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STATEMENT OF FACTS

1. This matter arises out of an injury plaintiff Nelson Prante sustained while he was a passenger in a van driven by defendant Bruce Hoffer. (See, Complaint attached as Exhibit "B" to Selective Insurance Company's motion; see also, Exhibit "A", Plaintiff's Answers to Interrogatories ¶ 2).

2. Defendant Bruce Hoffer and B.A.H. Pro Painting & Power Washing ("B.A.H.") has assigned Plaintiff any and all rights they have against Selective Insurance Company ("Selective"), in connection with this coverage matter.

3. On October 5, 2005, Defendant Bruce Hoffer was the owner of B.A.H. (See Exhibit "B", Defendants' Answers to Interrogatories ¶ 2).

4. On days that plaintiff would be performing painting and power washing services, plaintiff would commute with defendant Hoffer to the various job sites. (See Exhibit "C", plaintiff's deposition transcript, p. 12).

5. On October 5, 2005, at about 8:00 a.m., defendant Hoffer picked up plaintiff to work on a job site. Shortly after defendant had picked plaintiff up at his home in Long Branch, New Jersey, plaintiff was injured when tools in the back of the van struck his leg. This incident occurred within Long Branch, New Jersey. (See Exhibit "B", Defendants' Answers to Interrogatories ¶ 2; see also, Exhibit "A", plaintiff's Answers to Interrogatories ¶ 1, 2).

6. Since plaintiff was injured while on the way to a job site, he was not injured within the course of his employment, and as such is not entitled to workers' compensation insurance. (See Exhibit "A", Plaintiff's Answers to Interrogatories ¶ 2).

7. On December 16, 2005, Plaintiff filed a complaint against defendant driver, Bruce Hoffer,

and B.A.H. and this lawsuit ensued. (See, Complaint attached as Exhibit "B" to Selective's motion*)*.

8. Upon learning of plaintiff's claim, Selective, sent a reservation of rights letter to its insured, defendant Bruce Hoffer t/a B.A.H. Professional, dated January 19, 2006. This letter advises defendant of the exclusion under which Selective now seeks to disclaim coverage, specifically the "Employee Indemnification and Employer's Liability" provision. (See Exhibit "D", January 19, 2006 correspondence).

9. The January 19, 2006 correspondence makes clear that Selective had some information or had undertaken some investigation as to the facts surrounding plaintiff's complaint, as reflected by the cited exclusionary clause. Yet despite having some knowledge regarding the basis of the claim, Selective assigned Romando, Tucker, Zirulnik & Sherlock as counsel for defendant in the underlying lawsuit. (See Exhibit "D", January 19, 2006 Correspondence).

10. On or about March 8, 2006, Romando, Tucker, Zirulnik & Sherlock filed an Answer on behalf of defendant Bruce Hoffer and defendant B.A.H. (See Exhibit "E", Answer).

11. Discovery in this matter continued in normal course. Counsel hired by Selective, provided responses to discovery demands including but not limited to, Answers to Interrogatories and a response to Notice to Produce. Even after compiling discovery responses from defendant Hoffer, and receiving plaintiff's discovery responses, counsel appointed by Selective continued to control the defense in the underlying action. (See Exhibit "B", Defendants' Answers to Interrogatories ¶ 2).

12. On January 9, 2007[1], Counsel appointed by Selective took plaintiff's deposition. Despite a full factual account of the incident, Selective continued defend defendants Hoffer and B.A.H. (See Exhibit "C", plaintiff's deposition transcript).

13. On or about May 7, 2007, counsel appointed by Selective sent plaintiff for an Independent Medical Examination. (See, Exhibit "F" cover letter amending interrogatories with defense narrative report).

