

# Damage to Property Coverage Update

November 15, 2024

## **“Damage to Property” Exclusion – 1<sup>st</sup> Circuit (Massachusetts Law)**

***Admiral Ins. Co. v. Tocci Bldg. Corp.***

*No. 22-1462, 2024 WL 4716375 (1<sup>st</sup> Cir. Nov. 8, 2024)*

The U.S. Court of Appeals for the First Circuit held that the defendant insureds were not owed coverage for underlying litigation that alleged defective work caused by a subcontractor.

Admiral Insurance Company (Admiral) brought a declaratory judgment action against its insureds, Tocci Building Corporation, Tocci Residential LLC and John L. Tocci, Sr. (collectively, Tocci), seeking a declaration that it did not owe defense or indemnity to Tocci in relation to an underlying lawsuit filed against it. In the underlying litigation, an apartment owner, Toll JM EB Residential Urban Renewal LLC (Toll), brought suit against Tocci, the general contractor, for allegedly defective work caused by a subcontractor while Tocci was managing a construction project at an apartment complex owned by Toll. Court records indicated that the faulty work caused damage to other non-defective work at parts of the apartment complex.

The appellate court examined the question of “whether, under Massachusetts law, a general contractor’s [commercial general liability] policy covers damages to non-defective work resulting from defective work by subcontractors.” The appellate court noted that there are three necessary questions that determine whether insurance coverage is owed: “(1) Do the damages alleged in the action fall within the scope of coverage?; (2) if so, do the exclusions to coverage apply?; and (3) if so, do any exceptions to the exclusions apply?”

Though the appellate court ultimately affirmed the trial court’s decision, its rationale was different. The appellate court noted that the trial court only reached the first of the three pertinent questions for determining whether coverage is afforded. The trial court had only concluded that the allegedly defective work that damaged the non-defective work did not constitute “property damage” caused by an “occurrence” as those terms are defined in the policies and, thus, the damages did not fall within the scope of coverage under the Admiral policy.

Admiral argued that the policy’s two “Damage to Property” exclusions applied to preclude coverage for the underlying litigation against Tocci. The appellate court focused primarily on one of the two exclusions, which precluded coverage for “property damage” to “[t]hat particular part of any property

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that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The definition of "your work" includes "[w]ork or operations performed by you or on your behalf[.]" Toll retained Tocci to be the general contractor overseeing the entire project, which included management and supervision of subcontractors who were performing the construction work. Accordingly, the appellate court concluded that the "Damage to Property" exclusion applied to preclude coverage to the contractor for unintended damage to a project caused by the defective work of a subcontractor because the contractor was in charge of the entire project.

The appellate court next looked to the third question of whether Tocci had proven that an exception to the exclusion applied but determined no such showing had been made. Tocci argued that the relevant exclusion contains an exception for "property damage" included in the "products-completed operations hazard," which "[i]ncludes all 'bodily injury' and 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work' except ... [w]ork that has not yet been completed or abandoned."

The appellate court found that Tocci did not make an argument that the project had been "completed or abandoned" prior to the damage caused by the subcontractor, such that this exception might apply. However, the appellate court noted that any argument to this effect would have likely been futile, as Tocci had been terminated from the project by Toll before the work had been completed, and Tocci did not assert that its termination constituted an "abandonment" of the work.

As such, the appellate court affirmed the trial court's ruling in favor of Admiral, although for different reasons, determining there was no insurance coverage owed to Tocci for the underlying litigation under the Admiral policy.