

Update on the Law

INSURANCE – JUNE 2009

INSURER OBLIGATED TO PAY COUNSEL FEES FOR ASPECT OF DECLARATORY JUDGMENT ACTION IN ANOTHER JURISDICTION

On June 5, 2009, the New Jersey Appellate Court ruled that an insurer is obligated to pay counsel fees incurred by the insured for a declaratory judgment action that the insurer had filed in Federal Court in Illinois, but was deferred in favor of a New Jersey action in which the insured was ultimately successful.

The case of **Myron v. Atlantic Mutual** (approved for publication) involved a New Jersey based company's claim for insurance coverage for claims under the Telephone Consumer Protection Act (TCPA). Myron, a New Jersey based company, had been sued in numerous jurisdictions for allegedly sending "junk faxes" in violation of the TCPA, including one filed in Illinois as a class action. Atlantic Mutual initially agreed to defend under a reservation of rights. After more than a year, Atlantic filed a declaratory judgment action in the United States District Court for the Northern District of Illinois seeking a determination that the Atlantic Mutual policy did not cover the claims. The declaratory action was filed shortly after the Seventh Circuit Court of Appeals (which includes Illinois) issued a decision in another action denying coverage for

TCPA claims. The Court, however, dismissed Atlantic Mutual's action due to lack of jurisdiction since the amount in controversy was less than the required \$75,000.

Finding additional invoices, Atlantic Mutual re-filed. Five days later, Myron filed a declaratory judgment action in Bergen County, New Jersey. Although the Bergen County action was dismissed due to the earlier filed Illinois federal court action, the Illinois federal court granted Myron's motion for abstention, reasoning that New Jersey had the most substantial interest in the insurance coverage dispute. Myron then re-filed in New Jersey and was ultimately successful on the merits of Atlantic Mutual's duty to defend, leaving the indemnity determination pending the outcome of the underlying TCPA litigation. The court also granted Myron's claims for counsel fees in the New Jersey declaratory action in accordance with New Jersey Court Rule 4:42-9(a)(6), which permits an award of counsel fees to a successful claimant "[i]n and action upon a liability or indemnity policy of insurance." The trial court, however, denied Myron's application for reimbursement of approximately \$160,000 in fees incurred in the Illinois declaratory action reasoning, in part, that the rule should not apply "extraterritorially."

On appeal, the Appellate Division reversed, holding that granting an award of the fees furthers the intent and purpose of the rule, "to discourage groundless disclaimers and to provide more equitably to an insured the benefits of the insurance contract without the necessity of obtaining a judicial determination that the insured, in fact, is entitled to such protection." The Court also noted that this would prevent an insurer from using forum shopping to wear down an insured financially. The Court found that the two federal complaints were "battles in the war that Myron ultimately won," and therefore can be characterized as part of the same action in the context of the applicability of Rule 4:42-9(a)(6).

This is a significant decision in that it imposes what is, in essence, a rule of procedure to a largely substantive issue. As the Court noted, it has applied the rule in suits in New Jersey where the substantive law of other jurisdictions has been applied. In this case, however, the Court largely disregarded the distinction between the substantive laws as contained in legislation or common law, and elevated the rule based upon its espoused purpose, which is to provide an insured “the full benefits of the insurance contract” without the transactional costs necessitated by engaging in declaratory litigation.

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