

Construction Defects Coverage Update

April 15, 2024

Construction Defects – Eleventh Circuit (Florida Law)

Southern-Owners Ins. Co. v. MAC Contractors of Florida, LLC
No. 23-11366, 2024 WL 1573685 (11th Cir. Apr. 11, 2024)

The U.S. Court of Appeals for the Eleventh Circuit determined that an insurer had a duty to defend its insured on the basis that, at the time the insured requested a defense, the law on the application of certain exclusions was unsettled, giving rise to a duty to defend.

Southern Owners Insurance Company (SOIC) sought a declaration that it owed no duty to defend its insured, MAC Contractors of Florida LLC d/b/a KJIMS Construction (KJIMS), after property owners brought a breach of contract suit against KJIMS for abandoning a construction site and leaving work unfinished and damaged.

In two prior appeals, the appellate court held that the underlying complaint could be fairly construed to allege “property damage” within the meaning of the commercial liability policy, and coverage was only partially excluded by the “your work” exclusion. In this appeal, the appellate court focused on the meaning of “that particular part” as used in exclusions j(5) and j(6) of the standard CGL coverage form, which exclude coverage for:

- (5) That 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
- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

KJIMS argued that the exclusions should be interpreted to bar coverage for damages to only the distinct part or unit of the project worked on by it or its subcontractor. SOIC argued that because KJIMS was a general contractor, and thus oversaw all work, the exclusions apply to preclude coverage for any property damage caused by KJIMS or its subcontractors.

SOIC relied upon an Eleventh Circuit case that was decided in August 2021, which supported its position. The appellate court, however, pointed out that with respect to the duty to defend, SOIC was bound by the state of the law at the time a defense was requested, which was prior to August 2021. Ultimately, the appellate court determined that SOIC had a duty to defend because, at the time a

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defense was requested, Florida law was unsettled as to the application of the “that particular part” language in exclusions j(5) and j(6). Therefore, while indemnity coverage may not ultimately be available, the appellate court concluded that SOIC had a duty to defend at the time the insured requested a defense.

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