SUPREME COURT OF NEW JERSEY
DOCKET NO. A-13/14-15 (76348)

CYPRESS POINT CONDOMINIUM ASSOCIATION, INC., **Plaintiff/Respondent,** **v.** **ADRIA TOWERS, L.L.C., et al.,** **Defendants,** **and** **WEATHER-TITE,** **Defendant/Third-Party Plaintiff,** **v.** **PEREIRA CONSTRUCTION, L.L.C., et al.,** **Third-Party Defendants,** **and** **EVANSTON INSURANCE COMPANY,** **Defendant/Third-Party Plaintiff/Petitioner,** **v.** **NATIONAL INDEMNITY COMPANY and CRUM & FORSTER SPECIALTY INSURANCE COMPANY,** **Third-Party Defendants**	CIVIL ACTION On Certification from the Superior Court of New Jersey, Appellate Division No. A-2767-13T1 Sat below: Judges Yannotti, Fasciale, and Hoffman, J.J.A.D.

AMICUS CURIAE BRIEF OF TURNER CONSTRUCTION COMPANY IN SUPPORT OF PLAINTIFF/RESPONDENT CYPRESS POINT CONDOMINIUM ASSOCIATION, INC.

SAXE DOERNBERGER & VITA, P.C.
1952 Whitney Avenue
Hamden, Connecticut 06517
203-287-2100
Attorneys for Amicus Curiae, Turner Construction Company

On the Brief:
Michael A. Barrese, Esq. and Bethany L. Barrese, Esq.
Gregory D. Podolak, Of Counsel (Pro Hac Vice Motion pending)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This brief is submitted on behalf of amicus curiae, Turner Construction Company ("Turner"), to address an issue with significant insurance coverage ramifications for the construction industry: whether damages to non-defective work or property of a third party caused by defective construction constitute "property damage" caused by an "occurrence," triggering coverage under a commercial general liability ("CGL") policy.

This case involves important issues with respect to the interpretation of CGL policies in the State of New Jersey. The plaintiff, Cypress Point Condominium Association, Inc. ("Cypress Point"), which represents its own interest as well as that of all unit owners, filed suit against the condominium's general contractor, the general contractor's commercial general liability insurers, and subcontractors for damages caused by the subcontractors' defective work on the project. The general contractor's insurers denied coverage for the claim, leaving all parties involved open to significant losses. If the insurers' denials are permitted to stand in this case, the repercussions for the industry at large would be drastic, as general contractors and the public will be left with no recourse to recover damages where defective work causes damage to other, non-defective property.

When evaluating coverage under CGL policies, it is noteworthy that these policies are primarily sold using standardized forms crafted by Insurance Services Office, Inc. ("ISO"). These forms are developed by ISO through an arduous and calculated process which considers market conditions, relevant legislation and case law, and general industry concerns, a process which closely resembles the passage of legislation.

Relevant to this case is the 1986 amendment of the ISO standard CGL form, as these amendments were made in order to clarify coverage for defective construction claims

where defective work was performed by a subcontractor. When making the changes, ISO stated that the revisions were intended to make clear that the new policy form "specifically 'cover[ed] damage caused by faulty workmanship to other parts of work in progress; and damage to, or caused by, a subcontractor's work after the insured's operations are completed.'" U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 879 (Fla. 2007) (citing INSURANCE SERVICES OFFICE, CIRCULAR NO. GL-86-204, COMMERCIAL GENERAL LIABILITY PROGRAM INSTRUCTIONS PAMPHLET (July 15, 1986)).

As demonstrated below, the majority of jurisdictions interpreting the revised policy language at issue in this case have determined that defective construction, or damage to third party property caused by defective construction, constitute "property damage" caused by an "occurrence" under the 1986 ISO CGL policy.[1] Furthermore, the relevant case law in New Jersey, namely 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), support plaintiff's argument for coverage. Although the holdings in these cases addressed whether the cost to repair defective construction itself was covered under the more restrictive 1973 ISO CGL form, each expressly noted that had there been damage to third party work or property, the policy at issue would have provided coverage for those damages.