14. Discovery in this matter ended on June 7, 2007.

15. At the conclusion of discovery, counsel appointed by Selective determined there were sufficient facts to file a motion for summary judgment on behalf of defendant Bruce Hoffer and defendant B.A.H., alleging that the claim was barred under the Workers' Compensation Act alleging among other things that plaintiff was injured while in the course of employment[2]. (See, Exhibit "G" brief filed on behalf of defendants Bruce Hoffer and B.A.H.).

16. Plaintiff opposed this motion, arguing that plaintiff was not in the scope of his employment when he was injured and as such, the claim is not barred by the Workers' Compensation Act. (See, Exhibit "H", brief filed on behalf of plaintiff).

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[1]While the cover page of the deposition transcript indicates the same was taken on January 9, 2006, plaintiff's records reveal that the deposition was conducted on January 9, 2007 and the year a typographical error.

[2]Interestingly, the language of the reservation of rights letter highlights the inappropriateness and untimeliness of the summary judgment motion at this stage, as the letter states that "[i]f throughout the course of discovery it is determined that the plaintiff, Nelson Prante was an employee or leased worker, we may at that time disclaim coverage and withdraw our defense."(See Exhibit "D", January 19, 2006 Correspondence). As such, through this summary judgment motion Selective was putting counsel, hired to represent defendants, in a quite precarious position, preparing an affirmative motion that, if successful, would have resulted in Selective disclaiming coverage to the very individual counsel was hired to represent.

17. The court properly rejected the arguments made by Selective, finding that plaintiff's claim was not barred by the Workers' Compensation Act and thus, denying the summary judgment motion on July 20, 2007. (See Exhibit "I", July 20, 2007 Order).

18. Counsel appointed by Selective appeared at the mandatory non-binding arbitration on behalf of defendant Hoffer and defendant B.A.H., that took place on September 13, 2007. (See Exhibit "J", arbitration award).

19. Following arbitration, this matter was listed for trial on February 11, 2008.

20. This matter is presently scheduled for trial on August 25, 2008.

21. Despite controlling the defense of this matter from its inception, and depriving defendant of his opportunity to retain personal counsel to defend his interest, Selective waited until after this matter was listed for trial to make the instant motion to deny coverage - based upon a policy exclusion that it cited in its reservation of rights letter sent to defendant Hoffer on January 19, 2006 - two and one half years ago. (See Exhibit "D", letter of January 19, 2006).

PRELIMINARY STATEMENT

This matter arises out of an injury plaintiff sustained while he was a passenger in the back of a van driven by defendant Bruce Hoffer, on October 5, 2005. The morning of the incident, defendant Hoffer picked plaintiff up at his home in Long Branch, New Jersey in order to commute to a job site. While still in Long Branch, New Jersey, at approximately 8:00 a.m., the van in which plaintiff was a passenger road over railroad tracks causing tools to strike plaintiff's leg, injuring him severely. Plaintiff was commuting to a job site at the time of the accident and not within the scope of his employment when he was injured and therefore, cannot bring a worker's compensation claim.

On December 16, 2005, Plaintiff filed a complaint against defendant driver, Bruce Hoffer, and B.A.H. Pro Painting & Power Washing (B.A.H.) and this lawsuit ensued. However, on January 19, 2006, Selective Insurance Company, sent a reservation of rights letter to its insured, defendant Bruce Hoffer t/a B.A.H. Professional, referring to the "Employee Indemnification and Employer's Liability" exclusion. Despite this exclusion, Selective appointed counsel to defend defendants Hoffer and B.A.H. in the underlying lawsuit. An Answer was filed on behalf defendants Hoffer and B.A.H and discovery ensued.

Defense counsel appointed by Selective prepared and compiled discovery responses on behalf of their insured, defendants Hoffer and B.A.H. Defense counsel hired by Selective also received discovery responses from plaintiff. Yet, counsel appointed by Selective continued to control the defense in the underlying action by taking plaintiff's deposition and sending plaintiff for an independent medical examination.

