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IN THIS ISSUE

Negligent Work Of A Subcontractor, Constitutes "Property Damage" Caused By An "Occurrence" For Purposes Of The 1986 ISO Commercial General Liability Policy Form
(Read More)

New Jersey Appellate Court Holds That Provision Limiting An Employee's Right to Sue A Third Party Is Unenforceable
(Read More)

NJ Appellate Division Reverses *Walters* – Charitable Immunity Act Analysis Returns to Status Quo
(Read More)

New Jersey's Recent Treatment of Arbitration Agreements
(Read More)

The New York Storm in Progress Rule Applies When Ice Storm Changes to Rain
(Read More)

A Premise Owner's Duty May Extend Beyond Spouses In Toxic Tort Exposure Cases
(Read More)

New Jersey Appellate Division Reverses Trial Court Disclosure Of

Negligent Work Of A Subcontractor, Constitutes "Property Damage" Caused By An "Occurrence" For Purposes Of The 1986 ISO Commercial General Liability Policy Form

The New Jersey Supreme Court has ruled that water damage to completed and non-defective portions of property constructed by a general contractor, unexpectedly and unintentionally caused by negligent work of a subcontractor during the construction, constitutes "property damage" caused by an "occurrence" for purposes of the 1986 ISO commercial general liability policy form. *Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C.* , A-13/14-15, 076348 (N.J. Aug. 4, 2016).

In *Cypress Point*, a condominium association filed suit against developer and general contractor entities that had constructed a multi-unit condominium building, alleging that defective construction had resulted in damage to common elements of the building. The work that was alleged to be defective was performed by subcontractors. The common element damage alleged included allegations of damage to construction work that had not been performed defectively. Insurers of the developer and general contractor disclaimed coverage, saying, among other things, that because the suit consisted of alleged damage to property built by the developer and general

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contractor, the alleged damage was not on account of "property damage" caused by an "occurrence". The trial court granted summary judgment to the insurers, holding that the faulty work of the subcontractor causing damage to the work product of the developer and general contractor did not constitute "property damage" caused by an "occurrence". The Appellate Division reversed, finding that alleged costs, other than costs for the repair or replacement of the defective work itself, constituted "consequential" damage that was an "occurrence" for purposes of coverage. *Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C.*, 441 N.J. Super. 369, 379 (App. Div. 2015).

In affirming the Appellate Division, the New Jersey Supreme Court noted that the policies in question defined an "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general conditions." The policies did not define "accident". The Court, relying on interpretation of similar provisions in homeowners' policies, concluded that "accident" "encompasses unintended and unexpected harm caused by negligent conduct." Because there was no indication in the record before the Court that the subcontractors intended to cause damage, "the result of the subcontractors' faulty workmanship here - consequential water damage to the completed and non-defective portions of Cypress Point" was determined to be an "accident", and therefore an "occurrence". The Court concluded that this interpretation was consistent with the use of an exception in the exclusion for property damage to the policyholder's work if the damaged work or the work out of which the damage arises is performed by a subcontractor.

The Court noted that that the finding of "occurrence" results in coverage only "so long as the other parameters set by the policies are met." For instance, the Court cited with approval a decision stating that if an insurer wishes to exclude coverage for damage to a policyholder's work product, this "can be done simply by either eliminating the subcontractor exception or adding a breach of contract exclusion." Thus, even if damage to a general contractor's work product caused by defective work of a subcontractor is an "occurrence", courts will continue to be confronted with questions of coverage based on other provisions of the policies and the circumstances of the alleged damage.

New Jersey Appellate Court Holds That Provision Limiting An Employee's Right to Sue A Third Party Is Unenforceable

On August 22, 2016 the New Jersey Appellate Division issued a published opinion in *Vitale v. Schering-Plough Corp.*, A-1156-14T4. The court holds an agreement by an employee not to sue third-parties for workplace injuries is unenforceable and against public policy.

In *Vitale*, plaintiff was employed by a security firm. The security firm provided security services to Schering. While working at a Schering facility, plaintiff suffered injuries when he allegedly fell down stairs. Schering was in control of and responsible for the maintenance and repair of the stairs.

Plaintiff was required to sign a document entitled "Worker's Comp Disclaimer." The document included language stating ". . . in consideration of [the security firm] offering me employment I hereby waive and forever release any and all rights that I may have to make a claim, or commence a lawsuit, or recover damages or losses from or against any customer (and the employees of any customer) of [the security firm] to which I may be assigned, arising from or related to injuries which are covered under the Workers' Compensation statutes." Plaintiff did not recall reading or signing the document, or receiving any explanation regarding it.

Plaintiff received workers compensation benefits and he filed a third party liability suit against Schering. Schering moved for summary judgment relying on the waiver. The trial court denied summary judgment. The trial court also denied Schering's request for a comparative fault jury charge. The jury found Schering's negligence caused plaintiff's injuries and awarded him $900,000.

On appeal, Schering, citing out of state cases enforcing similar waivers, argued that the waiver was enforceable as it did not preclude or limit plaintiff's remedy for workplace injury. Rather, it limited plaintiff's remedy to workers compensation. Plaintiff argued that the waiver

violated public policy because it required him to waive his recognized right to recover from a third party and to the extent that it precluded recovery for reckless or intentional conduct.

