

US District Court of Maryland Finds Faulty Work Exclusion Bars Insured's Claim For Scratched Windows, Federal Judge Says

(December 22, 2016, 11:06 AM EST) -- BALTIMORE — An insurance policy's faulty workmanship exclusion applies to preclude coverage for an insured's claim for replacing scratched windows, a Maryland federal judge ruled Dec. 20, finding that the ensuing loss provision does not reach the claimed damage (James McHugh Construction Co. v. Travelers Property Casualty Company of America, No. 16-1099, D. Md.; 2016 U.S. Dist. LEXIS 176112). (Memorandum opinion available. Document #69-170106-007Z.)

James McHugh Construction Co. served as the general contractor for the construction of a high-rise apartment building at 360 West Hubbard in Chicago. As the owner of the project, 360 West Hubbard Joint Venture LLC purchased an insurance policy from Travelers Property Casualty Company of America covering builders risk and inland marine risks and included a blanket named insured endorsement that included McHugh.

In 2013, tenants began moving into the 360 West Hubbard building, and so the project owner asked McHugh to clean the exterior glass windows. McHugh subcontracted with Corporate Cleaning Services Inc. (CCS), to clean the exterior glass. However, McHugh alleged that "CCS failed to follow industry standards when removing debris from the glass designed to eliminate or reduce the risk of damaging glass" and, as a result, the glass surfaces were scratched.

Breach Of Contract

After McHugh repaired and replaced the scratched windows, it reported the loss and claim to Travelers. The insurer denied the claim based upon exclusion B(3)(d)(2) in the policy for "Omission or faulty, inadequate or defective: Materials, workmanship or maintenance."

On Feb. 5, 2016, McHugh sued Travelers in the Montgomery County, Md., Circuit Court, asserting a breach of contract claim and seeking a declaratory judgment that its claim is covered by the policy. Travelers removed the case to the U.S. District Court for the District of Maryland. McHugh moved for summary judgment, arguing that the "faulty workmanship" exclusion is ambiguous and the ambiguity should be resolved in favor of it as the insured.

Travelers filed a cross-motion for summary judgment, arguing that the faulty workmanship exclusion justifies its denial of the claim and that the ensuing loss exception does not apply. Judge Paula Xinis granted summary judgment to Travelers and denied McHugh's motion.

Faulty Workmanship Exclusion

The judge disagreed with McHugh's characterization of the term "workmanship." Whether one uses the term "workmanship" to describe the quality of work in progress or the quality of a final product, the judge said that the term is being used to refer to the quality or skill of the work performed in the process of creating the product. She held that the exclusion is unambiguous and that "faulty workmanship" applies to processes including commercial glass cleaning.

"In support of its position that CCS's cleaning constitutes faulty workmanship, Defendant has introduced the affidavit of Mark K. Schmidt. Schmidt is an engineer who specializes in building facades. He focuses on the evaluation of glass, particularly blemished glass surfaces. He is prepared to testify that 'the glass cleaning work by CCS was not performed in accordance with the glass manufacturer's recommendations and industry standards.' Because CCS's glass cleaning work did not conform to industry standards, Defendant argues that CCS's performance constitutes faulty workmanship," Judge Xinis said.

Although "expert testimony typically cannot be offered to support the interpretation of a contract term," the judge noted that she need not decide whether Schmidt's opinions are admissible because McHugh concedes that CCS failed to conform to "the Subcontract and all applicable industry standards." Thus, the judge accepted as true that CCS's glass-cleaning process fell below the industry standards. The judge further explained that it is undisputed that CCS "should have used a metal scraper or razor blade about an inch or an inch and half wide to clean the glass. CCS instead used a six-inch wide metal scraper."

The judge ruled that CCS' "faulty workmanship" damaged the glass. The judge also found that CCS failed to follow industry standards in cleaning the windows and scratched the glass as a result. Thus, the judge ruled that the faulty workmanship exclusion applies.

'Ensuing Loss' Exception

Next, the judge rejected McHugh's contention that even if CCS's glass cleaning falls within the policy's faulty workmanship exclusion, the damage that resulted is nonetheless covered under the policy's "ensuing loss" clause. The judge found that the damage from the scratched glass was directly the result of faulty workmanship. Thus, the ensuing loss clause does not apply, she said.

Much like the parties in *Carney v. Assurance Co. of Am.* (No. CIV. JFM-04-3434 [D. Md. Apr. 19, 2005], *aff'd*, 177 F. App'x 282 [4th Cir. 2006]), the judge noted that McHugh seeks recovery for the initial damage caused by CCS's faulty workmanship. In *Carney*, the Fourth Circuit U.S. Court of Appeals held that the "faulty workmanship" exclusion applied to the damages arising from the treatment of wood siding and that the plaintiff had not proffered sufficient evidence to trigger the ensuing loss provision. Alternatively, the court in *Carney* reasoned that even if plaintiffs had proffered such evidence, they still could not recover because damage excluded under the faulty workmanship provision cannot be an ensuing loss.

Brian A. Loffredo of Offit Kurman in Fulton, Md., Eric J. Pelletier of Offit Kurman in Bethesda, Md., and Christopher M. Cano and Robert J. Franco of Franco Moroney in Chicago represent McHugh. Craig D. Roswell of Niles Barton and Wilmer in Baltimore and Kirk M. Zapp and Matthew S. Ponzi of Foran Glennon Palandech Ponzi and Rudloff in Chicago represent Travelers.