BINDING AUTHORITY
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Smokin' *Weedo*: N.J. District Court Rejects Coverage Under the Garden State's Most Famous Construction Defect Insurance Case

District of New Jersey Prevents General Contractor from Reaching the "Sub-Contractor Exception" to the "Your Work" Exclusion

It has been slim pickins lately when it comes to material for *Binding Authority*. It is well over a month since I've seen a coverage decision of sufficient significance, for a large enough cross section of the *Binding Authority* readership, to justify publishing an issue. So I've stayed quiet and found other things to do to keep myself busy. If you were actually paying for this service, you've have a good case to complain.

The drought ended on Wednesday when the District of New Jersey issued its opinion on the Motion for Reconsideration in *Penn National Mutual Ins. Co. v. Parkshore Development Corp.* (*Parkshore* II). The opinion under reconsideration was the court's September 10, 2008 decision in the case (*Parkshore* I).

Parkshore involved coverage for construction defects at a condominium. At issue was whether faulty workmanship is an "occurrence" -- arising in the context of a project in which the developer/general contractor uses all subcontractors. These days cases that address whether faulty workmanship is an "occurrence" are dog bites man. But *Parkshore II* is significant enough to talk about.

The following factual summary is taken from both *Parkshore* I and *Parkshore II*. Parkshore was the developer and general contractor for Catalina Cove Condominiums in Linwood, New Jersey [not too far from my in-laws house, by the way]. All of the work on the project was performed by subcontractors [key fact that will be discussed below]. Construction was completed in 1998. In October 2006, Catalina Cove filed suit against Parkshore for breach of contract, negligence, breach of implied warranties, consumer fraud and failure of remediation. Catalina Cove's expert identified numerous construction problems in the condominiums that led to wet crawl spaces and water infiltration of the walls. *Parkshore I* at 1-2. Catalina Cove claimed that "Parkshore and the other defendants were negligent in failing to properly diagnose the cause of and failing to remedy water infiltration, failing to repair structural damage caused by water infiltration, and failing to prevent further water infiltration. According to Catalina Cove, this negligence caused common elements of the Catalina Cove condominiums to sustain substantial damage." *Parkshore II* at 2.

To make a long story short, the insurer disclaimed coverage to Parkshore on the basis that all of the claims sprung from Parkshore's faulty workmanship, which, the insurer concluded, was not an "occurrence." Coverage litigation ensued. *Parkshore II* summarized its decision in *Parkshore I* as follows:

> In its September 10, 2008 Opinion, this Court found that there was no occurrence because the only damage was to the condominiums built by Parkshore. The Court noted that the New Jersey Supreme Court has not ruled on when, if ever, faulty workmanship could constitute an

> occurrence. This Court further noted, however, that the Appellate Division of the Superior Court of New Jersey has held that faulty workmanship that damages only the work product of the insured is not an occurrence. *See Firemen's Ins. Co. of Newark v. Nat'l Union Fire Ins. Co.,* 387 N.J. Super. 434, 904 A.2d 754, 762-63 (N.J. Super. Ct. App. Div. 2006) (finding no occurrence where only damage was to general contractor's work product).

Parkshore II at 4.

In its Motion for Reconsideration, Parkshore argued that the Court overlooked the significance of the New Jersey Supreme Court's decision in *Weedo v. Stone-E-Brick, Inc.,* 81 N.J. 233, 405 A.2d 788 (N.J. 1979) – the *Marbury v. Madison* of New Jersey construction defect coverage law. According to Parkshore, the *Weedo* court drew a distinction between the risk of having to repair a defect and the risk that the defect could cause consequential damages. The *Parkshore II* Court disagreed:

> First, this Court stands by its prior conclusion that the decision in *Weedo* was based on an interpretation of exclusions in the policy, not on the definition of occurrence. *See Weedo*, 405 A.2d at 792 (finding that two exclusions were applicable). Second, to the extent that *Weedo* could be interpreted to address the definition of occurrence, the distinction drawn by the *Weedo* court was between the risk that faulty goods will need to be repaired or replaced and "the risk . . . that the goods, products or work of the insured, once relinquished and completed, will cause bodily injury or damage to property **other than to the product or completed work itself,** and for which the insured may be found liable." *Id.* at 791 (emphasis added by Parkshore II) (quoting Henderson, *Insurance Protection for Products Liability and Completed Operations: What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971)). Thus, the Court finds that there was no "manifest error" in its interpretation of *Weedo*.

Parkshore II at 4-5.

On one hand, *Parkshore I* and *Parkshore II* are consistent with prior New Jersey construction defect coverage decisions. But the decisions are nonetheless significant for their clear pronouncement that, when a general contractor employs all subcontractors on a project, the G.C. is not entitled to coverage when the faulty workmanship of one subcontractor causes damage to the work of another subcontractor. In other words, because, as a threshold matter, faulty workmanship is not an "occurrence," an insured-general contractor's claim, for faulty workmanship of one subcontractor, that causes consequential damages to another subcontractor's work, never has an opportunity to be potentially covered via the "subcontractor exception" to the "your work" exclusion.

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