Insurance Law Section Newsletter

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Recent Cases

by Brian R. Lehrer

In a case involving the duty to defend, the New Jersey Supreme Court recently held that the state of New Jersey was obligated to defend and indemnify the employees of a county prosecutor's office involved in a civil action arising from the loss of non-contraband items seized in the course of a criminal investigation. This duty was limited to the early stages of the litigation, with the proviso that the state could seek reimbursement of costs incurred in its defense of the county prosecutor's office if it was revealed during the course of the litigation that the plaintiff's property was stored in a facility controlled by the county.[1]

The Essex County Prosecutor's Office executed a search warrant issued in connection with an investigation of plaintiff Robert Lavezzi. The investigation was eventually abandoned and the state did not institute either criminal charges or a civil-forfeiture action.

The plaintiffs claimed that while the property was in the custody of the prosecutor's office, some of it was damaged and some of it was lost. They filed a complaint in the Law Division alleging the prosecutor's office and three of its employees were liable to them on theories of negligence, conversion and unlawful taking. The county requested the attorney general's office defend and indemnify it and the state refused. Ultimately, the Appellate Division upheld the state's refusal, but the Supreme Court reversed.

Pursuant to N.J.S.A. 59:1-1-12-3, the state has a general obligation to defend and indemnify state employees if the underlying action derives from the employees' acts or omissions in the scope of their employment. Under N.J.S.A. 59:10A-1, the attorney general is obligated to provide for a defense of any state employee or former state employee on account of an act or omission in the scope of his or her employment. There are exceptions provided at N.J.S.A. 59:10A-2, which involve a basis to deny defense for fraud, willful conduct or a conflict of interest.

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The attorney general's office did not dispute the county's contention that the employees were acting within the scope of their employment. However, the state disputed the allegation that the prosecutor's office employees were acting as state employees under the statute. The Court dispensed with this argument. The Court recognized that employees of a county prosecutor's office pose a hybrid status because they discharge a state responsibility in their enforcement of the law.[2] However, when county prosecutor's employees' actions address the administrative functions of a county prosecutor's office, they are not acting as state agents.

The Court held that the test for a defense and indemnification from the state is generally whether the act or omission of the county prosecutor's office and its employees that gives rise to the potential liability derived from the prosecutor's power to enforce the criminal law, and constitutes an exercise of that power. The Court held that the claim in this case originated from an activity that was part of the prosecutor's office's performance of the criminal business of the state, and therefore had met the burden demonstrating that the attorney general's determination was arbitrary and capricious in denying coverage.

The Court indicated that at the preliminary stage of the plaintiff's action, the state was obligated to defend and indemnify the county prosecutor's office. However, if a more complete record revealed the plaintiff's property was stored in the facility at the direction of the county, and that the loss or damage to the plaintiff's property resulted from a condition or maintenance of that facility, the state could seek reimbursement for the cost of defense.

Seatbelts and Third-Degree Crimes

In a case involving the seatbelt law at N.J.S.A. 39:3-76.2(f), the Supreme Court recently held that a seatbelt law violation is a predicate offense that can support a conviction under N.J.S.A. 2C:40-18(b), which makes it a third-degree crime when a person "knowingly violates a law intended to protect the public health and safety or knowingly fails to perform a duty imposed by a law intended to protect the public health and safety and recklessly causes serious bodily injury."[3]

In *State v. Lenihan*, Kirby Lenihan was driving her vehicle with a 16-year-old in the passenger seat. Neither the defendant nor the minor were wearing seatbelts when the vehicle was involved in a serious accident that resulted in the death of the minor.

The defendant was indicted and ultimately, as a result of plea negotiations, the indictment was amended to a third-degree crime encompassed by N.J.S.A. 2C:40-18(b). The defendant had made a motion to dismiss the indictment on the basis that it was grounded upon her failure to comply with the seatbelt law, which she argued could not be deemed to be a predicate offense within the meaning of the criminal code. The Appellate Division held that it could, and the Supreme Court affirmed.

The Supreme Court held that under the circumstances of this particular case, the mandatory seatbelt usage law is a law intended to protect the public health and safety and is, therefore, a predicate offense under N.J.S.A. 2C:40-18(b). That statute makes it a third-degree crime when a person knowingly violates a law intended to protect the public health and safety and recklessly causes serious bodily injury.

An extended discussion of this case is beyond the scope of this article; however, the case appears to raise potential issues concerning insurance coverage. For instance, most insurance policies provide exclusions for injuries suffered while the insured is committing a criminal act. If an insured is driving and has an accident with a passenger who is not wearing a seatbelt, will insurers now use this case as a basis to deny coverage on the grounds that the insured could be indicted under the aforesaid statute? Certainly, this case also provides a basis to deny coverage under policies that exclude a defense where the insured recklessly causes bodily injury.

While, to this author's knowledge, this issue has not yet arisen, the case does provide some grounds for disclaimers under the right set of circumstances.

