IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI SOUTHERN DIVISION

MISSISSIPPI PHOSPHATES CORPORATION	**PLAINTIFF**
VS.	**CAUSE NO. 1:07cv1140 LG-RHW**
FURNACE AND TUBE SERVICE, INC.	**DEFENDANT/ THIRD-PARTY PLAINTIFF**
VS.	
GRAY INSURANCE COMPANY	**THIRD-PARTY DEFENDANT**

MEMORANDUM IN SUPPORT OF FURNACE AND TUBE SERVICE, INC.'S "RESPONSE TO 'THE GRAY INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO COVERAGE'"
(Related to ECF Document Nos. 188 and 189)

Furnace and Tube Service, Inc. ("F&T") submits this Memorandum in Support of Its Response to "The Gray Insurance Company's Motion for Summary Judgment with Respect to Coverage" (docket no. 188). Evidentiary materials cited herein are attached as exhibits to "Furnace and Tube Service, Inc.'s Response to 'The Gray Insurance Company's Motion for Summary Judgment with Respect to Coverage'," filed herewith.

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

Cases

Other Authorities

INTRODUCTION AND SUMMARY

F&T operates a boiler and pressure vessel repair service. One of F&T's customers is Mississippi Phosphates Company ("MPC"), which produces fertilizer at its facility in Pascagoula. Some of the sulfuric acid that MPC uses to make the fertilizer is made at the Pascagoula facility, in what MPC calls the No. 2 Sulfuric Acid Plant. In June of 2007 F&T did some work on the No. 2 Sulfuric Acid Plant's No. 1 Waste Heat Boiler.

MPC has now filed suit against F&T, alleging, generally, (1) that Analytic Stress Relieving ("ASR"), an F&T subcontractor, warped the boiler's tubesheets and tubes while stress relieving them; and (2) that after F&T completed the job F&T welds on the boiler leaked repeatedly. Some of MPC's claimed damages are for physical injury to tangible property. *See, e.g., MPC's Supplemental Interrogatory Responses,* ($235,822.80 for refractory and brick, $9,139.46 for insulation on the boiler, $36,781.78 for ceramic ferrules, $129,747 for catalyst downstream, $26,838.60 for economizer downstream, $18,338.80 for heat exchanger downstream, and $8,500 for shell plate on bottom of sulfur furnace). The greatest portion of MPC's claim, over $16 million, is for lost profits. *Id.* MPC is *not* suing for the cost of replacing the tubesheets and tubes, or the cost of repairing the leaks, because F&T bore those costs itself.

F&T denies that it is liable to MPC, but so long as MPC's claims remain as set forth in MPC's Third Amended Complaint, Gray owes F&T a duty to defend. This fact alone – which Gray has admitted under oath -- makes Gray's motion meritless.

Moreover, although the point is currently academic, should F&T ever be subjected to liability to MPC, Gray will owe F&T a duty to indemnify. Gray cites five exclusions, and the second part of this memorandum will treat those in detail, but what Gray's motion really amounts to is coverage by adage. "Don't bother looking at the evidence, or analyzing the policy," Gray in effect says, "everyone knows that the CGL doesn't cover faulty work." This is just plain wrong.

> Faulty work can be covered by the CGL policy. Properly determining coverage does require a detailed understanding of precisely what happened as well as a thorough understanding how the property damage exclusions (and their exceptions) apply. Too often, coverage is denied without a good faith effort to ascertain the facts or by a less than careful reading of the CGL policy. Doctrines such as "business risk" or "economic loss" as reasons for denial are not a substitute for the plain meaning of the policy. While it may be easier and more expedient to deny coverage using such buzz phrases, the public and the industry will be better served by paying close attention to facts, coverage wording, and applicable case law.

C.F. Stanovich, "Faulty Work and the CGL," July 2005, last accessed April 20, 2009, http://www.irmi.com/expert/articles/2005/stanovich07.aspx.

The proof of this is found in numberless cases, two of which will serve, at this point, to illustrate. The insured in *Todd Shipyards Corp. v. Turbine Service, Inc.,* 674 F.2d 401 (5th Cir. 1982) (La. law), welded some new blades to a ship's turbine; the turbine was put into service and the welds failed. The insured was subjected to liability, to the shipowner, for two categories of damages: (1) "costs incurred in repairing and replacing the work product of their insureds, including the cost of inspecting, crating, shipping, and reinstalling the LP turbine"; and (2) "those damages attributable to the

KATRIN's 'down time', such as damages for loss of use of the vessel, general expenses from the master's accounts, and pilotage, wharfage, tug, repatriation and recrewing expenses." *Id.* at 423. The Fifth Circuit, applying Louisiana law, held that the first category of damages was not covered by the CGL, but the second was.

A second case that exposes Gray's position as fundamentally unsound is *Riley Stoker Corp. v. Fidelity & Guaranty Ins. Underwriters, Inc.*, 26 F.3d 581 (5th Cir. 1994) (La. law). The insured there contracted "to construct two coal-fired steam generators," which were to be used in the new electric-generating plant that plaintiff was building. *Riley Stoker,* 26 F.3d at 584. Once put in place, the generators "began to exhibit serious defects. A fire and several explosions occurred in 1980 and 1981. Tire cracking, thrusting problems, and gear reducing problems appeared during the same time period." *Id.* This, naturally, delayed the opening of the plant. *Id.* After opening, "the mechanical breakdowns continued to occur, and eventually, all of the ball tube mills [components of the generators] required repair and replacement." *Id.* The plant owner sued, and ended up with an arbitration award of

> $2,850,390 for financial damages caused by Riley Stoker's failure to complete its work in time to support commercial operation within the contractually required time (paragraph 12 of the arbitration award) and $28,618,184 for other damages caused by defective equipment furnished by or on behalf of Riley Stoker (paragraph 13 of the arbitration award).

Riley Stoker, 26 F.3d at 584-585. The district court "found that the damages awarded by the arbitrators in paragraph 12 were covered [by the CGL], but

those in paragraph 13 were not," *id.* at 585, and the Fifth Circuit agreed. *Id.* at 587-588.

Thus the true *and complete* statement of the law is that the CGL does not cover the cost of repairing or replacing the insured's own work, but it does cover damages -- including loss of use of other property -- even if they *arise out of* the insured's work. The boiler in this case is analogous to the turbine in *Todd Shipyard,* and to the steam generators in *Riley Stoker.* Gray's policy might not cover the cost of repairing the tubesheets, tubes, and welds, but this truth does nothing for Gray, because MPC is not suing for those costs – as noted above, F&T bore those costs itself. Gray's policy does cover the physical damage to other property (refractory and brick, etc.). And, most importantly, it covers loss of use of MPC's plant. Under *Todd Shipyards, Riley Stoker,* and other similar cases, Gray will have a duty to indemnify if F&T is ever subjected to liability to MPC.

