

The Saiber Construction Law Column: November/December 2022

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In July 2022, the Supreme Court of New Jersey issued an opinion, *Crystal Point Condominium Association, Inc. v. Kinsale Insurance Co.*, which considered whether (1) a condominium association that had obtained default judgments against a structural engineering firm and a construction inspection company resulting from construction defects, could assert claims against those judgment debtors' insurance company under New Jersey's Direct Action Statute and (2) an arbitration provision in the insurance company's policy issued to its insureds applied to the lawsuit filed by the condo association.

The Direct Action Statute is a law that provides third-party claimants (i.e., the condo association) with the right to seek insurance benefits owed by an insurer to an insolvent policyholder (i.e., the engineering firm and the inspection company). The insurance company argued that the statute did not apply because the condominium association had failed to demonstrate that its insureds were, in fact, insolvent or bankrupt. The insurance company further argued that if the statute did apply, the condo association had to proceed with its claims in arbitration rather than with a court action because the policies issued to its insureds contained an arbitration provision.

The Supreme Court applied the Direct Action Statute to the specific facts of the *Crystal Point* case and held that the statute was applicable because, although the condo association initially failed to satisfy its burden of demonstrating that the judgment debtors were bankrupt or insolvent, it had supplemented the record with sufficient evidence of their insolvency or bankruptcy. Accordingly, the Supreme Court held that the condominium association could proceed with its lawsuit against the insurance company pursuant to the Direct Action Statute.

The Supreme Court then turned to the arbitration provision argument raised by the insurance company. The Court looked at the language of the statute, which, among other things, defined a judgment creditor's claim against an insolvent or bankrupt judgment debtor to be a claim "under the terms of the policy for the amount of the judgment in the action not exceeding the amount of the policy." Based on this language, the Supreme Court held that the condominium association essentially "stepped into the shoes" of the engineering firm and inspection company which, if they had claims against their insurance company, would have had to resolve those claims in arbitration, not litigation. Accordingly, the Court held that the condo association's claims against Kinsale Insurance Company had to be submitted to arbitration.

Crystal Point is a case of importance in New Jersey because it is so far the only case decided by the New Jersey Supreme Court which construes the applicability of the Direct Action Statute. Insurance companies, agents and brokers should be aware of this decision, but contractors, inspectors, engineering and architectural firms should also familiarize themselves with the

decision and the statute, particularly if they are considering bankruptcy or insolvency and have any lawsuits or claims filed against them.

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Each issue's Legal Construction Column will discuss a recent decision by New Jersey courts or courts from other states which may be of interest to people in the construction industry. The information in each article is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case. Every effort has been made to assure this information is up-to-date. The article is not intended to be a full and exhaustive explanation of the law in any area, nor should it be used to replace the advice of your own legal counsel. For any question relating to this article, please contact Robert B. Nussbaum, Esq. at Saiber LLC at rnussbaum@saiber.com.