After discovery ended, counsel hired by Selective filed a motion for summary judgement seeking a ruling that plaintiff's claim was barred by the Workers' Compensation Act. Plaintiff

opposed and the Court properly rejected this argument. Following denial of the summary judgment motion, counsel appointed by Selective attended the mandatory non-binding arbitration on behalf of defendants Bruce Hoffer and B.A.H.

Despite defending this matter from its inception, and depriving defendant of his opportunity to retain personal counsel to defend his interests, counsel appointed by Selective continued to control the defense of this action, waiting until after this matter was listed for trial to act on its denial of coverage - based upon a policy exclusion that it sighted in its reservation of rights letter sent to defendant Hoffer on January 19, 2006 - *two and one half years ago.*

Selective now moves to disclaim coverage under the aforementioned "Employee Indemnification and Employer's Liability" portion of its policy, essentially asking the Court to reconsider whether plaintiff is an employee injured during the course of his employment - an issue the Court previously properly rejected.

Plaintiff opposes Selective's motion and cross-moves for summary judgment on the basis that the policy language does not exclude plaintiff and that pursuant to Griggs v. Bertram, 88 N.J. 347, 355-56 (1982), and its progeny, Selective is estopped from disclaiming coverage at this late date.

RESPONSE TO SELECTIVE'S STATEMENT OF MATERIAL FACTS

1. Denied. Plaintiff testified that he was on his way to a job site at the time the accident occurred. (See Exhibit "F", Plaintiff's Deposition, p. 11-12). Defendant also admitted in his answers to interrogatories that the accident happened on their way to a customer's home for a job. (See Exhibit "B", Defendants' Answers to Interrogatories ¶ 2).

2. Admitted.

3. Admitted for the purposes of this motion.

4. Admitted in so far as Selective Insurance Company issued a commercial auto policy to Hoffer with a policy period of July 1, 2005 through July 1, 2006. However, deny that the policy excludes coverage for employee indemnification and employee liability. (See Defendant Exhibit "A", "Insured's Copy" p 3 of 5, CA 23 25 - Coverage for Injury to Leased Workers).

5. Objection, this is not a statement of material fact, and not proper. Notwithstanding such objection, defendants' motion speaks for itself.

LEGAL DISCUSSION

POINT I

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SELECTIVE INSURANCE COMPANY IS NOT PERMITTED TO DISCLAIM COVERAGE IN THE UNDERLYING ACTION, SINCE PLAINTIFF'S IS NOT AN EMPLOYEE OF THEIR INSURED, INJURED ARISING OUT OF AND DURING THE COURSE OF HIS EMPLOYMENT, UNDER THE LANGUAGE OF THE POLICY.

Selective Insurance Company ("Selective"), seeks to disclaim coverage for the underlying claim because it alleges plaintiff is excluded from bodily injury protection under, their insured, defendant Bruce Hoffer's, policy. The exclusionary language[3] in the Selective policy states that bodily injury insurance does not apply to "(1) An 'employee' of the insured arising out of and in the course of: (a) Employment by the insured; or (b) performing duties related to the conduct of the insured". However, this conclusion assumes that plaintiff sustained injuries arising out of and in the course of employment by insured (defendant

[3] This language mimics the language of N.J.S.A. 34:15-7, which provides that workers' compensation benefits must be paid for personal injuries cause by an "accident arising out of and in the course of employment." Therefore, plaintiff relies on the interpretation of the statutory language.

Hoffer) or performing duties related to conduct of the insured's business. (See Exhibit "A" to Selective's motion).

Defendant would pick up plaintiff at his home, located in Long Branch, New Jersey, in defendant's work van before each day of work to go to the job site. (See Exhibit "C", plaintiff's deposition, p. 12). Defendant picked plaintiff up on the days that plaintiff would perform work for B.A. H. Pro Painting & Power Washing ("B.A.H.") because it was convenient to travel to job sites together. Id.