A review of ISO's stated intent in making the 1986 revisions to the standard CGL policy form in conjunction with an analysis of New Jersey case law and the case law of the majority of jurisdictions interpreting this issue should result in this Court finding that damage to third party work or property caused by defective construction constitutes

[1] See infra note 8.

"property damage" caused by an "occurrence" under New Jersey law. Accordingly, amicus respectfully requests that this Court affirm the judgment of the Appellate Division and find that damage to third party work or property caused by defective construction constitutes "property damage" caused by an "occurrence" under New Jersey law.

CERTIFIED QUESTION ON APPEAL

In a dispute between a condominium association and the condominium developer's commercial general liability insurer regarding coverage for damages to common areas and unit owners' property caused by a subcontractor's defective work, do such damages constitute "property damage" caused by an "occurrence" triggering the insurer's duty to indemnify?

STATEMENT OF FACTS

Amicus relies on the facts as stated in the Appellate Division's July 9, 2015 opinion which indicate the following:

Plaintiff, Cypress Point, is a condominium association that brought claims against the association's developer and general contractor, Adria Towers, L.L.C. ("Adria Towers"), the Adria Towers' insurers, Evanston Insurance Company and Crum & Forster Specialty Insurance Company, and several subcontractors. See Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C., 441 N.J. Super. 369, 371 (App. Div. 2015). Adria Towers served as general contractor on the condominium project and hired subcontractors to perform all of the construction work. Id.

During the course of construction, the subcontractors failed to properly install the roof, flashing, gutters and leaders, brick and EIFS façade, windows, doors, and sealants. Id. at 373-74. This faulty workmanship caused damage to the common areas of the property and to the property of numerous unit owners, including damage to steel supports, interior and exterior sheathing, sheetrock, insulation and other interior areas of the building. Id. at 374. Unit owners also reported experiencing water infiltration in the interior of window jambs and sills. Id.

In this suit, Cypress Point seeks coverage under Adria Towers' commercial general liability insurance policies for consequential damages caused by the subcontractors' defective work.

ARGUMENT

I. CONSTRUCTION DEFECT AS AN "OCCURRENCE": ISO'S CHANGE IN FORMS GRANTS BROADER COVERAGE TO INSUREDS IN DEFECTIVE CONSTRUCTION CLAIMS

In the insurance market, commercial general liability ("CGL") policies are primarily sold using standardized forms crafted by Insurance Services Office, Inc. ("ISO").[2] These forms are developed through an arduous and calculated process which considers market conditions, relevant legislation and case law, and general industry concerns. In fact, ISO's drafting process closely resembles the passage of legislation:

> First, a perceived problem arises. Second, the drafter learns of the problem through constituent lobbying or the notoriety of an event reflecting the problem. Third, the drafter (ISO and its core "membership" of insurers) considers the problem and interest group sentiment and responses as best it can consistent with the drafter's assessment of overall interests, including self-interest. Fourth, the drafter issues a response, usually in the form of new or revised policy language.

Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 McGeorge L. Rev. 203, 210 (2010). Throughout this process, ISO produces various materials reflecting on the drafting history of the policy form, such as memoranda, correspondence, committee meeting minutes, and testimony. Taken together, these various materials provide a rich source of information potentially shedding light on disputed insurance policy terms. Id.

After significant pressure from insurers and policyholders, ISO amended the language in its 1973 standard CGL policy form in 1986. Some of the most significant

---

[2] ISO is a private trade association of the property-casualty insurance industry that, through the use of committees and subcommittees, drafts and revises standard form property and casualty policies. *See* Jeffrey W. Stempel, Stempel on Insurance Contracts § 4.05[A] (3rd ed. 2006). Adria Towers' Evanston Insurance Company and Crum & Forster Specialty Insurance policies are written on an ISO form.

changes were made in order to clarify coverage for defective construction claims where the defective work was performed by a subcontractor.[3] In its July 15, 1986 circular discussing the changes, ISO stated that the revisions to the so-called "business risk"[4] exclusions were intended to make clear that the new policy form "specifically 'cover[ed] damage caused by faulty workmanship to other parts of work in progress; and damage to, or caused by, a subcontractor's work after the insured's operations are completed.'" U.S. Fire Ins. Co. v. J.S.U.B., *Inc.*, 979 So. 2d 871, 879 (Fla. 2007) (citing INSURANCE SERVICES OFFICE, CIRCULAR NO. GL-86-204, COMMERCIAL GENERAL LIABILITY PROGRAM INSTRUCTIONS PAMPHLET (July 15, 1986)).

