



# COUGHLIN DUFFY LLP

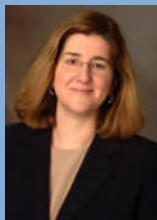
CASE ALERT, NO. 20

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## NEW JERSEY APPELLATE DIVISION HOLDS INSURER OWES NO DUTY TO DEFEND HOMEOWNER AGAINST COMPLAINT ALLEGING BOTH INTENTIONAL AND NEGLIGENT CONDUCT:

### NEW JERSEY MANUFACTURERS INS. CO. V. VIZCAINO

On April 25, 2007, the New Jersey Superior Court, Appellate Division, held a homeowner's insurer owed no duty to defend its insured in a personal injury action where claims against him included both negligent and intentional assault of the injured party. *New Jersey Manufacturers Ins. Co. v. Vizcaino*, \_\_\_\_ N.J. Super. \_\_\_\_, 2007 WL 1201579 (App. Div. April 25, 2007).

The underlying personal injury action arose from a physical altercation between the underlying plaintiff and the insured, Oscar Vizcaino, in the bathroom of a Monroe restaurant. The first count of the Complaint alleged that Vizcaino "intentionally, willfully and wantonly assaulted and struck" the plaintiff and the second count alleged that Vizcaino "carelessly, recklessly and negligently assaulted and struck" him. NJM agreed to defend as to the negligence claims, but denied coverage for the intentional assault claim. Vizcaino was "strongly advised" to retain personal counsel to represent him as to any non-covered claims. NJM thereafter filed the present declaratory judgment action. On cross motions for summary judgment, the trial court ruled that NJM had a duty to defend its insured against all claims until the negli-

gence claims were eliminated from the case.

In response to NJM's appeal, the insured maintained that NJM should be required to defend against all claims, relying on language in the New Jersey Supreme Court's opinion in *Voorhees v. Preferred Mutual Insurance Co.*, 128 N.J. 165, 174 (1992) that "[w]hen multiple alternative [ ] causes of action are stated, the duty to defend will continue until every covered claim is eliminated[.]"

The Appellate Division rejected the applicability of *Voorhees* as mere *dictum* to that opinion and not relevant to the present analysis. Instead, relying on the long-standing New Jersey Supreme Court decision in *Burd v. Sussex Mutual Insurance Company*, 56 N.J. 383, 267 A.2d 7 (1970) and its progeny, the Appellate Division confirmed that where the underlying complaint alleges both covered and non-covered claims such that "the plaintiff's verdict will not resolve the coverage problem in the insured's favor or because the carrier cannot defend with complete fidelity to the insureds' sole interest," an insurer can properly refuse to defend the insured

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without waiving the right to a trial on the coverage issues. Accordingly, NJM has no present duty to defend Vizcaino, but merely a potential obligation to reimburse for all defense costs if the jury ultimately finds Vizcaino acted solely in self-defense. If the jury finds Vizcaino intentionally assaulted the plaintiff, NJM will have no reimbursement obligation.

Please contact us with any questions.