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Year-End Review of New Jersey Insurance Case Law

By Robert D. Chesler, Steven J. Pudell and Beth D. Simon

Who, what, when, where, how? Important insurance cases decided in New Jersey courts in 2012 covered the full range of questions raised by policy language, law, chance, and human and corporate conduct: *Whose* property has been damaged (and whose is covered)? *What* duty does an insurance company or brokerage owe the policyholder? *When* is coverage triggered? *Where* should a given case be heard? *How* does risk get allocated among multiple insurance companies? And of course, what kinds of conduct or occurrences are covered or excluded? Below, a look at the decisions that addressed these questions this year.

Bad Faith

Bello v. Merrimack Mutual Fire Insurance Company (App. Div. 2012) is the first major decision on bad faith in New Jersey in almost 20 years. The policyholder had a retaining wall that was damaged during a storm. The insurance company sent an individual who was not an engineer to inspect, and that individual concluded that the damage was caused by long-term neglect and deterioration. As a result, the insurance company denied coverage. The policyholder contacted a superior at the insurance company, who confirmed the denial in June 2008.

However, that same superior had written an internal memo in May 2008, in which he had found that the claim was indeed covered. In fact, the insurance company later reversed itself and paid its policy limit of $100,750. That did not prevent the jury or the appellate court from finding that based on the May memo the disclaimer in June was in bad faith.

The jury awarded damages of $624,023.20, with no setoff for the $100,750.00 that the insurance company had already paid. The court awarded attorneys' fees of $195,583.34, and costs of $31,346.41. Bad faith is expensive for insurance companies.

Trigger

It is important for any policyholder to give timely notice of a claim to the right insurance company in the right policy period. Late notice under certain circumstances can result in forfeiture of coverage.

Memorial Properties, LLC v. Zurich American Insurance Company, 210 N.J. 512 (2012) involved illegal harvesting of body parts by employees of a cemetery / crematorium. The harvesting took place in 2002–2004, and came

ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000 Fax: (212) 278-1733

Anderson Kill Wood & Bender, P.C.
864 East Santa Clara Street
Ventura, CA 93001
(805) 288-1300 Fax: (805) 288-1301

ANDERSON KILL & OLICK, P.C.
1055 Washington Boulevard, Suite 510
Stamford, CT 06901
(203) 388-7950 Fax: (203) 388-0750

ANDERSON KILL & OLICK, L.L.P.
1717 Pennsylvania Avenue, Suite 200
Washington, DC 20006
(202) 416-6500 Fax: (202) 416-6555

ANDERSON KILL & OLICK, P.C.
One Gateway Center, Suite 1510
Newark, NJ 07102
(973) 642-5858 Fax: (973) 621-6361

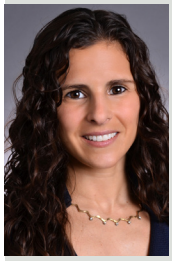
ANDERSON KILL & OLICK, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(267) 216-2700 Fax: (215) 568-4573

www.andersonkill.com

who's who

Robert D. Chesler is a shareholder in the Newark, NJ, office of Anderson Kill & Olick, P.C. Mr. Chesler represents policyholders in a broad variety of coverage claims and advises companies with respect to their insurance programs.
rchesler@andersonkill.com
(973) 642-5864

Steven J. Pudell is the managing shareholder in Anderson Kill's Newark office. Mr. Pudell regularly represents policyholders in insurance coverage matters and disputes.
spudell@andersonkill.com
(973) 642-5877



Beth D. Simon is an attorney in Anderson Kill's New York office. Ms. Simon's practice is in corporate and commercial litigation.
bsimon@andersonkill.com
(212) 278-1025

to light in 2006. At that point, the family members of the decedents sought damages because of emotional distress.

The cemetery/crematorium sought coverage under its 2003 general liability policy; the 2006 policy had an exclusion for "improper handling." The New Jersey Supreme Court affirmed the lower court's denial of coverage. Coverage under a general liability policy is typically triggered by the damage, and not by the acts leading up to the damage. The damage in this case was the emotional distress suffered by the family members when they learned of the theft of body parts in 2006.

Choice of Law

Insurance coverage law differs dramatically, and often dispositively, from state to state. Thus, choice of law is often a key element of a coverage analysis. *Glasbrenner v. Gulf Insurance Company*, 2012 W.L. 103 8913 (D.N.J. March 28, 2012) adds to the uncertainty in choice of law principles in New Jersey.

