The policy contains the so-called "business risk" exclusions for "property

■ Mark E. Mills is a director at Betts, Patterson & Mines, P.S. in Seattle, Washington. He practices in the Insurance Coverage Practice Group. He advises insurers on coverage questions and represents them in related litigation under commercial general liability and related coverages. He is a member of DRI and the Claims & Litigation Management Alliance. Daniel L. Syhre is a director at Betts, Patterson & Mines, P.S. in Seattle, Washington. His practice focuses on the representation of both personal lines and commercial lines of insurance in coverage and bad faith litigation. He has been a DRI member since 2012 and is a member of the Northwest Insurance Coverage Association. Kathryn Naegeli Boling is an attorney with Betts, Patterson & Mines in Seattle, Washington, where she represents insurers in coverage and bad faith matters, primarily litigation matters. She has been named a "rising star" in 2014–2016. She is a member of DRI's Insurance Law Committee and the Washington Defense Trial Lawyers Association.


damage" to the insured's own work or product.

"Tear Out" Costs Are Better Understood as an Alternative Way to Measure Liability, Not as a Separate Category of Covered (or Excluded) Damages

Asserting that a contractor is liable for repair costs simply because repairs have been done assumes that repair costs are a guaranteed part of a contractor's liability when it has been negligent or in breach of a contract. This is not the case, as illustrated by Justice Cardozo's classic case, now read by law school students, about measuring damages for construction defects,

In *Jacob & Youngs v. Kent*, 230 N.Y. 239, 129 N.E. 889, 890 (1921), a contractor installed Cohoes pipe instead of Reading pipe in a building, contrary to the contract specifications. When this error was discovered, the pipe had already been encased within the walls, and substituting the correct brand of pipe ("Reading") would require much of the completed structure to be demolished, at great expense.

The court was presented with two options for quantifying the damages for the error: (1) the cost of replacing the pipes, with its associated "tear out" expense, and (2) the difference in value of the house with the correct and incorrect brands of pipe, which in this case was "either nominal or nothing." Justice Cardozo, and the rest of the majority, acknowledged that "in most cases the cost of replacement is the measure" of contract damages, but they nonetheless chose the second remedy in *Jacob & Youngs* because the alternative was "grossly and unfairly out of proportion to the good to be attained." *Id.* at 890. The restatements of both contracts and torts codified the rules of *Jacob & Youngs*, making the choice of remedy an issue for a court to decide on a case-by-case basis. *See* Restatement (Second) of Contracts § 348 (1981); Restatement (Second) of Torts §§ 928(a), 929 (1979). This means an insured contractor is *not* necessarily liable for the expense to repair its mistake.

In *New Hampshire Ins. Co. v. Vieira*, 930 F.2d 696, (9th Cir. 1991), the Ninth Circuit Court of Appeals correctly analyzed coverage for tear out both by linking it to the insured's liability for covered "property damage" and explaining why alternative measures of damage should not determine coverage. In that case, the insured used too few nails to install drywall and failed to install the drywall to prevent fires. So there was no resulting "physical injury to tangible property." The insured sought coverage for the alleged diminished value the owners claimed because additional holes were cut in the roof to add more drywall as fire protection. *Id.* at 697. The insured sought coverage for two types of damage represented by its settlement for negligent installation of drywall: diminution in value of the buildings and damage to the roofs done in the process of repairing the drywall. Note these are the same measures of damage that can be awarded for damaging property as set out in *Jacob & Youngs* and the restatements.

> As the Tenth Circuit held, the intent of adding "physical" to "physical injury" was to preclude coverage for "intangible injuries such as diminution in value."

