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Michigan Supreme Court Finds Faulty Subcontractor Work That Damages Insured's Work Product May Constitute an "Occurrence" Under CGL Policy

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In *Skanska USA Bldg. Inc. v. M.A.P. Mech. Contractors, Inc.,* 2020 WL 3527909 (Mich. June 29, 2020), the Michigan Supreme Court addressed whether unintentionally faulty subcontractor work that damages an insured's work product constitutes an "accident" under a commercial general liability insurance policy. In aligning itself with a growing number of jurisdictions, the Michigan Supreme Court answered, "yes." In *Skanska*, a construction manager brought an action against a commercial general liability (CGL) insurer seeking coverage as additional insured for the cost of repairs to correct faulty work performed by its subcontractor in renovation of medical center. In 2009, the construction manager hired MAP to install a steam boiler and related piping for the medical center's heating system. MAP's installation included several expansion joints, which it was later discovered, were installed backward. Significant damage to concrete, steel, and the heating system occurred as a result. The construction manager performed the work of repairing and replacing the damaged property to the tune of $1.4 million, and submitted a claim to MAP's CGL insurer, Amerisure, seeking coverage as an additional insured.

Amerisure denied the claim contending that MAP's defective construction was not a covered "occurrence" within the CGL policy. The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," but did not define the term "accident." The trial court looked to the Court of Appeal's decision in *Hawkeye-Sec. Ins. Co. v. Vector Const. Co.,* 185 Mich. App. 369 (1990), which defined "accident" as "…a result which is not anticipated and…takes place without the insured's foresight or expectation and without design or intentional causation on his part." But, again citing *Hawkeye*, the trial court concluded that "[d]efective workmanship, standing alone, is not an occurrence within the meaning of a[ ] general liability insurance contract[;] an occurrence exists where the insured's faulty work product damages the property of another."

The trial court held that an "occurrence" *may* have happened because the damage caused by MAP's defective installation of the expansion joints *may* have gone beyond the scope of the work required by the contract between the plaintiff and the medical center. On appeal, however, the Court of Appeals reversed the trial court and ordered that summary disposition be granted to Amerisure reasoning that there was no "occurrence" under the CGL policy because the only damage was to the insured's own work product.

The Michigan Supreme Court reversed again holding that faulty work by a subcontractor may fall within the plain meaning of an “occurrence,” or “accident.” The Michigan Supreme Court rejected the carrier’s argument that faulty workmanship to the insured’s product was not an “occurrence” because it lacked “fortuity.” According to the court, fortuity is *one way to show* that an incident is an accident, but it is not the *only* way. Rather, appropriate focus of the term “accident” must be on both the injury-causing act or event and its relation to the resulting property damage or injury, which must be analyzed from the subjective standpoint of the insured. Thus, even if an insured acts intentionally, the act may still be an “accident” under policy so long as the injury or damage was not specifically intended by the insured. The Michigan Supreme Court also noted that the policy did not limit the definition of “occurrence” by reference to the owner of the damaged property, which might otherwise preclude a finding of an “occurrence” for damage to the insured’s own work product.

The court, referencing other similar rulings in other jurisdictions, resorted to its reading the contract as a whole to confirm its conclusion. For example, the court reasoned that the policy contained an exclusion precluding coverage for damage to an insured’s own work product (the “Your Work” exclusion), but that the exclusion contains an exception for work performed by a subcontractor on the insured’s behalf. Thus, “[i]f faulty workmanship by a subcontractor could never constitute an ‘accident’ and therefore never be an ‘occurrence’ triggering coverage in the first place, the subcontractor exception would be nugatory.” *Skanska*, 2020 WL 3527909 at *6 (citing cases). Put another way, if the insuring agreement does not confer an initial grant of coverage for injury or damage to the insured’s own faulty work, then there would be no reason for the “your work” exclusion (and the subcontractor exception).

The *Skanska* Court also reviewed the context and history of CGL policies, including policy language changes from the 1973 policy forms to those adopted in 1986 in support of its conclusion that an “accident” may include damage to an insured’s own work product, and referred to cases holding otherwise as an “outdated view” of the insurance industry. While this history is interesting, it is beyond the scope of this post. Suffice it to say, the Michigan Supreme Court found that “the 1986 reformation of the scope of coverage under the CGL policies underscored a plain reading of “accident”—that faulty subcontractor work may fall within the policy’s coverage. *Id*. at *10.

In sum, the Michigan Supreme Court’s holding in *Skanska* aligned Michigan with the growing body of jurisdiction to hold that an “accident” may include unintentionally faulty subcontractor work that damages an insured’s work product. Of course, the next logical inquiry is whether one or more of the CGL policy’s “business risk” exclusion might apply. (Notably, the Court did not address application of the “your work” policy exclusion. Specifically, Amerisure argued that because MAP was a named insured under the CGL policy, the subcontractor exception to the “your work” exclusion did not apply, and the exclusion barred coverage. The Court merely remanded this question, among others, to the Court of Appeals to address, depending on whether it determines they are properly presented and preserved for its review.)