BCBA CONTRUCTION LAW COMMITTEE NEWSLETTER - JULY 2019

Welcome to the first edition of the BCBA Construction Law Committee newsletter. We intend to publish the newsletter twice a year, in July and December, with articles and case law updates of interest to practitioners in the field of construction law.

This edition includes: "Understanding Key Exclusions in Construction Liability Insurance Policies" by Matthew Lakind; "Navigating the Landmines in Home Construction Dispute Resolution" by Adrienne L. Isacoff; and Construction Law Case Summaries, July 2018-June 2019 by Michael A. McDonough.

If you are interested in having an article published in our next edition, please contact Adrienne at aisacoff@floriolaw.com.

We hope you find this first edition helpful and interesting.

The Committee has scheduled its next CLE seminar for November 13, 2019, on "Arbitration: What you need to know to protect you and your clients." Speakers include Judge Carver, Lee Tesser, Brian Ade and Jason Shafron.

UNDERSTANDING KEY EXCLUSIONS IN CONSTRUCTION LIABILITY INSURANCE POLICIES

By Matthew Lakind

Legal claims stemming from a construction project typically involve injuries to workers on site, or defective work causing property damage to the construction itself. Many contractors/developers believe that both they and their subcontractors have Commercial General Liability (CGL) insurance policies to cover just these types events. But what many do not realize is that there are perhaps dozens of "exclusions" buried in the hundreds of pages of these CGL insurance policies that allow an insurance company to deny coverage for these claims.

For a plaintiff seeking to recover damages for bodily injury or property damage, these exclusions can be the difference between recovering nothing from a liable defendant with no assets, or obtaining a sizeable judgment or settlement paid out by an insurance company. For a defendant, these exclusions can be the difference between an insurance company providing monetary coverage (including coverage for costs of attorney representation and expert witnesses, as well as paying out the claim itself), or financial ruin for the contractor/developer if the claims and defense costs are not covered by their insurance policy.

Depending on the type of claim against a contractor or developer, there are three key exclusions in many insurance policies that every claimant, contractor, developer, and their attorneys should be aware of. These are the "Your Work" exclusion, the "EIFS exclusion", and the "Employer's Liability exclusion". If an accident occurs on a construction project, these

exclusions may apply, and insurance coverage for any resulting property damage or bodily injury could be denied. Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 237 (N.J. 1979).

The "Your Work" exclusion is perhaps the most common exclusion relied upon by insurance companies to deny coverage for damages caused by a contractor's (or subcontractor's) defective work. It essentially states that the insurance company will not cover property damage to "your work" that is caused by "your [defective] work". Cypress Point Condominium Ass'n, Inc. v. Adria Towers, L.L.C., 441 N.J. Super. 369, 379 (2015).

Prior to updating these standard form CGL insurance policies in 1986, the "Your Work exclusion" left general contractors and developers at great risk because all of the work on the project (even if performed by a subcontractor) would have been considered the work of the general contractor/developer. However, the standard form CGL insurance policies have now been updated to include two exceptions to the "Your Work" exclusion. The first is the "subcontractor exception". This exception states that the "Your Work" exclusion does not apply if the work out of which the damage arose was performed "on your behalf by a subcontractor". Id.

There is another exception to the "Your Work" exclusion that has not yet been the subject of any precedential case law in New Jersey. That exception (referred to as the "Incomplete exception") states that the "Your Work" exclusion does not apply if "the work has not, at the time of the damage, been abandoned or completed". 313 Jefferson Trust, LLC v. Mercer Ins. Cos., 2018 N.J. Super. Unpub. LEXIS 35, *19, 2018 WL 316972. The implications of this exception have not yet been fully tested in any New Jersey court. Based on a plain reading of the "Incomplete exception", if a roofing contractor improperly installs the gutters, and that improper installation causes damages to the leaders (which were also installed by the roofing contractor), the roofing contractor's CGL insurance policy may provide coverage for the damage to the leaders so long as the roofing contractor's work has not been abandoned or completed at the time of the damage. Without this "Incomplete exception", the damage to the roofer's own leaders may not be covered. But if the roofer's work is incomplete and the roofer remains on the project as of the time of the damage, the damage to the leaders should be covered. It bears repeating that the full scope of the "Incomplete exception" has not been ruled on by any New Jersey court. This exception notwithstanding, in no event will the CGL policy provide insurance coverage for repairing the improperly installed gutters. It will only cover the costs to repair the property damage caused by that improper installation.

