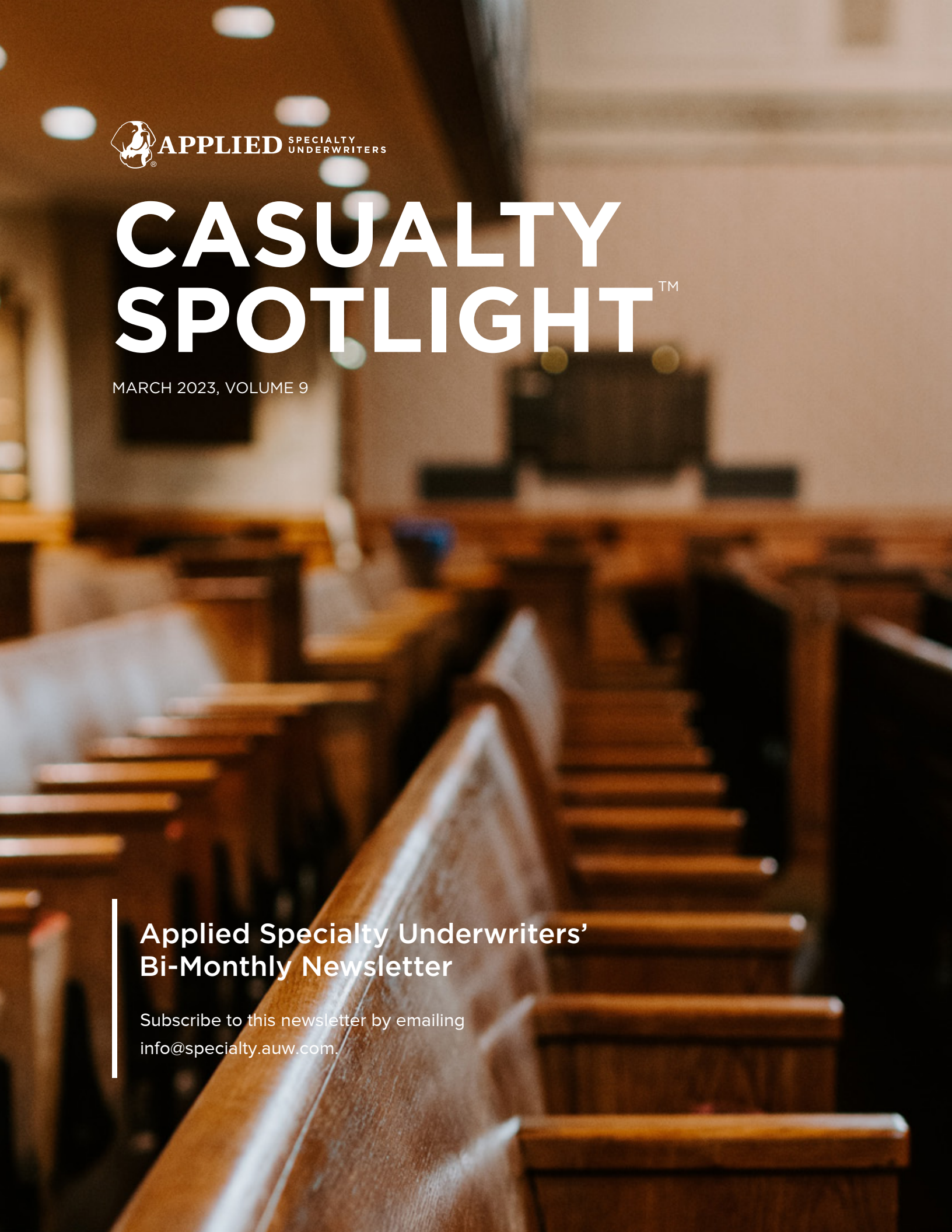

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MARCH 2023, VOLUME 9

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ILLINOIS

“Instructions Page” Was Not Part of Subcontract and (Therefore) No Additional Insured Obligation Was Owed to Contractor by Subcontractor’s Insurer

In *Loberg Excavating, Inc. v. Cincinnati Ins. Co.*, 2023 U.S. Dist. LEXIS 12656 (N.D. Ill. January 25, 2023). In March of 2017, Loberg Excavating, Inc. (“Loberg”) was hired by Devansoy to complete the expansion of a waste lagoon. Thereafter, Loberg subcontracted with Yunker Plastics, Inc. (“Yunker”) to install a liner and ventilation system on the project. The installation “did not go as planned” and Devansoy sued Loberg for damages. *Id.* at 2.