Gray's motion must be denied in its entirety.

ARGUMENTS AND AUTHORITIES

I. Gray has admitted that it has a duty to defend F&T. This alone makes Gray's motion meritless.

The standard liability policy contains two principal promises, to defend, and to indemnify. Gray's motion apparently seeks to be relieved of both. Because the duty to indemnify is determined by comparing the language of the policy to the facts that formed the basis for the insured's legal liability, *Vidrine v. Constructors, Inc.,* 953 So.2d 193, 200 (La. App. 3rd Cir. 2007) (reversing summary judgment on duty to indemnify, which would turn on final

determination of facts in underlying case), the only time an insurance company can obtain summary judgment on the duty to indemnify, prior to the insured being subjected to liability, is when the insurance company has no duty to defend. *Farmers Texas County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997) ("the duty to indemnify is justiciable before the insured's liability is determined in the liability lawsuit when the insurer has no duty to defend *and the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify*") (emphasis original).[1]

Gray has a duty to defend F&T against the allegations of MPC's Third Amended Complaint. Gray admitted this, albeit reluctantly, under oath, in its 30(b)(6) deposition. *See Gray Depo., 30(b)(6), via F. J. Sibley, Vol. I,* p. 92 line 8 through p. 95 line 16 (when Third Amended Complaint filed Gray undertook to defend; one of three reasons was "because Gray thought at that point it had a duty to defend"). *See also id.* p. 124 lines 17-23 ("we couldn't rule out the duty [to defend], I think, based on the Third Amended Complaint"); p. 92 lines 8-24

[1] A note about choice of law: Gray invokes Louisiana law, but choice of law is a fact-driven question, and Gray offers no evidence of the relevant facts, only argument. Gray has based its motion entirely on Louisiana cases. Surely it was part of Gray's burden to come forward with *evidence* that would support a determination that Louisiana law applies. Alternatively, if we assume that Louisiana law does apply, then Gray's motion would founder on the following interesting feature of Louisiana law: by statute, "the entire insurance policy must be written and delivered to the insured within a reasonable time after its issuance." Where an insurance company "fail[s] to comply with the statutory requirement of delivery, it c[an] not rely on policy exclusions." *Spomer v. Aggressor Intern., Inc.,* 807 So.2d 267, 277 (La. App. 1st Cir. 2001). Given that the insurance company bears the burden of proof on exclusions, *see infra* p. 9 and n. 3, and that Gray's motion rests entirely on exclusions, it follows that Gray can not show that it is entitled to judgment without first showing that it timely delivered the entire policy, including exclusions. It is our view that even if the exclusions are part of the policy, and even if Louisiana law applies, Gray's motion is without merit, but we can not pass over, or cede, these points.

(Gray "may" have duty to defend"; "I don't know"); p. 95 lines 13-23 ("some uncertainty"; "I'm not sure"); *Grand Acadian, Inc. v. Fluor Corp.,* 2009 WL 994990 *3 (W.D. La.) (if "there are any facts in the complaint which, if taken as true, support a claim for which coverage is not unambiguously excluded, then the insurance company has a duty to defend. So long as there is at least a single allegation in the petition for which coverage is not excluded, a duty to defend exists. Assuming all the allegations of the petition to be true, if there would be both coverage under the policy and liability to the plaintiff, the insurer must defend the lawsuit regardless of its outcome") (internal quotation marks omitted). *See also Gray Depo., 30(b)(6), via F. J. Sibley, Vol. II,* p. 41 lines 4-23 (property damage alleged in paragraph 11 of MPC's Third Amended Complaint is within the PCOH coverage); *id.* p. 42 lines 5-17 (exclusion 1 applies to this property damage only to the extent that the damaged property falls within the definition of "your work"); *id.* at p. 42 line 19 through p. 43 line 8 (at least some of the damaged property described in paragraph 11 is not within the definition of "your work").

This fact alone makes F&T's motion meritless, bordering on the frivolous.

II. Gray is wrong about the facts, and about the law.

Gray's duty to defend makes the rest of Gray's motion irrelevant, but for the sake of completeness we shall examine it.

A. Essential background: the basic structure of the policy, the definition of "property damage," how the exclusions fit in, and what this means for "consequential" damages.

The insuring agreement obligates Gray to "pay those sums" that F&T "becomes legally obligated to pay as damages because of . . . 'property damage' . . . ." Note that Gray's obligation is not limited to liability *for* property damage. Rather, it extends to all liability "*because of* 'property damage.'" Obviously, if, "because of 'property damage'" to a horseshoe nail, the insured becomes legally obligated for the cost of repairing the nail, this is "because of . . . 'property damage.'" Less obviously, but equally true: if, for want of that nail, a kingdom is lost, and the insured becomes legally obligated for the value of the kingdom, this, too, is "because of . . . 'property damage.'"[2] The important point is that the policy is not like a fire insurance policy, which merely pays to repair or replace property that is damaged. It is a liability policy, which pays for liability "because of 'property damage.'"

The term "property damage" is defined in the policy in a way that is different from how we ordinarily use the term; notice how loss of use is treated:

---

[2] *See* D. S. Malecki & A. L. Flitner, *Commercial General Liability* 7 (7th ed. 2001) ("The phraseology damages 'because of,' as used in the CGL insuring agreement, conveys a broad promise that is sometimes overlooked.... In light this wording, all damages flowing as a consequence of bodily injury or property damage would be encompassed by the insurer's promise, subject to any applicable exclusion or condition. This includes purely economic damages, as long as they result from otherwise covered bodily injury or property damage"); *Motorola, Inc. v. Associated Indem. Corp.*, 878 So.2d 824, 834 (La. App. 1st Cir. 2004) (class action complaint alleged that cell phone radiation caused brain damage, and demanded that cell phone manufacturer provide headsets; *held:* "Although the relief purportedly sought consists of tangible accessories to property of the class action plaintiffs, or the accessories' monetary value, the class action plaintiffs plainly seek such relief 'because of bodily injury'").

> **12.** "Property damage" means:
>
> **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 shall be deemed to occur at the time of the "occurrence" that caused it.

Among other things this means that a wrecked truck suffers "property damage" not only in that its bumper is bent, but also in that it can not be used while repairs are being made. More importantly, a truck impounded by customs officials has suffered "property damage" even though it is unscratched, and in perfect working order.

The exclusions come into play because the "property damage" that causes liability must be "'property damage' to which this insurance applies," and heading up the list of exclusions are the words "[t]his insurance does not apply to:. . . ." (The "occurrence" requirement is not at issue in this case.) Note that each and every one of the five exclusions on which Gray relies begins with the words "'Property damage' to," *not* "'Property damage' arising from. . . ." So, for example, in *Todd Shipyards*: the policy there contained an exclusion (essentially the same as Gray's exclusion l) for "property damage to work performed by or on behalf of the named insured." *Id.* at 420. The Fifth Circuit asked

> Does exclusion (o) exclude coverage, not only for the immediate cost of repairing or replacing the insured's work product, but also for other economic losses caused by the insured's faulty workmanship?

