

THE SUPREME COURT OF NEW JERSEY DEFINES A “SUCCESSFUL CLAIMANT” UNDER NEW JERSEY COURT RULE 4:42-9(A)(6) FOR FEE-SHIFTING IN CERTAIN COVERAGE ACTIONS

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Insurance Coverage Alert

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The Supreme Court of New Jersey recently issued a significant pro-policyholder decision regarding fee-shifting under the New Jersey Court Rules. Under *Rule 4:42-9(a)(6)*, courts may award attorneys' fees in "an action upon a liability or indemnity policy of insurance in favor of a successful claimant." The Court provided clear guidance as to what constitutes a "successful claimant" under *Rule 4:42-9(a)(6)* in its decision in *Occhifinto v. Olivo Construction Company*.^[1] According to the Court, "[a] party who 'obtain[s] a favorable adjudication on the merits' of a coverage question is a successful claimant under the Rule. Importantly, that 'favorable adjudication' can include the court 'confirm[ing] an insurance carrier's duty to defend.'"

In *Occhifinto*, plaintiff Robert Occhifinto ("Occhifinto") brought an action for damages against a number of defendants, including Keppler Mason Contractors LLC ("Keppler"), claiming improper design and negligent construction of a warehouse owned by Occhifinto. Mercer Mutual Insurance Company of New Jersey ("Mercer"), which sold the general liability insurance policy (the "Policy") at issue to Keppler, initially defended under a reservation of rights. However, prior to trial, Mercer filed a declaratory judgment action challenging its obligation to defend and indemnify Keppler in connection with the claims brought by Occhifinto. As a third-party beneficiary of the policy, Occhifinto defended the declaratory judgment action and filed counterclaims on Keppler's behalf.

In the declaratory judgment action, the trial court ultimately held that Mercer had a duty to indemnify Keppler for damages covered by the Policy. Given that the duty to defend is broader than the duty to indemnify, this finding had the practical result of enforcing Mercer's duty to defend. The liability action then proceeded to trial, and the jury apportioned no liability to Keppler for Occhifinto's damages.

After trial, Occhifinto moved to recover attorneys' fees incurred in litigating the declaratory judgment action from Mercer pursuant to *Rule 4:42-9(a)(6)*. The trial court denied Occhifinto's motion, reasoning that Occhifinto was not a "successful claimant" because success under *Rule 4:42-9(a)(6)* "is contingent upon the securing of indemnity coverage." According to the trial court, because "the jury found that Keppler was not...liable, Occhifinto did not actually secure...coverage and cannot be successful under [Rule 4:42-9(a)(6)]." The Appellate Division affirmed in an unpublished decision, and the Supreme Court granted certification, limited to the issue of Occhifinto's right to attorneys' fees under *Rule 4:42-9(a)(6)*.

New Jersey courts have long followed the American Rule prohibiting the recovery of counsel fees from the losing party. However, in deciding whether Occhifinto was a "successful claimant" for purposes of obtaining attorneys'

fees under *Rule 4:42-9(a)(6)*, the Court first explained that "counsel fees may be awarded in certain circumstances." The Court made clear that the purpose of the fee-shifting Rule was to "discourage[] insurance companies from attempting to avoid their contractual obligations and force their insureds to expend counsel fees to establish the coverage for which they have already contracted."

The Court then defined the term "successful claimant." According to the Court, that term is "broadly defined as a party that 'succeed[s] on any significant issue in litigation which achieves some benefit the parties sought in bringing the suit.'" Specifically in the context of coverage, the Court explained that "[a] party who 'obtain[s] a favorable adjudication on the merits on a coverage question as the result of the expenditure of [counsel] fees,' is a successful claimant under *Rule 4:42-9(a)(6)*."

The Court also noted that 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." The Court reasoned that "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."

Having defined the term "successful claimant," the Court next addressed whether Occhifinto had obtained a "favorable adjudication" on the merits of a coverage question in the declaratory judgment action. The Court specifically focused on the duty to defend, explaining that such a duty "is a 'coverage question' if the complaint alleges claims that would, if proven, fall under the policy," and, applying past precedent, held that "a party [to a declaratory judgment action] who confirms an insurance carrier's duty to defend qualifies as a successful claimant even if there is no award of damages requiring indemnification." Thus, according to the Supreme Court, Occhifinto succeeded in the declaratory judgment action by forcing Mercer to continue to defend Keppler in the liability action. The Supreme Court found that "[b]ecause the trial court concluded in the declaratory judgment action that the complaint filed in the liability action alleged claims that would, if proven, fall under Keppler's liability insurance Policy with Mercer, thereby enforcing Mercer's duty to defend, Occhifinto was a successful claimant entitled to counsel fees pursuant to *Rule 4:42-9(a)(6)*."

The Supreme Court of New Jersey's decision in *Occhifinto* is significant for policyholders in several respects. The Court has made clear that a policyholder need not realize or actually receive any indemnity payments in order to qualify as a "successful claimant." Instead, the policyholder need only obtain a "favorable adjudication" on the merits of a coverage question. This "favorable adjudication" can include a court's decision to "confirm" an insurance carrier's duty to defend, even if the insurance carrier is already providing a defense to the policyholder under a reservation of rights. Moreover, the Court in *Occhifinto* made clear that third-party beneficiaries can enforce *Rule 4:42-9(a)(6)*, even if the "favorable adjudication" obtained by the third-party beneficiary is a defense for the insured. Policyholders and third-party beneficiaries of insurance policies should be aware of the Supreme Court's decision in *Occhifinto* and its impact on their coverage disputes.

NOTES:

[1] ---A.3d---, 2015 WL 2095767 (NJ).

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