



BEWARE THE FINE PRINT — INSURANCE POLICIES OFTEN EXCLUDE COVERAGE

Contractors and commercial owners usually purchase commercial general liability (CGL) insurance to protect themselves against claims made by third parties, such as subcontractors, for physical injury and property damage that occurs on construction projects. The scope of coverage depends on the terms, conditions and exclusions of the particular policy.

Under the standard CGL policy, property damage usually means “physical injury to tangible property, including all resulting loss of use of that property” or “loss of use of tangible property that is not physically injured.” Michigan courts have construed those definitions to include the removal and replacement of a concrete floor in which a defective radiant heating tube was placed, damage to the interior of a lobby from a leaky roof, damage to a mobile home caused by structural defects and fire damage to a tunnel under construction and to construction equipment. In contrast, courts have excluded claims under CGL policies for lost profits, loss of good will and loss of business reputation and good standing.

CGL policies have many exclusions, but the insured can obtain coverage for most excluded risks by purchasing endorsements to a policy or separate policies. The exclusions can include: (a) damage to property under the insured’s control; (b) contractual liability assumed by the insured; (c) worker’s compensation, unemployment or disability benefits; (d) “business risk” (for example, property damage to the work arising out of the work); (e) “work in progress” (for example, property damage resulting from damages to property that occur while work is being performed thereon or costs to repair or replace defective work); (f) damage caused by pollutants discharged either accidentally or in the normal course of the insured’s business, including cleanup costs; (g) damage resulting from the ownership, operation, use, loading or unloading of automobiles; and (h) claims for diminution of value based on “loss of use” of property not physically injured.

To properly evaluate risks and minimize gaps in coverage, you should regularly review your CGL policy, especially exclusions, with your insurance agent or a lawyer familiar with this type of insurance coverage.

- Matthew Jane



GENERAL CONTRACTOR MAY DISCLOSE SUBCONTRACTOR AND SUPPLIER BIDS

When a general contractor prepares to submit a bid on a project, it often requests proposals from competing subcontractors and suppliers relating to the same item so that it can include the best number in its bid. It is also common for general contractors to shop bids by releasing pricing information from one subcontractor or supplier to another competing one to learn whether it can match or improve on a prior proposal. But is this permitted by law? What happens if the subcontractor’s proposal contains a confidentiality provision?

A Michigan court recently addressed this issue in an unpublished case and ruled that the solicitation of a bid by a general contractor and the submission of a bid from a subcontractor do not generally result in the formation of an express or implied contract. For an implied contract to exist, a person must engage or accept beneficial services of another for which compensation is customarily made and naturally anticipated. Since there is no expectation or industry practice that the mere submission of a bid in response to a general contractor’s bid solicitation creates a contract, no implied contract exists without an express agreement to the contrary. Because there is no implied contract, there is no contractual duty to comply with a term in a bid or proposal to a general contractor requiring confidentiality.

A subcontractor or supplier that wants its proposal to be kept confidential should require the general contractor to agree expressly to maintain the confidentiality of its proposal by having the general contractor sign a confidentiality agreement before submitting its bid or proposal. General contractors who want the freedom to disclose bids or proposals to competing parties should avoid signing such an agreement and may instead want to make the right to disclose to other bidders a condition of review of any bid or proposal from a subcontractor or supplier. - Edward Frankfort



UNSUCCESSFUL LIEN CLAIMANTS MAY STILL RECOVER LEGAL FEES

Michigan lien law provides that a court “may” award legal fees to a lien claimant who is a prevailing party in a

lien foreclosure lawsuit. A court may also award legal fees to a prevailing defendant such as an owner if the court determines that the lien claimant's action to enforce a construction lien under this section of the law is vexatious.

What happens if the lien being foreclosed on is determined to be invalid, but the lien claimant prevails on an alternative theory, such as breach of an implied or express contract or unjust enrichment? A Michigan court recently ruled that a plaintiff lien claimant in a construction lien foreclosure action may recover legal fees under Michigan's lien law even if the lien claim is invalid, as long as the lien claimant, in this case a contractor, prevails on an alternative theory to recover the same loss.

This decision is important because it may provide an expanded damage remedy to lien claimants. Like most states, Michigan follows the "American Rule" which generally prohibits the award of legal fees in a lawsuit unless otherwise permitted by contract or statute. Until now, many interpreted Michigan lien law only to permit the award of legal fees to a lien claimant who has a valid lien. This case significantly broadens a lien claimant's ability to recover legal fees and should increase a lien claimant's negotiating power even when its lien rights are not perfected. - Gary Reeves



INCOMPLETE CONDO DISCLOSURE ENDS DEAL

Michigan law requires condo developers to disclose certain information to a buyer in a document called a disclosure statement. Failure to disclose or fully disclose information required by law may allow a buyer to withdraw from the purchase agreement and even the building contract. Withdrawal may be permitted even if the building contract is separate from the purchase agreement and even if the developer and builder are separate entities. If withdrawal is permitted, the developer must return any deposit.

Developers generally know the basic disclosures that are required by law. However, some of the required disclosures are not as well known. For example, a Michigan court recently ruled that a developer's failure to disclose information relating to the condo experience of the builder extended the nine business day withdrawal period that Michigan law provides buyers to review the disclosure statement and other condo documents. The court extended the withdrawal period until nine business days after the developer provided all of the required information and thus required the builder to return the buyer's deposit. Although the court's decision was not published, it still provides important guidance.

To avoid the possible loss of a sale due to a lengthy extension of the withdrawal period, developers should include in their disclosure statements the following lesser known information:

- The prior experience with condominium projects of any builder, management agency or real estate broker;
- Legal proceedings involving the condominium project or the developer;
- Other material information that informs buyers about the unique characteristics of the particular condominium project; and
- Factors that might reasonably affect a prospective buyer's decision to accept or reject the offer to purchase the condominium unit.

Michigan's Condominium Act and Administrative Rules should be read together to ascertain the proper legal requirements for disclosure statements. - Harvey Berman

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