Liberty Surplus Insurance Corp. v. Kaufman Construction, Inc.: Operations versus Completed Operations Coverage Under Wrap-Up Insurance Policies

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Most wrap-up policies utilize similar exclusions to those found in standard Commercial General Liability (CGL) forms. They are endorsed to add provisions to adapt the policy to the wrap- up platform, such as extending the completed operations coverage to the length of the statute of repose, including all tiers on the project as named insureds, limiting the insured location to a specific project or projects, and revising certain exclusions in the policy. Courts so far have had little opportunity to interpret the effect of these exclusions on coverage under a wrap-up CGL policy. One of the first cases to focus on these issues, *Liberty Surplus Insurance Corp. v. Kaufman Lynn Construction, Inc.*, 130 F.4th 903 (11th Cir. 2025), involved an insurance coverage dispute between Kaufman, the sponsor of a wrap-up program on a commercial office project, and Liberty Mutual, the CGL insurer under the wrap.

The Court's Opinion

Kaufman was hired to build a new campus in Deerfield Beach for JM Family Enterprises, the largest Toyota dealership and financing operation in Florida. The work was to include new offices, a training and conference center, a dining hall, energy plant, parking garage and more. The project also included demolition of existing buildings. The project experienced a tropical storm, and defectively glazed aluminum curtain and window walls installed by Kaufman's subcontractor caused significant water intrusion and property damage to a portion of the project that was completed under Phase 1 of the two-phase project, with the final change order having been issued and after occupancy by the owner.

The owner demanded payment from Kaufman for repair and damages, but Liberty Surplus refused to cover the claim based on a manuscripted Course of Construction Endorsement ("COCE") to the policy. Liberty Surplus argued that the COCE applied to exclude property damage to any work that occurred prior to completion of the entire project, even though the work was divided into separate occupied phases. The endorsement stated in relevant part:

> **EXCLUSION – DAMAGE TO THE PROJECT DURING THE COURSE OF CONSTRUCTION**
>
> This insurance does not apply to:

1. Any "property damage" at or to any project insured under this policy during the course of construction until the project is completed.

2. Any obligation to investigate, settle or defend or indemnify any person, any claim or "suit" arising out of, or related in any way, either directly or indirectly to any "property damage" at or to the project during the course of construction until the project is completed.

Solely for the purpose of this endorsement:

Construction includes, but is not limited to, construction, renovation, repair, remodel, rehabilitation, demolition, excavation or landscaping.

Project includes, but is not limited to, buildings or structures and any supplies, materials, or equipment, used in connection with the project.

To render its opinion, the court analyzed completion of a multi-phase project for purposes of commencing completed operations coverage under the policy for each phase as it was completed. From the court's analysis, as well as the arguments of the parties, it appears that both Liberty Surplus and Kaufman regarded the COCE to be effective to exclude coverage for property damage at any project that took place prior to completion. Rather, the issue that was before the court was a bit more subtle, and in its eyes, the issue boiled down to whether a construction project that was completed in phases was still within the "course of construction," as to damage to occupied buildings that were completed in an earlier phase.

To answer this question, the court looked to the separate "Limitation of Coverage to Designated Premises or Project Endorsement," setting out the project to be insured under the contractor-controlled insurance program (CCIP):

> Project: Demolition of (5) five existing buildings and New, Ground-Up Construction of (2) two (4) four-story steel & concrete office buildings, (1) one (2) two-story dining hall, a 6k square foot, central energy plant, and a (6) six-story precast parking garage, as well as any operations within 1,000 feet of the designated project that are necessary and incidental thereto.

In essence, the Designated Premises Endorsement should have described two phases of construction of the project: demolition of existing buildings; and construction of multiple new buildings. Kaufman

contended that the Designated Premises Endorsement's description of the insured location was inaccurate and garbled, failing to distinguish between the completion of separate phases as called for in the construction contract, and as included by Kaufman as part of the underwriting of the policy. Discovery indicated that an inexperienced Liberty Surplus underwriter drafted the description.

The court rejected this argument, holding that under Florida law, an insurance policy is to be construed in accordance with the plain language of the contract. While ambiguous policy provisions are interpreted liberally in favor of the insured, and strictly against the drafter of the policy, the court interpreted the "critical language" in the COCE, i.e., the phrase "until the project is completed," noting that neither the terms "project," nor "completed," were separately defined in the policy. Therefore, it resorted to dictionary definitions, determining that the term "project" meant a "planned or proposed undertaking or scheme, and the term "completed" meant to "bring to an end, finish, or conclude."

In accepting these definitions, the Eleventh Circuit upheld the trial court's conclusion that the phrase "until the project is completed" means that the endorsement precluded coverage until the ***entire project*** was finished. Whether the first phase was finished at the time of the water damage, it was undisputed that the entire project had not yet been completed. The court stated that regardless of whether it viewed the term "project" as the policy currently described it, or as the two distinct phases set out by Kaufman in its policy application, the meaning was the same and even if the first phase was finished at the time of the water damage, it was undisputed that the entire project had not yet been completed.

