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Greystone and Insurance Coverage for "Get To" and "Rip and Tear" Expenses

by Ronald M. Sandgrund

This article discusses the 2011 Tenth Circuit Court of Appeals Greystone Construction Inc. v. National Fire & Marine Insurance Co. *decision and the related issue of liability coverage for what are commonly referred to as "get to" or "rip and tear" expenses—that is, coverage for the cost of repairing or replacing defective or nondefective construction work that is damaged or destroyed due to effecting repairs to other work that has sustained covered property damage.*

The *Greystone Construction Inc. v. National Fire & Marine Insurance Co.*[1] case involved the question of whether liability insurance coverage exists for property damage to an insured construction professional's work arising from the insured's or its subcontractor's negligent construction. In the 2009 *Greystone I* case,[2] the U.S. District Court for the District of Colorado, relying on the Colorado Court of Appeals decision in *General Security Indemnity Co. of Arizona v. Mountain States Mutual Casualty Co.* (*General Security*)[3] held that defective construction that damages only the insured's work is not an accidental occurrence and, thus, is not covered under the standard form post-1986 commercial general liability (CGL) insurance policy.

In *Greystone II*,[4] the Tenth Circuit Court of Appeals reversed and remanded *Greystone I*, predicting that the Colorado Supreme Court would hold that negligent construction constitutes an accidental occurrence if the resulting property damage to the insured's work was not intended or expected by the insured. The court qualified its ruling by holding that CGL policies provide coverage for the cost of repairing resulting damage to the insured's nondefective work, but not for damages awarded for the cost of repairing the defective work itself.[5] As discussed below, if the court's qualification was intended only to hold that the cost of repairing defective work that had not itself sustained property damage was not covered, it is more comfortably harmonized with the rest of the court's opinion.

Greystone Facts, Procedural Posture, and District Court Ruling

In *Greystone I*, two home builders and their liability insurer sued a second insurer who insured the same builders under later-issued polices. They sought reimbursement of part of the builders' and the first insurer's defense costs and settlements paid to the homeowner–claimants in two underlying construction defect lawsuits.[6] The second insurer had refused to contribute to the defense or settlement of either case. The parties stipulated that the underlying construction defects consisted of defective foundation systems built atop expansive soils and inadequate grading and drainage systems.[7]

On cross-motions for summary judgment, relying on *General Security*'s definition of "occurrence," which included the undefined term "accident," the district court held that because the underlying lawsuits "focused only on poor workmanship, and the stipulated facts yield no indication of property or consequential damage to anything other than [the insured's] work product (*i.e.*, the home) itself," neither lawsuit, on its face, involved "an 'occurrence' under the terms of the policy, and thus, National Fire had neither the duty to defend nor indemnify. . . ."[8] The district court did not consider coverage for the underlying negligent repair and misrepresentation claims because the arguments regarding these issues were "inadequately developed."[9]

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Tort and Insurance Law articles provide information concerning current tort law issues and insurance issues addressed by practitioners representing either plaintiffs or defendants in tort cases. They also address issues of insurance coverage, regulation, and bad faith.

Appeal and Intervening Statutory Changes

During pendency of the *Greystone I* appeal, Colorado's General Assembly passed House Bill (HB) 10-1394, codified at CRS §§ 10-4-110.4 and 13-20-808. Among other things, HB 10-1394 provides courts guidance when interpreting liability policies issued to construction professionals. HB 10-1394 directs courts to presume that a construction professional's defective work that results in property damage, including damage to the construction professional's work itself, is an accident, unless the construction professional intended and expected the resulting damage.[10]

In light of this new law, the importance of the insurance issues presented, and an apparent conflict among Colorado appellate decisions, the Tenth Circuit Court of Appeals certified the following question to the Colorado Supreme Court: "Is damage to nondefective portions of a structure caused by conditions resulting from a subcontractor's defective work product a covered 'occurrence' under Colorado law?"[11] The Colorado Supreme Court declined to consider the certified question.[12]

Tenth Circuit's Main Holdings

The Tenth Circuit Court of Appeals made two important holdings. First, the court noted that HB 10-1394 would "settle this appeal" and require coverage if applicable, but held that the new law was not intended to apply retroactively to the liability insurance policies at issue because the policy periods expired before HB 10-1394's May 21, 2010 effective date.[13] Colorado district courts have divided on the question of the law's retroactivity, and the issue is pending before the Colorado Court of Appeals.[14]

