

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ADMIRAL INSURANCE COMPANY,

Plaintiff,

v.

TOCCI BUILDING CORPORATION, et al.

Defendants.

Civ. No. 1:21-cv-10388-PBS

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY
JUDGMENT**

This action involves several intertwined claims for coverage brought by two Massachusetts companies (collectively, “Tocci”) and their principal, a Massachusetts resident, under a series of insurance policies issued by Admiral Insurance Company (“Admiral”). The claims arise out of three construction projects in Massachusetts and New Jersey on which Tocci served as general contractor or construction manager. The present motion seeks partial summary judgment with respect to one of those projects – an apartment complex in East Brunswick, New Jersey (“Project”) owned by Toll JM EB Residential Urban Renewal LLC (“Toll”).¹ Tocci signed an agreement in late 2013 to serve as the Project’s construction manager. It allegedly failed to perform its obligations, and was terminated prior to Project completion.

In this Motion, Admiral asks for a declaration that it has no duty to defend Tocci against the attached Amended Complaint, filed by Toll in the District of New Jersey. Admiral has no duty

¹ The other two projects are the “Connell Project,” Adm. Cmplt. ¶¶ 34-47, involving the development of a hotel in Berkeley Heights, New Jersey; and the “BHID Project,” Cmplt., ¶¶ 48-60, involving renovation of a building owned by Boston Harbor Industrial Development (“BHID”) in Boston, Massachusetts. There is significant factual and legal overlap as to these three projects – *see* Cmplt., ¶¶ 9-20, 61-76, 87 -- but the factual record at the other two projects is somewhat more complex, and Admiral has elected to limit its current motion to the Toll Project, for now.

to defend because [1] Massachusetts law applies; and [2] under Massachusetts law, Toll's allegations – involving breach of contract and faulty workmanship – fall outside the coverage provided by the Policies.

By disposing of these issues promptly, at the outset of this coverage case, the Court will relieve Admiral of an unwarranted defense; will reduce the burden and complexity of a subsequent claim for recoupment of defense costs; and will provide prompt, necessary clarity as to Admiral's overall coverage obligations.²

SUMMARY JUDGMENT³

A party does not need to wait for the close of discovery to move for summary judgment. It may move “at the commencement of the action,” *see* Fed. R. Civ. P. 56(b) (Advisory Committee Note, 2009 amendments), or at any other time, so long as ““there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.”” *Arrowood*

² If Admiral's motion is denied, and litigation goes forward, the parties will likely need to explore a number of other, more complex defenses to coverage in the three intertwined actions. These may include, for example, the Policies' Construction Management Errors and Omissions Exclusion Endorsements, which bar coverage for “property damage” arising out of “inspection, supervision, quality control, architectural or engineering activities done by or for [Tocci] on a project on which [Tocci] serve[s] as construction manager”; the Policies' provisions regarding late notice, “other insurance,” cooperation, pre-existing damage, and voluntarily assumed liabilities; and Massachusetts authority barring insureds from recovering pre-tender costs and costs of affirmative claims. *See Rass Corp. v. The Travelers Cos.*, 90 Mass. App. Ct. 643 (2016) (pre-tender costs), *Mount Vernon Fire Ins. Co. v. Visionaid, Inc.*, 477 Mass. 343 (2017) (affirmative claims). Moreover, if Admiral is compelled to provide a defense to Tocci while these matters are litigated, and it is ultimately determined that no defense was owed, the court will need to decide whether Admiral may recoup the defense costs incurred. *Compare Hebel v. Healthcare Ins. Co.*, 370 N.J. Super. 260 (App. Div. 2004) (right to recoupment); *Welch Foods Inc. v. Nat'l Fire Ins. Co.*, 2011 WL 576600 (D. Mass. Feb. 9, 2011) (predicting no right to recoupment under Massachusetts law). Fortunately, none of these issues need to be addressed to decide Admiral's present motion. If the court finds there is no duty to defend based on the threshold policy language in this motion – *i.e.*, the Admiral insuring agreement and Exclusions j(5) and j(6) – an extensive course of discovery, briefing, and trial can be avoided as to these other, more complicated issues.

³ Together with this Motion, Admiral is submitting a Rule 56 Statement of Undisputed Material Facts – referred to in this Memorandum as “Statement,” or “Stmt.” – supported by affidavits of Elizabeth Onslager and Maureen McCall, and attached documents. For ease of reference, this Memorandum will refer to the Onslager and McCall Declarations as “EO” and “MO,” respectively. The underlying complaints as to which Tocci seeks defense are included separately as exhibits to this memorandum, and are denoted “Ex. A” and “Ex. B.”

Indem. Co. v. Oxford Cleaners & Tailors, LLC, No. 1:13-12298-PBS, 2014 U.S. Dist. LEXIS 113734, at *9-10 (D. Mass. Aug. 15, 2014) (citation omitted)).

The present motion – seeking a ruling that Admiral has no duty to defend – presents exactly the kind of issue as to which early summary judgment is appropriate. Under Massachusetts law, “the initial duty of a liability insurer to defend third-party actions against the insured is decided by matching the third-party complaint with the policy provisions.” *See Continental Cas. Co. v. Gilbane Bldg Co.*, 391 Mass. 143 (1984). After considering these documents, a court should find no duty to defend “when the allegations in the underlying complaint lie expressly outside the policy coverage and its purpose,” *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 394-395 (2003).

In this case, the Admiral policies, Toll’s underlying complaint, and the correspondence between the parties, are all part of the record, as a matter of undisputed fact. The court can grant summary judgment to Admiral if it finds that these documents fail to trigger a defense. *Cable Mills, LLC v. Coakley Pierpan Dolan & Collins Ins. Agency, Inc.*, 82 Mass. App. Ct. 415, 418 (2012) (coverage cases are “well-suited for summary judgment, since the interpretation of an insurance contract is a question of law for the court”).

FACTUAL BACKGROUND

The Project

Tocci is a general contractor and construction manager based in Woburn, Massachusetts. Stmt. ¶¶ 10 – 11. It performs construction work in Massachusetts, New Jersey, New York, New Hampshire, Georgia, Connecticut, and various other states. *Id.* ¶¶ 18 – 19. On December 27, 2013, it entered into a Construction Management Agreement with Toll, a Pennsylvania company. *Id.* ¶ 22. The Agreement obligated Tocci to provide pre-construction and construction services for

a proposed rental apartment complex that Toll was developing in East Brunswick, New Jersey (the “Project”). *Id.* ¶ 23. Under the Agreement, Tocci was responsible for managing all aspects of Project construction. *Id.* ¶ 24.

However, issues soon arose with Tocci’s performance under the Agreement. According to Toll, “there were countless delays to the Project schedule, each of which was caused [or] exacerbated by [Tocci’s] failure to properly prosecute and manage the work.” *Id.* ¶¶ 25 – 26. These issues led to the issuance of a stop work order, and to a fourteen-month delay in the overall project schedule. *Id.* ¶ 27. Eventually, on March 2, 2016, Toll terminated Tocci and retained a new construction manager, who finished the project Tocci had been hired to do. *Id.* ¶¶ 28 – 29.

The Toll Action

On July 20, 2016, Toll filed a lawsuit against Tocci Residential, LLC, in New Jersey Superior Court. *Id.* ¶ 30 (Ex. A hereto). The lawsuit sought damages for breach of contract and breach of the duty of good faith and fair dealing, and requested a declaratory judgment upholding the validity of Tocci’s termination. *Id.* After Tocci removed the action to federal court, Toll submitted an Amended Complaint, naming additional entities, and including veil-piercing allegations. *Id.* ¶ 31 (Ex. B hereto).

In the Amended Complaint, Toll alleges that the three Tocci entities fraudulently induced Toll to enter into the Construction Management Agreement: for example, by representing that Tocci would use its own employees on the Project, when in fact it used subcontractors. *Id.* ¶ 32. Once hired, the Complaint alleges, Tocci failed to adequately supervise or manage the work. *Id.* ¶ 33. Among other things, the Amended Complaint alleges, Tocci:

- Failed to timely provide the Township of East Brunswick with necessary shop drawings to obtain building permits;

- Failed to properly install the building envelope due to deficient installation of the primary weather resistive barrier and windows in all five buildings;
- Failed to install required perimeter drains in basement areas, necessary for the installation of the foundation walls;
- Failed to backfill basement walls with proper structural bracing;
- Failed to install sprinklers in attic areas in each building, resulting in a stoppage of work;
- Failed to provide Toll with the necessary information to obtain a full building permit in a timely manner;
- Failed to review design and construction documents for constructability and compliance with applicable building codes, and to obtain and review for constructability any inconsistencies between submittals and the Contract Documents, causing, among other issues, Tocci to fail to discover during the pre-construction stage that the hot water heaters were too large for the mechanical closets;
- Failed to deliver a qualified team capable of managing the trade contractors;
- Failed to properly manage the work to ensure that it was free of defects, for example: [1] wire mesh not installed correctly in concrete slabs; [2] secondary electrical conduit discharging water onto electrical equipment; [3] until balcony membrane never installed; [4] RC channels installed upside down; [5] two hour shaft incorrectly installed in Building 1; [6] duct not installed in Building 2; and [7] temporary weather protection not installed.

Id. ¶ 34; Ex. B, ¶¶ 22 – 31. The Amended Complaint contained five counts: [1] breach of contract; [2] breach of the obligation of good faith and fair dealing; [3] declaratory judgment, for an order that Toll lawfully terminated Tocci for default of its obligations; [4] alter ego liability; and [5] fraud in the inducement. Stmt., ¶¶ 30 – 31.

The Admiral Policies

Admiral insured Tocci under a series of Commercial General Liability Policies, in effect from October 2012 to October 2020. Stmt. ¶ 1, MM Ex. 1-6. Toll's tender in mid-2016 was made under the second of these Policies, i.e., Policy No. CA000017078-02 (effective 10/21/13 to

10/21/14).⁴ The Policy Tocci selected for coverage may or may not be correct. But, fortunately, this motion does not turn on the specific Policy Tocci selected.

Each of the various Admiral Policies are substantially identical in terms of the coverage they offer. Each is written on standard coverage forms. Each provides coverage for third-party claims of “property damage,” i.e., resultant damage to the property of third parties, to the extent that “property damage” is caused by an “occurrence,” i.e., an “accident” not foreseen or expected by Tocci. Except in limited instances – not relevant here – none of the Policies cover Tocci for contractually assumed liabilities. *See infra* p. 13. Specifically, each Policy’s insuring agreement says, in relevant part, that:

[Admiral] will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result...

This insurance applies to “bodily injury” and “property damage” only if: [1] The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;...

Id. ¶ 2. Each Policy defines “occurrence,” in pertinent part, as:

[A]n accident, including continuous or repeated exposure to substantially the same general harmful conditions.

⁴ Interestingly, when Tocci first received notice of Toll’s suit in mid-2016, it did not immediately tender to Admiral. Instead Tocci elected to defend itself. It appointed its own counsel, developed its theories and defenses, and engaged in a number of mediations without inviting (or allowing) Admiral’s participation. *See* Stmt. ¶ 37; EO Ex. 3. Then, in February 13, 2020 – after the litigation was Toll had been going on more than three years – Tocci inexplicably reversed course. It sent Admiral a copy of Toll’s July 2016 complaint, and it belatedly demanded a defense against Toll’s allegations. Stmt. ¶¶ 35 – 37. Tocci’s belated notice, and its long defense without Admiral’s involvement, may be an important issue if this litigation proceeds. Adm. Cmplt., ¶¶ 28 – 33. But again, of course, if the Court grants the current motion, this issue need not be reached. *See* p.2, n.2, *supra*.

Id. ¶ 3. Each Policy defines “property damage,” in pertinent part, as

[a] Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

[b] Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

Id. ¶ 4. Finally, each Policy contains the following relevant exclusions:

This insurance does not apply to:

b. Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by means of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages ... that the insured would have in the absence of the contract or agreement ...

j. Damage to Property

“Property damage” to:

[5] That particular part of 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; or

[6] That particular part of any property that must be restored, repaired or replaced because “your work”⁵ was incorrectly performed on it. ...

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products completed operations hazard.”⁶

⁵ The Policies define “Your Work” to mean: “[1] [w]ork or operations performed by you or on your behalf; and [2] [m]aterials, parts or equipment furnished in connection with such work or operations.” The term, “Your Work,” also includes “[1] [w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of ‘your work’; and [2] [t]he providing of or failure to provide warnings or instructions.” Stmt. ¶ 5.

⁶ The Policies define “products-completed operations hazard,” in pertinent part, to include: “... all “bodily injury” and “property damage” occurring away from premises you own or rent and arising out of ... “your work” except: ... [2] [w]ork that has not yet been completed or abandoned.” They provide, further, that “‘your work’ will be deemed completed ... [c] when that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project. Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.” Stmt. ¶ 6.

Id. ¶¶ 7 – 9.

On March 17, 2020, Admiral denied coverage for the Toll Action, saying “the Lawsuit does not include any allegations that Tocci is liable for property damage caused by an occurrence, as those terms are defined in the policy. Rather, the lawsuit alleges that the Defendants failed to properly manage the construction project in violation of its contractual agreement causing delays and faulty workmanship.” Stmt., ¶ 38; EO Ex. 4. Additionally – Admiral went on – “even if the Lawsuit had alleged that Tocci was liable for property damage caused by an occurrence, the exclusion ‘Damage to Property’ bars coverage for property damage to arising out of Tocci's operations or ‘your work.’” *Id.*

**Tocci Admits That The Complaint Does Not
Trigger A Defense, and Instead Seeks To
Rely On Extrinsic Evidence**

On May 7, 2020, Tocci’s coverage counsel responded to Admiral’s coverage denial. *Id.* ¶ 39, EO Ex. 5. Tocci’s letter conceded – correctly – that “Toll’s Complaint [did] not specifically allege resultant property damage,” of a kind that would trigger coverage under the Policies. *Id.* ¶ 40. Instead, the letter argued that Tocci should be entitled to trigger a duty to defend by pointing to extrinsic evidence, *i.e.*, allegations outside the pleadings. The letter then pointed to deposition testimony from Toll’s corporate designee, Eric Cohen, that:

- A roof leak resulted in damage to sheetrock in Unit 3302 of Building 3 on the Project
- Inadequate sheathing resulted in water getting into the building and led to mold formation that required remediation
- Soil settlement resulted in damage to a pipe, which was replaced; and to the Project’s concrete slab and wood framing

Id. ¶ 41, EO Ex. 5, pp. 2, 5-15. Admiral reviewed this material and stood by its denial. It observed that Mr. Cohen’s new allegations also involved claims of faulty workmanship, falling within the scope of the Construction Management Agreement – i.e., a breach of contract. The new allegations still did not allege any “resultant damage,” i.e., damage to the property of third parties. Stmt. ¶ 42; EO Ex. 6. Further discussions ensued. These discussions refined, but did not resolve, the parties’ dispute. *See* Stmt. ¶¶ 43-47, EO Ex. 6 - 11.⁷

Finally, on January 8, 2021, Admiral issued a final letter, acknowledging the parties’ disagreement, and comprehensively summarizing the parties’ positions. The letter said Admiral would provisionally defend Tocci, but would seek a court order that it had no obligation to do so. Stmt. ¶ 48, EO Ex. 11. Admiral filed this action on March 5.⁸

CHOICE OF LAW

At the outset, it appears to be necessary for this Court to resolve a threshold question as to which state’s law – Massachusetts, or New Jersey – applies to the present dispute. *Id.* ¶ 48; EO Ex. 11. Admiral believes Tocci, as a general contractor, has no legitimate argument for coverage

⁷ On October 19, 2020, Admiral sent Tocci a supplemental letter, reiterating its original coverage denial, and asserting certain additional grounds for declination. Specifically, Admiral noted the response of a subcontractor’s insurance carrier – Citizens Insurance – which had acknowledged a conditional duty to reimburse Tocci for the cost of Tocci’s defense. For a time, the letter from Citizens mooted the parties’ disagreement as to whether Toll’s complaint gave rise to a duty to defend under the Admiral policies. Unfortunately, Citizens has now withdrawn its coverage position, and those additional grounds for declination are no longer applicable, and Tocci has returned to press its original claims for defense.