Prior to the 1986 revisions, the 1973 ISO standard CGL form provided coverage for "all sums which the insured shall become legally obligated to pay as damages because of . . . property damage . . . to which this insurance applies, caused by an occurrence . . . ." Firemen's Ins. Co. of Newark v. Nat'l Union Fire Ins. Co., 387 N.J. Super. 434, 441 (App. Div. 2006) (quoting the 1973 ISO CGL form). It defined an "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Id. "[P]roperty damage" was defined as:

> (1) [P]hysical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom; or

[3] Christopher C. French, *Construction Defects: Are They "Occurrences"?*, 47 Gonz. L. Rev. 1, 8-9 (2011-2012).

[4] These exclusions are referred to as the "business risk" exclusions because these are risks that the insured assumes simply by engaging in its business. See Jim Johnson Homes, Inc. v. Mid-Continent Cas. Co., 244 F. Supp. 2d 706, 717 (N.D. Tex. 2003).

(2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an "occurrence" during the policy period.

Id. The form also included the following "business risk" exclusions:

This [insurance] does not apply:

(n) to property damage to the named insured's products arising out of such products or any part of such products;

(o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;

Id.

In 1986, ISO made substantial revisions to the policy language. The new standard ISO form provided coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. . . ." Cypress Point, 441 N.J. Super. at 376. The definition of "occurrence" was modified to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Id. at 376. This change omitted the previous reference to "bodily injury" and "property damage" neither expected nor intended by the insured.[5] Additionally, the definition of "property damage" was changed to "[p]hysical injury to tangible property, including all resulting loss of use of that property. . . .; or b. [l]oss of use of tangible property that is not physically injured," stripping out any reference to an occurrence in the definition of "property damage." Id. at 376.

Along with these revisions, ISO also modified the "business risk" exclusions to read:

[5] The expected or intended language was not eliminated entirely; instead, ISO moved this language to a separate exclusion.

This insurance does not apply to:

k. Damage to Your Product:
"Property damage" to "your product" arising out of it or any part of it.[6]

This insurance does not apply to:

l. Damage to Your Work:
"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.[7]

These changes were beneficial to policyholders and insurers alike. From the policyholder perspective, these changes were demanded not only because they broadened the scope of coverage in the CGL policy, but also because policyholders reasonably expected to be covered for damages where defective construction caused damage to other, non-defective property. For insurers, these changes were seen as a way to make the CGL policy more attractive to potential policyholders and result in a greater number of policies sold. See French, supra note 3 (citing Stempel, *supra* note 1, at § 14.13[D] (3d ed. Supp. 2007)). With the new policy form, potential policyholders would be drawn to the presence of coverage for damage caused by a subcontractor's faulty work and the expanded definition of an "occurrence."

Contrary to policyholder expectations, however, even after the new policy form was made available to policyholders, claims for coverage for damage caused by defective construction continued to be met with coverage denials from insurers.

---

[6] See French, supra note 3 (quoting the 1986 ISO CGL form).
[7] See id. (emphasis added).

II. THE MAJORITY OF JURISDICTIONS FIND THAT DEFECTIVE CONSTRUCTION OR DAMAGE TO THIRD PARTY PROPERTY CAUSED BY DEFECTIVE CONSTRUCTION IS AN "OCCURRENCE"

Despite the 1986 revisions to the CGL policy form, insurers throughout the country continued to argue that defective construction claims did not constitute an "occurrence." Courts were forced to interpret the new policy form and determine whether the changes accomplished ISO's stated goal of providing coverage for damages caused by defective construction. The majority of courts have decided that defective construction is an "occurrence," either standing alone or, at a minimum, when it causes damage to other non-defective work or property.[8]