In order for general contractors, subcontractors, and developers to protect themselves against defective work alone, and for defective work causing additional damages, it is important to review their CGL policies with their insurance professionals and ensure that those policies include the "subcontractor exception" and "incomplete exception" to the "Your Work" exclusion. These exceptions can be used by Plaintiffs to argue in favor of insurance coverage for their losses, and by defendants who are seeking to have their insurance carriers provide counsel at no additional cost.

EIFS Exclusion

The EIFS exclusion is highly consequential on any project where EIFS is installed. EIFS stands for Exterior Insulation and Finish System, and has been defined as a "nonload bearing,

exterior wall cladding system that consists of an insulation board attached either adhesively or mechanically, or both, to the substrate; an integrally reinforced base coat; and a textured protective finish coat." https://www.eima.com/eifs. It is a commonly used exterior system in the construction industry.

The EIFS exclusion states that there is no coverage for bodily injury or property damage "arising directly or indirectly" out of "your EIFS product" or "your EIFS work". Crum & Forster Ins. Co. v. Breese Corp., 2016 N.J. Super. Unpub. LEXIS 829, *1. The EIFS exclusion may be incredibly broad, perhaps to the point of making the entire insurance policy coverage itself illusory an unenforceable. This is so because the EIFS exclusion appears to exclude coverage for any property damage or bodily injury occurring at ***any*** property where EIFS may have been installed anywhere on the building. Id. This was the apparent holding in Crum & Forster. Thus, if there is EIFS on any "exterior component, fixture or feature of any structure" where property damage or bodily injury resulted from an accident or defective work, coverage for such damage may be denied based on the EIFS exclusion. Id. at 8.

By way of example, if a large building has a leaking roof, insurance coverage for the damages caused by that leaking roof may be excluded because EIFS is found somewhere else on the structure. Id. It may not matter that the EIFS itself has nothing to do with the defective work or resulting damage. While this interpretation of the EIFS exclusion may be so broad as to render the insurance policy itself illusory, this proposition has not been fully tested in New Jersey's Courts. In contrast to the unreported New Jersey case of Crum & Foster, a Florida District Court has found that the EIFS exclusion, when applied to exclude coverage for property damage unrelated to the EIFS, is illusory. Amerisure Ins. Co. v. Auchter Co., 2017 U.S. Dist. LEXIS 185753, *64-71.

If this EIFS exclusion is upheld in New Jersey, it will have sweeping consequences for property owners, developers, and general contractors alike. There is a very real prospect that if bodily injury or property damage is suffered on a property where EIFS has been installed, the EIFS exclusion could preclude insurance coverage for damages resulting from that accident even if the EIFS installation itself had nothing to do with the accident.

The easiest way to protect contractors and developers from this exclusion is to ensure that they do not purchase any insurance containing this clause. On top of this, the development team, including the architect, must ensure that the term EIFS is only used if EIFS in fact appears somewhere on the construction project. Decorative EIFS may not qualify as EIFS since it may not be installed for the purpose of installation. If that is the case, referring to decorative EIFS as "EIFS" in any design documents will increase the likelihood that an insurance carrier will deny coverage based on the EIFS exclusion.

Eventually, the EIFS exclusion will have to make its way through the New Jersey court system, and the Supreme Court will have to decide whether such a broad exclusion is enforceable. Short of that, property owners, developers, and general contractors must either purchase coverage without the EIFS exclusion, or refrain from using the product on their construction projects.

Employer's Liability Exclusion

The third exclusion that everyone (injured workers, contractors, property owners) must be aware of is the "Employer's Liability exclusion." The exclusion precludes coverage for any bodily injury suffered by an employee, subcontractor to an employee, independent contractor, employee of an independent contractor, temporary worker, leased worker, or volunteer worker on a construction project. It can have serious consequences for a host of entities involved in a project if a worker is injured on a construction site.

Typically, if a worker suffers an injury at a construction site, the employer has worker's compensation insurance that insures the injured worker (providing coverage for medical treatment and/or disability payments) regardless of fault. N.J.S.A. 34:15-1, et seq. In exchange, the injured worker is generally barred from suing his employer for those injuries. Millison v. E. I. Du Pont de Nemours & Co., 101 N.J. 161 (1985); N.J.S.A. 34:15-8. However, that injured employee may still sue any other third party he or she believes was negligent and caused his or her injuries. N.J.S.A. 34:15-40.

