

Voice of the Bar

Insureds' Lawyers Seek End to Split Duty-to-Defend Doctrine

To the Honorable Justices of the New Jersey Supreme Court:

The undersigned attorneys all represent policyholders in insurance coverage litigation. We join together to request that the Supreme Court grant certification in *New Jersey Manufacturers Insurance Company v. Vizcaino*, 392 N.J. Super. 366 (App. Div. 2007) and use that opportunity to review the decision by the Appellate Division.

Vizcaino concerns an extremely common litigation situation. A plaintiff sued a defendant, and pled the same facts in two counts, one alleging negligence and the other intentional wrongdoing. Such alternative pleading is almost de rigueur. The defendant provided notice to his insurance company and requested that it defend him. The insurer refused. The Appellate Division upheld that refusal on the basis of this Court's prior decision in *Burd v. Sussex Mutual Insurance Company*, 56 N.J. 383 (1970).

This Court in *Burd* held that when a complaint alleges both covered and non-covered actions, a danger exists that the attorney appointed by the insurer to defend the insured could litigate the case in such a way that, if the defendant were found liable, he would be found liable for an intentional tort instead of a negligent one, in which case the insurer would not need to pay the resulting judgment. To avoid this conflict, the *Burd* Court held that the duty to defend should be converted into a duty to reimburse. The *Burd* rule is an anomaly and an anachronism, and it has resulted in a plague upon the policyholders of New Jersey. No other state has ever adopted a rule even remotely resembling *Burd*. (In *Ostrager & Newman, Insurance Coverage Disputes 226* (2006), the authors discuss 'the oft-cited rule that policy provisions should be construed to provide the broadest defense coverage to the insured,' and then say, 'but see *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. 383 (1970).') Indeed, on at least two occasions, this Court accepted certification of a case in which the Appellate Division applied *Burd* in the same manner as the Court did in *Vizcaino*. *Rutgers, the State University of New Jersey v. Liberty Mutual Insurance Co.*, 277 N.J. Super. 571 (App. Div. 1994), certif. granted, 140 N.J. 274 (1995), appeal dismissed, 143 N.J. 314 (1995); *Trustees of Princeton University v. Aema Casualty & Surety Co.*, 293 N.J. Super. 296 (App. Div. 1996). In both cases, the insurance company chose to settle before this Court could rule on the issue.

The *Burd* Court apparently believed that the duty to reimburse was equivalent in value to the duty to defend. This is wrong. Our society imposes a terrible financial burden on individuals and companies who must defend themselves in court. It is a crushing burden that many cannot sustain on their own: this is why they purchase insurance, and why the policies contain both the covenant to defend and a separate and independent covenant to indemnify the policyholder. This Court should not judicially abrogate the contractual right to a defense.

Moreover, the *Burd* rule finds no support in the insurance policy. The insurer undertakes to defend any suit

against the insured seeking relief potentially covered by the insurance policy. Courts in New Jersey frequently stress the extreme breadth of this promise, and its social value. *Burd* judicially imposes an exclusion on the policy that the insurance industry itself never sought to impose and that no other state's courts have imposed.

Burd also takes an extremely dim view of the ethics of the New Jersey bar. New Jersey law is clear that the counsel appointed by an insurer to defend an insured owes a single, undivided loyalty to the insured. It is scarcely credible that an attorney would secretly work against his or her client to find him or her guilty of intentional instead of negligent conduct in order to curry favor with the insurer.

Finally, *Burd* itself poses a simple cure for this situation, which subsequent case law inexplicably ignores. The insurer need only disclose this potential conflict to the insured, and offer the insured the opportunity to waive it. Indeed, as a practical matter, this is what normally occurs anyway. "On the contrary, the insurer should not be permitted to assume the defense 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. at 390, see also, 56 N.J. at 394-5. Another solution, adopted by the vast majority of other states' courts that have

addressed the issue, is to allow the insured to choose independent counsel, and require the insurance company to pay for the defense, when a conflict between the insurance company and the insured arises with respect to the defense of a potentially covered claim.

This case may seem a small matter when compared to the weighty public policy issues with which this Court wrestles. However, this is not so. Because of the general practice in civil litigation of pleading negligent or intentional behavior in the alternative, *Vizcaino* destroys the rights of every person who purchases an insurance policy in New Jersey. *Vizcaino* declares open season for insurance companies to walk away from their duty to defend. Many of these policyholders will not have the resources to defend themselves, much less bring a coverage action against their disappearing insurer. If not overruled, *Vizcaino* may have an immediate and devastating impact on New Jersey's legal system. This Court should reverse *Vizcaino*.

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