As background, it is typical for a court to apply the law of the state in which the parties entered into the insurance policy. However, the New Jersey Supreme Court has ruled that in insurance coverage cases involving hazardous waste, the location of the hazardous waste site often controls choice of law analysis. The Supreme Court based its decision on the overriding interest of the state in which the hazardous waste is located in remedying pollution within its borders.

Glasbrenner was a prosaic case involving a box falling on a customer at a Caldor store in New Jersey. Caldor was a New York corporation based in Connecticut with 136 stores in nine states. Since Caldor was in bankruptcy, the insured party, once it obtained a judgment against Caldor, proceeded directly against Caldor's insurance company. The court applied New Jersey coverage law instead of Connecticut's to this insurance dispute.

The court's decision is open to criticism. The Restatement provision on which it relied dealt with property policies that specifically insured real property, and not liability policies, which applied to damage or injury that could occur anywhere. Further, the New Jersey cases on which the court relied concerned hazardous waste sites and the state's heightened interest, and not a unique, one-time personal injury case.

Assignment

Confusion still exists over the issue of the assignability of an insurance policy. *CPR Restoration and Cleaning Services v. Franklin Mutual Insurance Company*, 2012 W.L. 235 5391 (N.J. App. Div. June 21, 2012) clarifies that while one's status as an insured under the policy is not assignable without the insurance company's consent, the right to receive proceeds under an insurance policy is freely assignable.

In *CPR*, a homeowner had a fire and employed CPR to clean up afterwards. CPR's contract with the homeowner stated that the homeowner assigned his right to receive proceeds from his insurance policy to CPR, and also stated that the insurance company

should make direct payments to CPR. However, the insurance company did not sign the contract.

The insurance company refused to make payment to CPR, resulting in litigation. The trial court found for the insurance company, holding that the anti-assignment clause in the insurance policy applied. The Appellate Division reversed.

The Appellate Division found that the insured was not assigning the policy, but only the right to receive payments under the policy. The court relied in part on N.J.S.A. 2A:25-1, which broadly permits assignment of a chose in action. The court further reasoned that once the loss had occurred, the assignment of the right to receive payment did not alter the insurance company's obligation.

Duty to Indemnify

A policyholder seeking indemnification from its insurance company following settlement of an underlying claim must present proof that the settlement included payment of a covered loss. *Building Materials Corp. of America v. Allstate Ins. Co.*, 424 N.J. Super. 448 (App. Div. 2012). In *Building Materials*, after settling a class action lawsuit in which the claimants alleged potential third-party property damage, the roofing materials manufacturer sought indemnification under an insurance policy that excluded coverage for property damage to the manufacturer's own products. The insurance company denied coverage, arguing that the settlement was solely for damage to the insured's own product. Coverage litigation ensued.

The Appellate Division rejected the manufacturer's argument that it did not have the burden to prove it paid for damage to third-party property. It held that the manufacturer cannot establish a prima facie case of covered loss simply by demonstrating property damage. Rather, the insured has the burden to show that the underlying settlement *actually* included payment for third-party property damage.

Broker Liability

In *Salley v. Beshay*, 2012 W.L. 2735961 (N.J. Super. Ct. Jul. 10, 2012), plaintiffs constructed the foundation and frame of a home on their property, and later hired the defendant insurance broker to obtain a builder's risk insurance policy. The president of the broker personally worked on the account. The defendant prepared an application for insurance coverage on behalf of the plaintiff that represented that the construction project had not started. A fire caused damage to the property and the insurance company denied coverage because the policy did not cover existing structures. The plaintiffs sued the insurance broker for negligence and breach of professional standards. The broker replied that the plaintiffs had told him that they had not yet started to build on the property. A jury found for the plaintiffs and the Appellate Division affirmed, finding that the insurance brokerage was negligent for failing to disclose the partial construction on the property. The court also found that the broker's president was individually liable, since it was his negligence that led to the loss.

The court underscored that insurance brokers owe a fiduciary duty of reasonable care and diligence to their clients. The court's finding that the president was liable was grounded in his personal failure to exercise reasonable care and diligence when acting as a broker. New Jersey remains a state that holds brokers to a high standard of conduct, leading to increased exposure for brokers.

Employee Exclusions

A general, employee "catch-all" exclusion is not limited by nearby, more specific employee exclusions. *Gabriele v. Lyndhurst Residential Community, L.L.C.*, 426 N.J. Super. 96 (App. Div. 2012)

In *Gabriele*, the additional insured sought coverage for the wrongful death of an employee on a construction site. The policy broadly excluded personal injury to an employee, arising out of or consequent to his or her employment,

pursuant to a catch-all exclusion. The policy also excluded specific actions related to "employment matters" such as wrongful termination or discrimination claims. The additional insured argued that the catch-all exclusion was also limited only to employment-related matters. The Appellate Court found that the specific, employment-related exclusions do not inform the general exclusion. Accordingly, the general exclusion was interpreted broadly to exclude insurance coverage for the wrongful death claim.