⁸ On the same day Admiral filed this action, an insurer for one of Tocci’s New Jersey subcontractors – Harleysville Insurance Co. – filed an action against Tocci in New Jersey Superior Court, seeking a declaration that Tocci was not entitled to coverage for the Connell Action as an additional insured under a policy Harleysville issued in New Jersey to one of Tocci’s subcontractors. At essentially the same time, Tocci filed its own action in New Jersey. Tocci’s action sought – among other things – a declaration [1] that Tocci was an additional insured under the Harleysville Policy; [2] that Tocci was owed defense by Harleysville in the Connell action, and [3] that Tocci was owed defense in the Connell and Toll actions under one or more New Jersey policies issued to one or more New Jersey subcontractors. Admiral is also named as a defendant in the New Jersey actions, but is not a central participant. Notably, neither New Jersey action includes the BHID claims, and neither encompasses the full course of dealing described in Admiral’s current Massachusetts complaint. Both New Jersey actions are currently stalled, as the plaintiffs in those actions dispute whether the actions should be consolidated with each other and (if so) where.

under either law. *Id.* ¶ 42, EO Exh. 6. Tocci appears to disagree. *Id.* ¶ 39, EO Exh. 5. Fortunately, the question is easy to resolve, since the law of Massachusetts – not New Jersey – indisputably applies to Tocci’s coverage claims.

Where, as here, a lawsuit is based on diversity of citizenship, the court “must apply the choice-of-law rules of the forum state,” *i.e.*, Massachusetts. *Acadia Ins. Co. v. Peerless Ins. Co.*, 679 F. Supp. 2d 229, 237 (D. Mass. 2010); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). In coverage cases, where the construction of an insurance policy is at issue, this means applying “the law of the state that has the most significant relationship **to the insurance contract at issue.**” *Id.* (emphasis added); *see also Bushkin Assoc., Inc. v. Raytheon Co.*, 393 Mass. 622, 632, 473 N.E.2d 662, 669 (1985) (quoting Rest. (Second) of Conflict of Laws (“Restatement”) § 188(1) (1971)). To perform this analysis,

The contacts to be taken into account . . . include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Bushkin, 393 Mass. at 632, 473 N.E.2d at 669 (quoting Rest. § 188(2)). The determination involves more than “simply adding up various contacts,” *Id.* and courts are instructed to consider the following additional factors as well:

(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectation, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Id. (quoting Rest. § 6(2)). Most importantly, where contracts of insurance are involved,

Section 193 [of the Restatement] provides that the [parties'] rights ... are to be determined by the local law of the State that the parties to the insurance contract understood would be the principal location of the insured risk during the term of the policy, unless some other State has a more significant relationship under the principles of § 6. Section 193 further provides that "[t]he location of the insured risk will be given greater weight than any other single contact in determining the state of the applicable law provided that the risk can be located, at least principally, in a single state. Restatement § 193 comment b. **The insured risk generally will be located in the State where the policy holder is domiciled.**

OneBeacon America Ins. Co. v. Narragansett Elec. Co., 90 Mass. App. 123 (2016) (emphasis added), quoting *Clarendon Natl. Ins. Co. v. Arbella Mut. Ins. Co.*, 60 Mass. App. Ct. at 496; see also *W.R. Grace & Co. v. Hartford Accident & Indem. Co.*, 407 Mass. 572, 586 (1990) (“*Grace Hartford*”); *W.R. Grace & Co. v. Maryland Casualty Co.*, 33 Mass. App. 358 (1992) (“*Grace Maryland*”).

Taken together, these factors compel the application of Massachusetts law. Both Tocci entities are organized in Massachusetts. Stmt. ¶¶ 10 – 11. Both are domiciled and have their headquarters here. *Id.* ¶¶ 10 – 11, 15. John Tocci, the companies’ principal, is a Massachusetts resident. *Id.* ¶ 12. The Policies were applied for, and issued, in Massachusetts. *Id.* ¶ 10 – 16, 20. They were brokered through the Driscoll Agency, in Norwell, Massachusetts. *Id.* ¶ 14. The premiums were paid through a Massachusetts company, which issued checks to Driscoll, which passed them along to Admiral. *Id.* ¶ 21. Driscoll has remained deeply involved in this matter, and continues to communicate with Admiral regularly as to the claim.

Tocci may argue that the specific Project that is the subject of this motion – i.e., the Toll Project – was located in New Jersey. This is true. But under Massachusetts law, that fact is of little relevance. Tocci – from its headquarters in Massachusetts – handles work throughout the Northeastern United States. *Id.* ¶¶ 17 – 19. It is exposed to claims in multiple jurisdictions. Indeed, Admiral’s current lawsuit involves claims that have arisen in at least two separate

jurisdictions – Boston, Massachusetts and New Jersey – and Tocci, in the past, has faced suits in other places as well. *See, e.g., Tocci Bldg. Corp. of N.J. v. Virginia Surety Co.*, 750 F.Supp.2d 316 (D. Mass. 2010) (coverage dispute arising from project in Westbury, New York); *Tocci Bldg. Corp. v. Zurich Am. Ins. Co.*, 659 F.Supp.2d 251 (D. Mass. 2009) (coverage dispute arising from project in Burlington, Massachusetts).

In circumstances like this, Massachusetts law is clear: the coverage provided by a company’s policies does not depend on the accident of where a particular claim arose. The law applied to coverage issues should be uniform, and these issues should be resolved in a consistent way, under the law of “the state where the policyholder is domiciled.” *Narragansett Electric*, 90 Mass. App. at 129. Application of the law of a single jurisdiction – the place of domicile –

produces coherent interstate insurance coverage; appears to conform to justified expectations; offers the prospect of certainty, predictability, and uniformity of result; provides relative ease in the determination and application of the governing law; and looks to the law of the State which, as to the legal issues involved, has the most significant relationship with the transactions and the parties.

Id.; *Grace Hartford*, 407 Mass. at 586. *See also Millipore Corp. v. Travelers Indem. Co.*, 115 F.3d 21, 30 (1st Cir. 1997); *HDI-Gerling American Ins. Co. v. Navigators Ins. Co.*, Civil Action No. 15-10338-FDS, 2015 U.S. Dist. LEXIS 121457, at *12 (D. Mass. Sep. 11, 2015) (“Massachusetts courts have held that where the insured risk can implicate multiple states, other governing principles of choice of law generally point to the law of the domicile of the policyholder”); *General Electric Co. v. Lines*, 2008 Mass. Super. LEXIS 284, 2008 WL 2908053, *7 (Mass. Super. 2008) (“the only sensible rule in insurance coverage cases is that the domicile of the policyholder shall govern”). Here the Policies were issued and brokered in Massachusetts, to a Massachusetts company performing work in multiple states. Thus Massachusetts law – not New Jersey law – governs Tocci’s claim for coverage under these Policies.

ARGUMENT

I. The Claims Against Tocci Arise In Contract, And Do Not Allege “Property Damage,” Only Economic Harm;

Once it is determined that Massachusetts law applies to this case, the remaining analysis is straightforward. “As the insured, [Tocci] bears the burden of proving that at least one of the underlying claims fall within the scope of coverage under the Policies.” *Mills Constr. Corp. v. Nautilus Ins. Co.*, No. 1:18-cv-10549-IT, 2019 U.S. Dist. LEXIS 55256, at *12 (D. Mass. Mar. 31, 2019). Here, the Toll complaint seeks to recover economic losses arising from Tocci’s alleged breach of its contractual obligations under the Construction Management Agreement. None of these allegations involve “property damage,” or “bodily injury.” None fall within the Policy’s insuring agreement.⁹

There is, to be sure, a small part of Toll’s Amended Complaint that refers to “defects” in the work for which Tocci was responsible. Specifically, Paragraph 31 says:

The Construction Manager [Tocci] failed to promptly manage the Work to ensure that it was free from defects, for example [1] wire mesh was not installed correctly in the concrete slabs; [2] secondary electrical conduit discharging water onto electrical equipment; [3] unit balcony membrane was never installed; [4] RC channels were installed upside down; [5] two hour shaft in Building 1 [was] incorrectly installed on all four floors; [6] duct not installed in Building 2; and [7] temporary weather protection never installed..

Stmt., ¶ 34; Ex. B, ¶ 31. But in the end, these allegations do not trigger coverage either. As Tocci itself admits, these allegations “[do] not specifically allege resultant property damage,” *i.e.*,

⁹ Thus – by way of example – even if Toll were successful in showing that “there were countless delays to the Project Schedule, each of which was caused and/or exacerbated by the Construction Manager’s failure to properly prosecute and manage the Work,” Ex. B ¶ 21 or that Tocci fraudulently “represented to Toll that Tocci Residential employed various people to perform the construction management work” Ex. B ¶ 131, Admiral would have no duty to cover Tocci’s liability. Whether true or false, these allegations do not involve “physical injury to tangible property,” and therefore do not trigger coverage.

property damage outside the scope of Tocci's Construction Management Agreement. Stmt. ¶ 40, EO Ex. 5, p.2. Each of the allegations is, ultimately, based on Tocci's alleged failure of contractual performance. And a general contractor's faulty workmanship – i.e., its breach of its contract with a third party to deliver a quality product – is simply not the kind of risk covered by a CGL policy. *See, e.g., Lee Kennedy Co. v. Arch Ins. Co.*, 357 F.Supp. 3d 81, 83 (D. Mass. 2019) (“to the extent that [a general contractor] bases its claim on the contract with [a project owner] in which [the general contractor] assumed liability for ... defective work, [the contractor's] coverage claim falls directly within the contract liability exclusion.” *Id.* at 83.¹⁰

II. To The Extent Toll Seeks Coverage Based on Claims of Improper Workmanship, Those Claims Do Not Involve “Property Damage,” Caused By An “Occurrence,” Within The Admiral Insuring Agreement.

The final question – since Tocci has conceded Toll's Amended Complaint does not seek recovery for any “resultant damage” – is whether Tocci has permissibly adduced any extrinsic evidence that might “add substance and meaning to skeletal claims” in the complaint, so as to permit the conclusion that Toll is in fact seeking recovery in tort for “resultant damage.” In certain circumstances, where a complaint is “skeletal” in form, *Mills*, No. 1:18-cv-10549-IT, 2019 U.S. Dist. LEXIS 55256, at *12, and where extrinsic facts are made “known to an insurer,” *see Sullivan*,

¹⁰ *See also, e.g., NWS Corp. v. Hartford Fire Ins. Co.*, Civil Action No. 12-30113-KPN, 2013 U.S. Dist. LEXIS 77182, at *12 (D. Mass. Apr. 25, 2013) (“economic loss . . . is not within the scope of property damage coverage”) (*citing Smartfoods, Inc. v. Northbrook Prop. & Cas. Co.*, 35 Mass. App. Ct. 239, 243 (1993)); *Amtrol*, 2002 U.S. Dist. LEXIS 18691, at *20 (D. Mass. Sep. 10, 2002) (“the physical injury requirement in standard CGL policies exists to prevent recovery of mere economic loss.”); *Commerce Ins. Co. v. Betty Caplette Bldrs.*, 420 Mass. 87, 91 (1995) (“The coverage is for tort liability for physical damages 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.”) *See also Essex Ins. Co. v. BloomSouth Flooring Corp.*, Civil Action No. 03-10275- LTS, 2006 U.S. Dist. LEXIS 109175, at *54 n.19 (D. Mass. Aug. 16, 2006) (“I note that any lost business damages would also be excluded under the CGL policies here. BFDS lost business is an economic loss arising out of contractual liability for the fact that BloomSouth's product or completed work is not that for which the damaged person bargained.”); *Lee Kennedy Co. v. Arch Ins. Co.*, 357 F. Supp. 3d 81, 85 (D. Mass. 2019) (“a commercial general liability insurance policy provision applies only to tort liability and not contractual liability.”)

439 Mass. at 394, a court may find coverage triggered even though the four corners of the complaint do not contain sufficient information to do so.

Of course, it is far from clear that these cases apply here. Toll's complaint is anything by "skeletal." It is detailed and comprehensive. As the court held in *Mills*, "[e]xtrinsic facts may add substance and meaning to skeletal claims only adumbrated in the complaint. But an insured may not, in the absence of a complaint that requires coverage, force its insurer to defend the insured by simply telling the insurer facts which would create coverage." 2019 U.S. Dist. LEXIS 55256, at *12 (internal citations omitted.)

But, again, the point is likely moot. Even if this court were to permit Tocci to introduce extrinsic evidence to buttress the allegations here, Tocci has given Admiral no extrinsic evidence that would trigger a defense. After more than three years of detailed discovery, multiple mediations, and a year of extended communications between coverage counsel, the only "extrinsic evidence" that Tocci has been able to present is the deposition testimony of Toll's corporate designee, Eric Cohen, that:

- A roof leak resulted in damage to sheetrock in Unit 3302 of Building 3 on the Project;
- Inadequate sheathing resulted in water getting into the building and led to mold formation that required remediation;
- Soil settlement resulted in damage to a pipe, which was replaced; and to the Project's concrete slab and wood framing.

Stmt. ¶ 41, EO Ex. 5. None of this "extrinsic evidence" shows any damage outside the Project itself, i.e., damage to property outside the scope of the work that Tocci was contractually commit-

ted to perform. None of this alleged damage falls within the scope of the coverage provided to Tocci, as general contractor, under the Admiral Policies.

The point is not hard to understand, or even particularly controversial. Over the past thirty years, Massachusetts courts have repeatedly rejected arguments like the ones Tocci is making: finding claims of faulty workmanship against general contractors do not involve “property damage,” caused by an “occurrence,” within the meaning of a CGL policy. As these courts hold, “CGL policies are intended to protect the insured from liability for injury or damage to the persons or property of others; they are not intended to pay the costs associated with repairing or replacing the insured’s defective work and products.” *Friel Luxury Home Constr., Inc. v. Probuilders Specialty Ins. Co. RRG*, No. 09-cv-11036-DPW, 2009 U.S. Dist. LEXIS 121775, at *13 (D. Mass. Dec. 22, 2009). As a result, these courts hold, “a failure of workmanship does not involve the fortuity required to constitute an accident.” *Id.* at 15. *See also Mello Constr., Inc. v. Acadia Ins. Co.*, 70 Mass. App. Ct. 1104 (2007), 2007 Mass. App. Unpub. LEXIS 683 at *7; *Mills*, 2019 U.S. Dist. LEXIS 55256, at *8 (D. Mass. Mar. 31, 2019); *American Home Assur. Co. v. AGM Marine Contrs., Inc.*, 379 F. Supp. 2d 134, 136 (D. Mass. 2005).

The decision in *Mills* is instructive. Indeed, it is on all fours with this case. While rebuilding a residential property, a general contractor damaged the building’s foundation, leading to delays. *Mills*, 2019 U.S. Dist. LEXIS 55256, at *2. The homeowner sued for the foundation damage, the resulting delays, and various other alleged defects: for example, finish trim work not performed in a good and workmanlike manner, exterior trim installed with nails that would rust and fail, leaking doors. *Id.* at *22 – 23. The contractor’s insurer denied coverage. After reviewing the homeowner’s allegations in detail, the court found the “complaint describe[d] no accidents” that could be considered an occurrence under Massachusetts law. *Id.* at 14. In effect, the contractor

had contracted to build a home free from defects, and failed to do so. While the contractor's failure might expose the contractor to a claim for breach of contract, i.e., economic harm, its failure to deliver the promised contractual performance did not constitute an "occurrence," under Massachusetts law.

The Toll project is larger, but the allegations are strikingly similar. Even if the Court chooses to credit Mr. Cohen's testimony, the issues he describes are materially identical to those in *Mills*: a cracked concrete slab, a broken pipe, a leaking roof. The outcome should be the same as well. There has been no "property damage," caused by an "occurrence." The Admiral policies are not triggered by this kind of contract claim.

III. To The Extent Toll Seeks Coverage Based on Claims of Improper Workmanship, Those Claims Fall Within The Business Risk Exclusions of the Admiral Policies.

Finally, and alternatively, even if this court were (somehow) to find that Tocci's claim involved some kind of "property damage," caused by an "occurrence" – these damages would be barred from coverage under the policies' "business risk" exclusions. *See, e.g., B&T Masonry Constr. Co. v. Public Serv. Mut. Ins. Co.*, 382 F.3d 36 (1st Cir. 2004); *Acadia Ins. Co.*, 679 F.Supp.2d 229 (D. Mass. 2010); *Mills*, 2019 U.S. Dist. LEXIS 55256, at *15. The exclusions – which only become relevant if there is a covered "occurrence" – "reflect the proposition that certain business risks are a normal, foreseeable and expected incident of doing business and should be reflected in the price of the product or service rather than as a cost of insurance to be shared by others." *Friel*, 2009 U.S. Dist. LEXIS 121775, at *19.

Although numerous exclusions are potentially at issue, *see* Stmt. ¶ 48, the most immediately relevant are exclusions j.5 and j.6, which bar coverage for property damage to:

5. That particular part of 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.
6. That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

Stmt. ¶ 8.¹¹ These exclusions apply when “that particular part” of property on which the insured has performed work has been damaged by the insured’s operations or must be replaced because the insured’s work was incorrectly performed. And where – as here – a general contractor is contractually responsible for an entire project, “that particular part” of property means the entire project. *See Friel*, 2009 U.S. Dist. LEXIS 121775, at *23 (“it is clear that any work or operations performed by Friel, as the general contractor, necessarily encompassed the Latessas’ home in its entirety”). *See also Mello*, 2007 Mass. App. Unpub. LEXIS 683 at * 13; *Jet Line Servs*, 404 Mass. at 711; *E.H. Spencer & Co., LLC v. Essex Ins. Co.*, No. 06-0135, 2009 Mass. Super. LEXIS 166, * 5 – 7 (Mass. Super. May 27, 2009).