Loberg tendered the lawsuit to Yunker’s general liability insurer, Cincinnati Insurance Company (“Cincinnati”), seeking defense and indemnity. Specifically, Loberg asserted it qualified as an additional insured under the Cincinnati policy pursuant to an “Automatic Additional Insured” provision. Cincinnati denied coverage and Loberg filed a declaratory judgment action, which was later joined by Loberg’s own insurer, Allied Property and Casualty Company. Each of the parties moved for summary judgment on the additional insured issue. *Id.* at 3-4, 6-7.

The Cincinnati policy provided an additional insured would include “[a]ny person or organization” whom Yunker was required to “add as an additional insured under this Coverage Part by reason of a written contract or agreement.” (“Automatic Additional Insured Provision”). Neither party disputed the meaning of the Automatic Additional Insured Provision, but disagreed on whether the “contract” at issue included an additional insured promise. *Id.* at 3-4.

The parties focused on the existence of four pages of documents. The first document (the “Lead Document”) (which Loberg described as an “instructions page”) required Yunker to “submit a certificate of insurance” that “must list (Loberg) as an additional insured… for both commercial general liability and automotive liability per our insurance company.” This Lead Document also instructed Yunker to “read the enclosed contract” and “return the contract” to Loberg. There was no page number on this document. *Id.* at 4.

The remaining three pages were numbered sequentially and included headings of "Subcontractor Work Order," "General Conditions" and "Indemnification." The "General Conditions" page was the only one mentioning insurance and specifically stated that "before commencing work," Yunker "shall furnish Certificate of Insurance showing that Workman's Compensation and Public Liability Insurance are in full force and effect." Loberg asserted the "instructions page" (Lead Document), as presented, was part of the contract and obligated Cincinnati to provide Loberg with additional insured status under its CGL policy. *Id.* at 4-5.

After diffusing a choice-of-law issue, the district court agreed with Cincinnati that a plain reading of all documents proved the Lead Document was not, in fact, part of the subcontract:

> A court's "primary objective" in interpreting a contract is to "ascertain and give effect to the parties' intentions as expressed in" the contract's language. The "best indication of the parties' intent is the language of the contract itself." Courts apply these principles to construct insurance policies and determine the rights and responsibilities thereunder.

Applying these principles, the Lead Document is not part of the Subcontract, and the Lead Document is the only possible contractual source requiring coverage for Loberg under the Policy.

The Lead Document, which does not include a page number, instructs Yunker to "read the enclosed contract", obtain a signature, and "return the contract" to Loberg. By the Lead Document's own terms, the "enclosed contract" is a separate and distinct document. What's more, the three pages of the "enclosed contract" are aptly numbered "1 of 3," "2 of 3," and "3 of 3." If the Lead Document were part of the Subcontract, the total number of pages would have been four.

Turning to the Subcontract itself, page "1 of 3" is labeled "Subcontract Work Order." It includes designated boxes at the bottom of the page for Loberg and Yunker to sign. Loberg's box asks Loberg to assent to "[t]he foregoing terms, specifications, and the conditions listed on *the following two pages of this Work Order*..." Yunker's box asks Yunker to assent to "the foregoing terms and specifications and the conditions listed on *the following two pages of this Work Order*." The word "foregoing" does not reach into the ether to draw in everything before it. Rather, the ordinary meaning of the unambiguous assent clauses dictates that "foregoing" applies only to the terms listed above the signature block on the Subcontract Work Order. With that, Loberg and Yunker have only assented to the "Work Order" and the following two pages.

Flip to the next page. Page "2 of 3," the "General Conditions" page, includes a provision that requires Yunker to "furnish Certificate of Insurance showing that Workman's Compensation and Public Liability Insurance are in full force and effect." Logically, any agreed-upon provision concerning an additional Certificate of Insurance or provisions concerning additional insureds would be included in this paragraph or the paragraphs surrounding it. But the General Conditions make absolutely no mention of a requirement that Yunker add Loberg as an additional insured to the Policy. A provision of such import – if agreed upon – would have been included in the General Conditions alongside all other material terms of the contract. *Id.* at 8-11 (citations omitted).

While the review employed in *Loberg* appears sound, one is left to wonder whether the parties' intent was actually realized. It is hard to argue that Loberg wasn't expecting additional insured coverage, as most contractors do when engaging subcontractors. The greater lesson from *Loberg* is the precision and care with which contracts (and their terms) need to be assembled.

