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COURT ADDS CLARITY TO "YOUR WORK" EXCLUSION

By Robert D. Chesler, Esq. and Adrienne L. Isacoff, Esq.

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Whether liability insurance policies cover damages flowing from faulty work continues to be a source of frequent litigation in New Jersey. Recently, this issue was examined again by the Law Division in a case involving the destruction by fire of an entire building, allegedly resulting from a worker using an acetylene torch. *Cypreco Industries, Inc. v. Great American E&S Insurance, et al*, (Monmouth County Superior Court, Law Div., Docket No. MON-L-146-08, Dec. 1, 2008). The facts of this case were very favorable to the insured, and the decision was based on those specific circumstances. However, the decision does little to clear up the distinction between what consequential damages will or will not be covered as a result of faulty work and litigation is likely to continue on this issue.

The facts of *Cypreco* are unfortunately typical of construction insurance cases. The owners, Monmouth County and Monmouth County Board of Recreation Commissioners (collectively 'Monmouth') retained *Cypreco Industries* to repair the roof and gutters of its historic Visitor's Center. *Cypreco* subcontracted the entire scope of work to *Telentos*

Construction Corp. *Telentos* was onsite repairing the downspouts in a corner of the building when, allegedly, a *Telentos* worker with an acetylene torch caused a fire that burned the \$10,000,000 building to the ground. *Monmouth*, *Cypreco* and *Telentos* all sought coverage under the *Telentos*' primary and excess policies (neither *Cypreco* nor *Telentos* had procured "builder's risk" insurance for the project).

The insurers argued that two identical exclusions in their respective policies were controlling. Those exclusions stated that the insurance coverage does not apply to "that particular part of the 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."

Under this exclusion, which is routinely included in general liability insurance policies, the work needed to repair faulty work is not covered, but consequential damages, like injuries to persons or to property arising from that faulty workmanship, are covered. For example, under this exclusion there would be no coverage for the work done by the insured in negligently building a stucco wall, but there would

be coverage for water damage caused by the negligently applied stucco.

The insurers' position was that the exclusion clause should not apply in this case because the insured (*Telentos*) was responsible for the entire scope of work of the project, not just for a particular element. Previous case law dealt with situations where the faulty work of one subcontractor affected the work being performed by other subcontractors. The insurers sought to limit the exclusion to those types of cases.

The Court strongly disagreed. It looked to dictionary definitions of the word "particular" and insurance industry literature on the purpose of the exclusion. The Court also noted that the insurance policies at issue were *Telentos*' policies, and *Telentos*' work was limited to certain parts of the building; on the day of the fire, *Telentos* was working solely on the gutter and downspout on the building's southwest corner. In finding coverage, the Court stated that "The key analysis is the scope of the work

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to be performed and what the particular contractor was on site to do." Reading the exact language of the exclusion clause, the Court found that it applies only to "that particular part of real property [the gutters and downspouts], on which you [the insured, Telentos] ... are performing operations." Therefore, the Court held that the CGL coverage policy does not apply to the gutters and leaders, because Telentos was working on them at the time the fire broke out. However, "the resulting damage to the rest of the Visitor's Center was consequential damage, stemming from the purported negligent use of the torch by Telentos' employees."

The insurers cited several cases where the courts held that the exclusion did apply. One of these cases concerned a

fire started by a contractor in an apartment building, another a case where a contractor was working on a storage tank, and a third involved a well. The court distinguished those cases on the basis that, in each of them, the contractor was working on the entire structure. For analytic purposes, the court drew a line between indivisible structures and divisible. "A house is a divisible structure...A house consists of thousands of different types of components and parts." Practitioners may find this a difficult distinction in many cases. While the cases involving the storage tank and the well are clearly distinguishable from the project involving the Visitor's Center, the apartment building is very similar. The only distinction the Court made was

that in the apartment building matter, the contractor, who was trying to dry plaster that had been applied to some rooms of the apartment, was "both spatially and temporally working on the entire apartment at the time the fire broke out." That reasoning may be difficult to apply in many cases and will, undoubtedly lead to more litigation on this issue.

Robert D. Chesler is Chair of the Insurance Litigation Practice Group.

Adrienne L. Isacoff is Senior Counsel in the Construction Litigation Practice Group.

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Boston

One Bowdoin Square
Boston, MA 02114
617 399 5950

New York

1251 Avenue of the Americas
New York, NY 10020
212 262 6700

Palo Alto

590 Forest Avenue
Palo Alto, CA 94301
650 433 5800

Roseland

65 Livingston Avenue
Roseland, NJ 07068
973 597 2500

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