



Florida Supreme Court Rules That Certain Commercial General Liability Insurance Policies Cover Repair or Replacement of Property Damage That Results from the Defective Work of Subcontractors

On December 20, 2007, the Florida Supreme Court decided two cases of importance to general contractors - U.S. Fire Ins. Co. v. J.S.U.B., Inc. and Auto-Owners Ins. Co. v. Pozzi Window Co. - that settle contradictory rulings of the Second and Fourth District Courts of Appeal regarding Commercial General Liability (“CGL”) insurance policy coverage for third-party claims arising from defective work performed by a subcontractor. The court’s decisions, which are mostly favorable to the general contractor, resolve the following questions:

1. Whether defective work by a subcontractor that is neither intended nor expected by the contractor may constitute an “occurrence” under a CGL policy with completed operations coverage.
2. Whether property damage to a project caused by the “occurrence” (the subcontractor’s unintentional and unexpected defective work) is “property damage” for which coverage is provided under a CGL policy with completed operations coverage.

The court answered both questions in the affirmative. What does this mean for the general contractor? The J.S.U.B. and Pozzi cases present two factual scenarios that illustrate the effect of these decisions. First, in J.S.U.B., a homeowner sought damages for structural defects to their home arising from a subcontractor’s defective soil compaction and/or testing. The court held that where “physical injury to tangible property” (i.e., moving and/or sinking walls) occurred as a result of the subcontractor’s defective work, coverage is provided. Distinguish this from Pozzi, in which a homeowner sought coverage under the general contractor’s CGL policy for the repair or replacement of defectively installed windows. While the policy would provide coverage for resulting property damage (e.g., damaged paint or wallpaper) caused by the

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subcontractor's defective window installation, the subcontractor's defective work itself does not constitute "property damage." Consequently, the court ruled that the CGL policy did not provide coverage for repair or replacement of the windows.

These cases clarify that CGL insurance policies may be looked to as a valuable resource when the general contractor is faced with a post-completion third-party claim for property damage caused by a subcontractor's defective work. However, this general rule is not without limitations. Importantly, the court's decisions are limited to post-1986 CGL policies with completed operations coverage. While most general contractors purchase this coverage, it is sometimes excluded as a cost savings measure. Furthermore, some insurers are now modifying their CGL insurance policies to contain exclusions for this type of claim. A common example of such an exclusion is in the case of the Contractor Controlled Insurance Program ("CCIP") or Owner Controlled Insurance Program ("OCIP"), under which insurers may exclude claims for property damage caused to the project by any named insured under the policy, which includes enrolled subcontractors. Accordingly, every policy must be carefully examined to determine what may or may not be covered in light of that particular policy's endorsements and/or exclusions.

Therefore, how should the general contractor proceed when faced with a third-party claim for property damage arising from a subcontractor's defective work? Because insurance claims relating to any construction project are complex and require careful pre-claim analysis and planning prior to submission, the general contractor should always first consult with legal counsel. Once carefully prepared with the assistance of counsel, a claim under a CGL insurance policy for post-completion property damage arising from the defective work of a subcontractor may provide substantial cost mitigation to the general contractor as compared to a performance bond claim. This cost savings would come in the form of the cost of defense (including attorney's fees) which, unlike a surety bond, is provided to the contractor by the insurance company without any obligation for repayment. Also unlike a surety bond, any amounts paid by a CGL carrier to settle a claim are not the ultimate responsibility of the contractor, as opposed to a surety bond for which the general contractor, as principal, indemnifies the surety.

Should you wish to learn more about the above, please do not hesitate to contact us.