From Kaufman's perspective, it was unnecessary to resort to the dictionary to apply a definition of the term "completed" because they were already set out in the Liberty Surplus policy. Kaufman placed primary reliance upon the definition of "Products-Completed Operations Hazard" contained in the main body of the wrap-up policy. That definition provided in relevant part:

> Products-completed operations hazard:
>
> a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent arising out of "your product" or "your work" except: …
>
> (2) Work that has not yet been completed or abandoned. However, *"your work" will be deemed completed at the earliest of the following times*:

(a) When all the work called for in your contract has been completed.

(b) When all the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at the job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project. [Emphasis inserted by the court, hereinafter the "PCOH definition."]

This PCOH definition is contained in the standard CGL policy and has been the subject of considerable interpretation by the courts. As such, PCOH, a defined term in the policy stating completion of a part of the contracted work that is put to its intended use is deemed completed under the policy and its endorsements. For that reason, Phase 1 of the project was "completed" for purposes of coverage under the policy. But the court refused to recognize that definition as applicable to the COCE. Its resort to common dictionary definitions flies in the face of the direction of the Florida Supreme Court that in interpreting an insurance policy, it is necessary for a court to examine the policy in its context and as a whole, and to avoid simply concentrating on certain limited provisions to the exclusion of the totality of others. *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.,* 845 So.2d 161 (Fla. 2003). In its analysis, the court acknowledged this rule of interpretation but proceeded to do the exact opposite by ignoring the PCOH definition in the same policy when interpreting the applicability of the endorsement.

Contrary to the mistaken holding of the Eleventh Circuit, the COCE and the PCOH definitions are perfectly harmonious, and the application of the standard PCOH definition should have dictated that Phase 1 was a completed operation and covered under the Liberty Surplus policy. That definition unambiguously provides that the insured's work is "completed" for purposes of completed operations coverage "when that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project." It reflects modern construction practices and understanding in that a certificate of occupancy had been issued for Phase 1 and the owner had put the Phase 1 buildings to their intended use as offices prior to the property damage caused by Tropical Storm Eta. Moreover, the careless underwriting of Liberty Surplus as displayed in the muddled description of the insured project in Designated Project Endorsement, cannot change that fact. Accordingly, the PCOH definition of "completed" should render the exclusion in the COCE inapplicable.

Sleight of Hand?

As previously stated, most CIP policies utilize standard CGL forms that are modified to achieve an insurance product to fit the peculiarities of insuring all participants in a single construction project. Initially, one may have the impression that these types of manuscript endorsements that delete exclusions extend coverage for areas that are typically difficult to insure, such as construction defects. Often, standard property damage exclusions may be eliminated altogether. However, as with any insurance product, a prospective CIP sponsor or participant should closely examine the terms of the CGL policy in a contemplated CIP. Some version of a course of construction/builders risk exclusion appears in most CIP CGL policies. The original thought process behind this approach appeared to be a means to reduce the cost of CIPs on the pretext that builders risk policies are the primary method of insuring fortuitous damage to buildings and other structures while under construction.

One of the most pervasive and troublesome CIP modifications to the customary CGL property damage exclusions is an endorsement that deletes Exclusions j(5) and j(6), the operations and incorrect work exclusions. Those exclusions apply to operations in progress, stating that the insurance does not apply to property damage to "***that particular part***" of real property on which the named insured or its subcontractors are performing operations, if the property damage arises out of those operations, or if the property must be restored, repaired, or replaced because the named insured's work was incorrectly performed on it. Exclusion j(6) also states that it does not apply to property damage within the products-completed operations hazard. As often as not, the provision deleting these exclusions from the policy is buried in a lengthy endorsement containing numerous revised terms, exclusions, or conditions in order to transform the CGL into a CIP policy insuring the eligible tiers on the project over an extended 10-year completed operations period.

Further complicating matters and as discussed above, deletion of these property damage exclusions from the CGL form is usually accompanied by attachment of a considerably more onerous endorsement to the CIP policy, stating that the insurance does not apply to property damage at or to the insured project during the course of construction or operations, up to the substantial completion of the project. This is often a stand-alone endorsement that may be labeled in various ways, such as "Property Damage to Work in Progress," "Course of Construction Endorsement," "Property Damage

to Contract Works," or "Exclusion – Damage To The Project During The Course Of Construction," (analyzed and quoted above from *Liberty Surplus v. Kaufman.*)

One might be tempted to believe that deletion of these two exclusions is a win for the insured participants and that coverage would be increased. Not so fast! While these two provisions are framed as exclusions, many courts have relied on the "particular part" formulation to narrowly interpret the scope of the exclusion. In *Mid-Continent Cas. Co. v. JHP Dev., Inc.,* 557 F.3d 207 (5th Cir. 2009), water damage occurred to a condominium building prior to completion, so Exclusion j(5) applied only to the "particular part" of the project on which operations were actively occurring at the time of the property damage. In addition, Exclusion j(6) applied only to property damage to the "particular part" of the property that was defective and not to the damage to non-defective property. Thus, these exclusions are generally regarded as preserving a considerable degree of coverage for property damage exposures during active operations to property other than the "particular part."

