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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0999**

Acceptance Insurance Company,
Appellant,

vs.

Ross Contractors, Inc.,
Respondent,

Charles D. Nolan & Sons, Inc.,
Respondent,

Century Surety Company, et al.,
Defendants.

Filed July 22, 2008
Affirmed in part, modified in part, and remanded
Minge, Judge
Hon. Kevin S. Burke
Hennepin County District Court
File No. 27-CV-04-000879

Kay Nord Hunt, Lommen, Abdo, Cole, King & Stageberg, P.A., 2000 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402; and

Richard J. Chadwick, Chadwick, Mertz, Bledsaw & Benson, P.S.C., 600 Market Street, Suite 240, P.O. Box 623, Chanhassen, MN 55317-0623 (for appellant)

Thomas H. Boyd, John C. Holper, Winthrop & Weinstine, P.A., 225 South Sixth Street, Suite 3500, Minneapolis, MN 55402 (for respondent Charles D. Nolan & Sons)

Ross Contractors, Inc., 17835 Ventura Boulevard, Suite, 306, Encino, CA 91316 (respondent)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

MINGE, Judge

This appeal arises out of a declaratory judgment action initiated by appellant insurer to determine its liability to respondent building owner for damages resulting from the work of its insured, a roofing contractor. Appellant insurer challenges the district court's decision that liability for the underlying jury award against the roofing contractor for negligence is covered under its policy, that none of the policy exclusions are applicable, and that the bankruptcy of the roofing contractor does not relieve appellant of its obligations to respondent. Appellant also claims the recovery exceeds the policy limits. Respondent claims the policy limits do not apply to postjudgment interest. We affirm the district court's determinations that the bankruptcy does not relieve appellant of its obligation and that the policy exclusions are not applicable. Because the policy limits recovery for property damage to \$1,000,000, we modify the jury award to comply with that limit. Finally, we determine that respondent is entitled to postjudgment interest without regard to the policy limits.

FACTS

A. Underlying Action

Respondent Charles D. Nolan & Sons, Inc. (Nolan) owns and operates the E-Z Mini Storage facility in Minneapolis. In 1998, Nolan decided that the facility's leaky

roof needed to be replaced and engaged Ross Contractors, Inc. (Ross) to replace the roof. There was no written contract.

Ross hired Duane Jones and his crew to perform the roofing work. Although Jones and his crew started the project in December 1998, they suspended work for part of the winter due to inclement weather. During construction, water leaked from the roof, and Nolan spent \$13,365.58 to fix these leaks. The roof work was completed in late fall of 1999. On February 19, 2000, Nolan discovered leaks in the new roof. Although Nolan tried to salvage the new roof, the roof was eventually replaced.

Nolan sued Ross, alleging breach of contract and negligence. The case was tried to a jury. On November 7, 2003, the jury rendered a verdict in favor of Nolan, concluding in part that (1) there was a contract between Ross and Nolan; (2) Ross breached the contract; (3) Ross was negligent in connection with the installation of the roof; (4) Ross's negligence was the direct cause of harm to Nolan; (5) Nolan was not negligent; and (6) Nolan acted reasonably to avoid harm and damages. It found Nolan had suffered the following damages: (1) \$13,365.58 for unreimbursed damages related to leaks through the old roof during construction; (2) \$119,707.79 for amounts Nolan spent in an effort to salvage the new roof and mitigate damages; (3) \$800,000 for the costs of repair or replacement of the roof; and (4) \$174,619.34 for lost profits. It appears that the underlying judgment was entered on February 4, 2004.

B. Declaratory Judgment Action

Ross was insured by appellant Acceptance Insurance Company (Acceptance) pursuant to a commercial general liability (CGL) policy from May 5, 1998 to May 5, 2000. On September 3, 2003, before the commencement of the trial in the underlying action, Acceptance and two other insurers brought this declaratory judgment action for a determination of coverage under the policies issued to Ross. Ross counterclaimed against the insurers, claiming coverage under the policies. In 2004, the district court concluded that the facts were undisputed and granted summary judgment in favor of the insurers. It ruled that although the property damage sustained was an “occurrence” covered under the CGL policies, certain exclusions applied and Acceptance was not obligated to indemnify Ross in the underlying lawsuit.

