Is the Increased Cost To Repair Undamaged Portions Of The Structure A Consequence Of Enforcement Of Building, Zoning Or Land Use Ordinance Or Law?

By Jason M. Seitz[1]

In *Deb Associates v. Greater New York Mutual Insurance Company,* 970 A.2d 1074 (N.J.Super. 2009) the court answered this question in the affirmative, granting the insured's motion for summary judgment, finding that repairs to undamaged floors fell within the policy's law and ordinance provision.

Plaintiff owned an 8-story office building constructed with a brick facade over cinder block walls. In December 2003, a windstorm sheared off most of the brick facade, the concrete block perimeter wall, and the windows on the north side of the building's seventh floor. When code officials inspected Plaintiff's building, they found that the walls had been secured to the concrete flooring only with mortar and not steel fasteners known as "angle irons." Further inspection revealed that this was the case throughout the entire building and that the walls were no longer securely attached to the flooring. In fact, the inspectors discovered that they could move the exterior walls simply by pushing on them.

The collapse of the 7th story wall and the unstable condition of the remaining walls led the municipal code officer to conclude that Plaintiff's building would be unsafe unless brought up to current code standards. The code official ordered the building vacated and closed until the walls of floors two through eight and the roof were secured to the structure with angle irons, in compliance with the current State construction code.[2] These repairs cost approximately $500,000.

The insurer agreed to pay for repairs to the seventh floor, but denied coverage for the cost of installing angle irons on floors two through six, eight, and the roof. The policy provided, in relevant part:

> 3. Coverage C - Increased Cost of Construction Coverage
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> a. *If a Covered Cause of Loss occurs to the Covered Building property, we will pay for the increased cost to*:
>
> (1) Repair or reconstruct damaged portions of that Building property; and/or
>
> (2) *Reconstruct or remodel undamaged portions of that Building property* whether or not demolition is required;
>
> when the increased cost is a consequence of enforcement of building, zoning or land use ordinance or law.

The trial court judge found that the, "remedial work... was required as a direct result of the collapse of the seventh floor wall." The judge accepted as undisputed fact that "the repairs to the other floors would not have been required if the seventh floor wall had not collapsed, and also that the angle irons were required as a consequence of the December 2003 partial collapse." The judge found no evidence of pre-existing code violations prior to the December 2003 wind damage.[3] Finding the policy unambiguous, the judge concluded that the policy provided coverage from bringing the undamaged floors into compliance with the current code.

Finding Coverage

The insurer argued that there was no coverage for repairs to the undamaged portion of the building because the conditions requiring the repairs did not result from the covered cause of loss (i.e., the wind storm). The insurer analogized the situation to one in which a code inspector comes to check covered damage to the building and fortuitously "happens" to notice other unrelated code violations or unsafe conditions, which he requires the owner to repair.

The Court rejected the argument that there was an insufficient connection between the wind damage to the seventh floor and the code official's direction that Plaintiff make identical code upgrades to the other undamaged floors of the structure. Instead, the Court found that the policy provided coverage for increased

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2 See *N.J.A.C.* 5:23 - 3.14(a)(1) (adopting International Building Code); *International Building Code* § 2109.7.2 (2000 ed.) (Requiring angle irons); *N J.A.C.* 5:23 - 6.2(f) (renovation subcode grandfathers lawful pre-existing buildings, except for unsafe structures).

3 The Superior Court noted that Plaintiff's building was constructed prior to the adoption of the State Uniform Code Construction Act, N.J.S.A. 52:27D - 119 to -141; there was no evidence that any then-applicable code required interior walls to be secured by angle irons or that the building violated code standards when it was constructed.

costs to bring both damaged and undamaged portions up to current code whenever laws and ordinances required upgrades in the course of repairing the damaged portion of the structure.[4]

The Court noted that guiding its analysis was the rule that the coverage sections of an insurance policy are to be liberally construed in favor of the insured and exclusions in the insurance policy should be narrowly construed in favor of coverage.[5]

Cases on either side of the Issue

The insurer relied heavily upon *Chattanooga Bank Associates v. Fidelity & Deposit Co. of Maryland*, 301 F.Supp.2d 774 (E.D.Tenn.2004). In *Chattanooga*, a bank building was damaged by two fires. Local inspectors surveying the damage discovered a host of unrelated building code violations throughout the structure. The bank sought coverage for the cost of repairing the violations under the premise that the inspection was triggered by the fire and resulted in enforcement of the building code, the fire was the cause of the enforcement of the building code. The Court disagreed, finding that simply because the violations might have remained undiscovered if not for the fire, the fire cannot be said to have "caused" the enforcement of a building code, which was at all times subject to enforcement. The Court characterized the increased cost of reconstruction of the undamaged facility as upgrades to undamaged portions that did not amount to repair or reconstruction.[6]

Under "perils insured against," the policy limited coverage to "direct physical loss or damage to the property."[7] The court construed the provision as, "limit[ing] the liability of the insurer to only those cases where the loss or damage results from the peril."[8]

> 14. Demolition and Increased Cost of Construction
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> In the event of loss or damage under this coverage part that causes the enforcement of any law or ordinance regulating the construction or repair of damaged facilities, the company shall be liable for:
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> . . .
>
> C. Increased cost of repair or reconstruction of the damaged or undamaged facility on the same or another site and limited to the minimum requirements of such law or ordinance regulating the repair or reconstruction of the damaged property on the same site.[9]

