

# Defects Exclusions - Is Someone Pulling Your LEG

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Wednesday, 9 November 2016

# STANDARD DEFECTS EXCLUSIONS - HISTORY

- 1985 - DE standard defects clauses introduced
- 1995 - DE Clauses Revised
- 1996 - LEG clauses produced
- 2006 - Minor Explanatory Revision to LEG3

# DE Clauses - What are they called?

- DE1 - Outright defect exclusion
- DE2 - Extended defective condition exclusion
- DE3 - Limited defective condition exclusion
- DE4 - Defective part exclusion
- DE5 - Design improvement exclusion

# DE1 (1995): Outright Defect Exclusion

“This Policy excludes loss of or damage to the Property insured due to defective design plan specification materials or workmanship.”

# Defect on its own is not damage

- “For the purpose of the Policy and not merely this exclusion the Property insured shall not be regarded as lost or damaged solely by virtue of the existence of any defect in design plan specification materials or workmanship in the Property insured or any part thereof.”

# DE2 (1995): Extended Defective Condition Exclusion

This Policy excludes loss of or damage to and the cost necessary to replace repair or rectify:

- i. Property insured which is in a defective condition due to a defect in design plan specification materials or workmanship of such Property insured or any part thereof
- ii. Property insured which relies for its support or stability on (i) above

# DE2 (1995): Extended Defective Condition Exclusion (cont'd)

- iii. Property insured lost or damaged to enable the replacement repair or rectification of Property insured excluded by (i) or (ii) above

Exclusion (i) and (ii) above shall not apply to other Property insured which is free of the defective condition but is damaged in consequence thereof.

# DE3 (1995): Limited Defective Condition Exclusion

This Policy excludes loss of or damage to and the cost necessary to replace repair or rectify:

- i. Property insured which is in a defective condition due to a defect in design plan specification materials or workmanship of such Property insured or any part thereof.
- ii. Property insured lost or damaged to enable the replacement repair or rectification of Property Insured excluded by (i) above.

Exclusion (i) above shall not apply to other Property insured which is free of the defective condition but is damaged in consequence thereof.



## DE4 (1995): Defective Part Exclusion

This Policy excludes loss of or damage to and the cost necessary to replace repair or rectify:

- i. Any component part or individual item of the Property insured which is defective in design plan specification materials or workmanship.
- ii. Property insured lost or damaged to enable the replacement repair or rectification of Property insured excluded by (i) above.

Exclusion (i) above shall not apply to other parts or items of Property insured which are free from defect but are damaged in consequence thereof.

# DE5 (1995): Design Improvement Exclusion

## This Policy excludes:

- i. the cost necessary to replace repair or rectify any Property insured which is defective in design plan specification materials or workmanship.
- ii. Loss or damage to the Property insured caused to enable replacement, repair or rectification of such defective Property insured.

But should damage to the Property insured (other than damage as defined in (ii) above) result from such a defect this exclusion shall be limited to the costs of additional work resulting from and the additional costs of improvement to the original design plan specification materials or workmanship.

# DE Clauses - A Summary

- DE1 - Outright Exclusion of all damage caused by defects
- The existence of a defect of itself is not damage
- DE5 - So long as there is damage all repairs will be paid (including to the defective part & access costs) save for the costs of improvement

# DE Clauses - A Summary

- DE2 - the “Extended defective condition” exclusion. Excludes the defective property and property which relies on it for support or stability
- DE3 - the “Limited defective condition” exclusion. Same as DE2 but without the exclusion of supported property.
- DE4 - the “Defective part” exclusion. Exclusion limited further to the “defective component part or individual item”

# DE Clauses - A Summary

## Access Costs

Each of DE2, DE3 and DE4 exclude loss or damage to enable replacement, repair or rectification of the excluded defective property

They are not excluded by DE5 in the event that damage other than access damage itself has occurred; if no such other damage has occurred there is no cover.

# LEG Clauses - What are they called?

- LEG 1/96 - “Outright” Defects Exclusion
- LEG 2/96 - “Consequences” Defects Exclusion
- LEG 3/06 - “Improvements” Defects Exclusion

# LEG 1/96: Model “Outright” Defects Exclusion

The Insurer(s) shall not be liable for:

Loss or damage due to defects of material workmanship design plan or specification.

# Defect on its own is not damage

- “For the purpose of this policy and not merely this exclusion it is understood and agreed that any portion of the Insured Property shall not be regarded as damaged solely by virtue of the existence of any defect of material workmanship design plan or specification.”



# LEG 2/96: Model “Consequences” Defects Wording

The Insurer(s) shall not be liable for:

All costs rendered necessary by defects of material workmanship design plan or specification and should damage occur to any portion of the Insured Property containing any of the said defects the cost of replacement or rectification which is hereby excluded is that cost which would have been incurred if replacement or rectification of the Insured Property had been put in hand immediately prior to the said damage.

# LEG 3/06: Model “Improvement” Defects Exclusion

The Insurer(s) shall not be liable for:

All costs rendered necessary by defects of material workmanship design plan or specification and should damage (which for the purposes of this exclusion shall include any patent detrimental change in the physical condition of the Insured Property) occur to any portion of the Insured Property containing any of the said defects the cost of replacement or rectification which is hereby excluded is that cost incurred to improve the original material workmanship design plan or specification.

# A Guide to DE5, LEG2 & LEG3

- The Exclusion
  - All - Costs of repairing defects
  - DE5 - includes specific reference to access damage
- The Trigger
  - All - The occurrence of damage

# A Guide to DE5, LEG2 & LEG3

- The Limitation
  - DE5 & LEG3 - the additional costs arising out of improvements to the original design etc
  - LEG2 - the cost which would have been incurred if rectification had been carried out immediately prior to the damage

# LEG2/96 & the Acciona Decision

- *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company*, 2014 BCSC 1568 & on appeal 2015 BCCA 347
- Defective formwork and shoring/reshoring work for casting concrete slab floors resulted in:
  - Over deflection of the floors towards the centre;
  - Stretching of the supporting rebar past its flexural yield point - causing permanent deformity
  - Cracking in many of the slabs in the vicinity of the support walls and columns. Some large enough for a credit card to be inserted.

# LEG2/96 & the Acciona Decision

- The Judge was not wrong in finding the over-deflection, cracking and bending of the rebar constituted “direct physical loss of or damage to the property insured” within the meaning of the Perils Insured Clause.
- The Judge then correctly applied the LEG2/96 wording to exclude only the costs of implementing proper workmanship in respect of the formwork and shoring/reshoring

# LEG2/96 & the Acciona Decision

- Insurers failed to persuade the court that the defect went beyond the formwork such that the slabs themselves were defective prior to that defect manifesting itself damage.
- Appear to have concentrated simply on that manifestation being nothing more than the defect and not being damage.

# LEG2/96 & the Acciona Decision

- Court was left with the only defect being in the formwork
- No evidence as to how much it would have cost to rectify that defect
- Found it was therefore \$nil



# Defects Exclusions: Is someone pulling your LEG

- Question?

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