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A Matter Judged: Subrogating Insurers Should Beware of Prior Suits Involving the Insured

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In *New Jersey Mfrs. Ins. Co. v. Lallygone LLC,* No. A-2607-22, 2024 N.J. Super. Unpub. LEXIS 120, the Appellate Division of the Superior Court of New Jersey (Appellate Division) considered whether New Jersey Manufacturers Insurance Company (the carrier) could bring a subrogation action after its insured, Efmorfopo Panagiotou (the insured), litigated and tried claims related to the same underlying incident with the same defendant, Lallygone LLC (the defendant). The Appellate Division affirmed the trial court's finding that the prior lawsuit extinguished the carrier's claims.

In *Lallygone LLC*, the insured hired the defendant to renovate a detached garage on his property. In March 2022, while the defendant's employees were removing existing concrete slabs, the garage collapsed. After the incident, the insured stopped paying the defendant. In addition, the insured filed a claim with the carrier, which ultimately paid the insured over $180,000 for the damage under its property policy. The carrier sent a subrogation notice letter to the defendant.

Unbeknownst to the carrier, in October 2022, the defendant sued the insured for failing to pay the invoice related to the work performed on the garage before it collapsed. The insured filed counterclaims for breach of contract and violation of the Consumer Fraud Act. The insured stated in his pleading that the insurance claim with the carrier had been resolved. The insured's attorney certified that there were no other pending matters and no other parties who should be joined.

In January 2023, the trial court deciding the matter conducted a two-day bench trial. The insured did not provide any expert testimony in support of his claim that the defendant's improper work caused the garage to collapse. The insured only provided his observations and limited experience as a contractor. The court found in favor of the defendant and ordered the insured to pay the defendant over $9,000 for the outstanding invoice.

In February 2023, the carrier filed a subrogation action against the defendant, alleging negligence, breach of contract and violation of the Contractor's Registration Act and Consumer Fraud Act. The defendant filed a motion to dismiss on grounds of *res judicata* and the entire controversy doctrine. The trial court hearing the subrogation action granted the motion to dismiss, holding that the insured already sued the defendant for claims arising from the same factual nexus of events and the same contract, and failed to meet its burden. The court held that the carrier could not get a second bite at the apple. The carrier appealed the dismissal, arguing that it was not a party to the first action and thus did not have the opportunity to present its claims, which were far greater in value than the insured's claims.

The Appellate Division acknowledged that for *res judicata* to apply there must be four elements: 1) a final judgment by a court of competent jurisdiction, 2) identity of issues, 3) identity of parties and 4) identity of causes of action. The parties conceded that the causes of action and the issues were identical. However, the carrier argued that the parties were not identical because a subrogating carrier is a different party than its insured. The defendant disagreed, arguing that a subrogating carrier "stands in the shoes" of its insured as subrogee, and is thus bound by the prior actions of the insured.

The Appellate Division agreed with the defendant. The court found that when the insured brought counterclaims against the defendant, he initiated an action to recover costs associated with the collapse of the garage. Thus, the court held that carrier's subrogation interest was represented by its insured and tried to a final decision on the merits. The Appellate Division affirmed the dismissal of the carrier's lawsuit.

The *Lallygone LLC* decision establishes that, in New Jersey, a subrogating insurance carrier and its insured are considered identical parties. Thus, if an insured brings a claim against an alleged tortfeasor, it is imperative that the subrogating carrier intervene into the action—or file a separate lawsuit and move to consolidate the cases—before the insured's claim is adjudicated. If an insurance carrier does not join or consolidate with the insured's claim prior to judgment, then the carrier will be barred from bringing its subrogation claim.

According to the *Lallygone LLC* case, it does not appear to be relevant that the defendant was aware of the subrogation claim. It also did not seem relevant that the insured and the defendant misrepresented that there were no related claims. This decision serves as a warning to subrogation professionals in New Jersey to be sure to check with the insured for any claims or lawsuits relating to the same set of facts giving rise to the subrogation claim.