

The New Jersey Supreme Court Holds That An Insurer Owes A Duty To Defend Against A Portee Claim Unless And Until The Insurer Can Demonstrate That There Is No Evidence Of Physical Injury Caused By Emotional Distress

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On June 21, 2011, the New Jersey Supreme Court decided Abouzaid v. Mansard Gardens Associates, LLC, ___ N.J. ___ (2011), A-5-10, and held that a plaintiff's claim for negligent infliction of emotional distress under Portee v. Jaffee, 84 N.J. 88 (1980), is a potentially covered "bodily injury" claim under a commercial general liability ("CGL") insurance policy.

A Portee claim is based on witnessing the death or serious injury of a family member. The Supreme Court determined that even if the pleading does not allege that the emotional distress was accompanied by physical manifestations, a Portee claim may involve physical sequelae and an insurer bears the burden to defend until the question of physical injury clearly drops out of the case.

On August 22, 2007, liquid paint thinner used to repair the kitchen floor in an apartment owned by Defendants Jack and Sally Pomeranc d/b/a Mansard Gardens Associates, LLC ("Mansard"), in which plaintiffs were tenants and guests of the tenants, was ignited by the kitchen stove's pilot light and the apartment caught on fire. The mothers of the three boys in the apartment at the time heard the explosion and saw their sons "engulfed by a fireball." The boys were injured by the fire but the mothers did not sustain any physical injuries.

The three boys and their parents sued Mansard for personal injuries, pain and suffering, and damages. The mothers of the three boys also sued for emotional distress under Portee because they witnessed the boys' "engulfed by a fireball." The mothers did not allege any physical injury associated with their emotional distress.

Mansard tendered the claim to Greater New York Mutual Insurance Company ("GNY"), its CGL insurer. GNY issued a reservation of rights, agreeing to defend Mansard against the claims for personal injuries. However, GNY disclaimed coverage for the Portee claim because the mothers did not allege any "bodily injury" as the term was defined in the CGL policy. Mansard retained separate counsel for the Portee claim who filed a third party complaint on behalf of Mansard against GNY, seeking a declaration that GNY owed a duty to defend Mansard against the Portee claim.

Mansard filed a motion to dismiss the Portee claim, alleging the claim was insufficiently pled because there was no allegation of physical injury accompanying the emotional distress. GNY filed a motion to dismiss the third party complaint. These motions were denied as premature. Mansard subsequently moved for summary judgment on the third party complaint and GNY moved for reconsideration of the order denying its motion to dismiss the third party claims. While these motions were pending, the trial court permitted the plaintiffs to file an amended complaint that included allegations of medical treatment for the alleged emotional distress suffered by the mothers. Based on the amended complaint, GNY issued a revised reservation of rights letter, agreeing to defend Mansard against all of the claims asserted by the plaintiffs. On that same day, the trial court granted Mansard's motion for summary

judgment, declaring GNY owed a duty to defend Mansard against all of the claims as asserted in the initial complaint and awarded Mansard attorneys' fees and costs.

GNY appealed the trial court's decision and the Appellate Division reversed, holding that the assertion of a Porteeclaim in the initial complaint without reference to physical injury was insufficient to trigger GNY's duty to defend. The Supreme Court granted certification, reversed the Appellate Division's decision, and reinstated the trial court judgment.

After discussing the history of claims for negligent infliction of emotional distress and the breadth of an insurer's duty to defend, the Supreme Court turned its focus to Porteeclaims, a form of the negligent infliction of emotional distress tort. The Court noted that "although a Porteeclaim may assert a physical injury, it need not do so — serious psychological damage will suffice." The Court further noted that the duty to defend is triggered "even if the asserted claims are 'poorly developed and almost sure to fail.'" Moreover, while courts look to the allegations in the complaint to determine whether an insurer owes a duty to defend, "the analysis [of whether a potentially covered claim is pled] is not necessarily limited to the facts asserted in the complaint," but instead, can include "after-acquired information." In light of these principles, the Supreme Court concluded that "[a]lthough the [Portee] count [in the initial complaint] was silent regarding the existence of physical manifestations, it did not exclude the possibility that such manifestations would be proved during the course of litigation." Because there was "a potential for plaintiffs to prove a covered claim," the Supreme Court held that the initial complaint triggered GNY's duty to defend Mansard. The Supreme Court's decision evidences an expansive view of the duty to defend.

Should you have any questions or comments regarding this matter, please feel free to contact Vincent E. Reilly or Amanda K. Coats.