---

[8] See, e.g., Owners Ins. Co. v. Jim Carr Homebuilder, LLC, 157 So. 3d 148, 155 (Ala. 2014) (finding that water damage resulting from faulty workmanship constitutes an "occurrence"); Fejes v. Alaska Ins. Co., 984 P.2d 519, 522-23 (Alaska 1999) (standing for the general proposition that improper or faulty workmanship constitutes an accident); Capstone Bldg. Corp. v. Am. Motorists Ins. Co., 67 A.3d 961, 982 (Conn. 2013) (finding that "the insuring agreement clearly does contemplate coverage for repairs to non-defective property stemming from '[p]hysical injury to tangible property' or 'loss of use' caused by defective work"); U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 891 (Fla. 2007) (concluding defective soil work done by a subcontractor that caused damage to homes was an "occurrence" under CGL policies); Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., 707 S.E.2d 369, 372 (Ga. 2011) ("[A]n occurrence can arise where faulty workmanship causes unforeseen or unexpected damage to other property."); U.S. Fid. & Guar. Co. v. Wilkin Insulation Co., 578 N.E.2d 926, 932 (Ill. 1991) (concluding that damage to a building caused by installation of asbestos was a covered "occurrence"); Sheehan Constr. Co. v. Cont'l Cas. Co., 935 N.E.2d 160, 171-72 (Ind. 2010) (concluding that the subcontractors' defective work was a covered "occurrence"); Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 137 P.3d 486, 493 (Kan. 2006) ("[D]amage occurring as a result of faulty or negligent workmanship constitutes an occurrence as long as the insured did not intend for the damage to occur.") (internal quotation marks omitted); Joe Banks Drywall & Acoustics, Inc. v. Transcon. Ins. Co., 753 So. 2d 980, 983 (La. App. 2 Cir. 3/1/2000) (standing for the general proposition that improper or faulty workmanship constitutes an "occurrence" within the meaning of a general commercial liability policy); French v. Assurance Co. of Am., 448 F.3d 693, 706 (4th Cir. 2006) (applying Maryland law and holding that "a standard 1986 commercial general liability policy form . . . provides liability coverage for the cost to remedy unexpected and unintended property damage to the contractor's otherwise non-defective work-product caused by the subcontractor's defective workmanship"); Radenbaugh v. Farm Bureau Gen. Ins. Co., 610 N.W.2d 272,

Although the precise basis for each of these decisions varies based on the facts, in essence courts have held that contractors or subcontractors who perform the work do not

279-80 (Mich. Ct. App. 2000) (stating that "when an insured's defective workmanship results in damage to the property of others, an 'accident' exists within the meaning of the standard comprehensive liability policy"); Wanzek Constr., Inc. v. Emplrs. Ins. of Wausau, 679 N.W.2d 322, 325-27 (Minn. 2004) (acknowledging earlier decisions based upon Roger C. Henderson's 1971 law review article were incorrectly decided because the "business risk" exclusions were changed in 1986); Architex Ass'n v. Scottsdale Ins. Co., 27 So. 3d 1148, 1162 (Miss. 2010) ("[T]he term 'occurrence' cannot be construed in such a manner as to preclude coverage for unexpected or unintended 'property damage' resulting from negligent acts or conduct of a subcontractor, unless otherwise excluded or the insured breaches its duties after loss."); Auto-Owners Ins. Co. v. Home Pride Cos., 684 N.W.2d 571, 578 (Neb. 2004) (finding that "if faulty workmanship causes bodily injury or property damage to something other than the insured's work product, an unintended and unexpected event has occurred, and coverage exists"); High Country Assocs. v. N.H. Ins. Co., 648 A.2d 474, 478 (N.H. 1994) (finding that property damage to condominium units caused by defective workmanship was an "occurrence" within the meaning of the CGL policy); ACUITY v. Burd & Smith Constr., Inc., 721 N.W.2d 33, 39 (N.D. 2006) (holding that "faulty workmanship causing damage to property other than the work product is an accidental occurrence for purposes of a CGL policy"); Crossman Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co., 717 S.E.2d 589, 592-93 (S.C. 2011) (concluding that water damage caused by faulty work to the exterior of a condo constitutes an "occurrence"); Corner Constr. Co. v. U.S. Fid. & Guar. Co., 638 N.W.2d 887, 894-85 (S.D. 2002) (affirming the lower court's ruling that construction defects resulting in ventilation problems constituted an accident and that such damage was covered by the policy at issue); Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302, 310 (Tenn. 2007) ("[D]efective installation [of windows] resulted in water penetration . . . [and] constitute[d] 'property damage' for purposes of the CGL."); Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1, 9 (Tex. 2007) (concluding that damage to the insured's work, as well as damage to a third party's property, can result from an occurrence as defined in the CGL policy, but that no basis exists in the definition of "occurrence" to distinguish between the two); Great Am. Ins. Co. v. Woodside Homes Corp., 448 F. Supp. 2d 1275, 1283 (D. Utah 2006) (applying Utah law and declaring that, among the various approaches to the issue at hand, "the better-reasoned approach, and the approach that is most consistent with Utah law, views faulty subcontractor work as an occurrence from the standpoint of the insured"); Cherrington v. Erie Ins. Prop. & Cas. Co., 745 S.E.2d 508, 521 (W. Va. 2013) (holding that "workmanship causing bodily injury or property damage is an 'occurrence' under a policy of commercial general liability insurance"); Am. Family Mut. Ins. Co. v. Am. Girl, Inc., 673 N.W.2d 65, 70 (Wis. 2004) (holding that excessive settlement of soil, which occurred after the building was completed, and which caused the building's foundation to sink, was "'property damage' caused by an 'occurrence' within the meaning of the CGL policies' general grant of coverage").