Again, *Mills* is instructive. The insured in that case was a contractor, who sought coverage for a suit alleging it caused damage to the foundation of a house. The contractor argued that this damage fell outside its scope of work, i.e., “they were not working on the foundation at the time that the damage occurred.” 2019 U.S. Dist. LEXIS 55256, at *18. The court found, however, that

¹¹ In the past, Tocci has suggested – providing no evidence – that the issues raised by Mr. Cohen occurred after Tocci was terminated from the project. Therefore, Tocci has suggested, the applicable exclusion is not exclusion j, which applies to an insured’s ongoing operations, but exclusion l, which applies to “property damage” to [an insured’s] ‘work’ arising out of it or any part of it *included in the ‘products – completed operations hazard.’*” The reason Tocci prefers exclusion l. is that it contains a narrow exception for work performed by subcontractors. But Tocci’s argument fails, for several reasons. For one thing, exclusion l (and the other exclusions in the policy) can only be reached if the court finds the damages in this case are the result of an “occurrence,” and involve covered “property damage.” For the reasons above, they do not. For another thing, the “products – completed operations hazard” does not apply in circumstances like these, where Tocci was terminated and never completed its work. *Clarendon Am. Ins. Co. v. General Sec. Indem. Co. of Ariz.*, 193 Cal. App. 4th 1311, 1318-1319 (2011). *See also Greystone Multi-Family Bldrs., Inc. v. Gemini Ins. Co.*, No. H-17-921, 2018 U.S. Dist. LEXIS 56770, at *30 (S.D. Tex. Feb. 26, 2018) (“Termination of the contract between TPG and Plaintiff does not render the work on the project complete. Therefore, the court finds the products-completed operations hazard inapplicable in this case.”).

“the scope of the work under contract, as claimed by [the building owner], included rebuilding the entire home. These allegations place the foundation damage within exclusion (j)(5) because it occurred during operations on the ‘particular part of real property’ on which the insured was performing operations.”

The same is true here. Even if the faulty work alleged in the Toll complaint could be viewed as “property damage,” caused by an “occurrence” – which it cannot – the damage was to “that particular part of real property on which [Tocci] or any contractors or subcontractors working directly or indirectly on [Tocci’s] behalf [were] performing operations...”, or, alternatively, “that particular part of any property that [had to] be restored, repaired or replaced because ‘[Tocci’s] work’ was incorrectly performed on it.” Such damage is excluded, because the Admiral Policies are “not intended as a guarantee of [Tocci’s] work.” *Mills*, 2019 U.S. Dist. LEXIS 55256, at * 8.

CONCLUSION

In the end, this is a relatively simple case. Insurance policies do not cover breaches of contract. They cover tort claims, alleging damage to property of third parties. Toll’s complaint against Tocci seeks damages for breach of contract. Moreover – as Tocci itself admits – the complaint does not allege any “resultant damage,” of a kind that might otherwise give rise to coverage under the Policies’ insuring agreements.

Tocci has no answer for the first of these deficiencies. It has tried to address the second by giving Admiral extrinsic evidence – namely, the deposition of Mr. Cohen – and suggesting that there may have been faulty work performed within the Project: for example, a roof leak that resulted in damage to sheetrock in one of the units in one of Tocci’s buildings. This testimony might be relevant if Tocci were seeking coverage under, say, the roofing subcontractor’s policies, for damage to the sheetrock subcontractor’s separate work. But the testimony is of no relevance

to a claim for coverage under the policies Admiral issued to Tocci, as general contractor, covering claims at the Project as a whole. “[Tocci’s] work product, as general contractor, encompassed the entire [structure],” on which both subcontractors were working. *Mello*, 2007 Mass. App. Unpub. LEXIS 683, at *13; *Friel*, 2009 U.S. Dist. LEXIS 121775 at *10 (similar).

In the end, “there is nothing about the general nature or purpose of a comprehensive general liability insurance policy that would lead an insured reasonably to expect that the policy covered a loss of the type involved here, caused by his breach of contract and poor workmanship.” *Bond Bros., Inc. v. Robinson*, 393 Mass. 546, 551-552 (1984). Admiral owes no coverage for the allegations Tocci has tendered. It has no duty to defend Toll’s Amended Complaint.

Respectfully submitted,

Dated April 9, 2020

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants as of April 9, 2021.

/s/ Eric B. Hermanson

Eric B. Hermanson

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ADMIRAL INSURANCE COMPANY,

Plaintiff,

v.

TOCCI BUILDING CORPORATION,
TOCCI RESIDENTIAL LLC and JOHN L.
TOCCI, SR.,

Defendants.

Civ. No. 1:21-cv-10388-PBS

November 5, 2021

**DEFENDANTS' COMBINED MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT
OF DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Respectfully submitted,

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INTRODUCTION

Defendants Tocci Building Corporation (“Tocci Building”), Tocci Residential, LLC (“Tocci Residential”), and John L. Tocci, Sr. (“John Tocci”) (collectively, “Tocci”), respectfully submit this Combined Memorandum of Law in Opposition to Plaintiff Admiral Insurance Company’s (“Admiral”) Motion for Partial Summary Judgment (Doc. 11) and in support of Tocci’s Cross-Motion for Partial Summary Judgment on Count I of Admiral’s Complaint. In the present motion, Admiral seeks a declaration that it has no duty to defend Tocci in an action captioned Toll JM EB Residential Urban Renewal LLC v. Tocci Residential, LLC, Civil Action No. 3:16-cv-0422-PGS-TJB, pending in the United States District Court for the District of New Jersey (the “Toll Action”). Admiral asserts that it has no duty to defend Tocci because the allegations in the Toll Action do not fall within coverage under the general liability insurance policies that Admiral issued to Tocci.

The duty to defend is very broad; it requires an insurer to defend its insured when the allegations of the complaint present a reasonable possibility that the claim falls within coverage. As discussed below, the allegations of the complaint in the Toll Action, coupled with extrinsic facts developed during discovery, clearly allege property damage covered by the Admiral Policies. An insurer can avoid its obligation to defend its insured only if it can show that the underlying claims against the insured are wholly outside coverage afforded by the policy. As discussed below, Admiral cannot meet its heavy burden of establishing that, as a matter of law, there is no possibility that any of the claims against Tocci fall within coverage provided by the Admiral Policies. For these

reasons, Tocci is entitled to judgment in its favor as to Admiral's duty to defend with respect to the Toll Action.

I. RELEVANT FACTUAL BACKGROUND

This coverage dispute concerns three underlying actions arising out of three different construction projects. However, because the present motions concern only the Toll Action, Tocci's recitation of the facts is limited to the Toll Action and the underlying construction project.

A. The Admiral Insurance Policies

Tocci is the Named Insured on several commercial general liability policies issued by Admiral, each providing liability limits of \$1 million per occurrence and \$2 million in the aggregate. The Admiral Policies insure against third-party property damage claims on an "occurrence" basis arising out of Tocci's operations nationwide (collectively, the "Admiral Policies"¹). "Occurrence" is defined by the Admiral Policies as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."²

Under the Insuring Agreement of the Admiral Policies, Admiral is obligated to defend Tocci against any "suit" seeking damages because of "property damage."

Admiral is also obligated to indemnify Tocci for "those sums that [Tocci] becomes legally

¹ See Defendants' Statement of Undisputed Material Facts In Support of Cross-Motion for Partial Summary Judgment ("SOMF") at ¶¶ 1-2. The Admiral Policies consist of the following: 1) Policy No. CA00001708-01, effective October 21, 2012 to October 21, 2013; 2) Policy No. CA00001708-02, effective October 21, 2013 to October 21, 2014; 3) Policy No. CA00001708-03, effective October 21, 2014 to October 21, 2015; 4) Policy No. CA00001708-04, effective October 21, 2015 to October 21, 2016; 5) Policy No. CA00001708-05, effective October 21, 2016 to October 21, 2017; 6) Policy No. CA00001708-06, effective October 21, 2017 to October 21, 2018; 7) Policy No. CA00001708-07, effective October 21, 2018 to October 21, 2019; and 8) Policy No. CA00001708-08, effective October 21, 2019 to October 21, 2020. See McCall Dec., Exs. 1-8.

² SOMF at ¶ 3; McCall Dec., Ex. 1, Form CG 00 01 12 07, p. 14.

obligated to pay as damages because of . . . ‘property damage’ . . .”³ The Admiral Policies define “property damage,” in relevant part, as: “physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it.”⁴

B. The Golden Triangle Project and Toll Action

On December 27, 2013, Toll JM EB Residential Urban Renewal LLC (“Toll”) hired Tocci Residential to serve as the construction manager for the construction of a luxury apartment complex located in East Brunswick, New Jersey (the “Golden Triangle Project”).⁵ As construction manager, Tocci Residential was responsible for hiring and overseeing various subcontractors to perform work on the Golden Triangle Project.⁶

Over the course of the Golden Triangle Project, defective work performed by several of Tocci’s subcontractors allegedly resulted in property damage to other non-defective portions of the Project. For example, soil settlement caused damage to underground pipes, concrete slab and framing.⁷ In June 2015, Tocci retained a geotechnical consultant, GZA GeoEnvironmental, Inc. (“GZA”) to assess the cause of and resulting damage from the soil settlement.⁸ On September 15, 2015, GZA issued an Opinion Letter with its findings. In the Opinion Letter, GZA noted that “[s]ettlement of

³ SOMF at ¶ 4; McCall Dec., Ex. 1, Form CG 00 01 12 07, p. 1.

⁴ SOMF at ¶ 5; McCall Dec., Ex. 1, Form CG 00 01 12 07, p. 15.

⁵ SOMF at ¶ 6; see also Exhibit 2 to Declaration of Elizabeth Onslager in Support of Admiral’s Motion for Partial Summary Judgment (“Onslager Dec.”).

⁶ SOMF at ¶ 7.

⁷ SOMF at ¶ 8.

⁸ SOMF at ¶ 9.

these soils caused shearing, damaging, and breaks of below slab plumbing piping.”⁹
Photos of the damaged plumbing piping were also included in the Opinion Letter.¹⁰

On July 21, 2016, Toll commenced the Toll Action against Tocci Residential alleging that Tocci Residential’s poor management of the work resulted in various instances of defective workmanship and property damage to various portions of the Golden Triangle Project, resulting in significant delays.¹¹ Specifically, Toll alleges that the Golden Triangle Project “was affected by serious workmanship issues, including, but not limited to, Tocci’s failure to properly install the building envelope due to deficient installation of the primary weather resistive barrier (Zip System) and deficient installation and sealing of the windows in all five buildings constructed at the time.”¹²

Toll also alleges that “in Building 1, Building 2A, and Building 4, Tocci failed to properly backfill with and manage and compact the soils onsite, including the back filling of basement walls with the proper structural bracing, in accordance with the recommendations of the geotechnical engineer of record, leading to slab settlement.”¹³ Toll further alleges that “Stop Work Orders were issued in August 2015 for portions of Buildings 2A and 4 due to settlement and damaged underground utilities.”¹⁴ Toll further alleges that MetroCorp Plumbing, Inc., the subcontractor hired by Tocci to perform

⁹ SOMF at ¶ 10; see also Exhibit A to Affidavit of Glynda Wehring in Support of Defendants’ Opposition to Admiral’s Motion for Partial Summary Judgment and in Support of Defendants’ Cross-Motion for Partial Summary Judgment (“Wehring Aff.”) at p. 5.

¹⁰ SOMF at ¶ 11; Ex. A, Wehring Aff., at p. 25.

¹¹ SOMF at ¶ 12; Ex. A to Admiral’s Memorandum of Law in Support of its Motion for Partial Summary Judgment (“Admiral’s MOL”).

¹² SOMF at ¶ 15; Ex. B to Admiral’s MOL at ¶ 23.

¹³ SOMF at ¶ 16; Ex. B to Admiral’s MOL at ¶ 24.

¹⁴ SOMF at ¶ 17; Ex. B to Admiral’s MOL at ¶ 25.

plumbing work on the Project, notified Tocci that “the piping systems in the Project became distorted, twisted and broke.”¹⁵

Finally, Toll alleges that Tocci “failed to properly manage the Work to ensure that it was free from defects,” including:

- Wire mesh was not installed correctly in the concrete slabs;
- Secondary electrical conduit discharging water onto electrical equipment;
- Unit balcony membrane was not installed;
- RC channels were installed upside down;
- Two hour shaft in Building 1 incorrectly installed on all four floors;
- Duct not installed on Building 2; and
- Temporary weather protection was not installed. ¹⁶

During the course of preliminary discovery in the Toll Action,¹⁷ it was revealed that the defective work by Tocci Residential’s subcontractors allegedly resulted in various instances of property damage to the Golden Triangle Project, including but not limited to:

- A roof leak resulted in damage to sheetrock in Unit 3302 of Building 3;
- Inadequate sheathing resulted in water entering the building, causing mold formation that required remediation;
- Soil settlement resulted in damage to underground pipes; and
- Soil settlement resulted in damage to the concrete slab and wood framing.¹⁸

For example, when asked what physical damage was caused by the soil settlement, Toll’s corporate designee as to damages testified that “there was concrete slab that was damaged. The settlement itself is evident by the fact that the concrete slab had

¹⁵ SOMF at ¶ 18; Ex. B to Admiral’s MOL at ¶ 81.

¹⁶ SOMF at ¶ 19; Ex. B to Admiral’s MOL at ¶ 31.

¹⁷ In its Memorandum of Law, Admiral asserts that the parties to the Toll Action engaged in “three years of detailed discovery” before it was put on notice of the Toll Action. See Admiral MOL at p. 15. Admiral overexaggerates the status of the Toll Action. To be clear, the Court in the Toll Action ordered Tocci and Toll to engage in limited discovery related to Toll’s claimed damages. Additionally, due to the Covid-19 pandemic, the proceedings were delayed for approximately one year. At the time of this filing, Toll and Tocci are still engaged in the preliminary phase of discovery.

¹⁸ SOMF at ¶ 20; Ex. 5, Onslager Dec.

dropped. That is damage. There was damage to wood framing. There was damage to pipes. There was other damage that occurred as a function of the settlement, including the fact that we had to, to my recollection, take out windows.”¹⁹

C. Tocci’s Tender to Admiral and Admiral’s Denial of Coverage

In January 2020, Tocci Residential tendered the Toll Action to Admiral, seeking defense and indemnity coverage under the Admiral Policies.²⁰ By letter dated March 17, 2020, Admiral denied coverage for Tocci Residential because the Toll Action “does not include any allegations that Tocci is liable for property damage caused by an occurrence, as those terms are defined” in the Admiral Policies.²¹

By letter dated May 7, 2020, Tocci’s defense counsel responded to Admiral’s denial, and provided excerpts of the relevant deposition testimony cited above to rebut Admiral’s position that the Toll Action does not involve allegations of property damage.²² Tocci’s counsel reiterated Tocci’s demand for coverage because, under New Jersey law, defective construction resulting in property damage is a covered occurrence.²³ By letter dated June 9, 2020, Admiral, relying on New Jersey law, reiterated its bases for denial.²⁴

On January 8, 2021, Admiral, recognizing that Tocci has a plausible claim for coverage under New Jersey law, issued a revised coverage position and offered Tocci a provisional defense in the Toll Action.²⁵ Shortly thereafter, Admiral commenced this

¹⁹ SOMF at ¶ 20; Ex. 5, Onslager Dec. at p. 13 (265:6-14).

²⁰ SOMF at ¶ 22; Ex. 1, Onslager Dec.

²¹ SOMF at ¶ 23; Ex. 4, Onslager Dec.

²² SOMF at ¶ 24; Ex. 5, Onslager Dec.

²³ SOMF at ¶ 25; Ex. 5, Onslager Dec.

²⁴ SOMF at ¶ 26; Ex. 6, Onslager Dec.

²⁵ SOMF at ¶ 27; Ex. 11, Onslager Dec.

action, seeking a determination that it has no obligation to defend or indemnify Tocci in the Toll Action under Massachusetts law.

As discussed below, Admiral's denial is unsupported by the facts and governing law. Admiral has a duty to defend Tocci Residential in the Toll Action because both the allegations of the Complaint filed in the Toll Action and related discovery allege that Tocci is liable for "property damage" caused by an "occurrence," as those terms are defined in the Admiral Policies. Further, exclusions j(5) and j(6) do not apply because the property damage did not occur during Tocci's or its subcontractor's ongoing operations. Accordingly, because there is a reasonable possibility of coverage under the Admiral Policies, Admiral must defend Tocci against the Toll Action.

