DIVISION 10

50-STATE UPDATES

2012-2013

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New Jersey

Case Law:

1. In *Potomac Ins. Co. of Illinois v. OneBeacon Ins. Co. 2012, N.J. Super. LEXIS 52 (N.J. App. Div. April 13, 2012),* Respondent co-insurer OneBeacon Insurance Company ("One Beacon") sued appellant co-insurer Pennsylvania Manufacturers' Association Insurance Company ("Pennsylvania"), seeking reimbursement for appellant's respective share of the defense costs in an underlying action filed against their insured. The insured, Aristone, Inc. ("Aristone"), was the general contractor on a school building sued over allegedly continuous water intrusion, which commenced at the completion of construction in 1993 and continued at least through the filing of suit in 2001. Aristone was insured under standard commercial general liability policies issued by four carriers, which included OneBeacon and Pennsylvania. OneBeacon and another of the carriers assumed Aristone's defense and appointed an attorney to defend Aristone in the litigation with the school. Through counsel appointed by OneBeacon, Aristone filed a declaratory judgment action against Pennsylvania. The declaratory judgment action was settled as was the underlying litigation with the school.

Despite the conclusion of both the declaratory judgment action and underlying litigation, OneBeacon subsequently filed suit seeking contribution from Pennsylvania for the costs and expenses it incurred in defending the underlying action with the school. Pennsylvania argued that OneBeacon's claim against it for reimbursement of defense costs was barred by its settlement with Aristone. Those costs, according to OneBeacon, were paid by OneBeacon, rather than Aristone, and were excluded from the release. The matter was tried and the judge found in favor of OneBeacon, reasoning that Aristone had no right to release Pennsylvania from any obligation that it may have.

Pennsylvania appealed the trial court's ruling; its principal argument on appeal was that the court below erred because New Jersey does not permit an insurer to obtain contribution from a settling insurer under the apportionment doctrine. The question of whether one insurer may pursue another insurer for contribution for defense costs when the second insurer has already settled with the common insured had not been addressed in New Jersey. The question had, however, been addressed on a number of occasions in California, where the court there recognized a direct right of action between coinsurers of the same risk. The Appellate Division therefore held that Pennsylvania's settlement with Aristone was not, in and of itself, a bar to OneBeacon's subsequent suit against it for contribution to defense costs.

Pennsylvania also argued that, even if OneBeacon had a legally cognizable, separate right to seek contribution, it was barred from filing the present action by the release resulting from the settlement between it and Aristone. The Appellate Division disagreed. The language of the release was sufficiently broad to allow for two interpretations, one favorable to Pennsylvania and the other favorable to OneBeacon. There was no meeting of the minds of the drafters of the release with respect to its meaning. The attorney appointed to represent Aristone and Pennsylvania's attorney had different and conflicting understanding in that regard. The appointed attorney testified that he wanted to eliminate any reference to any insurance carrier so that there was no confusion that the release was only between Aristone and Pennsylvania. Pennsylvania's attorney testified that he wanted to have broad language to include the instant claim. However, the attorneys never discussed or resolved directly the issue of whether the settlement of the declaratory judgment action brought by Aristone and the terms of the release settling that action would bar or permit a future claim by OneBeacon against Pennsylvania in a subsequent action. The court also held that the attorneys who filed and defended the coverage suit had an obligation under the entire controversy doctrine to disclose the potential claim for defense costs by respondent, the non-party co-insurer. Had counsel done so, the judge

responsible for the case could have required that all of the issues and parties be included and resolved in that single litigation, rather than in two separate actions.

2. In *Rational Contracting Inc. v. Congregation Agudath Israel of West Essex 2012 N.J. Super. Unpub. LEXIS 1648 (N.J. App. Div. July 10, 2012)*, plaintiff subcontractor filed an action to foreclose on a construction lien filed for moneys owed from defendant Frankoski, a general contractor, to construct exterior panels and a roof on a project to construct a synagogue. Defendant filed a counterclaim alleging that plaintiff failed to perform the work within the terms of the contract, requiring it to retain another roofing company and incur additional costs. In support of its counterclaim, plaintiff introduced the testimony of the president of the replacement roofing contractor, who, although was qualified as an expert, was never offered as such by defendant. The jury ruled in favor of defendant, finding that the testimony of the replacement contractor established the reasonable charges for the work performed to correct plaintiff's work, and awarded defendant $84,490 as compensatory damages and $9,357.55 as prejudgment interest.

On appeal, the plaintiff contended that the judge erred in not finding the testimony of the replacement contractor to be a net opinion and permitting the jury to consider the reasonable value of its services and materials without expert testimony. The appellate court disagreed with plaintiff and found that the replacement contractor, whose firm defendant hired to complete the work, testified as a fact witness, not as an expert, as to the cost to repair and complete the work, that he was the perfect witness to do so, that expert testimony was not required to establish damages with some reasonable degree of certainty, and that his opinion was not a net opinion and it affirmed the award for compensatory damages. The appellate court did reverse the award for prejudgment interest and remanded the matter to the court because the judge provided no reasons for awarding prejudgment interest or for the rate he used to calculate the award, and the judge may have calculated interest from the wrong date.

Submitted by: Lisa Lombardo, Gibbons P.C., One Gateway Center Newark, NJ 07102, 973-596-4481, llombardo@gibbonslaw.com.