NEW JERSEY COURT RULES CARRIER HAD NO DUTY TO INDEMNIFY THIRD PARTY WHERE INSURED WAS NOT LIABLE

By David G. Tomeo, Esq.

In ruling on a motion for summary judgment filed by the Becker LLC Insurance Coverage Litigation Group on behalf of one of its insurance company clients, the Superior Court of New Jersey recently ruled that the carrier had no duty to indemnify a third party additional insured where the insured itself was determined not to be liable for an accident occurring on the third party's property. In so doing, the Court affirmed long standing New Jersey law that third parties generally have no claim against the carrier of an insured – at least not until a judgment is entered against the insured.

The matter arose from a slip and fall on the property of a large residential development following a significant snow storm. The plaintiff who was visiting family at the development slipped on ice that had accumulated in the parking lot of the development. The plaintiff sued both the homeowners association as well as the independent maintenance company which was contracted to perform snow removal at the development – which company was the insured of the carrier client. The contract between the association and the maintenance company required the association be named as an additional insured as well as required the company to indemnify the association from any liability for injuries to person or damage to property due, or claimed to be due, in whole or in part, to any negligence, wrongful act, or omission of the company or its employees, agents, and servants.

In the course of discovery it was ascertained that the association and not the maintenance company was responsible for removal of the ice accumulation that had caused the fall, and thus the company moved for summary judgment. Finding that the association was charged with ice removal under the terms of the contract, the court granted the motion and dismissed the company from the case. Thereafter, the association brought a declaratory judgment action against the carrier client, primarily arguing that the carrier was liable to indemnify the association under the contract and the policy and thus was responsible for the settlement paid to the plaintiff – which ultimately totaled several hundred thousand dollars given the scope and extent of the injuries. In response, Becker filed a cross-claim for declaratory judgment against the association and impleaded the plaintiff so as to extinguish any claim the plaintiff may have had under the policy. After limited discovery, the association and the carrier cross-moved for summary judgment.

In support of its motion, Becker argued that the summary judgment determination by the court that the maintenance company insured was not negligent negated any contractual obligation of the company to indemnify the association under the contract and eliminated any obligation on the part of the carrier to provide indemnity under the policy.

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Becker premised its argument under *Manukas v. American Ins. Co.*, 98 N.J. Super. 522 (App. Div. 1968). In that case, plaintiff sued a church when she fell on the church premises. Following summary judgment in favor of the church under New Jersey's charitable immunity act, plaintiff brought a direct action against the insurance carrier for the church, which suit was also dismissed by the trial court. The *Manukas* appellate court affirmed the summary judgment in favor of the carrier on the principle that an injured party cannot sue the insurer of the tortfeasor in the absence of a judgment against the tortfeasor. *Id*. citations omitted. *See Hartford Acc. & Indem. Co. v. Aetna Life & Cas. Ins. Co.,* 98 N.J. 18, 22 (1984) (no coverage duty exists except with respect to occurrences for which the policy provides coverage); *Sears Roebuck & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 340 N.J. Super. 223, 242 (App. Div. 2001) (duty of an insurer to defend and its corresponding duty to indemnify are closely related. "[N]either duty exists except with respect to occurrences for which the policy provides coverage."); *Estate of Atanososki v. Acuri Agency, Inc.,* 2019 WL 1986539 at *3 (App. Div. 2019) [UNPUBLISHED] (following *Manukas* in dismissing direct action by injured party against insurance broker where there has been no finding of liability against underlying tortfeasor).

Applying *Manukas* to the facts at bar, Becker argued that the court's ruling that the maintenance company had no responsibility for the fall negated any duty by the company to indemnify the association and any duty by the carrier to indemnify the association. In other words, the finding that the company was not negligent meant that the company had no contractual obligation to the association, and, without such, and in the absence of a judgment against the company, the carrier had no obligation to indemnify the association under the policy as in *Manukas*. The trial court agreed, and granted summary judgment in favor of Becker's carrier client, thus negating any possible liability the carrier had for the substantial settlement paid in the case.

Please contact *David G. Tomeo, Esq*., a member of the Becker LLC Insurance Coverage Litigation Group for more information on this case and the range of services the Group provides to insurance companies.

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