2013 N.J. Super Unpub LEXIS 2125

Willey v. DD Transp., 2013 N.J. Super. Unpub. LEXIS 2125 (Copy citation)

Superior Court of New Jersey, Appellate Division
March 19, 2013, Argued; August 27, 2013, Decided
DOCKET NO. A-6255-10T4

Reporter: **2013 N.J. Super. Unpub. LEXIS 2125** | 2013 WL 4516039

JILL S. GIRARD WILLEY, Plaintiff, v. DD TRANSPORT; EUGENE GREENE; JOHN DIDOMENICIS; AMERICAN TRANS FREIGHT HOLDING, LLC; ATF TRUCKING, LLC; ATF TRUCKING, INC.; AMERICA'S PEO, INC.; NEW START SHIPPING SERVICE; INTERPOOL, INC.; HAMBURG SÜD NORTH AMERICA, INC.; HAMBURG SUDAMERIKANISCHE DAMPFSCHIFFAHRTS-GESELLSCHAFT EGGERT AND AMSINCK; TRAC LEASE, INC.; INTER STAR NORTH AMERICA; SHANGHAI/HYUNDAI; COLUMBUS LINE, INC.; SHOALHAVEN STARCHES PTY, LTD; MANILDRA MILLILNG CORP.; J. CROTHERS; T. TAYLOR; J. CARRIGAN; J. BURNARD; R. SCARRA; W. KEOOH; R. CASPER; C. KIEFER; R. RICHARDSON; GREENWICH TERMINALS, LLC; ZURICH AMERICAN INSURANCE GROUP; FALCON TRUST COMMERCIAL RISK SPECILISTS; AMF INSURANCE SERVICES, INC.; CAPACITY COVERAGE COMPANY OF NEW JERSEY, INC. AND AMGRO, INC., Defendants.FEDERAL INSURANCE COMPANY, a subrogee of QUICK COURIER SERVICES, INC., Plaintiff, v. DD TRANSPORT; JOHN DIDOMENICIS; EUGENE GREENE; NEW START SHIPPING SERVICE; INTERPOOL, INC.; INTER STAR NORTH AMERICA; SHANGHAI/HYNDAI; COLUMBUS LINE, INC.; HAMBURG SÜD NORTH AMERICA, INC.; HAMBURG SUDAMERIKANISCHE DAMPFSCHIFFAHRTS-GESELLSCHAFT EGGERT AND AMSINCK; TRAC LEASE, INC.; SHOALHAVEN STARCHES PTY, LTD; MANILDRA MILLING CORP.; J. CROTHERS; T. TAYLOR; J. CARRIGAN; J. BURNARD; R. SCARRA; W. KEOOH; R. CASPER; C. KIEFER; R. RICHARDSON; GREENWICH TERMINALS, LLC; AMERICAN TRANS FREIGHT HOLDING, LLC; ATF TRUCKING, INC.; ATF TRUCKING, LLC; AMERICA'S PEO, INC.; ZURICH AMERICAN INSURANCE GROUP; FALCON TRUST COMMERCIAL RISK SPECIALISTS; AMF INSURANCE SERVICES, INC.; CAPACITY COVERAGE COMPANY OF NEW JERSEY, INC. and AMGRO, INC., Defendants.EUGENE GREENE, Plaintiff, v. THE ESTATE OF BRUCE WILLEY, deceased; O'CONNOR TRUCK LEASING, INC.; and QUICK COURIER, Defendants.HAMBURG SÜD NORTH AMERICA, INC.; HAMBURG SÜD S.A.; INTERPOOL, INC.; and TRAC LEASE, INC.; Third-Party Plaintiffs-Respondents, v. ZURICH AMERICAN INSURANCE GROUP; AMF INSURANCE SERVICES, INC.; CAPACITY COVERAGE COMPANY OF NEW JERSEY, INC.; FALCON TRUST COMMERCIAL RISK SPECIALISTS, INC.; and FALCON TRUST GROUP, INC., Third-Party Defendants-Appellants.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[1]** On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2494-04.