intend, subjectively or objectively, to do so in a faulty manner, nor do they intend to cause damage to other non-defective work or property of third parties.[9] The change in the "occurrence" definition from "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured" in 1973 to "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" in 1986 has been critical to the courts' decision-making process. Firemen's 387 N.J. Super. at 440; Cypress Point, 441 N.J. Super. at 337. Although most courts do not reference the 1986 revisions, the fact that the definition of an "occurrence" was broadened gave courts the ability to depart from existing precedent and re-analyze whether defective construction constitutes an "occurrence." Under the new definition, a determination that there was property damage was no longer required. Instead, courts merely needed to decide whether a contractor's substandard performance was accidental.

Under the broadened definitions in the 1986 ISO CGL form, the majority of courts have found either that defective construction is an "occurrence," or that damage to third party property caused by defective construction constitutes an "occurrence," because the damage was unintentional or unintended from the perspective of the contractor or subcontractor.[10] Courts considered the alternative, i.e., that the contractor or subcontractor intended to conduct the work in a faulty manner and cause property damage, as an untenable notion absent direct evidence to the contrary.[11] Although done through different methods, the majority of states have arrived at the conclusion that defective construction is

---

[9] See id.
[10] See Id.
[11] Id.

an "occurrence" under the CGL policy, which affirms the intent of ISO, the insurance industry, and policyholders in revising the 1973 ISO form.

In the instant case, the subcontractors' admittedly defective work (i.e., the failure to properly install the roof, flashing, gutters and leaders, brick and EIFS façade, windows, doors, and sealants) led to significant damages to third party property. Cypress Point, 441 N.J. Super. at 374. According to the Appellate Division, the insurers do not contend, and there is no evidence to show, that the subcontractors "either expected or intended for their faulty workmanship to cause 'physical injury to tangible property.'" Id. at 377. As a result, the only conclusion that can be reached is that the consequential damages were caused by an "occurrence."

III. THE SUBCONTRACTORS' WORK CAUSED PROPERTY DAMAGE TO COMMON AREAS AND UNIT OWNERS' PROPERTY

As indicated above, the 1986 revisions included an amendment to the definition of "property damage," redefining the term to mean "[p]hysical injury to tangible property, including all resulting loss of use of that property. . . .; or b. [l]oss of use of tangible property that is not physically injured." Id. at 376 (quoting the 1986 ISO CGL form). In Cypress Point, the plaintiff claims that the faulty workmanship caused damage to "the common areas and unit owners' property." Id. at 377. More specifically, the plaintiff alleges that the faulty workmanship caused damage to non-defective work performed by other subcontractors including drywall, insulation, wall finishes and wood flooring. Id. Thus, the damages sought by the condominium association were not solely the cost to replace the faulty workmanship itself, but also the cost associated with repairing and replacing other non-defective, tangible property. Based on the definition of "property

damage" in the relevant policies, the consequential damage caused by the faulty work of a subcontractor constitutes physical injury to tangible property.

