Fields Howell

Case Advisory **October 2015**

This month we report on two cases from the Georgia Court of Appeals applying the "business risk" exclusions in a CGL policy.

Georgia Court of Appeals Holds Business Risk Exclusions (j)(6) and (j)(7) Do Not Apply to Completed Operations

In *Dolan v. Auto Owners Ins. Co.*, 773 S.E.2d 789 (Ga. App. 2015), the Georgia Court of Appeals has held that certain "business risk" exclusions in the Commercial General Liability ("CGL") policy do not exclude coverage for completed operations claims arising from the insured's negligent installation of air condition ductwork. The insured was an air conditioning installation company with a CGL policy. The insured replaced the duct system of an air conditioning unit in a residence, and sometime after the work was completed, the homeowners discovered mold growth on the air conditioning vent covers. They grew ill with respiratory problems, and sued the insured for the alleged negligent installation.

The insurance company filed a declaratory judgment action and sought a determination that the claims were excluded under Exclusions (j)(6) and (j)(7) of the CGL form. Those exclusions, part of what are often referred to as the "business risk" exclusions, provide that the insurance does not apply to property damage to: (j)(6) "[t]hat particular part of real property on which any insured or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations" or (j)(7) '[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." Exclusion (j)(7) "does not apply to 'property damage' included in the 'products-completed operation hazard.'"

The Court of Appeals held Exclusions (j)(6) and (j)(7) do not apply to work that has already been completed. The Court stated "[t]he Policy's use of the present tense verb, at the very least, creates an ambiguity as to whether it was intended to include completed work." Therefore, the Court read Exclusion (j)(6) to apply only to work currently being performed. The Court also found (j)(7) had no application to completed work, as by the policy's express terms, the exclusion does not apply to property damage included in the products-completed operations hazard. The case does not address other of the "business risk" exclusions, which by their terms expressly do apply to the products-completed operations hazard.

The Court did, however, uphold a separate Fungi Endorsement, which excluded bodily injury claims "arising out of a fungi or bacteria incident," regardless of completed operations, and which limited property damage coverage under the policy to $50,000.

Georgia Court of Appeals Holds Business Risk Exclusions Bar Coverage to General Contractor As An Additional Insured

In another case involving "business risk" exclusions in a CGL policy, the Georgia Court of Appeals has held a general contractor was not covered as an additional insured under a subcontractor's policy for a construction defect claim. *Auto Owners Ins. Co. v. Gay Construction Co.*, 774 S.E.2d 798 (Ga. App. 2015).

In this case, a general contractor was hired for a reconstruction project involving a swimming pool and buildings at Piedmont Park Conservatory. As part of this project, the general contractor hired a subcontractor to apply a waterproof membrane to a terrace deck. After the project was completed, park officers made a claim that the terrace leaked water into the space below.

The general contractor sought coverage under the subcontractor's CGL policy as an additional insured. The insurer denied coverage under certain of the "business risk" exclusions for faulty design, damage to "Your Work," and "impaired property." The general contractor then sued the insurer for breach of contract and bad faith.

The Court of Appeals held there was no coverage for the general contractor. The Court explained, "Business risk exclusions are designed to exclude coverage for defective workmanship by the insured builder causing damage to the construction project itself." The general contractor argued the exclusions should apply only to the subcontractor for its scope of work. But, the Court held that the "business risk" exclusions would bar coverage for the subcontractor, and as an additional insured, the Court stated the general contractor should have no greater coverage under the subcontractor's policy than the subcontractor would have had.

The Court of Appeals also affirmed summary judgment for the insurer on the bad faith claim. The Court held that under Georgia law, a claim for bad faith under O.C.G.A. § 33-4-6 is not authorized if the insurer "had any reasonable ground to contest the claim." The Court held the insurer's position was reasonable, because there was no coverage. Therefore, there was no bad faith as a matter of law.

For questions or comments,
please contact

Joseph C. Gebara
jgebara@fieldshowell.com
404.214.1734

Fields Howell LLP
1180 W. Peachtree St, Suite 1600 | Atlanta, GA 30309 | phone 404.214.1250 | fax 404.214.1251