

Cypress Point Condominium Association, Inc. v. Adria Towers, LLC, ___ N.J. Super ___ (App. Div. 2015)

July 10, 2015

On July 9, 2015, the New Jersey Appellate Division issued a published opinion in *Cypress Point Condominium Association, Inc. v. Adria Towers, LLC, ___ N.J. Super ___ (App. Div. 2015)*, holding that the unintended and unexpected consequential damages caused by a subcontractors' defective work constitutes "property damage" and an "occurrence" under a general liability policy. The Appellate Division reached its conclusion by viewing the policy as a whole and distinguishing *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233 (1979), and *Firemen's Insurance Co. of Newark v. National Union Fire Ins. Co.*, 387 N.J. Super. 434 (App. Div. 2006), as those opinions construed an earlier version of the ISO standard CGL form.

In *Cypress Point*, a condominium association, *Cypress Point*, sued the developer, *Adria Towers, LLC* (the developer) and its subcontractors, claiming that their defective work caused consequential damages to parts of the association that were not under construction. *Cypress Point* also sued the developer's insurers for a declaration that the developer's general liability policies covered the consequential damages caused by the subcontractors' defective work.

The trial court determined there was no "property damage" or "occurrence" as required by the policies to trigger coverage and granted summary judgment to the insurers. On appeal, *Cypress Point* made two arguments: (1) under the plain reading of the policies, consequential damages constitute "property damage" and an "occurrence"; and (2) that the trial court improperly relied on *Weedo* and *Firemen's* because those cases involved only replacement costs and relied on differently policy language.

The Appellate Division began by addressing the definition of "occurrence." Because the word "accident" was not defined, the court relied on *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165 (1992), to conclude that the consequential damages alleged by *Cypress Point* constituted an "occurrence." The Appellate Division also ruled that "property damage" existed because the consequential damages constituted "physical injury to tangible property."

Turning to point number two, the Appellate Division stated that *Weedo* did not apply in this case because the consequential damages were not "defective work" damages. In so ruling, the Appellate Division noted that *Weedo* involved an earlier ISO form with different language. The Appellate Division distinguished *Firemen's* by stating that damages in *Firemen's* were limited to the replacement of the defective work, and did not involve allegations of damage to the rest of the building.

The Appellate Division also ruled that the claims asserted by *Cypress Point* fell within the caveat that *Weedo* and *Firemen's* expressly recognized, i.e., the vast difference between the cost to repair the defective work and the cost of accidental injury to persons or to other property. The Appellate Division emphasized that *Cypress Point's* consequential damages claim did not include the cost to replace the defective work, but only the cost of repairing parts of the condominium association that were not under construction.

The Appellate Division also found persuasive the majority rule that construction defects causing

consequential damages constitute an “occurrence.” The court rejected the argument that a liability policy would be converted into a performance or surety bond because such bonds guarantee the construction of the project if a contractor defaults and enables the insurer to seek indemnification from the defaulting contractor. Finally, the court remanded the case to the Law Division to decide whether the exclusions in the policy could preclude coverage.

If you have any questions about the effect of this case, please call Kevin Wolff, Jim Lisovicz or Julia Talarick.