First Circuit Finds No Coverage For Subcontracted Faulty Work

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After almost two years' deliberation, the First Circuit last week issued its long-awaited decision in *Admiral Ins. Co. v. Tocci Bldg. Corp.*[1]: affirming on other grounds, and leaving in place a district court decision that found subcontracted faulty work was not an "occurrence" and did not lead to covered "property damage" under Massachusetts law.

The decision leaves Massachusetts among a number of states where general contractors should not expect coverage from their commercial general liability (CGL) insurers for damage falling within the contractor's scope of work.

Since the "scope of work" – where general contractors are involved – often encompasses an entire project, contractors who want coverage in Massachusetts should take care to make alternative arrangements: transferring risk to subcontractors through indemnity provisions and additional-insured endorsements, or relying on other policy forms where available.

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The defendant in *Tocci* was a Massachusetts-based general contractor. It faced suits in various jurisdictions, including one by a developer in New Jersey for widespread construction defects at a four-building apartment complex. Tocci tendered the suits to Admiral, its primary CGL carrier. Admiral denied coverage. After negotiations failed to resolve the issue, Admiral filed suit in the District of Massachusetts. Four days later, Tocci filed a competing action in New Jersey Superior Court.

In a first phase of the case,[2] the district court denied Tocci's motion to dismiss or stay the Massachusetts case in favor of the New Jersey state-court action. It found Admiral's action had priority under the "first-filed" rule, and that Tocci had shown no basis for abstention under *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800 (1976).

In a second phase,[3] the district court addressed choice of law, and found Massachusetts law applied. Then, surveying Massachusetts precedents, the court held construction issues falling within an insured's scope of work are not an "occurrence," and do not give rise to "property damage," as defined in standard-form CGL policies. The court acknowledged contrary authority – specifically, *Cypress Point Condo Assn. v. Adria Towers LLC*, 226 N.J. 403 (2016), in which the New Jersey Supreme Court repudiated *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233 (1979) and found subcontracted work could be an occurrence. However, the district court declined to follow *Adria*'s holding, and concluded Massachusetts would reach a different result.

Tocci appealed to the First Circuit. It said the district court had erred and the Massachusetts SJC would, in fact, follow *Adria*. Surveying precedents from other states, it argued that "the majority of high courts [find] damage to project work from defective construction can constitute property damage caused by an 'occurrence.'" Briefing was completed in late 2022; argument was held in January 2023; and for the past several years practitioners have been awaiting the ruling.

Last week's First Circuit decision acknowledged the sharp differences between states as to whether subcontracted faulty work constituted "property damage" caused by "occurrence." However, the FIrst Circuit declined to predict how the Massachusetts Supreme Judicial Court would come out on the issue. Instead the court chose a simpler path to affirmance: finding coverage precluded by Exclusion j(6), which addressed "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it."[4] The court cited Massachusetts precedents holding "that particular part" of property is the entire

piece of property on which the contractor was hired to perform work.[5] Thus, it found, when it comes to a general contractor like Tocci, "that particular part" of property is the entire project – in this case the four-building apartment complex.

The First Circuit decision represents a substantial win for insurers: extending Exclusion (6) to encompass the entirety of a general contractor's work, while leaving in place Judge Saris's decision holding faulty work is not "property damage" caused by "occurrence." Although the SJC has yet to weigh in on the issue, those lower-court decisions – at least for now – remain an accurate overall summation of Massachusetts law.[6]

NB: The authors represented Admiral in the trial and appellate proceedings above. The opinions in this note are those of the authors and may not reflect the views of Admiral or other Firm clients.

[1] 2024 U.S. App. LEXIS 28439 (1st Cir. Nov. 8, 2024).

[2] *Admiral Ins. Co. v. Tocci Bldg. Corp*, 2021 U.S. Dist. LEXIS 167608 (D. Mass. Sept. 3, 2021) (Saris, J.).

[3] *Admiral Ins. Co. v. Tocci Bldg. Corp*, 594 F.Supp.3d 201 (D. Mass. 2022).

[4]The First Circuit followed a similar path eight years ago in *Am. Home Assurance Co. v. AGM Marine Contractors, Inc*, 467 F.3d 810 (1st Cir. 2006): sidestepping the issue of whether damage to floating docks installed by the insured constituted an "occurrence," and affirming based on an exclusion for "property damage" to "the Assured's work."

[5] *E.g., Jet Line Services, Inc. v. American Employers Insurance Co*, 404 Mass. 706, 711 (1989).

[6] Interestingly, in the two years the *Tocci* decision was pending, the Massachusetts Supreme Judicial Court itself declined an opportunity to clarify this issue. In *Lessard v. R.C. Havens & Sons, Inc*, 2023 Mass. Super. LEXIS 767 (Feb. 3, 2023), a trial court – citing the district court's decision in *Tocci* – found no "property damage" caused by an "occurrence" where a contractor performed faulty work on a single-family home. The homeowner appealed, and the Appeals Court affirmed on slightly different grounds: finding the underlying judgment only involved faulty work, not resultant damage to non-defective work. 104 Mass. App. Ct. 572 (2024). The homeowners sought further appellate review. They argued that resultant damage had in fact occurred, and *Tocci* should not bar coverage under these circumstances. On October 16, 2024, the SJC declined to hear the case. 2024 Mass. LEXIS 438 (Oct. 16, 2024).