The Ninth Circuit held diminished value was not covered because it was not "property damage." More specifically, diminished value did not amount to "physical injury to or destruction of tangible property." The court pointed out that insurers revised the "property damage" definition in 1973 by adding "physical" to modify "property damage." Insurers revised the "property damage" definition to avoid the effect of holdings in which the courts held diminished value of real property was covered "property damage." *Id.* at 698–701. As the Tenth Circuit held, the intent of adding "physical" to "physical injury" was to preclude coverage for "intangible injuries such as diminution in value." *Hartford Accident & Indem. Co. v. Pac. Mut. Life Ins. Co.*, 861 F.2d 250, 254 (10th Cir.1988). By holding diminished value could not be covered "property damage" because it was not "physical injury," the Ninth Circuit removed one of the two damage measurements from coverage. This left the tear out costs. The Court reasoned that alternative ways of measuring the insured's liability for damage should not determine coverage:

> We hold that the nature of the repairs cannot create coverage where none exists. Diminution in value and cost of repair are not two separate harms—they are two different ways of measuring the same harm. If the harm—Vieira's defective work—is not covered as measured by diminished value, it is not covered as measured by cost of repair. The owner's decision to make repairs which necessitated damaging the roofs years after the settlement does not affect [coverage under the policy].

Id. at 701–02. What the *Vieira* court recognized is that making coverage determinations based upon the choice of remedy for a particular claim is arbitrary and nonsensical. Few other courts have been presented with the issue as directly as in *Vieira*, but its example illuminates the absurdity of granting coverage for tear out costs on their own.

Courts That Correctly Analyze the Issue

The Ninth Circuit's *Vieira* case is the only case we have found that identifies the mistake of connecting coverage to the measurement of damage. The courts in the decisions we discuss below link coverage for tear out costs to what the insured is liable for. These courts do not mistakenly confer covered status on tear out expenses apart from being a consequence of covered or excluded damage.

In *Limbach Co. LLC v. Zurich Am. Ins. Co.,* the insured contractor caused a pipe to leak, which caused resulting damage to property that was not the insured contractor's work. 396 F.3d 358, 365 (4th Cir. 2005). The leaking pipe was encased in concrete installed by another contractor. *Id.* at 360. The leak, caused by the insured, damaged the landscaping surrounding the buried pipe. *Id.* at 365. The concrete and landscaping the insured damaged had to

be removed to replace the leaking pipe. The court correctly interpreted general liability policies as covering damage the insured's work or product causes to a third party's property. The exclusion for damage to the insured's work does not apply to the property of another. The insured damaged the landscaping, which is covered, resulting damage. Replacing the undamaged concrete was simply a consequence of repairing the damaged landscaping. Hence replacing the concrete should be covered—even if it was not damaged—because its replacement flowed from covered damage.

In *Regional Steel Corp. v. Liberty Surplus Ins. Corp.*, the California Court of Appeals also illustrated why repair expenses for which the insured was liable were not covered because they did not flow from covered "property damage." 226 Cal.App.4th 1377, 173 Cal.Rptr.3d 91, 93–94 (2014). The insured subcontractor installed two types of seismic tie hooks (they connect rebar in buildings to prevent earthquakes damage). The tie hooks were then encased in concrete. The building inspector ordered that only one kind of seismic tie hook could be used. The concrete had to be torn out in order to correct the "inadequate installation" of the tie hooks. *Id.* at 95. The California Court of Appeals relied upon the rule that incorporating the wrong product into a structure is not covered "physical injury to tangible property" unless the product causes physical injury to other property. *Id.* at 101–02. The court relied on other cases in which the courts concluded that adding "physical" to the definition of "property damage" means economic damage caused by incorporating the insured's defective product is not covered "property damage." *E.g., F & H Const. v. ITT Hartford Ins. Co. of Midwest*, 118 Cal.App.4th 364, 12 Cal.Rptr.3d 896, 902 (2004), *cited with approval at*, *Regional Steel Corp.*, 173 Cal. Rptr.3d at 103.

Logically the alternative should also be true: if tear out is a consequence of covered "property damage," it is covered. But tear out is not covered just because it is tear out. The only reason an insured contractor becomes liable for damages for repairs is that it caused the damage or defect creating the *need* for the repairs. Consequently, *that* damage or defect is the only thing that can be analyzed as a potential source of coverage. *Mut. of Enumclaw Ins. Co. v. T & G Const., Inc.*, 165 Wash. 2d 255, 270, 199 P.3d 376, 384 (2008) (reversing summary judgment granted for coverage of tear out costs and remanding for determination of whether there actually was covered damage to the interior walls in all cases).

The only reason an insured contractor becomes liable for damages for repairs is that it caused the damage or defect creating the *need* for the repairs.

