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## CASE ALERT March 12, 2008

Last week the Appellate Division published a significant ruling regarding the right of a liability carrier to disclaim coverage based on the insured's lack of cooperation in defense of the claim.

In Hager v. Gonsalves, \_\_\_ N.J. Super \_\_\_, 2008 WL 612206 (App. Div. March 7, 2008) the Court held that to disclaim coverage for the defense of a third-party claim based upon a failure to cooperate with the insurance carrier, the carrier must prove that it was "appreciably prejudiced" by the insured's failure to cooperate.

The insured in Hager owned a vehicle involved in a motor vehicle accident which vehicle was operated by one Gonsalves, who was not a named insured under the policy. The carrier's investigator, through its SIU unit, attempted to determine whether Gonsalves was a permissive user.

The investigator first telephoned the insured and the driver and left messages. The messages were never returned. The investigator followed this up with letters, and later followed up the letters with certified mail return receipt correspondence. The signed return receipts came back to the investigator. There was absolutely **no response** at any time from the insured or the driver. The driver also failed to appear for the Municipal Court Summons issued to him as a result of the accident. Following six months of wasted effort to obtain a response to its investigative inquiries, the carrier declined coverage.

The Appellate Division held that as a result of a complete failure to cooperate by the insured, the insurance carrier "irretrievably lost" the opportunity to ascertain the true facts relating to the permission to use the vehicle at the time of the accident. The Court emphasized that the carrier should never have to speculate upon possibilities, when the insured alone is in a position to make an affirmative showing of the material facts of the case. The Court reasoned that because of the insured's complete failure to respond, "any reasonable doubt as to the showing of adequacy of appreciable prejudice should be resolved in [the insurance carrier's] favor."

This third-party case is consistent with prior rulings of the Appellate Division that:

(1) A PIP insurer is entitled to an Examination Under Oath of any person receiving PIP benefits, even if the carrier has terminated such benefits. NJAFIUA v. Jallah, 256 N.J. Super. 134 (App. Div. 1992)

(2.) An insured's failure to produce documents at the request of a homeowner's policy carrier was a material breach of the cooperation clause and precluded recovery on a first-party theft claim. DiFrancisco v. Chubb, 283 N.J. Super. 601 (App. Div. 1995); and

(3.) An insured has a contractual obligation to submit to an EUO and no right to assert a Fifth Amendment privilege against self-incrimination under State Farm v. Warrington, 350 N.J. Super. 379 (App. Div. 2002).