

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

BEAUFORT DIVISION

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Cincinnati Insurance Company, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Gate City Contract Glazing, LLC; )  
 Greenwood Development Corporation; )  
 Weaver Cooke Construction, LLC, )  
 f/k/a Weaver Construction, LLC; )  
 Somerset Horizontal Property Regime; )  
 Owners' Association for Somerset, Inc.; )  
 and John and Kathleen Affeldt, )  
 )  
 Defendants. )  
 )

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**COMPLAINT**  
**(NON-JURY)**

Plaintiff Cincinnati Insurance Company (“Cincinnati”), complaining of Defendants, would respectfully show unto the Court:

**JURISDICTIONAL ALLEGATIONS**

1. This is a declaratory judgment action brought pursuant to Rule 57, FRCP, and 28 U.S.C. § 2201, *et seq.*, to determine the rights of the parties under a policy of commercial general liability insurance issued by Cincinnati to Gate City Contract Glazing (“Gate City”).
2. Cincinnati is a Delaware corporation with its principal place of business in Ohio.
3. Defendant Gate City is a North Carolina limited liability company doing business in Beaufort County, South Carolina.

4. Defendant Greenwood Development Corporation is upon information and belief a South Carolina corporation doing business in Beaufort County, South Carolina.

5. Defendant Weaver Cooke Construction, LLC, f/k/a Weaver Construction, LLC, is upon information and belief a North Carolina limited liability company doing business in Beaufort County, South Carolina.

6. Defendant Somerset Horizontal Property Regime is upon information and belief a South Carolina horizontal property regime located in Beaufort County, South Carolina.

7. Defendant Owners' Association for Somerset, Inc. is upon information and belief a South Carolina corporation that administers the Somerset Horizontal Property Regime in Beaufort County, South Carolina.

8. Defendants John and Kathleen Affeldt are upon information and belief residents of Beaufort County, South Carolina.

9. Subject matter jurisdiction in this Court is proper as there is complete diversity and the amount being claimed exceeds \$75,000.

10. Personal jurisdiction in this Court is proper.

11. Venue in this Division is proper, pursuant to Local Rule 3.01(A)(1).

**POLICY LANGUAGE**

12. This is a declaratory judgment action to determine whether Cincinnati is obligated to defend or indemnify its insured under a policy of commercial general liability insurance issued by Cincinnati to Gate City.

13. Cincinnati issued policy number CPP0679000 to Gate City ("Policy"), a copy of which is attached hereto as **Exhibit A**.

14. The Policy was effective from January 1, 1997 to January 1, 1999, at which time it was cancelled.

15. The Policy contains the following relevant provisions, exclusions, and definitions:

## **SECTION I – COVERAGES**

### **COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

#### **1. Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. We may at our discretion investigate any “occurrence” and settle any claim or “suit” that may result....
- b. This insurance applies to “bodily injury” and “property damage” only if:
  - (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”; and
  - (2) The “bodily injury” or “property damage” occurs during the policy period.

#### **2. Exclusions**

This insurance does not apply to:

##### **b. Contractual Liability**

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement; or

- (2) That the insured would have in the absence of the contract or agreement.

**j. Damage to Property**

“Property Damage” to:

- (5) That 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; or
- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products-completed operations hazard.”

**k. Damage to Your Product**

“Property damage” to “your product” arising out of it or any part of it.

**l. Damage to Your Work**

“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.

**m. Damage to Impaired Property or Property Not Physically Injured**

“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.

## SECTION V – DEFINITIONS

7. “Impaired Property” means 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.
12. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
14. a. “Products-completed operations hazard” includes all “bodily injury” and “property damage” occurring away from premises you own or rent and arising out of “your product” or “your work” except:
- (1) Products that are still in your physical possession; or
  - (2) Work that has not yet been completed or abandoned.
- b. “Your work” will be deemed completed at the earliest of the following times:
- (1) When all of the work called for in your contract has been completed.
  - (2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.
  - (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.
- Work that may need service, maintenance, correction or replacement, but which is otherwise complete, will be treated as completed.

15. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

17. “Your product” means:

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
  - (1) You;
  - (2) Others trading under your name; or
  - (3) A person or organization whose business or assets you have acquired; and
- b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

“Your product” includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”; and
- b. The providing of or failure to provide warnings or instructions.

19. “Your work” means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

“Your work” includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”; and
- b. The providing of or failure to provide warnings or instructions.

## **FACTUAL ALLEGATIONS**

16. The Underlying Actions (as defined hereafter) concern alleged construction defects at a condominium project known as the “Somerset” (“Project”).

17. On June 27, 2006, Greenwood Development Corporation filed a Complaint against Gate City and Weaver Cooke Construction, LLC, f/k/a Weaver Construction, LLC, in the Beaufort County Court of Common Pleas (C.A. No. 2006-CP-07-1622) (“Greenwood Action”), a copy of which is attached hereto as **Exhibit B**. Plaintiff in the Greenwood Action, alleges the Project has experienced property damage resulting from “water infiltration in and around improperly utilized and installed doors and windows”; “water infiltration through balconies, decks, and/or their intersection with vertical walls”; and “water infiltration from premature flaking and peeling of finished aluminum building components resulting from the improper selection of materials, as well as the improper design, manufacture and installation of such components.”