Core Terms

insurance, policy, fees, coverage, rate, lease, endorsement, cancel, additional insured, claims, required, defense, notice, interpretation, contract, term, insurance policy, party, hourly rate, judgment, lessor, interchange, award, law, charged, certif, equipment, argument, expect, services

Counsel: James P. Lisovicz argued the cause for appellant Zurich American Insurance Group (Coughlin Duffy LLP; Mr. Lisovicz, of counsel and on the brief; Timothy P. Smith and Joseph C. Amoroso, on the brief).

Stacey Alison Fols argued the cause for respondents Hamburg Sud North America, Inc., Hamburg Sud, S.A., Interpool, Inc. and Trac Lease, Inc. (Montgomery, McCracken, Walker & Rhoads, LLP, attorneys; Ms. Fols, on the brief).

Judges: Before Judges Lihotz, Kennedy and Mantineo.

Opinion

PER CURIAM

I.

In this appeal, we are asked to review a Law Division grant of summary judgment on insurance coverage in the context of the intermodal transportation industry. The case arises from a tragic motor vehicle accident which occurred on March 17, 2003.

On that **[2]** date, Eugene Greene, was driving a tractor trailer northbound on the New Jersey Turnpike. Greene was an employee of New Start Shipping Service (New Start), an entity that had leased the tractor. At that time, the tractor was connected to a chassis that was leased and controlled by defendant Hamburg Süd North America (HSNA). Hamburg Süd S.A. (Hamburg) owned the intermodal container[1] that was attached to the chassis.

As Greene was driving northbound, a tire on the chassis blew out and, after pulling briefly into a rest area, Greene once again began driving northbound, when another chassis tire blew out. At this point, Greene was driving the tractor trailer in the right lane at a very slow speed.

George Willey was also driving a tractor trailer northbound on the New Jersey Turnpike. His vehicle came upon Greene's from the rear and crashed into the back of the trailer. **[3]** Willey's tractor sustained extremely heavy contact damage across its entire front. Willey was partially ejected from the cab and died at the scene from his injuries.

Willey's wife thereafter filed a complaint against New Start, and later amended it to assert claims against HSNA, Hamburg and other entities. HSNA and Hamburg filed a third-party complaint against Zurich American Insurance Group (Zurich), among others, seeking a defense and indemnification. HSNA and Hamburg asserted that New Start was contractually obligated to obtain insurance coverage listing them as additional insureds "for any accidents occurring while New Start had possession of [their] chassis and container." They further asserted that New Start had, in fact, obtained such a policy of insurance from Zurich for the period March 20, 2002, to March 20, 2003. In its answer, Zurich denied coverage and asserted that its insurance policy had been properly cancelled prior to the accident.

HSNA and Hamburg thereafter moved for summary judgment against Zurich, and contended they did not receive notice of any cancellation of the insurance policy pursuant to the terms of Zurich's "Lessor-Additional Insured and Loss Payee" endorsement, **[4]** which stated, "If we cancel the policy, we will mail notice to the lessor. . . ." Zurich cross-moved for summary judgment, contending that New Start received timely notice of the policy cancellation, and that Zurich had no duty to independently notify HSNA or Hamburg. The motion judge disagreed and granted summary judgment for HSNA and Hamburg on the issue of notice.

On June 6, 2008, the motion judge granted summary judgment to HSNA and Hamburg dismissing the first-party claims against them. HSNA and Hamburg later moved for fees and costs incurred in the litigation and the motion judge referred the issue to a Special Master. On January 6, 2011, the Special Master awarded $321,998.75 in fees and $40,914.24 in costs. The motion judge affirmed the Special Master's ruling on June 30, 2011.

This appeal followed.

II.

New Start and HSNA are signatories to the Uniform Intermodal Interchange and Facilities Access Agreement ("UIIA"). The UIIA "is a standard interchange contract developed to promote intermodal productivity and operating efficiencies through the development of uniform industry processes and procedures governing the interchange of intermodal equipment between ocean carriers, railroads,

[5] equipment leasing companies and intermodal trucking companies." UIIA, *http://www.uiia.org* (last visited July 18, 2013).