MASSACHUSETTS

Insured Owed Defense Where Damage Alleged Went Beyond "That Particular Part" of Property Upon Which It Was Working

In *Capital Specialty Ins. Corp. v. Dello Russo Enter., LLC*, 2023 U.S. Dist. 11627 (Dist. Mass. January 24, 2023), Dello Russo Enterprises, LLC and its owner (collectively "Dello Russo") was a home improvement contractor based in Boston, Massachusetts. In March of 2018, Dello Russo was hired by Gaye and Prinn ("owners") to serve as the general contractor for extensive remodeling and renovation of a four- story building in Boston. At some point during the renovation, the building collapsed, causing property damage and lost income in excess of $1,100,000. The owners' property insurer (Lloyd's) filed a subrogation action against Dello Russo and several other contractors alleging that one or more of the defendants caused the collapse. *Id*. at 4-5.

Capital Specialty Insurance Corporation ("Cap Specialty") issued a general liability policy to Dello Russo for the relevant period. Upon receipt of the claim, Cap Specialty filed a declaratory judgment action seeking a ruling that it owed Dello Russo no defense or indemnity for the underlying lawsuit. Dello Russo counterclaimed seeking coverage and both parties moved for summary judgment. *Id*. at 3, 9.

Cap Specialty argued (1) there was no "property damage" arising out of an "occurrence"; and (2) the "Damage to Property" exclusion barred coverage in its entirety. Specifically, the policy defines an "occurrence" as "an accident, including continuous or repeated exposure to

substantially the same general conditions." The relevant portion of the "Damage to Property" exclusion barred coverage for "property damage" to

> j. (5) That particular part of real property on which you or any contractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations; or
>
> j. (6) That particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it. *Id*. at 3-4, 17.

The district court first addressed Cap Specialty's argument that no "occurrence" was present because faulty workmanship is not an "accident." In doing so, it focused on the scope of the work Del Russo was hired to perform and the nature of the damage to the property:

> While "[f]aulty workmanship alone, is not an 'occurrence,' coverage may lie when 'faulty workmanship' ... causes an accident." *Fontaine Bros. v. Acadia Ins. Co*., 2019 U.S. Dist. LEXIS 148056 (D. Mass. Aug. 29, 2019 at 6) ... see also *Pacific Indemn. Co. v. Lampro*, 2013 WL 9902530, at 5. (Mass. Super. March 14, 2013) ("In essence, an 'occurrence' in a commercial general liability policy will not provide coverage if faulty workmanship is the accident, but will provide coverage if faulty workmanship causes the accident and there is collateral damage to property other than the insured's work product.")
>
> Here, the home-improvement contract makes clear – and Capital does not dispute – that the Prinns did not hire Dello Russo to demolish the entire building. Nor does the Underlying Complaint allege that Dello Russo or any of the subcontractors in fact

demolished the entire building. In other words, the Underlying Complaint does not allege that an improperly performed demolition was the accident.

Rather, the Underlying Complaint alleges that as a result of Dello Russo's faulty workmanship during renovations, the building partially collapsed, requiring the demolition of the remaining structure. In other words, the Underlying complaint alleges that Dello Russo's negligence caused an accident. Accordingly, the claims against Dello Russo allege "property damage" caused by an "occurrence." *Dello Russo*, supra at 16-17 (further citations omitted).

Cap Specialty thereafter argued the "Damage to Property" exclusion barred coverage for the entire claim, where Dello Russo (as the general contractor) "had control over the entire premises" and thus "that particular part of property means the entire project." The district court rejected this interpretation by (again) relying upon the limited scope of work Dello Russo was hired to perform:

> Massachusetts courts continue to construe exclusions that are limited to "that particular part of the property" as being limited to "coverage for the work product of the insured but not for damage to larger units of which the insured's work product is but a component" ...
>
> Unlike the insured general contractors in several of the cases relied on by Capital, Dello Russo was not hired to construct, renovate, or demolish an entire building. For example, as set forth in the contract between Dello Russo and the Prinns, while Dello Russo was required to provide "demo shoring equipment," he was not responsible for demolishing or removing any of the building's load-bearing walls.
>
> Nor was Dello Russo responsible under the contract for demolishing the building's exterior, or in any other way performing work relating to the building's exterior walls, windows, foundation or roof. Rather, under the contract, Dello Russo's tasks included, in part, removing all non-load bearing walls, and demolishing the building's "entire interior residential space." In other words, Dello Russo was contractually obligated to work on only a "particular part of the building: its interior... Accordingly, the Court holds that the words "[t]hat particular part" refer only to the building's interior, and thus the "claimed damages to the superstructure [do] not fall within [that] exclusionary language." *Id*. at 19-21 (citations omitted).

