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SUPREME COURT OF NEW JERSEY
DOCKET NO.: 089689

MIST PHARMACEUTICALS, LLC, Plaintiff-Petitioner, -vs- BERKLEY INSURANCE COMPANY, Defendant-Respondent.	ON PETITION FOR CERTIFICATION FROM FINAL DECISION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: A-1286-22 Sat Below: Hon. Morris Smith, J.A.D. Hon. Lisa Rose, J.A.D. Hon. Lisa Perez Friscia, J.A.D.

PETITION FOR CERTIFICATION OF PLAINTIFF-PETITIONER MIST PHARMACEUTICALS, LLC

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STATEMENT OF THE MATTER INVOLVED

In this insurance coverage action, the trial court dutifully followed this Court's jurisprudence and determined that Defendant Berkley Insurance Company ("Berkley") unreasonably withheld consent from its insured, Plaintiff-Petitioner Mist Pharmaceuticals, LLC ("Mist"), to settle lawsuits with CelestialRX Investments, LLC ("Celestial"). Based on that breach of the insurance contract, the trial court held that Berkley was duty-bound to cover the settlement because it was reasonable and made in good faith. In reversing the trial court, the Appellate Division unnecessarily decided a novel issue in a published opinion and, in doing so, disregarded multiple precedents of this Court, eviscerating well-established principles in the field of insurance law.

First, the Appellate Division failed to heed the dictates of Griggs v. Bertram, 88 N.J. 347 (1982) and Fireman's Fund Insurance Co. v. Security Insurance Co., 72 N.J. 63 (1976), which hold that when an insurer fails to promptly give reasons for refusing coverage and unreasonably withholds consent for its insured to settle a lawsuit, as Berkley did here, the insurer is required to provide coverage; the insurer's new, late *post*-settlement justifications and defenses cannot unwind its responsibility for the settlement to which the insured agreed.

Second, the panel then erroneously resolved "a matter of first impression" that it should never have reached. In denying indemnity coverage to Mist on

summary judgment, the Appellate Division relied solely on "heavily disputed" allegations in the underlying actions rather than on actual findings and undisputed facts, in violation of Flomerfelt v. Cardiello, 202 N.J. 432, 444 (2010).

Third, the Appellate Division failed to construe its novel interpretation of the insurance policy's capacity exclusion narrowly against Berkley, as required by Flomerfelt, and consistent with the narrow interpretation that Berkley itself advanced for nearly five years. Thus, the Appellate Division and Berkley undermined the reasonable and settled expectations of Mist.

Those errors led to the reversal of the trial court's sound findings made after five years of active coverage litigation. This decision will have a profound adverse effect on the duties an insurance company owes to insureds. If the Appellate Division decision stands, insurers will be emboldened to play "fast and loose" when dealing with their insureds. Certification is warranted because (1) the Appellate Division decision is in direct conflict with this Court's precedents; (2) the issues raised are of general public importance, including this State's public policies to promote settlement and make efficient use of judicial and party resources; and (3) a review of the panel's opinion, which lacks both a legal and factual foundation, is in the interest of justice. See R. 2:12-4.

* * *

Berkley insured Mist and Joseph Krivulka (Mist's chairman who was

insured by Berkley in that capacity) ("Mist Insureds") under a directors and officers insurance policy with a $2 million limit ("Policy"). The Policy insured "all Loss arising from any Claim . . . for any actual or alleged Wrongful Act" made and reported during the Policy period. (Da258.) The Policy included a capacity exclusion that applied to Claims "[b]ased upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any Wrongful Act of an Insured Person serving in their capacity . . . as director [or] officer . . . of [an uninsured] entity." (Da261.)