Todd Shipyards, 674 F.2d at 422, and correctly answered "no." *Id.* at 423. Or, to use the language of the Fifth Circuit, in a recent summary of this aspect of *Todd Shipyards:*

> the exclusion 'carves out of the policy damage to the particular work performed by the insured, but not the overall damage that the incorporation of the defective work product causes to the entire entity.' In addition the *Todd Shipyards* court recognized that while consequential damages arising from damage to work product itself may be excluded, those arising from damage to other property, in this case loss of use of the ship powered by the turbine engine, were not disallowed by the exclusion.

Underwriters at Lloyd's London v. OSCA, Inc., 2006 WL 941794 *22 (5th Cir. 2006) (citations omitted).

With this background we are equipped to examine each of the five exclusions on which Gray's motion rests, mindful always that the burden is on Gray to establish "with certainty" the applicability of the exclusions.[3] We shall resist Gray's invitation to generalize about the "work product exclusion," and instead simply take the exclusions one by one, analyzing them individually.

B. Exclusion j(4) does nothing for Gray, and certainly does not entitle it to judgment as a matter of law.

Exclusion j(4) provides that "[t]his insurance does not apply to . . . 'property damage' to:

[3] *Garcia v. St. Bernard Parish School Bd.,* 576 So.2d 975, 976 (La. 1991), *In re Combustion, Inc.*, 960 F.Supp. 1076, 1079 (W.D. La. 1997), and *Primm v. State Farm Fire & Cas. Co.,* 426 So.2d 356, 360 (La. App. 2nd Cir. 1983), together make it absolutely clear that the insurance company, which is free to draft its exclusions any way it wishes, must be "clear and unmistakable," and will remove coverage only when the insurance company "establishe[s] [them] with certainty."

> **(4)** Personal property in the care, custody or control of the insured; [4]

This exclusion, by its terms, only to "personal" property. Gray admitted this in its deposition, *Gray Depo., 30(b)(6), via F. J. Sibley, Vol. I,* p. 168 lines 2-5; p. 169 lines 12-14. Gray further admitted that it does not know whether the tubes, tubesheets, or the boiler were "personal property." *Id.* p. 170 lines 6 through p. 172 line 8; p. 176 lines 12-17. Gray even admitted that it does not know which State's law to consult to decide this question. *Id.* at p. 169 line 15 through p. 170 line 1. We may not simply gloss over this point. We may not, as Gray's Brief (p. 21) does, inadvertently leave out the word "personal." It was (and is) Gray's burden to place facts in the summary judgment record establishing that the property in question was personal property. Gray has not even attempted to carry this burden. Exclusion j(4) can have no relevance to this case.

We need go no further with j(4), but will do so for the sake of completeness. It has no application where "the occurrence causing damage occurs after the insured relinquishes custody or control of the property." *Todd Shipyards,* 674 F.2d at 418 ("under Louisiana law," the "care," etc. exclusion "does not apply where, as here, the occurrence causing damage occurs after

---

[4] We are speaking here, and hereafter, of policy number XSGL-073116. (Gray calls this an "excess" policy, but there is no underlying policy, and this Policy contains a promise to defend, so it is not clear what Gray means by "excess" in this context.) Gray also seeks judgment as to the other two policies, which form the layer above the '116 policy, *Gray's Brief* pp. 23-24, but Gray's only argument is that if the '116 policy affords no coverage, then these policies afford none. For the reasons set forth below Gray's motion is as ill-taken with respect to these policies as it is with respect to the '116 policy.

the insured relinquishes custody or control of the property"). Exclusion j(4), then, has no possible application to the leaks, which occurred after F&T had completed its work. *See F&T Depo 30(b)(6), via L. Maulden*, p. 154 line 6 through p. 155 line 6 (F&T finished with boiler in August); p. 162 lines 16-25 (leaks started in September).

Would j(4), perhaps, have some application to the warping of the tubesheets (assuming they were "personal" property at the time of the warping), which warping occurred before F&T had completed its work? The answer – no – is found in *H. E. Wiese, Inc. v. Western Stress, Inc.*, 407 So.2d 464 (La. App. 1st Cir. 1981). *Wiese,* remarkably enough, was a case about a stress-relieving company that warped a tube sheet during post-weld stress relieving. "The trial judge found as a fact that Western [the stress relieving company, not the general contractor] had the care, custody, and control of the boiler and the tube sheet while it was carrying out its work." *Id.* at 466. The Court of Appeals said "We find this to be correct as a matter of law and fact. The evidence shows that Western's personnel performed all of the stress relief work. The law is clear that where the damaged property is the subject of the work performed, it is deemed to be in the care, custody, and control of defendant." *Id.*

Wiese teaches us, first, that the question of "care, custody, and control" can not be determined without looking at the facts. Gray cites *Wiese* for precisely the opposite position, *Gray Brief* p. 22 (under *Wiese,* property "is deemed [i.e., as a matter of law] to be in the care," etc. "of the insured"), but

this is simply wrong. *See Dufrene v. Ace Builders Service Co.*, 529 So.2d 1328 (La. App. 5th Cir. 1988) ("[t]he court's determination that the damaged property in *Wiese* was in the care, custody, and control of the insured contractor was deemed to be a finding of fact") (reversing summary judgment in favor of insurance company based on this exclusion, because there was an issue of fact as to "care," etc.). Gray placed no "care," etc. facts in the summary judgment record. Gray's brief does offer an unsupported assertion, *Gray Brief* pp. 21-22 ("F&T had physical custody over the waste heat boiler"), but briefs are not evidence, and the evidence says otherwise. *ASR Depo., 30(b)(6), via A. Jarrell*, p. 23 lines 10-22 (F&T had to stop their work when ASR started putting pads on the boiler).

To make assurance sure, let us say, arguendo, that the *Dufrene* Court was wrong, and, that under *Wiese,* "care," etc. is a question of law. Is it not plain that under *Wiese,* a boiler and tube sheet, when being stress relieved, are "in the care" etc. of the stress relieving company? This would leave Gray right where it is, because j(4) applies only when the property is in the "care," etc. "of the insured," and, as Gray has already admitted, the stress relieving company was not an "insured." *Gray Depo. 30(b)(6), via F.J. Sibley, Vol. I,* p. 166 lines 2-6. Gray fudges this point in its brief, concluding that the boiler was in the "care," etc. "of F&T or its subcontractor. . . ." *Gray Brief* p. 23. Perhaps this is why Gray, when under oath, could manage only to claim that the boiler was

"arguabl[y]" in the "care," etc. of its insured. *Gray Depo., 30(b)(6), via F. J. Sibley, Vol. I,* p. 192 lines 5 through 13.[5]

Exclusion j(4) does nothing at all for Gray, and certainly does not entitle it to judgment as a matter of law.

