THE PASCHOS LAW UPDATE NEWSLETTER
THOMAS PASCHOS & ASSOCIATES P.C. ATTORNEYS AT LAW

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I. INSURANCE LAW

Insurers Have No Duty to Pay Fees of Insured's Chosen Defense Counsel Unless a Conflict of Interest Exists

In *Yaron v. Darwin National Insurance, No. 502* , Commerce Program, Control Nos. 1012209/ 10122559, Phila. Ct. Com. Pl. (July 5, 2011), plaintiffs, Harisse Yaron and Jodi Goldberg, filed a declaratory action seeking a declaration that defendant, Darwin National Insurance Company ("Darwin"), is obligated under their respective policies to pay the fees and expenses of plaintiffs' chosen defense counsel in connection with the underlying action.

In the underlying action, Yaron, President of the Pennsylvania Society for the Prevention of Cruelty to Animals ("PSPCA") Board of Directors, and Goldberg, member of the PSPCA Board of Directors, were sued along with other defendants, including Kristin Sullivan ("Sullivan"), for malicious prosecution, common law conspiracy and filing of animal cruelty charges against six dog breeders (the Myer's action).

At the time the complaints were filed, PSPCA, Yaron, Goldberg and Sullivan were insured under policies of insurance issued by Darwin. Darwin appointed Joseph J. Santar and the law firm of Marshall Dennehy Warner Coleman and Goggin to defend PSPCA and Sullivan and appointed Tracy A. Walsh, Esquire and Weber Gallagher Simpson Stapleton Fires & Newby to defend Yaron and Goldberg. Darwin later determined the interests of Yaron and Goldberg may become adverse to each other and appointed Robert G. Hanna, Jr., Esquire to defend Yaron. Both Yaron and Goldberg hired the law firm of Spector Gadon and Rosen ("SGR") to also represent them.

Yaron and Goldberg then filed this action seeking payment of the SGR attorney fees and expenses from the insurers. Darwin filed a motion for summary judgment.

The issue of whether there is a conflict of interest between an insurer and an insured to warrant payment of counsel of the insured's choice was an issue of first impression for the Pennsylvania Appellate Court.

The Court held that the Darwin policy did not permit reimbursement of an insured choice of counsel, noting that the policy clearly provides that the insurer has the right to select counsel for the insured. Plaintiffs argued that Darwin's interest conflicts with those of the plaintiffs and therefore, the plaintiff should be permitted to select its own counsel to be paid by Darwin. Plaintiffs based this argument on the fact that Darwin offered its defense in the underlying matter

under a reservation of rights to apply an exclusion for any "willful misconduct." The Court provided that "[t]he existence of a reservation of rights letter does not automatically give rise to a conflict of interest between the insurer and the insured with regard to the conduct of the insured's defense." The Court held that it was unwilling to adopt a per se rule that a reservation of rights letter creates a conflict of interest between the insurer and the insured. Specifically, the Court provided "[a]ctual proof that attorneys have disregarded their ethical duties to their clients as set forth in the professional rules of conduct is necessary to establish the conflict of interest. To hold otherwise would require this court to recognize a conclusive presumption, based on nothing more than the existence of a potential conflict between the insurer and the insurer, that counsel is unable to provide independent representation."

The Court found that plaintiffs failed to produce any evidence that counsel elevated the interests of the insurer over those of the plaintiffs, therefore, it granted Darwin's motion for summary judgment.

II. PROFESSIONAL LIABILITY

The NJLAD Does Not Provide for an Affirmative Defense to a Claim of Age Discrimination that "Lawful Considerations Other than Age" Motivated a Force Reduction Decision

In *Triarsi v. BSC Group Services, LLC* , --- A.3d ---, 2011 WL 3047694 (N.J. Super. A.D. July 26, 2011), Plaintiff, Joseph Triarsi, acting as trustee of the Joseph H. Halpin Insurance Trust (Trust) filed a complaint alleging that BSC, Halpin's insurance broker, and Herbert Wright, Halpin's agent, failed to prevent the cancellation of deceased's life insurance policy, and then failed to assist with its reinstatement. The complaint specifically alleged: (1) breach of defendants' fiduciary duty to Halpin and Triarsi as insured and trustee, respectively; (2) breach of defendants' duty of reasonable care in performing their duties as life insurance agent and broker; and (3) breach of the special relationship between insurance agent and client in connection with life insurance policies. Triarsi alleged that Wright and BSC "regularly received copies of all notices from the insurance carrier concerning the Policy, including the notice of intent to cancel for lack of payment, notice of cancellation, and the return of the premium check along with the [reinstatement] form." Consequently, Triarsi contends that they had a duty to effectuate the renewal of the policy or its reinstatement following cancellation.

Triarsi declined to serve an affidavit of merit, contending that based on "consultation with experts" an affidavit was not necessary. Wright filed a motion to dismiss, which was joined by BSC. Triarsi opposed the motion, but did not file an affidavit of merit. At the hearing on the motion, Triarsi argued (1) that the AOM statute did not apply to counts one and three, and (2) that, if they were found to be within the purview of the statute, the common knowledge exception applied. The judge rejected Triarsi's arguments and dismissed the complaint with prejudice holding that the AOM statute applies to malpractice suits against insurance producers, such as BSC and Wright, because they are licensed by the State.

After dismissal of the complaint, Triarsi obtained and served an affidavit of merit. Triarsi then filed a motion for reconsideration, along with his attorney's certification that he had consulted with his expert prior to drafting the complaint and had been advised by him at that time that there was a reasonable basis for the complaint. The motion judge concluded that he had correctly dismissed Triarsi's complaint with prejudice and that he had not failed to consider any probative, competent evidence that was presented on the original motion. He rejected the recently submitted affidavit of merit, noting that it had not been served during the 120 day period following the filing of the answers, as required by the AOM statute, and, in addition, that Triarsi had waited until after the order of dismissal had been entered to obtain and submit the affidavit.

On appeal, Triarsi argued that the motion judge erred in holding that an affidavit of merit was required. The appeals court held that both counts one and two focus on defendants' failure to advise Halpin and Triarsi of the impending cancellation of the policy and how to maintain or reinstate the policy. The Appellate Court found the legal theories were premised on defendants having a duty and that duty was essentially one sounding in negligence.

On the other hand, in count three, Triarsi claimed that defendants breached a “special relationship” between Wright, as an insurance agent, and Halpin and Triarsi as clients. The Appellate Court held that the duty owed by defendants under this relationship was not one based on the insurance agent's professional training or standards. Instead, the basis of the claim is that the insurance agent “assume[d] duties in addition to those normally associated with the agent-insured relationship” by conduct that invited plaintiff's detrimental reliance. The Appellate Court held that this claim does “not require proof of a deviation from a professional standard of care,” but instead depends on proof of the parties' conduct.

Therefore, the Appellate Court held that because the claim in count three did not require expert testimony to establish the existence of a professional standard of care pertaining to insurance professionals, the motion judge erred in finding the AOM statute applicable to count three. Consequently, the Appellate Court reversed the dismissal of count three and remand for further proceedings consistent with this opinion.

II. CONTRACT LAW

New Jersey Law Allows Reformation On The Basis Of Mutual Mistake Against A Party That Did Not Participate In The Negotiation Of A Contract.

In *Illinois Nat. Ins. Co. v. Wyndham Worldwide Operations, Inc.*, --- F.3d ----, 2011 WL 314946 (3d Cir. N.J. August 03, 2011), Illinois National provided insurance coverage to Jet Aviation and to some of Jet Aviation's clients, so long as Jet Aviation managed the clients’ aircraft and aircraft usage. Jet Aviation managed an aircraft owned by Wyndham and provided insurance for that aircraft pursuant to the terms of a series of Aircraft Management Services Agreements.

In 2001, Wyndham's predecessor, Cendant Operations, Inc., and Jet Aviation entered into the first of these Aircraft Management Services Agreements. Pursuant to the Aircraft Management Services Agreements, Jet Aviation agreed to procure insurance for Wyndham's aircraft while it was managed by Jet Aviation. The agreement also stated that it would provide Wyndham with insurance coverage when Wyndham used non-owned aircraft at the direction of Jet Aviation.

Beginning in 2004, and through the 2008 policy year, a series of aircraft fleet management insurance policies were purchased by Jet Aviation and issued by Illinois National. Each was negotiated by Illinois National and Jet Aviation, directly and through their agents. The policies contained endorsements that provided coverage for Jet Aviation's clients. These clients were identified on the endorsements as “Insured Owners” and also as “Named Insured.” In the negotiations leading up to the 2008 policy, Jet Aviation proposed new language for the endorsement. The revised endorsement, which was integrated into the 2008 policy, replaced “Jet Aviation” with “Named Insured.”

Jet Aviation and Illinois National claim that the drafting change was designed to make it more clear that entities affiliated with Jet Aviation were covered. Both contracting parties have stated that they believed that it did not expand coverage to entities that were unaffiliated with Jet Aviation, such as Wyndham. However, the modification, as written, appears to provide third parties with coverage when using non-owned aircraft without Jet Aviation's involvement.

It is undisputed that neither Wyndham nor its brokers was involved in the negotiations or drafting of the revised provisions of the endorsement. It was negotiated between Illinois National and Jet Aviation.

In August 2008, a Wyndham employee rented a Cessna 172 from Aviation Adventures to travel to a work-related meeting in Oregon. The Wyndham employee crashed into a house killing five people. As a result, various claimants have sued Wyndham for damages. While Jet Aviation had no involvement with the involved plane, the wording of the revised management aircraft endorsement nevertheless would have provided liability coverage to Wyndham for the matter.

Illinois National filed suit against Wyndham seeking a declaratory judgment. It argued that the 2008 policy, as written, did not provide coverage to Wyndham, or alternatively, that if the contract as written would provide coverage, the District Court should exercise its equitable power of reformation because there had been mutual mistake in the drafting of the contract between Illinois National and Jet Aviation. Wyndham filed a counterclaim seeking coverage, filing a motion to dismiss Illinois National's claim and a motion for summary judgment.

The District Court granted both of Wyndham's motions, holding that Wyndham was entitled to coverage under the 2008 policy and that Illinois National was not entitled to reformation based upon the alleged mistake. The District Court held that the 2008 policy was clear on its face and that Wyndham was entitled to coverage as a matter of law. The District Court went on to explain that “because Wyndham did not participate in the negotiation and drafting of the 2008 policy, there can be no mutual mistake.” Instead, the District Court analyzed Illinois National's argument in the context of unilateral mistake and determined that reformation was unavailable.

On appeal, Illinois National argued that the District Court erred both when it determined that mutual mistake can only serve as a basis for reformation in an action against a bargaining party and when it held that Illinois National had insufficiently pled mutual mistake. The Third Circuit Court agreed and held that New Jersey law allows reformation on the basis of mutual mistake against a party that did not participate in the negotiation of a contract and that Illinois National sufficiently pled mutual mistake.

Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.