In November 2015, Celestial sued numerous defendants in the Delaware Court of Chancery, including: (i) Mist; (ii) Krivulka; and (iii) several non-insured "Krivulka family entities" ("KFEs"), in which Krivulka exercised control and had ownership interests. (Da267.) The Delaware lawsuit spawned three related actions in the state courts of Connecticut and New Jersey and another lawsuit in Delaware ("Underlying Actions"). (Da1271–72.) Celestial, an investor in Akrimax Pharmaceuticals, LLC ("Akrimax"), alleged that Krivulka, as Akrimax's "controlling member," engaged in schemes to wrongly divert corporate funds and opportunities from Akrimax to Mist and the KFEs. (E.g., Da330.)

Mist sought coverage from Berkley for the Underlying Actions. However, over the years, Berkley pursued a campaign of stringing along its insured Mist with contrived excuses, unending information requests, and shifting coverage

positions to evade its responsibility to honor its duties under the Policy.

In March 2016, Berkley initially accepted its defense obligation. (Da417). In August 2017, it backflipped, abruptly denying coverage solely based on the "unjustified" position that the "Claim" against Mist was not made within the Policy period; Berkley, notably, did not raise the capacity exclusion as a basis for denying the Claim. (Da92; Da434–38.) In September 2017, Mist filed this coverage action. The trial court found Berkley's "no claim" position "groundless" and reestablished Berkley's duty to defend. (Da93; Da47.) The Appellate Division affirmed the trial court's duty-to-defend determination. (Pa22.)

When it initially accepted coverage in March 2016, Berkley interpreted the capacity exclusion narrowly, placing only a "limit" on coverage, allocating between insured and uninsured capacities, not imposing a total bar on coverage. Berkley notified Mist that "coverage for Krivulka is *limited to [conduct] in his capacity* as the chairman of Mist"; the exclusion only barred coverage *for that portion* of Krivulka's conduct on behalf of uninsured entities ("Coverage-Permitting Interpretation"). (Da413 (emphasis added).) Applying an allocation under that interpretation, Berkley agreed to cover 10% of the combined defense costs incurred by the Mist Insureds and other uninsured defendants. (Da417.)

Given Celestial's claimed damages of more than $300 million and Mist's estimated potential exposure of $30 million, in 2019–2020, Mist sought

Berkley's consent for the eventual $12 million global settlement of the Underlying Actions, with twenty-five percent allocated to Mist ("Mist Settlement Portion"). (Pa11.) In response, Berkley did not inform Mist that it would deny coverage because the capacity exclusion was an absolute bar. Quite the opposite, Berkley confirmed the "existence of potentially applicable coverage" and reiterated its Coverage-Permitting Interpretation. (Dca406, 449.) Berkley told Mist that if it provided certain information, Berkley would provide settlement authority. Berkley sought "from Mist information to permit Berkley to evaluate and analyze the potential settlement value to and the exposure of Mist . . . so that Berkley can meaningfully participate in settlement discussions." (Dca402).

Mist directed Berkley to information within 12,000 pages of discovery from the Underlying Actions and proffered multiple case assessments, prepared by defense counsel, which analyzed the Mist Insureds' potential liability and exposure. (Dca401–448.) Yet no amount of information or legal analysis was sufficient for Berkley. Proceeding under the pretense that it lacked sufficient information, Berkley refused consent. (Dca412.) Ultimately, abandoned by Berkley and given the risk of a high-damages judgment, the Mist Insureds, with the other underlying defendants, agreed to the global settlement in June 2020.

Mist subsequently sought to enforce Berkley's duty to indemnify for the Mist Settlement Portion in a motion for summary judgment. Berkley, in turn,

sought a new way to avoid coverage. *After* the global settlement was reached and five years *after* receiving notice of the Underlying Actions, Berkley first revealed a different position, claiming that the capacity exclusion no longer "limited" coverage. Belatedly, Berkley argued that the allegations in the Underlying Actions – allegations Berkley had known throughout those five years – now had to be viewed through Krivulka's "dual" role in allegedly diverting assets from Akrimax (an uninsured entity) to Mist (an insured entity). No court, however, made a factual finding that Krivulka engaged in any wrongful conduct.

