

Insured Not "Legally Obligated" To Pay Without Finding of Liability by Court

August 2009

The United States District Court for the District of New Jersey has held that an insured was not legally obligated to pay amounts it incurred in repairing its allegedly defective work, and, as a result, that its insurer was not obligated to provide coverage for such amounts. *Permasteelisa CS Corp. v. Columbia Cas. Co.*, 2009 WL 1874087 (D.N.J. June 29, 2009). In doing so, the court concluded that a "legal obligation to pay" as required by the insurer's liability policy required "the presentation of proofs in a court of competent jurisdiction and a finding by the court or jury of liability."

The policyholder, a construction sub-contractor, designed, constructed and installed an allegedly defective curtain wall on an office tower. After the project owner and the general contractor noted problems with the policyholder's work, they advised the insured of the alleged defective work and their view that the insured was "responsible for . . . remedial work at no additional cost because the work is the direct result of either [the insured's] design and/or field operations." The policyholder sent notice of a claim related to the curtain wall construction to its professional liability insurer, but the policyholder failed to respond when the insurer requested additional information. Further, contrary to the insurer's instructions, the policyholder began repair work on the curtain wall before the cause of the problems with the curtain wall could be confirmed. The policyholder subsequently filed suit against its insurer, alleging breach of contract and breach of the implied covenant of good faith and fair dealing, and seeking a declaratory judgment that the insurer was obligated to cover the cost of the remedial work.

The court granted the insurer's motion for summary judgment, which contended that the insured was not "legally obligated to pay" for the remedial work as required by the policy. The court agreed, relying on *Bacon v. American Insurance Co.*, 330 A.2d 389 (N.J. Super. Ct. 1974), *aff'd*, 351 A.2d 771 (N.J. Super. Ct. App. Div. 1976), which held that, "absent the presentation of proofs in a court of competent jurisdiction and a finding by a court or jury of liability, it cannot be said that the [policyholder] is 'legally obligated' to pay any damages." In doing so, the court rejected the insured's effort to distinguish *Bacon* because the operative language in that case required a legal obligation to pay "as damages," while the insurer's policy in this case did not contain the "as damages" language. The court found this immaterial, stating that the phrase "as damages" did not change the plain meaning of "legally obligated." The court held that the policyholder's "unilateral decision" to remedy its work absent a legal requirement that it do so precluded it from recovering the repair cost from its insurer.