Missouri Court Addresses Owned Property Exclusion

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In its recent decision in *Clarinet v. Essex Ins. Co.,* 2012 U.S. Dist. LEXIS 7300 (E.D. Mo. Jan. 23, 2012), the United States District Court for the Eastern District of Missouri had occasion to consider whether a general liability policy afforded coverage for an insured's obligation to stabilize and later demolish its own building so as to prevent damage to third-party property.

The insured, Clarinet, was the owner of a historic building located in St. Louis, Missouri. The building partially collapsed as a result of a severe windstorm. The insured undertook efforts to stabilize the building, but it ultimately was determined that the entire building needed to be razed in order to prevent harm to persons and to an adjacent bridge. It was not until after the demolition was complete that the insured gave notice to Essex that it had incurred costs to stabilize and demolish the building and that it was seeking coverage under its liability policy for such costs.

Essex denied coverage for Clarinet's stabilization and demolition costs on the basis that there was no property damage resulting from an occurrence. Specifically, Essex took the position that to constitute an "occurrence," there must be injury resulting from the insured's own negligent conduct. As such, Essex contended, a windstorm cannot qualify as an occurrence. Essex also denied coverage based on an "owned property exclusion" and an exclusion applicable to vacant buildings. Finally, it denied coverage based on Clarinet's failure to have provided notice of occurrence prior to undertaking the stabilization and demolition efforts.

The court only briefly addressed whether a windstorm can constitute an "occurrence," noting that there was no guidance under Missouri law as to whether an occurrence must result from the insured's negligent conduct. Ultimately, the court resolved coverage on the basis of the policy's owned property exclusion, applicable to property damage to:

> (1) Property you own, rent, or occupy, including any costs or expenses incurred 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*; (Emphasis supplied.)

Acknowledging a lack of Missouri case law on the issue, the court surveyed case law from throughout the country as to whether the exclusion applies to bar coverage for costs necessary to prevent damage to third-party property. In *Castle Village Owners Corp. v. Greater New York Mutual Ins. Co*., 878 N.Y.S.2d 311 (N.Y. 1st Dep't 2009), a New York appellate court held that the exclusion may not be enforceable when the insured has a legal obligation to prevent damage to another's property. The test in New York, as explained by the court, is whether there is a "nexus between the condition of the insured's property and the existence of ongoing and immediate harm to the property of others." Courts in Michigan and Maryland, on the other hand, apply a more lenient standard, holding that the exclusion does not apply when the insured acts to prevent "imminent harm" to third-party property. *See, Aetna Cas. & Sur. Co. v. Dow Chem. Co*., 28 F. Supp. 2d 448 (E.D. Mich. 1998); *Aetna Ins. Co. v. Aaron*, 685 A.2d 858 (Md. Ct. App. 1996). Wisconsin courts, however, do not recognize an exception to the exclusion, holding it applicable even when there is imminent risk of damage to third-

party property. *See, Watertown Tire Recycles, LLC v. Nortman*, 788 N.W.2d 384 (Wis. Ct. App. 2010). The *Clarinet* court ultimately decide concluded that Missouri courts, similar to those in Wisconsin, "would likely enforce the 'owned property' exclusion according to its plain terms, thereby excluding from coverage costs incurred to mitigate damage to third parties." In other words, there is no exception to the exclusion, even if the insured is acting so as to prevent third-party property damage that might otherwise be covered under a general liability policy.

The court found additional support for its conclusion on the basis of the policy's exclusion applicable to any claims involving vacant buildings. The policy specifically identified the building at issue as a vacant building. The court further noted that the insured's failure to have given notice to Essex of its stabilization and demolition efforts before incurring such costs necessarily prejudiced Essex and constituted an additional basis for noncoverage.