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CASE ALERT

DUTY TO DEFEND

NEGLIGENT INFLICTION OF EMOTIONAL INJURY

Two recent decisions have been handed down which potentially have great impact on New Jersey litigation. The first, Abouzaid v. Mansard Gardens, concerned itself with two mothers who saw their children hurt by an explosion and fireball. The flames injured the children, but did not physically injure the women.

A Complaint was filed on behalf of the children that included claims for emotional distress of the mothers. The original Complaint did not allege physical injury to the mothers as a result of their emotional distress nor specified that the emotional distress was accompanied by physical manifestations.

The carrier did not provide a defense and disclaimed for that specific count under its CGL policy because the allocations did not meet the definition of bodily injury.

The defendants retained personal counsel to defend that specific count of the Complaint, but when a motion judge allowed the plaintiffs to amend the Complaint to more specifically allege a claim of physical manifestation from emotional distress and associated medical costs, the carrier defended under a reservation of rights and assumed the defense of the entire Amended Complaint while reserving the right to deny coverage if investigation revealed that the emotional distress was not accompanied by a physical manifestation of the injury. At the same time the motion judge granted the insured's Motion for Summary Judgment on the coverage issue, declaring the duty to defend was triggered by the initial Complaint, and further awarded counsel fees. The Appellate Division reversed, but the New Jersey Supreme Court reversed the Appellate Division, holding that any claim alleging negligent infliction of emotional distress based on witnessing the death or serious injury of a family member may logically involve physical sequelae, and therefore is potentially covered by "bodily injury" provisions of a CGL policy and the burden is on the carrier to provide a defense until the question of physical injury clearly drops out of the case.

It is our feeling that this case, while limited to specific facts, could be used by Courts as a springboard for further coverage issues. Potentially, since this case was not decided on the principle of comparing the Complaint alongside the policy, carriers must be prepared to look beyond the simple wording of the Complaint in determining the duty to defend. Experience would tell us that although the mothers, in the underlying

case, were only alleging emotional distress in the pleading, and not physical manifestation, clearly such an allegation would have to be expected. Of course, even this approach must be cautiously considered. Although the original emotional distress claim of Portee v. Jaffee requires a serious injury, the definition of serious injury is in the eye of the beholder. Further, under any Portee allegation, it is the allegation that would trigger the defense, not the ultimate proof of a serious injury.

Vigilance is required in carefully reviewing discovery and expert reports; even if the Complaint does not allege triggering negligence, if the discovery does, then clearly the obligation for defense is triggered.

While usually the underlying injury to the seriously injured family member will be included as part of the Complaint and the Complaint will therefore be defended in any event, problems may arise nonetheless. The better practice is to defend all potentially covered allegations under a reservation of rights, and if discovery shows that the basic requirements of the claim cannot be met, look to withdraw later. This is the better course than the bigger risk of the plaintiff settling with the insured's personal counsel and later asserting that the carrier should have defended, therefore looking for indemnity of the settlement and attorney's fees.

CLASS ACTIONS

As many carriers are aware, Federal legislation prohibits the use of any fax machine to send any unsolicited advertisement. The Federal legislation calls for statutory damages of $500.00 (or actual damages) per fax sent. With the advent of computer programs to "blast fax", thousands of faxes can literally be sent out at once. Thus, an insured may be liable for the theoretic selling of thousands of faxes, generating potentially million dollars in damages to the recipients. Please note that if the recipient had an established business relationship or had given expressed permission or invitation for the sending of faxes, or if the fax did not involve commercial availability of property, goods, or services, or was sent by a non-profit organization, no violation arises.

The issue that has come to the fore was whether under New Jersey law plaintiffs could establish a class to file as a class action or whether the Complaints were better administered by the Courts on an individual basis. The stakes were of course quite high, because the likelihood of thousands of individual plaintiffs filing their own actions and coming to Court to prove same, even in a Small Claims Court, was minimal.

Jurisdictions around the country are split on this issue, as are several Federal jurisdictions. In fact, two states are split amongst their own Appellate Courts as to whether or not class actions should be allowed.

Our Appellate Division, in a published unanimous opinion, reasoned that the superior accessibility of Small Claims Courts in New Jersey provides the best basis for any aggrieved individual to access the courts and upheld an Essex County motion judge's decision denying class action certification. The Appellate Division noted, as did the motion judge, that a plaintiff in New Jersey can simply walk up to the Small Claims Court clerk counter, file a Complaint, have a hearing in 30 to 45 days, and have the matter resolved without an attorney. Of course, this decision does not reflect a judicial philosophy for all potential class actions, but under Federal law, where there is a statutory award of $500.00, a sum considerably in excess of any real or sustained damage, Congress has presented an aggrieved party with such an incentive to act on their own that a class action is not only unnecessary, but wasteful.