Second, the court held, "We predict the Colorado Supreme Court would construe the term 'occurrence,' as contained in standard-form CGL policies, to encompass unforeseeable damage to nondefective property arising from faulty workmanship."[15] In so holding, the court noted that:

> most federal circuit and state supreme court cases line up in favor of finding an occurrence in the circumstances we consider here" evidencing "a strong recent trend in the case law interpret[ing] the term 'occurrence' to encompass unanticipated damage to nondefective property resulting from poor workmanship.[16]

To determine what constitutes an unanticipated or unforeseeable injury, the court relied on the Colorado Supreme Court's earlier interpretation of "occurrence," which held that the term "occurrence" excludes from coverage only "'those damages that the insured *knew would flow directly and immediately from its intentional act*.'"[17] Thus, the Tenth Circuit reversed the federal district court's summary judgment and remanded the case for further proceedings, including consideration of potentially applicable policy exclusions and conditions not considered during the original summary judgment analysis.

Tenth Circuit Ancillary Holding— Damage to Defective Versus Nondefective Work

In an ancillary holding, the Tenth Circuit held that "injuries flowing from improper or faulty workmanship constitute an occurrence so long as the resulting damage is to nondefective property, and is caused without expectation or foresight."[18] The court further explained that "nondefective property is property that has been damaged as a result of poor workmanship."[19] Construction professionals and injured property owners are likely to argue in Colorado state court that the Tenth Circuit's distinction between property damage to defective versus nondefective work conflicts with several premises underlying that court's main holding, was unnecessary, and may raise questions of whether coverage applies to the cost of removing and replacing defective work to repair resulting damage to other work. Analysis follows of the court's rationale for its holding, construction professionals' expected criticism of the court's ancillary holding, and the insurance industry's likely rebuttal

to this criticism and disagreement with the court's holding regarding the scope of an accident.

Implicit Versus Explicit Exclusions and the Policy's Plain Language

The main holding of *Greystone II* rests primarily on the longstanding rule that courts should apply the plain and ordinary meaning of insurance contracts and strive to give effect to all policy provisions, rendering none superfluous. The court relied heavily on a standard CGL provision—the "your work" exclusion—and its disjunctive exception restoring coverage for (1) property damage to work caused by the defective work of the insured's subcontractors and, separately, for (2) property damage occurring to the work of the insured's subcontractors.[20] The court held, consistent with many other published decisions, that the exception to the exclusion would be rendered "superfluous," a "phantom," and "illusory" if negligent construction resulting in damage to the insured's own work could never be an occurrence.[21]

In holding that damage only to nondefective as opposed to defective work itself would qualify as an occurrence, the court relied on a distinction between coverage for the two types of work[22] it extracted from the CGL policy's "logic," "inherent structure," and "implicit distinctions"[23] rather than from any actual, specific policy language, stating, "The obligation to repair defective work is neither unexpected nor unforeseen under the terms of the contract or the CGL policies."[24] Yet, the court also acknowledged that, "by definition, only damage caused by purposeful neglect or knowingly poor workmanship is foreseeable. . . ."[25]

Construction professionals will argue that although the obligation to repair defective work may be neither unexpected nor unforeseen, the unintentional creation of a defect and any resulting property damage, whether to defective or nondefective portions of the work, is by definition neither expected nor foreseen. Construction professionals also will argue that leading construction defect coverage decisions and commentators have noted the importance of applying only express CGL policy exclusions to restrict coverage for deficient construction, rather than implying such exclusions or relying on public policy.[26] They will argue that relying on implicit distinctions based on the policy's structure is inconsistent with Colorado contract law, serves to rewrite the parties' insurance contract, and renders meaningless other policy provisions that specifically address such coverage distinctions. Insurers will argue that the holding prevents insurers from becoming the guarantors of their insured's work quality and prevents insureds from improperly shifting business risks, such as repair warranties, to their insurers.

