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What's the Deal? Additional Insured and Other Insurance Provisions

I. "Ongoing Operations"… Ongoing Additional Insured Battle

Pardee Construction Co. v. Insurance Company of the West (2000) 77 Cal.App.4th 1340 and Tri-Star Theme Builders, Inc. v. One Beacon Insurance Co. (Court of Appeals, 9th Circuit 2011) WL 1361468.

A. Insurer Cases

Pardee Construction Co. v. Insurance Company of the West (2000) 77 Cal.App.4th 1340, and its progeny Weitz Co., LLC v. Mid-Century Insurance (Colo. Ct. App. 2007) 181 P.3d 309; Royal Indemnity Co. v. American Family Mutual Insurance Co. (D. Colo. 2008) 2008 WL 4378737; Hartford Insurance Co. v. Ohio Casualty Insurance Co. (Wash. Ct. App. 2008) 189 P.3d 195; American Contractors Insurance Co., RRG v. Zurich American Insurance Co. (S.D. Fla. 2011) 2011 WL 6065400; and Absher Construction Co. v. North Pacific Insurance Co. (W.D. Wash 2012) 861 F.Supp.2d 1236.

The Pardee court opined that "the restriction of coverage in the two endorsements to only ongoing operations makes it clear that additional insureds will have no coverage under the named insured's policy for liability arising out of the products completed operations exposure." In analyzing the "ongoing operations" language, the court stated:

> "…in 1993, the Insurance Services Office (ISO) revised the language of the form 2010 endorsement utilized by the insurance industry to expressly restrict coverage for an additional insured to the "ongoing operations" of the named insured. [FN16] This revised language effectively precludes application of the endorsement's coverage to completed operations losses. (Wielinski *et al*., Contractual Risk Transfer, *supra*, § XI.C, p. 26.) One insurance commentator stated regarding the 1993 revisions of the standard additional insured endorsement forms: "The restriction of coverage in the two endorsements to only ongoing operations makes it clear that additional insureds will have no coverage under the named insured's policy for liability arising out of the products completed operations exposure... ." Pardee at 1358-1359.

Thus, "when the named insured's operations for the additional insured are no longer 'ongoing,' the additional insured no longer has coverage." Pardee at FN 16.

The court in the Hartford case reviewed the California Pardee opinion and reached the following conclusion:

> "The court concludes that to avoid such broad coverage for an additional insured, the insurer must draft and incorporate an express coverage limitation in the policy and endorsement language. The 'ongoing operations' term is such a limitation. (Citation)." Hartford at 202.

In Weitz, the Colorado Court of Appeal examined similar language and concluded, "[i]n our view, the policy is unambiguous as to the extent of the coverage available to the additional insured."

Arch Insurance Co. v. Scottsdale Insurance Co. (W.D. Wash. Oct. 27, 2010) 2010 U.S. Dist. LEXIS 115256, *9-10, adopts Hartford and states that Washington has "adopted the language of a California decision [Pardee] interpreting the meaning of 'ongoing operations.'"

Davis v. Liberty Mutual Group (W.D. Wash. 2011) 814 F. Supp. 2d 1111, 1120, relies upon Pardee to determine that an additional insured "was only covered to the extent that [the named insured] was engaged in ongoing operations at the [project], and [the AI's] coverage ended when [the named insured's] work was completed."

United Fire & Casualty Co. v. Boulder Plaza Residential, LLC (10th Cir 2011) 633 F.3d 951. In accord with Weitz following Colorado law.

Colorado Casualty Insurance Co. v. Safety Control Co., Inc. (Jan. 1, 2012) CA-CV 10-0871, rejects Tri-Star and instead follows Pardee, Weitz, and Hartford and the later 9th Circuit opinion Absher Construction Co. v. North Pacific Insurance Co. (W.D. Wash., March 20, 2012) 2012 U.S. Dist. LEXIS 38555 at *18-20, which is consistent with Pardee and follows Hartford for its interpretation of an "ongoing operations" clause.

Noble v. Wellington Assoc. (Miss. Ct. App. November 19, 2013) 2013 WL 6067991, follows Weitz, "ongoing operations" … cannot encompass liability arising after the subcontractor's work was completed."

Carl E. Woodward, LLC v. Acceptance Indemnity Insurance. Co. (5th Cir. 2014) 2014 WL 535726. In accord with Noble.