Nolan and Ross appealed. On appeal, this court ruled that the issue of whether there was an “occurrence” under the policy was not properly before this court because the insurer who raised the issue had not filed a notice of review. *Acceptance Ins. Co. v. Ross Contractors, Inc.*, No. A04-2102, 2005 WL 1870688, at *2 (Minn. App. Aug. 9, 2005). As to the applicability of the exclusions, this court ruled that it was undisputed that exclusion j(5) excluded liability for the \$13,365.58 for damages caused by leaks during construction. *Id.* at *3. But otherwise, this court held in relevant part that exclusions j(5), j(6), l, and m did not preclude recovery as a matter of law and that their applicability depended upon the resolution of factual issues. *Id.* at *3–*7.

Accordingly, we remanded to the district court. *Id.* at *8. After remand to the district court, the declaratory judgment action was set for trial on the disputed fact issues.

Nolan brought a motion in limine to preclude the insurers from relitigating the district court's earlier decision that the property damages arose out of an "occurrence." The district court declined to reconsider that issue and granted the motion in limine. After trial, the district court ruled that, except for the \$13,365.58 for damages that was subject to exclusion j(5), all other damages were covered under the CGL policy and none of the other exclusions applied. The district court ordered judgment in the amount of \$1,107,692.71 less \$13,365.58, and on January 8, 2007, judgment was entered accordingly. The district court denied Acceptance's motion for amended findings and for a new trial in an order filed on March 26, 2007, and judgment was entered on March 28, 2007. A motion to vacate due to the Ross bankruptcy was denied by an order dated May 9, 2007, and judgment was entered on May 17, 2007.

C. Bankruptcy

On March 20, 2006, Ross filed a chapter 7 bankruptcy. Prior to the bankruptcy, Ross's attorneys withdrew from representing Ross in the declaratory judgment action. Although the district court was advised of the pending bankruptcy, none of the other parties to this action sought relief from the automatic stay. Furthermore, until Acceptance's April 17, 2007 posttrial motion, neither party requested that the district court suspend the proceeding due to the stay. In response to the posttrial motion, the

district court ruled that the bankruptcy filing did not relieve Acceptance of its obligation to provide coverage and rejected appellant's motion to vacate.

The bankruptcy court documents in the record and supplied by the parties indicate that Ross filed a no-asset bankruptcy, that Ross's obligation to Nolan and Nolan's judgment were disclosed in the schedules, that the trustee filed a final report on March 7, 2007, and that the bankruptcy case was closed on March 23, 2007. There is nothing in the record to indicate the trustee ever took any action with respect to this litigation.

Acceptance appeals. Nolan filed a notice of review claiming accrued interest without regard to the policy limits.

DECISION

I.

The first issue is whether the judgment in this declaratory judgment proceeding violated the automatic stay in the Ross bankruptcy and, if so, whether the district court's determination of Acceptance's liability is enforceable. Ross filed for bankruptcy in March 2006. Acceptance contends that its declaratory judgment action is against the debtor Ross, that the CGL insurance policy and amounts payable pursuant to the policy are property of the estate, and that the district court's order therefore affects property of the bankruptcy estate. As a result, Acceptance claims that the district court's ruling that it indemnify Nolan is void because it violates the automatic stay.

Upon the filing of a bankruptcy petition there is an automatic stay against “the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title.” 11 U.S.C. § 362(a)(1) (2000). The provision also stays “the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title.” *Id.*, § 362(a)(2). It is often necessary in this situation for a state court to determine whether the automatic stay applies. See *Lanesboro State Bank v. Hennessey*, 317 N.W.2d 49, 51-52 (Minn. 1982); *Johnson Motor Co. v. Cue*, 352 N.W.2d 114, 116-17 (Minn. App. 1984), *review denied* (Minn. Oct. 11, 1984); see also *Chao v. Hosp. Staffing Servs.*, 270 F.3d 374, 383-85 (6th Cir. 2001). Accordingly, the threshold questions are (1) whether the present action is “against the debtor” Ross; or (2) whether Nolan, by attempting to recover the CGL insurance proceeds to satisfy the judgment in the underlying action against Ross, is attempting to enforce a judgment against property of the bankruptcy estate.

A. Whether Acceptance’s Declaratory Action is Against the Debtor Ross

Acceptance claims that the declaratory action it filed to determine liability under the policy is necessarily against the debtor Ross. Nolan responds that this action does not involve the continuation of proceedings or claims against Ross and the automatic stay does not prohibit Nolan’s counterclaim against Acceptance to establish the insurer’s liability.