The application of the Damage to Work exclusion will always be fact specific and tied to the scope of work for which a contractor is hired. The *Dello Russo* court's decision to grant the insured summary judgment appears sound, in that the damage alleged went beyond the scope of the work for which it was engaged.

MASSACHUSETTS

Allegation Insured Was Not Authorized to Remove Trees and Earth from Neighbor's Property Suggested an "Accident" Sufficient to Trigger Insurer's Duty to Defend

In *Partington Builders, LLC v. Nautilus Ins. Co.*, 2023 U.S. Dist. LEXIS 18274 (D. Mass. February 3, 2023), Partington Builder's, LLC ("Partington") purchased a plot of land in Sudbery, Massachusetts to build a home to sell for profit. The property was adjacent to land owned by the Blowers ("Blowers"). The property line between the two lots was drawn in such a way that a portion of the Blowers' property jutted out front of Partington's lot. *Id.* at 2.

Partington reached out to the Blowers seeking permission to remove small trees, brush and tree roots from this section of the Blowers' property, as well as to regrade the area. Partington and Blowers exchanged emails on the matter. At some point between April 5, 2021 and April 16, 2021, Partington went ahead with the proposed work. Shortly thereafter, Blowers sent Partington a cease and desist letter and demanded that the property be restored to its original state. *Id.* at 3-4.

In June of 2021, Blowers filed an action in state court against Partington seeking recovery under the Massachusetts tree cutting statute (M.G.L. c. 242 § 7), as well as for common law nuisance and trespass. It further sought damages for removing a berm and other unspecified damages. *Partington*, supra. at 4.

Partington was insured under a general liability policy issued by Nautilus Insurance Company ("Nautilus"). Upon receipt of Partington's tender, Nautilus denied coverage on three grounds: (1) there was no "occurrence" under the policy; (2) the complaint alleges Partington intentionally damaged the Blowers' property; and (3) the policy excluded coverage for damages arising out of the movement of soil (subsidence). Within a week, Partington filed a declaratory judgment action and both parties sought summary judgment (Partington only as to the duty to defend). *Id.* at 4, 8-9.

At the outset, the district court noted that

Nautilus would owe a duty to defend if at least one of the allegations in the underling complaint "reasonable sketches" a claim in which the Blowers' injury arose out of an accident. The complaint specifically alleged that Partington "without authority or permission, removed trees from the property of (the Blowers)" in violation of the Massachusetts tree cutting statute, which read, in relevant part:

> A person who without license willfully cuts down, carries away, girdles or otherwise destroys trees, timber, wood or underwood on the land of another shall be liable to the owner in tort for three times the amount of the damages assessed therefor; but if it is found that the defendant had good reason to believe the land on which the trespass was committed was his own, or that he was otherwise lawfully authorized to do the acts complained of, he shall be liable for single damages only. *Id.* at 10 (citing M.G.L. c. 242 §7).

Nautilus first argued that because such allegations focus on Partington "willfully" removing the trees without authorization, they precluded the finding of an "accident" (and thus an "occurrence"). The court rejected this interpretation of the statute and the allegations applied to it:

> To begin, the tree-cutting statute does not in and of itself foreclose the possibility that a violation can arise from an accident. As previously discussed, an "accident" for present purposes includes an intentional act that is not meant or substantially certain to cause harm. A person who intentionally cuts down trees without license incurs liability (for single damages) even if he had "good reason to believe" he was "lawfully authorized to do so." It stands to reason that a person who reasonably believes that he is lawfully

authorized to cut down trees is not substantially certain that cutting the trees will harm another.

Regarding the allegations in the underlying action, nowhere in the complaint do the Blowers allege that Partington definitively knew or should have known that it did not have a license to cut trees on the Blowers" property. The Blowers only allege that they never authorized Partington to cut any trees and that Partington cut the trees anyway... Although the Blowers will likely argue that Partington lacked a good reason to believe that it was authorized to cut the trees, so as to recover treble damages, the complaint embraces the possibility that Partington, even if mistaken, had a good reason to believe it was authorized to cut the trees, but nevertheless violated the statute. *Id.* at 11-12.