Under the UIIA, the motor carrier agrees to fully indemnify the equipment provider "against any and all claims, suits, loss, damage or liability for bodily injury, death and/or property damage . . . arising out of or related to the motor carrier's: use or maintenance of the equipment during an interchange period . . . ." Further, the motor carrier agrees to provide "[a] commercial automobile liability policy with a combined single limit of $1,000,000 or greater, insuring all Equipment involved in Interchange . . . ; said insurance policy shall name the Equipment Provider as an additional insured." The motor carrier must also "have in effect, and attached to its commercial automobile liability policy, a Truckers Uniform Intermodal Interchange Endorsement (UIIE-1)[.]"[2] Evidence of the coverage required by the UIIA must be provided to the Intermodal Association of North America ("IANA")[3] by the insurance company and the IANA must receive thirty days advance notice of any cancellation of coverage.

Here, on March 12, 2003, the Packer Avenue Marine Terminal in Philadelphia interchanged HSNA's chassis to New Start. New Start picked up Hamburg's container on March 14, 2003, at the CSX Rail Terminal in Philadelphia. On March 17, 2003, Greene was dispatched to drive the tractor, chassis and container to Woburn, Massachusetts.

Zurich, as noted earlier, had issued a commercial liability insurance policy to New Start covering the period from March 20, 2002 to March 20, 2003. On May 10, 2002, New Start's broker, AMF Insurance Services, Inc., faxed a "Certificate of Liability Insurance" to "UIIA" which confirmed New Start's insurance under the policy. Under "Description of Operations . . . Special Provisions" the certificate **[7]** stated: "ALL OPERATIONS OF THE INSURED. ALL COVERAGES ARE IN EFFECT AS LISTED ABOVE. ALL COMPANIES ON ATTACHED LIST ARE ADD'L INSUREDS ON AUTO GENERAL LIABILITY & TRAILER INTERCHANGE. ADDITIONAL INSURED: HSAC LOGISTICS - 465 SOUTH ST - MORRISTOWN NJ 07960 ALSO ADDITIONAL INSURED ON AUTO GENERAL LIABILITY TRAILER." HSAC Logistics is HSNA's authorized agent in matters pertaining to the UIIA.

The policy did not include a UIIE-1 endorsement. It did, however, have a "Truckers Coverage Form" that provided coverage to owners or providers of trailers in New Start's possession under an equipment interchange agreement. The form named as an insured "[t]he owner or anyone else from whom you hire or borrow a covered 'auto' that is a 'trailer' while the 'trailer' is connected to another covered 'auto' that is a power unit." It further stated that Zurich had the duty to defend any such insured against a suit seeking damages for bodily injury or property damage. Section III of the form specifically addressed trailer interchange coverage and again set forth Zurich's duty to defend insureds against liability claims.

A "Lessor - Additional Insured and Loss Payee Endorsement" attached to the policy included **[8]** New Start in its schedule, and "Additional Insured (Lessor) AS REQUIRED BY CONTRACT/AGREEMENT." It also stated that "[i]f we cancel the policy, we will mail notice to the lessor in accordance with the Cancellation Common Policy Condition[.]"[4]

After making an initial payment for the policy, New Start entered into a finance agreement with AMGRO, Inc., under which AMGRO would pay the balance of the premium and New Start would repay AMGRO with interest through nine monthly payments. AMGRO was appointed as New Start's attorney-in-fact with authority to cancel the insurance policy if New Start failed to make the scheduled payments.

New Start failed to make its November 21, 2002 payment and on December 17, 2002, AMGRO sent a notice of cancellation to New Start, AMF, and Zurich, the effective date of which was December 31, 2002. On January 7, 2003, Zurich submitted a certificate of cancellation to the Federal Motor Carrier Safety Administration, with an effective date of February 6, 2003. It did not send a notice of cancellation to HSNA **[9]** or its agents, or to the IANA.

III.