“[I]n determining whether a proceeding is *against* a debtor, the proceeding is to be viewed at its inception.” *Carson Pirie Scott & Co. v. County of Hennepin*, 508 N.W.2d

200, 202 (Minn. 1993) (quotations omitted). However, even if the original claim was brought against the debtor, the automatic stay does not necessarily apply to all other claims: “[M]ultiple claim and multiple party litigation must be disaggregated so that particular claims, [and] counterclaims . . . are treated independently when determining which of their respective proceedings are subject to the bankruptcy stay.” *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204-05 (3d Cir. 1991).

Here, Acceptance brought its original declaratory action against Ross, Nolan, and other potential co-obligors. However, Nolan also filed a counterclaim directly against Acceptance without any cross-claim against Ross. Nolan asserted that Acceptance was obligated to provide coverage for the loss Nolan incurred and indemnification for the judgment in the underlying action. Thus, although Acceptance’s declaratory judgment action was against the debtor, Nolan’s counterclaim was not; the counterclaim dealt with insurance coverage and indemnification. This leaves the question of whether the district court’s decision results in improper enforcement of a judgment against the property of Ross’s bankruptcy estate, namely, the proceeds of Ross’s CGL policy.

B. Whether the CGL Insurance Policy and Proceeds are “Property of the Estate”

Acceptance argues that because an insurance policy is considered property of the estate, the continuation of its declaratory judgment action violated the automatic stay. The commencement of a case under the bankruptcy code creates an estate, and such estate is comprised of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1) (2000). The bankruptcy estate also includes “proceeds” from the property of the estate. *Id.*, § 541(a)(6) (2000). Debtors’

insurance policies issued and in effect at the time of the bankruptcy petition constitute “interests” under section 541(a), and those policies may, depending on the circumstances, be property of the estate. See *Am. Bankers Ins. Co. of Fla. v. Maness*, 101 F.3d 358, 362 (4th Cir. 1996); *In re Edgeworth*, 993 F.2d 51, 55 (5th Cir. 1993).

“[F]or purposes of determining if a debtor’s interest in the policy is estate property, ownership of an insurance *policy* does not necessarily entail entitlement to receive *proceeds* of that policy.” 5 *Collier on Bankruptcy* § 541.10[1], at 541-60 (Alan N. Resnick & Henry J. Sommer, eds., 15th rev. ed. 2008). “[T]he question of whether the proceeds of an insurance policy are property of the estate must be analyzed in light of the facts of each case.” *In re Scott Wetzel Servs., Inc.*, 243 B.R. 802, 804 (Bankr. M.D. Fla. 1999). In *Edgeworth*, the Fifth Circuit Court of Appeals stated that

The overriding question when determining whether insurance proceeds are property of the estate is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on a claim. When a payment by the insurer cannot inure to the debtor’s pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate. In other words, when the debtor has no legally cognizable claim to the insurance proceeds, those proceeds are not property of the estate.

Examples of insurance policies whose proceeds are property of the estate include casualty, collision, life, and fire insurance policies in which the debtor is a beneficiary. Proceeds of such insurance policies . . . are property of the estate and may inure to all bankruptcy creditors. But under the typical liability policy, the debtor will not have a cognizable interest in the proceeds[, which will] normally be payable only for the benefit of those harmed by the debtor under the terms of the insurance contract.

Edgeworth, 993 F.2d at 55-56 (footnotes omitted).

The distinction explained by *Edgeworth* is helpful. It focuses on the critical question of whether policy proceeds are intended for the direct benefit of the debtor and generally available for the bankruptcy estate and all unsecured creditors, or are for the benefit of third parties with specific, insurance-related and covered claims.

Because Ross's bankruptcy action was filed in the Central District of California, it is appropriate for us to look to the caselaw of the United States Court of Appeals for the Ninth Circuit when analyzing whether the automatic stay applies. In *Pintlar Corp. v. Fidelity & Cas. Co. of New York (In re Pintlar)*, 124 F.3d 1310 (9th Cir. 1997), the Ninth Circuit held that the proceeds of a director and officer liability-insurance policy were not within the bankruptcy estate and, accordingly, that the automatic stay did not apply. *Id.* at 1313-14. The court reached this conclusion after inquiring whether “the debtor's estate is worth more with [the policies] than without them.” *Id.* at 1313 (quoting *In re Minoco Group of Cos.*, 799 F.2d 517, 519 (9th Cir. 1986)). Similarly, a CGL policy insures against “tort liability for *physical damages to others* and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.” Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations-What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971), quoted in *Wanzek Constr., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322, 325 (Minn. 2004) (emphasis added). Unlike a casualty or fire insurance policy, the insured is not intended to be the direct beneficiary of a CGL policy.