B. Policyholder Cases

Tri-Star Theme Builders, Inc. v. One Beacon Insurance Co., 426 Fed.Appx.506 (9th Cir. 2011) is a case decided under Arizona law. Tri-Star comes down foursquare in support of the Policyholder's position on the endorsement. **Pursuant to 9th Circuit Rule of Court 36-3, the opinion was denied official publication, is not citable and has no binding precedential value.**

Tri-Star's "official limits" notwithstanding, Tri-Star's reasoning has been, and continues to be, referenced in nearly every case where a court needs to interpret an ongoing operations endorsement.

In Tri-Star, a plumbing subcontractor on a construction project added the general contractor as an additional insured on its CGL policy with respect to liability arising out of the subcontractor's ongoing operations. The general contractor was sued for construction defects on the project and tendered its defense to the subcontractor's insurer. The insurer denied coverage and the general contractor brought an action for breach of the duty to defend. The District Court found that once the subcontractor completed its work, the ongoing operations coverage no longer applied and only damages that

manifested during the subcontractor's work would be covered. The 9th Circuit Court of Appeal reversed and remanded.

The 9th Circuit expressly rejected the District Court's analysis, finding its reliance on when damages "manifested" to be incorrect and its conclusion as to the applicability of "ongoing operations" to be in error:

> "Finally, although the contract contains a definition of the "products-completed operations hazard," nothing in the plain language of that definition indicates that the relationship between "ongoing operations" coverage and "completed operations" coverage is that "ongoing operations" coverage ceases to have effect once the primary insured's operations are complete ...
>
> The ongoing operations clause, ... addresses only the type of activity ... from which ... the liability must arise in order to be covered, not when the injury or damage must occur [citation omitted]. Under these circumstances, construing the words "ongoing operations" to exclude damage that arose from conduct performed by [(named insured)] *while its operations were ongoing* requires a parsing so abstruse as to be inconsistent with "what the ordinary person's understanding of the policy would be."" Tri Star at 4.

St. Paul Fire & Marine Insurance Co. v. American Dynasty Surplus Lines Insurance Co. (2002) 101 Cal.App.4th 1038, finding "ongoing operations" endorsement to be ambiguous and therefore construed against insurer.

Valley Insurance Co. v. Wellington Cheswick, LLC (W.D. Wash. 2006) 2006 WL 3030282, interpreting additional-insured endorsement to cover liability arising out of "ongoing operations."

D.R. Horton Los Angeles Holding Co., Inc. v. American Safety Indemnity Co. (S.D. Cal. 2012) 2012 WL 33070. Subcontractor performed work during policy periods and therefore "ongoing operations" afforded potential for coverage and duty to defend.

McMillin Construction Services, L.P. v. Arch Specialty Insurance Co. (S.D. Cal. 2012) 2012 WL 243321. Court finds that "ongoing operations" endorsement is ambiguous and therefore denies insurer summary judgment on duty to defend.

Jaynes Corporation V. American Safety Indemnity Co. (D. Nev. 2012) 925 F.Supp.2d 1095. Court rejects Pardee and agrees with Tri-Star and McMillin that "ongoing operations" clause applies to damage caused by subcontractor's ongoing operations. **This decision was vacated by the court.**

II. Exclusions j(5) and j(6)-Under Siege!

DAMAGE TO PROPERTY EXCLUSION:

> "Property damage to:
>
> . . .

(5) That particular part of real property on which you or any contactors 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.

Paragraph (2) of this Exclusion does not apply if the premises are your work and were never occupied, rented or held for rental by you.

Paragraph (6) of this Exclusion does not apply to property damage included in the products – completed operations hazard."

NOTE: Some policies specify that, for purposes of Exclusion "j," "if you are a general contractor, construction supervisor or developer, the entire construction project will be considered "that particular part" of real or other property."

Insurers generally take the position that Exclusions j(5) and (6), when read together with the definition of "products completed operation hazards," show that "the policy applies to completed work or operations," and the policy excludes property damage caused during ongoing construction operations. Citing Baroco West v. Scottsdale Insurance Co. (2003) 110 Cal.App.4th 96, 103-105. From these exclusions and the cases interpreting them they contend that any property damage to the project itself (as opposed to bodily injury claims) caused during ongoing operations is simply excluded. See also, Clarendon America v. General Security (2011) 193 Cal.App.4th 1311; and Western Employers Insurance Co. v. Arciero & Sons, Inc. (1983) 146 Cal.App.3d 1027, 1031.

> "The exclusion found in j(5) applies to works in progress. The insurer is not obligated to indemnify a policyholder for property damage that occurs while the insured is performing operations on that property. Thus, if the [plaintiffs'] claims encompassed property damage that occurred while [the Named Insured] or its subcontractors were performing operations on the property, no coverage would exist." Clarendon America v. General Security (2011) 193 Cal.App.4th 1311, 1325.