Zurich maintains that HSNA and Hamburg are not covered by its policy because that policy was cancelled prior to the March 17, 2003, accident. Further, it argues that they were not entitled to

notification of the cancellation because the policy only required that notice be given to "lessors" and not "additional insureds." Zurich contends that the court erroneously changed the terms of the policy and in doing so, improperly relied on non-policy agreements and unfounded expectations of the parties.

HSNA and Hamburg contend that the endorsement's use of the phrase "Additional Insured (Lessor)" signifies that when the word "lessor" is used in the policy it is interchangeable with "additional insured." They further argue that the UIIA is relevant to the interpretation of the policy because the endorsement specifically incorporates it into the policy by use of the phrase "as required by contract[.]" Finally, they add that, at best, the endorsement is ambiguous and should be read to favor coverage.

In granting summary judgment in favor of HSNA and Hamburg, the motion judge opined, in pertinent part:

> IANA, an industry association, has attempted to streamline the **[10]** course of business by creating an inclusive contract agreement. New Start was a member of IANA, and, therefore, they contractually agreed to provide the requisite insurance under UIIA. Zurich insured New Start in the context of this entire industry. They undertook to provide Hamburg notice of cancellation of the insurance policy issued to New Start based on Hamburg's status under the policy as an additional insured. The schedule of the additional insured endorsement provides that an additional insured includes those that are required by contract. They had to know there were additional insureds not just Hamburg. They didn't notify any.
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> . . . .
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> I've taken into account the flow of commerce and the effect on commerce. If every one of these transactions was reduced to writing a lease and supplied the volume, even with computers the volume would be immense, and I believe that Zurich was well aware of the practical aspects of what it was doing, and it did nothing.

Following our review, we find the endorsement ambiguous and, because the court's interpretation of the endorsement in the context of the UIIA is reasonable and in conformance with established principles of law, we affirm.

Summary judgment **[11]** is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R.* 4:46-2; *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 528-29, 666 A.2d 146 (1995). Summary judgment is particularly appropriate when the question presented is one of contract interpretation and there are no contested issues of fact. *Adron, Inc. v. Home Ins. Co.*, 292 N.J. Super. 463, 473, 679 A.2d 160 (App. Div. 1996).

Here, resolution of the parties' cross-motions hinged on the court's interpretation of the language of the Zurich insurance policy. It is well established that the interpretation and construction of an insurance policy, like any contract, is a matter of law. *Spring Creek Holding Co. v. Shinnihon U.S.A. Co.*, 399 N.J. Super. 158, 190, 943 A.2d 881 (App. Div.), *certif. denied*, 196 N.J. 85, 951 A.2d 1038 (2008); *Driscoll Constr. Co. v. State, Dep't of Transp.*, 371 N.J. Super. 304, 313, 853 A.2d 270 (App. Div. 2004); *Fastenberg v. Prudential Ins. Co. of Am.*, 309 N.J. Super. 415, 420, 707 A.2d 209 (App. Div. 1998). Thus, the determination of whether ambiguity exists **[12]** is a matter of law to be decided by the trial court. *Celanese v. Essex Cnty. Improvement Auth.*, 404 N.J. Super. 514, 528, 962 A.2d 591 (App. Div. 2009); *Fastenberg, supra*, 309 N.J. Super. at 420.

On appeal, the reviewing court applies the same legal standard as the trial court in determining whether the grant or denial of summary judgment was correct. *Turner v. Wong*, 363 N.J. Super. 186, 198-99, 832 A.2d 340 (App. Div. 2003); *Antheunisse v. Tiffany & Co.*, 229 N.J. Super. 399, 402, 551 A.2d 1006 (App. Div. 1988), *certif. denied*, 115 N.J. 59, 556 A.2d 1206 (1989). When considering the legal issues presented, the trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference. *Manalapan Realty L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378, 658 A.2d 1230 (1995); *see also, Spring Creek Holding Co., supra*, 399 N.J. Super. at 190 (stating that a trial court's interpretation of a contract is subject to de novo

review); *Simonetti v. Selective Ins. Co.*, 372 N.J. Super. 421, 428, 859 A.2d 694 (App. Div. 2004) (same).