Acceptance's CGL policy obligates the company to "pay those sums that [Ross] becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage'" covered under the terms of the contract. Accordingly, by its very nature, a CGL policy cannot inure to the pecuniary benefit of the insured except in the sense that the insured will be relieved of its obligation to the harmed third party for damages covered by the policy. In the present case, a jury returned a verdict against Ross for negligence and breach of contract in November 2003. The record indicates that the Ross bankruptcy was a no-asset bankruptcy, that Nolan's claim was disclosed in the bankruptcy, that neither the bankruptcy trustee nor any other creditor asserted a claim to the policy or the proceeds, that neither of the parties to this proceeding ever requested relief from the automatic stay or convinced the trustee to abandon any interest in the policy, and that the bankruptcy file was closed on March 23, 2007. Whether the policy provides coverage or not, it is clear that Ross has no right to receive and keep the insurance proceeds. Accordingly, we conclude that the insurance policy and its proceeds are not property of the estate, the automatic stay does not apply, and Ross's bankruptcy does not affect the enforceability of the district court's judgments against Acceptance in this declaratory action.

C. Conclusion

On this record, we conclude that the district court's proceedings were not in violation of an automatic stay. Nolan, through its counterclaim, has a right to directly establish the liability of Acceptance notwithstanding Ross's bankruptcy. Based on the underlying pre-bankruptcy judgment, neither Ross nor its bankruptcy trustee has any

cognizable legal claim to the insurance proceeds. Our conclusion is, of course, subject to the power of the bankruptcy court to determine whether the automatic stay applies and to grant retroactive relief to cure or validate any actions deemed to have been taken in violation of the stay. *See* 11 U.S.C. § 362(d) (2000) (allowing the bankruptcy court to grant relief from the automatic stay by terminating, annulling, modifying, or conditioning the stay); *Chao*, 270 F.3d at 384-85 (relying on the Supremacy Clause of the U.S. Constitution); *Schwartz v. United States*, 954 F.2d 569, 572 (9th Cir. 1992) (noting that a bankruptcy court has wide latitude in crafting retroactive relief from the automatic stay); *In re Profile Sys., Inc.*, 193 B.R. 507, 511 (Bankr. D. Minn. 1996) (holding that section 362(d) vests the bankruptcy court with power to grant retroactive relief).¹

II.

The next issue is whether the district court erred by determining that it was settled, as law of the case, that the policies provided coverage because there was an “occurrence” that caused damages. As previously stated, the district court ruled in its 2004 summary judgment that Nolan’s building sustained property damage that constituted an occurrence under the CGL policies, but concluded that exclusions applied that precluded Nolan from recovering under the policies. Nolan then brought the first appeal to this court.

Acceptance, which was a respondent in the first appeal, did not file a notice of review with this court under Minn. R. Civ. App. P. 106 to raise any issues adversely

¹ We do not by our conclusion suggest that it would have been inappropriate for either party to have sought or for the district court to have required relief from the automatic stay. Indeed, such a request for relief would be prudent. We note that no party, including the bankruptcy trustee, has sought relief from the stay in this protracted proceeding.

decided to it in the summary judgment. *Acceptance Ins. Co. v. Ross Contractors, Inc.*, No. A04-2102, 2005 WL 1870688, at *2 (Minn. App. Aug. 9, 2005). Also, none of the parties filed a petition for review of this court's first decision to the supreme court as provided under Minn. R. Civ. App. P. 117. We note that another insurer (not involved in the present appeal but with policy language identical to that of Acceptance's) argued in the first appeal that there was no "occurrence." *Acceptance Ins. Co.*, 2005 WL 1870688, at *2. But because that insurer did not file a notice of review under Minn. R. Civ. App. P. 106, this court declined to consider the occurrence issue, observing that "[t]he district court ruled that the property damage sustained in Nolan's building constituted an occurrence under Ross's CGL policies." *Id.* (footnote omitted).

"It is axiomatic that a judgment or appealable order becomes final if a timely appeal is not taken." *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 765-66 (Minn. 2005). "[I]ssues must be raised in a petition for review or they are waived." *Peterson v. BASF Corp.*, 711 N.W.2d 470, 482 (Minn. 2006). Thus, a party who does not file a proper notice of review or notice of appeal is bound by the judgment of the district court. *Loram Maint. of Way, Inc. v. Consol. Rail Corp.*, 354 N.W.2d 111, 113 (Minn. App. 1984), *review denied* (Minn. Jan. 11, 1985); *see Employers Nat. 'l Ins. Co. v. Breaux*, 516 N.W.2d 188, 190 (Minn. App. 1994) (holding that where district court held that an exclusion barred coverage for claims against certain parties and the decision was not appealed, it was final).