For example, if an employee of a subcontractor is injured while working, that employee can obtain worker's compensation insurance coverage through its employer, but cannot sue his/her employer absent some applicable extenuating circumstances. However, if that subcontractor's employee believes that the general contractor, property owner, or developer was negligent and contributed to the cause of his accident, that employee can sue those entities for money damages in addition to whatever the employee received from worker's compensation insurance (subject to any subrogation rights of the worker compensation insurance carrier). Id.

If an owner, general contractor, other subcontractor, construction manager, or developer has the "Employer's Liability exclusion" in its insurance policy, then it is unlikely that its insurance carrier will provide coverage for the damages claimed by the injured worker, and any damages and defense costs would have to be paid out of the company's own pocket. This presents a huge risk of substantial exposure to those entities if the employee's injuries are serious or even fatal.

Not all insurance policies contain this exclusion, and it is crucial that any company (whether in construction or not) review its own insurance policies to determine whether this exclusion applies. Any entity involved in construction must balance the payment of higher premiums to remove the "Employer's Liability exclusion" against the risk of no coverage for potential injuries to workers on the project. In addition, an injured worker and any attorney looking to represent that worker should determine whether any other potentially liable parties have insurance to cover the injured worker's damages, or whether the "Employer's Liability exclusion" might preclude such coverage. Depending on the financial status of the potentially liable entity, the injured worker may not be able to recover against that entity if the "Employer's Liability exclusion applies".

Conclusion

In sum, the "Your Work exclusion", the "EIFS exclusion" and the "Employer's Liability exclusion" can have devastating consequences for any entity working on a construction project, including owners, developers, contractors, and claimants alike. Applicability of any one of these

exclusions could work to preclude insurance coverage for sizeable property damage or bodily injury claims, thereby preventing claimants from obtaining adequate compensation for their damages, or putting potentially liable owners, developers, and contractors in financial jeopardy. It is important that all entities embarking on a new construction project ensure that they have the proper insurance coverage, and weigh the cost of eliminating an exclusion against the risks of possibly not having insurance coverage for an expensive accident. It is likewise important that claimants and their attorneys learn as much as they can about the insurance coverage of potentially liable parties before instituting suit, so as to avoid wasting money on a costly litigation only to get a judgment against a defunct company with no insurance coverage.

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NAVIGATING THE LANDMINES IN HOME CONSTRUCTION DISPUTE RESOLUTION

by Adrienne L. Isacoff

Whether the project is one involving new home construction or home renovation, resolving a construction dispute is inevitably painful, frustrating and costly for both the homeowners and the contractor. Uncertainty about whether the dispute is subject to arbitration, or what the implications are of choosing arbitration over litigation, can turn a simple headache into a migraine. This article provides a roadmap for considering the proper venue for home construction disputes and how to craft an enforceable arbitration clause, if that is the forum that your client would prefer.

Election of Remedies Under the New Home Warranty and Builder's Registration Act

The options provided to new homeowners under the New Home Warranty and Builder's Registration Act, N.J.S.A. 46:3b-1 et seq., must be carefully considered in order to avoid being locked into a decision that the homeowner may later regret. The act and regulations promulgated pursuant to its authority provide for the establishment of a fund to be available for the protection of new home owners, financed by builders who pay a warranty premium. N.J.A.C. 5:25-1.1 et seq. The Bureau of Homeowner Protection in the Department of Community Affairs ("DCA") administers and enforces the act.

The act provides a one-year warranty for any defects caused by faulty workmanship and/or defective materials due to failure to comply with established building standards; a two-year warranty for defects caused by faulty installation of plumbing, heating, cooling and electricals systems; and a ten-year warranty for major structural defects. Builders may enroll in and provide to new home purchasers a warranty under the "State of New Jersey New Home Warranty Plan" or in any one of the DCA-approved private warranty plans.

Although there may be some differences among plans, they all must comply with the statutory resolution process which requires that all claims submitted by an owner shall first be reviewed through conciliation or an arbitration procedure. Prior to making a claim against the fund, the owner must notify the builder of the asserted defects and allow a reasonable time for repair. If the builder refuses to remedy the asserted deficiencies, the parties then engage in a conciliation process administered by the DCA. If unsuccessful, with agreement of both parties, the dispute may be arbitrated through the American Arbitration Association or other designated administrative entities. If the arbitration results in a direction to remedy the defects and the builder refuses to do so, the owner may file a request for payment with the DCA.