Prior Publication Exception Clauses

The prior publication exclusion (sometimes called the first publication exclusion) eliminates insurance coverage for advertising injury "arising out of oral or written publication of material whose first publication took place before" the beginning of the policy period. In order for the republication of unlawful material to fall outside of a prior publication exclusion, the republication must contain new matter that the plaintiff in the underlying liability suit alleges as "fresh wrongs." *C.R. Bard, Inc. v. Liberty Mut. Ins. Co.*, 473 Fed. Appx. 128 (3d Cir. 2012).

In *C.R. Bard*, the plaintiff argued that the prior publication exclusion was inapplicable because the allegedly disparaging statements it made during the policy period were not identical to the statements it made prior to the inception of the policy. The defendants countered that the allegedly disparaging statements fall within the exclusion so long as they are substantively similar in content to the prior statements. No New Jersey court had previously addressed the issue. Predicting that the New Jersey Supreme Court would adopt a construction of the prior publication exclusion similar to that of the Seventh Circuit, the Third Circuit rejected plaintiff's argument. Instead, the Third Circuit held that the allegedly disparaging statements made during the policy period were substantively similar to the content of the statements prior to the policy period and, therefore, were excluded from coverage under the policy.

Contribution Among Insurance Companies

In a case of first impression, the Appellate Division held that an insurance company that settles with a common policyholder remains liable to its co-insurance companies who have already paid for the policyholder's defense. *Potomac Ins. Co. of Illinois v. Pennsylvania Manufacturers' Assoc. Ins.*, 425 N.J. Super. 305 (App. Div. 2012).

In *Potomac*, the plaintiff's insurance company brought an action against the policyholder's other insurance company seeking reimbursement for defense costs incurred by the plaintiff in defending the policyholder in the underlying negligence action. The defendant argued that New Jersey law does not recognize an insurance company's right to seek contribution directly from another insurance carrier that shared a duty to defend a common policyholder. Rejecting this argument, the Appellate Division held that defendant insurance company's settlement with the policyholder did not release the defendant from liability for contribution for defense costs. The court reasoned that unlike subrogation, the right to contribution by a co-obligor exists independently of the rights of the policyholder and, therefore, could not be extinguished by agreement with the policyholder.

Potomac is also important as the first New Jersey case to apply the continuous trigger outside of the environmental/toxic tort context.

"Ordinance or Law" Exclusion and Causation

Puhlovsky v. Rutgers Casualty Ins. Co., 2012 W.L. 3870408 (N.J. App. Div. Sept. 7, 2012) stands for two noteworthy points of law. In *Puhlovsky*, the plaintiff was required by the city of Paterson to either repair or demolish her building whose structure was compromised as a result of the collapse of an adjacent building. The defendant's insurance company denied coverage for the building loss based on the policy's "Ordinance or Law" exclusion, which applies to the enforcement of any ordinance or law regulating, among other things, the construction, use or repair of the covered building. The plaintiff sued and the trial court granted summary judgment in favor of the insurance company finding that the Ordinance or Law exclusion eliminated coverage since the building was demolished pursuant to governmental order. The Appellate Division reversed and held that:

i. the plaintiff was not required by governmental order to demolish the building, but did so by choice since repair was too costly; and

ii. the Ordinance or Law exclusion should be interpreted narrowly to exclude from coverage only non-catastrophic causes of loss, such as where a structure has become unsafe by reason of deterioration.

Since the plaintiff's property loss was occasioned by the collapse of the neighboring building, the exclusion was not applicable. Moreover, on remand the Appellate Division instructed the trial court that if the predominant cause of loss is covered, the fact that an excluded cause of loss may also have contributed to the damage does not vitiate coverage.

This year's noteworthy insurance coverage disputes in New Jersey touched on a wide range of perpetual pressure points between policyholders and insurance companies. There was a mixture of good and bad news for both sides — some fact-specific, some providing cues for future conduct and litigation strategy. Perhaps most noteworthy were decisions affirming the existence of a duty of good faith owed by insurance companies to policyholders, and of fiduciary duty for brokers. Policyholders should hold both their insurance companies and their brokers to high standards of service, while also maintaining vigilance on their own behalf.