

New Jersey Federal Court Examines And Applies The “j.(5)” Ongoing Operations Exclusion

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In *PJR Construction of N.J. v. Valley Forge Insurance Company*, 2019 U.S. Dist. LEXIS 127973 (D.N.J. July 31, 2019) (*PJR Construction*), a New Jersey federal court held that the “j.(5)” “Ongoing Operations Exclusion” applied to bar coverage for property damage to property on which a construction company allegedly performed faulty work. The court’s opinion follows prior New Jersey state court precedent, including *Ohio Casualty Insurance Company v. Island Pool & Spa, Inc.*, 12 A.3d 719 (N.J. Super. Ct. App. Div. 2011) (*Island Pool*), but also provides additional guidance on the elements which can make the Ongoing Operations Exclusion applicable to exclude coverage.

In *PJR Construction*, a commercial property owner engaged a construction company to build a 26,000 square foot swim club and related 3,000 square foot pavilion building in New Jersey. After about 75% of the work was completed, the property owner fired the construction company and denied it access to the property. The owner later sued the construction company in New Jersey state court alleging “shoddy workmanship” in, among other things, sealants, flashing, water resistant barriers, masonry and the handicap ramps. The construction company sought coverage from its CGL insurer, which denied coverage based on, among other things, the j.(5) Ongoing Operations Exclusion. After the denial of coverage, the company sued the insurer in New Jersey federal court seeking a declaration of coverage.

Relying principally on the *Island Pool* case, the federal court in *PJR Construction* held that the insurer did not owe coverage to the construction company based on the j.(5) Ongoing Operations Exclusion. The court examined whether the “three elements” of the *Island Pool* test for application of the Ongoing Operations Exclusion were “fulfilled” by the facts in *PJR Construction*. The *Island Pool* elements are: “(1) Is the claim for damage to ‘real property’? (2) Was the insured, or someone working on behalf of the insured, performing operations on ‘that particular part’ of the property that was damaged; and (3) Did the damage occur while the operations were being performed?” 12 A.3d 719, 728 (N.J. Super. Ct. App. Div. 2011).

The court in *PJR Construction* concluded that all three of the *Island Pool*’s elements were satisfied by the facts in the case, and therefore held that coverage was excluded by the j.(5) Ongoing Operations Exclusion. The court, citing Black’s Law Dictionary’s definition of “real property,” found the alleged damage was to real property because the construction company was asked to build structures which were “erected upon the land.” The court also found that the “particular part of the real property” element was satisfied because the company’s scope of work was “the Project as a whole.” The court reasoned that “PJR was hired to construct a building and at the time the damage occurred, [it] was still attempting to complete that building.” The court noted that the owner was not complaining of “damage to other parts of the worksite that PJR was not responsible for.” Finally, the court found that the construction company’s operations were still being performed because the company was “still working on the Project as of . . . when it was denied access to the site,” and the owner even admitted the damages occurred while the company was working on the site. Accordingly, the Ongoing Operations Exclusion applied to bar coverage for the construction company’s claim.

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