

Insured Not "Legally Obligated To Pay" Construction Repairs Required By Contract

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The United States Court of Appeals for the Third Circuit, applying New Jersey law, held that a policyholder did not become "legally obligated to pay" for repair of a negligently constructed curtain wall because the policyholder's liability for the repair was created by contract and not final judgment in a legal proceeding. *Permasteelisa CS Corp. v. Columbia Cas. Co.*, 2010 WL 1677185 (3d Cir. Apr. 27, 2010).

The insured, a construction company, agreed to build a curtain wall on a high-rise building. During construction, the building owner halted construction because of defects in the curtain wall and demanded that the construction company pay for the repairs. The construction company notified its insurer of the demand, and the insurer informed the construction company that no coverage was currently available because "no claim was yet filed." The insurer also instructed the construction company not to admit any liability or promise to repair the curtain wall. Months afterward, the construction company agreed to repair the curtain wall, and the repairs were incorporated into the construction company's contract. The construction company ultimately sought coverage from its insurer for the costs of the repairs. The insurer denied coverage based on its contention that the construction company did not have a legal obligation to pay for the repairs as required by the policy's insuring agreement. The construction company brought suit against the insurer, and the district court granted summary judgment in favor of the insurer. The construction company appealed.

In affirming the district court, the Third Circuit relied on *Bacon v. American Ins. Co.*, 330 A.2d 389 (N.J. Super. Ct. 1974), *aff'd*, 351 A.2d 771 (N.J. Super. Ct. App. Div. 1976), which held that a policyholder is "'legally obligated to pay' only after entry of final judgment establishing its liability." Concluding that the construction company's obligation to pay for the repairs was created by its contract and not a final judgment, the court held that the construction company's repair costs were not covered under the insurance policy. In so holding, the court noted that, although a contract creates a legal obligation, liability for breach of contract was not indemnifiable under New Jersey precedent.