The Tenth Circuit criticized decisions that rested not on the language of the CGL policies but on public policy or insurance industry underwriting concerns. For example, the court noted that its holding did not render a CGL policy a performance bond, and that "even if the CGL policy does share some characteristics of a performance bond, that alone is an insufficient reason to ignore the plain language and intent of the policy."[27]

Construction professionals will argue that despite recognizing the primacy of the policy language, the court improperly carved out an implied coverage exception for property damage to defective work without tying the exception to a specific policy exclusion or other policy language. They will argue that it is incongruous that an insured who negligently builds a construction element containing a hidden and unintended defect, such as in a foundation wall, as part of the window flashing, in a roof, or otherwise, should be denied enforcement of its CGL insurer's promise to "pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' . . . caused by an 'occurrence.' . . ."[28] when physical damage occurs to defective work as opposed to nondefective work if no policy exclusion specifically applies and eliminates coverage for damage to defective work. Insurers will counter that the Tenth Circuit's holding balances *General Security*'s concerns regarding overbroad application of CGL policies with the actual language of those policies.

Express Exclusions for Damage to Defective Work

Although the Tenth Circuit examined the "your work" exclusion, it alluded to in passing but did not discuss in detail several other standard CGL policy provisions addressing coverage for damage to defective work, including the "own property," "impaired property," and "sistership" exclusions.[29] The court acknowledged, however, that these exclusions "effectively eliminate coverage" for "many . . . business risks, including (in some instances) the cost of repairing damage to the contractor's own work."[30]

Construction professionals will argue that by these exclusions, the insurance industry expressly delineated when its policies would and would not cover damages arising from defective work, including property damage to the defective work itself. Insurers will argue that none of these exclusions deals expressly with the defective/nondefective property damage distinction drawn by *Greystone II*

and other courts and, thus, it was proper for the Tenth Circuit to address this coverage distinction in light of the policy's structure and implied intent.

Drafting History and Industry Comment

Although the *Greystone II* court declined to apply HB 10-1394, it examined the drafting history of and insurance industry commentary concerning the 1986 revisions to the Insurance Services Office's (ISO) standard CGL policy in construing the policy. Thus, it considered, although perhaps in *dicta*, extrinsic evidence as sanctioned by HB 10-1394.[31] Still, even when HB 10-1394 is inapplicable, Colorado common law provides courts an independent basis to consider such evidence where the contract at issue contains words that may have technical or special meaning unique to an industry, such as the undefined term "accident" in CGL policies.[32]

Construction professionals will rely on commentary published in a 2002 Fire Casualty and Surety (FC&S) bulletin to support their argument that an "occurrence" includes damage to defective work itself.[33] The bulletin provides as an example of coverage restored by the subcontractor exception to the your work exclusion coverage for defective stucco that is peeling and chipping, where the work was performed by the insured's subcontractor.[34] Insurers will argue that the parol evidence rule bars resorting to such extrinsic evidence, and that the CGL policy's plain language either expressly or implicitly bars coverage for property damage to the insured's defective work, because such damage is not accidental but results naturally and directly from defects in the work itself.

The Economic Loss Rule

Finally, the Tenth Circuit referenced a rule of tort (not contract) law in justifying its ancillary holding, stating that "the logic of CGL policies require us to conclude that the damage to the homes is covered, while the damage to the soil-drainage and structural elements is not," because "*repairing the foundations represents an economic loss* that does not trigger a duty to defend under the CGL policies."[35] It is unclear why the court chose this characterization, because an inherent construction defect may or may not result in property damage to the defective construction element itself, and it is only the occurrence of "property damage"[36] that triggers an insurer's duty to defend or to indemnify. A defect, standing alone—that is, mere economic loss or impairment—without resulting property damage (including, also, the mere loss of use of property), simply does not meet the definition of an "occurrence," which requires property damage to have occurred. In sum, the economic loss rule, even when applicable, merely defines the contours of the insured's liability to the claimant; the insurance policy, however, defines the insurer's liability to its insured.[37]

Construction professionals will argue that Colorado's economic loss rule does not limit residential property owner claims arising from defects in and property damage to residential property caused by construction defects.[38] They also will argue that this tort claim limitation does not turn on whether property damage has occurred; instead, it turns on whether a tort duty, independent of any contractual duty, exists between the claimant and the defendant.[39]

Further, they will point out that Colorado's legislature, in its Construction Defect Action Reform Act, CRS § 13-20-804, distinguishes between construction defects that result in statutorily defined "actual damage," to a home from those that do not only under very limited circumstances. They will conclude by arguing that, in light of a CGL insurer's promise to "pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' . . . caused by an 'occurrence,'" if a construction professional has a legal obligation to pay such damages, coverage is triggered by the occurrence of property damage, and the insurer is then obligated to establish that a policy exclusion bars coverage.