II. LAW AND ARGUMENT

A. Summary Judgment Standard

To prevail on a motion for summary judgment, the moving party must show "that there is no genuine dispute as to any material fact" and that the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To succeed on a motion for summary judgment, "the moving party must demonstrate that there is an 'absence of evidence supporting the non-moving party's case.'" Metropolitan Prop. and Cas. Ins. Co. v. Devlin, 95 F.Supp.3d 278, 280 (D. Mass. 2015) (quoting Sands v. Ridefilm Corp., 212 F.3d 657, 660 (1st Cir. 2000)). The court "must view 'the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor.'" HDI-Gerling America Ins. Co. v. Navigators Ins. Co., 199 F. Supp.3d 422, 435 (D. Mass. 2016) (quoting Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009)).

B. Choice of Law

At the outset, this Court must decide what law applies to the current motions for partial summary judgment. Admiral asserts that Massachusetts law governs this dispute, whereas Tocci maintains that New Jersey law should apply. In cases where the federal court is exercising diversity jurisdiction, “[t]he question of which state’s law applies is resolved using the choice of law analysis of the forum state,” which, in this case, is Massachusetts. Reicher v. Berkshire Life Ins. Co. of Am., 360 F.3d 1, 4 (1st Cir. 2004). See also Klaxon v. Stentor Elec. Mfg., 313 U.S. 487, 496 (1941). “The Massachusetts Supreme Judicial Court has decided ‘not to tie Massachusetts conflicts law to any specific choice-of-law doctrine, but seek[s] instead a functional choice-of-law approach that responds to the interests of the parties, the States involved, and the interstate system as a whole,’ and looks to the Restatement (Second) of Conflict of Laws (1971) as an ‘obvious source of guidance.’” Fire Ins. Exchange v. Pring-Wilson, 778 F.Supp.2d 116,125 (D. Mass. 2011) (quoting Bushkin Assocs., Inc. v. Raytheon Co., 393 Mass. 622, 631-32 (1985)).

Under this approach, “the court ‘applies the substantive law of the state which has the more significant relationship to the transaction in litigation’ and considers a myriad of factors. The analytical framework involves ‘section 6(2) of the Restatement [which] sets out a general conflicts analysis for all legal disputes, section 188 [which] provides a generic contract analysis.’” Jenny B. Realty, LLC v. Danielson, LLC, 456 F.Supp.3d 307, 314 (D. Mass. 2020) (quoting Bergin v. Dartmouth Pharm., Inc., 326 F.Supp.2d 179, 181 (D. Mass. 2004)). The contacts to be taken into account in applying the principles of Section 6 to determine the applicable choice of law include:

- (a) the place of contracting;
- (b) the place of negotiation of the contract;
- (c) the place of performance;
- (d) the location of the subject matter of the contract; and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

See Restatement (Second) of Conflict of Laws § 188 (1971).

Although Tocci Residential is domiciled in Massachusetts and the Admiral Policies were issued in Massachusetts, those factors alone are not determinative. In terms of the place of contracting, the Admiral Policies were countersigned by Admiral in New Jersey, where its corporate headquarters and Northeast Regional Branch Office are located.²⁶ With respect to the place of performance and location of the subject matter of the contract, the Admiral Policies cover Tocci's operations throughout the United States, not just Massachusetts. The Golden Triangle Project is located in New Jersey, and the Toll Action is currently pending in the United States District Court for the District of New Jersey. Accordingly, the weight of the above factors favors application of New Jersey law.²⁷

C. The Duty to Defend and Extrinsic Evidence

Under New Jersey law, the duty to defend is extremely broad. New Jersey courts have held that if the complaint "comprehends an injury which may be within the policy, a duty to defend will be found. . . In other words, potentially coverable claims require a defense." Abouzaid v. Mansard Gardens Assocs. LLC, 207 N.J. 67, 80 (2011) (internal citations and quotation marks omitted). The duty to defend "is determined by whether a covered claim is made, not by how well it is made. A third party does not write a

²⁶ See Exs. 1-8, McCall Dec., at Declarations Page.

²⁷ However, even if this Court were to apply Massachusetts law, Admiral nonetheless owes Tocci a defense in the Toll Action. For the sake of completeness, Tocci will address the coverage issues herein under both New Jersey and Massachusetts law.

complaint to apprise the defendant's insurer of potential coverage; fundamentally, a complaint need only apprise the opposing party of disputed claims and issues." Voorhees v. Preferred Mutual Ins. Co., 128 N.J. 165, 174 (1992).

In addition to the allegations of the complaint and policy language, an insurer must also consider facts that are readily available when determining whether it has a duty to defend. Under New Jersey law, insureds may rely on extrinsic evidence to establish that the insurer has a duty to defend. New Jersey courts have recognized that because "coverage and defense benefits [are] determined by the nature of the claim [and not] not by the fortuity of how the plaintiff, a third party, chooses to phrase the complaint," "the analysis is not necessarily limited to the facts asserted in the complaint." Abouzaid, 207 N.J. at 81; Jolley v. Marquess, 393 N.J.Super. 255, 271 (App. Div. 2007). See also SL Indus., Inc. v. Am. Motorists Ins. Co., 128 N.J. 188, 198-199 (1992) ("[F]acts indicating potential coverage that arise during the resolution of the underlying dispute . . . may trigger the duty to defend. . . To allow the insurance company to construct a formal fortress of the . . . pleadings and to retreat behind its walls, thereby successfully ignoring true but unpleaded facts within its knowledge that require it, under the insurance policy, to conduct the putative insured's defense, would not be fair.") (internal quotations and citation omitted).²⁸

²⁸ Similarly, "[l]ike most other jurisdictions, Massachusetts imposes a broad duty to defend on insurers: 'it is axiomatic that an insurance company's duty to defend is broader than its duty to indemnify.'" Open Software Foundation, Inc. v. U.S. Fidelity and Guar. Co., 307 F.3d 11, 14 (1st Cir. 2002) (quoting Boston Symphony Orchestra v. Commercial Union Ins. Co., 406 Mass. 7, 545 N.E.2d 1156, 1158 (1989)). Massachusetts courts recognize that "[t]he legal standards governing an insurer's duty to defend are slightly different than those conventionally applied to a motion for summary judgment. An insurer's duty to defend is determined by examining (1) the insurance policy; (2) the facts alleged against the insured; and (3) facts known or readily knowable by the insurer." Metropolitan Prop. and Cas. Ins. Co. v. Devlin, 95 F.Supp.3d 278, 281 (D. Mass. 2015). See also Desrosiers v. Royal Ins. Co., 468 N.E.2d 625 (1984). Likewise, Massachusetts courts allow insureds to rely on extrinsic evidence to establish the duty to defend: "the insurer must accept tender of a defense if the complaints state or adumbrate a covered claim

Admiral insists that the Toll Action does not allege any property damage. Property damage is defined by the Admiral Policies as “physical injury to tangible property, including all resulting loss of use of that property.”²⁹ According to Admiral, the Toll Action only alleges economic losses based on Tocci Residential’s alleged breach of its contractual duties as construction manager for the Project. Admiral’s view is short-sighted and self-serving. Notably, the New Jersey Supreme Court has explicitly rejected the notion that a breach of contract claim cannot give rise to an “occurrence” under a general liability policy. See Cypress Pt. Condo. Ass’n. v. Adria Towers, LLC, 226 N.J. 403, 428-29 (2016). Regardless, the duty to defend is not determined by the titles of the causes of action alone. Rather, Admiral must look to the actual substance of the allegations to determine whether any of the claims may fall within coverage.

To illustrate, Paragraph 19 of the Toll Action alleges that Stop Orders were issued for portions of the work “due to settlement and *damaged underground utilities*.”³⁰ Additionally, the Toll Action alleges that Tocci was notified that “piping systems in the Project became distorted, twisted and broke.”³¹ Further, the Toll Action alleges various instances of defective and deficient work on the Golden Triangle Project, from which reasonable inferences can be drawn that the defective and/or deficient work resulted in property damage to other non-defective portions of the work.³² These allegations alone

when read in light of extrinsic facts bearing some relevance to the allegations that the plaintiff did not specifically include in the complaint, but were nonetheless known or readily knowable by the insurer when the defense was tendered.” Open Software, 307 F.3d at 14-15. In other words, “the process is one of envisaging what kinds of losses may be proved as lying within the range of allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy.” Continental Cas. Co. v. Gilbane Bldg. Co., 391 Mass. 143, 461 N.E.2d 209, 212 (1984)) (citation omitted).

²⁹ SOMF at ¶ 5; McCall Dec., Ex. 1, Form CG 00 01 12 07, p. 15.

³⁰ SOMF at ¶ 17; Ex. B to Admiral MOL at ¶ 25.

³¹ SOMF at ¶ 18; Ex. B to Admiral MOL at ¶ 81.

³² SOMF at ¶¶ 15-16; 20; Ex. B to Admiral MOL at ¶¶ 23-24; 31.

are sufficient to trigger Admiral's duty to defend because the insured need only show that at least one claim is covered to trigger the insurer's duty to defend against the entire action. See, e.g., Conduit v. Hartford Cas. Ins. Co., 329 N.J. Super. 91, 105 (2000), *cert. denied*, 165 N.J. 135 (2000) ("if there are multiple causes of action alleged, only one of which may be covered, the duty to defend will continue until every covered claim is eliminated.") (citations omitted); Flomerfelt v. Cardiello, 202 N.J. 432, 447 (2010) ("in circumstances in which the underlying coverage questions cannot be decided from the face of the complaint, the insurer is obligated to provide a defense until all potentially covered claims are resolved.").³³

Although the complaint in the Toll Action alone is sufficient to trigger Admiral's duty to defend, both the GZA Opinion Letter and deposition testimony elicited in the Toll Action eliminates any doubt that the Toll Action involves covered property damage. As Admiral points out, extrinsic facts are not to be treated as independent grounds for a duty to defend. However, "extrinsic facts work in tandem with the 'adumbrate' standard to add substance and meaning to skeletal claims only adumbrated in the complaint." Open Software, 307 F.3d at 16. As discussed above, the Toll Action identifies various instances of defective and deficient work. The GZA Opinion Letter and deposition testimony "adds substance" to those allegations by identifying resultant property damage caused by the defective/deficient work of Tocci's subcontractors. Specifically,

³³ Likewise, "[i]n Massachusetts, as elsewhere, an insurer must defend the entire lawsuit if it has a duty to defend any of the underlying counts in the complaint." Liberty Mutual Ins. Co. v. Metropolitan Life Ins. Co., 260 F.3d 54, 63 (1st Cir. 2001). See also Mt. Airy Ins. Co. v. Greenbaum, 127 F.3d 15, 19 (1st Cir. 1997) ("under Massachusetts law, if an insurer has a duty to defend one count of a complaint, it must defend them all.") (citations omitted); Scottsdale Ins. Co. v. United Rentals (N. Am.), Inc., 152 F.Supp.3d 15, 20 (D. Mass. 2015) ("Once the insured party's ultimate burden regarding coverage is satisfied with regard to at least one claim against the insured, the insurer has a duty to defend generally... if [the claimant] shows that the allegations against it could give rise to a covered claim and if [the insurer] cannot show that such a claim would be expressly excluded, then [the insurer] owes [the claimant] a full defense.").

the Toll Action alleges that the primary weather resistive barrier (Zip System) was not properly installed.³⁴ According to Toll's corporate representative, the inadequate sheathing resulted in water entering the building, causing mold formation that required remediation.³⁵

In addition, the Toll Action alleges that "in Building 1, Building 2A, and Building 4, Tocci failed to properly backfill with and manage and compact the soils onsite, including the back filling of basement walls with the proper structural bracing, in accordance with the recommendations of the geotechnical engineer of record, leading to slab settlement."³⁶ Toll further alleges that "Stop Work Orders were issued in August 2015 for portions of Buildings 2A and 4 due to settlement and damaged underground utilities."³⁷ The GZA Opinion Letter confirms that the settlement "caused shearing, damaging, and breaks of below slab plumbing piping."³⁸ Likewise, Toll's corporate representative confirmed that the soil settlement caused damage to underground pipes, the concrete slab, and wood framing.³⁹

Taken together, the allegations of the Toll Action and deposition testimony elicited from Toll's corporate representative clearly demonstrate that at least a portion of Toll's claims involve property damage, as defined by the Admiral policies. Admiral cannot ignore facts developed in the underlying litigation that clearly trigger its duty to defend. See SL Indus., Inc. v. Am. Motorists Ins. Co., 128 N.J. 188, 198-199 (1992); see also Boston Symphony, 545 N.E.2d at 1160 ("[A]n insurer must give consideration

³⁴ SOMF at ¶ 15; Ex. B to Admiral MOL at ¶ 23.

³⁵ SOMF at ¶ 20; Ex. 5, Onslager Dec. at p. 8 (25:8-26:18).

³⁶ SOMF at ¶ 16; Ex. B. to Admiral MOL at ¶ 24.

³⁷ SOMF at ¶ 17; Ex. B. to Admiral MOL at ¶ 25.

³⁸ SOMF at ¶ 10; Ex. A to Wehring Aff. at p. 5.

³⁹ SOMF at ¶ 20; Ex. 5, Onslager Dec. at p. 13 (264:24-266:20).

to facts outside the complaint when it considers the allegations in the complaint to determine if coverage exists”). Accordingly, Admiral has a present duty to defend Tocci against the Toll Action.

D. Admiral Must Defend Tocci because the Toll Action Alleges “Property Damage” Caused by an Occurrence

As discussed above, the allegations of the Toll Action and supporting extrinsic evidence demonstrate that at least some of Toll’s claims against Tocci involve “property damage” as defined by the Admiral Policies. Notwithstanding this, Admiral maintains that it has no duty to defend Tocci because allegations of “defective workmanship” do not constitute a covered “occurrence” of “property damage” under the Admiral Policies. However, to the extent defective workmanship is an occurrence, Admiral further asserts that because Tocci was the construction manager for the Project, there is no coverage for any alleged property damage because the entire Project constitutes Tocci’s “work.” Admiral’s position is based on outdated policy language and contrary to present New Jersey and Massachusetts law.

Until recently, the seminal case on whether defective workmanship constitutes an occurrence was Weedo v. Stone-E-Brick, Inc., 81 N.J. 233 (1979), where the New Jersey Supreme Court was tasked with addressing the “business risk” exclusions in the 1973 version of the Insurance Services Office Inc.’s (“ISO”) commercial general liability insurance coverage form. Although the decision was initially focused on the exclusions in the policy form, the decision was adopted and expanded in many jurisdictions, with courts holding that defective workmanship could never constitute an occurrence

because any resulting damage was foreseeable and not accidental.⁴⁰ In 1986, ISO issued a new coverage form with significant changes from the 1973 version. These changes led the New Jersey Supreme Court to overrule Weedo in Cypress Pt. Condo. Ass'n. v. Adria Towers, LLC, 226 N.J. 403 (2016):

Since 1966, the ISO has promulgated two standard form CGL policies, one in 1973 and another in 1986. As the Appellate Division aptly noted, there are important differences between the 1973 and 1986 standard form CGL policies which are of particular importance in the instant dispute. First, the 1973 ISO policy defines “occurrence” as “an accident . . . which results in . . . property damage neither expected nor intended from the standpoint of the insured,” while the 1986 ISO policy defines “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Thus, “property damage” is not directly included in the policy’s definition of “occurrence.” Second, and most importantly, the 1986 ISO policy includes a significant exception to an exclusion not contained in the 1973 ISO policy.

The exception in the 1986 ISO CGL policy, which has never been directly addressed by this Court, is found under the “your work” exclusion clause of the policy. As outlined above, the 1986 standard form CGL policy eliminates coverage for “property damage” to “your work” arising out of it or any part of it . . . However, the policy’s exception to this exclusion, included in the form by the ISO for the first time in 1986, provides that the “your work” exclusion “does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

In creating the subcontractor exception to the “your work” exclusion, it has been noted that the ISO was motivated by an agreement between policy holders and insurers that ***the CGL policy should provide coverage for defective construction claims so long as the allegedly defective work had been performed by a subcontractor rather than the policyholder itself.*** This resulted both because of the demands of the policyholder community (which wanted this sort of coverage) and the view of insurers that the CGL was a more attractive product that could be better sold if it contained this coverage.

⁴⁰ See Travelers Property Casualty Co. of Am. v. USA Container Co., Inc., 686 Fed. Appx. 105, 109 n. 7 (3rd Cir. 2017) (explaining that the New Jersey “Appellate Division later extended Weedo by applying the business risk logic of the exclusions at issue in Weedo to the first-order questions of whether there is an occurrence,” but the New Jersey Supreme Court subsequently “rejected this extension, cabining Weedo to questions pertaining to exclusions and not to ‘the question of initial coverage.’”) (quoting Cypress Point, 226 N.J. at 428).