Consideration of whether to participate in the claims process should depend, in part, on the election of remedies provision included in the act, N.J.S.A. 46:3B-9:

> Nothing contained herein shall affect other rights and remedies available to the owner. The owner shall have the opportunity to pursue any remedy legally available to the owner. However, initiation of procedures to enforce a remedy shall constitute an election which shall bar the owner from all other remedies. Nothing contained herein shall be deemed to limit the owner's right of appeal as applicable to the remedy elected.

One of the reasons underlying the "about-face" attempted by aggrieved homeowners who file suit after already filing a warranty claim is that they realize (probably only after counsel has been retained) that they may have a consumer fraud claim against the contractor, in addition to breach of warranty and breach of contract claims. The case of Rzepiennik v. U.S. Home Corp., 221 N.J. Super. 230 (App. Div. 1987), illustrates this scenario. The homeowners filed a demand for arbitration in accordance with the warranty provided to them, which limited the arbitrator's authority to a determination of the existence of a defect under the warranty, the nature of the repair and the time within which the repair must be undertaken. Following the arbitration, the homeowners remained unsatisfied with the remedial work performed by the builder and filed a complaint seeking compliance with the award and asserting various claims, including breach of contract, negligence and consumer fraud. The Appellate Division affirmed the trial court ruling that the homeowners were barred from seeking additional relief in the courts. The court conceded that the arbitrator had no jurisdiction under the warranty to decide issues of consequential damages and alleged violations of the Consumer Fraud Act ("CFA"), N.J.S.A. 58:8-1, et seq., but emphasized that the homeowners elected to arbitrate the warranty claims. They could have, instead, brought an action for breach of warranty, as well as consumer fraud and other claims, in court. Their attempt to have it both ways came too late under the strict construction of the election of remedies provision of the act.

Bear in mind that the particular language of a warranty may also impact the jurisdictional issues. For example, in Haberman v. West Saddler Development Corp., 236 N.J. Super. 542 (App. Div. 1989), the decision of the "dispute settler" appointed by the warranty company found seven claims that fell ***outside*** of the policy provisions. The homeowners filed suit notwithstanding the fact that they had already elected to file their warranty claim, but the trial court barred that action based on the election of remedies. The appellate court remanded the case to determine which

claims could be considered an action for breach of contract since they were beyond the scope of the subject warranty and, therefore, would remain viable despite the election of remedies.

Home Improvement Contracts

The CFA applies to all consumer transactions, but the expansion of remedies in favor of homeowners against contractors has been particularly virulent. The regulations adopted by the Division of Consumer Affairs that govern home renovation contracts, known as "Home Improvement Practices," N.J.A.C. 13:45A-1.1, et seq., identify a laundry list of requirements that, if not strictly adhered to, have the practical result of imposing strict liability on companies and, under certain circumstances, their individual owners and officers. The Home Improvement Practices Regulations broadly define a home improvement as any remodeling, altering, painting, repairing or modernizing residential property, and includes work on the property outside the house, such as driveways, swimming pools, patios and landscaping.

The dangers facing contractors are illustrated by Allen v. V and A Brothers, Inc., 208 N.J. 114 (2011), where the court held that the corporate contractor's principal and employee could be individually liable under the CFA for regulatory violations relating to construction of a retaining wall for homeowners. The risk of potential individual liability is compounded by the fact that, in addition to a homeowner's right to try to recover additional completion or repair costs, if those damages were actually caused by the violation of the regulations, the homeowner is entitled to treble damages and legal fees. In fact, if a homeowner proves that a contractor has violated the CFA, and can survive a summary judgment motion with respect to whether the violation resulted in an ascertainable loss (damages that resulted directly from the CFA violation), then the homeowner will be entitled to attorneys' fees, even if it does not ultimately prevail on its damages action. Weinberg v. Sprint Corp, 173 N.J. 233 (2002).

Claims for breach of contract and for damages under the CFA may be litigated or arbitrated. However, as the following section explains, unless arbitration provisions in a contract are very carefully crafted, they may not be enforced if challenged by one of the parties.

Arbitrating Home Construction Disputes

For many decades, our courts have reflected a presumption in favor of arbitration. Construction claims were routinely decided by arbitration because of: (1) a recognition of the benefits of having an experienced construction law attorney, design professional or construction manager consider the proofs, which often include technical components; (2) the inclusion of arbitration clauses in form contracts such as those generated by the American Institute of Architects; and (3) an aversion to hearing construction cases by some members of the bench and/or an interest in moving a case off the trial docket.