Problematic Case Law Examples

It is not difficult to find case law that actually or apparently conflicts with the thesis of this article. The apparent conflicts sometimes result from policy language that is different from that recited in the "Background Assumptions" section.

Courts Getting It Wrong by Following Holdings Under Different Policy Language

It is always important to read the policy because any general coverage rule is based on an assumption about policy language. For example, in *Baugh Const. Co. v. Mission Ins. Co.*, 836 F.2d 1164, 1169 (9th Cir. 1988), the policy's non-standard language covered "loss of or damage to or destruction of property of others" instead of the modern definition of "property damage." The court held that damage to tenant improvements in a defective building occurred when they were installed because at that point they were "doomed" to be removed at some later point. This result is defensible because the policy has a nebulous concept of property damage that could arguably encompass non-physical injury. While these holdings do not conflict with the thesis of this article, they can lead to holdings that are in conflict if they are followed blindly as precedents, as the Ninth Circuit did.

Fourteen years after *Baugh*, the Ninth Circuit decided *Dewitt Const. Inc. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1134 (9th Cir. 2002). In *Dewitt,* the policy contained the modern and standard definition of "property damage": "physical injury to tangible property, including all resulting loss of use of that property." The court, however, assumed that its holding in *Baugh* was controlling. The court stated:

> We turn next to whether the alleged damage to the work of other subcontractors, which had to be removed and destroyed as a result of DeWitt's installation of defective piles, is property damage within the scope of the policies. We find that it is. In *Baugh,* we applied Washington law and found property damage to tenant improvements when those improvements had to be removed as a result of the installation of defective concrete panels in a building. Similarly, Opus had to hire a demolition subcontractor to tear out pile-caps that had been installed over the defective piles because they were no longer useful. *Baugh* controls our conclusion that there was property damage to the extent subcontractors' work had to be removed and destroyed.

Id. at 1134. It is easy to see the error in this reasoning because coverage turned on the *remedy* the owner and contractor chose for the subcontractor's otherwise non-covered defective work. Apparently, if the owner and contractor had simply negotiated a price reduction instead of correcting the defective work, there would have been no property damage. In *Baugh*, the incorporation of non-defective work into a defective building was itself property damage under the policy language regardless of whether the plaintiff ultimately repaired the building. The *DeWitt* court appeared to believe that what the owner and contractor chose to do to remedy the non-covered defect was the "property damage."

Courts Deliberately Ignoring Policy Language

Perhaps the most bizarre case under this heading is *Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 812 (7th Cir. 1992) (Posner, J.). In this case, the court held that

mere installation of a defective plumbing system into a home constituted "physical injury" within the definition of "property damage." The court cautioned that this will not always be the case with a product failure. The installation trigger only applies if the "expected failure rate [is] sufficiently high to mark the product as defective—sufficiently high, as is alleged to be the case regarding the Qest plumbing system, to induce a rational owner to replace it before it fails, so likely is it to fail." *Id.* at 812. The reasoning supporting the decision was both shallow and circular. Essentially, the court held that giving "physical injury" a restrictive meaning required by the ordinary understanding of those words would be contrary to the "objective of insurance" which is to "spread risks." This is so because in this case, there would be no coverage for most of the claims at issue. *Eljer* was a diversity case decided under Illinois law and the Illinois Supreme Court later wholly rejected the decision. *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 284, 757 N.E.2d 481, 487 (2001).

Courts Recognizing the Policy Language but Still Getting It Wrong

In *Wyoming Sawmills Inc. v. Transp. Ins. Co.*, "property damage" was defined as "physical injury to or destruction of tangible property." 282 Or. 401, 578 P.2d 1253, 1255 (1978). The insured installed defective studs into a building. The studs were failing but did not cause resulting physical damage to other property. *Id.* at 1256. Correcting the defect involved tearing out other wall components to access the studs. The court appreciated the significance of the definition of "property damage" and readily distinguished cases similar to *Baugh*. It held that the mere incorporation of the defective studs into a larger building, without more, was not "property damage" to the remainder of the building under the definition before the court. *Id.* at 1256.

After this good start, the court went on to hold that labor costs "attributable to the repair of damage to the balance of the building necessitated in getting to the studs in order to replace them would be labor expended for the repair of physical damage to the building caused by plaintiff's defective product." *Id.* at 1257. Like the court in *DeWitt*, the *Wyoming Sawmills* court confuses "damage" for which the insured may be liable with "damages because of … 'property damage.'"