Finally, we note that the occurrence issue is also barred because it was not included in the scope of review on remand. "It is the duty of the trial court on remand to

execute the mandate of this court strictly according to its terms,” and it does not have the power to “alter, amend or modify” this mandate. *Halverson v. Village of Deerwood*, 322 N.W.2d 761, 766 (Minn. 1982). Here, in the first appeal, this court ruled that there were genuine issues of material fact as to the exclusions and directed further proceedings on remand as appropriate. *Acceptance Ins. Co*, 2005 WL 1870688, at *4-*8. The district court was not directed to further consider the occurrence issue.

In light of our prior ruling that the district court’s determination that there was an occurrence triggering coverage was final, we do not further address the merits of this claim.

III.

The next issue is whether the district court properly determined that none of the exclusions in Acceptance’s CGL policy applies.

“The interpretation of an insurance policy is a question of law reviewed *de novo*.” *Wanzek Constr.*, 679 N.W.2d at 324. The general principles of contract interpretation that apply to insurance policies also apply to exclusions. *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998). Absent ambiguity, the language must be given its usual and accepted meaning. *Bobich v. Oja*, 258 Minn. 287, 294, 104 N.W.2d 19, 24 (1960).

The standard for review of a bench trial is governed by Minn. R. Civ. P. 52.01, which provides: “Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the

credibility of the witnesses.” An appellate court will not “reconcile conflicting evidence” in its review of findings after a bench trial. *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *review denied* (Minn. June 26, 2002).

“In an action to determine insurance coverage, once the insured has established a prima facie case of coverage . . . the burden then shifts to the insurer to prove the applicability of the exclusion as an affirmative defense.” *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 313 (Minn. 1995) (citation omitted). “[O]nce the insurer shows the application of an exclusion clause, the burden of proof shifts back to the insured because the exception to the exclusion ‘restores’ coverage for which the insured bears the burden of proof.” *Id.* at 314.

Exclusion 1

We first address Acceptance’s claim that the district court erred in concluding that Exclusion 1, entitled “Damage to Your Work,” did not apply. Under this exclusion, coverage does not apply to:

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard.”

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

(Emphasis added.) When there is no statutory or regulatory definition of subcontractor in the exclusion or policy, the term “subcontractor” is ambiguous and must be liberally construed in favor of coverage. *Wanzek Constr.*, 679 N.W.2d at 329.

The test for determining whether a worker is an employee or independent contractor/subcontractor² requires consideration of the following five factors:

(1) The right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge. In determining whether the status is one of employee or independent contractor, the most important factor considered in light of the nature of the work involved is the right of the employer to control the means and manner of performance.

Guhlke v. Roberts Truck Lines, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964) (footnotes omitted).

The issue of whether Jones was a subcontractor with a crew was a major issue at the trial after remand from this court. After trial, the district court made a number of specific findings on this issue. It found that Jones and his crew carried out all of the work performed on the project, and that Jones “made all decisions regarding how the actual roofing work was to be performed.” The district court also found that Acceptance did not provide any documentary evidence showing that Jones and his crew were employees, that Ross did not withhold taxes from their pay, provide health insurance, or issue W-2 statements, and that Ross reported to the Internal Revenue Service that it paid non-employee compensation to Jones. Based on these findings, the district court concluded that Jones was a subcontractor.

Acceptance challenges the district court findings, citing evidence that it asserts is uncontradicted and contrary to the district court’s findings. The issue before this court is

² In briefing and arguing this case, the terms “subcontractor” and “independent contractor” have been used interchangeably. We do not distinguish between the terms.

not whether the record would support the conclusion that Jones was an employee or whether we might find that conclusion more persuasive. That is a conclusion that requires weighing a substantial factual record of mixed evidence. This court in the previous appeal specifically declined to determine whether Jones was an employee or subcontractor. *Acceptance Ins. Co.*, 2005 WL 1870688, at *5. We remanded to the district court to consider and weigh conflicting evidence. *Id.* at *5–*6, *8. Now that the district court has completed that task, this court may reverse only if the district court’s finding that Jones was a subcontractor is clearly erroneous. Based on our review of the record, we conclude the district court’s findings are adequately supported in the record and are not clearly erroneous.

