MEMORANDUM

TO: John Gregory, Esq.

FROM: Barbara M. Vaccaro

DATE: April 19, 2007

RE: *Nunez v. Fox* – Memorandum discussing rights of injured of injured party as the third-party beneficiary of an auto insurance policy and attorney conflict in defending insured and insurer

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Third Party Beneficiaries

N.J.S.A. 2A:15-2 states that a beneficiary to a contract is "[a] person for whose benefit a contract is made [and] may sue thereon in any court[.]" To determine whether a person qualifies as a third-party beneficiary, the test is "whether the contracting parties intended that a third party should receive a benefit which might be enforced in courts.' *Rieder Communities Inc. v. North Brunswick Twp.,* 227 N.J. Super 214, 222 (App.Div.1988) (*quoting Brooklawn v. Brooklawn Housing Corp.,* 124 N.J.L. 73, 77 (E.&A.1940). In *Eschle v. Eastern Freight Ways Inc.,* the court stated that the public policy behind requiring auto insurance is "to see that drivers are insured, not only for their own benefit, … but also to provide a fund from which the damage claims of others may be satisfied." 128 N.J. Super. 299, 303 (App.Div.1974). Therefore, "[t]he beneficiaries of the agreement are not merely the insured who will have obtained coverage, and the insurance company which will obtain the premium, but also a potential injured party who will have a fund from which he can receive payment. The contract is made for his benefit as surely as if the provision appeared therein." *Id.* Automobile liability insurance is viewed as primarily protecting and benefiting those third parties that

are injured because the New Jersey views insurance as an "instrument of [the] social policy that the victims of negligence be fully compensated." *Cooper v. Government Employees Ins. Co.,* 51 N.J. 86, 94 (1968).

It is widely held that a "[t]hird-party beneficiary's rights depend upon, and are measured by, terms of contract between promisor and promisee." *Roehers v. Lees,* 178 N.J.Super. 399, 409 (App.Div.1981). Thus, as a third party beneficiary, one who is injured by an automobile that is covered by a liability policy, derives his rights from the insured**.** ***Whittle v. Associated Indem. Corp*.,** **130** N.J.L. 576, 578 (E.&A.1943). Because his rights are purely derivative, the injured party's rights are no greater or less than the insured's, whose shoes he stands in. *Id*. Under this rule, the third party beneficiary, "may, in his or her own right and name, enforce a promise made for his or her benefit even though such person is a stranger both to the contract and to the consideration." *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307 (1927). Therefore, under an automobile liability insurance policy, anyone injured in an accident is, by law, a third party beneficiary of the contract and may assert any rights that the insured party is deemed to possess.

Conflicts of Interest

"By entering into a liability insurance contract with an insurance company, the insured gives certain contractual rights to the insurer and consents to giving the company some control over the direction of the defense and any settlement of the matter." ABA Eth. Op. 01-421 (2001). The same is true when the insured is covered under an insurance policy paid for by another party, such as his employer. The ramifications of this triadic

relationship – insurer, insured and counsel – has been the subject of much concern in our courts as it is "fraught with real and potential conflicts of interest." *Longo v. American Policyholders' Ins. Co.,* 181 N.J.Super. 87, 91, (N.J.Super.L.1981). Because it is paying both the costs of defense and any resulting judgment or settlement up to the limits of the policy, the insurance company has a primary financial stake in the matter. The insured also has a direct pecuniary interest in the settlement of a suit when there is a chance that the claim will exceed the policy limits. "For these reasons, our courts have carefully scrutinized the role of counsel in such litigation." *Id.* at 91.

The *Rules of Professional Conduct*, Rule 1.7(a), states that "a lawyer shall not represent a client . . . if (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, . . . a third person or by a personal interest of the lawyer." When the ethical obligations of Rule 1.7 collide with the divergent interests of an insured and an insurance company, our Supreme Court has stated that "it is clear that insurance counsel is required to represent the insured's interest as if the insured hired counsel directly." *Montanez v. Irizarry-Rodriguez*, 273 N.J.Super. 276, 286 (App.Div.1994) (*citing Lieberman v. Employers Ins. Of Wausau*, 84 N.J. 325, 338 [1980]). "In such a situation, '(d)efense counsel owes (the insured) the same unqualified loyalty as if he had been personally retained by the insured. The loyalty to the insured may actually (even) be paramount since that defense is the sole reason for the attorney's representation." *Lieberman, supra,* at 338. "While the insurer is not compelled to disregard its own interests in representing or defending an insured, the insured's interests must necessarily come first." *Id., supra,* at 336. "Particularly with

respect to the settlement of claims, [the] Court has stated emphatically that 'the relationship of the (insurance) company to its insured regarding settlement is one of inherent fiduciary obligation.'" *Id.* (*citing Rova Farms Resort, Inc. v. Investors Ins. Co. of America*, 65 N.J. 474, 492 (1974).

Where, as in this case, not just a latent conflict, but an actual conflict of interest arises, the attorney must withdraw from representation of the client. "[W]henever counsel . . . has reason to believe that the discharge of his duty to the insured would conflict with the discharge of his duty to the insurance carrier, he cannot continue to represent both." *Lieberman, supra,* at 419. In the present case, it would be impossible for current counsel to represent both Cammarano and Sea Coast. Whether Mr. Cammarano was engaged in personal or business pursuits is a factual question that lies at the heart of both parties' defenses. Cammarano has already alleged that "he represents the corporation whenever he's out" and therefore will want to put forth that he was in the course of his employment when he hit Mr. DaCruz in order to shield himself from any personal liability. Quite to the contrary, Sea Coast and Underwriters will clearly seek to limit Cammarano's policy benefits so that the $10,000,000 policy limit will not be implicated or available. Thus, both parties look will look to put forth arguments that will support the differing factual situations that serve to further their own pecuniary interests. It is wholly impossible for a single attorney to assert positions that are so opposed.

Not only is such a task impossible for an attorney, our courts have clearly stated that it is also impermissible for an attorney to represent such divergent and conflicting interests. In *Burd v. Sussex Mut. Ins. Co*., the Court stated that "the (insurance) carrier should not be permitted to assume the defense (of the insured) if it intends to dispute its

obligation to pay a plaintiff's judgment, unless of course the insured expressly agrees to that reservation." 56 N.J. 383, 390 (1970). While SeaCoast and Underwriters have not yet expressed the desire to dispute their obligation to pay any verdicts up to the $10,000,000 policy limit, their withholding of the policy and vague answer to interrogatories suggest that this matter has not yet been resolved in their minds. Because there is the possibility that SeaCoast and Underwriters will argue that Mr. Cammarano was engaged in personal pursuits at the time of the accident, and therefore only entitled to $500,000 in liability coverage, counsel will be seeking dual results that are completely contrary to one another. As to this, the Court has gone on to say that "[a]n attorney, engaged by the carrier to defend in the insured's name, could not ethically seek . . . a result [which would deny coverage to the insured.]" and that "[a]n insurance carrier may not in the insured's name, defend as to exculpate the carrier alone." *Montanez, supra*, at 286 (*citing respectively Williams v. Bituminous Casualty Corp.,* 51 N.J. 146, 149 (1968); *Burd, supra,* at 395. The law is clear. Where the interest of the insurance carrier is to deny or limit coverage of the insured, separate counsel must represent the parties. It is ethically impossible for current counsel to seek to defend Cammarano and limit the policy coverage to $500,000. As such, she should be forced to withdraw from the suit.