C. Exclusion j(5) does nothing for Gray, and certainly does not entitle it to judgment as a matter of law.

Exclusion j(5) provides that "[t]his insurance does not apply to . . . 'Property Damage' to:

> **(5)** That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations;

This exclusion, much like j(4), applies only "while the insured's work is in process, i.e., the work is not yet completed." *Supreme Services and Specialty Co., Inc. v. Sonny Greer, Inc.*, 958 So.2d 634, 641 (La. 2007). Like j(4), it therefore has no possible application to the leaks. *See supra* p. 8.

What about the tubesheets, which were warped before F&T had completed its work? Here again we have an utter failure of proof on Gray's part, which has offered the Court no evidentiary ground for concluding that the

---

[5] Any suggestion that property that is the subject of the insured's contract is, as a matter of law, at all times in the "care" of the insured not be reconciled with *Wiese's* stress on whose "personnel performed . . . the stress relief work." *Wiese,* 407 So.2d at 466, or with *Reynolds v. Select Properties, Ltd.,* 634 So.2d 1180 (La. 1994) (suggesting that only one person can have "care," etc. at a time), or with *Hartford Cas. Co. v. Cruse*, 938 F.2d 601, 604 (5th Cir. 1991) ("control" limited to "particular object of the insured's work, usually personalty, and to other property which he totally and physically manipulates"). Nor is mere access sufficient. *Thomas W. Hooley & Sons v. Zurich General Acc. & Liability Ins. Co.*, 103 So.2d 449, 450-451 (La. 1958).

tubesheets were, at the time they were damaged, "real property" within the meaning of j(5). Indeed, Gray is on record as saying that they were "personal property. . . ." *Gray Depo., 30(b)(6), via F. J. Sibley, Vol. I,* p. 189 line 15 through p. 190 line 7 & Ex. 8. Now it is true that in its deposition Gray, unable to think of any basis for this position, receded from it, *id.* at p. 190 line 8 through p. 191 line 7, but it did so only to take the position that it does not know whether the tubes, tubesheets, and boiler were "real" or "personal" property. *Id.* at p. 176 lines 12-17 (tube sheets); p. 182 line 22 through p. 183 line 6 (boiler). In truth, given the law on the interpretation of exclusions, the boiler is likely neither "personal property" nor "real property," but, instead, an "improvement to real property" -- a separate category well recognized in Louisiana law.[6]

And, in any event, to what "particular part" of real property does Gray refer?[7] The Fifth Circuit takes this limiting language seriously, *see, e.g., Underwriters at Lloyd's London v. OSCA, Inc.*, 2006 WL 941794 ** 2, 17 (5th

[6] *See, e.g., Carriere v. Bank of Louisiana*, 702 So.2d 648, 667 & n. 9 (La. 1996) (Louisiana statute referred to lessee's interest in "real property . . . together with his interest in any…improvements"). Statutory uses are, by the way, relevant. *See Gulf-Wandes Corp. v. Vinson Guard Service, Inc.*, 459 So.2d 14, 19 (La. App. 1st Cir. 1984). The question is not whether the words "real property," standing alone, can ever extend to improvements, but whether they unambiguously do so here, in an exclusion to an insurance policy.

[7] Note that "particular part" means particular part that was the subject of the defective work. It does not include other parts, which, although the subject of work, were not the subject of defective work. *Mid-Continent Cas. Co. v. JHP Development, Inc.,* 557 F.3d 207, 215 (5th Cir. 2009).

Cir.) (La. law),[8] but the summary judgment evidence submitted by Gray – none – leaves the question wide open.[9]

Finally, it is worth noting that the word "operations" is ambiguous. The policy does not define the term. The policy does tell us, however, that "operations" means something other than "work," because the definition of "your work" uses the disjunctive, "[w]ork or operations." It would make no sense to interpret this as "work or work." Gray, having made no attempt to establish what this key word means, certainly can not expect it to form the foundation of a summary judgment.

Exclusion j(5) does nothing at all for Gray, and certainly does not entitle it to judgment as a matter of law.

---

[8] *OSCA*: Insured, attempting to set "bridge plug" inside oil and gas well offshore, caused blowout; district court held that exclusion identical to Gray's j(5) "bar[red] coverage for platform repair expenses, relief well costs, well re-drill costs, and lost hydrocarbons"; *held:* exclusion barred coverage "only to the parts of the platform on which OSCA was actually working. We therefore reverse the district court's finding that there was no coverage under the D(4) exclusion."

[9] Had Gray submitted evidence on this point it is likely that the "particular part" of the tubesheets would have turned out, at most, to be merely the two welds that ASR was heating, and the very small surrounding area that ASR was heating along with the welds. *See ASR Depo., 30(b)(6), via S. A. Martin,* p. 711 line 17 through p. 712 line 22 (ASR put heaters on outside, insulation on inside); p. 719 line 10 through p. 720 line 18 (tube sheet welded to "approximately four-inch ring coming off of the shell"); p. 722 line 20 through p. 724 line 3 ("soak band," or "soak zone," is the "area that's actually receiving the heat treatment"); p. 726 line 5 through p. 727 line 6 ("soak zone is always only going to be the weld plus about the width of a thermocouple off on either side of the weld"); p. 727 line 7 through p. 730 line 2 (no "back up" heat used on this job).

D. Exclusion j(6) does nothing for Gray, and certainly does not entitle it to judgment as a matter of law.

Exclusion j(6) provides that "[t]his insurance does not apply to . . . 'Property Damage' to:

> **(6)** That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Like j(5), j(6) applies only "while the insured's work is in process, i.e., the work is not yet completed." *Supreme Services,* supra, 958 So.2d at 641. Like j(4) and j(5), it has no possible application to the leaks. *See* supra, p. 8. As to the warping of the tubesheets by ASR, as noted, *supra* p.13 & n.13, had Gray submitted any proof on this point, the "particular part" of the tubesheets likely would not have been more than two bands, each just a few inches wide.[10]

Can it even be said that F&T's "work" on the tubesheets was "incorrectly performed" within the meaning of j(6)? Gray has made no attempt to prove this point. All Gray offers is the bare fact that damage occurred, but this, by itself, establishes nothing. There are all sorts of accidents, even at-fault accidents, that no one would describe as having been caused by "incorrectly performed" work. Suppose an inattentive driver rear-ends a stopped vehicle. This may well be negligence, but no one other than an insurance company lawyer (and not even all of them) would call it "incorrect performance" of the driver's job.

---

[10] Gray tries to make the contract the measure of "particular part," *Gray Brief* p. 11, but the contract is irrelevant to this inquiry. *Mid-Continent, supra,* 557 F.3d at 215 (j(6) applies only to the part that had *incorrect* work performed on it, not even to the other parts that had work performed on it, albeit correctly. Gray might not have fallen into this error had it not inadvertently omitted the key word "particular" when it purported to quote j(6) on page 11 of its brief.

