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S.C. Supreme Court Finds CGL Policy Excludes Coverage Where Subcontractor Damages Insured's Completed Work

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Practice Areas:
- Insurance Coverage
- Professional Liability

A Commercial General Liability (CGL) policy did not provide coverage when a brick face was damaged by improper cleaning after the insured completed its installation according to a recent opinion of the South Carolina Supreme Court. Finding exclusions j.(5) and n applied to remove coverage, the S.C. Supreme Court reversed the decision of the circuit court.

In *Bennett & Bennett Construction, Inc. v. Auto Owners Insurance Co.*, a homeowner engaged Bennett, a general contractor, to remove the stucco from her home and replace it with decorative brick. Bennett hired M&M, a subcontractor[1], to install the brick. The brick featured a sandy finish; Bennett and the brick's instructions warned M&M not to use pressure washing or acid to clean it. M&M completed installation of the brick, informed Bennett the work was complete, and sent a final invoice. Bennett inspected the work and discovered the brick needed to be cleaned. M&M hired a subcontractor to clean the brick. The subcontractor used a pressure washer and acid solution, which discolored the bricks and removed the decorative finish. Attempts to repair the brick were unsuccessful, and Bennett instructed M&M to replace the brick. M&M then ceased communication with Bennett, which replaced the brick at its own expense.

Bennett filed suit against M&M and gave notice of the suit to both M&M and Auto Owners, M&M's liability insurer. Neither M&M nor Auto Owners defended the suit or appeared at the damages hearing, and default judgment was entered against M&M. Bennett brought an action against Auto Owners and M&M seeking a declaration that M&M's liability policy provided coverage for the damages caused by M&M's subcontractor. Following a bench trial, the circuit court found the incident was an occurrence under the policy and that neither exclusion j.(5) nor exclusion n excluded coverage.

On appeal, Auto Owners argued (1) exclusion j.(5) applied even though M&M's work was complete, and (2) exclusion n barred coverage because M&M's work was replaced due to deficiency or inadequacy.

Exclusion j.(5): In the policy at issue, exclusion j.(5) excluded from the policy's coverage "property damage" to:

> That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations…

It was not disputed the damage was caused by a subcontractor working on behalf of the insured or that the property damage arose from that work. The question was whether the subcontractor was "performing operations" for the purposes of the policy. The circuit court had reasoned the subcontractor was not "performing operations" because M&M's work was complete when the damage occurred. The S.C. Supreme Court disagreed based upon (1) the plain and ordinary meaning of "performing operations," and (2) the immateriality of the time at which M&M's work was completed.

"Performing operations" was not defined in the policy. When policy language is undefined, courts must give it its plain, ordinary, and popular meaning. Citing the *American Heritage Dictionary* definition of "operation," "[a] process or series of acts performed to effect a certain purpose or result," the court determined that nothing in the policy suggested "operations" should not be given its plain, ordinary, and popular meaning. With regard to "performing," the court reasoned that the verb phrase "are performing" was used in the present continuous tense, which indicated the temporal limits of the exclusion were coterminous with the performance of the acts. Thus, the court found there could be no question the damage occurred when the insured's subcontractor was actively performing operations.

The S.C. Supreme Court also found that the circuit court's focus on the time "your work" was completed was misplaced: "The point in time when M&M's general aggregate coverage ended and its products completed operations coverage began is immaterial to this case since the insurer is not defending on the basis that the policy's limits have been exhausted." Accordingly, the court concluded j.(5) unambiguously excluded coverage when the insured's subcontractor damages the work product while performing operations, regardless of whether "your work" is complete under the policy.

Exclusion n: The court found that exclusion n also barred coverage under the policy. Pursuant to exclusion n, the policy did not cover:

> Damages claimed for any loss, cost or expense…incurred…for the…repair, replacement, adjustment, removal or disposal of…"Your work"…If such…work…is withdrawn…from use…because of a known or suspected defect, deficiency, inadequacy, or dangerous condition in it.

Likening the case to *Auto Owners v. Newman,* 385 S.C. 197, 684 S.E.2d 541 (2009), the court noted the insured contracted to install a decorative brick face, and the aesthetic characteristics of the brick were an important aspect of the contract. The brick face, i.e., the insured's work, was replaced because of a deficiency in its aesthetic characteristics. Accordingly, coverage was also barred under exclusion n.

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[1] We are not aware of any relation to the singer Eminem, or the candy, for that matter.

About Logan Wells

Logan Wells is an associate practicing in the areas of insurance coverage and professional liability. She also writes about insurance coverage issues and trends in the South Carolina Insurance Law Blog. She received her undergraduate degree in history and political science from Furman University and earned her juris doctor from the University of South Carolina School of Law. During her undergraduate career, she worked for a law firm in Spartanburg as a legal assistant. While in law school, she worked as a summer associate for Collins & Lacy, before joining the firm as an attorney in the fall of 2009.

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