Nautilus attempted to rely upon Massachusetts caselaw finding there was no "accident" if a contractor failed to follow directions and/or cut more trees than was requested. *See*, *Pacific Indem. Co. v. Lampro*, 86 Mass App. Ct. 60 (Mass. App. Ct. 2014). The court found the position inapposite, given Partington was (arguably) never authorized to do anything:

> In *Lampro*, the court found that, "in the landscaping trade, 'the possibility that unintended trees may be cut is clearly a normal, foreseeable, and expected incident of doing business,' and not a 'fortuitous event for which liability insurance was designed.'" The situation here is meaningfully different, though. No one alleges that Partington was authorized to cut some of the trees on the Blowers' property but not others. The allegation is that Partington was never authorized to cut any trees at all. Thus, this not a case, as in *Lampro*, where a contractor simply exceeded the scope of work it was already hired and authorized to perform. Whatever its instructive value, *Lampro* does not mandate a finding here that the tree cutting on the Blowers' property was not an accident. *Partington, supra* at 15 (further citations omitted).

Nautilus thereafter argued the "Damage to Property" exclusion barred coverage because Partington was performing landscaping operations on the Blowers' property when the damage allegedly occurred. Specifically, Nautilus sought to rely upon exclusion j. 5 of the exclusion, which barred coverage for "property damage" to:

> 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;" *Id*. at 21.

The district court rejected Nautilus' view that the exclusion could apply to property upon which the insured was (allegedly) not authorized to work. The cases relied upon by Nautilus always involved a property upon which the insured was hired to perform work:

> The cited cases (by Nautilus) share one commonality that meaningfully differentiates them from the case at bar. In each of the three cases, the excluded property damage arose out of work that the insured was authorized, indeed, hired, to perform. In fact, this is true of every case Nautilus cites in connection with J.5 or J.6. Even in *Lampro*, where the insured cut certain trees without authorization, it mattered that the insured was authorized to work on at least some part of the property. The situation here is inapposite. The basis for the Blowers' claims against Partington is exactly that Partington was not authorized to work on the property. In light of this, and bearing in mind that uncertainties should be resolved in favor of the insured, the court cannot and does not find that J.5 operates to exclude coverage here. *Partington*, supra. at 23-24 (citations omitted)

In granting summary judgment to *Partington*, the court further determined that the subsidence exclusion (if not ambiguous) only applied to the unintentional shifting of earth and not the intentional removal of earth. While indemnity remained unsettled in light of the underlying allegations, the district court's ruling in *Partington* on the duty to defend appears sound.

NEW YORK

"Lessor's Risk Only" Classification Bars Coverage for Injury to Subcontractor's Employee Working on Street in Front of Insured Premises

In *Colony Insurance Company v. 28-41 Steinway, LLC*, 2023 U.S. Dist. LEXIS 11317 (E.D.N.Y. January 23, 2023), 28-41 Steinway, LLC ("Steinway") owned property at the same address in Queens, New York. Figueroa, an employee of a concrete vendor, was working on the roadway in front of the building when his foot was run over by an excavator. He sued Steinway, among others, alleging they were negligent in causing his injuries. None of the tenants of the property were defendants in the underlying action. *Id*. at 2-3.

Colony Insurance Company ("Colony") issued commercial general liability coverage to Steinway for the relevant period. The Declarations of the policy classified coverage for the insured premises as "Lessor's Risk Only." An endorsement to the policy likewise included a business description as "Lessor's Risk Only", while including the statement "[c]overage under this policy is specifically limited to those classification codes listed on the Policy Declarations... No coverage is provided for any classification code or operation performed... not specifically listed in the Polic[y] Declarations." *Id*. at 4-5.

Upon receipt of tender, Colony filed a declaratory judgment action seeking a ruling that it owed no defense or indemnity to Steinway because the injury (1) was not incurred by a tenant; and (2) did not take place on the insured's premises. In opposing Colony's motion for summary judgment, Steinway argued that (1) the term "lessor's risk" was undefined and thus ambiguous; (2) "lessor's risk" coverage covers all damages owed by Steinway in maintaining its premises; and (3) the record in the underlying action was not developed enough to present uncontested facts as to coverage. *Id*. at 7-8.

In granting Colony's motion for summary judgment, the court determined the scope of the term "lessor's risk" was unambiguous - particularly when viewed through the lens of insurance:

> I begin with the text of the "lessor's risk only" classification. Its plain meaning imposes two limitations. First, the classification applies to "lessor's" risk. A "lessor is "someone who conveys real or personal property for lease," or a "landlord." The common definition aligns with the legal one; "lessor" means "[a] person who leases something, esp. land or property, to another." The term "lessor's" thus modifies the "risk covered by the policy to limit covered risks to those risks incurred by the landlords. Next, the word "only" further modifies the term "lessor's risk" to exclude other coverage types. Put together, the plain meaning of the text suggests that 28-41 Steinway's coverage under the Policy is limited solely to those risk incurred by landlords...
>
> Although defendant does not say so directly, this argument is effectively that "lessor's risk only" coverage could apply to damages created by a lessor's *maintenance* of a leased building, independent of any requirement that harm be done to a lessee. Defendant's position might be correct based upon the purely textual meaning of "lessor's risk only," but I am also required to examine this phrase in light of "the customs, practices, usages and terminology" of insurance. Colony has shown, and defendant has not refuted, that "lessor's" risk only" has a specialized meaning in insurance that "applies only to claims by tenants against property owners for property damage or bodily injury sustained while on the insured's premises." I agree that the term "lessor's risk" in insurance has a specialized meaning that limits insurance coverage to damages sought by property tenants or at the very least to injuries suffered on the landlord's property. *Id.* at 9-11 (citations omitted).

Having determined the limited scope of "lessor's risk only" coverage, the district court rejected the argument that a material issue of fact remained as to where the underlying plaintiff was injured:

> The parties agree that Mr. Figueroa alleged he was injured while standing in Steinway Street in Astoria. However, Mr. Figueroa has alleged that 28-41 Steinway owned the street on which the accident occurred. It is clear from publicly available information that Steinway Street is not owned by defendant. And Mr. Figueroa reiterated in his depositions that at the time his foot was run over, he "was being careful that there were no cars coming because we were very close to the yellow line separating the travel lane," i.e. he was positioned near the center of Steinway Street. Accordingly, there are no material facts in dispute that would suggest that Mr. Figueroa was on the Premises when he was injured. *Id.* at 13-14.

The *Steinway* decision presents a common-sense approach to a classification limitation within a CGL policy. "Lessor's risk only" is a term of art intending to limit a coverage to liability associated with a landlord. The plaintiff's allegation that he was injured while standing in the street left no basis to find coverage under these circumstances. What is curious about the opinion is why discovery (including depositions) was necessary before the Court made its decision.

Federal Appellate Cases

5TH CIRCUIT

Underwriter's Confirmation of Coverage Available Under Policy Was Not Misrepresentation Where Policy Exclusions Barred Coverage for Claim

In *Oil v. Mid-Continent Cas. Co.*, 2023 U.S. App. LEXIS 2202 (5th Cir. January 27, 2023), Finger Oil & Gas, Inc. ("Finger Oil") was an oil and gas producer insured under a general liability policy issued by Mid-Continent Casualty Company ("Mid-Continent"), On July 19, 2019, Finger Oil was drilling at its own natural gas well in Jackson County, Texas when a valve failed and a well "blew out." Finger Oil reached out to its broker at Marsh USA, Inc. ("Marsh") to inquire if it was covered for the blow out. *Id*. at 1-2.

Marsh reached out to an underwriter at Mid-Continent requesting that it "confirm that this insured has Blow Out and Cratering coverage and advise the available limit (if any)." Mid-Continent's underwriter responded with the following email reply:

> The policy ML1419 Oil & Gas Endorsement IV Blow-Out and Cratering has a box to X if the coverage is excluded. The ML1419 for this policy is not X'd. The limit for Blow Out and Cratering is included within the CG0001 Commercial General Liability Form, Section III Limits of Insurance.

Based upon this response, Marsh's account representative sent the following email to Finger Oil:

> Per the underwriter regarding coverage, the Blowout and Cratering are included within the limit of insurance. Limits are $1M occurrence/$2M aggregate. Please note that each claim is based on its own merit and this is just verifying the coverage in place. *Id.* at 2-3.

Thereafter, a claim specialist at Mid-Continent informed Finger Oil that he would be reviewing coverage for the accident. Before a determination was presented to Finger Oil, it (purportedly relying upon Marsh's email confirming it was covered for the accident), hired several contractors to repair property damaged by the well and restore it to working order. Total costs associated with these services exceeded $640,000. *Id*. at 2-3.

Mid-Continent ultimately issued a disclaimer relying upon two different exclusions. The first was the Damage to Property exclusion, which precluded coverage for "property damage" to:

> Property you own, rent, or occupy, including any costs or expenses by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration, or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property.

The second was an Oil and Gas endorsement that barred coverage for:

> Any loss, cost or expense incurred by you or at your request or by or at the request of any "Co-owner of the Working Interest"

> in connection with controlling or bring under control any oil, gas or water well. *Id.* at 3-4.

Mid-Continent's position was that the endorsements clearly precluded coverage for damage to Finger Oil's own well and any costs associated with bringing the well under control. Finger Oil filed a declaratory judgment action against Mid-Continent alleging it had (1) misrepresented coverage in violation of Texas statutes; (2) failed to timely investigate the claim; and (3) breached its contract with Finger Oil. *Id.* at 4.