More recently our courts have narrowed the enforceability of arbitration clauses, particularly in consumer contracts. In the leading case, Atalese v. U.S. Legal Services Group, 219 N.J. 430 (2014), the plaintiff contracted for debt-adjustment services and brought suit alleging violations of the CFA and similar statutory remedies. The court held that consumers may choose arbitration and waive their right to sue in court, but that waiver will only be enforced if the

consumer is provided a clear explanation about giving up the right to seek relief in a judicial forum – especially with regard to waiver of statutory rights.

Attorneys representing parties involved in construction projects who want to arbitrate any dispute relating to the agreement or to the work performed on the project must take care to incorporate language that reflects the criteria that is now being required by our courts. The American Institute of Architects form contracts do not include the requisite terms. AIA Document A201-2007, which is routinely used to provide general terms that amplify a myriad of contract types, provides the following with respect to arbitration:

> If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any claim subject to but not resolved by mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with the Construction Industry Arbitration Rules . . . .

There is little doubt that this arbitration provision, if challenged by one of the parties, will not be enforced. In Epstein v. Conboy, 2016 WL 3600251, the appellate court affirmed that because the subject arbitration clause did not clearly and unambiguously notify plaintiffs-homeowners that they were waiving their right to seek relief in a court of law the clause was unenforceable. The ruling is a cautionary tale in light of the fact that the homeowners had already pursued arbitration against the contractor while the home was being constructed. Later, when they discovered that there were deficiencies they had not known about during construction they filed suit against the contractor, including claims under the CFA. The court rejected the contractor's argument that the homeowner's prior use of arbitration to resolve the earlier dispute triggered the doctrine of equitable estoppel, holding that "plaintiffs' awareness and utilization of the arbitration clause is not an indication that they intended to be limited to arbitration as to future disputes or that they intended to waive their judicial remedies." Id. at *4.

Best Practices

If you are representing a client involved in either new home construction or a home renovation contract prior to the signing of an agreement, discuss the pros and cons of litigation and arbitration. If the client would prefer arbitration, do not rely on any form agreement, whether a boilerplate contract that you have in your own files or one produced by an industry group. Carefully draft the arbitration clause to reflect the intention of the parties with respect to whether all claims and disputes will be subject to arbitration, including, for example, claims under the CFA, and whether the proceedings will be subject to the Federal Arbitration Act, 9 U.S.C.A. 1, et seq., or the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 et seq.

A sample clause would be as follows:

> The parties have selected arbitration as the method of binding dispute resolution with respect to all claims, disputes and controversies arising out of this Agreement and all work performed on the project, including all common law and statutory claims, whether grounded in contract, tort, equity or otherwise. The parties

understand and acknowledge that they are waiving their right to trial in court, either with or without a jury. The provisions of this paragraph shall be governed by the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1, et seq.

Of course, if you are representing a client who does not want the dispute to be subject to arbitration and the dispute resolution clause did not include an expansive waiver, you may very well have the ammunition to knock the dispute back into court.

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CONSTRUCTION LAW CASE SUMMARIES

By Michael A. McDonough, Esq.

The following are case summaries of construction law matters decided July 2018 – June 2019:

In re Linear Elec. Co., Inc., 852 F.3d 313 (3d Cir. March 30, 2017). Plaintiff sold materials to an electrical subcontractor. The subcontractor failed to pay plaintiff and filed for bankruptcy. The plaintiff filed a lien against the properties where plaintiff's materials had been utilized. In affirming the bankruptcy and district courts, the Third Circuit held that the filing of the lien violated the stay provisions of the bankruptcy law. In reaching this decision, the Third Circuit held that if the plaintiff is able to collect on its lien, it would reduce the amount of the accounts receivable of the debtor and reduce the amount of the debtor's assets that were subject to distribution to all creditors, which are both prohibited by the bankruptcy law.

