Much Ado About "Marring"

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A golf ball-sized dent in 30-year-old siding, a quarter-sized chip in a 20-year-old ceramic floor, hail that dents a roof vent not visible from the ground, cosmetic "scuffs" to shingles after a minor hail storm — these are but a few examples of troublesome claims that arise where minor damage can result in disproportionately large indemnity payments. Any of these incidents could result in claims for tens of thousands of dollars. How can such diminutive damage result in exceedingly high dollar claims? Could that be the intent of insurance policies?

In the past, it would be unusual for an insured to file a claim for such minor damage. Today, however, increased consumerism, public adjuster retention and liberal risk policies have all helped fuel an exponential increase in these claims.

Policy Exclusions

Most policies cover losses on an "all risk basis" In essence, if a claim is the result of an "accidental and direct physical loss" the claim is covered unless it falls under an applicable exclusion. Therefore, if an insured drops a hammer on a 20-year-old tile floor and causes a quarter-sized chip in even one tile, coverage would exist for the replacement of that floor unless an exclusion applies (subject, of course, to policy limitations and jurisdictional law dictating scope of required repair). A typical relevant policy exclusion may read something along the lines of: "We insure against direct physical loss to property described in Coverage A. We do not insure, however, for loss: 2. Caused by: e. any of the following: 1. Wear, tear, marring, deterioration."

The wear, tear and deterioration exclusions are cited frequently, as these terms, by definition, are not accidental direct physical losses by nature. They are outside the scope of coverage, and of course, no premiums are collected to cover them. Some common examples include when water leaks over a period of time and causes rot to a ceiling joist, or when wear patterns develop in a hardwood floor after years of foot traffic. The question lies, however, in the circumstance where the loss is not gradual.

In the case of marring, would the exclusion apply when the damage is the type one would expect to occur over the normal life of the building component, but occurs suddenly? The word is written into policies for a reason, so actuaries must consider marring when setting premiums. It's interesting to note that, despite working in the property claims field for a combined 30 years, the authors have not yet been involved in a claims denial where the carrier has cited the marring exclusion. Considering the more recent proliferation of claims whereby this issue is relevant, it's important to understand how this word in the context of coverage exclusions applies.

Defining Marring

The crux of the issue is that marring is not defined in insurance policies, which potentially leaves the term open to different interpretations. In *Simon Wrecking Co. v. AIU Ins. Co.,* the Federal Court set forth the prevailing view on interpreting insurance contracts as follows:

> Interpreting an insurance contract, the goal is to 'ascertain the intent of the parties as manifested by the language of the written instrument' ... When the language of an insurance contract is clear and unambiguous, a Court is required to enforce that language… [however] any ambiguity should be construed against the insurer…The mere fact that a term used in the policy is not defined does not make the policy ambiguous. Courts should give undefined contract terms their common meaning.

In an attempt to determine that common meaning, the Courts that have contemplated the meaning of marring in insurance contracts have quoted the American Heritage Dictionary's definition of the word: "to inflict damage, especially disfiguring damage, on, or to impair the soundness, perfection or integrity of; spoil" Another Court analyzed other definitions including "to injure, spoil, damage, ruin, detract from" or to "detract from the perfection of wholeness of" "to cause harm to: spoil or impair; n. a disfiguring mark; blemish."

Applicable Case Law

Surprisingly, a search for the term has revealed only three cases that have addressed "marring" in the context of an insurance policy exclusion. In *Ehsan v. Ericson Agency, Inc*., the plaintiff filed what was essentially a "vandalism claim" after squatters occupied her home for an extended period of time. In this case, the home was insured under a homeowners' policy, but the insured resided elsewhere. Upon returning to the home, the plaintiff found pet urine and feces, flea infestations, blood splatter, garbage and drinks spilled throughout the home and "an intense stench from animal excretions" The carrier filed defenses based on concealment and misrepresentation and that the animal feces, spilled drinks, etc., constituted "marring" under the policy. The trial court found that although "mar" is defined more narrowly than "wear and tear" it determined in dicta that "marring" because it is adjacent to the words "wear and tear" and "deterioration" must mean "the marring of appearance caused by wear and tear and deterioration resulting from normal use of an object over time" However, the court found that regardless of the time element, the extensive damage to the home went far outside any definition of "marring" and the damage was indeed covered.