Upon removal to federal court, a magistrate dismissed all of Finger Oil's claims except those related to Mid-Continent's alleged breach in failing to pay costs and expenses to repair the well. On reconsideration, she granted Mid-Continent summary judgment on all issues, finding that the exclusions clearly applied to all first-party damages for which Finger Oil sought recovery. Finger Oil appealed *Id*. at 4-5.

Finger Oil argued Mid-Continent misrepresented (and thus owed) coverage when it told Marsh its policy provided coverage for blowout and cratering damage without disclosing that other exclusions might apply. The Fifth Circuit disagreed, finding nothing confusing or disingenuous about Mid-Continent's response to Marsh's inquiry:

> The general rule is that in the absence of an affirmative misrepresentation, a mistaken belief about the scope of coverage is not actionable under the Deceptive Trade Practices Act ("DTPA") or the Insurance Code. However, when an insurer or agent does more than represent that a policy provides full coverage – such as representing that coverage exists in a specific situation – the insurer or agent may be liable for a misrepresentation under the DTPA.

We agree with the magistrate judge's conclusion that Mid-Continent's statement does not amount to an actionable misrepresentation under the circumstances presented here. Finger Oil's agent asked Mid-Continent whether it had blow out and cratering coverage, to which Mid-Continent correctly replied that it did. Mid-Continent's statement was more akin to a general statement that the policy included such coverage, rather than it was to a misrepresentation of specific policy terms. Indeed, Finger Oil was warned in the same email

to "[p]lease note that each claim is based on its own merit and" that the statement was "just verifying the coverage in place." Hence, Finger Oil was not "led wrongly to believe that [its] policy provided protection against a particular risk that was in fact excluded by the policy's coverage." The summary judgment evidence therefore does not support Finger Oil's misrepresentation claims. *Id*. at 6-8 (citing *Manion v. Sec. Nat. Ins. Co*., 2002 WL 34230861 (Tex. App. August 15, 2002) (citing *Sledge v. Mullin*, 927 S.W.2d 89, 94 (Tex. App. Forth Worth, 1996) (further citations omitted).

The Court of Appeals quickly disposed of Finger Oil's objection to the application of the Owned Property and Oil & Gas exclusions to the claim, finding such provisions "unambiguously" applied to the first-party damages sought by the insured. *Id*. at 10-11. Upon reading, the *Finger Oil* decision on misrepresentation and a lack of coverage seems obvious. One is left to wonder if an issue existed with Finger Oil's property coverage such that it had no choice but to fight an uphill battle with its liability insurer.

11TH CIRCUIT

Efforts by Registered Agent and Others to Alert Insured to Occurrence and Suit Was Not "Actual Knowledge" Required to Trigger Insured's Notice Obligation to Insurer

In *Frankenmuth Mutual Ins. Co. v. Brown's Clearing, Inc*., et al., 2023 U.S. App. LEXIS 2450 (11th Cir. January 31, 2023), Brown's Clearing, Inc. ("Brown's") was a land-clearing company owned by Kelly and Steve Brown that was registered to do business in Georgia. On June 20, 2018, Courtney Ford was driving along a highway in Bartow, Georgia when a tree limb being cut by workers fell and struck her windshield, causing property damage and bodily injury. Brown's did not itself have employees working in that area, but had subcontracted work for this portion of the highway to S&S Diesel ("Diesel"). No one from Diesel ever told Brown's about the accident. *Id*. at 5-6.

On January 24, 2019, Ford sued Georgia Power Company and another tree trimming company in state court alleging the companies' negligence caused her injuries. On February 11, 2019, an attorney representing the defendants sent Kelly Brown ("Brown") an e-mail seeking information as to whether Brown's had a tree crew working at or near the scene on the date of the accident. On February 15, 2019, Brown provided counsel with information showing where their crews were working along the highway on the date of the accident. *Id*. at 6-7.

On May 10, 2019, Ford filed an amended complaint adding Brown's as a defendant to its tort action. On May 16, 2019, Brown's registered agent in Georgia accepted service of the complaint, summons and written discovery. That same day, the registered agent emailed Kelly Brown prompting her to log onto its computer system to access the documents. After failing to log into the system for several days, the registered agent sent Brown an email with a pdf of the documents for which it accepted service. Thereafter, the registered agent sent a physical copy of the materials to Brown's by regular mail. *Id*. at 6-8.