NRG REMA LLC v. Creative Envtl. Solutions Corp., 454 N.J. Super. 578 (App. Div. 2018). Owner of power generating station entered into a contract with abatement contractor whereby contractor agreed to pay owner $250,000 in return for the right for the salvage. Two subcontractors that performed work in connection with the abatement filed liens for non-payment. One of the liens was signed by a "financial director." As a result of the salvage efforts, a different subcontractor received over $2 million. One of the subcontractors moved to foreclose on its lien and the owner and the subcontractor that had received the $2 million for the salvage filed declaratory judgment actions claiming that the lien fund was limited to a $52,427 change order. The trial court determined that the lien fund was over $2 million and not $52,427 and rejected the argument that the foreclosing subcontractor's lien was invalid because an authorized officer did not sign it. On appeal, the Appellate Division noted that the amount of a lien is tied to the owner's contractual payment obligations and the lien claim cannot exceed the unpaid portion of the claimant's contract price and that no lien fund exists if, when the lien is filed, the owner has fully paid the contractor for the work or services

performed. The foreclosing contractor claimed that the revenue generated from the salvage was the contract price, while the owner claimed that until it agreed to pay a change order, the owner had agreed to pay nothing. The Appellate Division held that the value of the salvage materials is an element of the contract price. However, the Appellate Division rejected the trial court's calculation of the lien fund, since the trial court failed to discount certain payments previously made. Lastly, the Appellate Division determined that the foreclosing lien was not properly authorized, since the signatory was not an officer of the entity by its bylaws or by board resolution.

H&S Const. and Mech., Inc. v. Westfield Public Schools, Docket No. A-3696-17, 2018 WL 3282287 (App. Div. July 5, 2018). The Appellate Division affirmed the trial court's finding that the lowest bidder's failure to include Certification of No Material Change of Circumstances ("Certification") was non-material and waivable. The Appellate Division held that the statute's plain language contains no requirements for subcontractors to submit the Certification and there was no evidence in the bid documents that the submission of the Certification was mandatory and non-waivable.

Epic Mgmt., Inc. v. New Jersey School Dev. Auth., Docket No. A-3818-16, 2018 WL 3446735 (App. Div. July 18, 2018). Plaintiff was the second lowest bidder on a public works job. It lodged a protest with the New Jersey Schools Development Authority ("SDA") against the bid of the lowest bidder, Hall Construction Co. ("Hall"). Plaintiff claimed that Hall failed to disclose that if the public entity awarded the contract to Hall, the amount of unfinished work for Hall's electrical subcontractor would exceed that subcontractor's aggregate rating ($15 million) with the DPMC. In response, Hall advised that it intended to directly purchase certain electrical equipment and materials for the project. If the value of that material was not attributable to Hall's electrical subcontractor, the value of the subcontractor's unfinished work would remain within its aggregate rating. Plaintiff then claimed that Hall's decision to purchase material and equipment constituted self-performing work and Hall's failure to disclose that fact provided an additional basis to reject the bid. The SDA received the parties' submissions and, among other things: (1) rejected the argument that Hall's failure to disclose its decision to purchase materials and equipment as self-performing work rendered its bid defective because the relevant statute (N.J.S.A. 52:18A-243) did not preclude Hall from performing any of the work or from obtaining materials for that work. The statute only required Hall to identify any of the subcontractors with whom it will subcontract for the furnishing of "any of the work and materials" for the project, which Hall did by identifying its electrical subcontractor and (2) rejected the argument that the bid specifications required Hall to identify itself as self-performing because the bid specifications only required self-performing identification for "work" and not the purchase of materials. On appeal, the Appellate Division concluded that Hall's electrical subcontractor was not required to include on its DPMC disclosure form the value of the electrical equipment supplied by Hall. Thus, the electrical subcontractor's quote, when coupled with the value of its uncompleted work, did not exceed its $15 million aggregate rating limit. Moreover, N.J.S.A. 52:18A-243 did not

prohibit Hall from purchasing electrical supplies nor did the purchase constitute self-performance of electrical work by Hall.

