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## 'The good guys won one'

### Recent ruling clarifies insurance coverage on construction job site

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**O**n Feb. 11, the Mississippi Supreme Court ruled 9-0 that a general contractor's commercial general liability (CGL) policy should, once a project is completed, cover problems that arise from work performed by a subcontractor.

It was a result the construction industry had been hoping for since last fall.

The decision was the result of litigation between Architex Association, which built the Country Inn and Suites in Pearl, and Scottsdale Insurance Co., which had issued Architex its CGL policy.

Architex sued Scottsdale because once problems arose with County Inn and Suites' foundation, which had been laid by a subcontractor, Scottsdale had denied coverage of the costs of repairing it.

Architex argued its CGL policy should cover the cost of repairing the foundation, while Scottsdale countered that because the faulty work did not constitute an accident, that Architex committed an intentional act when it hired the subcontractor to lay the foundation, it was not obligated to do so.

Scottsdale's claim was based on a ruling the Fifth Circuit Court of Appeals issued in 2003, in which the court made what is called an erie guess.

"Basically the court with its erie guess says state law is unclear on this but we're going to guess what we think it is," said Jackson attorney Dorsey Carson Jr., of Burr and Forman who served as lead counsel for Architex.

What the Fifth Circuit guesses is this: That to trigger coverage under a CGL, there had to be an occurrence, which in turn had to be an accident and not an intentional act. Because the appeals court concluded that a general contractor hiring a subcontractor to perform work on a project constituted an intentional act, it was not considered an accident and did not trigger coverage once problems with a subcontractor's work arose.

"That ran counter to everything that the insurance industry, the underwriters and the salespeople, have been telling the construction industry since the 1970s," Carson said. "Insurance companies, as they grew and grew, their underwriters and their salespeople were not really communicating with their claims department. So their

claims department started taking this position that this is not even an accident because these people intended on doing this work. That's how the arguments developed. Lo and behold, some of the courts started adopting that. Even though their underwriters and their salespeople are issuing these policies that are supposed to cover it, claims handlers are denying it. That's just crazy. That's like saying you intended on driving a car down the street; therefore, your auto accident is intentional."

That precedent has caused substantial harm to the construction industry, Carson said.

"It would and has caused companies to go bankrupt. This affects developers, owners, banks. It adversely affected everybody in the construction industry, down to suppliers, architects and engineers. It's the one issue that sort of united the construction industry, which is amazingly hard to do."

With the Supreme Court's ruling, the case will be remanded back to Rankin County Circuit Court, where it originated before Scottsdale won on summary judgment. Carson hopes to get a trial date for later this year.

Nancy Smeltzer, spokeswoman for Nationwide Insurance, Scottsdale's parent company, declined comment, citing the ongoing litigation.

Aside from affirming what the construction industry had claimed what should be covered under CGLs, Perry Nations, executive director of the Associated General Contractors of Mississippi, said the ruling offers much-needed clarity.

"Now when he goes into a job, a contractor knows what his insurance is. That wasn't the case before," Nations said. "The good guys won one."

Carson agreed.

"We decided this issue had to be resolved," he said. "There was too much uncertainty out there. Every insurance company that wanted to fight defending its insured could hold up this (Fifth Circuit) decision and deny the coverage. I anticipate that (the Mississippi Supreme Court's decision) will be heavily cited, not only in Mississippi, but throughout the nation."