

April 2011

Storm Damage to Swimming Pool Not Covered by CGL Policy

Contacts

Cheryl M. Nicolson

nicolson@nicolsonassoc.com

Madeline S. Baio

baio@nicolsonassoc.com

Leanne A. Waldie

waldie@nicolsonassoc.com

Barbara C. Morrow

morrow@nicolsonassoc.com

Melissa L. Yemma

yemma@nicolsonassoc.com

Rose Tree Corporate Center II
1400 N. Providence Road
Suite 4045
Media, PA 19063
610.891.0300
www.nicolsonassoc.com

In a case of first impression, the New Jersey Superior Court Appellate Division interpreted the Commercial General Liability Exclusion j(5) to deny coverage to a swimming pool contractor for storm damage to the pool on which he was performing repair operations. *Ohio Casualty Insurance Company v. Island Pool and Spa, Inc.*, --A.3d--, 2011 WL 408182 (N.J. Super A.D.).

Island Pool and Spa, Inc. was hired to repaint an in-ground pool. In order to paint the pool, Island drained the pool and installed a temporary pump to prevent subterranean water from lifting the pool out of the ground. The temporary pump failed during torrential rains while the pool was empty. The pool lifted and cracked beyond repair. The adjacent decking and landscaping was also damaged during the incident. Island Pool constructed a new pool, and replaced the decking and landscaping for its customer. It then requested coverage from Ohio Casualty pursuant to its CGL policy. Ohio Casualty paid for the damage to the decking and landscaping, but denied coverage for the damage to the pool, citing Exclusion j(5), which read as follows:

“Property Damage” to:

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations[.]

The Superior Court, in overturning the trial court’s entry of summary judgment, looked to decisions from two jurisdictions that had interpreted Exclusion j(5), Florida and Illinois. Both the Florida and Illinois cases were factually nearly identical to the Island Pools case. Those courts held that, where damages to the pool occur as the result of

the pool contractor’s negligence while the work on the pool is ongoing, the ongoing operations Exclusion j(5) bars coverage. The Island Pool court analyzed the purpose of the CGL policy as providing indemnity to an insured for liability to others from harm caused by the insured, but not for business risks that are a predictable consequence of doing business.

The New Jersey Superior Court applied a three part test to determine whether the j(5) exclusion applies. If the claim is for damage to real property occurring while the insured (or someone working on behalf of the insured) was performing operations on “that particular part” of the damaged property, the exclusion will apply. In the Island Pools case, there was no dispute that the contractor was performing operations on the pool at the time of the loss. The court, therefore, held that the loss fell within the exclusion for ongoing operations. However, because Island Pools was not performing operations on the deck and landscaped area, the court agreed that Ohio Casualty was correct in indemnifying Island Pools for that portion of the claim.

The New Jersey ruling is consistent with decisions in other jurisdictions that have found that a commercial general liability policy does not indemnify a business for normal, predictable business risks. The CGL is not intended to provide a guarantee of the workmanship of its insured and does not indemnify for losses to the insured’s product or work caused by faulty workmanship. Exclusion j(5) achieves that objective.

For further information about this and other insurance-related topics, please contact the attorneys at Nicolson Associates, LLC.

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