Tejandra Shah and Aruna Shah v. T&S Builders, LLC, Docket No. A-0276-17, 2018 WL 3543007 (App. Div. July 24, 2018). Plaintiffs engaged Defendant-builder to build an addition on Plaintiffs' home. The contract between the parties included an arbitration provision drafted by Plaintiffs. A dispute arose and Defendant made a demand for arbitration. Plaintiffs answered and asserted counterclaims that included a claim for violation of the Consumer Fraud Act ("CFA"). Two weeks before the arbitration hearing, Defendant argued that the arbitrator should not consider the CFA claims because the arbitration provision failed to make any reference to statutory claims and that the Defendant, while agreeing to arbitrate contract claims, never waived its right to a trial in the Law Division as to the CFA claims. Plaintiffs countered by arguing, among other things, that based upon an Appellate Division's decision in Atalese v. United State Legal Services, Group, L.P., Docket No. A-065412 (App. Div. Feb. 12, 2013), CFA claims are subject to agreements to arbitrate. On the evening before the hearing, the arbitrator sent the parties the decision of the Supreme Court that reversed the Appellate Division's Atalese decision. The Supreme Court that held that "[t]he absence of any language in the arbitration provision that plaintiff was waiving her statutory right to seek relief in a court of law" rendered the subject arbitration provision unenforceable. On the day of the hearing, the Plaintiffs claimed that the subject arbitration provision could not be enforced and the Defendant claimed that the CFA claims had to be heard by the arbitrator. The arbitrator stayed the arbitration, and Plaintiffs filed a complaint in the Law Division. The Defendant moved to dismiss that complaint. The trial court, relying on Cole v. Jersey City Medical Center, 215 N.J. 265 (2013), which was a case that discussed factors a court should consider in determining if a party waived the right to arbitrate, granted the Defendant's motion to dismiss. The trial court determined that the Plaintiffs' participation in the arbitration for a three year period constituted a waiver of the Plaintiffs' right to seek relief in the Law Division. On appeal, the Plaintiffs, relying on the Appellate Division's "solicitude" of consumers forced to arbitrate claims buried in a contract, argued that the terms of the contract only related to contract-based claims and that the trial court erred in relying on Cole, as that case related to a delay in seeking arbitration and not litigation in the Law Division. In affirming the trial court's decision, the Appellate Division declined to address whether Cole should be applied to the facts of the instant case. Rather, the Appellate Division determined that the conduct of the parties, which included the following facts: (1) Plaintiffs drafting the arbitration provision; (2) Plaintiffs filing a CFA counterclaim in the arbitration; and (3) the parties' participation in arbitration, were, as the trial court found, "powerful indicators," that the parties agreed and understood that the CFA claims were subject to arbitration.

Martin v. Bank of America, Docket No. A-2128-15, 2018 WL 3614171 (App. Div. July 30, 2018). Plaintiffs purchased a home from another homeowner. Plaintiffs alleged that the Defendant's predecessor, Fleet Bank, N.A. ("Fleet"), concealed engineering plans and made

misrepresentations to a planning board in order to obtain final approval to develop a property adjacent to Plaintiffs' home. The Plaintiffs, who had no direct contact with Fleet, argued that if Fleet had disclosed the plans, the township would not have approved the development of the adjacent property, the developer would not have purchased that property, and Plaintiffs' home would have not flooded. When the developer began construction of homes on the adjacent property, the original owners of the Plaintiffs' property experienced flooding and commenced suit against the developer. During discovery, the original home owner's expert opined that a discrepancy in the grading elevations between the two properties caused the flooding and continued development at the adjacent property would cause more harm. The original home owners settled with the developer and the developer purchased the original home owner's property. Approximately 9 months later, the developer sold the subject home to another couple. The following year the Plaintiffs purchased the home. The Plaintiffs experienced water intrusion issues in their home as the development of the adjacent property continued. The Plaintiffs sued the Defendant for, among other claims, a Consumer Fraud Act ("CFA") claim. The case went to trial and the jury awarded, among other things, $48,750 in treble damages and $1,817,937 in legal fees for violation of the CFA. Defendants appealed. The Appellate Division held that to successfully assert a CFA claim, a Plaintiff must show a causal nexus between the unlawful conduct and the ascertainable loss. The Appellate Division also held that a "complete lack" of any relationship between a defendant's unlawful conduct and a plaintiff's loss "compels a finding of a lack of causation under the CFA" and cited several cases where courts have found a causal connection lacking because the defendants made alleged misrepresentations to prior purchasers (and not to the CFA plaintiffs). The Appellate Division concluded that the Plaintiffs had no direct contact with the Defendant (or its predecessor) and the Defendant did not make any representation to the Plaintiff. Thus, the Plaintiff failed to demonstrate a causal connection. Accordingly, the Appellate Division vacated the final judgment that awarded Plaintiffs damages and attorneys' fees on their CFA claims.