It is fundamental that where the terms of an insurance policy are clear and unambiguous, the court must enforce those terms as written. *Flomerfelt v. Cardiello*, 202 N.J. 432, 441, 997 A.2d 991 (2010); **[13]** *Kampf v. Franklin Life Ins. Co.*, 33 N.J. 36, 43, 161 A.2d 717 (1960). The court may not make a better contract for the parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of another. *Longobardi v. Chubb Ins. Co. of N.J.*, 121 N.J. 530, 537, 582 A.2d 1257 (1990); *Karl's Sales & Serv., Inc. v. Gimbel Bros.*, 249 N.J. Super. 487, 493, 592 A.2d 647 (App. Div.), *certif. denied*, 127 N.J. 548, 606 A.2d 362 (1991); *Flynn v. Hartford Fire Ins. Co.*, 146 N.J. Super. 484, 488, 370 A.2d 61 (App. Div.), *certif. denied*, 75 N.J. 5, 379 A.2d 236 (1977).

When faced with differing proposed interpretations of policy terms, the court must determine whether the language of the agreement is indeed clear and unambiguous. *Schor v. FMS Fin. Corp.*, 357 N.J. Super. 185, 191, 814 A.2d 1108 (App. Div. 2002). "If the language is clear, that is the end of the inquiry." *Chubb Custom Ins. Co. v. Prudential Ins. Co.*, 195 N.J. 231, 238, 948 A.2d 1285 (2008). If the terms of the policy are susceptible to at least two reasonable alternative interpretations, however, then an ambiguity exists. *Schor, supra*, 357 N.J. Super. at 191. Stated another way, an ambiguity exists when the "phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries **[14]** of coverage." *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 246-47, 405 A.2d 788 (1979); *Lee v. Gen. Accident Ins. Co.*, 337 N.J. Super. 509, 513, 767 A.2d 985 (App. Div. 2001).

Here, the policy required Zurich to provide notice of cancellation to New Start as the named insured, and "any person entitled to notice under this policy." The only provision that named another person entitled to notice was the additional insured endorsement, which stated that if New Start cancelled the policy, Zurich would mail notice to "the lessor." The term "lessor" is not defined.

Absent specific definition, the terms of a contract must be given their plain and ordinary meaning. *Schor, supra*, 357 N.J. Super. at 191 (citing *Kaufman v. Provident Life & Cas. Ins. Co.*, 828 F. Supp. 275, 283 (D.N.J. 1992), *aff'd*, 993 F.2d 877 (3d Cir. 1993)). In general usage, a lessor is "one who rents property to another," *Black's Law Dictionary* 902-03 (6th ed. 1990), or who "transfers the right to possession and use of goods under a lease," *N.J.S.A.* 12A:2A-103(1)(p). In turn, a "lease" is "a transfer of the right to possession and use of goods for a term in return for consideration." *N.J.S.A.* 12A:2A-103 (1)(j).

It is undisputed that there was no written agreement **[15]** specifically designated as a "lease" between New Start and HSNA.[5] Further, the title of the additional insured endorsement, "Lessor - Additional Insured and Loss Payee", appears simply to designate a lessor as an additional insured. Thus, reading the title and cancellation provision of the endorsement in isolation, the endorsement may be interpreted as providing the right of notice only to persons with whom New Start has entered into a lease agreement.

Confusion arises, however, from the listing that appears under the heading "Schedule"[6] on the face of the endorsement. Along with the identification of the Zurich policy and the designation of New Start as the named insured, the schedule includes "Additional Insured (Lessor) AS REQUIRED BY CONTRACT/AGREEMENT." As HSNA and Hamburg point out, this phrase can be interpreted as designating all "additional insureds" as "lessors" for purposes of the endorsement. Moreover, the use of the general terms "contract" and "agreement" rather than the more specific term "lease" seems to imply that the endorsement applies broadly to anyone who is an additional **[16]** insured under the policy. Zurich does not dispute that HSNA is an additional insured under the policy.

