

June 14, 2021

Rizescu v. Selective Insurance Company of America: Insurer Not Liable for Settlement Reached Without Insurer's Knowledge and Consent

BY: Copernicus T. Gaza

April 16, 2021, the New Jersey Appellate Division recently enforced a voluntary payments condition in holding that an insurer had no obligation to pay a settlement that was agreed to without the insurer's knowledge and consent. The insured was a remodeling contractor that sued certain homeowners after they failed to pay for work performed. The homeowners filed a counterclaim alleging negligence, among other causes of action. The contractor's insurer, Selective, initially defended the counterclaim under reservation of rights but ultimately reached a claim release agreement with its insured, under which the insurer paid \$10,000 to the contractor in exchange for a release of any further defense or indemnity obligation under the policy. After assuming control of the case from Selective-appointed defense counsel, the contractor's personal attorney settled for the insured, confessing to a \$400,000 judgment in favor of the homeowners. The homeowners then sued Selective, seeking to collect on the judgment, and Selective counterclaimed for a declaration of no coverage. The trial court held that the settlement reached without Selective's knowledge or consent constituted a voluntary payment under the policy and that the insurer had no obligation to pay, noting that Selective "cannot be stuck after the fact." The homeowners further argued that Selective's counterclaim was barred by the New Jersey Entire Controversy Doctrine, arguing that Selective should have litigated the voluntary payment issue in the underlying case. However, the court held that the doctrine did not apply because Selective was not a party to the underlying litigation but merely had appointed defense counsel to represent the contractor. While *Rizescu* demonstrates the New Jersey courts' willingness to enforce the voluntary payments clause, the case is more remarkable for what it did not address. The contractor released Selective prior to agreeing to the \$400,000 settlement with the homeowners. Under New Jersey law, a claimant has no rights under the insured's liability policy prior to obtaining a judgment against the insured. And, upon obtaining such judgment, the claimant succeeds only to the rights that the insured has. It appears that Selective did not argue that the homeowners had no standing to sue under the policy on the basis that the contractor had released Selective prior to the judgment, or that the court simply did not reach this issue.