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New Jersey Supreme Court Tackles Insurance Coverage Issues

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The New Jersey Supreme Court has only rarely addressed insurance coverage issues in recent years. However, in the present term it has accepted for review three insurance coverage cases. As one would expect, these three cases involve issues of immediate impact to many New Jersey policyholders and insurance companies, and, for at least two of the cases, concern issues currently being debated nationally.

Construction Defects

Cypress Point Condominium Association, Inc. v. Adria Towers, LLC, No., 441 N.J. Super. 369 (App. Div. July 9, 2015), certif. granted 2015 N.J. Lexis 1116 (Oct. 29, 2015), held that the "your work" exclusion in the standard general liability policy does not bar coverage for consequential damages caused by subcontractors' faulty workmanship — as long as that exclusion contains the "subcontractor exception." Several years earlier, the Third Circuit in *Parkshore* had reached the opposite conclusion. *Pennsylvania National Mutual Casualty Insurance Co. v. Parkshore Development Corp.*, 403 Fed. Appx. 770 (3d Cir. 2010).

In *Parkshore*, the Third Circuit assertedly followed *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233 (1979) and *Firemen's Insurance Co. of Newark v. National Union Fire Insurance Co.*, 387 N.J. Super. 434 (App. Div. 2006) and held that coverage did not exist for the consequential damages caused by faulty workmanship. In *Parkshore*, these consequential damages consisted principally of water infiltration. The trial court in *Cypress* agreed with *Parkshore*, and the Appellate Division reversed. The Appellate Division found that *Parkshore's* reliance on *Weedo* and *Firemen's* was misplaced, as was the trial court's reliance on *Parkshore*. The Appellate Division relied on two dispositive factors that the Third Circuit had ignored. First, the insurance policies in *Weedo* and *Firemen's* pre-dated the adoption of the subcontractor exception in 1986 and were therefore inapposite. Second, *Weedo* and *Firemen's* did not involve consequential damage but only faulty workmanship. The Appellate Division in *Cypress* found that the consequential damages included damage to the "common areas and unit owners' property [including] damage to steel supports, exterior sheathing and interior sheathing and sheetrock, both visible and latent[.]"

The Appellate Division found that when the "your work" exclusion of the general liability insurance policy contains an exception for work performed by subcontractors, as has been standard since 1986, and the

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faulty workmanship by the subcontractor causes consequential damage, coverage exists. The Appellate Division did not reach the issue of whether the subcontractor exception also provided coverage to the owner for the defective work itself. Notably, the Third Circuit now is revisiting its opinion in *Parkshore* and has certified the question to the New Jersey Supreme Court. *The Travelers Property Casualty Company of America v. USA Container Co., Inc.*, No. 14-3685 (3d Cir. July 10, 2015).

Late Notice

Templo Fuente De Vida Corp. v. National Union Fire Insurance Company of Pittsburgh, P.A., No. A-4516-12, 2014 N.J. Super. Unpub. Lexis 1303 (App. Div. June 6, 2014), certif. granted 220 N.J. 42 (2014), addressed the issue of allegedly late notice under a "claims-made policy." It is well-settled in New Jersey that for occurrence-based policies, notice of a suit must be given "as soon as practicable," and the insurance company must show that it suffered appreciable prejudice from the late notice before it can deny coverage. However, in *Templo* the policyholder's policy was what is known as a claims-made policy. This type of policy requires that the policyholder receive the claim during the policy period and provide notice of it to the insurance company during the same policy period. Failure to do so can be fatal to coverage.

In *Templo*, the policyholder gave notice during the policy period. However, the policy also said that the policyholder should provide notice "as soon as practicable." The policyholder gave notice six months after it received the claim, which was still within the policy period. The Appellate Division held that this was not "as soon as practicable," and denied coverage.

Templo is inconsistent both with New Jersey and national insurance coverage law. Since *Cooper v. Government Employees Insurance Company*, 51 N.J. 86 (1968), New Jersey has had a strong public policy in preventing the forfeiture of insurance coverage because of late notice. No one in *Templo* disputed that under a claims-made policy, the policyholder should give notice of the claim during the policy period. However, since Cooper, no one has disputed that the denial of coverage under the clause "as soon as practicable" requires that the insurance company demonstrate appreciable prejudice. The insurance company did not assert prejudice in *Templo*. The Supreme Court has already heard oral argument on this case.

Assignment

Givaudan Fragrances Corporation v. Aetna Casualty & Surety Company, No. A-2270, 2015 N.J. Super. LEXIS 131 (App. Div. Aug. 12, 2015), certif. granted 2015 N.J. Lexis 1200 (Nov. 9, 2015), concerns insurance coverage for an environmental cleanup. In 1987, the New Jersey Department of Environmental Protection determined that there was environmental contamination at a manufacturing plant, and Givaudan sought insurance coverage.

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In the 1990s, Givaudan went through several corporate changes. Givaudan asserted that the insurance policies were assigned each time to the successor corporation. The insurance companies asserted that the standard "no assignment" clause prevented such assignments.

The Appellate Division disagreed. It found that the "no assignment" clause was only intended to prevent policy assignments during the policy period that increased the risk to the insurance company. In the case of *Givaudan*, the occurrence had already taken place, and the assignments were only of the right to receive the proceeds from the insurance policies, not of the policies themselves. As a result, the court held that the "no assignment" clause did not apply.

Conclusion

Each of these cases concerns a major issue that can have an immediate impact on New Jersey policyholders and insurance companies. In view of the contrasting holdings in *Cypress* and the Third Circuit decision in *Parkshore*, a ruling from the New Jersey Supreme Court is necessary to resolve the dispute regarding insurance coverage for consequential damages. Litigation concerning assignability of insurance policies has raged nationally, with mixed results, and here too leadership from the Supreme Court is necessary. *Templo* is more of an outlier, and the Supreme Court should align it with existing precedents on New Jersey law on notice. It is clear that by the end of the Supreme Court's term, policyholders and insurance companies will have a great deal more certainty on key issues of New Jersey insurance law.