Although Zurich ignores the schedule and focuses instead on the specific language of the cancellation provision, the policy must be examined as a whole. *Schor, supra*, 357 N.J. Super. at 191. Indeed, every effort must be made to avoid rendering any portion of the policy meaningless. *J. Josephson, Inc. v. Crum & Forster Ins. Co.*, 293 N.J. Super. 170, 214-16, 679 A.2d 1206 (App. Div. 1996); *see also Prather v. Am. Motorists Ins. Co.*, 2 N.J. 496, 502, 67 A.2d 135 (1949) (explaining that "the construction which gives a reasonable meaning to all [of the policy's] provisions will be preferred to one which leaves a portion of the writing useless or inexplicable").

Reading the schedule along with the title and text of the endorsement renders the cancellation provision ambiguous. It simply is not clear who is entitled to notice of cancellation under the policy.

"[I]nsurance policies are contracts of adhesion and are subject to special rules **[17]** of interpretation." *Christafano v. N.J. Mfrs. Ins. Co.*, 361 N.J. Super. 228, 234, 824 A.2d 1126 (App. Div. 2003). Because policies should be construed to afford coverage to the fullest extent a fair interpretation will allow, ambiguities must be resolved in favor of the insured. *Ibid.* "Even if a particular phrase or term is capable of being interpreted in the manner sought by the insurer, 'where another interpretation favorable to the insured reasonably can be made that construction must be applied.'" *Simonetti, supra*, 372 N.J. Super. at 429 (quoting *Ellmex Constr. Co. v. Republic Ins. Co.*, 202 N.J. Super. 195, 204, 494 A.2d 339 (App. Div. 1985), *certif. denied*, 103 N.J. 453, 511 A.2d 639 (1986)).

When a genuine ambiguity arises, "the policy should be construed to comport with the insured's objectively reasonable expectations of coverage." *Christafano, supra*, 361 N.J. Super. at 234; *accord State, Dep't of Envtl. Prot. v. Signo Trading Int'l, Inc.*, 130 N.J. 51, 62, 612 A.2d 932 (1992); *Simonetti, supra*, 372 N.J. Super. at 429. "That fundamental rule of interpretation, known as the doctrine of reasonable expectations, has long been a part of our law." *Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 595, 775 A.2d 1262 (2001). Because of "the stark imbalance between **[18]** insurance companies and insureds in their respective understanding of the terms and conditions of insurance policies[,] . . . '[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.'" *Id.* at 594-95 (quoting *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 338-39, 495 A.2d 406 (1985)).

Zurich argues that the reasonable expectations doctrine does not apply here because New Start is a sophisticated commercial entity. In support of that argument it cites *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates*, 182 N.J. 210, 223, 864 A.2d 387 (2005), a case involving a real estate option contract between two highly competitive business enterprises. Because *Brunswick Hills Racquet Club* involved a real estate transaction negotiated at arm's length, it is of questionable relevance to the interpretation of an adhesion contract such as the Zurich insurance policy. Nevertheless, courts have considered the relative sophistication of the insured in determining whether an insurance provision is ambiguous. *See, e.g., Di Orio v. New Jersey Mfrs. Ins. Co.*, 79 N.J. 257, 269, 398 A.2d 1274 (1979) **[19]** (considering position of "laymen" with respect to insurance policies); *Am.'s Dream Homes v. Ins. Co. of Am.*, 300 N.J. Super. 543, 549, 693 A.2d 517 (App. Div. 1997) (noting that "sophisticated large scale builder" was capable of understanding insurance policy's conditions).

It makes little sense, however, to refuse to apply the reasonable expectations doctrine based on the sophistication of the insured once an ambiguity has been found to exist. Moreover, there is little in the record to substantiate the claim that New Start is a "sophisticated commercial entity." While New Start is a commercial motor carrier, nothing indicates that it has any particular experience or expertise in the insurance industry. For these reasons, the endorsement should be interpreted in light of the insured's objectively reasonable expectations of coverage.