Lessner Elec. Co. v. Fid. and Deposit Co. of Md., Docket No. A-0081-17, 2018 WL 3747794 (App. Div. Aug. 8, 2018). Plaintiff, an electrical subcontractor, entered into a subcontract agreement with a general contractor for a public works project. The subcontract stated that the Plaintiff waived any damages for delay. The owner removed the general contractor from the project and the surety assumed the general contractor's role. The surety and Plaintiff entered into an agreement whereby the parties agreed, among other things, that (a) the terms of the Plaintiff's subcontract agreement with the general contractor applied; (b) the surety would pay Plaintiff the sums owed to Plaintiff under the subcontract and change orders; and (c) other than payments due to Plaintiff under subcontract and change orders, there were no other conditions that needed to be satisfied for Plaintiff to return to the project. The agreement with the surety also noted that Plaintiff reserved its right to assert claims relating to delay damages. Plaintiff subsequently claimed that it sustained $1.82 million in delay related damages and sued the surety and the general contractor. The trial court granted the

Defendants' motion to dismiss based upon the terms of the subcontract and also because delay damages are not recoverable under the terms of the bond and the Bond Act. On appeal, the Appellate Division held that the plain language of the subcontract provided for clear waiver of delay damages and the agreement between Plaintiff and the surety did not modify or afford greater rights to the Plaintiff other than those set forth in the subcontract agreement.

Hockenjos v. Peterson & Staeger Inc., Docket No. A-5138-16, 2018 WL 5623687 (App. Div. Oct. 31, 2018). In December of 2012, Plaintiff hired F&A General Construction, LLC ("F&A") to repair her home. F&A walked off the project due to Plaintiff's alleged failure to pay F&A in April of 2013. On April 2, 2013, Plaintiff hired Peterson & Staeger, Inc. ("P&S") to continue the home repair. In July 2013, Plaintiff sued F&A. In 2015, Plaintiff settled her suit with F&A. As part of that settlement, Plaintiff released her claims against F&A. Five days later, Plaintiff sued P&S. P&S filed a third-party complaint against F&A. F&A and P&S then moved for summary judgment claiming that the entire controversy doctrine barred the Plaintiff's claims. The trial judge granted the motion, determining that the P&S litigation was a successive action because Plaintiff previously filed similar claims against F&A arising out of the same facts and that the parties would be substantially prejudiced if Plaintiff continued the P&S litigation. The Appellate Division affirmed and concluded that, at the time Plaintiff filed her claims against F&A, she was cognizant of her claims against P&S and elected not to assert these claims at that time.

Vela Townhomes Condo. Ass'n, Inc. v. Rosen Partners, LLC, Docket No. BER-L-4477-18 (L. Div. Jan. 23, 2019). Plaintiff condominium association filed a construction defect case and attempted to file a fifth amended complaint to assert claims for piercing the corporate veil to add claims against a newly formed proposed defendant and individuals. The court denied the motion to amend. Therefore, the Plaintiff filed a new action that contained all of the claims set forth in the proposed fifth amended complaint in the pending action. The Defendants in the new action moved for summary judgment based upon the statute of limitations and the statute of repose. The Plaintiff argued, among other things, that the statute of limitations should be tolled and that the statute of repose does not apply to the consumer fraud act claim. The trial court granted summary judgment for the Defendants and held that the claims were barred by the statute of limitations and that the statute would not be equitably tolled because the Plaintiff was aware of the potential claims through the discovery in the prior action. The trial court also determined that the Plaintiff's claims were barred by the statute of repose.

County of Hudson v. PMK Group, Inc. et al., Docket No. A-1543-17, 2019 WL 993336 (App. Div. Feb. 28, 2019). Defendants were engineers on two construction projects. A bridge collapsed on one project and Hudson County sued the Defendants. The matter settled and the parties executed a release that stated, among other things, that the release "applies to all claims resulting from anything which has happened up to now" and form the basis of Hudson

County's claims against the defendants in the pending lawsuit. Three months later, a portion of the other project collapsed and Hudson County filed suit against the same Defendants. The Defendants moved for summary judgment based upon the release. The trial court granted that motion. On appeal, the Appellate Division reversed and remanded and directed the parties to complete discovery and ordered a hearing be conducted regarding the interpretation of the release. The Appellate Division found that the trial court had impermissibly rewrote the release to bar future claims and that there were genuine issues of material fact as to whether the language in the release contemplated only present or prior-existing claims and whether Hudson County was aware of these claims. Lastly, the Appellate Division held that the trial court's decision to deny discovery was an abuse of discretion.

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