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PENNSYLVANIA / NEW JERSEY INSURANCE COVERAGE FAULTY WORKMANSHIP

James R. Callan

Commercial general liability policies characteristically include exclusions for liability arising out of the insured contractor's faulty workmanship. The common exclusions for damage to "your work" or "your product" are generally referred to as business risk exclusions. These policy provisions exclude coverage for the risks of doing business taken on by the insured which frequently involve the breach of a construction contract.

For example, both Pennsylvania and New Jersey courts have established that a general liability policy does not provide an insured with coverage for the costs of repair or replacing its own defective workmanship or services.

In *Firemen's Ins. v. National Union*, 387 N.J. Super. 434, 904 A.2d 754 (2006), the Appellate Division affirmed the trial court's finding that faulty workmanship, in itself, does not constitute "property damage" or an "occurrence" which would trigger coverage within the meaning of the applicable policies. The Court in *Firemen's*, supra, cited to the seminal New Jersey case regarding insurance coverage for a contractor's defective work, *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788 (1979). In *Weedo,* the defendant-masonry contractor was insured under a general liability policy that contained the then-standard CGL coverage clause, by which the insurer agreed to pay sums that the insured is "legally obligated to pay as damages because of . . . bodily injury . . . or *property damage to which this insurance applies*, caused by an occurrence." Id. at 237, 405 A.2d 788. The policy also contained two relevant exclusions for: (1) property damages to the "insured's products arising out of such products or any part of such products"; and (2) "property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith." Id. at 241, 405 A.2d 788. The issue was whether the CGL policy "indemnifies the insured against damages in an action for breach of contract and faulty workmanship on a project, where the damages claimed are the cost of correcting the work itself." Id. at 235. The Court answered "no," holding that either or both of the pertinent exclusions, which it referred to as "business risk" exclusions, defeated coverage. Id. at 241-15.

The Court further explained that the insured contractor bears the business risk that its work may be faulty and may breach express or implied warranties. However, the insured retains control over the quality of its own work, and should be expected to bear the cost of curing its own deficient performance. See *Firemen's,* supra at 442. The Court in ***Weedo*** further clarified that the second type of risk, which is covered, is the risk of injury to people and damage to property caused by faulty workmanship. The key distinction was the predictability of the harm: damage for breach of contractual warranty is limited and is an expected

cost of doing business; liability for injury or damage to a person or property is "almost limitless" and "entirely unpredictable," and the policy is intended to insure against the latter risk.

Likewise, in *Newark Ins. Co. v. Acupac Packaging, Inc.*, 328 N. J. Super. 385, 746 A.2d 47 (app. Div. 2000), the Court applied the *Weedo* distinction as follows:

> There is a critical distinction between insurance coverage for tort liability for physical damages to other persons or property, and protection from contractual liability of the insured for economic loss caused by improper workmanship. Ordinarily, the coverage is for tort liability for physical damage to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.

Id. at 391, 746 A.2d 47. (See also, *Atlantic Mutual v. Hillside,* 387 N.J. Super. 224, 903 A.2d 513 (2006): the risk of one's own faulty work is always borne by the party performing the work; that party's liability to others for its own faulty work is a matter of warranty and not a matter of insurance coverage.

It is noteworthy that a mere allegation of negligent construction in a Complaint which otherwise seeks damages for breach of a construction contract does not invoke coverage. The Supreme Court of Pennsylvania in *Mutual Beneficial Insurance Co. v. Haver,* 555 Pa. 534, 538, 725 A.2d 743, 745 (1999) held that "to allow the manner in which the complainant frames the request for redress to control in a case such as this one would encourage litigation through the use of artful pleadings designed to avoid exclusions in liability insurance policies." Id. at 539, 725 A.2d at 745. As the Superior Court noted in *Redevelopment Authority of Cambria County v. International Insurance Co.*, 685 A.2d 581 (Pa. Super 1996), an insurer has no duty to an insured where:

> the underlying suit arises out of a breach of contract which is not an accident or occurrence contemplated or covered by the provisions of a general liability policy.

The reason that such coverage is not provided by CGL policies is that such policies are intended to protect against limited risks and are not intended to act as performance bonds. However, many policies include a "subcontractor exception" to the business risk exclusions if the faulty work of a subcontractor caused damage to the insured contractor's otherwise non-defective work.

A significant shift regarding liability coverage for a contractor's faulty work is evident in the recent passage of a statute in Colorado nearly compelling coverage for faulty work. Colorado Rev. Stat. § 13-20-808 provides in relevant part as follows:

> In interpreting a liability insurance policy issued to a construction professional, a court shall presume that the work of a construction professional that results in property damage, including damage to the work itself or other work, is an accident unless the property damage is intended and expected by the insured.

The Tenth Circuit Court of Appeals recently addressed the new Colorado statute in *Greystone Construction, Inc. v. National Fire & Marine Ins. Co.*, —F.3d.—, 2011 WL 5148688 (109th Cir. Nov.1, 2011), holding that under the Colorado statute, a contractor's faulty work constituted an accident unless the contractor's actions amounted to "purposeful neglect." The Court concluded that if the physical damage was unforeseeable and resulted from poor workmanship, then the exposure to harmful conditions would constitute an accident, and therefore, an "occurrence" even though it did not necessarily occur by chance.

The Colorado statute and the Tenth Circuit's recent opinion suggest that future decisions may continue to expand the meaning of an "accident" and wear away at the "business risk" exclusions in commercial general liability policies.

