New Jersey's Appellate Division Holds That To Prevail On An Indemnity Claim Against An Insurer To Pay A Settlement, A Policyholder Has The Burden Of Establishing That The Settlement Includes A Covered Loss Under The Policy

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On March 13, 2012, in Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 2012 N.J. Super. LEXIS 35 (App. Div. 2012), a published decision, the New Jersey Superior Court Appellate Division addressed a policyholder's burden of proof when seeking indemnity under an insurance policy to pay a settlement. The court held that where the indemnity claim arises out of an underlying settlement entered into by the policyholder, the policyholder must show that the settlement included payment for damages falling within the insuring agreement language of the policy. In doing so, the court rejected the policyholder's argument that it could prevail by showing that the plaintiffs in the underlying lawsuit sought damages for a potentially covered claim.

In Bldg. Materials, GAF Materials Corporation ("GAF"), the policyholder, manufactured roofing shingles. A class action lawsuit was filed on behalf of various homeowners against GAF alleging that GAF's shingles were defective because they rapidly deteriorated after installation ("underlying lawsuit"). In addition to product defect allegations, the claimants in the underlying lawsuit also alleged that the shingles caused third-party property damage to the claimant's personal property.

GAF eventually settled the underlying lawsuit and sought indemnification under its National Union claims-made excess general liability policy ("policy"). Under the terms of the policy, National Union agreed to "pay on behalf of the Insured that portion of the ultimate new loss in excess of the Retained Amounts…which the Insured shall become legally obliged to pay as…damages…because of…Property Damage…caused by an occurrence to which this insurance applies[.]" The policy excluded coverage for property damage to GAF's own products.

After National Union denied GAF's claim for coverage, GAF filed a complaint against National Union seeking, amongst other things, a declaration that National Union wrongfully refused to indemnify GAF in the underlying lawsuit. The case proceeded to trial and the jury returned a verdict of no cause in favor of National Union. GAF appealed the verdict after its motion for a new trial was denied.

On appeal, the parties agreed that under the terms of the policy, damage to third-party property, rather than damage to GAF's shingles, constituted a covered loss. However, GAF contended that the trial judge wrongfully put the burden on GAF to establish, as a prerequisite to coverage, that some of the money GAF paid to settle the underlying lawsuit compensated claimants for third-party property damage. According to GAF, its burden to establish a covered loss under the policy only required GAF to show that the underlying lawsuit potentially alleged damage to third-party property. The Appellate Division rejected GAF's argument, holding that GAF could not establish a covered loss for purposes of indemnity simply by demonstrating that the claimants in the underlying lawsuit alleged third-party property damage; rather, it must show that the underlying settlement actually included payment for such damage. The court noted that GAF's failure to introduce evidence at trial of settlement payments for

third-party property damage was fatal. The court, therefore, affirmed the jury verdict that National Union owed no duty to indemnify GAF.

This decision highlights the policyholder's burden of proof on a claim seeking indemnity arising out of a settlement. When a comprehensive general liability policy contains an own-product exclusion, a policyholder seeking indemnity has the burden of proving that its claim is covered under the policy's insuring agreement. The insurer does not have the burden of proving that the own-product exclusion applies.

Should you have any questions or comments regarding this matter, please feel free to contact Vincent E. Reilly or Eduardo DeMarco.