



SWIMMING LESSONS Legal Tips For The Pool Industry



Understanding "Performing Operations" Exclusions in Comprehensive General Liability Policies

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Read it before you sign it - you don't even need a lawyer to tell you that! A recent New Jersey case underscores the importance of both brokers and insureds reading and understanding precisely what insurance policies cover. Otherwise, one might be stuck footing the bill for losses thought to be covered. That's exactly what happened in *Ohio Casualty Insurance Co. v. Island Pool & Spa, Inc.*, 418 N.J. Super. 162 (App. Div.), *cert. denied*, 20 A.3d 435 (2011).

The insured in the case, Island Pool, was hired to repaint an in-ground pool at a residence. To complete the task, Island Pool drained the pool. Once empty, Island Pool installed a temporary pump to prevent groundwater from exerting upward pressure on the emptied pool shell. When a torrential rainstorm fell before Island Pool could finish the job, the resulting elevated groundwater table lifted the pool out of the ground, cracking it beyond repair, and damaged nearby decking and landscaping as well. Island Pool spent approximately \$89,000 to fix the damaged pool, decking, and landscaping. It then submitted a claim to its comprehensive general liability carrier, Ohio Casualty.

Ohio Casualty denied coverage for the expenses related to the pool; however, it accepted coverage for the decking and landscaping. Ohio Casualty asserted that exclusion j(5) of the policy precluded recovery of losses related to the pool. The exclusion states as follows:

This policy does not apply to:

j. "Property damage" to: . . . (5) That particular part of real property on which you or any contractors or sub-contractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations.

The policy defined property damage as either 1) physical injury to tangible property or 2) the loss of use of tangible property that is not physically injured. Ohio Casualty maintained that j(5) excluded coverage because Island Pool was "performing operations" on the pool when the damage occurred.

In the ensuing insurance coverage litigation, Ohio Casualty moved for summary judgment arguing that the exclusion clearly barred reimbursement for any damages related to the pool repair because Island Pool's operations were ongoing when the loss occurred. Island Pool cross-moved for summary judgment, seeking a declaration that the j(5) exclusion did not apply. It argued that the purpose of the policy was to protect it against the unforeseen consequences of its actions, which it claimed was exactly what happened. The trial court rejected Ohio Casualty's argument and granted Island Pool's cross-motion. Ohio Casualty appealed.

This case was the first time a New Jersey appellate court interpreted the j(5) exclusion. The Appellate Division cited to Florida and Illinois cases that had similar facts and identical exclusions. Those courts found that the j(5) "performing operations" provision applied to exclude coverage. Similarly, the appellate court in this case found for Ohio Casualty. It determined that draining the pool was the first step Island Pool had to complete in order to paint it. Before Island Pool could finish painting the pool, the property damage occurred. Accordingly, the court found that the "property damage" to the customer's pool arose out of Island Pool's operations, and occurred while Island Pool was "performing operations." Therefore, the Appellate Division determined that the trial court erred in failing to grant Ohio Casualty's summary judgment

motion disclaiming coverage. The matter was reversed for an entry of judgment in favor of the insurer.

This case illustrates that insureds must read and understand the clauses, exclusions, and endorsements to the policies that they purchase. Courts will enforce these provisions as long as they are unambiguous and do not violate public policy. Exclusion j(5) is standard in most CGL policies. An insured seeking to have coverage for damage to the real property on which the insured is working will be well-served to negotiate j(5) out of the policy, although it will likely result in higher premiums. Or, the insured can make sure this type of damage is covered by an errors and omissions policy.

Brokers, too, must understand the policies they are procuring for their insureds. Indeed, the failure of a broker to obtain the coverage requested by the insured can subject the broker to liability for malpractice. If a contractor retains a broker to procure a policy that would provide the contractor with coverage under facts similar to this case and the broker obtains a CGL policy that includes exclusion j(5), the broker could very well end up footing the bill.

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