More to the point: suppose a roofer puts a new roof on a house. The roof is perfect in every way, except that, due to a miscommunication somewhere, the shingles are the wrong color. The roof will have to be "restored, repaired, or replaced," but not because the roofing was "incorrectly performed."

The Jury in the instant case will be entitled to find that had the shell been only an inch thick (which ASR claims to have believed) rather than the two and three quarters inches that it was in fact, the tubesheets would not have warped. *See ASR Depo., 30(b)(6), via S. Moots*, p. 68 line 25 through p. 70 line 1. In that scenario -- in which the stress relieving itself would have been performed precisely as it was in fact performed – per ASR, the whole stress relieving operation would have been regarded as an unqualified success. Put another way, per ASR, the stress relieving was correctly performed, within the meaning of this exclusion, but correctly performed under a mistaken belief. The Jury may find that the belief was negligently formed, but this will still not make the stress relieving itself "incorrectly performed."[11]

The exception to j(6)

As Gray acknowledges, *Gray Brief* pp. 15-16, exclusion j(6) has an exception:

> Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."

[11] *See Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 642 (Ky. 2007) (insured hired to tear down carport but leave house standing; mis-communication between supervisor and trackhoe operator; operator tears down house; *held:* work not "incorrectly performed" within meaning of j(6)); *Pekin Ins. Co. v. Miller*, 854 N.E.2d 693, 700 (Ill. App. 1st Dist. 2006) (similar).

Gray tells us that "[p]utting the exclusion and the exception together" there is coverage only for property damage that "arises out of the insured's work," and not for "the insured's defective work itself or property on which the insured was working. . . ." *Gray Brief* p. 15 (emphasis by Gray). The policy, however, does not tell us to "put the exclusion and the exception together." And the words "arises out of" do not even appear in j(6) or the exception to j(6)). The exception, by its own terms, states that the exclusion "does not apply to 'property damage' included in the" PCOH. Period. Now it is true that exclusion l, which we treat below, has something to say on the subject, but Gray's attempt to use j(6) to expand l is misguided and distinctly unhelpful.

Exclusion j(6) does nothing at all for Gray, and certainly does not entitle it to judgment as a matter of law.

E. Exclusion l does nothing for Gray, and certainly does not entitle it to judgment as a matter of law.

Exclusion l provides that "[t]his insurance does not apply to

> l. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

The first thing we note is that it applies only to damage that is "included in the products-completed operations hazard," which is defined as follows:

> **11. a.** "Products-completed operations hazard" includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> **(1)** Products that are still in your physical possession; or
>
> **(2)** Work that has not yet been completed or abandoned.

As Gray tacitly admits, *Gray Brief* pp. 14-15, the PCOH is, first and foremost, a grant of coverage. *Accord Gray Depo., 30(b)(6), via F. J. Sibley, Vol. II,* p. 13 lines 20-23 ('116 Policy affords PCOH coverage). Broadly speaking, the PCOH grants coverage for the risk that something will go wrong with the insured's work after the job is completed (or with the insured's product after it is sold). Gray has admitted, under oath, that at least some of MPC's claims trigger the PCOH coverage. *See supra* p. 6. Moreover, MPC's Third Amended Complaint alleges (Counts Nine and Ten) that F&T warranted, and negligently represented, that F&T had "performed in a workmanlike manner, and that the boiler was ready for service." These allegations also trigger the PCOH coverage.[12]

The retraction – exclusion l – comes into play because the PCOH is designed to cover the consequences of faulty work, but not the cost of re-doing the work itself. Professors McKenzie and Johnson offer the classic illustration:

> Suppose an insured contracted to make and install a sign on a commercial building. After the work was completed, the sign fell due to defective installation, causing damage to the sign, the building's canopy, a parked car, and also bodily injury to a pedestrian. The insurer covering the products-completed operations hazard would cover all claims except the contractor's responsibility to repair and replace the sign, coverage for which would be excluded under the product and work exclusions.

---

[12] *See* C.F. Stanovich, "The Hazards of Products and Completed Operations: Understanding the Fundamentals," (October 2006), http://www.piaw.org/pdfs/0307_the_hazards_of_products_&_completed%20_operations.pdf (last accessed April 21, 2009) ("For those insurers who routinely break out the boilerplate 'the CGL never provides coverage for any breach of contract claim,' take note. . . . The CGL policy plainly intends to include breach of warranty claims in the definition of your product").

Supreme Services, supra, 958 So.2d at 644 (quoting S. McKenzie & H. A. Johnson, III, *Insurance Law and Practice*, (3d ed. 2006) p. 521). Thus the exclusion does not embrace damage arising from "your work." To be excluded, the "property damage" must "aris[e] out of" "your work," but the only damage actually excluded is the "property damage to 'your work.'" The distinction is illustrated in *Markel American Ins. Co. v. Schubert's Marine East, Inc.,* 2007 WL 54808 *3 (E.D. La.).[13] Exclusion l, then, might well apply to the cost of grinding out leaking welds, and re-welding same. But, as noted above, F&T bore this expense itself; MPC never paid any of it, and is not suing for it.

As for the damage that ASR did, exclusion l has no application (1) because that damage was not "included in" the PCOH; (2) because of the "subcontractor" exception to the exclusion, *Massey v. Parker,* 733 So.2d 74, 76 (La. App. 3rd Cir. 1999, and (3) because ASR, which merely performed a service, had no "work" that could suffer "property damage" within the meaning of this exclusion.

Exclusion l does nothing for Gray, and certainly does not entitle Gray to judgment as a matter of law.

---

[13] In *Markel* the insured's subcontractor, attempting to dry the fiberglass hull of a sport fishing boat, mis-heated same, thereby warping it. The owner sued to recover value of the boat, and the carrier invoked the exclusion for "property damage to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard." The *Markel* Court held that the exclusion did not apply: the "work" of the insured, it said, "consisted of the process of drying out the hull. . . . While this 'work' was allegedly performed improperly, the Plaintiff does not seek recover for damage to the 'work,' but instead seeks recover for the unexpected damage to [the] vessel occasioned by the faulty 'work.'" *Id.* at *3.

F. Notes on Gray's "Your Work" exclusion, "consequential damages," and the definition of "property damage," and how it relates to loss of use.

