

NEW JERSEY INSURANCE COVERAGE LITIGATION 2021

A PRACTITIONER'S GUIDE

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Frank J. DeAngelis
William D. Wilson
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DEDICATIONS

To Susan, Katie, Emma & Hanna

Love you more

Frank J. DeAngelis

DEDICATIONS

To Anna, Julia, Emily, and Grace. You make it all worthwhile.

William D. Wilson

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INTRODUCTION

It has been almost four years since the second edition of this book was published. In this third edition, the authors have added analysis of every significant insurance case that has been decided by New Jersey state and federal courts since the second edition was published. In addition, this edition contains a new chapter on COVID-19 cases, focusing on first-party property insurance coverage for claims arising out of the coronavirus pandemic. In just the past few months, there have been over thirty decisions issued by both state and federal courts in New Jersey addressing COVID claims.

As noted in the prior editions, in this book we provide a broad overview of New Jersey insurance coverage litigation involving the enforcement and interpretation of insurance policies. An insurance policy is a contract and, therefore, the general law governing the enforcement and interpretation of contracts applies to insurance policies. Given their unique nature, however, courts have developed additional, specialized, rules concerning the enforcement and interpretation of insurance policies. Most of these rules developed because for many years, courts treated insurance policies as contracts of adhesion. This is because the “typical” insured is not sophisticated when it comes to insurance issues and has little or no ability to negotiate the particular terms of the policy. Large commercial insureds, on the other hand, who generally are represented by sophisticated insurance brokers, have the ability to negotiate the terms of their policies. Consequently, the specialized rules of insurance contract construction may not apply to them.

Resolution of insurance coverage issues turns on the particular policy language at issue. Thus, it is critically important to read through and be familiar with each and every provision in an insurance contract before trying to ascertain whether coverage exists. Even small changes in wording can lead to widely varying results, and insurers often modify the main policy form by way of declarations and endorsements. Likewise, the determination of the cause of the loss is instrumental in ascertaining whether any exclusions apply or, if a series of events led to the loss, whether the insured’s loss was the result of multiple occurrences and, if so, what the effect is on both coverage and the amount of recovery.

In a situation involving a fire that destroys a house, the issues are fairly simple and straightforward. However, if a fire destroys a business, the issues may be much more complex, especially if the insured purchased business interruption insurance. In cases involving manmade disasters (such as the 9/11 terrorist attack) or natural disasters (such as Hurricane Katrina, Superstorm Sandy, or a global pandemic), determining what caused a particular insured’s loss, or the extent of the loss attributable to the disaster as opposed to other factors, can be factually complex. Disputes also arise when there are issues as to the timing of a loss or injury. The date of injury in a garden-variety personal injury case generally is not difficult to pinpoint. Typically, an injury can be attributed to some easily identifiable accident or intentional act. However, in cases involving exposure to toxic substances such as lead or asbestos, it can be quite difficult to pinpoint the date of injury. To complicate matters further, the date the injury is deemed to have occurred for insurance purposes typically depends, in the first instance, on whether a claim is being made under a first-party property policy or a third-party liability policy. Such losses also often present complex choice-of-law issues. We attempt in this book to address both fairly simple, straightforward losses as well as large, complex losses.

NEW JERSEY INSURANCE COVERAGE LITIGATION

Throughout this book, we cite to a number of unpublished decisions issued by New Jersey courts. Unfortunately, very few decisions—especially insurance decisions—are “officially” published. Practitioners should keep in mind that pursuant to Rule 1:36-3 of the New Jersey Rules of Court:

No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by *res judicata*, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all other relevant unpublished opinions known to counsel including those adverse to the position of the client.

This rule has been held to apply to unpublished decisions issued by other jurisdictions.¹

The unpublished decisions we cite were based on well-established principles of insurance law; they did not create “new” law by any means. We cite them because they illustrate how a New Jersey court is likely to apply the law to the facts before it. In addition, we note that while such decisions are not binding, courts often find such decisions persuasive and can rely on the reasoning of such decisions—without citing them—in fashioning their own decisions.

Finally, we note that under New Jersey law, decisions by the Appellate Division, which is New Jersey’s intermediate appellate court, are binding on all lower courts.² However, a decision by one panel of the Appellate Division is not binding on another panel. Thus, it is quite possible for seemingly inconsistent decisions to be issued by the Appellate Division. In that event, a trial court may choose which decision to follow until there has been a definitive ruling by the New Jersey Supreme Court.³

¹ *In re Bacharach*, 344 N.J. Super. 126, 133, 780 A.2d 579 (App. Div. 2001).

² *David v. Gov’t Employees Ins.*, 360 N.J. Super. 127, 142, 821 A.2d 564 (App. Div.), *certif. denied*, 178 N.J. 251, 837 A.2d 1094 (2003).

³ Comment 3.3 to *N.J. Court Rule* 1:35-3.

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