Moreover, plaintiff was not injured "arising out of and in the course of (a) employment by the insured; or (b) performing duties related to the conduct of the insured's business." (See Exhibit "A" to Selective Insurance Company's brief). Plaintiff testified that he was on his way to a job site at the time the accident occurred, but still within Long Branch, New Jersey not far from Plaintiff's home. (See Exhibit "C", plaintiff's deposition, p. 11-12). Defendant also admitted in his answers to interrogatories that the accident happened on their way to a customer's home for a job. (See Exhibit "B", Defendants' Answers to Interrogatories ¶ 2). Therefore, plaintiff's claims fails outside the policy exclusion sited by defendant Selective Insurance Company, as plaintiff was injured while commuting to a job site not "arising out of and in the course of (a) employment by the insured," since his accident happened while going to work. (See Exhibit "A" to Selective's brief).

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A. Going and Coming Rule

N.J.S.A. 34:15-36, provides in part that: [e]mployment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work, otherwise known as the "going and coming rule". The "going and coming rule" is a rule of workers' compensation which denies compensation for injuries incurred while traveling to and from work. See Hammond v. The Great Atlantic & Pacific Tea Co., 56 N.J. 7, 11 (1970); 1 Larson, The Law of Workmen's Compensation, § 15.11 (1985). The rule, which is a generally accepted one, limits recovery for injuries which occur on the employer's

premises. Ibid. It does this by confining the term "course of employment" to the physical limits of the employer's premises. Ibid; Cressey v. Campus Chefs, Div. of CVI Service, Inc., 204 N.J.Super. 337, 342 (App. Div. 1985). As such, employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment. Ramos v. M & F Fashions, Inc., 154 N.J. 583, 591 (1988). In this case, defendant picked plaintiff up his home in Long Branch, New Jersey. The incident occurred while plaintiff was a passenger in the van on his commuting to the job site where the painting would commence. (See Exhibit "C", plaintiff's deposition, p. 11-12; see also, Exhibit "A", plaintiff's Answers to Interrogatories ¶ 2).

In 1979 the legislature codified the "going and coming rule", in N.J.S.A 34:15-36, "and in doing so rejected many of the exceptions that had come to qualify and limit the effect of the rule." Zelasko v. Refrigerated Food Express, 128 N.J. 329, 342 (1992), J. Handler, dissenting. In light of the same, the legislature carved out specific exceptions to the "going and coming rule", known as the "special mission" exception and the "travel time" exception. The instant circumstances do not fit within either of these two situations, and thus the plaintiff's employment, if any, began when plaintiff arrived at the place of employment, in this instance, the job site at which he was to perform his painting and or power washing services. N.J.S.A. 34:15-36.

B. The Exclusionary Language Should be Construed in Favor of Coverage and Against the Insurer.

Clearly plaintiff's injury does not fall with the exclusion because plaintiff was not

injured “arising out of and in the course of his employment” as the subject motor vehicle accident occurred while plaintiff was on his way to a job site. (See Exhibit “C”, plaintiff’s deposition, p. 11-12; see also, Exhibit “A”, plaintiff’s Answers to Interrogatories ¶ 2). While a court should not ignore an exclusion's clear meaning, if there is another fair interpretation, the court must construe the insurance policy in favor of coverage and against the insurer, adopting the interpretation supporting coverage. Id. at 105, 706 A.2d 785. The insurer has the burden of establishing application of an exclusion. Hartford Acc. & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 26 (1984).

Any ambiguity found in an insurance policy must be construed against the insurer and an exclusion clause must be "strictly construed against the insurer." Pacific Indemnity Co. v. Linn, 766 F.2d 754, 761 (3rd Cir. 1985); Stafford v. T.H.E. Ins. Co., 309 N.J.Super. 97, 103, (App. Div.1998).