IV. NEW JERSEY CASE LAW ON DEFECTIVE CONSTRUCTION SUPPORTS CYPRESS POINT'S CLAIM FOR COVERAGE

In New Jersey, two cases are regularly cited regarding the issue of whether defective construction is covered by the CGL policy: 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). It is worthwhile to note at the outset that there are two significant differences between Weedo and Firemen's on the one hand and Cypress Point on the other. First, the policies at issue in Weedo and Firemen's were written on the 1973 ISO form, and as a result, provided narrower coverage than the 1986 ISO form at issue in Cypress Point. Second, in Weedo and Firemen's, the insureds sought coverage for the repair and replacement of defective work itself, while in Cypress Point the plaintiff seeks coverage for damage to third party property caused by a subcontractor's defective work. Nonetheless, as set forth below, Weedo and Firemen's support the conclusion that consequential damage caused by the faulty work of a subcontractor is an insured risk under the CGL policy.[12]

A. Weedo v. Stone-E-Brick, Inc. Calls for Coverage Where Defective Construction Causes Damage to a Third Party

In Weedo, the insured, Stone-E-Brick, Inc. ("Stone-E-Brick"), requested that its insurer, Pennsylvania National Mutual Casualty Insurance Company ("Pennsylvania National"), defend and indemnify it in two cases in which it was alleged that Stone-E-Brick

[12] In fact, Weedo and Firemen's support this finding even under the narrower 1973 forms, leaving little doubt that this Court should hold that the CGL policy at issue in this case provides coverage for consequential damages caused by defective construction.

performed work in a defective manner and that the defective work needed to be replaced. Pennsylvania National denied coverage, stating that the policy did not cover the defective work of the insured. Stone-E-Brick filed suit against Pennsylvania National, seeking a declaration that the policy covered the damages in both actions. The Appellate Division found coverage for the insured, and this Court granted certification to determine whether a CGL policy "indemnifies the insured against damages in an action for breach of contract and faulty workmanship on a project, where the damages claimed are the cost of correcting the work itself." Weedo, 81 N.J. at 235.

The Pennsylvania National policy stated that the insurer agreed to pay "on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury . . . or property damage to which this insurance applies, caused by an occurrence . . . ." Id. at 237. In determining whether there was coverage for the losses, this Court did not conduct an analysis of whether there was an "occurrence," but instead went directly into a discussion of whether the "business risk" exclusions, Exclusions (n) and (o), applied. This is notable because in order to get to a discussion of the exclusions, the insured must first prove that the claim falls within the policy's coverage grant. Rosario ex rel. Rosario v. Haywood, 351 N.J. Super. 521, 529-30 (App. Div. 2002). Only after the insured demonstrates that there is a covered claim will courts look to whether an exclusion applies to preclude coverage. See Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 399 (1970). Thus, in beginning the discussion with whether the "business risk" exclusions applied, this Court implicitly found that the insured had met its burden of proving that the claims for damages arising out of the insured's faulty workmanship were covered by the policy.

The "business risk" exclusions relied on by this Court state:

> This insurance does not apply:
>
> (n) to property damage to the named insured's products arising out of such products or any part of such products;
>
> (o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

Weedo, 81 N.J. at 241. In upholding the insurer's denial of coverage, this Court held that the CGL policy at issue did not insure against the contractor's faulty workmanship. The Court reasoned that every contractor undertakes the "business risk" of providing faulty goods and services. As the contractor can control the quality of goods and services supplied, allowing substandard goods and services to be delivered to the consumer is a risk that the contractor cannot insure.

Notably, the Court engaged in a lengthy discussion comparing the "business risks" that precluded coverage in Weedo to other risks insured by the CGL policy. With respect to faulty workmanship, the court stated that there are two risks at issue. First, the aforementioned "business risks" associated with supplying substandard products and craftsmanship which are excluded by the policy. Second, a separate, albeit related, risk that each and every contractor faces which is insured by the policy. This risk relates to accidental "injury to people and damage to property caused by faulty workmanship." Id. at 239. Unlike business risks, "the accidental injury to property or persons substantially caused by [the contractor's] unworkmanlike performance exposes the contractor to almost limitless liabilities." Id. at 239-40. "While it may be true that the same neglectful craftsmanship can be the cause of both a business expense of repair and a loss represented

by damage to persons and property, the two consequences are vastly different in relation to sharing the cost of such risks as a matter of insurance underwriting." Id. at 240.