Id. at 417-18 (internal quotations and citations omitted; emphasis added). While the subcontractor exception does not create coverage, it clearly informs policyholders' and the courts' understanding of an "occurrence," as defined by the 1986 ISO coverage form. As the Cypress Point Court noted, "it is very difficult for a general contractor to control the quality of a subcontractor's work. If the parties to the insurance contract did not intend a subcontractor's faulty workmanship causing consequential damages to constitute 'property damage' and an 'occurrence,' as those terms are defined in the policy, then it begs the question as to why there is a subcontractor's exception." Id. at 381. See also Belmont Condo. Ass'n, Inc. v. Arrowpoint Cap. Corp., No. A-4187-12T4, 2015 WL 4416582 (N.J. Super. Ct. App. Div. July 21, 2015).

The law is clear in New Jersey that insurance policies cannot be interpreted in a way that would render coverage meaningless.⁴¹ See, e.g., Cannavo v. Liberty Mut. Ins. Co., No. A-6458-05T1, 2007 WL 2990109, at *4 (App. Div. Oct. 16, 2007) (explaining that "a contract should not be interpreted in a fashion that renders its undertakings meaningless" – a principle also "applied in connection with the construction of insurance policy exclusions that could serve to make coverage undertakings illusory") (citations omitted). Further, "because insurance policies are adhesion contracts, courts must assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness. . . Moreover, if an insured's 'reasonable expectations' contravene

⁴¹ The law is the same in Massachusetts. See, e.g., Lexington Ins. Co. v. All Regions Chemical Labs, Inc., 647 N.E.2d 399, 400 (1995) ("A contract should be construed in a way that no word or phrase is made meaningless by interpreting another word or phrase, because the interpretation should favor a valid and enforceable contract or lease rather than one of no force and effect") (citation omitted); Aquino v. United Property & Cas. Co., 143 N.E.3d 379, 395 (2020) (explaining that courts must "construe policies as a whole" and "[i]n so doing, the provisions of the policy concerning different coverage types should be read together in a way that does not render either coverage meaningless") (citations omitted).

the plain meaning of a policy, even its plain meaning can be overcome.” Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992) (citations omitted).

Based on the foregoing, the New Jersey Supreme Court held that in situations such as this where a general contractor/construction manager’s subcontractor’s defective work causes unexpected property damage to otherwise non-defective portions of the insured’s work, that damage is a covered “occurrence.” Consequential damage resulting from defective work constitutes an “accident” and, therefore, falls within the definition of an “occurrence.” Here, Tocci did not self-perform any work on the Project. Although Tocci was responsible for overseeing the work of its subcontractors, it did not control the means and methods by which the subcontractors performed their work. Under Admiral’s position, there would never be coverage for Tocci, as a construction manager, for property damage to the Project. Such a position is not only nonsensical, but it contravenes Tocci’s “reasonable expectations” as to what coverage is available under the Admiral Policies. Further, Admiral’s position does not make sense when considering the subcontractor exception for completed operations property damage. As noted by the Cypress Court, why would such an exception even exist if all work on the Project is considered Tocci’s work, and therefore not covered by the Admiral Policies?

It is worth noting that many of the Massachusetts decisions cited by Admiral, holding that defective workmanship does not constitute an occurrence, rely in part on the outdated reasoning of Weedo. However, more recent Massachusetts decisions that do not rely on Weedo have found that while defective workmanship itself may not be an “occurrence,” resultant “property damage” has been deemed to be an occurrence.⁴² As

⁴² See Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Mod. Cont’l Const. Co., No. 082015BLS1, 2009 WL 6376180, at *3 (Mass. Super. Dec. 11, 2009) (“Faulty workmanship, alone, is not an ‘occurrence’ as

discussed above, the Toll Action is not limited to damages to the allegedly defective work itself, but rather includes damages for resulting property damage to non-defective work, as confirmed by the deposition testimony of Toll's representative. Accordingly, because the Toll Action alleges property damage caused by an occurrence, Admiral must defend Tocci.

E. Exclusions j(5) and j(6) do not apply to the Toll Action

Notwithstanding the foregoing, Admiral maintains that there is no coverage for Tocci under the "business risk" exclusions in the Admiral Policies. Specifically, Admiral relies on exclusions j(5) and j(6) in the Admiral Policies, which bar coverage for:

5. that particular part of 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.
6. that particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.⁴³

New Jersey law is clear that "[w]hen an insurance carrier puts in issue its coverage of a loss under a contract of insurance by relying on an exclusionary clause, it bears a substantial burden of demonstrating that the loss falls outside the scope of coverage." United Rental Equip. Co. v. Aetna Life & Cas. Inc., 74 N.J. 92, 98 (1977). See also Flomerfelt v. Cardiello, 202 N.J. 432, 442 (2010) ("In general, insurance policy

defined by the ... policy; nor does the cost to repair the defective work constitute property damage.' . . . '[F]aulty workmanship [that] causes an accident,' however, may amount to an occurrence."). See also All Am. Ins. Co. v. Lampasona Concrete Corp., 120 N.E.3d 1258 (2019) (holding that subcontractor's alleged puncturing of vapor barrier and resulting migration of water through concrete slab was an "occurrence" because subcontractor caused damage to property other than its own work). Further, the cases cited by Admiral are inapposite because they are limited to damages for faulty workmanship and do not involve resultant property damage. To illustrate, in Friel Luxury Home Const., Inc. v. Probuilders Specialty Ins. Co. RRG, Civil Action No. 09-cv-11036-DPW, 2009 WL 5227893 (D. Mass. Dec. 22, 2009), the District Court concluded that the underlying action did not allege property damage caused by an occurrence because all of the allegations arose out of the insured's defective construction work, and there were no allegations that an "accident" occurred or caused property damage. Id. at *5. Likewise, in Am. Home Assur. Co. v. AGM Marine Contractors, Inc., 467 F.3d 810 (1st Cir. 2006), the damage at issue was limited to the insured's own work and there was no resulting property damage.

⁴³ Ex. 1, McCall Dec., Form CG 00 01 12 07, p. 4-5.

exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion. As a result, exclusions are ordinarily strictly construed against the insurer.”) (quotations and citations omitted).⁴⁴

Admiral’s reliance on these exclusions is misplaced. First, as to exclusion j(5), the clear language of the exclusion prevents its application here. The j(5) exclusion “applies to ‘ongoing operations,’ meaning it excludes coverage for damage to property the insured is working on at the time the property damage occurs. . . the j(5) exclusion is written in the present tense – it applies to property on which the insured ‘is performing’ operations. The use of the present tense [signifies] . . . that the exclusion applies to damages that occur while the insured is working on the project.” Ohio Cas. Ins. Co. v. Island Pool & Spa, Inc., 12 A.3d 719, 728 (App. Div. 2011) (quoting 3 Jeffrey E. Thomas, *New Appleman on Insurance Law, Library Edition* § 18.03 [10][h] (2010)). In order for j(5) to apply, the following three questions must be answered in the affirmative:

- (1) is the claim for damage to “real property”?
- (2) was the insured, or someone working on behalf of the insured, performing operations on “that particular part” of the property that was damaged; and
- (3) did the damage occur while the operations were being performed?

Id. (citing *Appleman*). Here, there are no allegations that any of the alleged property damage occurred while Tocci or its subcontractors were actively working on a particular part of the Project. Accordingly, exclusion j(5) does not apply.

Exclusion j(6) is likewise inapplicable because Tocci is not seeking coverage for the costs to repair and replace the defective work performed by its subcontractors.

⁴⁴ The law is the same in Massachusetts. See, e.g., John Beaudette, Inc. v. Sentry Ins. A Mut. Co., 94 F.Supp.2d 77, 134-35 (D. Mass. 1999) (“Once an insured establishes that a claim comes within the terms of coverage, the insurer must demonstrate “the applicability of any exclusion.”) (quoting Dryden Oil Co. of New England, Inc. v. Travelers Indemnity Co., 91 F.3d 278, 282 (1stCir. 1996). See also Camp Dresser & McKee, Inc. v. Home Insurance Co., 568 N.E.2d 631, 635 (1991) (holding that exclusions are to be “strictly construed against the insurer so as not to defeat any intended coverage or diminish the protection purchased.”).

Rather, Tocci seeks coverage for resultant property damage caused by its subcontractors' defective work. For example, Tocci seeks coverage for the alleged water damage to interior sheetrock caused by a roof leak. While the costs to repair and replace the defective roof may not be covered, the resulting water damage is covered. Likewise, the damaged concrete slab and underground pipes are covered because it is property damage that resulted from the soil settlement.

The burden is on Admiral to show that the allegations of the Toll Action are wholly excluded by exclusions j(5) and j(6). Admiral has not met its heavy burden, and accordingly, Admiral must defend Tocci against the entire Toll Action.

III. **CONCLUSION**

For all of the foregoing reasons, Tocci respectfully requests that this Court deny Admiral's motion for partial summary judgment and grant Tocci's cross-motion for partial summary judgment on Admiral's duty to defend Tocci in the Toll Action.

Respectfully submitted,

/s/ Jeffrey J. Vita

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants as of November 5, 2021.

/s/ Jeffrey J. Vita _____
Jeffrey J. Vita

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CLOSED

**United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:21-cv-10388-PBS**

Admiral Insurance Company v. Tocci Building Corporation
et al
Assigned to: Judge Patti B. Saris
Cause: 28:2201 Declaratory Judgment

Date Filed: 03/05/2021
Date Terminated: 05/09/2022
Jury Demand: Defendant
Nature of Suit: 110 Insurance
Jurisdiction: Diversity

Date Filed	#	Docket Text
03/05/2021	1	COMPLAINT against All Defendants Filing fee: \$ 402, receipt number 0101-8668038 (Fee Status: Filing Fee paid), filed by Admiral Insurance Company. (Attachments: # 1 Civil Cover Sheet, # 2 Category Form)(Hermanson, Eric) (Entered: 03/05/2021)
03/05/2021	2	CORPORATE DISCLOSURE STATEMENT by Admiral Insurance Company identifying Corporate Parent W.R. Berkley Corporation for Admiral Insurance Company.. (Hermanson, Eric) (Entered: 03/05/2021)
03/08/2021	3	ELECTRONIC NOTICE of Case Assignment. Judge Patti B. Saris assigned to case. If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Magistrate Judge Donald L. Cabell. (Finn, Mary) (Entered: 03/08/2021)
03/08/2021	4	Summons Issued as to All Defendants. Counsel receiving this notice electronically should download this summons, complete one for each defendant and serve it in accordance with Fed.R.Civ.P. 4 and LR 4.1. Summons will be mailed to plaintiff(s) not receiving notice electronically for completion of service. (Pacho, Arnold) (Entered: 03/08/2021)
03/19/2021	5	AFFIDAVIT OF SERVICE Executed by Admiral Insurance Company. All Defendants. Acknowledgement filed by Admiral Insurance Company. (Moody, Austin) (Entered: 03/19/2021)
03/19/2021	6	NOTICE of Appearance by Austin D. Moody on behalf of Admiral Insurance Company (Moody, Austin) (Entered: 03/19/2021)
04/08/2021	7	NOTICE of Appearance by Jeffrey J. Vita on behalf of Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr. (Vita, Jeffrey) (Entered: 04/08/2021)
04/08/2021	8	First MOTION for Extension of Time to May 8, 2021 to File Answer by Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr..(Vita,

		Jeffrey) (Entered: 04/08/2021)
04/09/2021	9	Judge Patti B. Saris: ELECTRONIC ORDER entered granting 8 Motion for Extension of Time to Answer re 1 Complaint. Tocci Building Corporation, Tocci Residential LLC and John L. Tocci, Sr. answer due 5/8/2021. (Baker, Casey) (Entered: 04/09/2021)
04/09/2021	10	MOTION for Summary Judgment <i>Motion For Partial Summary Judgment</i> by Admiral Insurance Company.(Hermanson, Eric) (Entered: 04/09/2021)
04/09/2021	11	MEMORANDUM in Support re 10 MOTION for Summary Judgment <i>Motion For Partial Summary Judgment</i> filed by Admiral Insurance Company. (Hermanson, Eric) (Entered: 04/09/2021)
04/09/2021	12	Statement of Material Facts L.R. 56.1 re 10 MOTION for Summary Judgment <i>Motion For Partial Summary Judgment</i> filed by Admiral Insurance Company. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Affidavit of Maureen McCall, # 4 McCall - Exhibit 1, # 5 McCall - Exhibit 2, # 6 McCall - Exhibit 3, # 7 McCall - Exhibit 4, # 8 McCall - Exhibit 5, # 9 McCall - Exhibit 6, # 10 McCall - Exhibit 7, # 11 McCall - Exhibit 8, # 12 McCall - Exhibit 9, # 13 McCall - Exhibit 10, # 14 McCall - Exhibit 11, # 15 McCall - Exhibit 12, # 16 McCall - Exhibit 13, # 17 Affidavit Of Beth Onslagter, # 18 Onslagter - Exhibit 1, # 19 Onslagter - Exhibit 2, # 20 Onslagter - Exhibit 3, # 21 Onslagter - Exhibit 4, # 22 Onslagter - Exhibit 5, # 23 Onslagter - Exhibit 6, # 24 Onslagter - Exhibit 7, # 25 Onslagter - Exhibit 8, # 26 Onslagter - Exhibit 9, # 27 Onslagter - Exhibit 10, # 28 Onslagter - Exhibit 11)(Hermanson, Eric) (Entered: 04/09/2021)
04/09/2021	13	MOTION to Temporarily impound Certain Materials by Admiral Insurance Company. (Attachments: # 1 Affidavit Of Eric B. Hermanson)(Hermanson, Eric) Modified text to reflect the title of the document on 4/13/2021 (Baker, Casey). (Entered: 04/09/2021)
04/13/2021	14	Judge Patti B. Saris: ELECTRONIC ORDER entered granting 13 Motion to Temporarily Impound Certain Materials. Counsel will receive an email within twenty-four (24) hours of this order with instructions for submitting sealed documents for which leave has been granted in accordance with the Local Rules of the U.S. District Court of Massachusetts. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Baker, Casey) (Entered: 04/13/2021)
04/16/2021	16	NOTICE of Appearance by Kerianne E. Kane on behalf of Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr. (Kane, Kerianne) (Entered: 04/16/2021)
04/16/2021	17	MOTION for Protective Order by Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr.. (Attachments: # 1 Affidavit of Kerianne E. Kane)(Kane, Kerianne) (Entered: 04/16/2021)
04/16/2021	18	MEMORANDUM in Support re 17 MOTION for Protective Order filed by Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr..