The insured cited to the decision in *Davidson Hotel Co. v. St. Paul Fire & Marine Insurance Co.*, 136 F.Supp.2d 901 (W.D.Tenn.2001), in which the court took a more expansive view of coverage under a policy that provided:

> J. Demolition and Increased Cost of Construction
>
> In the event of loss or damage under this policy that causes the enforcement of any law or ordinance in effect at the time of covered loss, regulating the construction, repair, or use of the property, this Company [St. Paul] shall be liable for:
>
> . . .
>
> 3. Increased cost of repair or reconstruction of the damaged and undamaged property on the same or another site intended for the same occupancy, and limited to the costs that would have incurred in order to comply with the minimum requirements of such law or ordinance regulating the repair or reconstruction of the damaged property on the same site[10]...

In *Davidson*, a water leak in a hotel led to an inspection by code officials who "required compliance with numerous building code provisions" discovered during the inspection.[11] In finding coverage, the court observed:

> The provision applies to the "enforcement of any law or ordinance in effect at the time of covered loss." The breadth of the provision is not diminished by any limiting language regarding the "grandfathered" status of code violations, as St. Paul would have the Court hold. The main limitation upon this provision is the causal connection required between the loss and the enforcement. Davidson has shown this causation

4 The Court gave as an example where a portion of a wall collapses, and as a result the code official requires the entire wall to be reconstructed using code complaint materials there is coverage.

5 See *Nav-Its, Inc. v. Selective Ins. Co. Of Am.*, 183 N.J. 110, 118-19, 869 A.2d 929 (2005) (citations omitted).

6 *Id.* at 780-81.

7 Id. at 780.

8 *Ibid.*

9 *Id.* at 910-11.

10 *Id.* at 910.

11 *Id.* at 911.

> through deposition testimony of several building officials involved in the inspection process. The testimony makes clear that, in the first place, the inspection occurred only because the incident giving rise to the liability and, secondly, the thoroughness of the inspection was also a result of the incident. The Court finds that the proximate cause of the inspection was the February 16, 1998, event, and therefore, that the plain language of this provision renders St. Paul liable for costs associated with code compliance.
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> . . .
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> If St. Paul wished to avoid liability, it could have done so through the language of the contract.[12]

Plaintiff also relied upon *Commonwealth Insurance Co. of America v. Gray Harbor County*, 120 Wash.App.232, 84 P.3d 304 (2004), a case in which the court construed a substantially similar policy provision in the context of earthquake damage to a county courthouse. While the earthquake damaged certain specified portions of the structure, the local code official required the county to bring the "egress, accessibility, fire alarm, fire protection, ventilation, and seismic systems" up to current code standards as a condition of issuing a permit to repair the damaged portions of the courthouse.[13] The court held that "the alterations are covered if the earthquake caused the code enforcement resulting in the alterations[14]." However, the court concluded that "an issue of material fact exists as to whether the building official required the upgrades *because* of the earthquake damage" and remanded for further proceedings on that issue.[15]

In approaching the question of causation, the court in *Gray Harbor County* looked at the policy language through the eyes of a reasonable insured. The court reasoned that, "[a] reasonable lay purchaser of insurance would conclude that the building official has the authority under [the unsafe structures section of the building code] to require alterations to existing, nonconforming uses that are dangerous to human life."[16]

As the court did in *Gray Harbor County,* the court in *Deb Associates* construed the provisions of the building code concerning unsafe structures as a factor in deciding whether the code upgrades to the undamaged portions of the structure "were caused by" the covered peril. Under the facts in *Deb Associates,* causation was found because a building that did not conform to the current code was deemed unsafe and therefore both damaged and undamaged portions of the structure were required to meet current codes.[17]

The Court in *Deb Associates* agreed with the plaintiff that there was a clear causal connection between the collapse of the seventh floor wall and the code official's mandate that plaintiff bring the remaining floors into compliance. The court held that where a peril, specifically insured against, sets other causes in motion, which in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the proximate cause for the entire loss.[18]

Here the policy explicitly excluded pre-existing code violations which the insured had failed to correct. However, the policy did not specifically exclude situations where a covered structure was "grandfathered" under the current code but lost its "grandfathered" status as a result of a covered damage.[19] As the Court concluded, "If the insurer intended to exclude coverage in such situations, it could have specifically so provided."[20]

12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

15 Id. at 308

16 "The deficiencies in the building may not have been so obvious or immediate as to require building condemnation before the earthquake damage; but they may be sufficiently serious to address as part of major repairs required by the earthquake damage. Moreover, to the extent 'unsafe,' 'hazardous,' and 'dangerous' can fairly be read in two ways, we must adopt the meaning that favors coverage." *Id.* at 308.

17 *Franklin Packaging Co. v. Cal. Union Ins. Co.*, 171 N.J.Super. 188, 191, 408 A.2d 448 (App.Div.1979), *certif. denied*, 84 N.J. 420 A.2d 340 (1980)(emphasis omitted) (quoting 5 *Appleman on Insurance* § 3083, at 309-11 (1970)).

18 See N.J.A.C. 5:23-6.2(f); N.J.A.C. 5:23-2.32.

19 *Deb Associates*, 407 N.J.Super. 287 at 301.