Acceptance also contends that the district court erred as a matter of law when it focused on whether Jones himself was an employee or subcontractor and failed to ask this question of the others on the roofing crew. But because the court’s findings specifically address both Jones and his crew, Acceptance’s claim is not persuasive. Finally, Acceptance asserts that even if the subcontractor exception applied, the damage was not covered because it was caused by Ross’s design flaws and not the work by Jones and his crew. While the focus at trial was on whether Jones was a subcontractor or employee, the exception to the exclusion applies only if the damaged work or the work out of which it arose was performed on behalf of the insured by a subcontractor. The design-flaw argument is not relevant.

In conclusion, we affirm the district court’s determination that the exception to exclusion 1 applies, so that exclusion 1 does not exclude coverage.

Exclusion j(5)

We next address Acceptance's challenge to the district court's ruling that exclusion j(5) does not apply. Exclusion j(5) precludes coverage for "property damage" to "[t]hat 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." Exclusion j(5) applies whenever property damage arises out of the work of the insured or its subcontractors while performing operations and, accordingly, the exclusion applies only to damage from ongoing work, not damage after completion. *Advantage Homebuilding, LLC v. Maryland Cas. Co.*, 470 F.3d 1003, 1011 (10th Cir. 2006).

In the previous appeal, this court reversed and remanded the district court's determination that under exclusion j(5), the insurers had no indemnification obligation to the extent that the property damages were due to the incorrect performance of Ross's construction or related work. *Acceptance Ins. Co.*, 2005 WL 1870688, at *3–*4. Except as to the \$13,365.58 in damages that Nolan undisputedly sustained during construction, we remanded for a factual determination "as to which additional damages, if any, the exclusion applies." *Id.* at *4.

On remand, the district court addressed whether exclusion j(5) precluded Nolan from coverage for the jury awards of \$119,707.79 that Nolan spent to salvage the new roof and mitigate damages and \$800,000 to repair and replace the new roof. The district court ruled that because exclusion j(5) barred coverage only for property damage that occurs while the insured is performing work on the project and did not exclude coverage

for property damage that occurs after work on a project is completed, exclusion j(5) did not apply.

Acceptance renews its position from earlier stages of this litigation that the damages for which Nolan seeks coverage arose out of Ross's faulty design and workmanship while performing operations and are thus excluded under j(5). Our consideration of this assertion is limited by our previous rejection of the initial district court grant of summary judgment on j(5).

Nolan acknowledges that exclusion j(5) reduces Acceptance's indemnification obligation by \$13,365.58 of the jury award for property damage sustained during the construction. But Nolan contends the remaining damages to the new roof are not excluded because they occurred after, not during, construction of the new roof. Acceptance's witness acknowledged that the roof was completed by late October or early November 1999 and that Nolan first discovered the property damage in February 2002. Further, with the exception of the \$13,365.58 portion of the jury award, Acceptance has not identified any damages sustained while construction was in progress.

The existence of this factual question was a reason for this court's earlier remand. *Acceptance Ins. Co.*, 2005 WL 1870688, at *4, *8. On this record, we conclude that Acceptance has not shown additional damages or that the district court's finding is clearly erroneous.

Exclusion j(6)

We next address Acceptance's challenge to the determination that exclusion j(6) does not apply. Exclusion j(6) precludes coverage for "property damage" to "[t]hat

particular part of any property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it.” An exception to this exclusion exists for “property damage” included in the “products-completed operations hazard,” which applies to all property damage occurring away from premises owned or rented by the insured, arising out of the insured’s work, and occurring after the work has been completed.

The district court concluded that the exception to exclusion j(6) applied because (1) the damage to Nolan’s roof occurred away from Ross’s premises; (2) the damage arose out of work done to the roof on Ross’s behalf; (3) the roof is no longer in Ross’s possession; and (4) the work on the roof was completed before defects were discovered. Thus, it ruled that the \$119,707.79 award for Nolan’s efforts to salvage the roof and mitigate damages and the \$800,000 award for repair and replacement of the roof were covered because the exception for property damage included in the “products-completed operations hazard” applied.

