

**ALERT**

# Consent Judgment Coupled With Agreement to Not Execute Against the Insured Is Enforceable Under New Jersey Law

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September 18, 2013

Applying New Jersey law, the United States District Court for the District of New Jersey has held that a consent judgment that assigns the rights of an insured against an insurer to a third party and limits execution to the policy proceeds is enforceable. *First Mercury Ins. Co. v. Markowitz*, 2013 WL 4430831 (D.N.J. Aug. 14, 2013).

The case involved a professional liability policy issued to a lawyer. The insured was sued for malpractice in connection with a real estate transaction. The insurer initially defended the action, but later withdrew the defense upon a determination that the policy did not afford coverage. The insured assumed his own defense and subsequently agreed to a consent judgment with the claimants for \$310,000, which represented \$240,000 in compensatory damages and \$70,000 in attorney's fees. The insured further agreed to pay \$5,000 in partial satisfaction of the judgment and to assign to the claimants all of his rights under the policy and claims against the insurer, and the claimants agreed not to seek the unpaid balance of the judgment from the insured and to limit satisfaction of the judgment to any amounts they recovered from the insurer.

The insurer filed suit against the insured and claimants for a declaration of no coverage, and the claimants counterclaimed for breach of contract and bad faith. The insurer filed a motion to dismiss for failure to state a claim, arguing that a consent judgment that releases the insured of all liability likewise releases the insurer of liability to the claimants. In making this argument, the insurer contended that New York law applied. The court disagreed, recognizing that in the absence of a conflict of laws, it was required

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to apply the law of the forum state—*i.e.*, New Jersey. In this regard, the court held that both New York and New Jersey law allow for the assignment of an insured's interests against an insurer to a third party. The court further held that, for purposes of New York law, the assignment here was valid because it did not actually release the insured from all liability; rather, even though the claimants agreed not to execute the balance of the judgment from his personal assets, the insured remained liable for the judgment entered against him.

Turning to New Jersey law, the court recognized that a consent judgment and assignment of rights is enforceable against the insurer if the insurer wrongfully denies coverage and the settlement is reasonable and entered into in good faith. The court found that the amount of the judgment was reasonable, notwithstanding that the negotiations among the parties were limited, because the dispute involve claimed damages in excess of \$240,000 for which the insured could have been found liable. The court also found that the insurer had presented no facts to support the contention that the insured and the claimants had colluded to defraud the insurer. The court did not address the propriety of the insurer's coverage position, but did find that the insurer had failed to prove the consent judgment was unenforceable at the pleadings stage, and accordingly denied the motion to dismiss the counterclaims.