We are now in a position to re-visit the term "'your work' exclusion," and to address Gray's "your work" cases. We have stressed that each exclusion has its own specific wording, and while we do not wish to lose sight of that fact, it is also true that there is a common thread to exclusions j(5), j(6), and l (and, to some extent, j(4)). Generally speaking, the idea is that the policy will not "be used to repair and replace the insured's defective products and faulty workmanship." *Supreme Services*, supra, 958 So.2d at 641. Thus, as Gray correctly reports, the policy at issue in *Supreme Services* did not apply to the "property damage," i.e., the cracks, that occurred to the concrete slab.[14] In each of Gray's cases the insured constructed something; the thing constructed thus fell within the definition of "your work"; and thus the insurance company was not obliged to indemnify the insured for liability for the "property damage" to the thing constructed. Or, to use the words that the *Supreme Services* Court used to summarize *Swarts, Old River,* and *Allen,* "the 'work product' exclusion eliminates coverage for the cost of repairing or replacing the insured's own defective work or defective product." *Supreme Services,* 958 So.2d at 643 (footnote omitted).

---

[14] So too in the all-fours *Vintage Contracting, L.L.C. v. Dixie Bldg. Material Co., Inc.,* 858 So.2d 22 (La. App. 5th Cir. 2003), upon which *Supreme Services* relied. Likewise, the floor in *Joe Banks* Drywall & *Acoustics, Inc. v. Transcontinental Ins. Co.*, 753 So.2d 980 (La. App. 2nd Cir. 2000), the silos in *Old River Terminal Co-op v. Davco Corp. of Tennessee*, 431 So.2d 1068 (La. App. 1st Cir. 1983), the house in *Swarts v. Woodlawn, Inc.*, 610 So.2d 888 (La. App. 1st Cir. 1992), and the house in *Allen v. Lawton and Moore Builders, Inc.,* 535 So.2d 779 (La. App. 2nd Cir. 1988).

All of this avails Gray nothing. The tubesheets that ASR warped are not F&T's "work."[15] And Gray, in its eagerness to invoke every conceivable exclusion, has managed to back itself into a corner, logically forced to admit under oath that the boiler was not F&T's "work."[16] Even if we were to ignore this admission, the only thing analogous to the concrete slabs in *Supreme Services* would be the welds with which F&T joined the tubesheets to the shell, and the welds with which F&T joined the tubes to the tubesheets. But, as we have already observed, MPC is not suing for the cost of grinding out these welds and re-welding them; F&T bore this cost itself.

"Consequential" damages

Let us, for the sake of argument, suppose that Gray had identified some property damage to F&T's "work." Gray tells us that "consequential" damages from property damage to "your work" are excluded, but Gray's policy says no such thing. The exclusions, as we noted at the outset, exclude "property

---

[15] Gray asserts that the tubesheets come under the "b" part of the definition of "your work," that is, "[m]aterials, parts or equipment furnished in connection with such work or operations," *Gray Depo., 30(b)(6), via F.J. Sibley, Vol. I,* p. 174 line 14 through p. 175 line 24, but this is simply incorrect. "Furnished" means furnished by the insured. *Gulf Mississippi Marine Corp. v. Engine Co., Inc.*, 697 F.2d 668, 673 (5th Cir. 1983) (La. law) ("furnished," as used in this exclusion, means "furnished *by the insured,*" and does not include things furnished *to* the insured "for installation in conjunction with the insured's own product"). It is undisputed that these were furnished by MPC, not F&T.

[16] *Gray Depo., 30(b)(6), via F.J. Sibley, Vol. II,* p. 21 lines 13-15 (Gray says boiler is "impaired property" within the meaning of exclusion m); p. 22 lines 17-18 (same); p. 26 lines 2-6 (same); p. 22 line 22 through p. 23 line 25 (confronted with fact that "impaired property" is defined as "tangible property other than 'your work,'" Gray admits that boiler, which Gray says is "impaired property," can not also be "your work"); p. 24 lines 16-24 (only "your work" at issue "is the replacement of the tube sheets and tubes").

damage *to*" certain property, not "property damage *arising out of*" that property.[17] This is why the Fifth Circuit has repeatedly held that "consequential" damages are not categorically excluded.[18]

As for Gray's cases, such as *Old River, Swarts,* and *Allen,* the Court in *Gaylord Chemical Corp. v. ProPump, Inc.*, 753 So.2d 349 (La. App. 1st Cir. 2000), was faced with the same cases, and the same erroneous insurance-company spin on them. The *Gaylord* Court distinguished them:

> However, each of these cases involved purely redhibition claims[19], in which the only consequential damages were those directly resulting from

---

[17] *See Markel*, 2007 WL 54808, discussed *supra* at p. 18, n. 18. Had Gray wished to achieve, unambiguously, the result for which it now contends, it could have used the language at issue in *Freeport McMoRan Resource Partners, Limited Partnership v. Kremco, Inc.*, 827 F.Supp. 1248, 1255 (E.D. La. 1993) ("Unlike the policies in those cases, subsection c(3) of the excess policy here does not simply exclude claims for "property damage to work ...", but excludes claims 'on account of property damage to work ...' (emphasis added)").

[18] *See Underwriters at Lloyd's London v. OSCA, Inc.,* 2006 WL 941794 ** 19-22 (5th Cir.) (La. law) (insured accidentally causes a well to blow out while attempting to set a bridge plug downhole; *held* "work product exclusion" (actually broader than Gray's) "does not apply to the consequential damages awarded," to wit, the cost to bring the well under control, the cost to clean up the escaped hydrocarbons, the cost to drill a relief well, and the cost to re-drill the blown well); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Puget Plastics Corp.*, 532 F.3d 398, 403 (5th Cir. 2008) ("National Union argues that the Policy simply does not cover consequential damages. This argument lacks merit") (citing *Todd Shipyards*).

Another example of covered "consequential" damages arising out of the insured's "work" is found in *Cleveland Const., Inc. v. Whitehouse Hotel Ltd. Partnership*, 2004 WL 1460047 *5 (E.D. La.) (Ohio law) ("The Court finds that genuine issues of material fact remain with regard to coverage for collateral 'damage' to property 'necessary to gain access to and correct' the allegedly defective work of Cleveland. This alleged damage was not to "that particular part of any property that must be restored, repaired or replaced because '[Cleveland's] work' was incorrectly performed *on it,"* which Section I(A)(2)(j)(6) specifically excludes. (Emphasis added). The exclusion in this policy is limited to property on which Cleveland worked").

[19] "Redhibition" is analogous to rescission. *Alston v. Fleetwood Motor Homes of Indiana Inc.*, 480 F.3d 695, 699 (5th Cir. 2007) (La. law).

> defects in the insured's "work" or "product" itself, such as damages for inconvenience, engineering fees, and repair costs. In each of these cases, the courts also recognized that damages to *other* property would not be excluded by the "work" and "product" exclusions.