Insurers will argue that shoddy construction that results in damage to the defective work itself is not an accident; instead, it is a failure by the insured to deliver a certain quality of work, and the consequences of this business risk must be borne by the construction professional and not shifted to the insurer simply because the claim is cloaked in terms of negligence. Insurers will rely on the Fourth Circuit Court of Appeals' decision in *French v. Assurance Company of America*, which *Greystone II* cited with authority. There, the court held that the cost of repairing defectively applied synthetic stucco was not covered, but consequential water intrusion and damage to other parts of the home was.[40] Construction professionals will counter that *French* properly treated coverage for the defective synthetic stucco and resulting water intrusion damage separately and differently because the defective stucco was not alleged to have sustained property damage.

"Get to" and "Rip and Tear" Expenses

The appellate record in *Greystone II* did not squarely present the question of whether the CGL coverage grant includes coverage for damages attributable to the cost of "ripping and tearing out" defective work that has not sustained property damage to "get to" other work that has sustained property damage. One approach construction professionals may suggest that Colorado courts take to answering this question is, first, to apply *Greystone II*'s holding that unintended property damage arising from the insured's work is a covered occurrence, and second, to apply the policy's express exclusions and any exceptions to those exclusions to determine whether coverage is preserved for some or all such costs. Both steps may involve disputed factual issues that a jury will need to decide.

Several courts have addressed the question of whether coverage for damages awarded for property damage includes coverage for damages attributable to the cost of ripping and tearing out defective work that has not sustained property damage to get to other work that has sustained property damage, regardless of whether the defective work itself has sustained property damage. These decisions fall into two broad, complementary camps.

One line of cases holds that, as long as the insured's damages liability arises from the need to effect repair of covered property damage, all the damages are "sums [the insured] becomes legally obligated to pay as a result of . . . 'property damage' . . . caused by an occurrence," and, thus, are covered.[41] These cases hold that the insurer must indemnify the insured against all damages awarded, including the cost to repair work that has not sustained property damage but that must be repaired and/or replaced because it is damaged to get to and repair covered property damage, unless a specific policy exclusion applies to limit or eliminate coverage. These cases generally hold that barring such exclusion, the fact that undamaged, defective or nondefective work has to be removed and replaced coincidentally with the repair of covered property damage is not sufficient to limit coverage for the insured's legal liability for the resulting damages.

These same decisions do not address whether any extra cost associated with correcting the defective work—as opposed to the cost of removing and replacing the defective work with similarly defective work—is covered, or whether such distinction is even relevant if subcontractors were involved in the work. In some cases, the extra cost of correcting the defect may be nominal, such as reinstalling impermeable plastic building wrap on a wall or roof in shingle fashion so that water is directed away from the building cavities rather than its original "reverse-lapped" orientation that drew water into the building, causing interior wood members to swell and rot. In other cases, the cost may comprise a larger portion of the claimant's damages.

A second line of cases precludes coverage for the cost of ripping and tearing out the defective work to get to other work if the other work has not sustained covered property damage.[42] These cases hold that if property damage results *only* from the performance of repairs, there is no coverage.

It is unclear whether *Greystone II*'s ancillary holding that "injuries flowing from improper or faulty workmanship constitute an occurrence so long as the resulting damage is to nondefective property"[43] was intended to suggest that coverage might not exist for some rip and tear and get to damages. Colorado case law will need to develop and clarify this issue.

Unresolved Issues

Had the federal district court and Tenth Circuit faced disputed rather than stipulated facts, some of the questions *Greystone II* raises may have been illuminated. Neither a settlement of nor a jury verdict on the underlying claims likely would have resolved the question of whether the allegedly inadequate grading/drainage or the defectively designed foundation caused the foundation to fracture and the homes to break apart, or whether both deficiencies contributed. Neither settlement nor verdict likely would have settled the question of whether inadequately sized vertical foundation elements, such as the system's piers, caused damage to nondefective portions of the foundation's horizontal elements, such as its grade beams. In resolving coverage, these kinds of fact questions might need to be answered.