Indeed, exclusion clauses are strictly construed against the insurer, "especially if they are of uncertain import." Boswell v. Travelers Indem. Co., 38 N.J.Super. 599 (App. Div.1956). While an insurer may cut off liability under its policy with clear language, "it cannot do so with that dulled by ambiguity." Id. at 606. The insurer is charged with the responsibility of phrasing its contracts with such clarity as to avoid ambiguity as to their meaning; otherwise "they must be construed most strongly against the insurer." Id. at 607. When an insurance carrier puts in issue its coverage of a loss under a contract of insurance, it bears a substantial burden of demonstrating that the loss falls outside the scope of coverage. United Rental Equip. Co. v. Aetna Life & Cas. Ins. Co., 74 N.J. 92, 99 (1977); Ruvolo v. American Cas. Co., 39 N.J. 490, 498 (1963); Weedo v. Stone-E-Brick, Inc., 155

N.J. Super. 474, 485 (1977).

Therefore, Selective Insurance Company is bears the burden of establishing that plaintiff's injury is excluded from coverage under the policy.

C. The Court has already Considered And Rejected Selective's Argument

At the conclusion of discovery in the underlying action and after controlling the defense throughout, counsel hired by Selective determined that there were sufficient facts to file a motion for summary judgment on behalf of defendant Bruce Hoffer and defendant B.A.H., alleging that the claim was barred under the Workers' Compensation Act alleging among other things that plaintiff was injured while in the course of employment. (See, Exhibit "G" brief filed on behalf of defendant Bruce Hoffer and B.A.H.).

Plaintiff opposed this motion, arguing as he does in the instant motion, that he was not in the scope of his employment when he was injured and as such, the claim is not barred by the Workers' Compensation Act. (See, Exhibit "H", brief filed on behalf of plaintiff).

The Court entertained oral argument on the issue and properly rejected the arguments made by counsel hired by Selective, finding that plaintiff's claim was not barred by the Workers' Compensation Act and thus, denying the summary judgment motion on July 20, 2007. (See Exhibit "I", July 20, 2007 Order).

Thereafter, this matter was listed for trial. Despite having previously dispensed with this issue, Selective now seeks to revisit an argument already properly rejected. As such, the Court must again reject Selective's attempt to disclaim coverage.

POINT II

SELECTIVE INSURANCE COMPANY SHOULD BE ESTOPPED FROM WITHDRAWING COVERAGE FOR THE UNDERLYING LAWSUIT PURSUANT TO GRIGGS V. BERTRAM, AS THE SELECTIVE KNEW OF THE FACTS OF THE CASE FOR OVER TWO YEARS BEFORE SEEKING TO DISCLAIMING COVERAGE

Selective Insurance Company is prohibited from disclaiming coverage at this late stage based upon the reasoning set forth in Griggs v. Bertram, 88 N.J. 347, 355-56 (1982), and its progeny.

The underlying matter arose out a motor vehicle accident in which plaintiff was a passenger in vehicle operated by defendant, Bruce Hoffer. (See, Complaint attached as Exhibit "B" to Selective's motion; see also, Exhibit "A", Plaintiff's Answers to Interrogatories ¶ 2). Since plaintiff's injury occurred while commuting to a job site, he was not injured during the course of his employment and not entitled to bring a workers' compensation claim. (See, Exhibit "A", Plaintiff's Answers to Interrogatories ¶ 2). As such, on December 16, 2005, Plaintiff filed a complaint against defendant driver, Bruce Hoffer, and B.A.H. and this lawsuit ensued. (See, Complaint attached as Exhibit "B" to Selective's motion).

Upon learning of plaintiff's claim, third party plaintiff, Selective Insurance Company, sent a reservation of rights letter to its insured, defendant Bruce Hoffer t/a B.A.H. Professional, dated January 19, 2006. (See Exhibit "D", January 19, 2006 correspondence). This letter advises defendant of the exclusion under which Selective now seeks to disclaim coverage, specifically the "Employee

Indemnification and Employer's Liability" provision. Id. The January 19, 2006 correspondence makes clear that Selective Insurance Company, had some information or had undertaken some investigation as to the facts surrounding plaintiff's complaint, as reflected by the cited exclusionary clause. Id.