Misunderstanding the nature of tear out is not always to the insured's advantage. In *Desert Mountain Properties Ltd. P'ship v. Liberty Mut. Fire Ins. Co.*, the insured developer was liable for defectively compacting the soil. 225 Ariz. 194, 236 P.3d 421, 425 (2010), *aff'd*, 226 Ariz. 419, 250 P.3d 196 (2011). To identify the areas of poorly compacted soil, workers had to drill through concrete floor slabs. More holes would be drilled and a mixture of cement and water would be pumped to stabilize the soil. When this work was done, floors and wall cracks and drainage systems would be repaired, and patio slabs and tile floors would be replaced. *Id.* at 425. This work sometimes required damaging floors or walls that were undamaged. *Id.* at 441.

> If the insured either caused no "property damage," or the "property damage" the insured caused is excluded, then tear out expenses must stand on their own in order to be covered.

The court held the exclusion for property damage to the insured's completed work did not apply because the insured developer did not perform the defective work. *Id.* at 432. So the insured is liable for un-excluded "property damage." But the court also held the $136,000 the insured spent repairing damage to non-defective property was not covered because it was "a cost of repairing the defect." *Id.* at 441. For our purposes, the point is that covered "property damage" in the form of damaged the defective soil caused was present. The CGL form itself had the standard language covering "'property damage' to which this insurance applies." *Id.* at 427. The "get to" expense was a consequence of this covered damage. So under the language quoted, the carrier should have paid for "property damage" caused by other covered "property damage." Instead, the court rejected the rule that "get to" expenses are covered and adopted a rule or said that "get to" damages are not covered. The court did so without explaining how this rule is consistent with policy language.

The Texas Supreme Court illustrated an approach that is the opposite of *Desert Mountain Properties Ltd. P'ship* by creating or inventing a rule that tear out is covered. *U.S. Metals, Inc. v. Liberty Mut. Group, Inc.*, ___ S.W.3d ___, 2015 WL 7792557 (2015). In *U.S. Metals*, the insured's product, flanges, were incorporated into diesel units used by oil refineries. *Id.* at *1. But the insured's flanges leaked. Because the oil refinery discovered the problem early, leaks from the flanges caused no other injury. *Id.* at *5. In other words, the insured's product caused no "property damage." Replacing the insured's product, however, required tearing out undamaged materials and property surrounding the insured's product. *Id.* at *1.

Following most courts since "physical" was added to the definition of "property damage," the Texas Supreme Court held that incorporating the flanges into the refinery owner's diesel unit was not covered "property damage" because the component into which the insured's product was incorporated was not "physically injured merely by the installation of" the insured's flanges. *Id.* at *6. If the insured did not cause "property damage," this should have ended the Court's inquiry. But the Texas Court made the familiar error of focusing not on the lack of "property damage" the insured caused, but the damage removing and replacing the flanges caused. The original welds, coating, and insulation were destroyed, and the original flanges had to be cut out. In the court's view, this was the "physical injury" creating coverage. *Id.* at *6.

As the Texas Supreme Court summarized, "the fix necessitated injury to tangible property, and the injury was unquestionably physical." *Id.* at *6. Wrong. The fix does not determine coverage. What the insured did determines coverage. What

the insured did in this case caused no covered "property damage." Thus, there should be no coverage.

Problems Raised by Court Incorrectly Interpreting Tear Out

Cases like *U.S. Metals*, *DeWitt*, and *Wyoming Sawmills* raise the problems detailed in the following sections.

Intentionally Tearing Out Property Is Not an Accident

Modern CGL policies only cover "property damage" that is caused by an "occurrence," *i.e.*, an "accident." If the insured either caused no "property damage," or the "property damage" the insured caused is excluded, then tear out expenses must stand on their own in order to be covered. But tear out of non-defective property, undertaken for the purpose of gaining access to other property, is not accidental. It is difficult to imagine more non-accidental conduct than a laborer demolishing sheetrock with an axe, sledgehammer, or similar implement to expose a pipe or other defective construction. If the reason for the tear out is the wrong kind of pipe (as in *Jacob & Youngs*), the insured is not liable for covered "property damage." By holding tear out is covered without covered "property damage," a court is holding that damage caused by non-accidental is covered. This court would therefore be holding coverage exists in the absence of an "occurrence."