Furthermore, repairing the fractured and damaged foundation would have necessarily required removing the entirety of the soils adjacent to the foundation, even if only a portion of the grade had been negligently prepared. Moreover, if only a part of the foundation had failed, stabilization of other portions that had not failed or were not defective likely would have been necessary. Thus, fact questions would abound as to whether and how much of any allegedly defective work would need to be damaged or destroyed to effect the repair of nondefective work. Unanswered questions would remain as to what portion, if any, of these get to or rip and tear expenses could be attributable solely to remedying defects in the disturbed work, versus those necessary to get to the nondefective damaged work.[44] These disparate scenarios, and questions regarding what portion of the settlement or verdict should be covered, highlight some of the unanswered questions *Greystone II* raises.

Conclusion

Greystone II provides guidance to Colorado courts addressing the question of whether damages arising from a construction professional's or its subcontractor's negligent construction resulting in property damage will be afforded coverage under the standard post-1986 CGL policy. Colorado courts will be asked by construction professionals and their liability insurers to address the issues raised by *Greystone II*'s distinction between coverage for damage to an insured's defective versus nondefective work, and to consider the question of coverage for "get to" and "rip and tear" expenses associated with repairing covered property damage embedded in a structure.

Notes

1. *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272 (10th Cir. 2011) (*Greystone II*), *as modified on rehearing* (Dec. 23, 2011), *rev'g Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 649 F.Supp.2d 1213 (D.Colo. 2009) (*Greystone I*).

2. *Greystone I, supra* note 1.

3. *Gen. Sec. Indem. Co. of Ariz. v. Mountain States Mut. Cas. Co.*, 205 P.3d 529 (Colo.App. 2009) (*General Security*).

4. *Greystone II, supra* note 1.

5. *Id.* at 1286-87.

6. *Greystone I, supra* note 1 at 1215; *Greystone II, supra* note 1 at 1276-77.

7. *Id.*

8. *Greystone I, supra* note 1 at 1219.

9. *Id.* at 1217 n.1. *Cf. Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 307 (Colo. 2003) (where negligent misrepresentation was made to mine purchaser, resulting in purchaser's liability for clean-up costs due to mine pollution, such misrepresentation had a sufficient connection with the pollution-caused property damage to trigger commercial general liability (CGL) coverage).

10. CRS § 13-20-808(3). *See generally* Sandgrund and Sullan, "House Bill 10-1394: New Law Governing Insurance Coverage for Construction Defect Claims," 39 *The Colorado Lawyer* 89 (Aug. 2010).

11. *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, No. 09-1412, 2010 WL 5776109 at *2 (10th Cir. June 3, 2010) (Certification of Question of State Law).

12. *Greystone II, supra* note 1 at 1277.

13. *Id.* at 1278-81. *See generally* Sandgrund and Sullan, *supra* note 10 at 93-94 (discussing House Bill (HB) 10-1394's effective date).

14. *Compare Colo. Pool Sys., Inc. v. Scottsdale Ins. Co.*, No. 09CV836 (Arapahoe County. Dist. Ct. Oct. 4, 2010) (appeal pending (Colo.App. 2010CA2638)), refusing to apply HB 10-1394 retroactively at district court level, *with D.R. Horton Inc. v. Assurance Co. of Am.*, No. 09CV1350 (Arapahoe County Dist. Ct. Dec. 30, 2010) *and Am. States Ins. Co. v. JP Enters.*, No. 2010CV215 (Larimer County Dist Ct. Nov. 1, 2011), applying HB 10-1394 retroactively in the district court.

15. *Greystone II, supra* note 1 at 1282. The court originally characterized its holding more broadly, stating, "We hold that because damage to property caused by poor workmanship is generally neither expected nor intended, it may qualify under Colorado law as an occurrence and liability coverage should apply." *Id.* at 1276. It also initially characterized the issue more broadly as, "whether . . . property damage arising from poor workmanship is an 'occurrence' under the standard CGL definition." *Id.* at 1281.