In an about-face, Berkley transformed its Coverage-Permitting Interpretation which had been in place from 2016 – 2020 into a "No Coverage Interpretation," arguing that the capacity exclusion afforded no coverage based on allegations of Krivulka's wrongful acts on behalf of insured and uninsured entities. Even the Appellate Division concluded that Berkley waited to raise this interpretation until *after* the June 2020 settlement: "Berkley did not raise the [dual] capacity argument *until* the exchange of pleadings and argument [in December 2020] leading to the trial court's July 7, 2021 order." (Pa22 (emphasis added).)

The trial court ultimately held that Berkley breached the Policy and ordered it to indemnify the Mist Settlement Portion. (171a.) The Policy required Berkley's "prior written consent" to a settlement, but Berkley's "consent" could "not be unreasonably withheld, provided that [Berkley] shall be entitled to full

information and all particulars it may request . . . ." (Da254.) The trial court rejected Berkley's coverage defense that Mist provided "woefully inadequate" information to evaluate the Mist Insureds' share of the defendants' overall liability. (Dca412). The record established that Berkley's representative "did not conduct any assessment of [defense counsel's] settlement recommendation" and "Berkley had the information necessary to provide consent to settle." (Da168–69, Da171). The trial court correctly held that "Berkley breached the Policy and that it acted unreasonably in refusing to grant consent to settle." (Da171.) Because of that breach, the trial court properly applied Fireman's and Griggs to require Berkley to indemnify the Mist Settlement Portion.

Instead of addressing the record as it appeared in June 2020 when Berkley breached the Policy by wrongly refusing to consent to the Mist Settlement Portion, the Appellate Division considered a "matter of first impression" raised by Berkley *after* the settlement. The panel newly framed the issue as the applicability of the capacity exclusion "where the insured director/officer is alleged to have engaged in wrongful corporate acts in a dual capacity." (Pa2.)

The Appellate Division erred for several reasons. First, had the panel not ignored Griggs and faithfully followed Fireman's, it would not have reached Berkley's post-settlement, novel No Coverage Interpretation. Second, in violation of Flomerfelt, the panel improperly allowed Berkley to deny *indemnity*

coverage *on summary judgment* based solely on admittedly "heavily disputed" allegations in the underlying complaints. (Pa4; Pa6.) The panel mistakenly determined that there were undisputed facts when *no* court found that Krivulka engaged in any wrongful corporate acts, and the Mist Insureds made no such admission. Last, the panel failed to construe the capacity exclusion narrowly. The panel did not hold Berkley to its earlier narrow Coverage Permitting Interpretation of the exclusion. Instead, the panel adopted an alternative expansive interpretation of that exclusion that did not flow from the Policy language and that should have been construed against Berkley. Adopting the new and novel interpretation, the Appellate Division wrote for Berkley a better Policy than the one it sold to Mist.

REASONS WHY CERTIFICATION SHOULD BE ALLOWED

I. THE PANEL IMPROPERLY REVERSED THE TRIAL COURT, WHICH DUTIFULLY APPLIED THIS COURT'S DICTATES IN GRIGGS AND FIREMAN'S.

A. If the Appellate Division Had Followed Griggs, Berkley's Unreasonable Delay Would Have Precluded Consideration of the Capacity Exclusion.

For decades, this Court has held that "once an insurer has had a reasonable opportunity to investigate, or has learned of grounds for questioning coverage, it then is under a duty promptly to inform its insured of its intention to disclaim coverage or of the possibility that coverage will be denied or questioned."

Griggs, 88 N.J. at 357; accord Merchants Indem. Corp. v. Eggleston, 37 N.J. 114, 131 (1962); Sneed v. Concord Ins. Co., 98 N.J. Super. 306, 319 (App. Div. 1967). "Unreasonable delay in disclaiming coverage . . . can estop an insurer from later repudiating responsibility under the insurance policy." Griggs, 88 N.J. at 357. That is because "[i]t would be speculative, unproductive and unfair to try to surmise or recreate what avenues the insured might otherwise have pursued . . . . That course cannot be rerun." Id. at 362. Thus, "prejudice [to the insured] should be presumed." Id. at 359.

