

## California: "Ongoing Operations" AIE Limitation Does Not Preclude Completed Operations Coverage

For the first time in a published opinion, a California appellate court directly addressed whether the ongoing operations limitation in additional insured endorsements (AIEs) precludes completed operations coverage. In *Pulte Home Corp. v. American Safety Indemnity Co.*, Cal.Ct.App. (4th Dist.), Docket No. D070478 (filed 8/30/17), the court held that the manuscript AIEs involved in the litigation did not.

In the *Pulte* case, general contractor Pulte Home Corporation tendered its additional insured defense under commercial general liability policies issued by American Safety Indemnity Company to three Pulte subcontractors. Each American Safety policy provided additional insured coverage for liability "arising out of 'your [the named insured's] work'" for the additional insured. One policy modified that provision with a clause stating "but only as respects ongoing operations performed by the Named Insured for the Additional Insured on or after" the endorsement's effective date. Another added the sentence "This Endorsement applies only to ongoing operations performed by the Named Insured on or after" the endorsement's effective date. Each policy deemed the named insured's work complete when: (a) the work called for in the contract is complete; (b) the work at a particular job site is complete; or (c) the work is put to its intended use.

American Safety declined Pulte's request for coverage, based on the ongoing operations limitation as well as a number of other grounds. Another insurer afforded Pulte a defense, but Pulte paid for a portion of its defense fees and costs. Pulte sued American Safety for breach of contract and bad faith. The trial court determined that the policies were ambiguous and therefore did not effectively preclude coverage for completed operations. The trial court concluded that American Safety's denial was in bad faith because it had disregarded several unpublished federal court decisions that had reached a contrary position to that taken by American Safety, including one against American Safety (*D.R. Horton Los Angeles Holding Co., Inc. v. American Safety Indem. Co.* (S.D.Cal., Jan. 5, 2012, No. 10CV443WQH) 2012 U.S. Dist. LEXIS 1881). The trial court determined that American Safety was guilty of fraud, oppression, or malice because American Safety had demonstrated a pattern and practice of denying hundreds of tenders by other additional insureds "using every conceivable argument to deny coverage." The trial court awarded Pulte compensatory damages, punitive damages, and attorneys' fees under *Brandt v. Superior Court*, 37 Cal.3d 813 (1985).

The Court of Appeal affirmed. The court ruled that the additional insured endorsements' language allowing coverage for "liability arising out of 'your [the named insured's] work' can be read as a coverage grant for the named insured's completed operations." The court determined that that ongoing operations limitation — simply by linking the "ongoing operations" phrase to the "liability arising out of the work" clause — does not clearly undo the coverage grant or restrict coverage only to ongoing operations. Because the AIEs were issued while the subcontractors were still working on different phases of the projects, some of the subcontractors' work could have been ongoing and some completed. "For purposes of determining a defense, the AIEs seem to allow completed operations coverage, based on potential liability that might yet arise from the subcontractors' completed work. ... If the 'ongoing operations' language was meant by American Safety to preclude coverage for completed operations losses, it had to expressly state that coverage was limited to claims arising from work performed during the policy period." Because the underlying pleadings stated claims that could create the potential for coverage, the court found that American Safety had a duty to defend.

In so holding, the appellate court relied upon *Pardee Construction Co. v. Insurance Company of the West*, 77 Cal.App.4th 1340 (2000), which addresses the "commercial reality of the CGL market" and recognizes that damage from a subcontractor's work may not arise for years. The *Pardee* court



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explained that to preclude completed operations coverage, the endorsements needed to include language to “expressly restrict coverage for an additional insured to the ‘ongoing operations’ of the named insured.” The court cited as an example the Insurance Services Office’s 1993 revisions to the form 2010 additional insured endorsement, under which coverage applies not to liability arising out of the named insured’s work, but to liability in connection with the named insured’s ongoing operations. *Id.* at 1358-1359 & n. 3. Although the court’s comments about the revised 2010 endorsement were dictum, it provided guidance for several years regarding additional insureds’ entitlement to completed operations coverage. The *Pulte* case distinguished American Safety’s AIE language from the ISO endorsement.

Insurers with AIEs containing ongoing operations limitations should closely examine the *Pulte* decision to determine whether the language in their AIEs will be restricted to liability arising out of the named insured’s ongoing operations or whether such coverage will extend to completed operations.

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**To discuss any questions you may have regarding the issues discussed in this Alert, or how they may apply to your particular circumstances, please contact Michael W. Melendez at (415) 593-9610 or [mmelendez@cozen.com](mailto:mmelendez@cozen.com).**