Insurance underwriters often refer to this type of provision as the "builders risk exclusion," apparently on the assumption that builders risk insurance, rather than liability insurance, should provide coverage for property damage to the work that occurs during the course of construction. This overly simplistic approach ignores the fact that builders risk policies contain many gaps in coverage versus a standard CGL policy, particularly as to defective construction. The exclusion can thus create a significant gap for participants in a wrap-up project for property damage occurring during the course of operations, depending on their ability to coordinate and rely upon coverage within their own insurance program. First and foremost, a builders risk policy is a first-party property policy that does not include a defense obligation for the insurer. Therefore, when the insured looks to the wrap-up CGL policy for defense of a claim involving property damage during construction, it may be excluded. In addition, builders risk coverage may not provide coverage for certain types of risks such as consequential damages, certain soft costs, and faulty workmanship/design (absent an ensuing loss clause that preserves coverage for damage to other non-defective work caused by the defective work). Coverage for such damages may be otherwise be covered under a CGL policy for a course of construction exclusion attached to a wrap-up.

AGC of America and NAHB, together with their local Florida chapters, filed an amici curiae brief in support of Kaufman in the Eleventh Circuit on the completion/phase issue. In addition, the amici entities alerted the court to what appeared to amount to sleight of hand as to the underwriting of the

policy, seeming to broaden coverage by eliminating standard property damage exclusions, but actually reducing coverage by inserting in their place an absolute exclusion of property damage occurring prior to completion.

The AGC's and NAHB's efforts, though less than successful at sponsoring Kaufman's major argument, nevertheless grabbed the court's attention as to the bait and switch potential of attachment of a course of conduct endorsement to a wrap-up policy. The court stated:

> Appearing as amici, a number of contractors' and builders' associations express concern that Liberty drafted a more onerous COCE through a "sleight of hand," and warn that such a practice could harm construction businesses by rendering coverage unreliable. *See* Br. for Associated General Contractors of America et al. as Amici Curiae at 6 (asserting that the COCE "replaced [a] deleted property damages exclusion with a more onerous exclusion denying coverage for any property damage occurring during construction operations"). But the policy Kaufman obtained from Liberty was through a contractor-controlled insurance program that is used by a general contractor "to provide all participants in the insured construction project—the general contractor, the owner, and all subcontractors—with dependable and affordable insurance coverage under a single commercial liability ... insurance policy." *Id.* at 4.
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> As we have noted, JM Family, [the owner] was required to obtain builder's risk insurance pursuant to its contract with Kaufman. The builder's risk policy, however, is not in the record. We therefore do not know whether the COCE drafted by Liberty created a problematic gap in coverage.

Liberty Mutual v. Kaufman, 130 F.4h 913.

Another case, perhaps the only other one decided to date besides *Kaufman*, and addressing the deletion of property damage exclusions j(5) and j(6) and replacement with an absolute course of construction endorsement in a wrap is *Kelly Panteluk Construction Ltd. v. Lloyd's Underwriters, et al.*, 2024 SKCA 42, decided under Canadian law.) The court acknowledged a potential problem created by the deletion of the standard exclusions. However, it determined that even had those exclusions not been eliminated from the policy, it was a rare instance of a "no harm, no foul" application of the course of construction exclusion, because the "particular part" limitation on the exclusions did not apply due to the atypical, unified nature of the project work, i.e., an embankment. In other words, for purposes of Exclusions j(5) and j(6), the entire embankment project constituted the excluded "particular part" of which the property damage arose, and which needed to be replaced. However, as to a more typical claim

where the work can be divided into discrete "particular parts," the insertion of course of conduct or builders risk exclusions into the CGL wrap-up policy creates serious gaps in coverage versus what the insured participant may be accustomed to under its own corporate policies.

Conclusion

While the Eleventh Circuit mistakenly applied the dictionary definition of "completed" under Florida law, *Liberty Surplus v. Kaufman* may ultimately amount to a mere anomaly with little, if any, precedential value. That is because the Eleventh Circuit remanded the case to the trial court to determine whether the failure to address the phased completion of the project required reformation of the Limitation of Coverage to Designated Premises to Project Endorsement to accurately describe the project, based upon a mutual mistake between Liberty Mutual and Kaufman. While the doctrine of reformation is seldom sought or granted as to an insurance policy, perhaps the court may have remanded on that basis because it believed the case was ripe for that remedy and that, if granted, the ultimate result of the case would change.

While the result in *Liberty Surplus v. Kaufman* may be anomalous based upon its facts, what is not an anomaly is that all terms of an insurance policy, particularly manuscripted provisions, are to be carefully reviewed and applied according to their plain terms. Departures from standard policy language create more opportunity for possible abuse in the claims stage.