

## Fifth Circuit -- Damage to Property Beyond Insured's Product/Work Not Precluded By 'Your Product/Your Work Exclusion'

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*Insurance Coverage and Bad Faith Alert*

1.12.22

On January 11, 2022, the United States Court of Appeals for the Fifth Circuit issued its decision in *Siplast, Incorporated v. Employers Mutual Casualty Company*, 2022 U.S. App. LEXIS 795 (5th Cir. Jan. 11, 2022), finding that an insurer had a duty to defend its insured in a construction defect case where the underlying complaint alleged damage to property beyond the product and work of the insured.

Siplast, Inc. (Siplast) had contracted with the Archdiocese of New York (the Archdiocese) to install a roof membrane system at a high school in the Bronx, New York. *Id.* at \*1. As part of the contract, Siplast guaranteed that the roof membrane system would remain in a watertight condition for at least twenty years. *Id.* at \*2. If it did not, Siplast would repair the roof membrane system at its own expense. *Id.*

Several years after the installation, the Archdiocese observed water damage in the ceiling tiles at the high school. *Id.* The Archdiocese contacted Siplast, who attempted to repair the damage and prevent further leaks; however, leaks and resultant damage continued to occur. *Id.* Siplast subsequently refused to make any more improvements to the roof. *Id.*

The Archdiocese retained a consultant, who noted significant issues with both the workmanship and the materials used in the roof membrane system. *Id.* at \*2-3. The consultant determined that the only way to remediate the issues would be to replace the failed membrane with a new one. *Id.* at \*3.

The Archdiocese sued Siplast, which tendered its defense to Employers Mutual Casualty Company (EMCC) under several commercial general liability policies that Siplast had purchased from EMCC. *Id.* at \*6. EMCC denied Siplast's claim pursuant to, *inter alia*, the policies' "Your Product/Your Work Exclusion." *Id.*

Siplast filed a declaratory judgment action, seeking a declaration that it was entitled to coverage under the policies. *Id.* at 6. Both parties moved for summary judgment, and the District Court ruled in favor of the carrier, finding that – while the underlying complaint did allege "property damage" that was caused by an "occurrence" – the alleged damage nevertheless fit within the policies' "Your Product/Your Work Exclusion." *Id.* at \*6-7.

The Fifth Circuit, applying Texas law, reversed. Relying on *Wilshire Insurance Company v. RJT Construction, LLC*, 581 F.3d 222 (5th Cir. 2009), and *Building Specialties, Incorporated v. Liberty Mutual Fire Insurance Company*, 712 F. Supp. 2d 628 (S.D. Tex. 2010), the Fifth Circuit explained that if a "complaint alleges damage to and seeks damages for any property that is not the insured's product or directly subject to the insured's work," then the "claim falls outside of a 'your product/your work' exclusion" and the insurer has a duty to defend." *Id.* at \*12. If, however, a complaint "solely alleges facts and damage to the insured's own products, or solely seeks to recover the costs to repair the insured's work, then it is covered by a 'your product/your work' exclusion and the duty to defend remains dormant." *Id.*

The Fifth Circuit specifically disagreed with the District Court's finding that – while the underlying complaint mentioned damage to property other than Siplast's roofing products – coverage was not owed as the Archdiocese did not actually make a claim to recover for any such damage. *Id.* at \*13-14. Such a reading, explained the Fifth Circuit, was "overly narrow" where the factual allegations raised

by the underlying complaint "repeatedly point to damage to property other than Siplast's roof membrane system." *Id.* at \*14. For example, the underlying complaint "alleges that there was 'water damage in the ceiling tiles throughout the [school] after a rainstorm' and that Siplast recommended the Archdiocese 'contact a designated Siplast roofing contractor to address the *damage* and leak.'" *Id.* (emphasis in original).

According to the District Court, such factual allegations create inferences that: (1) the Archdiocese asserted their cause of action based not only on damage to the roof membrane, but also on property damage to other parts of the school; and (2) that the water damage to non-roof-membrane property was caused by the failure of Siplast's faulty roof membrane system. *Id.* at \*15. Because the underlying complaint alleged damage to property beyond the product and work of the insured, the damages fell outside of the "Your Product/Your Work Exclusion" such that EMCC owed a duty to defend. *Id.* at \*16.

The Fifth Circuit also affirmed the District Court's finding that the underlying complaint sought damages for "property damage" caused by an "occurrence" – defined, in part, as an "accident" – as: (1) the complaint contained factual allegations that Siplast's negligence led to the failure of the roof membrane, which caused damage to both the roof itself and to the school as a whole; and (2) there were no allegations that the failure of the roof and attendant damage were intended by Siplast or the 'natural and expected result' of Siplast's actions. *Id.* at \*20-21.

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