Superior Court of New Jersey,
Appellate Division.
In the Matter of the LIQUIDATION OF INTEGRITY INSURANCE COMPANY/THE CELOTEX ASBESTOS TRUST.

Argued June 8, 2011.
Decided Aug. 15, 2011.

On appeal from an interlocutory order of Superior Court of New Jersey, Chancery Division, General Equity Part, Bergen County, Docket Nos. C–7022–86 and C–63–03.
James R. Matthews (Keating Muething & Klekamp, P.L.L.) of the Ohio Bar, admitted pro hac vice, argued the cause for appellant The Celotex Asbestos Trust (Saiber L.L.C., attorneys; Marc E. Wolin, of counsel and on the brief; Mr. Matthews, of counsel).

David M. Freeman argued the cause for respondent Thomas B. Considine, The Commissioner of Banking and Insurance of the State of New Jersey in his capacity as Liquidator of Integrity Insurance Company (Mazie Slater Katz & Freeman, L.L.C., attorneys; Mr. Freeman, of counsel and on the brief; John D. Gagnon, on the brief).

Before Judges PAYNE, BAXTER and KOBLITZ.

PER CURIAM.

***1** On December 31, 2004 and, again, on September 25, 2009, the Celotex Asbestos Settlement Trust (Trust) filed proofs of bodily injury and property damage claims arising out of exposure to asbestos and asbestos-containing products with the Liquidator of Integrity Insurance Company in Liquidation (Integrity). In the claims, the Trust sought coverage under two policies of excess comprehensive general liability insurance, each offering five million dollars in coverage, issued to Jim Walter Corporation, the parent of Celotex, effective October 1, 1982 to 1983 and renewed for an additional one-year period.

In notices of determination, the Liquidator disallowed the claims, contending that they were barred by the decision of the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, as affirmed by the United States Court of Appeals for the Eleventh Circuit. *See IMO The Celotex Corp. v. AIU Ins. Co .*, 216 *B.R.* 867 (Bankr.M.D.Fla.1997), *aff'd sub nom. In re: The Celotex Corp., Debtor. Asbestos Settlement Trust v. Continental Ins. Co.*, 299 *Fed. Appx.* 850 (11th Cir.2008) (barring recovery from excess carriers as the result of lack of timely notice). The Trust filed a formal objection to the notices of determination, which was denied.

Thereafter, Integrity requested a hearing before the Special Master overseeing the liquidation proceeding and, following briefing and oral argument, the Special Master issued a written opinion in which he concurred with the Liquidator's position. An appeal resulted in the entry of an order confirming the Special Master's determination. The Trust then sought leave to appeal, which we granted. We now reverse, determining that the decisions upon which Integrity relies do not have the preclusive effect recognized by the Liquidator, the Special Master and the court.

I.

The policies at issue provided excess liability insurance, with policy terms that followed the form of the underlying umbrella coverage issued by International Insurance Company. Although Integrity contends that coverage was limited to property damage, it appears that the policies provided lim-

ited coverage for bodily injury, as well. The Trust claims that the policies are applicable to both types of claims. However, the issue of the extent of coverage is not before us, and we decline to decide it. FN1

> FN1. We note, however, that the Liquidator did not disallow the bodily injury claims on the basis of the absence of coverage or the applicability of any policy exclusion.

The policies contained a "Notice of Loss" provision, that stated in relevant part:

> The Insured shall immediately advise the Company of any accident or occurrence which appears likely to result in liability under this Policy and of subsequent developments likely to affect the Company's liability hereunder.

As the result of the pendency of thousands of lawsuits alleging liability associated with the use of products containing asbestos, on October 12, 1990, the Celotex Corporation and Carey Canada Incorporated (collectively, Celotex) filed for reorganization under Chapter 11 of the United States Bankruptcy Code. *IMO The Celotex Corporation v. AIU Ins. Co.*, 196 *B.R.* 973, 978 (Bankr.M.D.Fla.1996). In an adversary proceeding within the bankruptcy instituted in 1991, Celotex sought a declaratory judgment as to insurance coverage for existing asbestos-related claims FN2 under various policies covering Celotex over a period of approximately thirty years. *Id.* at 976–77. Named as defendants were Celotex's insurers and the Florida Insurance Guaranty Association, the protections of which had been activated as the result of the insolvency of three insurers including Integrity, which was found to be insolvent in 1986.

> FN2. It also sought recovery for environmental damage, but that claim is not a part of the present appeal.

