Originally published in the NJSBA Construction Law Section Newsletter Vol. 17, No.1/January 2016

Occhifinto v. Olivio Construction Co.: Counsel Fees and Beyond

by John S. Prisco

In May 2015, the New Jersey Supreme Court handed down its opinion in the case of *Occhifinto v. Olivio Construction Co.*,[1] and with it provided construction defect litigants a new tool to use in insurance coverage battles. *Occhifinto* will have to be carefully evaluated by insurance carriers before they attempt to disclaim coverage in construction defect cases.

Occhifinto involved a lawsuit instituted by Robert Occhifinto, a manufacturing warehouse owner, against Robert S. Keppler Mason Contractors, LLC, as well as other parties.[2] Occhifinto retained the services of Olivo Construction Co., LLC to construct an addition on Occhifinto's manufacturing warehouse.[3] In turn, Olivo hired Keppler as the masonry subcontractor to pour the warehouse's second-story concrete floor.[4] Subsequent to construction of the warehouse addition, the second-story concrete floor installed by Keppler began to fracture, thereby making the warehouse unfit for use.[5] As a result, Occhifinto filed suit against Keppler and others involved in the construction of the warehouse addition for, *inter alia*, damages resulting from the negligent installation of the second-story concrete floor.[6]

Keppler's commercial liability carrier, Mercer Mutual Insurance Company, initially defended Keppler in the liability action pursuant to a reservation of rights. However, prior to trial, Mercer filed a declaratory judgment action seeking to disclaim its obligation to defend and indemnify Keppler.[7] Occhifinto defended the declaratory judgment action on behalf of Keppler and filed a counterclaim against Mercer, asserting the carrier had a duty to defend and indemnify Keppler in the liability action, and was also required to reimburse Occhifinto for costs incurred in defending the declaratory judgment action.[8] Mercer and Occhifinto both moved for summary judgment in the declaratory judgment action on the issue of Mercer's duty to defend and indemnify Keppler in the underlying liability action.[9] The trial court denied Mercer's motion, holding it was obligated to defend Keppler and to provide indemnification in the event Keppler was found liable at the conclusion of the underlying trial.[10] The judge, however, reserved decision on Occhifinto's request for attorney's fees until the conclusion of the liability trial, and further consolidated the declaratory judgment action with the underlying liability action.[11]

At the conclusion of the trial, the jury returned a verdict in favor of Keppler, concluding that although Keppler breached its duty of care to Occhifinto, that breach was not a proximate cause of Occhifinto's damages.[12] Despite losing on the issue of liability, Occhifinto nevertheless moved, pursuant to Rule 4:42-9(a)(6),[13] to recover counsel fees incurred in defending against Mercer's declaratory judgment action.[14] The trial court denied Occhifinto's motion, reasoning that Occhifinto was not a "successful claimant," as required under Rule 4:42-9(a)(6), because he was not successful in proving liability at trial, which was affirmed on appeal.[15] The Supreme Court granted certification on the issue of Occhifinto's right to attorney's fees under Rule 4:42-9(a)(6), and reversed both lower courts.[16]

In discussing Rule 4:42-9's exceptions to New Jersey's longstanding public policy against fee shifting, the Court fired a warning shot to insurance carriers: "Fee shifting under Rule 4:42-9(a)(6) discourages insurance companies from attempting to avoid their contractual obligations and force their insureds to expend counsel fees to establish coverage for which they have already contracted."[17] Thus, the Court ultimately held that "[a] party who obtains a

favorable adjudication on the merits of a coverage question as the result of the expenditure of counsel fees is a successful claimant under Rule 4:42-9(a)(6).”[18] Further bolstering the Court’s ruling, the Court went on to state:

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A successful claimant under Rule 4:42-9(a)(6) may include a party in a negligence action who, like plaintiff, is a third party beneficiary of a liability insurance policy and litigates a coverage question against a defendant's insurance carrier. We authorize trial courts to award counsel fees in favor of third-party beneficiaries of insurance contracts because an insurer's refusal to provide liability coverage may also, as a practical matter, preclude an innocent injured party from being able to recover for the injury.[19]

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Significantly, the Court found that “the duty to defend is a ‘coverage question’ if the complaint alleges claims that would, if proven, fall under the policy.”[20] Thus, “where an insured or a third-party beneficiary of an insurance policy has established the carrier's duty to defend, counsel fees are recoverable regardless of the liability determination in the underlying case.”[21] Applying these principles to the matter at hand, the Court found that because the trial court had concluded that Occhifinto’s complaint alleged claims that would, if proven, fall under the Mercer policy, Occhifinto was a “successful claimant” in the declaratory judgment action. Occhifinto was, therefore, entitled to counsel fees pursuant to Rule 4:42-9(a)(6), notwithstanding the fact that he was unsuccessful in proving liability regarding Keppler.

The Court’s holding that a successful litigant includes a party that obtains a favorable adjudication on the merits of a coverage question, irrespective of its success at the liability stage, is without question significant in and of itself. However, what may be of even more significance is what the Court stated in passing:

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A successful claimant under Rule 4:42-9(a)(6) may include a party in a negligence action who, like plaintiff, is a third Party beneficiary of a liability insurance policy and *litigates* a coverage question against a defendant's insurance carrier.[22]

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The Court’s usage of the word ‘litigates’ contemplates not a scenario in which a party, like Occhifinto, defends a coverage dispute initiated by an insurance carrier, but rather intimates that such a plaintiff could proactively call the insurance carrier to court in the underlying action for a coverage determination.

Many plaintiffs’ attorneys are now seeking to add insurance carriers as named defendants in their underlying liability actions, seeking declaratory relief as well as filing motions for partial summary judgment under *Occhifinto* in cases where they are third-party beneficiaries of commercial general liability policies and the insureds have received disclaimers of defense and indemnification by their carriers. To date, no published opinions have dealt with the implications of the Court’s passing statement in *Occhifinto*. With the new year upon us, it will be interesting to see how the lower courts and litigants interpret *Occhifinto*. One thing, however, is certain—the Court’s message to insurance carriers is clear: The Court has issued a clarion call letting insurance carriers know they need to be much more circumspect in disclaiming coverage going forward from here, and that they do so at their peril.

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Endnotes

1. 221 N.J. 443 (2015).
2. *Occhifinto v. Olivio Construction Co*., 221 N.J. 443, 446 (2015).
3. *Occhifinto*, 221 N.J. at 446.
4. *Id.* at 446-47.
5. *Id.* at 447.
6. *Ibid.*
7. *Ibid.*
8. *Ibid.*
9. *Ibid.*
10. *Id*. at 447-48.
11. *Id.* at 448.
12. *Ibid.*
13. R. 4:42-9(a)(6) states in pertinent part: "No fee for legal services shall be allowed in the taxed costs or otherwise, except...(6) [i]n an action upon a liability or indemnity policy of insurance, in favor of a successful claimant."
14. *Occhifinto*, 221 N.J. at 448.
15. *Ibid.*
16. *Ibid.*
17. *Id.* at 450.
18. *Id.* at 451 (*citing Transamerica Ins. Co. v. Nat'l Roofing Inc*., 108 N.J. 59, 63 (1987)).
19. *Ibid.*
20. *Ibid*.
21. *Id.* at 453.
22. *Id.* at 451 (emphasis added).