16. *Id.* at 1282. *Cf.* French, "Construction Defects: Are They 'Occurrences'?" 47 *Gonzaga L.Rev.* 1, 25-27 (2011–12) (comprehensively surveying case law and concluding majority rule is that construction defects constitute "occurrences").

17. *Greystone II, supra* note 1 at 1285, *quoting Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1088 (Colo. 1991).

18. *Greystone II, supra* note 1 at 1284.

19. *Id.*

20. *See generally* Malecki and Flitner, *Commercial General Liability* at 76 (8th ed., Nat'l Underwriter Co., June 2007); Stanovich, "Faulty Work and the CGL," *Insurance Risk Management Institute Circular* (July 2005), available at www.irmi.com/expert/articles/2005/stanovich07.aspx; Sandgrund *et al.*, "Theories of Homebuilder Liability for Subcontractor Negligence—Part II," 34 *The Colorado Lawyer* 55, 58-60 (July 2005). *Cf. Commercial Gen. Liab. Program Instructions Pamphlet* (ISO ed., 1986) (stating that the "Broad Form Endorsement [now incorporated in the post-1986 policy] . . . also covers damages caused by faulty workmanship to other parts of work in progress; and damage to, *or* caused by, a subcontractor's work after the insured's operations are completed." (emphasis added)). Recently, the Fire, Casualty & Surety (FC&S) Bulletins editors reaffirmed that "the fact is that the current CGL form allows coverage for property damage to the named insured's work if the damaged work *or* the work out of which the damage arises was performed by a subcontractor" (emphasis added). *See* FC&S Bulletins, No. 982 Dec Page (Nat'l Underwriter Co. March 1, 2011). *Greystone II* relied on case law and other authorities citing FC&S commentary. *See Greystone II, supra* note 1 at 1287-88.

21. *Greystone II, supra* note 1 at 1283, 1289.

22. *Id.* at 1286 ("CGL policies implicitly distinguish between damage to nondefective work product and damage to defective work product.").

23. *Id.* at 1284-86. *Cf.* O'Connor, "What Every Court Should Know About Insurance Coverage For Defective Construction," 5 *Am. Col. Constr. Law.J.* 1 (2011) ("The courts that find coverage for property damage caused by defective construction find it in the express language of the CGL policy. The courts that refuse to find coverage do so by ignoring the express language of the policy.").

24. *Id.* at 1286.

25. *Id.* at 1285-86.

26. *See generally Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 881-82 (Minn. 2002); 4 Bruner and O'Connor, Jr., *Bruner & O'Connor on Constr. Law* § 11:28.06 (2009) (arguing that adhering to rigid no occurrence rule for poor workmanship is neither good policy nor proper contract interpretation).

27. *Greystone II, supra* note 1 at 1288-89.

28. *Id.* at 1277 (quoting standard CGL policy insuring clause).

29. *Id.* at 1278, 1287, 1289-90. *See also* FC&S Bulletins (Nat'l Underwriter Co. 2010), Public Liability, A.3-13 and -14 ("own property" exclusion); A.3-16 ("impaired property" exclusion); A.3-17 ("sistership" exclusion), all discussed more fully in Benson, *Practitioner's Guide to Colorado Construction Law*, "Residential Construction," (Chapter XIV) § 14.12.2.t—Standard Exclusions ("Business Risk" Exclusions [Typically Exclusions j Through n"]) (CBA-CLE 2010).

30. *Greystone II, supra* note 1 at 1287.

31. *See* CRS § 13-20-808(4)(b)(I) and (II). In contrast to its holding that HB 10-1394's substantive aspects did not apply retroactively, the court noted that HB 10-1394's procedural aspects are presumed to apply retroactively. *Greystone II, supra* note 1 at 1280 n.6. Generally, evidentiary rules and presumptions affect procedural not substantive rights. *See Day v. Madden*, 48 P. 1053, 1056 (Colo.App. 1897) (changes in evidentiary rules may be applied retroactively without being rendered unconstitutionally retrospective). *Accord* 2 *Sutherland Statutory Constr.* § 42:7 (7th ed. 2010). *See also United Securities Corp. v. Bruton*, 213 A.2d 892, 893, 894 (D.C.App. 1965) ("holding "[t]here is no vested right in a rule of evidence, and a statute relating solely to procedural law, such as burden of proof and rules of evidence, applies to all proceedings after its effective date even though the transaction occurred prior to its enactment").