Other jurisdictions to examine Exclusions j(5) and (6) have found them unambiguous. (See, *e.g.*, Canal Indemnity Co. v. Adair Homes, Inc. (W.D. Wash. 2010) 2010 WL 3385337 citing Vandivort Construction Co. v. Seattle Tennis Club (1974) 11 Wash.App.303 (exclusion for damage caused by ongoing operations not limited to portion of property that was subject to operations, but barred coverage for all damages caused by operations). Accord, William Crawford, Inc. v. Travelers Insurance Co. (S.D.N.Y. 1993) 838 F.Supp. 157; Jet Line Services, Inc. v. American Employers Insurance Co. (Mass. 1989) 404 Mass. 706, 537 N.E.2d 107; Goldsberry Operating Co. v. Cassity, Inc. (La.App. 1979) 367 So.2d 133; and Vinsant Elec. Contractors v. Aetna Casualty & Surety (Tenn. 1975) 530 S.W.2d 76.)

The purpose of these exclusions is to give "the [insured] contractor an incentive to exercise care in workmanship thereby reducing the risk that is covered . . . and the cost of the policy." Western Employers Insurance Co. v. Arciero & Sons, Inc. (1983) 146 Cal.App.3d 1027, 1031-1032. "The risk intended to be insured is the possibility that the . . . work of the insured, **once relinquished or completed**, will cause bodily injury or damage to property other than to the product or completed work

itself." *Id*. at 1031 (bold added). Otherwise, Named Insureds would have no incentive to exercise care during ongoing operations - if they knew insurance would cover poor workmanship. The possibility of damaging the property on which one is working is the type of routine and limited risk that constitutes a "business risk" so commercial liability policies afford no coverage for a general contractor for construction defects and resulting damages to the project itself until completed (thus the exception to Exclusion j(6)). See F & H Construction v. ITT Hartford Insurance Co. (2004) 118 Cal.App.4th 364, 371-373; and Maryland Casualty Co. v. Reeder (1990) 221 Cal. App.3d 961.

Policyholders generally argue that this interpretation of the exclusions is overbroad and is not supported by the language of the exclusions which, under long-standing California law, must be interpreted narrowly and in favor of coverage for the insured. California appellate courts have narrowly construed these exclusions. Roger H. Proulx & Co. v. Crest-Liners, Inc. (2002) 98 Cal.App.4th 182.

Baroco West v. Scottsdale Insurance Co. (2003) 110 Cal.App.4th 96, 103-104, does not hold that the exclusions bar all property damage occurring during ongoing operations. Instead, it states that while the exclusions preclude coverage for the insured's own work, they do not bar coverage for damage to other property on which the insured or its subcontractors were not working. In summarizing its holding, the court in Baroco stated:

> "[T]he policy excludes property damage caused during ongoing construction operations. Without damage to property or to a particular part of real property on which *Baroco* was not performing work, there was no property damage of any kind covered under the policy."

Id. at 105 (emphasis added.)

In support of this statement, the court cited Roger H. Proulx & Co. v. Crest-Liners, Inc. (2002) 98 Cal.App.4th 182. In that case, the issue was whether an insurance policy provided coverage for property damage to a tank due to faulty installation of a waterproof liner. Holding that Exclusion j(5) did not preclude coverage, the court in Proulx stated:

> "This exclusion cannot be the basis for summary judgment because J&H failed to produce evidence to show that the exclusion applied, *i.e.*, that all of the damage for which Turner sought to recover was damage to "the particular part of real property" on which Crest-Liners or Proulx was performing work. [Citations.] In fact, as discussed above, the evidence before the trial indicated that at least some of the damage at issue involved property other than the tank liner on which Crest-Liners was performing work."

Id. (emphasis added; internal citations omitted.)

Clarendon America v. General Security (2011) 193 Cal.App.4th 1311 also recognizes that the j(5) and j(6) exclusions do not exclude the risk of damage to the property of others. *Id*. at 1325. The Clarendon court simply noted that the insured had failed to reference any specific examples of damage to the work of others that might have been caused by the insured's allegedly faulty work.

III. Defense-Only "Other" Insuring Agreements: Still Escape Clauses?

Generally, excess "other insurance" clauses which purport to have primary coverage "become" excess coverage in the presence of other insurance are disfavored and may be held to be an invalid "escape" clause. Dart Industries, Inc. v. Commercial Union Insurance Co. (2002) 28 Cal.4th 1059, 1080.