Yet, rather than disclaim coverage at the outset, Selective assigned Romando, Tucker, Zirulnik & Sherlock as counsel for defendant in the underlying lawsuit. Id. On or about March 8, 2006, Romando, Tucker, Zirulnik & Sherlock filed an Answer on behalf of defendant Bruce Hoffer and defendant B.A.H. (See Exhibit "E", Answer).

Counsel hired by Selective, provided responses to discovery demands including but not limited to Answers to Interrogatories. (See Exhibit "B", Defendants' Answers to Interrogatories ¶ 2). Despite having complied discovery responses and receiving plaintiff's discovery responses, Selective continued to control the defense in the underlying action.

Specifically, thereafter counsel appointed by Selective took plaintiff's deposition.(See Exhibit "C", plaintiff's deposition transcript). Even after obtaining a full recitation of the facts from plaintiff, Selective continued to control the defense. Following the deposition counsel appointed by Selective sent plaintiff for an independent medical examination, and filed discovery motions. (See Exhibit "F" cover letter amending interrogatories with defense narrative report). Thereafter, discovery in this matter ended on June 7, 2007.

At the conclusion of discovery, defense counsel determined that it was

appropriate and there were sufficient facts to file a motion a motion for summary judgment on behalf of defendant Bruce Hoffer and defendant B.A.H., alleging that the claim was barred under the Workers' Compensation Act[4], arguing among other things, plaintiff was injured within the course of his employment. (See Exhibit "G", filed on behalf of defendant Bruce Hoffer and B.A.H.). Plaintiff opposed this motion on the basis that the injury did occur during the scope of his employment. (See, Exhibit "H", brief filed on behalf of plaintiff). The Court properly rejected the argument made on behalf of defendants Hoffer and B.A.H. and denied that motion on July 20, 2007. (See Exhibit "I", July 20, 2007 Order).

Thereafter, on September 13, 2007 counsel appointed by Selective appeared at the mandatory non-binding arbitration on behalf of defendant Hoffer and defendant B.A.H. (See Exhibit "J", arbitration award). Following arbitration, this matter was listed for trial on February 11, 2008. This matter is presently scheduled for trial on August 25, 2008.

Despite defending this matter from its inception, and depriving defendant of his opportunity to retain personal counsel to defend his interests, Selective waited

[4]Interestingly, the language of the reservation of rights letter highlights the inappropriateness and untimeliness of the summary judgment motion at this stage, as the letter states that "[i]f throughout the course of discovery it is determined that the plaintiff, Nelson Prante was an employee or leased worker, we may at that time disclaim coverage and withdraw our defense."(See Exhibit "D", January 19, 2006 Correspondence). As such, through this summary judgment motion Selective was putting counsel, hired to represent defendants, in a quite precarious position, preparing an affirmative motion that, if successful, would have resulted in Selective disclaiming coverage to the very individual counsel was hired to represent.

until after this matter was listed for trial to make the instant application to deny coverage - based upon a policy exclusion that it cited in its reservation of rights letter sent to defendant Hoffer on January 19, 2006 - two and one half years ago. (See Exhibit "D", letter of January 19, 2006). Selective Insurance Company now moves to disclaim coverage under the aforementioned "Employee Indemnification and Employer's Liability" portion of its policy.

However, Selective Insurance Company is now estopped from disclaiming coverage as Selective undertook the defense of its insured, Bruce Hoffer and B.A.H., and unreasonably delayed in disclaiming coverage. Under- Griggs, 88 N.J. 347 (1982), Merchants Indemnity Corp. of New York v. Eggleston, 68 N.J. Super. 235, 254 (App. Div.), aff'd 37 N.J. 114, 131 (1962), Ebert v. Balter, 83 N.J. Super. 545 (Law Div. 1964), and Jorge v. Travelers Indemnity Co., 947 F.Supp. 150 (D.N.J. 1996), Selective is clearly and without doubt estopped under the law from now denying coverage based on the cited policy language excluding coverage for an individual injured while an "employee of the insured arising out of and in the course of (a) employment by the insured; or (b) performing duties related to conduct of the insured's business." (See Exhibit "A" to Defendant Selective Insurance Company's brief).