In a Federal Trial Court level *California case, Gerawan Farming Partners, Inc. v. West Chester Surplus Lines Insurance Company*, the Court found that "pitting" on an entire harvest of peaches did not constitute marring. In Gerawan, the court determined "pitting is a cosmetic problem that affects a surface of a fruit" Apparently, the pitting was not visible until after harvest and shipment. The court cited the Eshan case as support that marring must result from long-term wear, tear and usage. Because it determined that pitting was a sudden occurrence, the Court determined marring did not apply. What both of these cases have in common is that the carrier attempted to apply the marring exclusion to extensive damage.

The only Appellate Court to tackle the marring issue did so in a scenario involving isolated damage. In the Court of Appeals of Florida, Fourth District, 2013 decision of *Ergas v. Universal Property and Casualty Insurance Co.,* Universal was faced with what has become an all too common scenario — it was claimed that an entire tile floor needed to be replaced after a dropped hammer resulted in damage to one tile on the floor. The damage was the size of a quarter. In Ergas, Universal cited the marring exclusion and denied the claim. The plaintiff cited Ehsan and argued that marring must be applied only in situations involving long-term, or wear-and-tear type of damage. The plaintiff did not offer an alternative to Universal's marring definition, but instead suggested that the application of the legal principal, ejusdem generis, mandated that marring only could apply to long-term type damage. The Florida Appellate Court rejected this, and instead, determined the

words in the exclusion were specific — wear and tear, marring and deterioration — and each of those specific words did not require interpretation similar to the other.

However, the court also recognized that marring, taken to its extreme, could potentially exclude any damage. It ultimately held, under the facts presented, which included isolated damage, "that the damage caused by the hammer dropping constituted marring, and thus, was excluded from policy coverage" This Appellate Court decision was the first decision involving marring whereby the courts recognized that isolated, sudden and accidental damage was beyond the coverage afforded by the policy.

Taking Stock

If a quarter-sized chip in a tile constitutes marring, it stands to reason that a golf ball-sized dent in 20-year-old aluminum siding, or several small cosmetic hail marks in a roof vent, would as well. For insurers litigating these claims, a cautious approach and one that does not take an unreasonable position is advised. If a carrier asserts that extensive damage is "marring" it calls into question the nature and potential ambiguity of an exclusion. Just as the Ergas Court recognized, if taken to its extreme, "marring" could be used to exclude any loss, which of course is not the intent of the policy. When a carrier is reasonable in its interpretation, there is less of a risk of an ambiguity being found and the result could be a court ruling consistent with the Ergas Opinion.

Based on an analysis of the law, three factors should be considered when deciding whether "marring" excludes coverage:

- Is the damage cosmetic in nature or does it affect the functionality of the building component? For example, did wind-blown debris scratch a piece of vinyl siding, or did it puncture a hole in the siding that would allow the elements to enter?
- Is the damage small and isolated or large and widespread? For example, did the chair that tipped over damage one or multiple tiles?
- Is the damage the type one would expect to occur through the normal life of the building element? For example, did pulling a toaster across a formica countertop cause a shallow two-inch scratch?

When the damage is purely cosmetic in nature, is small and isolated, and is the type one would expect to occur during the life of the item, there is a good argument for the application of the marring exclusion. Conversely, if the damage is widespread and significantly affects the functionality of the building component, it is likely a court will find the exclusion inapplicable. Bottom line — it is clear that marring needs to be considered when evaluating coverage. However, it cannot be used as a catchall exclusion, but only to protect carriers from certain loss scenarios that are clearly outside the intent of coverage. Every claim should be reviewed on its individual facts and the application of the exclusion should occur only in clear instances of marring.

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