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NEW JERSEY MARITIME SUMMARY JUDGMENT FOR SHIPOWNER

Carl D. Buchholz, III

Plaintiff James Fiocca was a longshoreman who was allegedly injured while working aboard the LOMBOK STRAIT on June 25, 2007 when he slipped in a puddle of water/oil at the top of a stairway on the vessel, fell down the stairs, and allegedly sustained serious and permanently disabling injuries to his neck, low back, and knees. Fiocca filed suit against the owner of the LOMBOK STRAIT, claiming that the vessel was negligent for breaching the duty of care it owed to the longshore employees of the stevedore hired to load/discharge cargo from the vessel.

According to the testimony of the witnesses, the stevedore began discharging cargo from the vessel shortly after midnight on June 24. The water/oil was first observed around 3:00 p.m. on June 25 by the stevedore's gang boss. The stevedore's gang boss allegedly complained about the presence of the oil/water to one of the vessel's mates and testified that he expected the vessel's crew to remedy the hazardous condition. Around 4:40 p.m., the gang boss was again in the area at the top of the stairs and observed that the water/oil had not been cleaned up. However, the gang boss took no action to warn the longshoremen of the presence of the water/oil or to have the water/oil cleaned up. Around 5:00 p.m., Fiocca's shift was over and he was preparing to leave the vessel. Fiocca denied seeing the water/oil at the top of the steps before he slipped and fell down the stairs. A coworker took post-accident photographs of the area which showed the puddle of water/oil. However, the vessel's Chief Officer denied receiving any complaint about the water/oil from either crewmembers or the stevedore prior to the accident.

Plaintiff submitted the report of maritime expert, Captain Joseph Ahlstrom, who opined that it was the "custom and practice" in the maritime industry in U.S. ports for the vessel's crew to monitor conditions on the vessel during the stevedore's loading/discharge operations and to remedy any slippery or unsafe conditions involving the vessel, such as the puddle of water/oil that Fiocca slipped in. The vessel owner submitted the report of stevedoring expert, Walter Curran, who opined that the OSHA Regulations for Longshoring specifically placed the requirement for eliminating slippery conditions in the areas on the vessel where the longshoremen walk or work on the stevedore.

Kevin L. McGee

The shipowner filed a Motion for Summary Judgment arguing that the shipowner was entitled to judgment as a matter of law since the stevedore had actual knowledge of the water/oil prior to the accident and actual knowledge that the vessel's crew had not remedied the condition prior to the accident, as well as the fact the OSHA Regulations placed the responsibility for eliminating such a hazard on the stevedore. In response to the shipowner's Motion for Summary Judgment, Fiocca's counsel argued that there were unresolved issues of fact that precluded summary judgment and required liability be decided by a jury. Plaintiff's counsel noted the report of his liability expert, Captain Ahlstrom, regarding the alleged "custom and practice" in the maritime industry for the ship's crew to remedy such problems; the testimony of the ship's Chief Officer that the Officer on Duty was expected to clean up such conditions on deck if brought to his attention; and that the area in question was a walkway on the deck of the vessel, not the immediate work area, so the OSHA Regulations did not apply to this situation.

On March 5, 2012, Judge Rodriguez issued a Memorandum Opinion and Order granting the shipowner's Motion for Summary Judgment. In granting summary judgment, Judge

Rodriguez noted that the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act were intended to place the primary obligation for the safety of the longshoremen on the stevedore employer, and to eliminate the liability of the shipowner for such accidents. Judge Rodriguez noted that under the 1972 Amendments, the shipowner still owed three duties of care to longshoremen: 1) the "turnover duty," which includes the duty to ensure that the ship and its equipment are in reasonably safe condition and to warn the stevedoring company of any hidden dangers; 2) the "active control duty," which imposes a duty of care on the shipowner *vis a vis* the areas of the ship that remain under the ship's crew's active control during cargo operations; and 3) a "duty to intervene," which requires the vessel's crew to alert the stevedore to any hidden dangers of which the crew becomes aware after discharge has begun.

In the instant case, since there was no evidence the condition existed at time of turnover, Judge Rodriguez concluded the "turnover duty" was not invoked. As to the "active control duty," Judge Rodriguez noted that this duty requires that the vessel's crew must have substantially retained control over the area/instrumentality in question, but that the plaintiff had not evidence that the vessel retained and/or exercised active control of the area during the stevedore's operation; in fact, Judge Rodriguez noted that when the stevedore's gang boss saw at 4:40 p.m. that the puddle of water/oil was still present at the top of the stairs, he did not request the vessel's crew to clean up the puddle because "there were no crewmembers in the area."

Lastly, as to the vessel's "duty to intervene," Judge Rodriguez noted that the vessel can only be liable if it has actual knowledge of a dangerous condition and actual knowledge that it cannot rely on the stevedore to avoid or eliminate the alleged hazard. Judge Rodriguez accepted the shipowner's argument that the plaintiff had no evidence to establish that the water/oil on deck created a hazardous condition, especially to an experienced longshoreman, and specifically noted that the OSHA Regulations for Longshoring provided that the stevedore employer is responsible to "eliminate conditions causing slippery walking and working surfaces in immediate areas used by employees," not just the immediate "work area."

Judge Rodriguez did a thorough analysis of the case law interpreting the 1972 Amendments to the Longshore Act, and correctly analyzed plaintiff's proffered evidence, in reaching the determination that, even in a light most favorable to the plaintiff, plaintiff's evidence failed to establish that the vessel owner breached a legal duty owed to plaintiff.

Fiocca v. Triton Schiffahrts GmbH and Lombok Strait Schifffahrtsgesellschat mbH & Co., KG, No. 10-208 (D.N.J. Mar. 5, 2012), appeal docketed, No. 12-1907 (3d Cir. Mar. 29, 2012)

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