



Ongoing or Completed Operations? Fifth Circuit Finds No Duty to Defend Contractor under Additional Insured Endorsement

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In *Woodward, L.L.C. v. Acceptance Indemnity Insurance Company*, WL 535726 (5th Cir. 2014), the Fifth Circuit Court of Appeals held the insurer had no duty to defend the contractor named as an additional insured under a subcontractor's Commercial General Liability policy. The Court's holding, based on its interpretation of "completed operations" versus "ongoing operations," demonstrates the importance of the specific wording of the additional insured endorsement on the insurer's duty to defend. Furthermore, in regards to Mississippi law, the Fifth Circuit's ruling adds support to the proposition that an insurer's duty to defend depends significantly upon the facts in the underlying complaint.

Woodward stems from Pass Marianne, L.L.C.'s contract with general contractor Carl E. Woodward to construct condominiums, which were later determined to have construction issues. Woodward entered into a contract with subcontractor DCM Corporation, L.L.C. to provide concrete work for the project. DCM subsequently obtained a CGL policy in November 2005 from Acceptance Indemnity Insurance Co. for its work on the project from January to October 2006. Upon completion of the project in August 2007, Pass Marianne sold the condominiums to Lemon Drop Properties in October of the same year.

One year later, Lemon Drop brought suit against both Pass Marianne and Woodward alleging breach of contract and gross negligence. Pass Marianne then filed a cross-claim against Woodward alleging faulty construction and damage arising out of the construction. The fault of concrete subcontractor, DCM, was also at issue. Based on its status as an additional insured under DCM's CGL policy, Woodward demanded Acceptance provide defense and indemnity. Acceptance refused to defend Woodward. Litigation ensued, and the district court held that Acceptance had a duty to defend Woodward. Acceptance appealed and Woodward filed a cross-claim.

The Fifth Circuit, applying Mississippi law, began its analysis by holding that when determining whether an insurer has a duty to defend, courts must overlay the language of the policy with the facts alleged in the complaint. The Court added that no duty arises when the alleged conduct falls outside the policy's coverage. However, the Court noted that if an insurer's independent investigation establishes facts that would present a claim "which potentially would be covered under the policy, the insurer must provide a defense until it appears that the facts upon which liability is predicated fall outside the policy's coverage." To that end, the Court deemed a report provided by Woodward relevant for determination of whether Acceptance had a duty to defend Woodward. The report concluded that DCM failed to comply with both construction drawings and industry standards as evidenced by, among other things, improperly-sloped floors.

The Court then shifted its attention to two clauses included in the policy language relied upon by Woodward. The first provided that Woodward was an insured “only with respect to liability arising out of [DCM’s] ongoing operations performed for that insured.” The second stated that the policy “does not apply to ‘bodily injury’ or ‘property damage’ occurring after [all work] to be performed by or on behalf of the additional insured(s) at the site of the covered operations has been completed.”

Because the Mississippi Supreme Court lacked guidance on the meaning of the clause “arising out of [an insured’s] ongoing operations” found in the CGL policy, the Court relied upon a recent decision from the Mississippi Court of Appeals. The intermediate court’s decision relied, in part, upon a Colorado Court of Appeals opinion. In *Noble v. Wellington Assoc.*, 2013 WL 6067991 (Miss. Ct. App. Nov. 19, 2013), the court interpreted the phrase “ongoing operations” to refer to actions “actually in progress,” and held it could not encompass “completed operations.” That court, among other things, determined that the contractor was only an additional insured for liability caused by the subcontractor’s active work on the site, and not damage after the subcontractor had ceased working on the site. Accordingly, the Mississippi Court of Appeals held DCM’s insurer did not owe any contractual duty to defend or indemnify its contractor under the terms of the additional-insured endorsement.

The Fifth Circuit was persuaded by *Noble* and its support of the proposition that claims for liability can be brought after ongoing operations are complete, but the underlying liability cannot be due to the “completed operations.” The Court stated that Acceptance’s additional-insured endorsement also included a specific exclusion for property damage occurring after all work had been completed. Thus, the Court interpreted the endorsement as applying to DCM’s ongoing operations, regardless of when the claim was filed as long as the liability did not arise out of completed operations. According to the Court, a contrary conclusion on its behalf would have effectively converted a CGL policy into a performance bond. As a result, the Court determined the claims of fraud, defamation, and breach of contract in the complaint clearly did not arise out of DCM’s ongoing operations of work on the condominiums.

Characterizing an allegation of non-conformance to specifications as a claim of construction defect, the Court held that liability for construction defects (even though created during ongoing operations) legally arise from completed operations. Furthermore, while acknowledging that Woodward’s liability for the alleged liability was causally related to DCM’s operations, the Court reiterated its position that Acceptance’s policy specifically excluded liability for property damage occurring after all work had been completed.

In sum, the Court restated its finding that: “Even accepting the district court’s factual finding that damage had occurred during ongoing operations, the only ‘damage’ supported by allegation is the construction that was not in conformity with plans and specifications. Liability for such damages arises out of completed operations, for which Woodward was not an additional insured under the policy.” Determining that the claims fell outside the coverage of the additional insured endorsement, the Fifth Circuit held Acceptance had no duty to defend Woodward.

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