Appellate Division Decides "Owned Property" Exclusion Does Not Apply To Damage To Insured's Property Caused by Remediation Process

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May 3, 2010

The New Jersey Superior Court, Appellate Division, in an unpublished decision, recently addressed the application of the "owned property" exclusion in a homeowner policy to an insured's property where a leaking underground storage tank caused soil and groundwater contamination. In Proformance Insurance Co. v. Riggins, Inc., No. A-2486-08T1 (App. Div. April 27, 2010), ("Proformance"), the Appellate Division held that if damage to the insured's property is caused by a remediation process for covered damage, as opposed to the initial contamination that gives rise to the remediation process, the "owned property" exclusion does not apply to bar coverage.

Proformance involved the application of three successive insurance policies from three different insurers for the remediation costs associated with a leaking 550-gallon underground storage tank. The leak, which was discovered in January 2006, entered into the groundwater "at levels that exceed the standard established by the Department of Environmental Protection." Proformance Insurance Company ("Proformance"), insured the property from July 11, 2004 through July 11, 2006. Metropolitan Property and Casualty Insurance Company ("Metropolitan") insured the property from July 11, 2002 through July 11, 2004. The other insurer covered the property from July 11, 2000 through July 11, 2002, and it was undisputed that the leak was on-going for four to eight years before it was discovered.

Proformance acknowledged its obligation to provide coverage for the remediation of the property and retained the services of two environmental service consultants regarding remediation. The groundwater contamination extended approximately 20 feet below the house. In order to remediate the groundwater contamination under the house, two options were offered by the environmental consulting service entities. One would include demolition of the house and the other would involve the installation of structural supports to preserve the house from the effects of the remediation process. The demolition process was the most cost-effective remediation method.

Metropolitan also acknowledged its obligation to contribute to the cost of groundwater remediation. However, it claimed to have no obligation to compensate the insured for the demolition of the house in the course of the remediation process because its policy did not cover "property damage to property owned by you." Metropolitan considered the damages to the house to be a first-party property claim subject to the manifestation trigger as opposed to the continuous-trigger theory, which would apply to the groundwater contamination.

The trial court granted partial summary judgment to Metropolitan finding that the demolished house was a first-party claim subject to the "owned property" exclusion. Proformance appealed and the Appellate Division reversed the trial court.

The Appellate Division first noted the well-settled law that environmental contamination of groundwater is a third-party claim subject to a continuous-trigger. Although the Appellate Division stated that the "owned property" exclusion typically applies to amounts paid for back filling property, it determined that

the reimbursement to an insured for the demolition of a house is not the same as replacement of contaminated soil on the insured's property. The Appellate Division next noted that there was no claim that the house itself was damaged by the contamination, and as such, the claim did not constitute compensation for damage to owned property. Rather, the destruction of the house was based upon a determination that the demolition of the house was the most cost-effective way of addressing the covered third-party claim. The Appellate Division held that the damage was caused by the remediation process for third-party property damage as opposed to the initial contamination. As such, the Appellate Division found that the "owned property" exclusion would not apply.