By way of example, this Court stated:

> [w]here a craftsman applies stucco to an exterior wall of a home in a faulty manner and discoloration, peeling and chipping result, the poorly-performed work will perforce have to be replaced or repaired by the tradesman or by a surety. On the other hand, should the stucco peel and fall from the wall, and thereby cause injury to the homeowner or his neighbor standing below or to a passing automobile, an occurrence of harm arises which is the proper subject of risk-sharing as provided by the type of policy before us in this case.

Weedo, 81 N.J. at 240. This is because the "happenstance and extent of the latter liability is entirely unpredictable—the neighbor could suffer a scratched arm or a fatal blow to the skull from the peeling stonework." Id. Regardless of how the injured party presents their claim, this is the type of risk insured by the CGL policy.

Although Weedo has been regularly cited for the proposition that faulty workmanship is not covered under a CGL policy, the decision actually stands for two separate and distinct propositions. The first is that under the 1973 ISO form, the cost to repair or replace faulty work itself is not a risk covered by a CGL policy. The second is that where faulty work causes damage to a third party, the damage to the third party is, in fact, insured by the 1973 ISO CGL policy. Given that the 1986 ISO form broadened coverage relative to faulty workmanship, this Court's decision in Weedo persuasively supports the insured's position that the CGL policy provides coverage for damage to third party property, even where said damage arises out of a contractor or subcontractor's faulty workmanship.

B. Firemen's Ins. Co. of Newark v. National Union Fire Ins. Co. Makes the Case for Coverage Where Defective Construction Causes Damage to Third Parties

In Firemen's Ins. Co. of Newark v. National Union Fire Ins. Co., 387 N.J. Super 434 (App. Div. 2006), Society Hill Condominium Association ("Society Hill") filed suit against the developer and a number of contractors for damages arising out of defects in the construction of the Society Hill Condominiums. Importantly, the suit sought to recover damages solely related to the defective work itself, and did not allege that there was any damage to other, non-defective property. Thus, the trial court held that faulty workmanship itself does not constitute "property damage" or an "occurrence" within the meaning of the applicable insurance policies.

On appeal, Society Hill argued that the trial court erred in finding that the claims did not involve "property damage" or an "occurrence" because the cost of repairing the defective workmanship fell within the coverage clauses of the policies and none of the policy exclusions applied. Id. at 441. In determining the outcome, the Appellate Division looked to this Court's decision in Weedo for guidance.

As in Weedo, the Appellate Division repeatedly noted the difference between the excluded "business risk" of performing work in a faulty manner and the insured risk that such faulty work will cause damage to third party work and/or property. Id. at 442-43. Quoting Weedo, the court noted that:

> The insured-contractor can take pains to control the quality of the goods and services supplied. At the same time he undertakes the risk that he may fail in this endeavor and thereby incur contractual liability whether express or implied. The consequence of not performing well is part of every business venture; the replacement or repair of faulty goods and works is a business expense, to be borne by the insured-contractor in order to satisfy customers.

Firemen's, 387 N.J. Super at 442-443 (citing Weedo, 81 N.J. at 239). Unlike business risks, the cost of which the insured must absorb, accidental injury to third parties caused by the insured's faulty work exposes the insured to "almost limitless liabilities." Firemen's, 387 N.J. Super at 443 (citing Weedo, 81 N.J. at 240). Although the same faulty workmanship can be the cause of both the business expense of repairing faulty work and a loss involving damage to third parties, "the two consequences are vastly different in relation to sharing the cost of such risks as a matter of insurance underwriting." Id.

