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INSURANCE LAW

Key Recent Insurance Coverage Decisions

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New Jersey courts were active in deciding insurance coverage cases in 2009, making it difficult to select the 'most important.' The cases selected for this article arise in a broad variety of contexts, but share one attribute: they are all directly relevant to the way in which attorneys practice insurance law.

Additional Insured: Additional insured status is ever-present in commercial transactions, and is a mechanism for the parties to allocate risk among themselves. In *W9/PHC Real Estate LP v. Farm Family Casualty Ins. Co.*, 407 N.J. Super. 177 (App. Div. 2009), a landlord hired a snow removal company, which named the landlord as an additional insured on its liability insurance policy. The parties obviously intended that the snow removal company's insurer would bear the risk of loss, and that the landlord's insurance program would be protected. Unfortunately, after an accident occurred, the Appellate Division frustrated the parties' intent. That court looked to the 'other insurance' clauses of the landlord's and snow remover's insurance policies, and based on those clauses, held that the landlord's insur-

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ance policy should pay.

First Party Property Coverage: Property policies are geared toward physical injury. In *Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co.*, 406 N.J. Super. 524 (App. Div. 2009), a power outage caused extensive spoilage at a supermarket. The property policy required "physical damage" to trigger a loss. The insurer disclaimed coverage for the losses associated with the power outage, taking the position that the power grid was not physically damaged because none of the generators were ruined when the system was shut down and the system came back online after the power outage. The Appellate Division held that the interruption of electrical power to the supermarkets was caused by "physical damage" to electrical equipment and property as that term was commonly used, and any other interpretation would be contrary to the insured's reasonable expectations when purchasing the policy.

Interpreting Exclusions: It is typical that exclusions in insurance policies state that they exclude coverage for damage or injury 'arising out of' the excluded risk. Courts have traditionally construed that language broadly to deny coverage. However, the decisions in *Sealed Air Corp. v. Royal Indemnity Co.*, 404 N.J. Super. 363 (App. Div. 2008), and *Somerset Medical Center v. Executive Risk Indemnity, Inc.*, No. A-6214-

08T2 (N.J. Sup. Ct. App. Div. Mar. 22, 2010), reverse that trend. *Somerset Medical* arises out of 29 murders committed by a nurse employed by Somerset Medical. Family members filed a complaint against Somerset Medical and its directors, alleging negligent hiring, negligent supervision and entrustment, negligent reporting, and negligent continuation of employment relating to the nurse's murders. The directors and officers policy excluded claims "arising out of" bodily injury. Based on this exclusion, the insurer disclaimed coverage, arguing that the allegations arose from the murder of the patients. Somerset Medical successfully filed a summary judgment motion and the insurer appealed. The Appellate Division disagreed with the insurer; finding that the underlying complaint was premised on the insured's purported negligence as opposed to the bodily injury. Accordingly, the court held that it was the insured's negligence which was the proximate cause of the underlying complaint.

In *Sealed Air*, a class-action complaint brought by shareholders alleged that the directors and officers of Sealed Air made misleading statements causing the company's stock to trade at artificially inflated levels. The allegedly false and misleading statements related to the asbestos liability of an affiliated, but independent entity. Sealed Air notified its D&O insurer, which denied coverage on

the basis of an exclusion which precluded claims "arising out of" the discharge of pollutants. Sealed Air filed for declaratory relief and subsequently successfully moved for summary judgment. The insurer appealed, and the Appellate Division affirmed. It held that the underlying complaint had roots in securities fraud and misrepresentation, not pollution. The court held that the exclusion reasonably allows the insurer to disclaim coverage where the company's directors or officers were sued for polluting, not mere misrepresentations with a remote connection to polluting.

Estoppel Based Upon Faulty ROR:

Insureds bemoan that reservations of rights letters are often incomprehensible, and leave the insured with little idea of what rights it may have. *Gomez v. First Jersey Cas. Ins. Co.*, Docket No. A-3928-08T1 (N.J. Super. Ct. App. Div. Apr. 1, 2010) is the third case to estop an insurer from denying coverage because of a faulty reservation of rights. In *Gomez*, the court affirmed the lower court's determination that the insurer had failed to fairly inform the insured that the offer of a defense under a reservation of rights could be accepted or rejected. Under those circumstances, the court stated that the insured's silence would only be construed to mean affirmative consent to representation under a reservation of rights if the reservation of rights letter unambiguously expressed the insured's right to reject the offer to defend. In *Gomez* and the cases before it, the courts all held that since the insurer did not clearly advise the insured that it had the right to reject the offer of a defense under a reservation of rights, the insurer was estopped from denying coverage. Since insurers frequently fail to inform the insured unambiguously of the right to reject the defense under a reservation of rights, this opens up an important avenue of redress for insureds, especially since in all three of these cases, there would not have been coverage but for the estoppel.

Apportionment of Attorneys' Fees:

Complaints frequently contain a mix of covered and uncovered causes of action, and in *SL Industries*, our Supreme Court opined that, where possible, courts should allocate defense costs on that basis. *William H. Hall Co. v. Harleysville Insurance Co.*, No. A-1282-08T2, 2009 WL 3416050 (N.J. Sup. Ct. App. Div. Oct. 13, 2009), provides some much needed guidance on this issue. In this case, the insured sold defective washers and dryers, and the insured's customer sued for the costs of the purchase and also for damage to its clients' clothing caused by dryers which caught on fire. The court, when asked to allocate attorneys' fees between the uncovered and covered causes of action, assigned 10 percent to the damaged clothing. The Appellate Division reversed, holding that the allocation of attorneys' fees should not be based on the amounts of the claim, but rather on the amount of legal fees incurred on each cause of action.

Environmental Insurance: *The Proformance Insurance Co. v. Riggins, Inc.*, Docket No. A-2846-08T1 (N.J. App. Div. April 27, 2010), is a second case involving insurance for an environmental cleanup, pitting a general liability insurer, Metropolitan Property & Casualty Insurance ("MetLife"), against a first-party property, Proformance. The case involved a leak of home heating fuel into the groundwater. In order to remedy the contamination, the house needed to be either supported during the cleanup or demolished, with the latter option being significantly cheaper. MetLife accepted liability for demolishing the house, but argued that because of the 'owned property exclusion' in its policy, it did not need to rebuild it. MetLife argued that rebuilding the house was the responsibility of the property insurer. The trial court agreed, but the Appellate Division reversed.

Duty to Defend and Allocation: In *Szelc v. Stanger*, 3:08-04782-AET-DEA (D.N.J. Dec. 3, 2009), Judge Thompson addressed a different issue concerning the duty to defend. In that case, the mul-

ticount complaint against the insured was that he had participated in a fraud and conspiracy. As a result, the insurer denied coverage because the insured's acts were intentional. However, the court, emphasizing the importance of the duty to defend, carefully reviewed each of the counts in the complaint. The court found that some of the claims did not necessarily implicate the insured as a "knowing" individual, and that the evidence produced at trial could show that the insured had no knowledge of or responsibility for the alleged forgery scheme and still find him liable. Since the insurer would be liable to indemnify the insured under those circumstances, and the insurer's duty to defend continues until every potentially covered claim is eliminated, the Court required the insurer to defend those claims that did not depend upon the insured's knowledge or participation. The court found the record insufficient to address the issue of allocation and asked the parties to work out the precise nature of the "partial" defense.

Insurer's Bad Faith Refusal to Settle: *Rova Farms Resorts, Inc. v. Investors Ins. Co. of Am.*, 65 N.J.474 (1974), was such a landmark decision that almost no case law exists construing it. *Riehs v. Rutgers Casualty Ins. Co.*, Docket No. A-1171-08T3 (N.J. Sup. Ct. App. Div. Jan. 5, 2010), fills that gap, awarding recovery in excess of policy limits for the insurer's bad faith refusal to settle. *Riehs* involved an auto policy with a limit of \$100,000. The insurer reserved the underlying auto accident at \$75,000, but only offered \$30,000 to settle the case. The victim reduced his demand from an initial \$200,000 to \$35,000, but the insurer refused to budge from \$30,000. The jury awarded the victim \$186,000. The court provided a detailed review of the insurer's actions, and found that the insurer had violated its good-faith obligations under *Rova Farms*. Interestingly, the court found that the insured did not need an expert witness to establish the insurer's bad faith. ■