Evidence of New Start's expectations is the certificate of insurance that its broker sent to the IANA. That certificate stated that all of New Start's operations were insured under general liability and automobile liability policies with a combined single limit of $1,000,000 and that HSNA through HSAC Logistics was an additional insured on the trailer interchange coverage. **[20]** The certificate, combined with the fact that New Start was a signatory to the UIIA, indicates that New Start believed that the Zurich policy satisfied its obligations under the UIIA. Those obligations included the requirement that Zurich provide the IANA with thirty days advance notice of any cancellation of coverage.

Citing *Jeffrey M. Brown Associates, Inc. v. Interstate Fire & Casualty Co.*, 414 N.J. Super. 160, 997 A.2d 1072 (App. Div.), *certif. denied*, 204 N.J. 41, 6 A.3d 443 (2010), Zurich argues that the court erred in relying on the UIIA to alter the terms of the insurance policy. We reject the argument because the matter at hand differs from *Brown* in several respects.

The relevant holding in *Brown* is that "a subcontract that requires the named insured-subcontractor to obtain primary coverage for the additional insured-general contractor cannot be construed to expand the scope of coverage provided under an additional insured endorsement *if the issuer of the policy was*

not provided notice of the subcontract's terms." *Id.* at 163 (emphasis added). Here, Zurich was certainly aware of the UIIA and its terms prior to issuing the New Start policy. Further, it was aware that New Start was a motor carrier which engaged **[21]** in equipment interchanges and which sought coverage for equipment providers as additional insureds. Thus, this is not a situation where the insured's obligations under an existing contract could not have been within the insurer's contemplation when the policy was issued.

Moreover, there was no ambiguity in the policy endorsement in *Brown. Id.* at 171. Rather, the plaintiffs argued that the subcontract imposed liability by superseding and expanding the terms of the insurance policy. Here, HSNA and Hamburg are not arguing that the UIIA itself imposes liability on Zurich; they are simply arguing that the UIIA evidences New Start's reasonable expectations at the policy's inception.

For that reason, this case is more like *Pennsville Shopping Center Corp. v. American Motorists Insurance Co.*, 315 N.J. Super. 519, 523, 719 A.2d 182 (App. Div. 1998), *certif. denied*, 157 N.J. 647, 725 A.2d 1128 (1999), where the court considered the terms of a tenant's lease when interpreting ambiguous provisions of the tenant's insurance policy. In so doing, the court held that "the question whether a party is insured at all may be a separate matter susceptible of resolution by reference to any relevant matter such as an underlying contract **[22]** . . . which clarifies the intendments of the parties in apportioning responsibility and providing for insurance coverage." *Ibid.* That is the purpose for which the UIIA is used here.

In sum, the language of the endorsement is subject to two reasonable alternative interpretations concerning who is entitled to notice of a policy cancellation. The policy is therefore ambiguous and it is appropriate to apply the reasonable expectations doctrine to determine the scope of coverage. Under that doctrine, it is clear that New Start expected that the Zurich policy would satisfy all of its obligations under the UIIA, including the UIIA's notice requirements. Zurich was therefore required to provide the IANA with thirty days' notice of a policy cancellation. Because it failed to do so and because HSNA is an additional insured under the policy, Zurich was obligated to indemnify and defend HSNA in the first-party action. For that reason, the court's grant of summary judgment in favor of HSNA should be affirmed.[7]

Zurich argues that the court erred in holding that the UIIA is a "lease" within the scope of the "lessor" endorsement. Relying on federal law governing intermodal transportation, it points out that leases and interchanges are distinct methods of effecting the transport of equipment by motor carriers. It therefore asserts that the court's finding that the UIIA converted HSNA from an additional insured into a lessor should be reversed.[8]

HSNA and Hamburg respond that Zurich misstates the court's ruling and that the court never found that the UIIA qualified as a "lease" under the additional ensured endorsement. Moreover, they argue that the plain meaning of "lease" is sufficiently broad to encompass the equipment interchange between HSNA and New Start, and that the restrictive definitions of "lease" in federal motor safety **[24]** regulations are inapplicable here.

