New Jersey Court Ruling Addresses Enforceability of Waiver of Subrogation Provisions in Homeowners Association Documents

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A continuing issue in the relationship between community associations and their constituent property owners has been the allocation of responsibility for damages to the residences as a result of a casualty originating in the common elements or common property. It is commonplace for homeowner association documents to provide that the homeowner's insurance policy must contain "waiver of subrogation" provisions for the benefit of the association. Waiver of subrogation provisions may also benefit residential owners for casualty originating in their units.

By way of example, if a fire occurs in the common element attic space and spreads to the unit below, the unit owner could claim that the association was negligent in maintaining the attic space, resulting in the fire that caused damage to the unit. Subrogation is the right of the unit owner's insurance company, which pays for the damage, to assert the unit owner's claim for damage against the association. A waiver of subrogation provision in the policy would prevent the insurance company from asserting such a claim against the association, and could also prevent the insurance company from asserting a claim against an adjacent unit owner.

In the Appellate Division of the Superior Court of New Jersey's 2009 decision in *Skulskie v. Ceponis*, the by-laws provisions of a condominium association that required unit owners to have their insurance companies waive subrogation was enforceable. In that case, water damage to a unit was paid for by the damaged unit owner's insurance company. The Court prevented the insurance company from suing the upstairs unit owner who caused the water damage (and who had no insurance).

In *Universal North American Insurance Company v. Bridgepointe Condominium Association*, a case of first impression decided in March of 2018, the Superior Court of New Jersey held that the plaintiff, an insurer that paid under its policy for damages to a unit owned by one of its insureds, was not allowed to maintain its subrogation claim against the condominium association. Judge Gary K. Wolinetz (a former Greenbaum partner) ruled that whether or not a waiver of subrogation provision was included in the policy, the association's by-laws required unit owners to include a waiver of subrogation in their homeowner's insurance policy, and that the waiver was binding on the insurance company.

The opinion makes it clear that insurance companies are on notice of waiver of subrogation provisions in homeowner association documents: "It is also undisputed that Universal knew, or should have known about the Association's Master Deed and Bylaws, including the Waiver of Subrogation Provisions, before it agreed to sell Laspada [a unit owner] an insurance policy." The opinion also reconciles the fact that a Master Deed may be silent on the subrogation issue, with a bylaw provision containing the waiver requirement in favor of the association, which requirement will remain enforceable.

The *Universal* opinion is the first reported case to address the waiver issue in the context of claims against associations head-on. It reinforces the common practice of associations to require that unit owners who suffer casualty damage to their units assert claims against their homeowner insurance policies - and avoid any liability of the association or other unit owners to the insurance carrier for any such claims paid under the policy.