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New Jersey Appellate Division Rejects Argument That an Insurer is Estopped from Denying Coverage Unless the Insurer Uses Certain "Magic Words" in its Disclaimer Letter to its Insured

A New Jersey Appellate Division's published decision in Northfield Insurance Company v. Mt. Hawley Insurance Company, A-1771-16T4 (App. Div. March 28, 2018), made several significant holdings regarding whether an insurer that fails to expressly advise an insured that it is free to accept or reject a defense subject to a reservation of rights is estopped from denying coverage because it did not obtain the insured's consent. The Appellate Division held that the ruling in Merchants Indemnity Corp. v. Eggleston, 37 N.J. 114 (1962) "did not impose only one way in which the insured's rights may be observed." The court also ruled that factual uncertainties may preclude application of estoppel principles even if the insured's "consent was not obtained or assumed through its silence." The court rejected the argument "that estoppel must always follow an insurer's failure to fairly seek consent," stating that "Eggleston in no way suggests that estoppel immediately attaches when an insurer, while reserving its rights or declining coverage, assumes control of the defense without first obtaining the insured's consent." Estoppel, as an equitable doctrine, cannot be applied until it is established that the insured "in good faith relied upon such conduct" and "has been led thereby to change its position for the worse." The court disagreed with Sneed v. Concord Ins. Co., 98 N.J. Super. 306 (App. Div. 1967), which held that estoppel automatically follows and prejudice to an insured will be assumed when an insurer takes control of the defense subject to a reservation of rights without first obtaining the insured's consent.

CDA Roofing Consultants, LLC ("CDA") was hired by Empress Properties, Inc. ("Empress") to install a roof on the Empress Hotel in Asbury Park. Superstorm Sandy damaged the roof, which led to water damage to the hotel's interior. Empress and its insurer, Mt. Hawley Insurance Company ("Mt. Hawley"), sued CDA for property damage. CDA's insurer, Northfield Insurance Company ("Northfield"), disclaimed any obligation to indemnify CDA, but volunteered to provide a "courtesy defense." Northfield then filed a declaratory-judgment action. Mt. Hawley moved for summary judgment, arguing that Northfield should be estopped from denying coverage. The trial judge granted Mt. Hawley's motion, ruling that Northfield's actions did not comport with Eggleston because it did not properly seek CDA's consent to control its defense.

The Appellate Division reversed, finding that Northfield's statement that it was willing to provide a "courtesy defense" suggested that Northfield acted voluntarily and did not insist on controlling the defense. Therefore, CDA's silence could be interpreted as acquiescence in Northfield's control of the defense. Further, the court ruled that Eggleston in no way suggests that estoppel immediately attaches when an insurer assumes control of the defense without first obtaining the insured's consent, because the prejudice required to estop the insurer will not be presumed.

Because two published Appellate Division decisions differ on whether estoppel automatically applies when an insurer assumes control of the defense without first obtaining the insured's consent, reserving its rights, or disclaiming coverage, the issue likely awaits resolution by the Supreme Court. Insurers wishing to control the defense and to reserve all rights should continue to advise the insured in express terms that it is free to accept or reject the offer of a defense.

For more information, please contact Vincent E. Reilly, Esq. or Kathleen J. Devlin, Esq.

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Kinney Lisovicz Reilly & Wolff PC represents clients in federal and state courts and handles an extensive variety of matters, including insurance coverage, civil litigation, premises liability, product liability, construction defect, food-borne illnesses, toxic exposure, contract and breach of contract, professional liability, employment litigation, auto and trucking, criminal defense, and appeals.

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