		(Attachments: # 1 Exhibit Redacted McCall Exhibit 1, # 2 Exhibit Redacted McCall Exhibit 2, # 3 Exhibit Redacted McCall Exhibit 3, # 4 Exhibit Redacted McCall Exhibit 4, # 5 Exhibit Redacted McCall Exhibit 5, # 6 Exhibit Redacted McCall Exhibit 6, # 7 Exhibit Redacted McCall Exhibit 7, # 8 Exhibit Redacted McCall Exhibit 8, # 9 Exhibit Redacted McCall Exhibit 9, # 10 Exhibit Redacted McCall Exhibit 10, # 11 Exhibit Redacted McCall Exhibit 11, # 12 McCall Exhibit 12, # 13 Exhibit Redacted McCall Exhibit 13) (Kane, Kerianne) (Attachments 1 - 13 replaced on 4/27/2021, per 23 Order) (Baker, Casey). (Entered: 04/16/2021)
04/19/2021	19	MOTION to Dismiss by Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr..(Kane, Kerianne) (Entered: 04/19/2021)
04/19/2021	20	MEMORANDUM in Support re 19 MOTION to Dismiss filed by Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr.. (Attachments: # 1 Exhibit A - Complaint, # 2 Exhibit B - DJ Complaint, # 3 Exhibit C -Harleysville DJ Motion to Consolidate)(Kane, Kerianne) (Entered: 04/19/2021)
04/23/2021	21	<p>ELECTRONIC NOTICE Setting Hearing on Motion 19 MOTION to Dismiss , 10 MOTION for Summary Judgment <i>Motion For Partial Summary Judgment</i>, 17 MOTION for Protective Order :</p> <p>This hearing will be conducted by video conference. Counsel of record will receive a video conference invite at the email registered in CM/ECF. If you have technical or compatibility issues with the technology, please notify the session's courtroom deputy as soon as possible.</p> <p>Access to the hearing will be made available to the media and public. In order to gain access to the hearing, you must sign up at the following address: https://forms.mad.uscourts.gov/courtlist.html.</p> <p>For questions regarding access to hearings, you may refer to the Court's general orders and public notices available on www.mad.uscourts.gov or contact media@mad.uscourts.gov.</p> <p>Motion Hearing set for 6/15/2021 09:30 AM in Remote Proceeding : Boston before Judge Patti B. Saris. (Baker, Casey) (Entered: 04/23/2021)</p>
04/23/2021	22	Joint MOTION for Order to For Leave to Refile Redacted Exhibits by Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr.. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 13)(Kane, Kerianne) (Entered: 04/23/2021)
04/27/2021	23	Judge Patti B. Saris: ELECTRONIC ORDER entered re 22 Joint MOTION for Order to For Leave to Refile Redacted Exhibits. "Allowed. The Clerk is directed to replace the Exhibits in docket entry 18 ." (Baker, Casey) (Entered: 04/27/2021)

04/29/2021	24	Joint MOTION for Extension of Time to 6/28/2021 to Extend Briefing Schedule And Reschedule June 15, 2021 Oral Argument by Admiral Insurance Company.(Moody, Austin) (Entered: 04/29/2021)
05/03/2021	25	<p>NOTICE of Hearing.</p> <p>This hearing will be conducted by video conference. Counsel of record will receive a video conference invite at the email registered in CM/ECF. If you have technical or compatibility issues with the technology, please notify the session's courtroom deputy as soon as possible.</p> <p>Access to the hearing will be made available to the media and public. In order to gain access to the hearing, you must sign up at the following address: https://forms.mad.uscourts.gov/courtlist.html.</p> <p>For questions regarding access to hearings, you may refer to the Court's general orders and public notices available on www.mad.uscourts.gov or contact media@mad.uscourts.gov.</p> <p>Scheduling Conference/Status Conference set for 5/10/2021 02:30 PM in Remote Proceeding : Boston before Judge Patti B. Saris. (Baker, Casey) (Entered: 05/03/2021)</p>
05/05/2021	26	Joint MOTION for Leave to File Excess Pages <i>nunc pro tunc</i> by Admiral Insurance Company.(Moody, Austin) (Entered: 05/05/2021)
05/05/2021	27	Judge Patti B. Saris: ELECTRONIC ORDER entered granting 26 Joint MOTION for Leave to File Excess Pages <i>nunc pro tunc</i> . (Baker, Casey) (Entered: 05/05/2021)
05/06/2021	28	JOINT SUBMISSION pursuant to Local Rule 16.1 by Admiral Insurance Company.(Moody, Austin) (Entered: 05/06/2021)
05/06/2021	29	CERTIFICATION pursuant to Local Rule 16.1 by Admiral Insurance Company.(Hermanson, Eric) (Entered: 05/06/2021)
05/06/2021	30	Opposition re 19 MOTION to Dismiss filed by Admiral Insurance Company. (Hermanson, Eric) (Entered: 05/06/2021)
05/06/2021	31	AFFIDAVIT in Opposition re 19 MOTION to Dismiss <i>and in Support Of Admiral's Opposition To Motion To Dismiss</i> filed by Admiral Insurance Company. (Attachments: # 1 Ex. A, # 2 Ex. B, # 3 Ex. C, # 4 Ex. D) (Hermanson, Eric) (Entered: 05/06/2021)
05/07/2021	32	CERTIFICATION pursuant to Local Rule 16.1 . (Vita, Jeffrey) (Entered: 05/07/2021)
05/10/2021	33	Electronic Clerk's Notes for proceedings held before Judge Patti B. Saris: Scheduling Conference/Status Conference held on 5/10/2021 by Video. ORDERED: Joint Statement #28 NOT ADOPTED. Automatic Disclosures to go forward. All Discovery is STAYED. Hearing on Motion to Dismiss is reset

		from 6/15/2021 to 6/29/2021 at 2:30pm REMOTE PROCEEDING. (Court Reporter: Lee Marzilli at leemarz@aol.com.) (Molloy, Maryellen) (Entered: 05/10/2021)
05/10/2021	34	Judge Patti B. Saris: ELECTRONIC ORDER entered granting in part 24 Joint MOTION for Extension of Time to Extend Briefing Schedule And Reschedule June 15, 2021 Oral Argument. (Baker, Casey) (Entered: 05/10/2021)
05/10/2021	35	<p>ELECTRONIC NOTICE Resetting Hearing on Motion 19 MOTION to Dismiss :</p> <p>This hearing will be conducted by video conference. Counsel of record will receive a video conference invite at the email registered in CM/ECF. If you have technical or compatibility issues with the technology, please notify the session's courtroom deputy as soon as possible.</p> <p>Access to the hearing will be made available to the media and public. In order to gain access to the hearing, you must sign up at the following address: https://forms.mad.uscourts.gov/courtlist.html.</p> <p>For questions regarding access to hearings, you may refer to the Court's general orders and public notices available on www.mad.uscourts.gov or contact media@mad.uscourts.gov.</p> <p>Motion Hearing RESET for 6/29/2021 02:30 PM in Remote Proceeding : Boston before Judge Patti B. Saris. (Baker, Casey) (Entered: 05/10/2021)</p>
05/14/2021	36	NOTICE of Appearance by Greil I. Roberts on behalf of Starr Indemnity & Liability Company (Roberts, Greil) (Entered: 05/14/2021)
05/14/2021	37	MOTION for Leave to Appear Pro Hac Vice for admission of Alexander S. Brown Filing fee: \$ 100, receipt number 0101-8775175 by Starr Indemnity & Liability Company. (Attachments: # 1 Exhibit A-Affidavit in Support) (Roberts, Greil) (Entered: 05/14/2021)
05/14/2021	38	MOTION for Leave to Appear Pro Hac Vice for admission of William P. Shelley Filing fee: \$ 100, receipt number 0101-8775190 by Starr Indemnity & Liability Company. (Attachments: # 1 Exhibit A - Affidavit in Support) (Roberts, Greil) (Entered: 05/14/2021)
05/14/2021	39	MOTION to Intervene by Starr Indemnity & Liability Company. (Attachments: # 1 Supplement Memorandum of Law in Support of Motion, # 2 Exhibit A to Memorandum of Law in Support of Motion)(Roberts, Greil) Modified to remove Memorandum and Exhibit and refile as separate entry, see dkt. no. 40 on 5/14/2021 (Baker, Casey). (Entered: 05/14/2021)
05/14/2021	40	MEMORANDUM in Support re 39 MOTION to Intervene filed by Starr Indemnity & Liability Company. (Attachments: # 1 Exhibit A) (Baker, Casey) (Entered: 05/14/2021)
05/14/2021	41	Notice of correction to docket made by Court staff - Memorandum in Support

		and Exhibit A re 39 Motion to Intervene, have been removed from dkt. entry 39 and refiled as a separate entry, see dkt. no. 40 . (Baker, Casey) (Entered: 05/14/2021)
05/14/2021	42	Judge Patti B. Saris: ELECTRONIC ORDER entered granting 37 Motion for Leave to Appear Pro Hac Vice; Added Alexander S. Brown. Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form. (Baker, Casey) (Entered: 05/14/2021)
05/14/2021	43	Judge Patti B. Saris: ELECTRONIC ORDER entered granting 38 Motion for Leave to Appear Pro Hac Vice; Added William P. Shelley. Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form. (Baker, Casey) (Entered: 05/14/2021)
05/17/2021	44	MOTION for Leave to File <i>Reply in Further Support of Motion to Dismiss</i> by Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr..(Kane, Kerianne) (Entered: 05/17/2021)
05/19/2021	45	Judge Patti B. Saris: ELECTRONIC ORDER entered granting 44 Motion for Leave to File Document ; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Baker, Casey) (Entered: 05/19/2021)
05/24/2021	46	NOTICE of Appearance by Jonathan B. Bruno on behalf of Great American Assurance Company (Bruno, Jonathan) (Entered: 05/24/2021)
05/24/2021	47	MOTION for Joinder <i>to Motion to Intervene (ECF No. 39)</i> by Great American Assurance Company.(Bruno, Jonathan) (Entered: 05/24/2021)
05/24/2021	48	MEMORANDUM in Support re 47 MOTION for Joinder <i>to Motion to Intervene (ECF No. 39)</i> filed by Great American Assurance Company. (Attachments: # 1 Exhibit A - Intervenor Complaint, # 2 Exhibit 1 to Intervenor Complaint - Policy EXC 4223353, # 3 Exhibit 2 to Intervenor Complaint - Policy EXC 4101321, # 4 Exhibit 3 to Intervenor Complaint - Policy EXC 1615227, # 5 Exhibit 4 to Intervenor Complaint - Policy EXC 2275809)(Bruno, Jonathan) (Entered: 05/24/2021)
05/24/2021	49	MOTION for Joinder <i>in the Motions to Intervene of Starr Indemnity and Great American Assurance Company</i> by Admiral Insurance Company. (Moody, Austin) (Entered: 05/24/2021)
05/24/2021	50	MOTION for Extension of Time to June 11, 2021 to Respond to Starr Indemnity & Liability Company's Motion to Intervene by Tocci Building

		Corporation, Tocci Residential LLC, John L. Tocci, Sr..(Kane, Kerianne) (Entered: 05/24/2021)
05/25/2021	51	MOTION for Leave to Appear Pro Hac Vice for admission of Michael A. Kotula Filing fee: \$ 100, receipt number 0101-8790158 by Great American Assurance Company. (Attachments: # 1 Exhibit A - M. Kotula Affidavit) (Bruno, Jonathan) (Entered: 05/25/2021)
05/25/2021	52	MOTION for Leave to Appear Pro Hac Vice for admission of Robert A. Maloney Filing fee: \$ 100, receipt number 0101-8790219 by Great American Assurance Company. (Attachments: # 1 Exhibit A - R. Maloney Affidavit) (Bruno, Jonathan) (Entered: 05/25/2021)
05/26/2021	53	Judge Patti B. Saris: ELECTRONIC ORDER entered granting 51 Motion for Leave to Appear Pro Hac Vice; Added Michael A. Kotula. Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form. (Baker, Casey) (Entered: 05/26/2021)
05/26/2021	54	Judge Patti B. Saris: ELECTRONIC ORDER entered granting 52 Motion for Leave to Appear Pro Hac Vice; Added Robert A. Maloney. Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form. (Baker, Casey) (Entered: 05/26/2021)
05/26/2021	55	Judge Patti B. Saris: ELECTRONIC ORDER entered granting 50 Motion for Extension of Time to June 11, 2021 to Respond to Starr Indemnity & Liability Company's Motion to Intervene. Responses due by 6/11/2021. (Baker, Casey) (Entered: 05/26/2021)
05/28/2021	56	Joint MOTION for Protective Order by Admiral Insurance Company. (Attachments: # 1 [Proposed] Stipulation Protective Order)(Moody, Austin) (Entered: 05/28/2021)
06/01/2021	57	REPLY to Response to 19 MOTION to Dismiss filed by Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr.. (Attachments: # 1 Exhibit A Citizens Insurance Co. Answer to Complaint in Tocci DJ Action, # 2 Exhibit B American Fire & Casualty Answer to Complaint in Tocci DJ Action, # 3 Exhibit C Starr Indemnity Answer to Complaint in Tocci DJ Action, # 4 Exhibit D Great American Assurance Co. Answer to Complaint in Tocci DJ Action)(Kane, Kerianne) (Entered: 06/01/2021)
06/04/2021	58	Judge Patti B. Saris: STIPULATED PROTECTIVE ORDER entered. (Baker, Casey) (Entered: 06/04/2021)
06/07/2021	59	Transcript of Scheduling Conference held on May 10, 2021, before Judge Patti B. Saris. The Transcript may be purchased through the Court Reporter, viewed

		at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Lee Marzilli at leemarz@aol.com. Redaction Request due 6/28/2021. Redacted Transcript Deadline set for 7/8/2021. Release of Transcript Restriction set for 9/7/2021. (Coppola, Katelyn) (Entered: 06/07/2021)
06/07/2021	60	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Coppola, Katelyn) (Entered: 06/07/2021)
06/10/2021	61	MEMORANDUM in Opposition re 39 MOTION to Intervene , 47 MOTION for Joinder to Motion to Intervene (ECF No. 39) filed by Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr.. (Kane, Kerianne) (Entered: 06/10/2021)
06/11/2021	62	Assented to MOTION for Leave to File <i>Surreply In Further Opposition To Motion To Dismiss Or Stay</i> by Admiral Insurance Company. (Attachments: # 1 [Proposed] Surreply In Further Opposition To Motion To Dismiss Or Stay, # 2 Ex. A to [Proposed] Surreply, # 3 Ex. B to [Proposed] Surreply) (Hermanson, Eric) (Entered: 06/11/2021)
06/11/2021	63	Judge Patti B. Saris: ELECTRONIC ORDER entered granting 62 Motion for Leave to File Document ; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Lara, Miguel) (Entered: 06/11/2021)
06/11/2021	64	SUR-REPLY to Motion re 19 MOTION to Dismiss , 62 Assented to MOTION for Leave to File <i>Surreply In Further Opposition To Motion To Dismiss Or Stay</i> filed by Admiral Insurance Company. (Attachments: # 1 Ex. A, # 2 Ex. B)(Hermanson, Eric) (Entered: 06/11/2021)
06/11/2021	65	Judge Patti B. Saris: ELECTRONIC ORDER entered granting 17 Motion for Protective Order. (Lara, Miguel) (Entered: 06/11/2021)
06/16/2021	66	MOTION for Leave to File <i>Reply Brief</i> by Starr Indemnity & Liability Company. (Attachments: # 1 Exhibit A- Proposed Reply Brief)(Brown, Alexander) (Entered: 06/16/2021)
06/16/2021	67	Judge Patti B. Saris: ELECTRONIC ORDER entered granting 66 Motion for Leave to File Reply ; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Baker, Casey) (Entered: 06/16/2021)
06/17/2021	68	REPLY to Response to 39 MOTION to Intervene filed by Starr Indemnity & Liability Company. (Brown, Alexander) (Entered: 06/17/2021)

06/17/2021	69	<p>ELECTRONIC NOTICE Setting Hearing on Motion 47 MOTION for Joinder to Motion to Intervene (ECF No. 39), 19 MOTION to Dismiss , 49 MOTION for Joinder in the Motions to Intervene of Starr Indemnity and Great American Assurance Company, 39 MOTION to Intervene :</p> <p>This hearing will be conducted by video conference. Counsel of record will receive a video conference invite at the email registered in CM/ECF. If you have technical or compatibility issues with the technology, please notify the session's courtroom deputy as soon as possible.</p> <p>Access to the hearing will be made available to the media and public. In order to gain access to the hearing, you must sign up at the following address: https://forms.mad.uscourts.gov/courtlist.html.</p> <p>For questions regarding access to hearings, you may refer to the Court's general orders and public notices available on www.mad.uscourts.gov or contact media@mad.uscourts.gov.</p> <p>Motion Hearing set for 6/29/2021 02:30 PM in Remote Proceeding : Boston before Judge Patti B. Saris. (Baker, Casey) (Entered: 06/17/2021)</p>
06/29/2021	70	<p>Electronic Clerk's Notes for proceedings held before Judge Patti B. Saris: Motion Hearing held on 6/29/2021 by Video. Motions taken under advisement. (Court Reporter: Lee Marzilli at leemarz@aol.com.) (Molloy, Maryellen) (Entered: 06/29/2021)</p>
07/06/2021	71	<p>Transcript of Motion Hearing held on June 29, 2021, before Judge Patti B. Saris. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Lee Marzilli at leemarz@aol.com. Redaction Request due 7/27/2021. Redacted Transcript Deadline set for 8/6/2021. Release of Transcript Restriction set for 10/4/2021. (Coppola, Katelyn) (Entered: 07/07/2021)</p>
07/06/2021	72	<p>NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Coppola, Katelyn) (Entered: 07/07/2021)</p>
09/03/2021	73	<p>Judge Patti B. Saris: ORDER entered denying 19 Motion to Dismiss</p> <p>The Court DENIES the motion to dismiss or stay (Dkt. 19) as to all counts.</p> <p>(PBS, law6) (Entered: 09/03/2021)</p>
09/08/2021	74	<p>Judge Patti B. Saris: ELECTRONIC ORDER entered. Starr Indemnity & Liability Company's Motion to Intervene (Docket No. 39), Great American Assurance Company's Motion for Joinder to Starr Indemnity & Liability Company's Motion to Intervene (Docket No. 47), and Admiral Insurance</p>