Finding that the waiver violated public policy, the court reasoned that when he signed the waiver, plaintiff "was unaware of the risks he was undertaking" and "he could not have known of the working conditions he might encounter" while working at the premises of his employer's customers. The court noted that exculpatory clauses are not viewed favorably and that the waiver created a "disincentive" for Schering to maintain a safe workplace for contractors working on its premises. To the extent that the waiver precluded a claim based on reckless or intentional conduct it was similarly against public policy as such claims are exempt from the workers compensation. The court noted that New Jersey recognizes the concept of dual or joint employment in which an employee may be viewed as having two employers, neither of which cannot be subject to a negligence action for work related injuries (subject to contractual indemnification rights between them). However, where the elements of joint employment are not shown, the employee can sue the alleged joint employer for negligence for work related injuries. The waiver would preclude that such a suit.

Finally, the court reversed the trial court's refusal to give a comparative negligence jury charge and remanded for a new trial on liability only.

Employers seeking to curtail employees' rights to sue third parties for workplace injuries should carefully consider whether such efforts will be enforceable.

HKMP has experienced employment practice attorneys who regularly represent and advise management and employers.

New Jersey's Recent Treatment of Arbitration Agreements

Although the federal government favors arbitration as an alternative dispute resolution tool, New Jersey courts have recently thwarted enforcement of arbitration provisions in consumer contracts. In *Kleine v. Emeritus at Emerson*, No. A-4453-14T3 (App. Div. June 9, 2016) (unpub.), the Appellate Division reversed an order compelling arbitration of plaintiff's personal injury claims per an arbitration provision in the patient's admission agreement. Despite the U.S. Supreme Court broadly construing the Federal Arbitration Act, the panel concluded New Jersey law controlled whether there was a meeting of the minds and whether the patient clearly and unambiguously consented to arbitration. After strongly questioning the arbitration provision's conscionability, the panel found there was no meeting of the minds because the parties' designated arbitration forum, American Arbitration Association, was purportedly no longer available and no alternative forum was identified by the contract.

The Appellate Division in *Souza-Bastos v. Federal Auto Brokers, Inc. t/a BM Motorcars*, No. A-1594-15T3 (App. Div. June 10, 2016) (unpub.) affirmed a denial of a motion to dismiss a consumer contract dispute over the purchase of a car in favor of binding arbitration. Despite plaintiff signing documents with arbitration provisions, the denial was affirmed because of discrepancies between the different clauses which the panel deemed "hopelessly confusing to the average consumer." The panel was concerned a consumer would not apprehend the documents' essential terms and would not understand how to arbitrate a claim.

The New Jersey Supreme Court held in *Annemarie Morgan v. Sanford Brown Institute*, No. 075074, A-31-14 (2016) that the arbitration and delegation provisions of a student enrollment agreement were unenforceable as contra New Jersey contract principles set forth in *Atalese v. U.S. Legal Services Group*, 219 N.J. 430, 436 (2014). First, the agreement did not explain that arbitration was a substitute for the right to file suit so the student plaintiffs could not provide informed assent to arbitrate. Second, the enrollment agreement did not possess "a clearly identifiable delegation clause" assigning to an arbitrator the decision as to whether a dispute between the parties would be subject to arbitration.

Justice Patterson's dissent in *Morgan* argued that the matter concerned a procedural question subject to federal law of whether plaintiffs preserved or waived their argument

that the parties' arbitration agreement did not clearly and unmistakably assign the issue of arbitrability to an arbitrator. Since the plaintiffs did not challenge the provision before the trial court, before the Appellate Division, or in the petition for certification to the New Jersey Supreme Court, Justice Patterson concluded they were barred from doing so by the U.S. States Supreme Court's holding in *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 74-76 (2010).

These cases caution companies dealing with New Jersey consumers when incorporating arbitration provisions into agreements. Hardin, Kundla, McKeon, & Poletto has attorneys who can discuss the nuances of drafting and litigating the enforceability of arbitration provisions. Our attorneys can discuss consideration of the forum in which to litigate arbitration provisions and whether a federal judge may be more inclined to compel arbitration. *See, Aiton v. Verizon N.J., Inc.*, No. 15-6533, 2016 U.S. Dist. LEXIS 64610 (D.N.J. May 17, 2016) (unpub.).

NJ Appellate Division Reverses *Walters* – Charitable Immunity Act Analysis Returns to Status Quo

On August 15, 2016, the Appellate Division issued an unpublished decision *Walters v. YMCA*, reversing the trial court's denial of the YMCA's motion for summary judgment based upon the New Jersey Charitable Immunity Act, N.J.S.A. 2A:53A-7 ("the Act").

The trial court in *Walters* held that the YMCA was not immunized under the Act because it operated as a "fitness center" and therefore was not organized exclusively for religious, charitable or educational purposes. It also found that the YMCA was not funded predominantly by charitable donations but rather was sustained through fees and government grants. The plaintiff's bar, citing the *Walters* trial court decision, convinced other trial courts to adopt this reasoning.