Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

A Roof By Any Other Name

Law360, New York (March 05, 2012, 1:25 PM ET) -- As the snow and ice of winter give way to spring, owners exit their buildings to assess the work that must be performed on their building exteriors. The first place many look is up, to the roof.

But roof replacements rarely go as planned. They generally take longer than expected, leaving the roof exposed to unpredictable spring weather. With the roof open and a spring storm closing in, building owners and contractors might grab their trusty blue visqueen tarp to cover any exposed areas.

Mother Nature, however, will often not be contained, and tarps blow off, letting water enter and damage the building. If the building owner calls, the insurer should ask: “Is that blue visqueen tarp covering the hole in the roof part of the 'roof' for purposes of insurance coverage?”

The answer, it turns out, depends on the state where the harm occurred, the language of the specific policy in effect and the adequacy of the temporary covering.

The Nevada Supreme Court Recently Held That a Tarp is Not Part of the Roof

In Fourth Street Place LLS v. Travelers Indemnity Company, No. 54415 (Nev. Dec. 29, 2011), the Nevada Supreme Court found that a tarp placed on a roof after rain had already damaged the contents of the buildings was not a “roof” for purposes of an all-risk policy’s rain limitation.

There, the insured, Fourth Street, hired a general contractor to supervise the repair and renovation of the building. The general contractor hired Above it All Roofing & Construction Inc. to perform the roof repairs. On a Saturday in November, Above it All removed the waterproof membrane on the roof of the building and prepared to replace the membrane the following week.

That evening, a substantial amount of rain fell and continued through the weekend. The next day, Sunday, Above it All returned to the building to cover the exposed portions of the roof with tarps to protect the building.

Shortly after they were installed, however, strong winds blew the tarps off the roof. As a result, water continued to infiltrate the building and caused water damage to the ceiling; drywall; doors; windows; cabinetry; electrical and heating, ventilation and air conditioning systems; and carpeting and other flooring.

Travelers denied Fourth Street's subsequent insurance claim in part on the grounds that the tarps were not part of the "roof." The policy's "rain limitation" excluded damage to "'[t]he interior of the building or structure' ... caused by rain ... unless: (a) the building or structure first sustains actual damage to the roof."

In the end, the Nevada Supreme Court agreed with Travelers, reasoning that because "the tarps used to cover the areas of the building's roof exposed by the removal of the waterproof membrane" were not planned as a replacement of the waterproof membrane to protect the building from reasonably anticipated weather-related risk, the tarps did not constitute a "roof."

Under Certain Circumstances, a Temporary Roof Covering May Be Considered Part of the Roof

The court in Fourth Street Place considered the Oregon Supreme Court's decision in Dewsnup v. Farmers Insurance Co., 239 P.3d 493 (Or. 2010). In Dewsnup, the insured homeowner removed the damaged wood shingles from the roof, leaving only the plywood sub layer.

During the repairs, the insured replaced the shingles with a six-mil-thick polyethylene plastic that was secured to the wood sub layer with a system of staples, roof tacks, and wooden bats. The homeowner's experts testified that the plastic sheeting was sufficient to protect the roof for one to two years under normal circumstances and was "functionally permanent."

But after the installation of the plastic sheeting, high winds tore it off the roof and rain entered the home. Farmers denied coverage under a rain limitation provision similar to the one in Fourth Street. Because the policy did not define "roof," the parties contested whether the plastic sheeting constituted a roof. Farmer's asserted that because the sheeting was permanent it could not be part of the "roof."

The Oregon Supreme Court rejected this contention and adopted a functional definition of a roof, stating that "a roof should be sufficiently durable to meeting its intended purpose: to cover and protect a building against weather-related risks that reasonably may be anticipated." Dewsnup, 239 P.3d at 499; see also Homestead Fire Ins. Co. v. DeWitt, 245 P.2d 92 (Okla. 1952) (stating "[t]he fact that the [roof] opening was adequately covered by canvas brought it within the provisions of the windstorm clause, since except for the action of the wind the opening was adequately closed."); Victory Peach Group Inc. v. Greater N.Y. Mut. Ins. Co., 707 A.2d 1383 (N.J. Super. Ct. App. Div. 1998) (extending coverage to property in a building that was damaged by water that infiltrated three tarps protecting a compromised portion of roof).

The Oregon court reasoned that "[w]hen a roof is sufficiently durable to serve the functional purpose described above, it is still a 'roof' within the ordinary understanding of that term, even if it is not necessarily permanent." Dewsnup, 239 P.3d at 497. In other words, according to Dewsnup, a tarp or other temporary roof covering can be part of the "roof" for purposes of insurance coverage. This holding, however, may be limited to Oregon, and perhaps in Nevada, for the time being.

Because the Tarp is Not "Permanent," It is Not Part of the Roof

Other courts have summarily rejected that idea that a tarp or other temporary protection can be part of the "roof." For example, the court in Diep v. California Fair Plan Association, 15 Cal. App. 4th 1205, 19 Cal. Rptr. 2d 591 (1993), referred to dictionary definitions of a "roof" and determined that:

> "[A] roof is commonly considered to be a permanent part of the structure it covers. 'Roof' is not considered an ambiguous or vague word. The plastic sheeting was used here [in Diep] because part of the roof had been removed. The breach in the roof was not caused by wind or hail, but by the workmen who removed that portion of the roof needing repair."

Deip, 19 Cal. Rptr. 2d at 593; see also Aginsky v. Farmers Ins. Exch., 409 F. Supp. 2d 1230 (D. Or. 2005) (holding that a tarp applied to a roof during repairs does not constitute a "roof" for purposes of coverage). But see Camden Fire Ins. Ass'n v. New Buena Vista Hotel Co., 24 So.2d 848 (Miss. 1946) (seemingly adopting a functional definition of a roof and stating "[a] reasonably prudent householder would [not] consider it, if left in that condition for a month or months, or longer, as adequate against all risks of wind or rain which could be reasonably anticipated as likely to happen according to the general and recurrent experiences of the past").

The limitation at issue in Diep similarly excluded damage to the building's contents due to rain, snow or sleet unless the building structure first sustains damage to its roof or walls through which the rain, snow or sleet entered.

The definition adopted by the Diep court currently seems to be the majority position. Because a tarp is merely a temporary solution, it does not constitute a "roof." Still, insureds may argue that a planned temporary roof covering that is specifically designed to protect the building is part of the "roof."

To satisfy this standard, however, the building owner will have to show that temporary covering was designed to protect the building for a reasonably long time — several months to years — and was designed to protect against reasonably anticipated weather — a thunderstorm with strong winds and heavy rain. A blue visqueen tarp attached with a few nails does not meet this standard.

--By Gerardo Alcazar, Robins Kaplan Miller & Ciresi LLP

Gerardo Alcazar is an associate in Robins Kaplan's Minneapolis office.