Courts, such as the Texas Supreme Court, which do not analyze tear out as a consequence of covered or excluded damage for which the insured is liable, are effectively requiring insurers to pay for events that are not "occurrences" because they are not accidents. In *U.S. Metals*, the insured caused no "property damage." 2015 WL 7792557 at *5. By allowing coverage for removing and replacing the insured's product and the materials around it, the court held non-accidental conduct was covered.

Detaching Covered Liability from the Insured Contractor's Underlying Negligence or Breach Removes the Insured Contractor's "Legal Obligation" to Pay Tear Out Costs

If liability for repairs is detached from the underlying defect or damage, why would it be the breaching insured contractor whose coverage is triggered? Consider the causal chain for the example involving again the *Jacobs & Young* facts. See Figure 1.

Figure 1

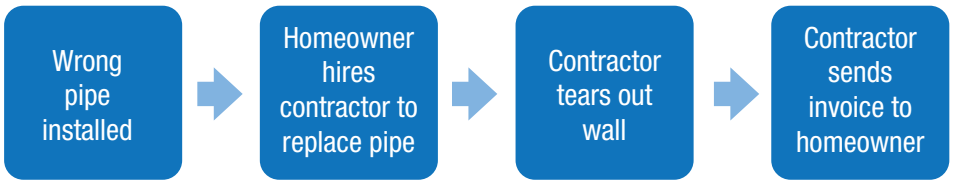
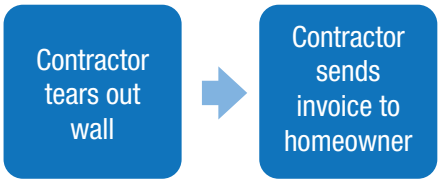


Figure 2



Under this hypothetical, the liability incurred for the "tear out" costs is "because of" the installation of the wrong pipe because it is downwind of it in the causal chain. That chain does not go backward, though. What is contemplated by a claim for the "tear out" costs as its own "property damage" is demonstrated in Figure 2.

As this diagram shows, without the defect or damage that put the contractor at fault, there is nothing to make the contractor any more responsible than any other stranger to the situation. At most, the property owner who hired someone to do the tear out work would become "legally obligated" to pay that contractor.

Policy Period Problems

Even if the plaintiff chose repair costs as the measure of damage, it would have to actually repair the property for coverage to be triggered, even though it does not need to actually conduct repairs in order to receive this measure of damage. Thus, coverage would not be triggered unless and until the repairs actually occur; and the trigger may never happen if the policy expires before the repairs commence. Because the repairs had in fact been conducted in *Dewitt Const.* and *Wyoming Sawmills*, the potential for inadvertently holding that "property damage" can be covered outside the correct policy period was less apparent.

It is unclear which policy, if any, is triggered if the defective work and repairs are conducted at different times. Is it the policy in force during the defective work triggered if the repairs happen in another year? It would not be if the repairs are the "physical injury." Is a later policy triggered by the plaintiff's arbitrary decision to begin repairs that year for a condition that was known prior to the policy period?

When repairs are done in different policy periods, the problems we discussed previously must be addressed. Are the repairs caused by an accident as to the later insurer? Isn't the "property damage" expected or intended?

Conclusion

Looking at "get to" costs as a *measure of damage*, not as a discrete category of covered damage, avoids the problems we describe here. Even in jurisdictions where cases like *U.S. Metals*, *DeWitt*, and *Wyoming Sawmills* may apply, understanding the principles described in this article should be helpful to anyone wishing to critically navigate the difficult trigger questions that those cases give rise to.

Rather than relying on an arbitrary rule making tear out costs a separate coverage category, the damage for which the insured is liable should be analyzed to determine if it is "'property damage' to which this insurance applies." If it is either not covered (because it is not "property damage") or the insured's liability is excluded (it is the insured's "work" or "product"), the resulting or consequential damage from what the policy does not cover should not be covered. But if the insured is liable for covered "property damage," and the tear out expense is a consequence of this covered "property damage," the tear out expense should also be covered.