

NJ Ruling Could Deter Insurers From Trying To Buck Defense

By **Martin Bricketto**

Law360, Jersey City (May 07, 2015, 9:19 PM ET) -- The New Jersey Supreme Court found Thursday that a plaintiff who went after a defendant's insurer to force coverage of the suit is entitled to attorneys' fees even though the defendant was ultimately cleared, a decision experts say could have insurers thinking twice about denying litigation coverage.

Upending lower court decisions, the justices found that Mercer Mutual Insurance Co. owed counsel fees to businessman Robert Occhifinto, who had intervened in a lawsuit that the insurer filed trying to deny coverage for Occhifinto's suit against Robert S. Keppler Mason Contractors LLC and others. Occhifinto had originally sued Keppler, which was insured by Mercer, for the allegedly negligent construction of a warehouse addition.

A ruling that Mercer had to indemnify Keppler for damages forced the insurer to continue defending the contractor and justified the fee award to Occhifinto, the high court found. Mercer had initially agreed to defend Keppler under a reservation of rights.

Trial and appellate courts held that Occhifinto couldn't recover counsel fees under a New Jersey's statute that covers fee shifting in insurance cases because Keppler ultimately wasn't found liable for damages in the underlying suit.

Allowing those decisions to stand would have eroded a powerful disincentive against insurers attempting to avoid their coverage responsibilities, policyholder attorneys told Law360.

"If the Supreme Court had affirmed the lower courts' determination, it would have been a tremendous setback for policyholders as it would have emboldened insurers to 'take a shot' on avoiding a defense obligation because it would cost them no more than paying their own coverage litigation fees," said Lynda Bennett, the chair of Lowenstein Sandler LLP's insurance coverage practice.

The case centered on New Jersey's Rule 4:42-9(a)(6), which allows fee shifting in situations including "an action upon a liability or indemnity policy of insurance in favor of a successful claimant." Justice Lee Solomon said in his opinion for the unanimous court that Occhifinto was indeed a successful claimant because, by spending counsel fees, he secured a merits-based win on a coverage question.

"Because the trial court concluded in the declaratory judgment action that the complaint filed in the liability action alleged claims that would, if proven, fall under Keppler's liability insurance policy with Mercer, thereby enforcing Mercer's duty to defend, Occhifinto was a successful claimant entitled to

counsel fees pursuant to Rule 4:42-9(a)(6).5,” Justice Solomon said in the opinion.

The high court controls its own docket and didn't have to take up the case, but it obviously wanted to make a statement, according to Robert D. Chesler, a shareholder with Anderson Kill PC.

“I think it's sending a broad message that courts should award attorneys' fees,” Chesler said.

But Susan Stryker of Bressler Amery & Ross PC disagreed that the court was sending any message about broadly awarding fees or that the ruling could serve to discourage coverage actions. The court extended existing law to the unique facts of the case, she said.

“Insurers always must consider whether providing a defense under a reservation of rights substantially complies with their contractual undertaking in the policy, especially given the public policy articulated by the court of discouraging insurers from filing declaratory judgment actions to avoid their obligations to provide coverage,” Stryker said.

Quoting its 1987 decision in *Transamerica Insurance Co. v. National Roofing Inc.*, the court said a successful claimant is a party who “obtain[s] a favorable adjudication on the merits on a coverage question as the result of the expenditure of [counsel] fees.” That can include a party in an underlying case who is a third-party beneficiary to a policy and litigates a coverage question against a defendant's carrier, according to the court.

The court added that a party who nails down an insurance carrier's duty to defend qualifies as a successful claimant even if there is no award of damages that the carrier has to shoulder. While the award of counsel fees involves a trial court's discretion, the trial court here misinterpreted the law, according to the court.

When Occhifinto won summary judgment in the coverage case, the trial court didn't mention Mercer's duty to defend Keppler, but it effectively concluded that the underlying complaint “alleged claims that would, if proven, fall under Keppler's policy with Mercer,” the Supreme Court said.

“The trial court's additional determination that Mercer may have a duty to indemnify Keppler had the practical result of enforcing Mercer's duty to defend,” the opinion said. “Occhifinto thus succeeded in the declaratory judgment action by forcing Mercer to continue to defend Keppler in the liability action.”

Mercer argued it didn't contest its duty to defend Keppler and that the declaratory judgment action only decided the issue of indemnification, but that position is inconsistent with the carriers' request to adjourn the underlying case until the coverage issue was decided, according to the court. The insurer's complaint also specifically denied a duty to defend “and/or” indemnify Keppler on the underlying claims, the court said.

The insurer was trying to “ride the picket fence” and get credit for defending Keppler while suing to avoid coverage, but it didn't work, according to Bennett. The decision leaves insurers with a clear warning to think twice before “spawning a new, expensive front in coverage litigation,” Bennett said.

“The duty to defend is broad; New Jersey law on the duty to defend is clear: Insurers need to step up so that underlying lawsuits may be defended vigorously and resolved without the sideshow of coverage litigation,” she said.

But James W. Carbin, a partner with Duane Morris LLP, said the fees contemplated by the rule are those of the insured to secure coverage, and Keppler received the benefit of a defense from Mercer, albeit under a reservation of rights.

“This is a surprising and troubling application of the statute which is designed to protect an insured who succeeds in a coverage [declaratory judgment] suit, not to protect the plaintiff against the insured who is not in privity with the insurer,” Carbin said.

On the other hand, Daniel H. Rylaarsdam of Kilpatrick Townsend & Stockton LLP speculated that the court would have reached the same result if had viewed the matter strictly through the lens of a duty to indemnify.

“Whether that ultimately materialized or not, that doesn't change the fact that you had to pay money and you had to get the decision in the trial court,” Rylaarsdam said.

Attorneys for Occhifinto and Mercer did not immediately return requests for comment Thursday.

Occhifinto is represented by Dennis T. Smith of Pashman Stein PC.

Mercer is represented by Michael L. Testa Sr. and Justin R. White of Testa Heck Scrocca & Testa.

The case is Occhifinto v. Olivo Construction Co. LLC, case number 073174 before the New Jersey Supreme Court.

--Editing by Chris Yates and Kelly Duncan.