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More Good News for Sureties in New Jersey: Still No Bad Faith

by Patrick R. Kingsley, Esq. and Benjamin E. Gordon, Esq.

Last month, the U.S. District Court for the District of New Jersey stated what now appears to be established law: "There is no cause of action for bad faith breach of a surety bond in New Jersey." See U.S. Sewer & Drain, Inc. v. Earle Asphalt Co. and Federal Insurance Company, 2015 WL 3461087 (D.N.J. June 1, 2015).

In U.S. Sewer & Drain, a subcontractor asserted a claim against the payment bond. The surety denied the bond claim. The subcontractor sued, asserting several claims, including a bad faith claim against the surety. The surety moved to dismiss. The court granted the surety's motion, emphasizing two important aspects of New Jersey bad faith law. First, the New Jersey bad faith statute, on its face, does not allow claims against a surety for alleged bad faith. In fact, the New Jersey bad faith statute does not even create a private right of action. Rather, the statute merely allows an investigation by the Commissioner of Insurance. The statute specifically does not apply to surety bonds. Second, New Jersey courts have proven to be unwilling to recognize a bad faith cause of action against sureties. This is contrary to a prediction offered by the District Court in 2000. See U.S. *ex rel* Don Siegel Constr. Co. v. Atul Constr. Co., 85 F.Supp.2d 414 (D.N.J. 2000). In 2000, the Atul court predicted that the New Jersey Supreme Court would recognize a bad faith cause of action against sureties. That prediction simply has not come true. In the fifteen years since the Atul decision, no New Jersey court, state or federal, has established a "bad faith" cause of action against a surety.

Six years ago, Stradley Ronon successfully reversed the direction of New Jersey law on this subject by convincing the District Court of New Jersey that the Atul prediction was wrong and that New Jersey would not recognize a claim for "bad faith" against sureties. The court agreed and held that Stradley had "the better argument on every point." See SBW, Inc. v. Ernest Bock & Sons, Inc., No. 07-cv-4199-MLC D.N.J. Mar. 17, 2009 (unpublished oral opinion, p. 23). This case turned out to be seminal and marked the turning point of New Jersey jurisprudence on this issue. In the six years since the Bock decision, it appears increasingly unlikely that the New Jersey courts will ever recognize a claim for purported "bad faith" against a surety for the denial of a bond claim. Since Judge Cooper first rejected the Atul predication in Bock, other judges have agreed with her assessment. In 2011, Deluxe Building Sys., Inc. v. Constructamax, Inc., 2011 WL 322385 (D.N.J. 2011) endorsed the decision in SBW v. Bock. And now, with U.S. Sewer & Drain decision, it would appear that the tort of "bad faith" against sureties has been squarely rejected by the federal courts that have been asked to interpret New Jersey law on this issue. It still remains to be seen whether a state appellate decision will confirm these federal predictions of state law. But until then, momentum in favor of sureties continues to build on this issue.

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