18. On October 17, 2008, Somerset Horizontal Property Regime and Owners’ Association for Somerset, Inc. filed an Amended Complaint against Gate City and Weaver Cooke Construction, LLC, f/k/a Weaver Construction, LLC, *inter alios*, in the Beaufort County Court of Common Pleas (C.A. No. 2008-CP-07-3776) (“Somerset Action”), a copy of which is attached hereto as **Exhibit C**. Plaintiffs in the Somerset Action allege the Project has experienced property damage resulting from “water infiltration in and around improperly designed, manufactured and installed doors and windows”; water infiltration through negligently designed, constructed and installed balconies, decks, and/or their intersection with vertical walls”; “water infiltration from premature flaking and peeling of finished aluminum building components resulting from the improper selection of materials, as well as the improper design,

manufacture and/or installation of such components and materials”; and “water infiltration through negligently designed, constructed and installed exterior cladding, sealants, joints, grout and caulk.”

19. On July 28, 2008, John and Kathleen Affeldt filed an Amended Complaint against Gate City and Weaver Cooke Construction, LLC, f/k/a Weaver Construction, LLC, *inter alios*, in the Beaufort County Court of Common Pleas (C.A. No. 2008-CP-07-1597) (“Affeldt Action”), a copy of which is attached hereto as **Exhibit D**. Plaintiffs in the Affeldt Action allege the Project has experienced property damage resulting “water infiltration in and around improperly utilized and installed doors and windows”; “water infiltration through balconies, decks, and/or their intersection with vertical walls”; and “water infiltration from premature flaking and peeling of finished aluminum building components resulting from the improper selection of materials, as well as the improper design, manufacture and installation of such components.” (The Greenwood Action, Somerset Action, and Affeldt Action are collectively referred to herein as the “Underlying Actions”).

20. The Policy period ended on January 1, 1999.

21. A certificate of occupancy was not issued for the Project before January 1, 1999.

22. A certificate of substantial completion was not issued for the Project before January 1, 1999.

23. Neither the insured nor a subcontractor of the insured installed doors and/or windows at the Project before January 1, 1999.

24. Neither the insured nor a subcontractor of the insured installed balconies and/or decks at the Project before January 1, 1999.

25. Neither the insured nor a subcontractor of the insured installed finished aluminum building components at the Project before January 1, 1999.

26. Neither the insured nor a subcontractor of the insured installed exterior cladding, sealants, joints, grout and/or caulk at the Project before January 1, 1999.

27. No property damage attributable to the insured occurred at the Project before January 1, 1999.

28. No property damage attributable to a subcontractor of the insured occurred at the Project before January 1, 1999.

29. No water intrusion occurred at the Project before January 1, 1999.

30. No property damage resulting from water intrusion occurred at the Project before January 1, 1999.

**FOR A FIRST CAUSE OF ACTION**  
**DECLARATORY JUDGMENT – NO OCCURRENCE**

31. The foregoing allegations are incorporated herein and made a part hereof by reference.

32. To the extent the Underlying Actions allege construction defects, those defects are the result of alleged faulty workmanship.

33. To the extent the Underlying Actions allege construction defects arising out of the insured's work, those defects are the result of the insured's alleged faulty workmanship.

34. To the extent the Underlying Actions allege construction defects arising out of the work of the insured's subcontractor, those defects are the result of subcontractor's alleged faulty workmanship.

35. Faulty workmanship is not an "occurrence" under the Policy.

36. The Underlying Actions do not allege an "occurrence" under the Policy.

**FOR A SECOND CAUSE OF ACTION**  
**DECLARATORY JUDGMENT –**  
**NO PROPERTY DAMAGE WITHIN POLICY PERIOD**

37. The foregoing allegations are incorporated herein and made a part hereof by reference.

38. Even assuming faulty workmanship could constitute an occurrence under the Policy, which is expressly denied, neither the insured nor a subcontractor of the insured performed any work giving rise to property damage alleged in the Underlying Actions during the Policy period.

39. Property damage resulting from water intrusion did not occur during the Policy period.

40. The Underlying Actions do not allege property damage within the Policy period.

**FOR A THIRD CAUSE OF ACTION**  
**DECLARATORY JUDGMENT –**  
**EXCLUSION FOR CONTRACTUAL LIABILITY**

41. The foregoing allegations are incorporated herein and made a part hereof by reference.

42. The Policy does not apply to property damage the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

43. To the extent the Underlying Actions allege the insured is obligated to pay damages in contract, this Policy exclusion precludes coverage for those damages.

**FOR A FOURTH CAUSE OF ACTION**  
**DECLARATORY JUDGMENT – j(5) EXCLUSION**

44. The foregoing allegations are incorporated herein and made a part hereby by reference.

45. The Policy does not apply to property damage occurring while the insured, or a subcontractor of the insured, was actively working on the Project.

46. Even assuming the insured performed work giving rise to the alleged property damage at the Project before January 1, 1999, which is expressly denied, the insured was actively working on the Project at that time.