Where, as is the case here, an insurer has complete knowledge of facts giving rise to a defense under the policy but nonetheless continues unequivocally to treat the policy as operative and to undertake the defense of the insured, it is held to have waived its right later to assert that defense. Merchants Indemnity, 37 N.J. 114

(1962). ***Assumption of complete control of the insured's defense***, a contractual condition of the insurer's liability, is considered a substantial deprivation and should be timely relinquished when the asserted right of the insurer to avoid liability accrues. Id. at 255.

The rationale behind estoppel in this context is that once the insurer has acknowledged the claim and assumes control of the defense, the insured is justified in relying upon the carrier to protect it under its policy and to be responsible for any judgment against it. See Merchants Indemnity, supra, 37 N.J. at 127. The insured's justifiable reliance arises from the insurer's contractual right to control the defense under the policy. In assuming this contractual right of control, the insurer preempts its insured from defending itself. If the insurer could later repudiate its responsibility and ultimate liability under the policy, it would in effect have left its insured defenseless or seriously hampered in its ability to protect itself. That resultant inequity is a necessary ingredient of an estoppel. Griggs, supra, at 356.

As such, when the insurer has had full knowledge of all facts giving rise to possible rights of disclaimer before commencement of the primary action against the insured, but nevertheless assumes command of that action and proceeds to file all necessary pleadings and to engage in discovery maneuvers, it has embarked on a firm commitment which must reasonably be construed as a waiver of those rights. Merchants Indemnity Corp. of New York v. Eggleston, 68 N.J. Super. at 257.

Accordingly, an insurance carrier that undertakes the defense of a lawsuit based upon a claim against its insured with knowledge of the facts that are relevant

to policy defense will be estopped from denying coverage of the claim against the insured. Griggs v. Bertram, 88 N.J. 347, 355-56 (1982).

Thus, upon the receipt from its insured of a claim or notification of an incident that may give right to a claim, an insurer is entitled to a reasonable period of time in which to investigate whether the particular incident involves a risk covered by the terms of the policy. See Bonnet v. Stewart, 68 N.J. 287, 296-97 (1975); Jones v. Continental Casualty Co., 123 N.J. Super. 353, 357 (Ch. Div. 1973).

Unreasonable delay in disclaiming coverage, ***or*** in giving notice of the possibility of such a disclaimer, even before assuming actual control of a case or a defense of an action, can estop an insurer from later repudiating responsibility under the insurance policy. Griggs, supra at 357-58; Bonnet, supra (holding that the Eggleston principles of estoppel were potentially applicable where there was a disclaimer only four months after receiving the summons and complaint from insureds). In Griggs, the Court discussed circumstances akin to the one at bar and determined:

> Even where the insurer had done nothing after notification of a claim and has not otherwise assumed control of the case, the insurer, as we have noted, has the exclusive right under the policy to control the claim and effectively deter the insured from taking any action that will interfere with the insurer's right to control the matter. In the absence of any conduct by the insurance carrier that is inconsistent with, or clearly indicative of a repudiation of, its contractual rights, the insured is justified in believing the insurer is vigorously exercising these rights in a manner which will fully protect the insured's interest under the policy.

Id. 362.