Acceptance first contends that the awards should be precluded under exclusion j(6) because they were the direct result of faulty workmanship and design errors that occurred while the work was ongoing, and that the timing of the discovery of the defects was not determinative. It argues the damages should be limited only to consequential damages as a result of faulty workmanship, not damages that were the direct result of the faulty workmanship. Acceptance refers to the recent federal circuit court decision of *Advantage Homebuilding*, 470 F.3d at 1011-12. In that case, a policy exclusion similar to our j(6) was applied to damages attributed to replacement of a poorly constructed roof

that was the direct result of faulty workmanship, although consequential damages to the floor caused by the leaking roof were covered. *Id.*

The decision in coverage cases is fact specific. We must examine the plain language of the exception to the exclusion as applied to the facts as found by the district court. Here, the exception to exclusion j(6) applies to all property damage occurring away from premises owned or rented by the insured, arising out of the insured's work, and occurring after the work has been completed. *See Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 82 (Wis. 2004) (holding that products-completed operations hazard exception applied when damages to the property occurred after the work was completed). Because the record supports the district court's determinations that the work was done off Ross's premises and arose out of work done on Ross's behalf, because the premises are no longer in Ross's possession, and because the work was completed before the defects were discovered, we conclude that the district court's findings are not clearly erroneous and the exception to exclusion j(6) applies.

Exclusion m

Acceptance argues that the district court erred in ruling that exclusion m did not apply and that exclusion m precludes the award of \$174,619.34 in lost profits. Exclusion m precludes coverage for property damage to:

“impaired property” or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

“Impaired property” is defined as

tangible property, other than “your product” or “your work” that cannot be used or is less useful because:

- a. It incorporates “your product” or “your work” that is known or thought to be defective, deficient, inadequate or dangerous; or
- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

- a. The repair, replacement, adjustment or removal of “your product” or “your work”; or
- b. Your fulfilling the terms of the contract or agreement.

The district court determined exclusion m did not apply because the negligent work was performed by a subcontractor. At the outset, we note that there is no language in exclusion m that refers to a subcontractor. Whether that limiting factor is part of the exclusion because the exclusion applies to “impaired work” which is “your product” or “your work” has been addressed by at least one other court. *See Pavarini Constr. Co. v. Cont’l Ins. Co.*, 759 N.Y.S.2d 56, 57 (App. Div. 2003) (holding that any claim that the damages sustained were attributable to the work of a subcontractor, even if factually accurate, is without significance respecting the applicability of exclusion m). “Your work” is defined under the Acceptance policy as “[w]ork or operations performed by you or on your behalf.” The term “you” refers to the named insured shown in the policy declarations, which in this case is Ross. Because Ross’s work included the design and

installation of the roof and because Jones's work was done on Ross's behalf, we conclude that Jones's work as a subcontractor constitutes Ross's work for purposes of exclusion m and that the district court erred in excluding coverage based on subcontractor involvement.

In the prior appeal, we remanded the question of this exclusion for the district court to determine the "fact issue as to precisely which property was impaired." *Acceptance Ins. Co.*, 2005 WL 1870688, at *7. The district court did not address that question. Rather than remand for a second time, we will determine based on the record whether exclusion m precludes recovery of lost profits as an element of damages arising out of what the jury and the district court determined to be negligent work by Ross and its subcontractor.

The reach of exclusion m is difficult to determine. Because it is part of a standard, insurance-industry-wide policy provision, there is caselaw from other jurisdictions and secondary commentary summarizing that caselaw and analyzing the exclusion. *See, e.g.*, 4 Philip L. Bruner & Patrick J. O'Connor, *Bruner and O'Connor on Construction Law* § 11.49, at 166-74 (2002); 2 Allan Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds* § 11.21, at 530-31 (4th ed. 2001); 3 Robert J. Franco, *Insurance Coverage for Faulty Workmanship Claims under Commercial General Liability Policies*, 30 *Tort & Ins. Law J.* 785, 800-02 (1995). Bruner and O'Connor cite other commentators and courts expressing frustration with the complexity of exclusion m, its untoward reach, and its limited actual application. *See* 4 Bruner & O'Connor, *supra*, § 11.49, at 169-75. We recognize this confusion. We note

that “[i]f policy language is ambiguous, it must be interpreted in favor of coverage [and that policy] exclusions are read narrowly against the insurer.” *Wanzek Constr.*, 679 N.W.2d at 325 (citation omitted).

The purpose of exclusion m is apparently to eliminate coverage for breach of contract claims and business risks. *See id.* Here, the jury in the underlying case found not only that Ross had breached the contract with Nolan, but that Ross was negligent in the installation of the roof. It is the damages from this negligence for which Nolan seeks coverage. Those portions of exclusion m that refer to “contract or agreement” do not apply to this case. Next, we note that the exclusion uses the phrase “impaired property” to describe the source of damage claims. In defining impaired property, the policy indicates the exclusion is limited to property that “can be restored to use by: a. The repair, replacement, adjustment or removal of ‘your product’ or ‘your work’” In this case a new roof had to be installed. The potential scope of exclusion m is breathtaking; it could vitiate the insuring clause of the policy and eliminate all coverage. This clash between the possible broad scope of the exclusion and the intended coverage creates an ambiguity in the meaning of the exclusion.

