J.S.U.B., INC. v. U.S. FIRE INSURANCE COMPANY
WHAT DOES IT MEAN TO YOU?

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The Supreme Court of Florida recently issued its long awaited opinion in U.S. Fire Insurance vs. J.S.U.B., Inc. The Supreme Court held that a post-1986 standard form Commercial General Liability ("CGL") policy, with products-completed operations coverage that is issued to a contractor, provides coverage where a claim is made against the contractor for damage to the completed project caused by a subcontractor's defective work. While heralded by the commercial construction industry, this opinion may cause insurers to change the terms and conditions of future CGL policies to limit coverage.

Over several decades the provisions of CGL insurance policies have evolved from individual policies tailored to the business of the policyholder to a uniform policy which became known as the Comprehensive General Liability policy. In 1986 the name of that type of policy was changed to the Commercial General Liability policy. Post-1986 CGL policies have continued to evolve to the present format which has a broad grant of coverage followed by definitions and exclusions which narrow that coverage.

One notable evolution concerns the exclusion for property damage within the policyholder's "...care, custody or control." This language has long existed in liability policies and was interpreted broadly by the courts. The courts concluded generally that because the contractor controls the jobsite, the entire project is under the contractor's "care, custody and control."

The industry reacted to these rulings by developing an endorsement soon to be known as the Broad Form Property Damage Endorsement ("BFPD"). This endorsement was intended to narrow the exclusion to that particular part of the project upon which operations were being performed at the time of the loss. While the BFPD Endorsement addressed operational liabilities it did not clearly address liabilities arising out of the contractor's completed operations.

Consequently, an endorsement was developed to address that issue. This endorsement was referred to as "Broad Form Completed Operations Coverage ("BFCO"). This endorsement specifically restricted the policy exclusion within the Products/Completed Operations Coverage dealing with damage to the work of the contractor to exempt loss or damage to or arising out of the work performed by subcontractors. This coverage continued to be marketed as an endorsement until 1976 when the industry developed the General Liability Extension Endorsement. This endorsement merged numerous broadening endorsements (including both the BFPD Endorsement and the BFCO Endorsement) into one form.

In 1986, the basic CGL policy was modified to include the broader provisions of the General Liability Extension Endorsement, inclusive of the BFPD and BFCO coverages. This became known as the "your work" exclusion. The coverage did not apply to loss or damage to the contractor's work. The term "your work" was defined as "...work or operations performed by you or on your behalf, including materials, parts or equipment furnished in connection with such work or operation. The exclusion often included the following language:

"This exclusion does not apply if the damaged work or the work out of which it arises was performed on your behalf by a subcontractor."

The Lassiter decision issued by Florida's Fourth District Court of Appeal in 1997 held that CGL policies can never provide coverage for a claim made against the contractor for damage to a completed project caused by a subcontractor's faulty workmanship. Given the decision in Lassiter, many insurers in Florida interpreted the "your work" exclusion without regard to the 'subcontractor" exception. However, the Lassiter holding was expressly rejected by the Florida Supreme Court in JSUB.

The JSUB case was appealed to the Florida Supreme Court from Florida's Second District Court of Appeal in 2005. The Second District had issued an opinion in favor of coverage. The Supreme Court noted that the policy in JSUB case did not contain a specific exclusion for subcontractor work. Therefore, the Supreme Court approved the Second District's decision in favor of coverage. Now that the JSUB ruling has been upheld and the Lassiter ruling rejected, the industry is likely to react by creating endorsements with language that revives the Lassiter exclusion.

Insurers are likely to utilize endorsement form CG2294, or their own scripted or proprietary endorsements. The intent is likely to be the same; to eliminate coverage for the work of the subcontractors. Without this endorsement, the basic (unmodified) CGL policy should reasonably be interpreted to provide coverage for:

- Damage to the insured contractor's work that arises out of the work of a subcontractor;
- Damage to the work of the Insured's subcontractor that arises from the subcontractor's work;
- Damage to the work of the Insured's subcontractor arising out of the insured contractor's work;
- Damage to the work of the insured's subcontractor arising out of another contractor or subcontractor's work.

Contractors should carefully review their CGL policies and resist the inclusion of form CG2294 (or its equivalent). While many insurers may take this approach, some will not; so insurer selection may become crucial. Prudent contractors should also develop sensible risk allocation provisions in their subcontract agreements that require their subcontractors to provide reasonable indemnifications secured by insurance coverage with commercially reasonable limits and appropriate additional insured provisions.

CGL policies are "occurrence" policies. Accordingly, the policy in effect when the actions or omissions giving rise to the claim occurred is the policy that provides the coverage. Florida has a ten year statute of repose for latent liabilities, so the contractor's exposure does not end with the completion of the project and the running of the conventional four year statute of limitations. Accordingly, decisions involving these issues have far reaching consequences and should be made carefully and with the advice of competent professionals.

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