Griggs required the Appellate Division to first determine whether Berkley "promptly" notified its insured that the capacity exclusion would result in no coverage. By the panel's own calculation, Berkley waited until five years *after* the initiation of the Underlying Actions and *after* Mist sought consent for, and entered, the settlement to announce its newly discovered No Coverage Interpretation. (See Pa22.) Inexplicably, the panel's decision never mentions Griggs.

Had the panel addressed Griggs, the analysis would have ended there, and Berkley would be estopped from "repudiating responsibility." Id. at 357. If Berkley's dallying for five years is not an "unreasonable delay in disclaiming coverage," see id., then Griggs has no vitality. Insurers must not be permitted to strategically withhold positions, only to advance them *after* an insured seeks settlement authority and settles the case. An insured has a fundamental right to

know the rules of the game long before the game is over.

To be sure, Berkley knew all along of its "grounds for questioning coverage." Id. Berkley's 2016 claim file states that "Krivulka appears to own or control all of the entities at issue, and most of the allegations against Krivulka pertain to his position with these non-insured entities." (Dca1816). Nevertheless, from 2016–2020, Berkley led Mist to believe in "the existence of potentially applicable coverage" under its then Coverage-Permitting Interpretation of the exclusion. (Dca449.) To that end, Berkley sought information regarding "the exposure of Mist . . . so that Berkley can meaningfully participate in settlement discussions." (Dca402). If Berkley had believed that the capacity exclusion resulted in no coverage whatsoever, no information would have been necessary. In any event, by changing positions in December 2020, Berkley presumptively prejudiced Mist: the Underlying Actions had been defended and settled. "That course [could not] be rerun." Id. at 362

Because the panel never addressed Griggs, its reason for bypassing it is unknown. But if its justification is a stray statement that "as early as March 2016, Berkley notified Mist the capacity exclusion may apply to *either bar or limit* coverage," (Pa7 (emphasis added)), the court misread Berkley's coverage position letter. Berkley never placed Mist on notice that the exclusion could result in no coverage. Just the opposite, Berkley said there *is* "coverage for

Krivulka . . . limited" to his Mist capacity, and then adhered to that position for years when it sought information for the sole purpose of "meaningfully participat[ing] in settlement discussions." (Da413, Dca402.)

The Appellate Division's failure to enforce Griggs undermines an essential principle espoused by this Court that "settlement of litigation ranks high in our public policy." Brundage v. Est. of Carambio, 195 N.J. 575, 601 (2008). This Court favors "prompt and proactive involvement by all responsible carriers [to] promote[] the efficient use of resources of insurers, litigants, and the court." Potomac Ins. Co. v Pa. Mfrs.' Ass'n Ins. Co., 215 N.J. 409, 426 (2013). The "relationship of the (insurance) company to its insured regarding settlement is one of inherent fiduciary obligation." Liberman v. Emp'rs Ins. of Wausau, 84 N.J. 325, 336 (1980). Permitting an insurer to withhold requested settlement authority based on undisclosed coverage positions achieves the opposite.

In addition to Griggs, this Court's other precedents reinforce that Berkley should be estopped from benefitting from its post-settlement No Coverage Interpretation. Equitable estoppel "is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment." Knorr v. Smeal, 178 N.J. 169, 178 (2003). Therefore, this Court applied that doctrine to bar a late-filed motion to dismiss because "plaintiffs incurred significant expert and deposition costs" and because attorney and

judicial resources were needlessly expended on a case that should have been disposed of earlier. Id. at 180.

Here, after the settlement, Berkley repudiated its earlier Coverage-Permitting Interpretation of the capacity exclusion on which Mist detrimentally relied. Further, before raising the capacity exclusion as a "silver bullet" defense at the eleventh hour and based on allegations known to Berkley since the first hour, Berkley forced Mist to litigate a host of *other* issues over five years, such as whether a "Claim" was made within the Policy period, the Mist Insureds' share of the overall liability for the settlement, the sufficiency of information Mist provided to Berkley, the adequacy of Berkley's evaluation of the settlement opportunity, and whether Berkley unreasonably withheld consent to the settlement. Estoppel is warranted here as well.

