

Points of Law 6

ABC Warehouse IV

Retaining Wall Collapse

6.1 Liability and Insurance

The retaining wall was properly designed and built. It collapsed because weep holes were plugged by a painting contractor. It looks like the painting contractor is probably uninsured, so Phil will take a careful look at Allen's property insurance policy. He will also want to examine Allen's liability policy, since damage has been done to the property of third parties: DEF Gasket Corporation and the automobiles belonging to Vernon and Allen himself.

Under an ancient common law doctrine, a landowner is strictly liable for damage done by dirt, mud, or water that escapes from its property. This doctrine applies to damage to the automobiles. If Allen's automobile belongs to ABC Warehouse Company, the potential for coverage will be affected by whether the negligence of ABC caused the loss. If the automobile belongs to Allen, on the other hand, the negligence of ABC would be irrelevant.

6.2 Property Coverage

Allen's property insurance probably covers not only loss to the warehouse building itself, but also to other structures including the pergola, retaining wall, landscaping, irrigation and electrical installations. Whether coverage is afforded by the policy will depend on the specified exclusions from coverage.

Common exclusions that could apply include *landslide*, *earth movement*, *faulty design*, *faulty workmanship*, and *latent defect*. The *latent defect* exclusion would not apply because the defect is obvious to reasonable inspection (at least a person with a rudimentary understanding of the laws of nature). It doesn't really take an expert to understand the purpose of weepholes at the bottom of a retaining wall. It is to prevent the wall from becoming a dam subjected to the pressure of rainwater.

The *faulty workmanship* exclusion could apply since the painting contractor performed the work of plugging the weep holes. Courts, however, interpret insurance policies in favor of coverage and would probably accept the argument that the workmanship itself was good since the painter did an excellent job of plugging those weep holes: it was not faulty workmanship that caused the collapse, but the fact that the work was undertaken at all.

6.3 Landslide and Earth Movement

The *landslide* and *earth movement* exclusion, at first blush, appears to remove coverage since the earth certainly moved. Here, however, the loss must be examined to determine its efficient, moving, proximate cause. A court might well determine that the efficient moving cause was the negligence of the painting contractor who filled the weep holes. Since contractor negligence is not excluded the policy would afford coverage.

6.4 Collapse Coverage

Many property insurance policies offer *collapse coverage* for which an additional premium is paid. Since the retaining wall did collapse, collapse coverage may apply to the loss.

6.5 Liability Coverage

ABC might have a good liability claim against Nels, the painting contractor – but there’s a fly in the ointment. The decision to fill the weep holes was partly made by Teri, who is an employee of ABC. Allen can’t recover compensation from Nels for a loss that was actually caused by the negligent conduct of his own employee!

6.6 Comparative Fault

Here, we must deal with the concept of comparative fault. It often occurs that the fault of two or more persons together causes a loss. Nels and Teri are jointly responsible for the decision to fill the weep holes. Since Teri is an employee of ABC, Nels’ liability will be reduced by a factor that measures the degree of his fault against hers. The law will certainly place a higher degree of responsibility on a licensed contractor than an inexperienced property owner: nevertheless, Allen’s recovery would probably be reduced by 10% or 15% to take into account the negligence of his own employee.

6.7 Employee vs. Independent Contractor

Why isn’t Allen also responsible for the misconduct of his painting contractor? The reason is precisely that Nels is a *contractor*, and not an *employee*. Companies are responsible for the misconduct of their employees but not of independent contractors.

The main distinction between an employee and an independent contractor is that an employer exercises supervision and control over the activities of employees, while an independent contractor is responsible only to achieve results, but is not subject to close supervision.

6.8 Damage to DEF Gasket Corporation Parking Lot

The final problem is the claim DEF Gasket may have for damage to its parking lot. Nels is uninsured and apparently has few resources other than his Chevy pickup. ABC Warehouse Company, though, carries liability insurance. Nels and Teri are both responsible for the loss, but between the two of them Nels’ degree of fault outweighs Teri by about 85 to 15. Does this prevent DEF Gasket from obtaining 100% compensation from Teri’s employer. In most states, the answer is “no.” DEF Gasket can collect 100% of its damages from ABC Warehouse Company, and ABC Warehouse will then have the right to recover 85% from Nels under principles labeled “*contribution and indemnity*.”