32. *See KN Energy, Inc. v. Great W. Sugar Co.*, 698 P.2d 769, 776-77 (Colo. 1985) (court may consider extrinsic evidence of "technical or special" usage to determine whether ambiguity exists in the first instance). *Cf. Roberts v. Am. Fam. Mut. Ins. Co.*, 113 P.3d 164, 167 (Colo.App. 2004) (where contract term has a special technical meaning or usage unique to an industry, parol evidence may be considered in giving meaning to the term).

33. The Colorado Supreme Court has considered FC&S bulletins in at least one case. *See Hecla, supra* note 17 at 1086 and 1087 n.6.

34. *See* Appendix G, FC&S Bulletins, Public Liability, M 10-3 (Nat'l Underwriter Co., 2002).

35. *Greystone II, supra* note 1 at 1286 (emphasis added).

36. The standard post-1986 CGL policy and the *Greystone* policies define "property damage" as:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

See id. at 1277 n.1 (quoting policy). In *Am. Family Mutual Ins. Co. v. Teamcorp, Inc.,* 659 F.Supp.2d 1115, 1130 (D.Colo. 2009), the court held that an insured's defective home plans and specifications resulting in a partially completed structure that violated a local ordinance and would render it structurally unsound and uninhabitable if completed, resulting in the need to tear the structure down, could be construed to constitute physical injury, citing with authority *Cyprus Amax Minerals Co., supra* note 9 at 304 (property damage includes economic losses resulting from loss of use of property).

37. *See generally* Sandgrund and Tuft, "Liability Insurance Coverage for Breach of Contract Damages," 36 *The Colorado Lawyer* 39 (Feb. 2007).

38. *See, e.g., Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041 (Colo. 1983); *A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 114 P.3d 862 (Colo. 2005). *Cf. Hiigel v. Gen. Motors Corp.*, 544 P.2d 983, 989 (Colo. 1975) (physical injury to consumer goods, property, products, or work-product that is the subject of a contract remains actionable in tort and claims for such injuries not barred by economic loss rule).

39. *See Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1262 n.8 (Colo. 2000).

40. *French v. Assurance Co. of Am.*, 448 F.3d 693 (4th Cir. 2006) (cited in *Greystone II, supra* note 1 at 1286).