*2 The 1997 opinion to which we have previously referred addressed coverage claims for asbestos-related bodily injury and property damage under excess liability policies issued to Celotex for policy periods between October 1, 1978 and October 1, 1984. *IMO Celotex, supra,* 216 *B.R.* at 871. At issue was whether Celotex's "notice, if any, of asbestos bodily injury and property damage claims to Defendants, i.e., excess insurers, was proper and timely under the applicable insurance policy provisions." *Id.* at 870.

In resolving the issue the court held that Illinois law controlled, and that "Illinois courts take the position that such notice is required by the policy, and is not a technicality but a prerequisite to coverage." *Id.* at 872. Further, it held that notice must be given as soon as practicable to constitute reasonable notice. *Ibid.* The court observed:

> The reasonableness of notice varies based on different duties, mainly the duty to defend and the duty to investigate the occurrence, which are placed upon the primary carrier, as distinct from the umbrella and excess carriers. The excess carriers normally do not expect they will receive notice for an occurrence associated with an insured unless the excess coverage will, in fact be impacted by such occurrence (i.e., the insured's liability will transverse the primary and umbrella coverage and invade the excess insurance coverage layers).
>
> As a result of this layering of coverage, when an occurrence takes place, the insured has the ability to ascertain how its coverage layers may be affected by the occurrence. With this knowledge, the insured, then, has some discretion in determining when and if the excess coverage will be implicated and thus, whether notice is required. The test as to an excess carrier relates more to the question of when the reasonably prudent insured has cause to believe the excess insurance coverage will be implicated by the occurrence.

[*Id.* at 872–73 (citation omitted).]

The court held that whether notice was reasonable was affected by factors such as "the sophistication of the insured," the "timing of notice in relationship to the status of ongoing claims or the ongoing litigation," the "length of time between the insured's knowledge of the occurrence and the notice," and the "[d]ue diligence of the [insured] in handling the claims." *Id.* at 873.

After a lengthy consideration of the history of Celotex's claims handling in light of policy language and available knowledge, the court concluded as to asbestos bodily injury coverage between 1982 and 1984—the years of Integrity's policies—Celotex should reasonably have provided notice of claims in April 1983, but it did not do so until much later,[FN3] and as such, notice was unreasonable. *Id.* at 880. As to property damage claims, the court noted the first asbestos-related building claim was filed against Celotex on April 27, 1981, and that from 1981 to 1984, in excess of fifty building claims were filed against it, five of which were class actions. *Id.* at 876. Nonetheless it observed: "Scant is the evidence to persuade this Court [Celotex] gave notice to the excess insurance carriers as to asbestos property damage." *Id.* at 880. Indeed, it appeared that notice was not provided until "maybe post–1990." *Ibid.* As a result, the court entered judgment in favor of the excess insurers on claims for bodily injury and property damage as the result of late notice. *Id.* at 883.

> FN3. The court does not provide a specific date when notice was given but suggests in "may have taken place in 1985." *Ibid.*

***3** As part of its reorganization plan, on February 1, 1998, the Celotex Asbestos Settlement Trust was created. The Trust assumed Celotex's tort liabilities and was assigned Celotex's right to indemnity under its excess insurance policies. *In re: The Celotex Corp., supra,* 299 *Fed. Appx.* at 850. The Trust appealed the bankruptcy court's order to the United States District Court, which affirmed in an unreported opinion. *In Re: The Asbestos Settlement Trust v. Continental Ins. Co.,* 2006 *U.S. Dist. LEXIS* 96091 (M.D.Fla.2006). As stated, the Eleventh Circuit likewise affirmed.

II.

In the present matter, the Liquidator contends that the decisions in the adversary proceeding denying, as the result of lack of timely notice, excess insurance coverage for asbestos-related bodily injury and property damage claims[FN4] collaterally estop the Trust from seeking payment of claims arising after the bankruptcy proceeding was concluded, as to which timely notice was given. The Trust contests the Liquidator's position, arguing that the issues now raised differ from those before the bankruptcy court.

> FN4. At the time Celotex filed for bankruptcy, there were over 140,000 asbestos-related bodily injury lawsuits pending against it. *In Re: The Asbestos Settlement Trust, supra,* 2006 *U.S. Dist. LEXIS* 96091 at *8.