Gaylord Chemical, 753 So.2d at 355-356. *See also OSCA, supra,* 2006 WL 941794 at ** 19-22 (distinguishing *Old River* and *Allen*); *Lauren Plaza Associates, Ltd. v. Gordon H. Kolb Developments, Inc.*, 1993 WL 529909 **3-4 (5th Cir. 1993) (La. Law) (unpublished) (distinguishing *Old River* and *Allen*) ("if there are allegations against McAdams that his faulty workmanship on the roof caused damages to other property, that is, property other than the roof itself, the "work product" exclusion of the policy would not deny coverage").[20]

The definition of "property damage," and how it relates to loss of use

Gray attempts to bolster its arguments by calling attention to a portion of the definition of property damage:

> 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

[20] When once traces the thread of the idea that the "work product" exclusion reaches "consequential damages," from *Swarts* through *Old River,* thence to *Breaux v. St. Paul Fire & Marine Ins. Co.*, 345 So.2d 204, 205 (La. App. 1977), and finally to *Homes, Inc. v. Hartford Accident & Indem. Co.,* 179 So.2d 496, 497 (La. App. 3rd Cir. 1965), and *Vobill Homes, Inc. v. Hartford Accident & Indem. Co.,* 179 So.2d 496, 497 (La. App. 3rd Cir. 1965), one finds it difficult to resist concluding that *Old River* over-read *Breaux,* and *Swarts* followed unthinkingly. Indeed, the trial court in *Breaux* excepted from summary judgment "the claim for loss of reputation to the complex. . . ." *Breaux,* 345 So.2d at 205. And consequential damages were not even at issue in *Vobil*.

Gray Brief p. 12 (emphasis supplied by Gray). Gray then says that all of MPC's claimed damages "stem directly from" F&T's work, and are "[t]herefore . . . also excluded. . . ." *Gray Brief* p. 12.

This is simply wishful thinking. There is no exclusion in the policy for "property damage" that "stems directly from" the insured's work, or "arises out of" the insured's work, or any such thing. Now it is true that if physical damage to a widget is excluded, resulting loss of use *of that widget* is excluded, but it is equally true (and here is where Gray errs) that resulting loss of use of other property is not excluded, even if that loss of use results from loss of use of the widget. Even if damage to the boiler were somehow excluded, loss of use of the No. 2 Sulfuric Acid Plant would not be.

This is a "nice" distinction, in the old fashioned sense of the word, but a very important one. Where, as in the case at bar, the insured's work causes the rest of the plant to go down, the rest of the Plant has suffered "property damage" within the meaning of the second half of the definition of "property damage":

> **12.** "Property damage" means: * * * *
>
> **b.** Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

The first half – the half quoted by Gray -- simply doesn't apply.

Riley Stoker, the steam generators case, is a good illustration. The insured's liability for "for damage to [the insured's] product and work" was

excluded, *id.* at 587-588, but the liability for loss of use of the rest of the plant, which was not physically injured, was covered. The insurance company in *Riley Stoker* made the argument that Gray now makes: "because the court excluded the property damage for physical injury under the product exclusion, the loss of use caused by the physical injury must also be excluded." *Id.* at 588. The Fifth Circuit rejected this argument, distinguishing *Borden, Inc. v. Howard Trucking Co.,* 454 So.2d 1081 (La.1983):

> Unlike *Borden,* the loss of use in this case relates to property (the electric generators) that has not been physically injured. And unlike *Rivnor,* it relates to loss of use of property (the electric generators) other than the insured's work or product (the steam generating equipment). The steam generators supplied by Riley Stoker suffered from mechanical breakdowns causing physical damage to the steam generators. These breakdowns, because they interrupted steam flow to the turbines, caused loss of use of the power plant's electric generators. Loss of use was the only damage suffered by the electric generators. Thus, the loss of use of Cajun's electric generators was loss of use of property not physically injured.

Riley Stoker, 26 F.3d at 588 (footnote omitted). Thus *Borden* (like Gray's *Hallar Enterprises, Inc. v. Hartman*, 583 So.2d 883, 890 (La. App. 1st Cir. 1991)), is limited to loss of use that was physically injured. What was true in *Riley Stoker* is true in the case at bar: loss of use of the rest of the plant is covered.

G. Exclusion m does nothing for Gray, and certainly does not entitle it to judgment as a matter of law.

Exclusion m provides that "[t]his insurance does not apply to . . . 'property damage' to:

> **m.** "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> **(1)** A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work;" or
>
> **(2)** A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

"Impaired property," in turn, is defined as follows:

> **5.** "Impaired property" means tangible property, other than "your product" or "your work," that cannot be used or is less useful because:
>
> **a.** It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
>
> **b.** You have failed to fulfill the terms of a contract or agreement;
>
> if such property can be restored to use by:
>
> **a.** The repair, replacement, adjustment or removal of "your product" or "your work;" or
>
> **b.** Your fulfilling the terms of the contract or agreement.

The most Gray could bring itself to say under oath was that exclusion m would "potentially" apply to the Plant as a whole. *Gray Depo., 30(b)(6), via F. J. Sibley, Vol. II,* p. 21 line 13 through p. 22 line 21); *id.* at p. 46 lines 11-13. Had Gray's brief been equally circumspect the errors asserted there would have been edited out.

Gray first overlooks the fact that "[t]his exclusion excludes coverage for damage to property that has *not* been physically injured . . . . [It] does not apply where there is physical damage to property other than the insured's work or product." *North American Treatment*, *supra*, 943 So.2d at 445-446 (emphasis original). Even if we ignore Gray's admission, *supra* p. 20 & n. 21, that the

boiler is not F&T's "work," the record contains several examples of physical damage to other things. *See supra* p. 1. Exclusion m does not even begin to apply.

Even if we ignore this fatal point we find another, equally fatal, in the two cases that Gray cites, *PCS Nitrogen Fertilizer, L.P. v. U.S. Filter/Arrowhead, Inc.*, 834 So.2d 456 (La. App. 1 Cir. 2002), and *Our Lady of the Lake Hosp., Inc. v. Transcend Services, Inc.,* 884 So.2d 605 (La. App. 1 Cir. 2004). As the *Our Lady* court recognized, the key to *PCS Nitrogen,* and to *Our Lady,* which relied on *PCS Nitrogen,* is that the claims in both cases were strictly and only breach of contract claims. *See Our Lady,* 884 So.2d at 608 (summarizing *PCS* holding as "when a plaintiff has alleged only damages related to loss of use that occurred as a result of the insured's breach of contract, coverage was excluded").[21] Gray seems to concede this, albeit while simultaneously ignoring it. Arguing the application of *PCS Nitrogen* and *Our Lady* to the case at bar, Gray says "Here, MPC is claiming that F&T breached its contract with MPC . . . . Here, if F&T had fulfilled the terms of the contract, the No. 2 Sulfuric Acid Plant would have worked and there would be no lost production." *Gray*

[21] *See also Dietrich v. Travelers Ins. Co.*, 551 So.2d 64, 67 (La. App. 1st Cir. 1989) (insured sued for failing to enroll employee in group insurance policy; *held:* summary judgment for insurance company, based on exclusion m, reversed, where insured's liability might be in tort) ("We note that even assuming a valid contractual relationship, liability in tort could nonetheless have been incurred. Therefore, summary judgment on the issue of coverage was improper. We must remand this case to the trial court for a determination of whether the loss was caused by the breach of contractual or delictual obligation") (citing *Borden*); *Alert Centre, Inc. v. Alarm Protection Services, Inc.*, 967 F.2d 161, 165 (5th Cir. 1992) (suit against insured primarily for breach of contract; *held:* duty to defend, notwithstanding exclusion m, where tort theories alleged as well; exclusion m applies when a "contract is the exclusive source of the duty that was allegedly breached").