In reaching its decision, the Dart Industries court had ample authority to rely on. See, *e.g.*, the overwhelming trend in in appellate decisions is to "cancel out" any form of other insurance provision that has the characteristics of an escape clause. Fireman's Fund Insurance Co. v. Maryland Casualty Co. (1998) 65 Cal.App.4th 1279; CSE Insurance Group v. Northbrook Property & Casualty Co. (1994) 23 Cal.App.4th 1839; Hartford Accident & Indemnity Co. v. Pacific Indemnity Co. (1967) 249 Cal.App.2d 432; Continental Casualty Co. v. Zurich Insurance Co. (1961) 57 Cal.2d 27; and Peerless Casualty Co. v. Continental Casualty Co. (1956) 144 Cal.App.2d 6170.

Since Dart Industries' publication, appellate courts have, even more consistently, disfavored excess escape clauses. See, *e.g.*, Travelers Casualty & Surety Co. v. Century Surety Co. (2004) 118 Cal.App.4th 1156; Century Surety Co. v. United Pacific Insurance Co. (2003) 109 Cal.App.4th 1246; and USF Insurance Co. v Clarendon America Insurance Co. (2006) 452 F.Supp.2d 972.

In an effort to counteract the appellate trend towards negation of other insurance provisions, some insurers have moved the other insuring provision traditionally contained in the Conditions section of the policy to the insuring agreement.

In Scottsdale v. National Union (2002) 95 Cal.App.4th 891, the insuring agreement to the Scottsdale policy provided that:

> "The company shall have the right and duty to defend any suit against the insured, seeking damages which are payable under the above insuring agreement below, provided, however that no other insurance afforded a defense or indemnity against such a suit is available to the insured."

The Scottsdale court enforced the provision as even though it was a "true escape clause" as the insured was not left without a defense, the court believed the equities were in Scottsdale's favor.

In making its ruling, the Scottsdale court specifically choose not to address "whether it makes any difference that the critical provision appears in the insuring grant." Scottsdale was ordered depublished by the California Supreme Court.

In Underwriters of Interest Subscribing to Policy No. A15274001 v. ProBuilders Specialty Insurance Co., (2015) 241 Cal.App.4th 721, the appellate court refused to enforce language in the insuring agreement which operated as an escape clause as to the duty to defend. The insuring provision at issue provided:

> "We will pay those sums that an insured becomes legally obligated to pay as tort damages for bodily injury or property damage to which this insurance applies. We will have the right and duty to defend you, the Named Insured, against any suit seeking those damages provided that no other insurance affording a defense against such a suit is available to you. …"

In rejecting ProBuilders' other insurance language as an inequitable escape clause, the Court of Appeal specifically noted ProBuilders' role as the underlying mutual insured's only potential primary carrier for certain times and for certain of the underlying homeowners' claims.

The position of ProBuilders' escape clause in the insuring agreement was not specifically mentioned in the Opinion, although the briefing and oral argument by Underwriters stressed the applicability of Aydin Corp. v First State Insurance Company (1998) 18 Cal.4th 1183.

The Underwriters opinion has now been followed by a decision which does, in fact, make clear that the "other insurance provision" at issue is contained in the insuring agreement: Certain Underwriters at Lloyds, London v. Arch Specialty Ins. Co. 2016 Cal. App. LEXIS 275 (Cal. App. Apr. 11, 2016).

The ProBuilders policies at issue in the Underwriters case (and other carriers, such as Arch, who use the same insuring agreement) commonly have additional insured endorsements "tracking" the insuring agreement. In its briefing, ProBuilders maintained that the additional insured endorsement ought to be interpreted consistent with its insuring agreement, *i.e.*, excess as to defense, if any other carriers are defending the additional insured. ProBuilders' additional insured endorsement litigated in the Underwriters case provided that:

> "IT IS AGREED THAT COVERAGE IS PROVIDED TO THE ADDITIONAL INSURED AS FOLLOWS:
>
> ***
>
> 3. OTHER THAN AS EXPRESSLY NOTED HEREIN, COVERAGE FOR THE ADDITIONAL INSURED IS GOVERNED BY THE TERMS AND CONDITIONS OF THIS POLICY, INCLUDING THE INSURING AGREEMENTS. …"

Consequently, many parties receiving assurances that they were named as additional insureds under policies such as the ProBuilders policy in the Underwriters decision received denials of their tenders because another insurer had assumed the defense of the named insured. In light of the Underwriters and Arch decisions, the additional insured endorsements on such policies ought to be interpreted in a manner consistent with the interpretation of the insuring agreement, *i.e.*, as an invalid excess escape clause.