41. *See Indian Harbor Ins. Co. v. Transform, LLC*, No. C09-1120 RSM, 2010 WL 3584412 at *5-6 (W.D.Wash. Sept. 8, 2010) ("rip and tear" damages were covered third-party damages resulting from insured's defective work); *Riverfront Landing Phase II Owners' Ass'n v. Assurance Co. of Am.*, No. C08-0656RSL, 2009 WL 1952002 at *6 (W.D.Wash. July 6, 2009) (cost to remove and repair insured's work to "get to" and repair resultant damage is covered consequential damages); *Mut. of Enumclaw Ins. Co. v. T & G Constr., Inc.*, 199 P.3d 376, 385 (Wash. 2008) (removal and replacement of poorly installed siding necessary to remedy underlying water intrusion damage was covered property damage); *Clear, LLC v. Am. & Foreign Ins. Co.*, No. 3:07-cv-00110 JWS, 2008 WL 818978 (D. Alaska March 24, 2008) (finding coverage for settlement consisting of cost of removing and replacing property damage caused by insured's defective work, including cost of removing and replacing property not injured when that removal and replacement was necessary to fix damages caused by subcontractor's work); *Assurance Co. of Am. v. Lucas Waterproofing Co.*, 581 F.Supp.2d 1201, 1209 (S.D.Fla. 2008) (fact questions existed regarding how much of underlying judgment against insured subcontractor attributable to repairing damage to other parts of condominium buildings was caused by defective work versus repairing defective work itself); *DeWitt Constr. Inc. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1134 (9th Cir. 2002) (insurer liable for cost of removing subcontractor's work installed atop insured's work). *But see Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, 679-80 (Tex.App. 2006) (holding cost to repair defective wall cladding to repair resulting water infiltration damage covered, but not repair of portions of defective wall that were not damaged and did not have to be removed and replaced to effect repair of other damage), *abrogated on other grounds by Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2009). *And compare Auto Owners Ins. Co. v. Newman*, 684 S.E.2d 541, 546 (S.C. 2009) ("sistership exclusion" precluded recovery for cost of removing and replacing defective stucco, even if replacement incidental to repair of property damage covered by the policy (holding questioned by *Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589 (S.C. 2011)), *with Clear, LLC* at *9 (exception to "impaired property" exclusion coverage restored for cost of removing and replacing uninjured property to remedy damage within policy's coverage grant); *Employers Mut. Cas. Co. v. Grayson*, No. CIV-07-917-C, 2008 WL 2278593 at *5-6 (W.D.Okla. May 30, 2008) ("your product" and "impaired property" exclusions not applicable to damage to other property that occurs when a defective part requires tearing out non-defective parts to gain access to the defective part to replace it), *and DeWitt* at 1135 (impaired property exclusion inapplicable because the destroyed work of other subcontractors was neither merely impaired nor was it restored to use). The South Carolina Supreme Court's reliance on the sistership exclusion in *Auto-Owners* is unique because that exclusion's application generally has been limited to recall efforts initiated before the insured's product or work has caused property damage. *See, e.g.*, Windt, "Sistership or Withdrawal from Market Exclusion," *Insurance Claims and Disputes* § 11:13 (3d ed., 2009); *id.* at § 34:3 (exclusion applies only to "recalls for preventative purposes"). *See also* 4 Bruner and O'Connor, *Construction Law* § 11:87 (June 2011) (common refrain that repair and replacement costs associated solely with insured's work are not property damage is problematic and proper analysis is much more nuanced), *citing Columbia Mut. Ins. Co. v. Epstein*, 239 S.W. 3d 667 (Mo.App. 2007) (cost of removing and replacing defective concrete covered because such work necessary to repair other, covered property damage); *Woodfin Equities Corp. v. Hartford Mut. Ins. Co.*, 678 A.2d 116 (Md.App. 1996) (cost of removing and repairing nondefective property to repair defective HVAC system not an occurrence because there was no property damage, but coverage afforded for lost hotel suite rentals arising from loss of use due to HVAC's defective construction), *aff'd in part, rev'd in part on other grounds*, 687 A.2d 652 (Md. 1997). *Cf. Pac. Indem. Co. v. Benson*, 176 S.E.2d 668, 670 (Ga.App. 1970) (although undisputed that there was no homeowner policy coverage for pipe repair, coverage did extend to expense necessary to get to burst pipes to repair leak).

42. *See Desert Mountain Props. Ltd. P'shp v. Liberty Mut. Fire Ins. Co.*, 236 P.3d 421 (Ariz.App. 2010) (nondefective property removal and repair expenses necessary to repair poorly compacted soil was damage caused by repair of poorly compacted soil, not damage caused by poorly compacted soil); *OneBeacon Ins. v. Metro Ready-Mix, Inc.*, 427 F.Supp.2d 574 (D.Md. 2006) (demolition of pilings and columns required to repair defective grout not covered property damage because demolition was necessary only to replace the insured's defective work); *H.E. Davis & Sons, Inc. v. N. Pac. Ins. Co.*, 248 F.Supp.2d 1079, 1080-85 (D. Utah 2002) (cost to remove concrete footings to repair underlying inadequate soil compaction not property damage because footings were not damaged); *NAS Sur. Group v. Precision Wood Prods., Inc.*, 271 F.Supp.2d 776 (M.D.N.C. 2003) (repair and replacement of nondefective property not an occurrence). *See generally* Rawls, "Do CGL Policies Cover 'Rip and Tear' Expenses?" *Insurance Risk Management Institute Circular* (March 2011), available at www.irmi.com/expert/articles/2011/rawls03-liability-insurance-coverage-law.aspx.

43. *Greystone II, supra* note 1 at 1284.

44. *See Clear, LLC, supra* note 41 (discussing complications arising from settlement of complex construction defect dispute); *Lucas Waterproofing Co., supra* note 41 (fact questions existed regarding what portion of underlying judgment attributable to repairing damage to other parts of condominiums was caused by defective work versus repairing defective work itself). ■