

Massachusetts Appellate Court Holds Construction Defects Not “Property Damage” Under Commercial General Liability Policy

21 Aug 2024

In a significant decision issued on August 14, 2024, the Massachusetts Appeals Court in *Lessard v. R.C. Havens & Sons, Inc.* held that widespread construction defects in the construction of a home were not covered by the construction company's general liability (CGL) policy. The appellate court upheld a trial court decision granting summary judgment for an insurer who had argued that the coverage for “property damage” offered under the CGL policy contemplated physical injury to existing property, not faulty construction.

A jury in the underlying case had awarded the homeowners, Lawrence Lessard and Jennifer Meshna, the sum of \$272,533 in compensatory damages for numerous serious construction defects in their home. The plaintiffs had contracted with R.C. Havens & Sons, Inc. (Havens) to build their home, but the residence ended up exhibiting improper framing and inadequate support beams which shifted loads onto partition walls, along with errors in the construction of flashing, siding, and the roof. The defects compromised the structural integrity of the entire building and necessitated extensive repairs.

Havens' insurer, Main Street America Assurance Company (MSA), intervened in the case seeking a declaration that it had no duty to indemnify Havens under its CGL policy. The trial court found that the construction defects were not “property damage” caused by an “occurrence” under the terms of the CGL policy, and granted summary judgment for MSA against the homeowners.

On appeal, the Massachusetts Appeals Court analyzed the definition of “property damage” within the CGL policy at issue, which defined the term to require physical injury to tangible property (or loss of use of tangible property that is not otherwise physically injured). Following the requirement to construe insurance policy definitions in a “reasonable and practical way” under *Norfolk & Dedham Mut. Fire Ins. Co. v. Norton*, 100 Mass. App. Ct. 476, 478 (2021), the court followed rulings from other jurisdictions such as Florida, North Carolina, Tennessee, and Texas in holding that “property damage” does not include costs to repair or remove construction defects. “Commercial general liability policies provide coverage for tort liability for physical damages to others,” the court explained, not coverage for contract damages when “the product or completed work is not that for which the damaged person bargained.”

In holding that the homeowner's judgment was not covered under Havens' CGL policy, the court did not foreclose that such a policy could include coverage for property damage to separate property caused by a construction defect. The court drew a clear distinction between construction defects themselves and any damage caused by those defects. Although the costs of repairing or removing construction defects are not covered under a CGL policy, as they represent a failure to meet the expected quality of work from the outset, damages resulting from the impact of the defects on other property may be covered. “Taking a simple example, an improperly installed window would not be ‘property damage,’ but resulting water damage to the surrounding wall would be.”

The court noted that, although the homeowners argued on appeal that they were seeking damages for such secondary, consequential loss, an examination of the record below did not show any award for such secondary losses, only for the actual construction defects and associated remediation costs. “In this situation, absent evidence that the construction defects caused injury to other property, MSA had no duty under its commercial general liability policy . . . to indemnify

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