Workers' Compensation Bar and Special Employees

In a case involving a fall-down at a golf club, the Appellate Division recently held that the plaintiff was barred from pursuing a third-party action against the club because he was a special employee of the defendant and, therefore, was barred by the exclusivity provision of the workers' compensation statute.[4]

Plaintiff Eric Hanisko was injured when he slipped and fell on an allegedly defectively constructed wooden step in his residence. At the time, he was the superintendent of a golf club owned by defendant Cranberry Golf Club, LLC.

The plaintiff had been hired after accepting a package of employment from the defendant and another

corporation, Billy Casper Golf Management, which included the provision of housing at the golf club. All defendants moved for summary judgment, arguing that the plaintiff's joint employment with CGC and BCGM barred the trial court's jurisdiction over his personal injury complaint under the exclusivity provision of the Workers' Compensation Act. The trial court granted summary judgment and the Appellate Division affirmed.

Pursuant to N.J.S.A. 34:15-8, an employer may not be sued in tort by its employee if that employee is eligible for workers' compensation benefits from the employer as a result of an accident. Therefore, the relevant inquiry was whether the plaintiff was an employee of CGC at the time of the accident.

This case presented a somewhat unique scenario because the plaintiff resided at the golf club. Generally, accidents may be compensable under workers' compensation if the activity leading to the injury was reasonably incident to the employment. The court noted the plaintiff was injured in a living space provided by CGC and on its property. He paid no rent or utilities except for cable. He was on-call virtually seven days a week, and therefore the court held that the accident occurred within the scope of his employment and was compensable under workers' compensation law.

While the plaintiff's benefits were provided by BCGM, his salary was paid by CGC. The court concluded the plaintiff was a special employee of CGC and, therefore, the action against CGC was barred.

The question of whether CGC was the special employer of the plaintiff was governed by a five-part test: Whether the plaintiff had a contract with CGC; whether the work being done was essentially that of CGC; whether CGC had the right to control the details of the work; whether CGC paid the wages; and whether CGC had the power to hire, discharge or recall the employee. The facts revealed that CGC satisfied this test and, therefore, the plaintiff was barred under N.J.S.A. 34:15-8 from pursuing a tort claim against it. Thus, the plaintiff was entitled to pursue an action for workers' compensation benefits against CGC, but not a tort claim.

Surety Bonds—Bond and Contract are One Document

In a case involving an action on a surety bond, the Appellate Division recently held that a surety was obligated to perform under its bond issued to a subcontractor, even though the general contractor rejected the bond.[5]

Dobco was retained as a general contractor by William Paterson University. Strober bid for and was awarded a subcontract for roofing work. The contract required Strober to furnish performance and payment bonds. Strober obtained a bond from Colonial Surety Company, a Pennsylvania company licensed in New Jersey as a property and casualty insurer.

Colonial issued the bond. Strober paid the premiums. However, the bond was rejected by Dobco because it was not issued on the right form. Ultimately, Strober was terminated by Dobco. Dobco filed a claim against the Colonial bond after Strober sought bankruptcy protection.

Colonial denied the claim on the basis that Dobco had rejected the bond, and that the bond actually named William Paterson as the obligee and not Dobco.

The trial court granted summary judgment to Colonial. The Appellate Division reversed.

A suretyship is a contractual relation resulting from an agreement whereby one person (the surety) engages to be answerable for the debt, default or miscarriage of another (the principal). Traditionally, these relationships involve three parties: an obligee who is owed a debt; a primary obligor who is responsible for the payment of the debt; and a secondary obligor (the surety) who agrees to answer for the primary obligor's debt. The obligee has an enforceable cause of action to recover on the debt from the surety if the surety promises in the bond, either in express words or by reasonable implication, to pay money to him or her.

The court rejected Colonial's argument and held that when a bond incorporates a contract by reference, the bond on the contract must be considered as one integrated document in ascertaining the meaning of the bond's provision. The trial court had concluded that Dobco had no rights under the bond because Colonial's promise was unambiguously to William Paterson, the stated obligee. However, the performance bond had an explicit reference to Strober's contract for the addition at William Paterson and the bond explicitly incorporated the contract for the addition by reference.

The court determined that Colonial was obligated under the bond. The court noted that Colonial agreed to bond the performance undertaken by Strober and the fact that Colonial chose not to review the contract did not relieve it of its obligations. It further rejected Colonial's argument that it was relieved of performance to Strober by Dobco's rejection of the non-conforming

bond, because no New Jersey case requires acceptance by the obligee before the surety can be charged.

Title Insurance—Tax Appeal Does Not Create Defect

In a case involving title insurance, the Appellate Division recently held that a pending tax appeal by a municipality asserting that a property had been under-assessed did not create a defect on the property owner's title or render the title unmarketable, and thus the plaintiff's claim was not covered.[6]

Princeton South bought a foreclosed commercial property at a sheriff's sale. The conditions of the sale included a provision that the property was being sold subject to unpaid taxes. There were no unpaid taxes, but the plaintiff contended that municipal tax appeals covering several prior tax years constituted a title defect covered by a policy issued by defendant First American Title Insurance Company.

