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MEMORANDUM

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Washington's Supreme Court Holds That Tear-Out Damage Is Property Damage Under Contractors' and Developers' CGL Policies

For many years, Washington attorneys on all sides of the insurance debate have disagreed over the extent to which CGL policies covering "property damage" provide coverage to non-damaged work requiring tear-out and replacement as a result of underlying damaged work. Today, in its decision in *Mutual of Enumclaw v. T&G Construction Co., Inc.*, ___ Wn.2d ___ (2008), the state's Supreme Court held that tear-out is covered property damage under a CGL policy.

The case arose when the Villas at Harbour Pointe Owners Association sued the project's developer for construction defects, including water intrusion and resulting damage, at the Villas at Harbour Pointe Condominiums. The developer in turn brought suit against the general contractor, which then filed suit against several subcontractors, including T&G Construction Co., Inc., which had installed the siding. T&G tendered its defense to Mutual of Enumclaw ("MOE"), which accepted defense under a reservation of rights. The parties eventually settled, and MOE filed a declaratory judgment action arguing that the settlement was not covered under MOE's policy on several grounds.

Relevant here is MOE's argument that the costs to tear-out and replace non-damaged siding was not covered under T&G's policy because the policy only covers "property damage." Thus, MOE argued, MOE could not be held liable for costs attributable to tearing out and replacing property that was admittedly not damaged.

However, several interior walls of the condominium had been damaged by water intrusion at the project; accordingly, T&G and the homeowners (pursuant to an assignment of rights against MOE obtained in the settlement) argued that MOE was liable for the entire cost to repair property damage, which necessarily included the costs to tear-out and replace property that was otherwise undamaged.

The Court agreed with T&G and the homeowners, holding that "'property damage'... does not necessarily mean tangible damage to tangible property. It can include consequential

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damages, such as those alleged here.”¹ *Id.* at 14. The Court further held, “[r]emoving and repairing the siding is simply part of the cost of repairing the damage to the interior walls and was properly treated as property damage by the trial court.” *Id.* at 15. Thus, the holding establishes that “the cost of repairing the damage,” including costs to tear-out and replacement of undamaged work, constitute “property damage” that may be covered under a CGL policy.

¹ The Court recites the policy’s definition of property damage as follows:

“Property damage” means: “(a) physical injury to tangible property, including all resulting loss of use of that property” or (b) “loss of use of tangible property that is not physically injured”....

Id. at 15.