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Griggs Settlements: Dead or Alive?

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In the world of tort litigation, the existence and amount of insurance coverage is as important to the plaintiff as it is to the insured-defendant. Often, the carrier wrongfully disclaims coverage and leaves the insured without defense and indemnity.

Twenty-six years ago, our Supreme Court declared in *Griggs v. Bertram*, 88 N.J. 347, that such an insured would be entitled to settle the claim against him and bind the carrier, provided that the settlement is reasonable and not collusive. The so-called *Griggs* settlement reiterated the strong public policy of encouraging settlements.

A recent Appellate Division case involving lasik surgeon Joseph Dello Russo has called into question whether a *Griggs* settlement can ever be used again. As a group of 15 medical malpractice actions marched toward trial, Dello Russo found himself in a bind. He had a \$3 million malpractice policy for himself and a \$6 million-\$8 million policy issued by Princeton Insurance Co. for the New Jersey Eye Center, his professional corporation and employer. Princeton was defending the Eye Center under reservation of rights but disclaimed coverage for any vicarious liability by Dello Russo, leaving him with only \$3 million to cover tens of millions of dollars worth of potential verdicts.

Faced with huge personal exposure, the Eye Center instituted a declaratory judgment action against Princeton, asserting that the Princeton policy covered Dello Russo and other professionals for vicarious liability and thus Dello Russo had an additional \$8 million in coverage per year. Before adjudication of the declaratory judgment action, Dello Russo entered into a *Griggs* settlement in the 15 pending cases; he assigned his rights in the declaratory judgment action and the Princeton policy to the plaintiffs in exchange for the agreement by all, except one, not pursue claims against his personal assets. Dello Russo also agreed not to contest liability and proximate cause. In addition, a retired judge would fix the quantum of damages in a series of binding arbitrations.

After the retired judge awarded \$15.2 million, Princeton challenged the enforceability of the *Griggs*

settlement. The trial court then conducted a plenary hearing and enforced the settlement, finding that Princeton had abandoned the insured, and that the settlement that required an arbitrator to fix the amount of damages was a "reasonable business decision."

Unhappy with the prospect of paying \$15.2 million, Princeton appealed the order enforcing the *Griggs* settlement. However, Princeton did not appeal the determination in the declaratory judgment action that held the Eye Center would be covered for the vicarious liability of Dello Russo and other Eye Center professional employees.

Despite the deference usually given factual findings made by a trial court, the Appellate Division rejected the finding of abandonment and stated that the defense of the Eye Center under reservation of rights can "in no way be deemed an abandonment of its insured," *N.J. Eye Center v. Princeton Ins. Co.*, 394 N.J. Super. 557 (App. Div. 2007), certif. denied. 193 N.J. 275 (2007). The panel also rejected the argument that Princeton was obligated to commence a declaratory judgment action before the trial date and that by not clarifying the coverage issue Princeton left its insured exposed to substantial claims.

In reversing the trial court, the panel determined that by entering into the settlement, Dello Russo breached the terms of the policy, which required the insured to "cooperate . . . in the investigation, settlement, or defense of the claim or suit" and to abide by a duty not to "assume any obligation . . . without [Princeton's] consent." The panel then said it would not consider issues of collusion or reasonableness of damages as they were "simply immaterial" because entry into the *Griggs* settlement represented a breach of the insured's obligation to the carrier.

With this reversal, all three published opinions involving a *Griggs* settlement have vacated the settlements and granted the carrier a second chance. Not once has a New Jersey appellate court sided with a plaintiff who sought to enforce a *Griggs* settlement.

So the question must now be raised: Is *Griggs* dead? While the case law certainly suggests that a *Griggs* settlement can be used where an insured is abandoned, these settlements never seem to stick. In every reported instance where the plaintiff seeks to recover the fruits of the settlement, the appellate courts have not permitted a single plaintiff to recover. For all practical purposes, the Appellate Division, with the approval of the Supreme Court (when the petition for certification was denied), has buried the corpse of *Griggs*. It is time to come up with new strategies to deal with the abandonment of insureds by their carriers.

Nagel, who argued the appeal on behalf of plaintiffs in three of the 15 cases noted, is with Nagel Rice in Roseland.