B. The Appellate Division Erred By Not Affirming The Trial Court Based On Griggs and Fireman's.

The panel's decision also departed from Griggs and Fireman's in another material way, which should have precluded deciding the capacity exclusion. The trial court held that Berkley breached the Policy by unreasonably withholding consent to the Mist Settlement Portion. Despite having the "information necessary to provide consent," Berkley "did not conduct any assessment" based on that information. (Da168–69, Da171). The panel left undisturbed the trial court's findings on this point. The Appellate Division, moreover, did not

distinguish Fireman's as it claimed; it effectively ignored it.

Under Fireman's and Griggs, because Berkley breached the Policy, Mist was permitted to settle the Underlying Actions and recover the Mist Settlement Portion up to the Policy limit. "The breach of an insurer's covenant . . . leaves the insured free . . . to protect his own interest . . . by agreeing to a reasonable good faith settlement," and the insured can "recover from [the breaching insurer] the amount of its policy limits." Fireman's, 72 N.J. at 73. At this point, the breaching insurers' coverage defenses become unavailable, with one exception: "[t]he *only* qualifications to this rule are that the amount paid in settlement be reasonable and . . . in good faith." Griggs, 88 N.J. at 364 (emphasis added). The panel turned this Court's precedent "upside down" when it admonished the trial court for not "first address[ing] . . . the policy's capacity exclusion." (Pa15.)

Next, the panel's disregard of Fireman's oddly rests on Berkley's mere "*assert[ion]* [that] withholding consent was reasonable [because] the global settlement represented the separate interests of multiple entities not insured, and *Berkley reserved* its rights under the capacity exclusion repeatedly from its earliest communications with Mist." (Pa15 (emphasis added).)

In fact, Berkley never made that "assertion" during the defense and settlement of the Underlying Actions. Before the settlement was achieved, Berkley's lone reason for withholding consent was "woefully inadequate" information

relating to the allocation of the settlement (Dca402), not "the separate interests of multiple entities." And rather than reserve any right to *completely bar* coverage based on the exclusion, Berkley represented to Mist that Krivulka *was covered* in his Mist capacity and that if it only received information to evaluate "the potential settlement value to and the exposure of Mist," it would "meaningfully participate in settlement discussions." (Dca402).

Berkley had the information it needed. Therefore, as the trial court held, Griggs and Firemen's compelled the outcome in favor of Mist. The Appellate Division's disregard of those controlling precedents requires this Court's intervention.

II. THE APPELLATE DIVISION ERRONEOUSLY RELIED ON "DISPUTED" ALLEGATIONS TO NEGATE BERKLEY'S DUTY TO INDEMNIFY BASED ON THE CAPACITY EXCLUSION.

Because it faithfully applied this Court's precedents, the trial court never reached Berkley's novel, post-settlement interpretation of the capacity exclusion. Only when "there is no genuine issue as to any material fact challenged" is summary judgment appropriate. Rule 4:46-2(c); see also Brill v. Guardian Life Ins. Co., 142 N.J. 520, 529 (1995). In contravention of that standard and Flomerfelt, the Appellate Division granted summary judgment to Berkley, holding it had no duty to indemnify the Mist Settlement Portion based solely on "disputed" complaint allegations and not on undisputed facts. Evidently, the

panel conflated the standard of proof that applies to the duty to defend (disputed allegations) and the duty to indemnify (definitive, undisputed evidence).

An insurer's duty to defend turns on "a comparison between the allegations set forth in the . . . pleading and the language of the insurance policy," Flomerfelt, 202 N.J. at 444, whereas the duty to indemnify "arises only once liability has been conclusively determined," 14 Couch on Ins. § 200:3. Accordingly, to avoid its duty to indemnify, the insurer must present "definitive" evidence or findings from an underlying action that proves that coverage is excluded. See, e.g., Flomerfelt, 202 N.J. at 457. "[T]he burden is on the insurer to bring the case within the exclusion." Id. at 442. In Flomerfelt, because of disputed allegations and evidence, "the record [was] not sufficiently developed to decide the question of the insurer's liability for indemnity." Id. at 457.

Here, neither the trial court nor any court in the Underlying Actions found that the "Claim" was based on the "*Wrongful Act* of [Krivulka] serving in [his] capacity . . . as director [or] officer . . . of [an uninsured] entity [Akrimax]." (Da261.) Nor did Mist or Krivulka make any such admission; they disputed liability. In the absence of such a finding, there was no basis for the Appellate Division to make its own finding without conducting a hearing.

The Appellate Division opinion itself sows confusion. On the one hand, the panel states that, to uphold Berkley's duty to defend, "[t]he *record* shows

there were *disputed* issues of material fact concerning whether the capacity exclusion applied to bar coverage . . . when Mist moved for partial summary judgment on Berkley's duty to defend." (Pa21 (emphasis added).) On the other hand, it inconsistently states that "[i]t is *undisputed* that Krivulka acted in a dual capacity" when it applied the exclusion to excuse Berkley from its duty to indemnify. (Pa20 (emphasis added).)

The panel does not and cannot cite to any authority or evidence that supports its comment that "the undisputed record shows Krivulka used his position as an Akrimax director to require that Akrimax guarantee to Mist certain obligations . . . *without consideration*." (Pa20 (emphasis added).) While the decision summarily references 12,000 pages of discovery, Berkley opted to rely only on disputed complaint allegations and not on that discovery. Confirming this, the panel recounts how "[t]he Delaware court summarized the *allegations*" – allegations the Delaware court found were "*heavily disputed*." (Pa4 (emphasis added).) Neither the panel nor Berkley identify an undisputed fact or finding. Thus, the panel erred by deciding that Berkley had no duty to indemnify Mist based solely on "disputed" allegations and without "definitive" evidence.

III. THE APPELLATE DIVISION ERRED BY EXPANSIVELY AND NOT NARROWLY CONSTRUING BERKLEY'S NOVEL RECASTING OF THE CAPACITY EXCLUSION.

"In general, insurance policy exclusions must be narrowly construed; the

burden is on the insurer to bring the case within the exclusion." Am. Motorists Ins. Co. v. L–C–A Sales Co., 155 N.J. 29, 41 (1998) (quoting Princeton Ins. Co. v. Chunmuang, 151 N.J. 80 (1997)). For that reason, "exclusions are ordinarily strictly construed against the insurer, and if there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it." Flomerfelt, 202 N.J. at 442 (citations omitted).

The Appellate Division did not comply with this canon of insurance policy interpretation, opting to expansively interpret an exclusion that was admittedly a "matter of first impression." (Pa2.) In adopting a novel "but for" analysis that appears nowhere in the Policy's capacity exclusion, the panel held that, because "Krivulka was acting in his capacity as both a director of Akrimax and majority shareholder of Mist," the exclusion applied. (Pa20.) Yet the panel disregarded that, for years, Berkley itself applied the exclusion in a manner that allowed limited – and did not prohibit – coverage under that very circumstance. See, supra, Point I.A. Thus, to "strictly construe" the exclusion and "apply the meaning that supports coverage," Flomerfelt, 202 N.J. at 442, the panel needed to adopt the reasonable narrower interpretation. The decision's ultra-broad application of the capacity exclusion is at complete odds with Mist's reasonable expectations and Berkley's course of dealing with Mist for years.

Nevertheless, the panel broadened the exclusion, not because the Policy

language compelled the result, but to "foster a simpler approach." (Pa21.) It is not the function of a court to rewrite an insurance policy to create a better one than the insurer could have drafted. See, e.g., Flomerfelt, 202 N.J. at 441. Berkley can write into future policies the "but for" approach that it now favors – the one that it first advanced only *after* the Mist Insureds' settled.

Consequently, the Appellate Division's "but for" rewrite of the exclusion runs contrary to this Court's review of exclusions with the "arising out of" phrase. See id. at 456. The panel did not consider that "[a]n insurer's use of the phrase 'arising out of' in an insurance policy exclusion with no clarification of its intended meaning in circumstances arising from potentially concurrent causes *makes the phrase ambiguous*." See id. at 456 (emphasis added). Berkley should not be allowed to avoid coverage because Celestial alleged losses from both insured and uninsured entities.

Thus, the Appellate Division compounded its errors by incorrectly interpreting the exclusion broadly and contrary to Berkley's earlier narrow interpretation, in violation of well-established principles of policy interpretation.

QUESTIONS PRESENTED

1. Whether the Appellate Division, in reversing the trial court, violated Griggs and Fireman's by not compelling Berkley to indemnify its insureds' good-faith settlement after Berkley, over a five-year period, failed to notify Mist of its intention to entirely deny coverage under the capacity exclusion and unreasonably withheld its consent from Mist to settle?

2. Whether, on a summary judgment record, the Appellate Division violated Flomerfelt by relying on disputed allegations to support the application of a policy exclusion to deny the insured indemnity coverage and by not holding the insurer to its burden to prove the exclusion?

3. Whether, in violation of Flomerfelt, the Appellate Division erred by not strictly construing the policy exclusion language against the insurer when more than one possible interpretation could be drawn from that language, including an interpretation the insurer applied for years?

ERRORS COMPLAINED OF

1. The Appellate Division had no basis to ignore Griggs and bypass Fireman's. By ignoring Griggs, the panel excused Berkley's post-settlement five-year delay to advise that no coverage exists based on the capacity exclusion. Based on Fireman's, the trial court soundly decided that Berkley unreasonably withheld from Mist consent to enter into a settlement. The panel had no basis to disturb that finding based on the trial court's review of a fulsome record. The panel has placed in question the vitality of Griggs and Fireman's.

2. The Appellate Division erred by applying the capacity exclusion to bar indemnity coverage based on "highly disputed" complaint allegations rather than on undisputed facts or judicial findings, as required by Flomerfelt. Neither the trial court nor any of the underlying courts found that Krivulka committed wrongful acts that might have justified the application of Berkley's novel and later-discovered interpretation of the capacity exclusion.

3. The Appellate Division failed to apply basic canons of insurance policy

interpretation by broadly, rather than narrowly construing, the capacity exclusion. There were competing interpretations of the exclusion, including an earlier one Berkley espoused. The panel was obligated to adopt the narrower interpretation, consistent with Mist's reasonable expectations.

COMMENTS ON APPELLATE DIVISION DECISION

Had the panel faithfully applied Griggs and Fireman's, it would not have decided a "matter of first impression" that should not have been reached. By reversing the trial court, the panel condoned both Berkley's five-year failure to inform Mist of its coverage position and its unreasonable withholding of consent to settle after it had sufficient information to authorize consent. The panel, moreover, gave license to a policy exclusion for indemnity coverage based on disputed complaint allegations, not undisputed evidence. Last, the panel failed to narrowly construe the exclusion, in keeping with the principles of Flomerfelt.

CONCLUSION

The errors in the panel's decision requires this Court's correction.

Respectfully submitted,

LOWENSTEIN SANDLER LLP

By: /s/ Lynda A. Bennett
Lynda A. Bennett

September 9, 2024

CERTIFICATION PURSUANT TO RULE 2:12-7

Pursuant to Rule 2:12-7(a), I certify that this petition represents a substantial question and is filed in good faith and not for purposes of delay.

I certify that the foregoing statement made by me is true. I understand that if the foregoing statement is willfully false, I may be subject to punishment.

/s/ Lynda A. Bennett

September 9, 2024 Lynda A. Bennett