Brief pp. 20-21. The case at bar, however, unlike *PCS Nitrogen* and *Our Lady,* is not exclusively a breach of contract case. MPC's Third Amended Complaint alleges both tort and contract claims, neither of which negate the presence of the other. *See Borden,* supra, 454 So.2d at 1081 ("When a party has been damaged by the conduct of another arising out of a contractual relationship, he may choose to recover under either tort or contract").

Even if we were to ignore all of the forgoing, Gray would still founder on the exception to exclusion m:

> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

Gray merely touches on this exception, *Gray Brief* p. 21 & n. 6, baldly asserting that "[t]h[e] leaks developed over time and not suddenly or accidentally." Both the law and the facts are against Gray on this point. The boiler, it will be remembered, is a pressure vessel, operating at approximately 660 psi. *Dr. Clarke Depo*, p. 171 line 21 through p. 172 line 17 ("you've got a boiler filled with water, by design, at 660 psi and that is pushing against each end of the tube sheet on the ends exposed to the boiler water"). Whatever may be said of a non-pressurized vessel, there is only one way for a pressurized vessel to leak: it must "spring a leak." *MPC Depo., 30(b)(6), via J. Sparks,* p. 1083 line 22 through p. 1085 line 22 (noting rapid temperature drop is one of three signs of a leak). One minute it is not leaking, the next minute it is--suddenly and accidentally. *See Todd Shipyards, supra,* 674 F.2d at 418-

419 (welds that held blades to turbine failed; *held:* exception to this exclusion, for "sudden and accidental" physical injury, applied); *see also* other cases cited in footnote.[22]

Exclusion m does nothing for Gray, and certainly does not entitle Gray to judgment as a matter of law.

CONCLUSION

We respectfully submit that Gray denied this claim because it had a pre-conceived idea of what the policy was "meant" to cover, and was unwilling to consider objectively the actual facts of the case, and what the words of the policy do in fact cover.[23] As Gray was forced to concede under oath, it has a duty to defend. This alone makes its motion meritless. More fundamentally, if and when F&T is subjected to liability, Gray will have a duty to indemnify. Gray's policy will not "be used to repair and replace the insured's defective products and faulty workmanship," *Supreme Services*, supra, 958 So.2d at

---

[22] *United Steel Fabricators, Inc. v. Fidelity & Guar. Ins. Underwriters, Inc.,* 1993 WL 69258 *4 (Ohio App. 10th Dist.) (Ohio App. 10th Dist. 1993) (insured repaired bridge; after bridge placed in service, some of the insured's welds cracked, causing loss of use of bridge; *held:* this exclusion did not justify refusal to defend; exception to this exclusion, for "sudden and accidental" physical injury, potentially applied); *Cf. In re Combustion, Inc.*, 960 F. Supp. 1076, 1078 (W.D. La. 1997) ("migration of hazardous substances" from recycling site, resulting "both from the continuous and systematic recycling process, and from fires, floods, and spills that occurred throughout the operation of the business and the site cleanup," was "sudden and accidental" within meaning of exception to pollution exclusion); *Riley Stoker, supra*, 26 F.3d at 584 & 589 (evidence was sufficient to support finding that exception to this exclusion applied).

[23] In its 30(b)(6) deposition, Gray was so fixated on the idea of a "'work' exclusion" that it testified that exclusions j(4), j(5), and j(6) -- none of which even mention "work" -- applied because "we're still talking about damage to the insured's work." *Gray Depo., 30(b)(6), via F. J. Sibley, Vol. I* p. 185 line 22 through p. 186 line 7. And, according to Gray, everything F&T touched – literally – became F&T's "work." *Id.* at p. 72 lines 12-22.

641, because such costs form no part of MPC's claim. Gray's policy will cover, however, the physical damage to other property (refractory and brick, etc.). And, most importantly, it covers loss of use of MPC's plant, under *Todd Shipyards, Riley Stoker,* and other similar cases. Gray's motion must be denied.

/s/ A. Kelly Sessoms
By:_____
A. KELLY SESSOMS (MSB #9466)

OF COUNSEL:
LYONS, PIPES & COOK, P.C.
2901 Magnolia Street
Post Office Box 30
Pascagoula, Mississippi
T - (228) 549-4481
F – (228) 549-1820
AKS@LPCLaw.com

LYONS, PIPES & COOK, P.C.
2 North Royal Street
Post Office Box 2727
Mobile, Alabama 36652
T - (251) 432-4481
F – (251) 433-1820

CERTIFICATE OF SERVICE

I hereby certify that on 23rd day of April, 2009, I electronically filed the above foregoing document with the Clerk of Court using the ECF system which sent notification of such filing to the following:

1. Mr. John Adam Crawford, Jr. — jack.crawford@butlersnow.com
   Mr. Phillip B. Abernethy — phil.abernethy@butlersnow.com
   Mr. Robert M. Frey — bob.frey@butlersnow.com
   Mr. Patrick T. Bergin — patrick.bergin@butlersnow.com
   Butler Snow O'Mara Stevens & Cannada
   P.O. Box 22567
   Jackson, MS 39225-2567
   T - 601/985-4532
   F - 601/985-4500

2. Mr. David L. Carrigee — dcarrigee@bhbmlaw.com
   Mr. Bernie Ticer — bticer@bhbmlaw.com
   Baldwin, Haspel, Burke & Mayer, LLC
   1100 Poydras Street, Suite 2200
   New Orleans, LA 70163-2200
   T - (504) 569-2900
   F - (504) 569-2099

3. Mr. David Krause — dkaruse@Danielcoker.com
   Daniel, Coker, Horton & Bell, P.A.
   1712 15th Street
   P.O. Box 416
   Gulfport, MS 39502-0416
   T - (228) 864-8117
   F - (228) 864-6331

4. Mr. Roy A. Smith, Jr. — rsmith@danielcoker.com
   Daniel, Coker, Horton & Bell, P.A.
   4400 Old Canton Road, Suite 400
   P.O. Box 1084
   Jackson, MS 39215-1084
   T - (601) 969-7607
   F - (601) 969-1116

5. Mr. Fred B. Feeney fbf@frslaw.com
Frank & Salloum, PLLC
2605 14th Street
P.O. Drawer 460
Gulfport, MS 3950-0460
T - (228) 868-7070
F - (228) 868-7090

/s/ A. Kelly Sessoms

A. KELLY SESSOMS