Acceptance does not argue for this broad effect of exclusion m. Instead, Acceptance asserts that because the loss-of-profit damages are tied to contract claims, exclusion m only eliminates loss of profits as an element of damages. However, coverage here was based on the negligence, not the breach of contract. Accordingly, this argument by Acceptance is not persuasive. In addition, we note that there is no rational

distinction between this more limited reach of exclusion m in eliminating the loss-of-profits award and its effect of negating the insuring clause.

Further, Acceptance provided coverage for “those sums that the insured becomes legally obligated to pay as damages because of . . . ‘property damage’ to which this insurance applies.” “Property damage” is defined to include: “Physical injury to tangible property, including all resulting loss of use of that property,” and thus does not explicitly address lost profits. This court has addressed a claim for lost profits in a case in which “property damage” did not include economic losses. *Reinsurance Ass’n of Minn. v. Timmer*, 641 N.W.2d 302, 313-14 (Minn. App. 2002), *review denied* (Minn. May 14, 2002). There, due to the broad terms of the coverage language, this court upheld the district court’s conclusion that coverage was not limited to property damage but included coverage for consequential losses, which included lost profits that flowed from physical injury to the insured’s property. *Id.* at 314. We adopt the same reasoning to conclude that exclusion m does not preclude coverage and recovery by Nolan for lost profits.

IV.

Acceptance argues that the district court erred by entering a \$1,094,327.13 judgment that exceeded the coverage limits of the CGL policy. The policy covers up to \$2,000,000 for the sum of damages under Coverage A (bodily injury or property damage caused by an occurrence), B (personal and advertising injury liability), and C (medical expenses). However, the policy provides an Each Occurrence Limit of \$1,000,000 for damages under Coverage A resulting from “property damage” arising out of any single “occurrence.” Because the entirety of the district court’s \$1,094,327.13 award is

attributable to property damage covered under Coverage A that arose out of a single occurrence, we reduce the award against Acceptance to \$1,000,000.

V.

Respondent Nolan raises an additional issue on appeal: whether Acceptance is obligated to pay all accrued and continuing postjudgment interest on the underlying judgment notwithstanding any policy limits. Nolan claims entitlement to postjudgment interest under Minn. Stat. § 549.09, subd. 1(a) (2006), and argues that the CGL policy provides that Acceptance will pay postjudgment interest without regard to policy limits.

“When a judgment or award is for the recovery of money . . . interest from the time of the verdict, award, or report until judgment is finally entered shall be computed by the court administrator or arbitrator . . . and added to the judgment or award.” Minn. Stat. § 549.09, subd. 1(a). This court held in *Balder v. Haley*, 441 N.W.2d 539, 542 (Minn. App. 1989), *review denied* (Minn. July 27, 1989), that an insurer was required to pay postjudgment interest on an underlying personal injury award where the language in the insurance policy stated that the insurer would pay “interest on the entire judgment which accrues after entry of the judgment and before we pay or tender or deposit in court that part of the judgment which does not exceed the limit of liability that applies.”

Although neither party references the clause, a substantially similar provision exists within Acceptance’s CGL policy:

SUPPLEMENTARY PAYMENTS-COVERAGES A AND B

We will pay, with respect to any claim we investigate or settle, or any “suit” against an insured we defend . . .

....

7. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

This court previously noted that “[s]everal jurisdictions have held that an insurer that issues a policy with a standard interest clause like [Acceptance’s policy] quoted above must pay postjudgment interest regardless of the liability limits.” *Lessard v. Milwaukee Ins. Co.*, 496 N.W.2d 852, 856 (Minn. App. 1993) (citing *Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 424 (Iowa 1988) (listing jurisdictions)), *aff’d*, 514 N.W.2d 556 (Minn. 1994).

The record indicates that Acceptance retained an attorney to defend Ross in the underlying action. Under the terms of the policy, Acceptance is obligated to pay the interest on the underlying judgment that has accrued without regard to the policy limits. We remand to the district court for calculation of the interest on the underlying judgment consistent with Minn. Stat. § 549.09, subd. 1(a). Because of our previous modification of the judgment to the \$1,000,000 policy limit, this interest should be added to that policy limit figure to determine the obligation of Acceptance under its policy.

Affirmed in part, modified in part, and remanded.

Dated: