THE PASCHOS LAW UPDATE NEWSLETTER

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I. EMPLOYMENT LAW

Employee's State Law Whistleblower Claim Preempted by Federal Law

In *Puglia v. Elk Pipeline, Inc.*, 2014 N.J. Super. LEXIS 141 (N.J. Super. October 10, 2014), plaintiff, Salvatore Puglia, was employed by Elk Pipeline from October 2, 2006, to December 16, 2010. He was assigned to work on a public works project as defined in the New Jersey Prevailing Wage Act ("PWA"). In January 2010, Plaintiff complained that Elk failed to properly pay overtime at an applicable rate which violated the New Jersey Prevailing Wage Act (PWA). Plaintiff alleged that his complaints resulted in his lay-off despite his level of seniority under the Collective Bargaining Agreement (CBA).

Subsequently, Puglia sued Elk Pipeline claiming that defendants retaliated for reporting Elk's alleged violations of the Conscientious Employee Protection Act (CEPA). Finding Puglia's claims were based on an interpretation of the parties' CBA and must be addressed under federal law, trial court grant of summary judgment to the employer.

Plaintiff appealed. On appeal, the Law Division rejected plaintiff's claims as cognizable under CEPA, finding they were based on an interpretation of the parties' collective bargaining agreement (CBA) and redress was governed by federal law. The Court noted that the CBA addressed wages, pay rates and seniority, including factors to be considered in layoffs. The employee's "assessment of his seniority status, as compared to that of his colleagues who continued working, can only be reviewed by an analysis of the CBA's factors," and that by "maintaining he was wrongly laid off and should have continued working because he had seniority, [he] inherently invokes interpretation of the CBA. Thus preemption applies," the Court reasoned.

The three-judge panel concluded the employee's whistleblower allegations were "inextricably intertwined" with his rights delineated in the CBA, and, therefore, invoked provisions of the NLRA, requiring administrative review by the National Labor Relations Board. Since Plaintiff's claims are preempted by federal labor laws, plaintiff's complaint was properly dismissed.

II. INSURANCE LAW

Superior Court Decision Addresses Issue of Allocation of Defense Costs in Long-Tail Claims

In *IMO Industries, Inc. v. Transamerica Corp.*, 2014 N.J. Super. LEXIS 132 (September 30, 2014), Plaintiff, IMO, a manufacturer of industrial machinery, was faced with thousands of personal injury claims related to the manufacturing of products that contained asbestos. Defendants are primary and excess liability insurers, as well as Transamerica Corp., the former parent company of the predecessor manufacturer.

Over the years, IMO purchased a total of $1.85 billion in insurance coverage from all the defendant insurers. After tens of millions of dollars had been paid by IMO's primary carriers IMO sued its primary carriers and later added its excess carriers as additional claims were filed to establish its rights under those insurance policies and to recover

money damages.

The lower court ruled that the excess carriers must pay the defense costs of IMO in its underlying cases. Several parties appealed. On appeal, the court considered the amount of coverage IMO was entitled to, how that coverage should be allocated between the carriers, and for what period primary insurers must cover defense costs. These issues had not been previously addressed in the New Jersey Supreme Court's insurance allocation decisions - *Owens-Illinois, Inc. v. United Insurance Co*. and *Carter-Wallace, Inc. v. Admiral Insurance Co*. Additional issues included whether IMO was entitled to a jury trial on its claims for money damages, and numerous challenges to the trial court's interpretation of insurance policies within the *Owens-Illinois* and *Carter-Wallace* allocation methodology.

The Appellate Court upheld the lower court's decision that the excess carriers must pay the defense costs of IMO in its underlying cases, and also rejected the carriers' attempt to reduce the amount they collectively owed, finding that multiyear policies provide separate per-occurrence limits for each year of coverage. The Court said that allowing excess carriers to contest coverage "is not feasible for long-tail, multi-claim coverage cases," and that to revisit settled claims for reallocation purposes would "greatly complicate the already complex allocation process."

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