

## Insurance Coverage Law Update: **Wiegert v. TM Carpentry, LLC**

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***Wiegert v. TM Carpentry, LLC***, No. 2020AP1833 (Wis. Ct. App. May 4, 2022)

In *Wiegert* a three-judge panel for the Third District Court of Appeals affirmed the Sheboygan County Circuit Court's grant of summary judgment ruling that Acuity had no duty to defend or indemnify its insured, Stone Creek, against claims asserted by Terry and Deborah Wiegert which arose out of renovation work Stone Creek performed on the Wiegert's home. The court determined any alleged damage could only have arisen out of Stone Creek's work in raising the home off its foundation, and the damage therefore fell within the "k.(5)" exclusion in the Acuity liability policy barring coverage for "[p]roperty damage" to "[t]hat particular part" of real property upon which an insured "is performing operations, if the property damage arises out of those operations." The court held, notwithstanding its obligation to construe the phrase "[t]hat particular part" narrowly, Stone Creek's contract was broad enough to encompass the entire house because the contract required it to lift the house off the foundation to complete its work.

The Wiegerts entered into a contract with Stone Creek to renovate their home to raise the basement foundation and basement ceiling height. The scope of the contract entailed first disconnecting the basement ceiling, fixtures, stairway and utilities, and then raising the house three feet above the existing foundation to allow the installation of concrete block on top of the existing foundation. Stone Creek then was to lower the house onto the raised foundation, install new window openings and reconnect mechanical services and rebuild the basement staircase. After Stone Creek elevated the house, the Wiegerts noticed damage including cracking and structural damage throughout the part of the home raised, exclusive of the basement where Stone Creek was working. The Wiegerts sued Stone Creek and its insurers seeking to recover for the damage. Acuity intervened, and the court bifurcated the litigation of the underlying merits from insurance coverage issues and stayed proceedings on the merits, pending a determination of the coverage issues. The circuit court granted Acuity's subsequent coverage motion, agreeing that the k.(5) exclusion in its policy precluded coverage because the entire house constituted "that particular part" of property on which Stone Creek was working.

In affirming the circuit court, the court of appeals authored only the second published Wisconsin case applying the k.(5) exclusion. See *Acuity v. Society Ins.*, 2012 WI App 13, 339 Wis. 2d 217, 810 N.W.2d 812. In *Acuity*, the insurer of a processing plant sued to recover for damages to multiple parts of a plant building, and resulting from disruptions of utility service throughout the plant, following excavation work to remove and replace a single wall within the building. In determining the k.(5) exclusion did not bar coverage under the contractors' liability policy for damages exclusive of the subject wall, the court examined the contractors' scope of work under the contract and found it was limited to the removal and replacement of the wall. *Wiegert*, at ¶ 24 (citing *Acuity v. Society Ins.*, 339 Wis. 2d 217, ¶ 41). The court focused on the phrase "that particular part" and, drawing on decisions from other jurisdictions applying the same language, determined it limited the exclusion's reach to "those parts of a building on which the defective work was performed, which is determined based on the scope of the construction agreement." *Id.* (citing *Acuity*, ¶ 40). The court recognized further that the inclusion of the phrase "that particular part" in the exclusion was intended to narrow the focus to the smallest component of the building on which the insured's work was performed. *Id.* (internal cites omitted).

In applying *Acuity*, the *Wiegert* court focused on the scope of Stone Creek's contract and found it "clearly specified work – raising and lowering – to be performed to the entire structure." *Id.*, ¶ 25. The damage observed immediately after Stone Creek lifted the house was confined to interior portions of the house. *Id.* The court concluded, given these facts, the only work Stone Creek performed which could have resulted in "property damage" during the *Acuity* policy period was lifting the house. *Id.* Moreover, because "[t]hat particular part" of the *Wiegert*'s real property on which Stone Creek was performing operations was the entire house, any damages awarded against Stone Creek fell within the scope of the k.(5) exclusion. *Id.*

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