

SUPREME COURT OF NEW JERSEY BROADENS THE DEFENSE OBLIGATION IN EMOTIONAL DISTRESS CLAIMS

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On June 24, 2011, the Supreme Court of New Jersey broadened the defense obligation for *Portee* emotional distress claims under the “bodily injury” provisions of commercial general liability policies. *Portee* claims, named after the 1980 *Portee v. Jaffe* case, may be brought by close family members who witnessed the death or severe injury of a loved one. The decision in *Abouzaid v. Mansard Gardens Assoc., LLC*, A5-10, will require insurers with policies covering bodily injuries to defend a *Portee* claim from the outset, even if the complaint is silent regarding physical injuries caused by the alleged emotional distress, unless the defense of the claim is specifically excluded.

The case arose from a flash fire in an apartment in Bayonne, N.J., during which two mothers watched their three children “engulfed by a fireball.” The mothers were not injured by the flames. The fire was blamed on flammable vapors from paint thinner applied to a kitchen floor by the landlord’s handyman that were ignited by a pilot light on the kitchen stove.

The three count initial complaint included a count for the emotional distress of the mothers, however, it did not allege that the emotional distress was severe or that it caused bodily injury. The insurer, Greater New York Mutual Ins. Co., provided a limited defense for the two counts alleging negligent conduct, but denied both coverage and a defense for the *Portee* claim in the third count.

Defendants retained independent counsel to defend the emotional distress claim and to file a third-party claim against the insurer seeking a defense for that claim. Thereafter, the trial court permitted plaintiffs to file an

amended complaint alleging bodily injury from the emotional distress. The insurer then agreed to provide a defense for the emotional distress count.

The case reached the New Jersey Supreme Court after the trial court awarded \$38,345 in counsel fees to the defendant on the third-party action. On appeal by the insurer, the Appellate Division of the Superior Court reversed the award of counsel fees and ordered the dismissal of the third-party complaint with prejudice. The appellate court held that without an allegation of bodily injury, the underlying complaint was insufficient to trigger a defense obligation under the bodily injury provision of the defendants’ policy. The Supreme Court then granted the defendants’ petition for certification, reversed the appellate division and remanded the case to the trial court for further proceeding. In reaching the decision, Justice Long, writing for a unanimous court said “we presume that the extraordinary level of emotional distress required to support a *Portee* claim – ‘severe emotional distress’ – will, in most cases, bear with it a physical component.” The court held that this was “reasonable from the perspective of the insurer, who is on notice that the plaintiff may, in fact, prove physical sequelae, and from that of the insured, who expects to be defended against potential claims, regardless of the imprecision of the third-party’s pleadings.”

To discuss any questions you may have regarding the opinion addressed in this Alert, please contact Thomas McKay, III, at tmckay@cozen.com or 856.910.5012.