		<p>Company's Motion for Joinder to Starr Indemnity & Liability Company's Motion to Intervene (Docket No. 49) are ALLOWED.</p> <p>Rule 24(b) of the Federal Rules of Civil Procedure authorizes this Court to permit anyone to intervene who... has a claim or defense that shares with the main action a common question of law or fact. Because Starr Indemnity & Liability Company and Great American Assurance Company, like Admiral Insurance Company, seek a Declaratory Judgment that their policies do not obligate [them] to defend or indemnify Tocci in the Toll Action, the Connell Action or the BHID Action, Dkt. 40-1 at 8; Dkt. 48-1 at 8, the Court determines that this standard has been met. Furthermore, the intervenors have represented that they will not substantially add to the briefing in this case, so the Court determines that allowing the Motion to Intervene will not unduly complicate or delay the proceedings. (Geraldino-Karasek, Clarilde) (Entered: 09/08/2021)</p>
09/09/2021	75	Intervenor COMPLAINT , filed by Starr Indemnity & Liability Company. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8)(Brown, Alexander) (Entered: 09/09/2021)
09/09/2021	76	Intervenor COMPLAINT , filed by Great American Assurance Company. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4) (Kotula, Michael) (Entered: 09/09/2021)
09/10/2021	77	Judge Patti B. Saris: ELECTRONIC ORDER entered. Parties shall file an Amended Joint Statement on or before 9/17/2021.(Molloy, Maryellen) (Entered: 09/10/2021)
09/17/2021	78	JOINT STATEMENT of counsel <i>Pursuant to D. Mass. LOC. R. 16.1(D)</i> . (Moody, Austin) (Entered: 09/17/2021)
10/04/2021	79	Judge Patti B. Saris: ELECTRONIC ORDER entered re 78 Joint statement of counsel. "The Court stays all discovery until it rules on the motion to defend in the Toll Action. However, the parties shall exchange automatic disclosure. The choice of law issues shall be resolved within the context of the Motion for Summary Judgment. The Court declines to coordinate with the state court until it rules on the duty to defend which likely won't be resolved until the spring given the proposed briefing schedule."(Geraldino-Karasek, Clarilde) (Entered: 10/04/2021)
10/20/2021	80	ANSWER to 1 Complaint with Jury Demand , COUNTERCLAIM against Admiral Insurance Company by John L. Tocci, Sr., Tocci Residential LLC, Tocci Building Corporation.(Kane, Kerianne) (Entered: 10/20/2021)
11/04/2021	81	ANSWER to Counterclaim <i>and Affirmative Defenses</i> by Admiral Insurance Company.(Moody, Austin) (Entered: 11/04/2021)
11/05/2021	82	MEMORANDUM in Opposition re 10 MOTION for Summary Judgment <i>Motion For Partial Summary Judgment And In Support of Defendants' Cross-Motion For Partial Summary Judgment</i> filed by Tocci Building Corporation,

		Tocci Residential LLC, John L. Tocci, Sr.. (Kane, Kerianne) (Entered: 11/05/2021)
11/05/2021	83	Counter Statement of Material Facts L.R. 56.1 re 10 MOTION for Summary Judgment <i>Motion For Partial Summary Judgment</i> filed by Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr.. (Kane, Kerianne) (Entered: 11/05/2021)
11/05/2021	84	STATEMENT of facts <i>In Support of Cross-Motion For Partial Summary Judgment.</i> (Kane, Kerianne) (Entered: 11/05/2021)
11/05/2021	85	AFFIDAVIT in Opposition re 10 MOTION for Summary Judgment <i>Motion For Partial Summary Judgment And In Support Of Defendants' Cross-Motion For Summary Judgment</i> filed by Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr.. (Attachments: # 1 Exhibit A 9.15.2015 GZA Settlement Opinion Letter)(Kane, Kerianne) (Entered: 11/05/2021)
11/15/2021	86	ANSWER to 75 Intervenor Complaint <i>Starr Indemnity & Liability Company</i> , COUNTERCLAIM against Starr Indemnity & Liability Company by Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr..(Kane, Kerianne) (Entered: 11/15/2021)
11/15/2021	87	ANSWER to 76 Intervenor Complaint <i>Great American Assurance Company</i> , COUNTERCLAIM against Great American Assurance Company by Tocci Building Corporation, John L. Tocci, Sr., Tocci Residential LLC.(Kane, Kerianne) (Entered: 11/15/2021)
11/19/2021	88	Cross MOTION for Summary Judgment <i>on Count I of Complaint</i> by Tocci Building Corporation, Tocci Residential LLC, John L. Tocci, Sr..(Kane, Kerianne) (Entered: 11/19/2021)
11/30/2021	89	ANSWER to Counterclaim by Starr Indemnity & Liability Company.(Brown, Alexander) (Entered: 11/30/2021)
12/03/2021	90	Opposition re 88 Cross MOTION for Summary Judgment <i>on Count I of Complaint</i> filed by Admiral Insurance Company. (Attachments: # 1 Exhibit A - State by State Survey: Defective Construction as an Occurrence")(Moody, Austin) (Entered: 12/03/2021)
12/03/2021	91	Response by Admiral Insurance Company to 83 Statement of Material Facts L.R. 56.1 <i>Filed in Support of Tocci's Cross-Motion For Partial Summary Judgment.</i> (Moody, Austin) (Entered: 12/03/2021)
12/07/2021	92	ELECTRONIC NOTICE Setting Hearing BY VIDEO on 88 Cross MOTION for Summary Judgment <i>on Count I of Complaint</i> , 10 MOTION for Summary Judgment <i>Motion For Partial Summary Judgment</i> : MOTIONS HEARING SET FOR 1/5/2022 09:30 AM BY VIDEO before Judge Patti B. Saris. This hearing will be conducted by VIDEO CONFERENCE. Counsel of record will receive a video conference invite at the email registered in CM/ECF. If

		<p>you have technical or compatibility issues with the technology, please notify the session's courtroom deputy as soon as possible.</p> <p>Access to the hearing will be made available to the media and public. In order to gain access to the hearing, you must sign up at the following address: https://forms.mad.uscourts.gov/courtlist.html.</p> <p>For questions regarding access to hearings, you may refer to the Court's general orders and public notices available on www.mad.uscourts.gov or contact media@mad.uscourts.gov.</p> <p>(Geraldino-Karasek, Clarilde) (Entered: 12/07/2021)</p>
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03/28/2022	96	Judge Patti B. Saris: MEMORANDUM AND ORDER entered. The Court ALLOWS Admiral's motion for partial summary judgment (Dkt. 10) and DENIES Tocci's motion for partial summary judgment (Dkt. 88). (Geraldino-Karasek, Clarilde) (Entered: 03/28/2022)
04/07/2022	97	STATUS REPORT (<i>Jointly Submitted</i>) by Admiral Insurance Company. (Moody, Austin) (Entered: 04/07/2022)
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05/09/2022	99	Judge Patti B. Saris: ORDER entered. SETTLEMENT ORDER OF DISMISSAL (30 Days). (Geraldino-Karasek, Clarilde) (Entered: 05/09/2022)
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05/17/2022	101	Judge Patti B. Saris: ELECTRONIC ORDER entered Allowed re 100 Joint MOTION for Order to Enter Final Judgment (Geraldino-Karasek, Clarilde) (Entered: 05/18/2022)
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ADMIRAL INSURANCE COMPANY,

Plaintiff,

v.

TOCCI BUILDING CORPORATION,
TOCCI RESIDENTIAL LLC and JOHN L.
TOCCI, SR.,

Defendants.

Civ. No. 1:21-cv-10388-PBS

December 30, 2021

**DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Respectfully submitted,

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SUMMARY

Defendants Tocci Building Corporation (“Tocci Building”), Tocci Residential, LLC (“Tocci Residential”), and John L. Tocci, Sr. (“John Tocci”) (collectively, “Tocci”), respectfully submit this Reply Memorandum of Law in further support of Tocci’s Cross-Motion for Partial Summary Judgment on Count I of Admiral’s Complaint. Regardless of whether this Court decides to apply Massachusetts or New Jersey law, the duty to defend under both jurisdictions is very broad. As long as there is a reasonable possibility that at least one claim is covered, the insurer must defend its insured against the entire action. As discussed in detail in Tocci’s Combined Memorandum of Law in Opposition to Plaintiff Admiral Insurance Company’s (“Admiral”) Motion for Summary Judgment and in Support of Tocci’s Cross-Motion for Summary Judgment (Doc. 82) (“Cross MOL”), the allegations of the underlying Toll Action, together with extrinsic evidence, clearly demonstrate that at least some of the claims against Tocci are based on “property damage” caused by an “occurrence,” as those terms are defined in the Admiral Policies.

Admiral’s position that no coverage is owed because the entire project constitutes Tocci’s “work” is misplaced. As discussed below, not only is Admiral’s position contrary to a plain reading of the relevant policy language, but it also would render the duty to defend meaningless. The same can be said with respect to Admiral’s reliance on the j(5) and j(6) exclusions in the Admiral Policies. An insurer must prove that a claim is wholly within an exclusion in the policy in order to avoid its obligation to defend its insured. As discussed below, Admiral cannot meet its heavy burden. Accordingly, because there is a reasonable possibility that some of the claims against Tocci fall within coverage afforded by the Admiral Policies, Admiral must defend Tocci against the entire Toll Action.

I. LAW AND ARGUMENT

A. Choice of Law—Under Either Massachusetts or New Jersey law, Admiral Owes a Duty to Defend Tocci in the Toll Action

Tocci maintains that New Jersey law should apply to the present cross-motions for summary judgment.¹ As set forth in Tocci’s Cross MOL, Massachusetts applies a “functional” choice of law approach “that responds to the interests of the parties, the States involved, and the interstate system as a whole.” Fire Ins. Exchange v. Pring-Wilson, 778 F.Supp.2d 116, 125 (D. Mass. 2011) (internal quotation marks and citations omitted). Admiral asserts that Massachusetts law applies because Tocci is domiciled in Massachusetts and the Admiral Policies were brokered in Massachusetts. However, these are only a couple of the factors that this Court must consider when determining what law should apply. This Court must also consider the place of contracting (the Admiral Policies were countersigned by Admiral in New Jersey); the place of performance (the Admiral Policies cover Tocci’s operations nationwide, but the Golden Triangle Project is located in New Jersey); and the location of the subject matter of the contract (the subject matter of the present dispute, i.e., the Toll Action, is currently pending in the United States District Court for the District of New Jersey). Additionally, Toll JM EB Residential Urban Renewal LLC and the majority of the subcontractors Tocci hired to work on the Golden Triangle Project (who are also parties to the Toll Action), are domiciled in New Jersey. Thus, the weight of factors favors application of New Jersey law.

¹ Tocci takes issue with Admiral’s mischaracterization of this Court’s findings during the June 29, 2021 hearing on Tocci’s Motion to Dismiss. To be clear, this Court did not determine that Massachusetts law applies to this dispute. Choice-of-law was not an issue before this Court during that hearing, and Tocci expressly reserved the right to brief the issue at a later date. See 6-29-21 Hrg. Tr. at p.8-9 (Doc. 71).

Throughout its briefing for the present motions, Admiral cites to Tocci Bldg. Corp. v. Virginia Surety Co., Civil Action No. 1:08-CV-11402 (D. Mass.), a case from over ten years ago, to note that Tocci sought application of Massachusetts law to previous insurance coverage disputes. Until now, Tocci has not addressed this argument because it is completely irrelevant and has no bearing on the present dispute. The Virginia Surety Co. action concerns a completely different project and involves different parties and insurance policies. In fact, Admiral did not even insure Tocci at the time the Virginia Surety Co. case was decided. Tocci is not bound by a position it may have taken in prior unrelated litigation and this Court need not consider it because it presents no issues of res judicata or collateral estoppel with respect to the current dispute.

Rather, this Court need only consider the facts giving rise to the current coverage dispute to determine whether Massachusetts or New Jersey law should apply. It is worth noting that Admiral has previously interpreted its coverage obligations **for this very action** under New Jersey law. In fact, Admiral did not take the position that Massachusetts law governs its coverage obligations with respect to the Toll Action until January 2021, approximately one year after the claim was first tendered to Admiral.

To illustrate, in its initial denial letter dated March 17, 2020, Admiral did not cite to any Massachusetts law in support of its coverage determination. Curiously, Admiral noted that should Tocci have any issue with Admiral's coverage position, it should contact the New Jersey Department of Banking & Insurance.² It begs the question, then – why would Admiral refer Tocci to the New Jersey Department of Insurance and not the

² See Ex. 4 to Declaration of Elizabeth Onslager in Support of Admiral's Motion for Partial Summary Judgment ("Onslager Dec.").

Massachusetts Department of Insurance if the Admiral Policies are to be construed according to Massachusetts law?

Thereafter on May 7, 2020, Tocci responded to Admiral's March 17, 2020 denial. Relying on relevant New Jersey law, Tocci provided extrinsic evidence (i.e., deposition testimony from Toll's corporate representative) that bolstered Tocci's claim that the Toll Action involves allegations of covered property damage.³ On June 9, 2020, Admiral responded to Tocci's May 7, 2020 letter and reiterated its bases for denial under New Jersey law (albeit a misapplication of relevant New Jersey law).⁴ Notably, Admiral did not assert that Massachusetts law applied to its assessment of coverage under the Admiral Policies. Thereafter, in a letter dated January 8, 2021, Admiral revised its coverage position upon further review of governing New Jersey law.⁵ In that same letter, Admiral, for the first time, asserted that the Admiral Policies are subject to Massachusetts law. This comes as no surprise, since Admiral realizes that it clearly owes Tocci a defense under New Jersey law, as illustrated by its offer to provide a provisional defense to Tocci in its revised coverage position dated January 8, 2021.

Based on the foregoing, Tocci has a reasonable basis to believe that New Jersey law governs this dispute, based on Admiral's prior actions leading up to the filing of this suit. As set forth in detail in Tocci's Cross MOL, Admiral owes Tocci a defense in the Toll Action under New Jersey law.⁶ However, as discussed below, even if this Court were to apply Massachusetts law, Admiral still owes Tocci a defense in the Toll Action.

³ See Ex. 5 to Onslager Dec.

⁴ See Ex. 6 to Onslager Dec.

⁵ See Ex. 11 to Onslager Dec.

⁶ See Tocci's Cross MOL at pp. 9-13.

B. Admiral Must Defend Tocci because the Toll Action Alleges “Property Damage” Caused by an Occurrence

As set forth in detail in Tocci’s Cross MOL, the allegations of the Toll Action clearly allege “property damage” caused by an “occurrence,” as those terms are defined in the Admiral Policies.⁷ Although the allegations of the Toll Action alone are sufficient to trigger Admiral’s broad duty to defend, extrinsic evidence provided to Admiral eliminates any doubt that the Toll Action involves allegations of property damage.

Admiral misses the mark by continuing to focus on the title of the causes of action alleged against Tocci in the Toll Action (i.e., breach of contract, breach of good faith and fair dealing, fraud), rather than the substance of the allegations. An insurer cannot rely on the causes of action alone to determine whether it has a duty to defend its insured. Rather, “the process is one of envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy. . . . There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage.” Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Mod. Cont’l Const. Co., Inc., No. 082015BLS1, 2009 WL 6376180, at *2 (Mass. Super. Dec. 11, 2009).⁸

Tocci disagrees with Admiral’s assertion that Tocci’s counsel “conceded” that the Toll Action does not allege property damage in the May 7, 2020 rebuttal letter. Regardless

⁷ See Ex. 1 to Declaration of Maureen McCall in Support of Admiral’s Motion for Partial Summary Judgment (“McCall Dec.”), Form CG 00 01 12 07, pp. 14-15.

⁸ See also Vorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 174 (1992) (The duty to defend “is determined by whether a covered claim is made, not by how well it is made. A third party does not write a complaint to apprise the defendant’s insurer of potential coverage; fundamentally, a complaint need only apprise the opposing party of disputed claims and issues.”).

of what Tocci's counsel may have said, the allegations of the Toll Action speak for themselves. As set forth in Tocci's Cross MOL, the Toll Action includes explicit allegations of property damage. Specifically, Toll alleges that Stop Orders were issued for portions of the work "due to settlement and **damaged underground utilities.**"⁹ Additionally, Toll alleges that "piping systems in the Project **became distorted, twisted and broke.**"¹⁰

The Toll Action also alleges various instances of defective and deficient work on the Project, from which it can be reasonably inferred that the defective and deficient work likely caused property damage to other portions of the Project.¹¹ See, e.g., Phoenix Ins. Co. v. Ragnar Benson Construction, LLC, 404 F.Supp.3d 427 (D. Mass. 2019) (holding that arbitration demand for damages attributable to defective and deficient pavement work triggered insurer's duty to defend because "the Statement of Claim makes clear that [claimant] is alleging a claim for potential coverage under the [policies] because the defects in the [pavement] present a substantial risk of damage to its equipment. The duty to defend is broad enough to encompass claims for potential coverage.>").¹²

In addition to the foregoing allegations, Admiral has also been presented with extrinsic evidence that further supports Tocci's claim that the Toll Action involves covered property damage.¹³ Admiral urges this Court to ignore the extrinsic evidence Tocci relies on its Cross MOL because such evidence should not be admissible since the Toll Action is a "detailed" complaint. However, none of the cases Admiral relies on stand for the

⁹ See Ex. B to Admiral's Memorandum of Law in Support of its Motion for Partial Summary Judgment ("Admiral's MOL") at ¶ 25.

¹⁰ See Ex. B to Admiral's MOL at ¶ 81.

