



BLOGS
Policyholder

What Lies Beneath: Everything Policyholders Need to Know About the Subsurface Water Exclusion

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Many commercial property policies provide broad “all risk” coverage for losses resulting from direct physical loss or damage subject only to certain exclusions. Under all-risk policies, the policyholder has the burden of establishing that a claim falls within the boundaries of coverage. Then, the insurer has the burden of proving whether any exclusions apply to limit coverage.

One such exclusionary provision that is the subject of much litigation is commonly referred to as the “Subsurface Water Exclusion” – a subpart of the broader “Water” exclusion. The standard form ISO commercial property Subsurface Water Exclusion” states, in pertinent part:

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

...

g. Water . . .

(4) Water under the ground surface pressing on, or flowing or seeping through:

- (a) Foundations, walls, floors or paved surfaces;
- (b) Basements, whether paved or not; or
- (c) Doors, windows or other openings

One reoccurring issue is whether the Subsurface Water Exclusion only bars coverage for water damage resulting from natural sources (e.g., precipitation, underground springs, or other naturally occurring deposits of water) or whether it also extends to artificial sources, such as underground piping or irrigation systems. Courts are divided on the issue with some limiting the exclusion to natural sources

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whereas others have construed it more broadly to preclude damage from all sources of water.

However, even in jurisdictions that apply this exclusion more broadly, that does not necessarily foreclose the possibility of coverage. Indeed, a number of endorsements or other provisions may conflict with and supersede the Subsurface Water Exclusion to give back coverage—at least with regard to artificial sources of water. For example, sewer and drain endorsements insure against “direct physical loss or damage” caused by the “discharge of water or waterborne material from a sewer, drain or sump pump” located on the insured’s premises. Such amendatory endorsements expressly usually supersede the Subsurface Water Exclusion by including language that resembles the following:

To the extent that the Water Exclusion might conflict with the coverage provided under this endorsement, *the Water Exclusion does not apply to such coverage.*

And while some provisions or endorsements may not expressly amend coverage as outlined above, inconsistent and contradictory interpretations may nonetheless render the policy ambiguous in favor of coverage (although these endorsements may have a sublimit that is less than the full policy limit).

Because water losses involve complicated and often unique circumstances, it is imperative that policyholders ensure that a comprehensive and unbiased investigation of the source is completed during the claims process to determine not only the extent of damage but also the origin of the water loss. To the extent the source and nature of the water is unknown, the insurer may be unable to carry its burden to exclude coverage.

Whether the Subsurface Water Exclusion may apply often requires a highly fact-dependent analysis and it is best to rely upon those with extensive experience in such matters. Lathrop GPM has a practice dedicated to maximizing insurance recovery for policyholders.