The Firemen's court also acknowledged three other New Jersey Appellate Division cases interpreting Weedo as requiring an insurer to defend an insured where the defective work caused damage to other property. See Firemen's, 387 N.J. Super at 444. In both Hartford Insurance Group v. Marson Construction Corp., 186 N.J. Super. 253 (App. Div. 1982), cert. denied, 93 N.J. 247 (1983), and Aetna Casualty & Surety Co. v. Ply Gem Industries, Inc., 343 N.J. Super. 430 (App. Div. 2001), cert. denied, 170 N.J. 390 (2001), the Appellate Division held that, pursuant to Weedo, the insurer was required to defend a suit in which there were claims that the insured's defective work caused damage to other property because that is the exact risk that the CGL is meant to insure against. Similarly, in Heldor Industries v. Atlantic Mutual Insurance Co., the Appellate Division held that "the insured assumes the risk of necessary replacement or repair of faulty goods as part of the cost of doing business, but passes on to the insurance carrier the risk of personal injury or damage to property of third parties caused by the faulty goods." 229 N.J. Super. 390, 396 (App. Div. 1988) (citing Weedo, 81 N.J. at 239-40).[13]

[13] The Firemen's case briefly discusses the application of the Broad Form Property Damage Endorsement ("BFPD"), which amended the 1973 CGL Policy Exclusion (o) to exclude coverage for "property damage to work performed by the named insured arising out of such

In summary, the decisions in Weedo and Firemen's hold that the 1973 ISO CGL policy does not cover the "accident of faulty workmanship but rather faulty workmanship which causes an accident." Firemen's, 387 N.J. Super at 443. This is the exact situation presented in Cypress Point, albeit under the broader 1986 policy form, where the insured is seeking coverage for unintentional damage to third party property caused by a subcontractor's faulty workmanship.

---

work or any portion thereof, or out of such materials, parts or equipment furnished in connection therewith." In its discussion, the Firemen's court agreed with the reasoning of two foreign cases which held that work performed on behalf of the general contractor is considered the general contractor's work once completed, and therefore the BFPD does not allow for coverage where a subcontractor's defective work causes damage to other, non-defective work. The Firemen's analysis should not be followed in the present case because the BFPD referenced in Firemen's does not contain a subcontractor exception whereas the policy in this case contains a specific exception to the "Your Work" exclusion for work performed on the insured's behalf by a subcontractor. Exclusion (l) reads:

> This insurance does not apply to:
>
> l. Damage to Your Work:
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
>
> ***This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.***

(emphasis added). In addition, the type of analysis followed in Firemen's improperly allocates responsibility for all work performed on a project to the general contractor, despite the fact that the general contractor did not actually perform the work. Although the general contractor is generally responsible for ensuring that all work is performed in an acceptable manner, eliminating a subcontractor's responsibility for performing work in a faulty manner would turn the general contractor into a surety. Just as the insurer has argued that it is not a surety for the general contractor's faulty work, the general contractor should not be made into a surety for a subcontractor's faulty work. Allocating responsibility for all work to the general contractor, and preventing the general contractor from using the subcontractor exception as written, would render this clause meaningless.

CONCLUSION

Policyholders and insurers joined to push for changes to the standard form ISO CGL policy in 1986. The changes made were intended by ISO, policyholders, and insurers to expand coverage for defective construction claims. As a result of these changes, the claims made by Cypress Point are covered by the relevant CGL policies as they involve defective construction that caused damage to other, non-defective property.

In New Jersey, Weedo and Firemen's, the most frequently cited cases on the issue of coverage for defective construction under a CGL policy, interpret the more restrictive 1973 ISO form, and indicate that the policy was meant to cover, and must cover, claims where defective construction causes damage to other property. In addition to New Jersey, the majority of jurisdictions have held that defective construction either is an "occurrence" outright or is an "occurrence" where the defective construction causes damage to other property. Given the current status of New Jersey law, the majority viewpoint on this issue and ISO's stated intent of expanding coverage under the 1986 ISO CGL form, the Appellate Division's decision should be affirmed.

Dated January 13, 2016

Respectfully submitted,

Michael A. Barrese, Esq.
Bethany L. Barrese, Esq.
Gregory D. Podolak, Esq., Of Counsel (Pro Hac Vice motion pending)
SAXE DOERNBERGER & VITA, P.C.
1952 Whitney Avenue
Hamden, Connecticut 06517
203-287-2100
Attorneys for Amicus Curiae, Turner Construction Company