

General Contractor Held Not To Have Coverage As Additional Insured For Damage Arising Out Of Its Subcontractor's "Completed Operations"

April 29, 2014 | [Additional Insured, Completed Operations, Policyholder Protection](#)



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The language contained in policy endorsements dramatically impacts the scope of coverage for additional insureds. In a recent decision, *Carl E. Woodward, LLC v. Acceptance Indemnity Insurance*, ____ F.3d ____ (5th Cir. 2014), the U.S. Court of Appeals for the Fifth Circuit overruled the district court's determination that a general contractor was insured as an additional insured on its subcontractor's commercial general liability (CGL) policy for claims arising out of the allegedly defective work performed by the subcontractor. The case arose out of a project to build condominiums on the Mississippi Gulf Coast. The general contractor entered into a subcontract for concrete work and was named as an additional insured on the concrete subcontractor's CGL policy. The subcontractor worked on the project from January to October 2006, but the project was not completed until August 2007, nearly a year after the subcontractor completed its work. Shortly after the condominiums were sold, the condominium association brought suit against the seller and general contractor alleging faulty construction and resulting property damage arising out of the construction. The claims were eventually submitted to arbitration and one of the most significant construction defects related to the work performed by the concrete subcontractor. After the association asserted its claims, the general contractor tendered the case to the subcontractor's insurer and sent a copy of the complaint along with an expert report that stated conclusions about the nature and effect of the defective concrete work. The carrier refused to defend the general contractor based on the following language contained in the additional insured endorsement:

Section II – Who is an Insured is amended to include as an insured the person or organization shown in the Schedule, *but only with respect to liability arising out of your ongoing operations performed for that insured.* (emphasis added)

According to the insurer, the coverage for the general contractor as an additional insured only existed if the claim arose out of the concrete subcontractors "ongoing operations" while that work was being performed, and expired when the subcontractor's concrete operations were complete. The insurer therefore concluded that the general contractor had no coverage as an additional insured because the claim arose after the concrete subcontractor's ongoing operations (and construction of the project) were

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complete. The district court disagreed, and held that the insurer had a duty to defend because liability arose out of the subcontractor's defective work. However, the Fifth Circuit Court of Appeals reversed, finding that the general contractor had no coverage as an additional insured under the subcontractor's policy. In reaching its decision, the Fifth Circuit relied upon the both the coverage grant contained in the "additional insured" endorsement as well as the following exclusion that was contained in that endorsement:

This insurance does not apply to "bodily injury" or "property damage" occurring after: 1. All work, including materials, parts or equipment furnished in connection with such work on the project . . . to be performed by or on behalf of the additional insured(s) at the site of the covered operations has been completed . . .

According to the Fifth Circuit: "The first section establishes the broad parameters of the coverage as matters 'arising out of [subcontractor's] ongoing operations.' The second limits the scope of coverage, specifically excluding property damage that occurs after all the work at the site of the covered operations have been completed." *Id.* at *4. The court also determined that "ongoing operations" means that which is actually in process, as opposed to completed operations, which generally are defined as "brought to an end or to a final or intended condition." *Id.* at *6. With these provisions in mind, the court narrowed the central issue to whether the contractor's liability arose out of the subcontractor's ongoing operations or its completed operations. The court concluded that the claim asserted by the association arose out of the subcontractor's alleged failure to build foundation piers in accordance with the plans and specifications, and that the property damage arose out of the subcontractor's defective concrete work. Nevertheless, the court held that the contractor's liability arose out of the subcontractor's completed operations because the work performed by the subcontractor was completed nearly a year prior to final completion. In reaching this conclusion, the court explained "liability for construction defects, while created during ongoing operations, legally arises from completed operations." This subtle distinction was critical to the outcome of the case. Because liability arose from completed operations, the Court stated "even if [the general contractor's] liability for [the association's] breach of contract claim is related to [the subcontractor's] concrete work, [the general contractor's] liability did not arise out of [the subcontractor's] ongoing operations. The breach necessarily arises from the completed construction, which is the point in time when [the association] received the completed building." *Id.* at *8. As such, liability for such damages arises out of completed operations, for which the contractor was not an additional insured under the policy. This case underscores the fact that many standard policy forms may not include completed operations coverage for additional insureds. Owners and contractors that desire to have such coverage therefore need to check their contracts to be make sure the contract language requires completed operations coverage for additional insureds, and they also need to obtain and review the actual additional insured endorsement contained in their subcontractors' insurance policies before work commences to make sure that the required completed operations insurance coverage is provided.