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Wisconsin Supreme Court Holds That the Ensuing Loss Exception Reinstates Coverage for Rainwater Damage Caused by Construction Defects

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On July 6, 2026, the Supreme Court of Wisconsin held in a narrow 4-3 decision that the 'ensuing loss' exception to the "Construction Defect" exclusion (or "Faulty Workmanship" exclusion) contained in the policyholder-defendants' homeowner's insurance policy reinstated coverage for damages caused by rainwater entering the policyholder's dwelling as a result of construction defects, regardless of whether such defects existed from the time of original construction. *Cincinnati Ins. Co. v. Ropicky*, 2026 WI 25. While the Court recognized and purported to follow the majority rule, previously applied in *Arnold v. Cincinnati Ins. Co.*, 2004 WI App 195, 276 Wis. 2d 762, 688 N.W.2d 708 and other jurisdictions, that the ensuing loss exception requires the loss to be caused by a separate and independent peril, it nevertheless determined that the intrusion of rainwater as a result of faulty workmanship, in and of itself, was an additional cause of damage beyond just the faulty workmanship (the "Majority").

The 12-page dissenting opinion (the "Dissent") criticized the Court's decision as misconstruing *Arnold*, and interpreting the ensuing loss exception so broadly that the "Construction Defect" exclusion is effectively swallowed altogether. The Dissent further warned that the Majority's decision will lead to skyrocketing insurance costs as homeowner's coverage is expanded to encompass the homebuilder's faulty workmanship.

Previous Analysis Under *Arnold*

The *Arnold* case arose out of a dispute between the Arnolds and a contractor hired to clean and stain siding on their house. In the initial stage of the work, the contractor applied a stripping agent, and rinsed it with a pressure washer. The Arnolds claimed that the stripping agent caused damage to their home, including deterioration of the caulking around the windows and that, as a result of a later rainstorm, water and stripping product leaked into the home from the damaged seals of the windows and skylights causing additional interior damage. The Dane County Circuit Court granted summary judgment in favor of Cincinnati Insurance Company ("Cincinnati") in the insureds' declaratory judgment action finding that the Cincinnati policy's Faulty Workmanship Exclusion defeated coverage.

The Wisconsin Court of Appeals affirmed in part and reversed in part, finding that damage to the exterior of the Arnolds' home and water damage to the interior of the home due to the faulty pressure washing operations was excluded by the "Faulty Workmanship" exclusion; however, any damage to the interior of the home that was caused by subsequent rainwater intrusion as a result of the damaged caulking was a loss ensuing from the excluded loss (faulty workmanship or faulty materials), and covered by the homeowner's policy. In reaching this conclusion, the *Arnold* Court found that a reasonable insured would understand that an ensuing loss was not merely any loss to covered property that chronologically follows from a construction defect. Rather, the Court concluded that there must be a cause of loss in addition to the excluded cause of loss, resulting from a "separate and independent peril."

Ropicky **Background**

The *Ropicky* case arose out of a 2018 storm resulting in property damage to a home constructed in 2005. The insured, James Ropicky ("Ropicky"), woke up to discover rainwater pouring into his home and causing significant damage and subsequently made a claim for property damage to his insurer, Cincinnati. During the inspection, Cincinnati's retained engineer discovered the rain water entered as a result of construction defects existing from the time of original construction, including a 1-inch gap between the gutters and roof flashing, defective stone veneer siding, and improper grading. Ropicky's own experts offered no alternative explanation for the water intrusion. Cincinnati paid Ropicky for unspecified damages it determined constituted "ensuing losses" and $10,000 for mold damage under the "Fungi Additional Coverage" endorsement, reinstating coverage up to $10,000 for damages otherwise excluded by the policy's "Fungi" exclusion.

Additional damages to the property were discovered when Ropicky began his repairs. Cincinnati again inspected the property, determining the additional damages were caused by the previously identified construction defects and by fungi. Accordingly, Cincinnati issued a denial based on the "Construction Defect" exclusion, also denying based on the "Fungi" exclusion since the $10,000 limit of the "Fungi Additional Coverage" endorsement was already exhausted.

Cincinnati filed suit seeking declaratory judgment that its policy provided no coverage beyond what it had already paid. Ropicky responded with counterclaims for breach of contract, declaratory judgment, and bad faith. After discovery, the parties filed competing motions for summary judgment. The Waukesha County Circuit Court granted Cincinnati's motion in its entirety, declaring that the "Construction Defect" and "Fungi" exclusions barred all coverage other than what had already been paid. On appeal, the Wisconsin Court of Appeals reversed the circuit court's grant of summary judgment on the basis that genuine issues of material fact remained. Specifically, the Court of Appeals held that *Arnold* controlled, and that rainwater was an ensuing loss, regardless of whether the defects at issue existed at the time of the initial construction. The Wisconsin Supreme Court granted Cincinnati's petition for review.

Analysis by Majority

In the Majority opinion, the Wisconsin Supreme Court agreed with the Court of Appeals, concluding that, under *Arnold*, the rainwater was an ensuing cause of loss and, thus, the resulting damages were covered under the homeowner's policy, despite evidence on summary judgment showing the construction defects existed at the time the home was constructed. In so holding, the Wisconsin Supreme Court suggested that an insurer which wishes to exclude coverage for such losses should include "different, more precise, and clearer language" in its policies.

The Majority also clarified the effect of the “Fungi” exclusion and “Fungi Additional Coverage” endorsement and, specifically, how the endorsement, which provides coverage for damages caused by fungi with a $10,000 limit, impacts the exclusion. The Supreme Court reversed the Court of Appeals’ determination that the exclusion does not apply at all when an insured obtains the additional coverage, concluding that the “Fungi Additional Coverage” endorsement operates as an exception to, rather than a replacement of, the exclusion. Thus, Ropicky was entitled to recover up to $10,000 for mold damage.

Analysis by Dissent

The Dissent asserts that the Majority has departed from *Arnold* and has expanded the coverage under a standard homeowner’s insurance policy to include damages attributed solely to pre-existing construction defects, without any independent cause of loss. The Dissent also asserts that the Majority’s opinion relies on an improper reading of *Arnold*. A proper reading of *Arnold*, it claims, is the excepted loss was an “attenuated event” from the construction defect and, thus, constituted an independent loss. There, rainwater entered the property due to the caulking, which was itself damaged by the construction defect. In contrast, all of the damages in *Ropicky* derived from rainwater directly entering the property through the construction defect itself. The Dissent argues that the Majority’s failure to properly apply or clarify *Arnold* breaks with the majority of other jurisdictions, and contradicts the intent of the contracting parties: the Construction Defect Exclusion applies unless there is an ensuing loss exception, and that loss must be caused by a separate and independent peril. Finally, the Dissent warns that the decision will result in Wisconsin homeowners’ insurance costs increasing due to the expanded coverage encompassing the homebuilder’s faulty workmanship.

Conclusion

The instant effect of the *Ropicky* decision is to limit application of the “Construction Defects” exclusion solely to the costs to repair the construction defects themselves. Only time will answer whether the Dissent’s warning comes to fruition, namely, that the *Ropicky* decision will cause higher insurance costs due to the expanded scope of coverage that encompasses a builder’s faulty workmanship. Insurers themselves may also follow the *Ropicky* Court’s guidance and modify future policies to include “different, more precise, and clearer language” limiting application of the ensuing loss exception.
