NEW JERSEY INSURANCE COVERAGE LITIGATION 2017

A PRACTITIONER'S GUIDE

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and

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Frank J. DeAngelis
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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 still make it all worthwhile.

William D. Wilson

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Frank J. DeAngelis has more than twenty years of experience in domestic and international litigation. He is a former partner in the law firm of Mound Cotton Wollan & Greengrass. His experience includes first- and third- party coverage and claims defense, bad faith, multi-layered policy defense of complex property losses, reinsurance, fire/arson losses, and property and casualty defense, all-risk and builder's risk policy defense, weather related catastrophic losses, environmental contamination, business interruption, time element, products liability defense, coal mining losses, defense of travel agents and tour operators under errors and omissions coverage, general commercial litigation, and real estate transactions.

Frank has tried cases and argued appeals in various state and federal courts throughout the United States. In addition, he has authored articles on litigation practice and emerging insurance issues.

He is a graduate of Elizabethtown College and Seton Hall University School of Law, and a member *emeritus* of the Seton Hall University School of Law Alumni Association. He has been an Adjunct Professor of Law at Seton Hall University School of Law since 2001, and was selected as the Adjunct Professor of the Year in 2009. He was selected for inclusion in New York Metro Super Lawyers, 2013, 2014, New Jersey Super Lawyers, 2012, 2014, New Jersey Super Lawyers Rising Stars, 2008-2010, as well as the New Jersey Law Journal's 40 Under 40 in

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In addition to co-authoring this book, Bill is the author of NJInsuranceBlog.com, which summarizes recent New Jersey insurance decisions. Since 2015, Bill has been an Adjunct Professor of Law at Seton Hall University School of Law. He also is a frequent lecturer and has published articles on insurance issues and general litigation topics

Bill is a member of the New Jersey, New York, Florida, and Pennsylvania bars. He also is admitted to the United States Supreme Court, the United States Court of Appeals for the Second, Third, Eleventh, and Federal Circuits, the United States Court of Appeals for the Armed Forces, the United States Court of Federal Claims, the United States District Court for the District of Connecticut, the United States District Court for the Northern, Middle, and Southern Districts of Florida, the United States District Court for the District of New Jersey, and the

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INTRODUCTION

It has been a little over two years since the first edition of this book was published. In this second edition, we have added over seventy cases that have been decided since the first edition was published. In addition, we have added a new chapter that discusses the potential liability of insurance agents and brokers. As noted in the first edition, 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 those rules developed because for many years, courts treated insurance policies as contracts of adhesion. That 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 or Superstorm Sandy), 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 very 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 very 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, straight-forward losses as well as large, complex losses.

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

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

[2] *David v. Government Employees Ins.*, 360 N.J. Super. 127, 142, 821 A.2d 564 (App. Div.), *certif.*

by one panel of the Appellate Division is not binding on another panel. Thus, it is very 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].

denied, 178 N.J. 251, 837 A.2d 1094 (2003).

[3] Comment 3.3 to Rule 1:35-3.

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