

New Jersey Supreme Court Affirms Coverage for Construction Defects

By Robert D. Chesler and Bruce Strong

The New Jersey Supreme Court has affirmed the Appellate Division's pro-policyholder decision in *Cypress Point*, confirming broad coverage for construction defects. *Cypress Point Condominium Association v. Adria Towers, LLC* (A-13/14-15) (076348) (August 4, 2016). The Appellate Division had reversed the trial court decision that denied coverage. In a scholarly decision, the Supreme Court traced the development of the relevant provisions of the general liability insurance policy, examined decisions from other jurisdictions, and reviewed law review articles and dictionaries in order to find coverage for the consequential damages arising out of construction defects.

The underlying facts of this case are sadly very typical. Roof, facade and window construction defects caused water infiltration to owners' units and common areas. The association sued the developers and several subcontractors. One of the developers sued its insurance company, Evanston, which denied any obligation, resulting in the coverage action. It is noteworthy that the association sued under four consecutive insurance policies in place during the four years of construction. Moreover, Evanston then sued another insurance company for contribution. Thus, sub silentio, the Supreme Court acknowledged that the continuous trigger theory of insurance coverage applied not just to toxic tort and environmental actions, but also to construction defects.

Evanston asserted that there was no coverage because there was no occurrence, which was defined in relevant part as an accident, and no property damage. Evanston asserted that since there was no occurrence, the court could not reach the exclusions, and particularly the subcontractor exception to the "your work" exclusion. As noted, the trial court adopted these arguments, and the Appellate Division reversed.

The court began its discussion of the law with an examination of the rules of insurance policy construction. Most importantly, the court stressed that "if the controlling language of a policy will support two meanings, one favorable to the insurer and the other to the insured, the interpretation favoring coverage should be applied."* at 15 (cites omitted). The court noted that if there was an ambiguity, the court could turn to extrinsic evidence.

After a detailed review of authorities and case law from other jurisdictions, the Supreme Court first tackled the issue of property damage.

ANDERSON KILL
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000

ANDERSON KILL
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(267) 216-2700

ANDERSON KILL
1055 Washington Boulevard, Suite 510
Stamford, CT 06901
(203) 388-7950

ANDERSON KILL
1717 Pennsylvania Avenue, Suite 200
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ANDERSON KILL
One Gateway Center, Suite 1510
Newark, NJ 07102
(973) 642-5858

www.andersonkill.com



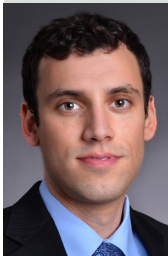


who's who

Robert D. Chesler
is a shareholder
in Anderson

Kill's Newark office. Mr. Chesler represents policyholders in a broad variety of coverage claims against their insurers and advises companies with respect to their insurance programs.

rchesler@andersonkill.com
(973) 642-5864



Bruce Strong
is an attorney in
Anderson Kill's
New York office.
Mr. Strong's
practice concen-
trates in insur-
ance recovery

exclusively on behalf of policyholders and in corporate and commercial litigation.

bstrong@andersonkill.com
(212) 278-1034

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Here, the Association alleged that water infiltration, occurring after the project was completed and control was turned over to the Association, caused mold growth and other damage to Cypress Point's completed common areas and individual units. Those post-construction consequential damages resulted in loss of use of the affected areas by Cypress Point residents and, we hold, qualify as "[p]hysical injury to tangible property including all resulting loss of use of that property." Therefore, on the record before us, the consequential damages to Cypress Point were covered "property damage" under the terms of the policies.

It is of interest that the court concentrated on the "loss of use" aspect of property damage, and not on the issue of physical damage to tangible property.

The court next examined whether an occurrence had taken place. The court found that the term "accident" encompasses unintended and unexpected harm caused by negligent conduct. The court found that the consequential property damage was not foreseeable, and that no one claimed that the subcontractors intentionally caused the property damage.

Evanston argued that the damage was a normal, predictable risk of doing business, relying on *Weedo v. Stone-E-Brick*, 81 N.J. 233 (1979). The court held that *Weedo* was inapposite because it relied upon an earlier form of the general liability policy, and not the newer 1986 policy that was at issue in *Cypress Point*. The court concluded by holding that "the association's claims are covered under the policies' general insuring agreement"

The court next addressed the "your work" exclusion and found that, "in isolation," it would bar coverage. However, the court found that the subcontractor exception added back coverage for consequential damages resulting from work by subcontractors. The court noted that the insurance industry added this exception to make the policy more marketable.

The court concluded by holding that the association's claims of consequential water damage resulting from defective workmanship performed by subcontractors constitutes both an "occurrence" and "property damage" under the terms of the policies. ▲

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