The Supreme Court has recently observed:

> As a general principle, "[c]ollateral estoppel is that branch of the broader law of *res judicata* which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." *State v. Gonzalez,* 75 *N.J.* 181, 186, 380 A.2d 1128 (1977) (citations omitted); *See also Tarus v. Borough of Pine Hill,* 189 *N.J.* 497, 520, 916 A.2d 1036 (2007); *Sacharow v. Sacharow,* 177 *N.J.* 62, 76, 826 A.2d 710 (2003); *Zirger v. Gen. Accident Ins. Co.,* 144 *N.J.* 327, 337, 676 A.2d 1065 (1996). "[I]ts applicability also extends to questions of law where the claims arise from the same transaction, or if injustice would result." *Id.* at 187, 676 A.2d 1065 (citations and internal quotation marks omitted). No doubt, " '[c]ollateral estoppel] is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice." *Id.* at 192, 676 A.2d 1065 (quoting *Ashe v. Swenson,* 397 *U.S.* 436, 443, 90 *S.Ct.* 1189, 1194, 25 *L.*

Ed.2d 469, 495 (1970)). Further, the term collateral estoppel " 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' " *Ibid.* (quoting *Ashe, supra,* 397 *U.S.* at 443, 90 *S. Ct* . at 1194, 25 *L. Ed.*2d at 495).

[*New Jersey Div. of Youth & Family Servs. v. R.D.*, — *N.J* . ——, —— (2011) (slip op. at 34–35).]

In order for the doctrine to be applicable, "the party asserting the bar must show that: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding." *In re Estate of Dawson,* 136 *N.J.* 1, 20–21, 641 A.2d 1026 (1994).

***4** Here, the Trust argues correctly that the first two conditions cannot be met in this case. What the bankruptcy court had before it was the issue of whether Celotex had provided reasonable notice to its excess carriers of the claims that were then pending against it, and the answer was that it had not. The court's decision did not address future claims, nor could it do so, because it lacked any factual basis on which to opine whether notice with respect to those prospective claims had been reasonably provided or not.

As we have stated, the policies at issue required Celotex (or now, the Trust) to "immediately advise the Company of any accident or occurrence which appears likely to result in liability under this Policy." An "occurrence" as defined in the International Insurance Company umbrella policies as to which the Integrity policy followed form is

> either an accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and [un]intentionally causes injury to persons or tangible property during the policy period. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence.

[*IMO The Celotex Corp., supra,* 196 *B.R.* at 1020 .[FN5]]

> FN5. In Appendix B to its opinion, the court sets forth the occurrence definition applicable to the various umbrella and excess policies at issue. Integrity's policy XL 50 01 78 appears in Group E and F, which follow form to International Insurance Company's policy 523–252321, the terms of which apply to Group E in the year October 1, 1982 to 1983, and apply to Group F in the following year.

Thus, the duty to provide notice arises only when an occurrence takes place. Since the occurrences for which the Trust now seeks payment were not known at the time of the Celotex bankruptcy, there could have been no duty to provide reasonable notice. Moreover, those occurrences could not have been considered by the bankruptcy court since no claim, premised on the happening of an occurrence, had been filed. The only occurrences that the court could have considered in connection with its ruling on notice were those particular occurrences that had led to the claims that were the subjects of the adversary proceeding.

We agree with the Trust's position that the issue of whether Celotex provided timely notice that a certain threshold level had been reached that would impact Integrity's layer of coverage is wholly separate from the issue, arising once that threshold had been attained, of whether notice in a particular case was adequate. As the result of the bankruptcy court's opinion, it is now clear that, with respect to claims on the 1982 to 1984 policies,

the threshold was reached on bodily injury claims in April 1983, and it was reached on property damage claims some time shortly after 1981.

However, because Integrity's policies require that the insured give notice of each occurrence as it arises, whether that notice is adequate depends on the facts existing at that point in time. As a consequence, the issue of the adequacy of notice, determined in connection with earlier claims in the adversary proceeding, cannot be found to be dispositive of the issue of the adequacy of notice with respect to later-arising claims. While the bankruptcy court's ruling addressed the former issue, it did not address the latter, and indeed, the latter issue was not actually litigated in that adversary proceeding. The manner in which the bankruptcy court framed the issue before it—"whether the [insureds'] notice, if any, of asbestos bodily injury and property damage claims to Defendants ... was proper and timely under the applicable insurance policy provisions"—demonstrates this fact. Thus, collateral estoppel cannot apply and the court's contrary order must be reversed.

***5** Reversed.

N.J.Super.A.D.,2011.
In re Liquidation of Integrity Ins. Company/The Celotex Asbestos Trust
Not Reported in A.3d, 2011 WL 3557508 (N.J.Super.A.D.)

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