The First American Title policy provided coverage for any defect in or lien or encumbrance on the title of the property. The policy contained exclusions for assessments not yet due and payable. Furthermore, the policy explicitly provided that the coverage for taxes was as of the date the policy was issued, not thereafter.

The Law Division entered summary judgment in favor of the insurance company. The Appellate Division affirmed. A title insurance policy is a contract that protects a landowner against loss caused by defective title to the land. Title insurance protects a buyer against the risk of defects that exist at the time the policy is purchased, but not against the risk of defects that may arise in the future.

In New Jersey, the municipal tax assessor must assess all property as of Oct. 1 of the pre-tax year. Once taxes are assessed, they give rise to a lien on the property that continues until they are paid. In this case, there were no delinquent taxes at the time First American issued the policy.

The court pointed out that there was a clear policy exclusion, which provided that it did not cover tax liens created after the policy was written. The court then rejected the plaintiff's argument that a pending tax appeal creates a defect or an encumbrance on the property's title. Taxes do not actually become a lien on property until they are assessed, and future assessments could not logically be considered a cloud on the title because taxes are a known, predictable, constantly reoccurring phenomenon.

Thus, the court concluded that summary judgment had been properly granted because the pending tax appeals did not render the title unmarketable or constitute a defect on the tile, and the policy, by its own terms, did not cover the potential future lien of taxes that might be assessed after the policy was issued. ■

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Endnotes

1. *Lavezzi v. State*, 219 N.J. 163 (2014).
2. *See generally, Wright v. State*, 169 N.J. 422 (2001).
3. *State v. Lenihan*, __ N.J. __ (2014).
4. *Hanisko v. Billy Casper Golf Mgmt, et al.*, 437 N.J. Super. 349 (App. Div. 2014).
5. *Allied Bldg. Prods. v. J. Strober*, 437 N.J. Super. 249 (App. Div. 2014).
6. *Princeton South v. First American*, 437 N.J. Super. 283 (App. Div. 2014).

Recent Cases Retrospective

by Brian R. Lehrer

Since 1998, I have edited the *Insurance Law Section Newsletter*. During that time, I have digested a few hundred cases. As the old issues collect dust, I thought it might be worthwhile to do a retrospective of the digested cases to provide a handy reference.

This issue's subject is permissive use under automobile insurance policies.

Permissive Use—Reasonable Belief

The Appellate Division upheld a policy exclusion issued in New York that barred coverage for individuals operating a vehicle without a reasonable belief the person was entitled to do so.[1]

The Supreme Court held that the correct inquiry in cases of permissive use is whether the driver of a non-owned vehicle had express or implied permission to use the vehicle. The Court rejected a test of whether the driver "reasonably believed" he or she had permission to use the vehicle.[2]

Permissive Use—Initial Permission Rule

The Supreme Court held that the initial permission rule did not apply to a driver of a vehicle who was only given permission by the owner to retrieve cigarettes from her vehicle.[3]

Permissive Use—Unlicensed Immigrant

The Supreme Court held that an unlicensed, intoxicated, immigrant, temporary employee did not have initial permission or implied permission to operate his employer's vehicle and, therefore, the plaintiff had to recover damages from her uninsured motorist carrier because the employer's carrier was not obligated to provide a defense.[4]

Auto Insurance—Drunk Son is Permissive User

The Appellate Division held that a drunk 16-year-old was a permissive user of his father's vehicle, and thus entitled to a defense under the vehicle's insurance policy.[5]

Auto Insurance—Permissive Use, Business Pursuits Exclusion

The Supreme Court held that a permissive user of a motor vehicle was entitled to coverage up to the statutory minimum for third-party liability claims, even though the vehicle was used in violation of the policy's business pursuits exclusion.[6]

Initial Permission Rule

The Appellate Division held that an alcoholic family member who took the keys to his father's car, which was at the home of his brother, was not a permissive user of the vehicle, even though his brother had initial permission from the father to use the vehicle.[7]

Policy Interpretation—Repo Man Not Permissive User

The Appellate Division held that an entity repossessing an automobile was not a permissive user under the omnibus provision of a personal auto insurance policy and, therefore, was not entitled to coverage from the auto policy.[8]

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Endnotes

1. *Ryan v. LCS, Inc.*, 311 N.J. Super. 618 (App. Div. 1998).
2. *Rutgers Cas. Ins. Co. v. Collins*, 158 N.J. 542 (1999).
3. *Jacquez v. National Continental*, 178 N.J. 88 (2003).
4. *French v. Hernandez*, 184 N.J. 144 (2005).
5. *Ferejohn v. Vaccari*, 379 N.J. Super. 18 (App. Div. 2005).
6. *Proformance v. Jones*, 185 N.J. 406 (2005).
7. *Atlantic States Group v. Skovron*, 383 N.J. Super. 423 (App. Div. 2006).
8. *Repossession Spec v. Geico Ins.*, 423 N.J. Super. 518 (App. Div. 2012).