Brown's did not respond to the state court action and plaintiff filed a motion for entry of default on July 19, 2019. That same day, counsel for the other defendants emailed Brown notifying her of the motion for default while advising her to contact her liability insurer. Brown testified that this was her first knowledge of an occurrence or claim for which Brown's could be responsible. Brown's tendered the lawsuit to its general liability insurer, Frankenmuth Mutual Insurance Company ("Frankenmuth"), on July 26, 2019. *Id*. at 9-10.

Frankemuth (presumably) agreed to defend Brown's, but filed a declaratory judgment action on August 20, 2020 seeking a ruling that it owed no duties to Brown's. Specifically, it argued Brown's violated the policy condition to provide timely notice of an occurrence, claim or suit. The policy, by form and endorsement, required that, when "known to" an executive officer or insurance manager", the insured had to notify Frankenmuth of an "occurrence," claim or "suit" "as soon as practicable," including the "immediate" forwarding of any suit papers. *Id.* at 2-4, 10.

Frankenmuth moved for summary judgment by arguing (1) Brown's knew about the accident in February of 2019 and lawsuit no later than May of 2019; (2) Brown's failed to provide notice as "soon as practicable" pursuant to the Policy; and (3) Brown's failed to provide "written notice" as required by the policy by not forwarding all suit papers to Frankenmuth. Brown's itself sought a ruling that its notice was timely under the circumstances. The district court granted Brown's motion for summary judgment, finding (1) no reasonable jury could conclude that Brown's had actual knowledge of the accident in February of 2019; and (2) notice was conveyed to Frankenmuth "as soon as practicable." Frankenmuth appealed.

Id. at 10-11.

The court of appeals initially sought to end any argument as to what level of knowledge by Brown's was required to trigger notice:

> In the Policy, the notice requirement is triggered when a suit is "known" to an executive officer or insurance manager." "Known" is used as a verb in the past tense of "know," which is defined as "[t]o recognize, acknowledge, perceive." Frankenmuth urges us to adopt a Merriam-Webster definition of "known" to mean "generally recognized". Such a definition implies not whether information is known to an individual but rather whether information is widely known among a certain population. Certainly the Policy addresses whether an occurrence is specifically recognized by an individual or partner, not whether it is generally recognized. Instead, we agree with the district court's determination that, to an ordinary person, the word "known" means "actually known." If a fact is "known" to a person, it is reasonable to assume that person has actual knowledge of the fact. *Id*. at 14-15.

Having affirmed the standard for triggering notice was "actual knowledge" by an executive or insurance manager, the court rejected Frankenmuth's position that notice to a registered agent should be imputed to the insured:

> Frankenmuth argues that Brown's Clearing knew of the suit on May 16, 2019, when its authorized agent, Registered Agents, was served with process. According to Frankenmuth, because Registered Agents was served with process, Brown's Clearing "knew" of the lawsuit at the same time. Instead of wading into questions of agency law and constructive knowledge, as Frankenmuth suggests, we need only look at the language of the parties' agreement. The Policy does not state that a suit being "known" to a registered agent is imputed to the executive officer. In fact, the Policy explicitly states that the notice requirement is triggered "only" when a suit is "known" to certain individuals – "[a]n executive officer or insurance manager." Again, the parties could have added "registered agent" to that list, but they did not. Given the language of the Policy and the record, the district court was correct in finding that the date triggering Brown's Clearing's duty to provide notice to Frankenmuth was July 19, 2019. *Id*. at 16.

In affirming summary judgment in favor of Brown's, the court noted (1) Frankenmuth made no argument that a seven-day delay in providing notice of the suit was unreasonable; and (2) Brown's online notice of the claim met the policy's "written notice" requirement. Finally, the court found Frankenmuth's position that Brown's violated the cooperation clause of the policy (by ignoring emails and letters counsel and its registered agent sent it) was untenable:

> Frankenmuth's reading of the contract would imply a duty to provide information of which Brown's Clearing has no actual knowledge. Instead, a more logical understanding of the Policy as a whole reads the requirement that the insured send copies of any demands, notices summonses or legal papers as an instruction on cooperation after a notice of an underlying occurrence or suit has been sent. Indeed, interpreting the Policy in a way to find that the parties agreed to require cooperation on a suit of which neither Frankenmuth nor Brown's Clearing had any awareness would be a bizarre conclusion. *Id*. at 19.

While the *Brown's Clearing* decision presents a faithful interpretation of policy language, what is less clear is whether the record warranted summary judgment. It is undisputed Brown's was presented with information on numerous occasions that, if read and understood, would have satisfied the "known to" the insured requirement. One wonders if a jury would have agreed Brown's never read or understood the importance of any of the early communications related to the claim.

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