47. Even assuming the insured's subcontractor performed work giving rise to the alleged property damage at the Project before January 1, 1999, which is expressly denied, the insured's subcontractor was actively working on the Project at that time.

48. This Policy exclusion precludes coverage for property damage occurring while the insured, or a subcontractor of the insured, was actively working on the Project.

**FOR A FIFTH CAUSE OF ACTION**  
**DECLARATORY JUDGMENT – j(6) EXCLUSION**

49. The foregoing allegations are incorporated herein and made a part hereby by reference.

50. The Policy does not apply to property damage that must be restored, repaired, or replaced, because the insured's work, or the insured's subcontractor's work, was incorrectly performed on the Project, and is not included in the products-completed operations hazard.

51. Even assuming the Underlying Actions allege property damage within the Policy period, which is expressly denied, the Underlying Actions allege property damage that must be restored, repaired, or replaced, because the insured's work, or the insured's subcontractor's work, was incorrectly performed on the Project.

52. Even assuming the insured performed work giving rise to the alleged property damage at the Project before January 1, 1999, which is expressly denied, that work is not included in the products-completed operations hazard.

53. Even assuming the insured's subcontractor performed work giving rise to the alleged property damage at the Project before January 1, 1999, which is expressly denied, that work is not included in the products-completed operations hazard.

54. This Policy exclusion precludes coverage for property damage from defective work, operations, materials, parts, or equipment performed or furnished by the insured, or the insured's subcontractor, at the Project.

**FOR A SIXTH CAUSE OF ACTION**  
**DECLARATORY JUDGMENT – “YOUR PRODUCT” EXCLUSION**

55. The foregoing allegations are incorporated herein and made a part hereby by reference.

56. The Policy does not apply to property damage arising out of the insured's product.

57. To the extent the Underlying Actions allege property damage arising out of the insured's product, as that term is defined by the Policy, this Policy exclusion precludes coverage for such property damage.

**FOR A SEVENTH CAUSE OF ACTION**  
**DECLARATORY JUDGMENT – “YOUR WORK” EXCLUSION**

58. The foregoing allegations are incorporated herein and made a part hereby by reference.

59. The Policy does not apply to property damage arising out of the insured's work, and included in the products-completed operations hazard.

60. To the extent the Underlying Actions allege property damage arising out of the insured's work, as that term is defined by the Policy, and assuming the property damage is included in the products-completed operations hazard, all of which is expressly denied, this Policy exclusion precludes coverage for such property damage.

**FOR AN EIGHTH CAUSE OF ACTION**  
**DECLARATORY JUDGMENT – EXCLUSION FOR DAMAGE**  
**TO IMPAIRED PROPERTY OR PROPERTY NOT PHYSICALLY INJURED**

61. The foregoing allegations are incorporated herein and made a part hereby by reference.

62. This Policy does not apply to property damage to impaired property or property that has not been physically injured.

63. To the extent the Underlying Actions allege property damage for impaired property or property that has not been physically injured, which is expressly denied, this Policy exclusion precludes such damage.

WHEREFORE, Plaintiff Cincinnati, having fully complained against the Defendants, respectfully requests this Court to:

- (a) Declare that the Underlying Actions do not allege an “occurrence” as defined by the Policy;
- (b) Declare that the Underlying Actions do not allege property damage occurring within the Policy period;
- (c) Declare that to the extent the Underlying Actions allege property damage arising out of a contract or agreement, such property damage is precluded under the Policy exclusion for contractual liability;
- (d) Declare that to the extent the Underlying Actions allege property damage that property damage is precluded by Policy exclusion j(5);
- (e) Declare that to the extent the Underlying Actions allege property damage that property damage is precluded by Policy exclusion j(6);

- (f) Declare that to the extent the Underlying Actions allege property damage to the insured's product, as that term is defined in the Policy, that property damage is precluded by the "your product" Policy exclusion;
- (g) Declare that to the extent the Underlying Actions allege property damage to the insured's work, as that term is defined in the Policy, that property damage is precluded by the "your work" Policy exclusion;
- (h) Declare that to the extent the Underlying Actions allege property damage to impaired property, or property not physically injured, that property damage is precluded by Policy exclusion m.
- (i) Declare that the Policy does not obligate Cincinnati to indemnify its insured for any judgment or settlement obtained in any and all of the Underlying Actions;
- (j) Declare that the Policy does not obligate Cincinnati to provide a defense to its insured in any and all of the Underlying Actions;
- (k) In the event coverage exists under the Policy, Cincinnati seeks a declaration for the amount of damages the insured is responsible for in the Underlying Actions, and of that amount the percentage excluded from coverage under the Policy;
- (l) In the event coverage exists under the Policy, Cincinnati believes that coverage likewise exists under other potential policies; as such, Cincinnati seeks a declaration from the Court on the allocation of amounts among the other insurers, taking into account the period of time in which the insured was uninsured;

- (m) For the costs and disbursements of this action; and
- (n) For such other relief as this Court deems just and proper under the circumstances.

March 20, 2009

s/Richard H. McDuff  
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ATTORNEYS FOR PLAINTIFF