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CONSTRUCTION: Completed Operations; Are You Covered?

The timing of when someone purportedly hurts themself as a result of the design or construction of a building or structure is important for purposes of liability insurance. Depending on the terms of the insurance, coverage may not exist to the extent the accident takes place after the building or structure is complete. To ensure that insurance is available beyond the date upon which a construction project is substantially complete, construction companies often purchase and/or require their subcontractors to purchase what is called "completed operations" coverage. Great Divide Insurance Company v. Amerisure Insurance Company, 2018 U.S. Dist. LEXIS 41443 (S.D. Fla. March 14, 2018), is a reminder to work with your insurance and legal advisors to make sure that the contracts governing a construction project (contracts, subcontracts, insurance policies, and certificates of insurance) reflect the parties' intent as to insurance for post-completion injuries and property damage.

In Great Divide, after the construction of a Cumberland Farms convenience store, "a customer . . . tripped and fell over the ADA [Americans with Disabilities] ramp outside the store." The customer sued the general contractor responsible for building the store and the general contractor turned to the subcontractor that built the ADA ramp, and its insurer, for indemnification (directly and as an additional insured). The subcontractor's insurer refused to get involved on the grounds that its policy (issued to the subcontractor) did not provide "completed operations" coverage for the accident. The general contractor's insurer settled the customer's claim on behalf of the general contractor and sued the subcontractor's insurer for a declaration that its policy did in fact provide coverage.

The Court agreed with the subcontractor's insurer and held that the subcontractor's policy did not provide "completed operations" coverage for the customer's post-completion injuries. The Court's holding rested on a careful reading and analysis of the "Major Contract" governing the general contractor's work in building the store, the subcontract between the general contractor and the subcontractor in charge of building the ADA ramp, the subcontractor's insurance policy, and the certificate of insurance issued to the general contractor by the subcontractor's insurer. The Major Contract required that the general contractor "and any subcontractors" procure, among other types, "products and completed operations" insurance. The subcontract, however, only required that the subcontractor procure "insurance throughout the entire performance of this agreement," i.e., for its ongoing operations. The subcontract did not require the subcontractor to purchase "completed operations" insurance. Furthermore, the certificate of insurance issued to the general contractor did not state that it covered completed operations. Finally, the subcontractor's insurance policy contained an endorsement ("Contractor's Blanket Additional Ensured Endorsement') that specifically provided "completed operations" coverage but only upon the satisfaction of two conditions: (1) the contract establishing the additional insured status itself required the procurement of "completed operations" coverage, which it did not, and (2) such coverage was specifically listed in the certificate of insurance, which it was not.

In holding that the subcontractor's insurance policy did not cover completed operations and that the subcontractor's insurer had no duty to defend or indemnify the customer's claim, the Court noted that,

while the subcontractor had agreed to assume the risks of the general contractor with respect to the ADA ramp (via the indemnification provisions contained in the subcontract), the subcontractor had not agreed to assume the general contractor's obligations under the Major Contract to make sure that all involved in the project procured the types of insurance listed in that contract, including "completed operations" insurance. The Court suggested that the subcontractor's policy might have provided completed operations coverage had the subcontract contained what it referred to as "a flow-down clause which [would have] required [the subcontractor] to be bound by all of the obligations in the Major Contract."

For assistance with your risk management and/or insurance needs, please call or email Fannie Minot at: fannie@minotreports.com; (978) 578-2076.