Yet, unlike Griggs, where the insurer disclaimed coverage before a lawsuit was initiated and

where the insurer did not have any hand in the defense of the underlying lawsuit; here, the prejudice to the insured is even more egregious. In the instant underlying lawsuit, despite having knowledge of the facts regarding the circumstances of the plaintiff's claim as early January 19, 2006, Selective chose to hire counsel to control the defense of the underlying lawsuit. (See Exhibit "D", letter of January 19, 2006). As set forth in a footnote supra, Selective's decision continue in the defense of plaintiff even after the conclusion of discovery placed both defendants Hoffer and B.A.H., as well as counsel hired by Selective in a precarious position - where, defendants interest in the summary judgment were diametrically opposed to Selective's interest in the motion. (See Exhibit "G", brief filed on behalf of defendants Hoffer and B.A.H.). Moreover, the record is devoid of any evidence that defendants Hoffer and B.A.H. were notified that such a motion was even being made.

Yet, regardless of whether the various defense tactics undertaken by counsel hired by Selective in the underlying action were appropriate, the insurer's unreasonable delay in disclaiming coverage will automatically result in prejudice to the insured. In Eggleston, supra, the Court recognized that "prejudice is inevitable when the insured is denied the right to maintain complete control of the defense of the damage action." 37 N.J. at 129. As such, the Eggleston Court found that prejudice against an insured is presumed as a matter of law where a carrier has undertaken to defend a damage suit. Id. "Actual prejudice is presumed and need not be proven by the insured" Griggs, supra at 358; Sneed v. Concord Insurance Co., 98 N. J. Super 306 (App. Div. 1967).

These obligations upon the insured to turn over claims promptly, to abstain from any conduct that might interfere with the contractual rights of the insurer and to affirmatively cooperate with the insurance carrier, in turn, impose commensurate duties upon the insurer. Griggs, supra at 360. Upon receiving notice of a possible claim against its insured, an insurer has the duty to investigate the

matter within a reasonable time. "[C]onsiderations of good faith and fair dealing require that the insurer make . . . investigation(s) (of any claim) within a reasonable time." Fireman's Fund Ins. Co. v. Security Ins. Co. of Hartford, 72 N.J. 63, 73 (1976). See also Ebert v. Balter, supra.

The insurer's obligation to deal in good faith also includes a "duty of fair and full disclosure between the insured and his insurer." Yeomans v. All State Ins. Co., 121 N.J.Super. 96, 102 (Law Div.1972), aff'd 130 N.J.Super. 48 (App.Div.1974). See generally Keeton, "Insurance Law Rights," 83 Harv.L.Rev. 961, 965 (1970). This duty necessarily requires that an insurer communicate to the insured in a timely fashion the results of any investigation. Cf. Bollinger v. Nuss, 449 P.2d 502, 512 (Kan.1969). Such disclosure is especially important where the results of an investigation reveal a conflict between the interests of the insured and its insurer. Cf. Board of Ed. of Bor. of Chatham v. Lumbermens Mut. Cas. Co., 293 F.Supp. 541, 544 (D.N.J.1968), aff'd 419 F.2d 837 (3 Cir. 1969) ("when a conflict of interest arises between the insurer as agent and its insured as principal, the insurer's conduct will be subject to closer scrutiny than that of the ordinary agent because of the adverse interest.") Failure to give prompt notice of such a conflict, or potential conflict, is inconsistent with the overriding fiduciary duty of an insurer to deal with an insured fairly and candidly so that the insured can, if necessary, protect itself. Yeomans, supra; see Herges v. Western Casualty and Surety Company, 408 F.2d 1157, 1162 n.7 (8 Cir. 1969); Tannerfors v. American Fidelity Fire Insurance Co., 397 F.Supp. 141, 147 (D.N.J.1975), aff'd 535 F.2d 1247 (3 Cir. 1976).

CONCLUSION

For the foregoing reasons, plaintiff respectfully request that Selective's motion for summary judgment be denied and plaintiff's cross-motion for summary judgment be granted.

Respectfully submitted,

SARAH K. DELAHANT

Dated: July 11, 2008

I:\CLF Copy 5-12-17\Bank- Briefs, Forms, Other\Insurance Coverage Issues\Griggs- Estopple-late claim denial- late DJ action- waiver- Nelson Prante brief.wpd