¹¹ See Ex. B to Admiral's MOL at ¶ 31.

¹² See also Cypress Pt. Condo Ass'n. v. Adria Towers, LLC, 226 N.J. 403, 417-18 (2016); Belmont Condo. Ass'n., Inc. v. Arrowpoint Cap. Corp., No. A-4187-12T4, 2015 WL 4416582 (App. Div. Jul. 21, 2015).

¹³ See Tocci's Cross MOL at pp. 12-13; Exhibit A to Affidavit of Glynda Wehring in Support of Tocci's Cross MOL at p. 5; Ex. 5 to Onslager Dec. at pp. 8 (25:8-26:18) and 13 (264:24-266:20).

proposition that the Court is prohibited from considering extrinsic evidence under these circumstances.¹⁴ While extrinsic evidence may be especially helpful in cases where the underlying complaint is bare-boned, an insurer cannot selectively ignore readily available extrinsic evidence that bolsters allegations that trigger its duty to defend. See, e.g., Open Software Foundation, Inc. v. U.S. Fid. and Guar. Co., 307 F.3d 11, 14-15 (1st Cir. 2002).¹⁵

The Ragnar Benson decision is instructive. There the court considered whether Ragnar, a general contractor, was entitled to additional insured coverage under its subcontractor, Logistics Concrete, LLC's, insurance policies in connection with an arbitration commenced by CSX Intermodal Terminals, Inc., the owner of the project. CSX alleged that Ragnar failure to adequately perform its work, resulting in various deficiencies with respect to the pavement work performed by Logistics. Additionally, although not expressly alleged in the arbitration demand, CSX sought to recover damages to its equipment, allegedly caused by the defective pavement work. Phoenix Insurance Company denied coverage on the ground that CSX's arbitration demand did not allege any property damage caused by an occurrence.

Specifically, Phoenix denied coverage for Ragnar because CSX sought damages for damages to Ragnar's work "i.e., damage to the work comprising the project that it

¹⁴ Admiral's reliance on Mills Construction Corp., Inc. v. Nautilus Ins. Co., 1:18-cv-10549-IT, 2019 WL 1440404 at *5 (D. Mass. Mar. 31, 2019), where the Court noted that an insured "may not, in the absence of a complaint that requires coverage, force its insurer to defend the insured by simply telling the insurer facts which could create coverage" is misplaced. This is not a case where Tocci is providing facts beyond the allegations of the Toll Action in an effort to create coverage. Rather, the extrinsic evidence that Tocci provided to Admiral bolsters the factual allegations in the Toll Action, which is very much in line with how Massachusetts courts treat extrinsic evidence for purposes of determining the duty to defend: "Massachusetts courts generally use extrinsic facts (such as those set forth in demand letters to the insurer) to aid interpretation of the complaint and not as independent factual predicates for a duty to defend." *Id.* at *5 (quoting Open Software Foundation, Inc. v. U.S. Fid. & Guar. Co., 307 F.3d 11, 16 (1st Cir. 2002)).

¹⁵ See also Abouzaid v. Mansard Gardens Assocs. LLC, 207 N.J. 80, 81 (2011); SL Indus., Inc. v. AM. Motorists Ins. Co., 128 N.J. 188, 198-99 (1992).

contracted to perform for CSX – caused by construction defects in that work,” and such damages are a natural and ordinary consequence of improperly performing the work Ragnar was contracted to perform. Id. at 445. The court disagreed, finding that CSX alleged that Logistic’s work damaged other areas of the project that it was not responsible for. With respect to the alleged damage to CSX’s equipment, the court noted that Phoenix was made aware, through extrinsic evidence, that CSX was claiming actual damage to its equipment. Id. at 446. The court concluded that while the majority of CSX’s allegations are excluded from coverage because they are based on Ragnar’s and Logistic’s failure to properly perform the work, because “at least one or more claims are reasonably susceptible to coverage,” Phoenix was obligated to defend Ragnar in the arbitration. Id. at 446.

Despite Admiral’s insistence that Massachusetts courts have repeatedly found that claims of faulty workmanship did not constitute “property damage” caused by an “occurrence,” it is important to note that “the Supreme Judicial Court has not decisively circumscribed the bounds of what constitutes an occurrence under Massachusetts law.” Gen. Cas. Co. of Wisconsin v. Five Star Bldg. Corp., Civil Action No. 11-30254-DJC, 2013 WL 5297095, at *5 (D. Mass. Sept. 19, 2013). While some Massachusetts appellate courts have held that faulty workmanship alone is not covered property damage, the parties agree that commercial general liability policies cover accidental property damage that results from faulty workmanship.¹⁶ See Admiral’s Opp. to Tocci’s Cross-MSJ at p. 10;

¹⁶ It should be noted that many of the Massachusetts courts that have concluded that defective construction does not constitute an “occurrence” rely on a fifty-year-old law review article authored by a former dean of the Nebraska School of Law who introduced the concept of the “business risk” doctrine. See Henderson, *Insurance Protection for Products Liability and Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415 (1971). The Henderson article, which multiple jurisdictions have relied on over the years, was authored before the 1973 ISO CGL coverage form was even published. As discussed in Tocci’s Cross MOL, the ISO coverage form has been revised numerous times since then, including significant

see also Five Star Bldg. Corp., supra, 2013 WL 5297095, at *5; Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Mod. Cont'l Const. Co., No. 082015BLS1, 2009 WL 6376180, at *3 (Mass. Super. Dec. 11, 2009); All Am. Ins. Co. v. Lampasona Concrete Corp., 120 N.E.3d 1258 (2019).

Although Admiral attempts to trivialize the extent of property damage at issue, it cannot deny that at least some of the allegations in the Toll Action, coupled with extrinsic evidence, clearly demonstrate that a portion of Toll's alleged damages sound in property damage. Indeed, Admiral has already acknowledged that the Toll Action alleges property damage and offered Tocci a provisional defense in the Toll Action.¹⁷ As discussed in Tocci's Cross MOL, the duty to defend is exceedingly broad and so long as at least one of the claims is potentially covered, the insurer must defend against the entire action.¹⁸ Accordingly, Admiral must defend Tocci against the Toll Action.

C. Exclusions j(5) and j(6) Do Not Apply to the Toll Action

Notwithstanding the fact that the Toll Action clearly alleges property damage caused by an occurrence, Admiral maintains that coverage is precluded under exclusions j(5) and j(6). In order to avoid its coverage obligations, Admiral must demonstrate that the

changes to the definition of "occurrence." As a result, some jurisdictions, including New Jersey, have moved away from the antiquated view that defective construction is not an "occurrence" under the modern CGL form. See Tocci's Cross MOL at pp. 14-16 (discussing Adria Towers and Belmont Condo.). For a comprehensive review of the issues presented by Henderson's article and the recent trend of jurisdictions recognizing defective construction as an occurrence, see O'Connor, *What Every Court Should Know About Insurance Coverage for Defective Construction*, 5 C Constr. Law J. 1 (Winter, 2011).

¹⁷ See Exhibit 11 to Onslager Dec.

¹⁸ See, e.g., Liberty Mutual Ins. Co. v. Metropolitan Life Ins. Co., 260 F.3d 54, 63 (1st Cir. 2001) ("In Massachusetts, as elsewhere, an insurer must defend the entire lawsuit if it has a duty to defend any of the underlying counts in the complaint."). See also Mt. Airy Ins. Co. v. Greenbaum, 127 F.3d 15, 19 (1st Cir. 1997) ("under Massachusetts law, if an insurer has a duty to defend one count of a complaint, it must defend them all.") (citations omitted); Scottsdale Ins. Co. v. United Rentals (N. Am.), Inc., 152 F.Supp.3d 15, 20 (D. Mass. 2015) ("Once the insured party's ultimate burden regarding coverage is satisfied with regard to at least one claim against the insured, the insurer has a duty to defend generally... if [the claimant] shows that the allegations against it could give rise to a covered claim and if [the insurer] cannot show that such a claim would be expressly excluded, then [the insurer] owes [the claimant] a full defense.").

allegations of the Toll Action fall wholly within the exclusions. See, e.g., John Beaudette, Inc. v. Sentry Ins. A Mut. Co., 94 F.Supp.2d 77, 134-35 (D. Mass. 1999).¹⁹ As discussed below, Admiral cannot meet its heavy burden of demonstrating that the Toll Action falls wholly within either of these exclusions.

Exclusion j(5), which bars coverage for property damage to “[t]hat particular part of 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,” does not apply because 1) Tocci is seeking coverage for non-defective portions of the work that were damaged by the defective work of its subcontractors; and 2) the alleged damage did not occur while Tocci and its subcontractors were actively performing work on the Project.

Admiral relies on several Massachusetts decisions where courts found that j(5) bars coverage for general contractors because the entire project constitutes the general contractor’s “work.”²⁰ These decisions, which have not been endorsed by the Supreme Judicial Court (or cited by any other Massachusetts state courts, for that matter) are based on a fundamental misunderstanding of the meaning of “that particular part of real property.” The “[t]hat particular part of any property” language in exclusion j(5) “limits the scope of the exclusion to the extent of ‘faulty workmanship *thereon*’ . . . i.e., to that particular part of the property subject to the faulty workmanship.” Frankel v. J. Watson Co., Inc., 21 Mass. App. Ct. 43, 46, 484 N.E.2d 104 (1985) (emphasis in original).

¹⁹ See also United Rental Equip. Co. v. Aetna Life & Cas. Inc., 74 N.J. 92, 98 (1977).

²⁰ See Mello Const., Inc. v. Acadia Ins. Co., 70 Mass. App. Ct. 1104 (2007); Mills Const. Corp., Inc. v. Nautilus Ins. Co., Civil Action No.: 1:18-cv-10549-IT, 2019 WL 1440404 (D. Mass. Mar. 31, 2019).

The “particular part” language “creat[es] a distinction between damage to the work product of the insured and damage to larger units of which the insured’s work product is but a component.” Id. (citing cases). Indeed, “later decisions in Massachusetts strengthen the distinction between property damage that goes to the essence of the insured’s work, which falls within the scope of the 2(j)(5) exclusion, and property damage that is merely incidental to the insured’s work to which the exclusion does not apply.” Gen. Cas. Co. of Wisconsin v. Five Star Bldg. Corp., Civil Action No. 11-30254-DJC, 2013 WL 5297095, at *6 (D. Mass. Sep. 19, 2013). The Five Star Court went on to explain that:

As the Supreme Judicial Court noted in Commerce Ins. Co. v. Betty Caplette Builders, Inc., 420 Mass. 87, 92, 647 N.E.2d 1211 (1995), the exclusion does not apply where the product or work causes damages to other persons or property. In such a situation, while there would not be coverage for damage to the work or product itself, damages caused by the product to other work or products would be covered. This distinction is consistent with the goal of the exclusion, which is to protect the insured from the claims of injury or damage to others, but not to insure against economic loss sustained by the insured due to repairing or replacing its own defective work or products.

Id. at *6 (internal quotation marks and citations omitted).

If the entire project is treated as “that particular part of real property,” then it renders the terms “that particular part” meaningless, in contravention of basic principles of insurance contract interpretation.²¹ “When interpreting an insurance contract, [courts are to] consider what an objectively reasonable insured, reading the relevant policy language,

²¹ See, e.g., S.D. Shaw & Sons, Inc. v. Joseph Rugo, Inc., 343 Mass. 635, 180 N.E.2d 446, 449 (1962) (“An interpretation which gives a reasonable meaning to all of the provisions of a contract is to be preferred to one which leaves a part useless or inexplicable.”); Schiappa v. Nat’l Marine Underwriters, Inc., 1999 Mass. App. Div. 122, 1999 WL 788616, at *1 (Dist. Ct. May 20, 1999) (“In construing the language of a policy of insurance which is clear and unambiguous, this court must give the words contained in the policy their ordinary meaning and avoid interpretations of policy language which result in words being rendered meaningless.”) (citing Gibraltar Financial Corp. v. Lumbermens Mut. Cas. Co., 400 Mass. 870, 872, 513 N.E.2d 681 (1987)). See also Cannavo v. Liberty Mut. Ins. Co., No. A-6458-05T1, 2007 WL 2990109, at *4 (App. Div. Oct. 16, 2007).

would expect to be covered.” McGregor v. Allamerica Ins. Co., 449 Mass. 400, 868, N.E.2d 1225, 1227 (2007) (internal quotation marks and citation omitted).

As a general contractor, Tocci supervises and coordinates the work performed by its subcontractors. Tocci does not perform any actual construction, nor does it control the means and methods used by its subcontractors. Thus, Tocci would reasonably expect that property damage caused by its subcontractors in the performance of their work would be covered by the Admiral Policies. If the entire project constitutes Tocci’s work for purposes of exclusion j(5), then there would never be coverage under the Admiral Policies for damage caused by Tocci’s subcontractors. Such a reading would render the liability coverage for which Tocci paid significant premiums meaningless.²²

The more appropriate reading is that recognized by the courts in Frankel, Five Star, and Ragnar Benson, all of which held that damage to non-defective work caused by a contractor’s defective work are not excluded under j(5). With respect to the Toll Action, for example, while j(5) may bar coverage for damage to the concrete slab because the damage was caused by the allegedly defective work of Tocci’s subcontractor (i.e., “that particular part of real property” on which Tocci’s subcontractor was working because the “property damage ar[ose] out of those operations”), it does not apply to other non-defective portions of the Project that were damaged as a result of the defective installation of the concrete slab (i.e., the underground pipes).

²² Although not currently at issue in the present cross-motions, the same can be said about the “subcontractor exception” in exclusion I of the Admiral Policies. Exclusion I excludes property damage to the insured’s work but does not apply “if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.” See Ex. 1 to McCall Dec., Form CG 00 01 12 07, at p. 5. Again, if the entire project constitutes Tocci’s work, then why would there be a need for an exception for work performed by Tocci’s subcontractors? See also Tocci’s Cross MOL at pp. 14-16 (discussing Adria Towers and Belmont Condo.).

Notwithstanding the foregoing, Admiral argues that coverage is barred under exclusion j(5) because the alleged property damage arose out of Tocci's "ongoing operations." Admiral's position is based on the fact that Tocci was terminated from the Project, so it never completed construction of the Golden Triangle Project. Admiral's position is based on a misunderstanding of "ongoing operations" in the context of exclusion j(5). The law is clear that exclusions such as j(5) must be narrowly construed against the insurer.²³

As discussed above, because the exclusionary language "that particular part of real property" is limited to the actual part of the project on which a contractor is actively working (i.e., the concrete slab), the term "ongoing operations" within the same clause necessarily means only the active performance of work on **that particular part** of the project.²⁴ It does not mean ongoing operations on the entire project. Admiral could have chosen to say the "entire real property" but did not. Thus, a portion of the project may be complete while construction is ongoing on other parts of the project. That is the case here where the damage to the underground pipes was discovered after the concrete slab had already been installed. The damage did not occur while Tocci's subcontractor was actively installing the concrete slab. Indeed, Admiral cannot point to any evidence to prove that Tocci's subcontractor was actively performing its work at the time the property damage occurred. Rather, Admiral merely relies on the fact that the Project as a whole was not complete at the time the damage occurred. Admiral's position is based on a

²³ See, e.g., Flomerfelt v. Cardiello, 202 N.J. 432, 442 (2010). See also Camp Dresser & McKee, Inc. v. Home Ins. Co., 568 N.E.2d 631, 635 (1991).

²⁴ See Ohio Cas. Ins. Co. v. Island Pool & Spa, Inc., 12 A.3d 719, 728 (App. Div. 2011) (holding that j(5) "applies to 'ongoing operations,' meaning it excludes coverage for damage to property the insured is working on at the time the property damage occurs . . . The use of the present tense [signifies] . . . that the exclusion applies to damages that occur while the insured is working on the project.") (quoting 3 Jeffrey E. Thomas, *New Appleman on Insurance Law*, Library Ed. § 18.03 [10][h] (2010)).

misreading of the plain language in exclusion j(5) and, accordingly, it cannot meet its burden of proving that the exclusion applies.

Exclusion j(6) is likewise inapplicable for substantially the same reasons that j(5) does not apply to the Toll Action. As discussed in Tocci's Cross MOL, Tocci is not seeking coverage for damages associated with the cost to repair and replace the defective work performed by its subcontractors. Rather, Tocci seeks coverage for non-defective portions of the work that were damaged and required repairs as a result of the defective work (i.e., the underground pipes that were damaged by the defective concrete slab).

Accordingly, because neither exclusion j(5) nor j(6) applies, Admiral must defend Tocci against the Toll Action.

II. **CONCLUSION**

For all of the foregoing reasons, Tocci respectfully requests that this Court deny Admiral's motion for partial summary judgment and grant Tocci's cross-motion for partial summary judgment on Admiral's duty to defend Tocci in the Toll Action.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants as of December 30, 2021.

/s/ Kerianne E. Kane _____
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