In the portion of the decision cited by Zurich, the court stated:

> Because the UIIA is a contract agreement, in quotes, that requires New Start to provide insurance coverage for the equipment provider, Hamburg, Zurich, as an insurer, undertook to mail the notice to the additional insured regardless whether that cancellation originated with Zurich or New Start. Despite the allegation, Hamburg claims Zurich did not provide notice of cancellation of the New Start policy to Hamburg, and because of this failure to notify, they are still entitled to an effective policy. It still remains in effect.

Nowhere in this statement did the court find that the UIIA is a "lease" for purposes of the endorsement. Rather, in the first sentence the court appears to be referring to the parties' reasonable expectations, as evidenced by the UIIA. In the second and third sentences, it merely refers to the argument concerning why the policy is still in effect.

As discussed above, the UIIA is relevant to the parties' reasonable expectations of coverage. Because that issue need not be addressed again, and because the court did not find that the UIIA constituted a

"lease" under the **[25]** insurance contract, it is not necessary to consider Zurich's arguments on this point.

We note only that the United States Department of Transportation regulations permit an authorized carrier to transport equipment either through the interchange of equipment or through a written lease. 49 *C.F.R.* § 376.11(a); 49 *C.F.R.* § 376.31(a). Under 49 *C.F.R.* § 376.12, a written lease must contain specific provisions conforming to requirements for identification of parties, duration, exclusive possession and responsibilities, compensation, and insurance, among other things.

Zurich's argument is that because no written agreement between New Start and HSNA, including the UIIA, conformed with the requirements of 49 *C.F.R.* § 376.12, there was no "lease." Hence, HSNA was not a "lessor" entitled to notice under the endorsement.

The problem with this argument is that the case law does not support utilizing the federal regulations' constricted definition of "lease" in the context presented here. As an interstate carrier, there is no question that New Start's interchange agreement and insurance policy are subject to federal regulations. *Planet Ins. Co. v. Anglo Am. Ins. Co.*, 312 N.J. Super. 233, 238, 711 A.2d 899 (App. Div. 1998). **[26]** Any provision of that policy that does not specifically further the federal regulations' purpose of safeguarding the public while using the highways, however, is interpreted under state, not federal, law. *Ibid.*

This principle is explained in *Griffin v. Public Service Mutual Insurance Co.*, 327 N.J. Super. 501, 504-05, 744 A.2d 204 (App. Div. 2000), which involved a dispute among insurance companies concerning which was responsible for covering claims by a worker who was injured while unloading a trailer. We rejected the argument that federal regulatory policies altered the coverage allocation, noting that federal regulations do not control in situations where the dispute is solely between insurance companies as to who should provide coverage. *Id.* at 508 (citing *Casey v. Selected Risks Ins. Co.*, 176 N.J. Super. 22, 31, 422 A.2d 83 (App. Div. 1980)). Observing that the worker would be fully compensated for his injuries regardless of which insurer was held responsible, we found that federal policy concerns are not implicated when the injured party has been afforded adequate coverage by an insurance company. *Id.* at 508-09 (citing *Moore v. Nayer*, 321 N.J. Super. 419, 431, 729 A.2d 449 (App. Div. 1999), *appeal dismissed*, 164 N.J. 187, 752 A.2d 1289 (2000)). **[27]** We therefore concluded that the responsibility of each insurance company should be determined by state insurance and contract law. *Id.* at 509.

Applying the principle set forth in *Griffin, supra*, 327 N.J. Super. at 508-09, it is apparent that federal regulations establishing the requirements for a written lease are not applicable to the interpretation of the Zurich policy. The dispute before us concerns responsibility for coverage on the underlying claims. Plaintiff received compensation for the decedent's injuries and HSNA was provided with a defense at trial. Thus, federal policy concerns regarding public safety while using the highways are not implicated. The terms of the insurance policy should therefore be interpreted solely under state law.

As discussed earlier, state law defines a "lease" as "a transfer of the right to possession and use of goods for a term in return for consideration." *N.J.S.A.* 12A:2A-103(1)(j). Dictionaries define a "lease" as "a contract by which one owning [tangible personal property] grants to another the right to possess, use and enjoy it for specified period of time in exchange for period payment of a stipulated price, referred to as rent," *Black's Law Dictionary, **[28]** supra*, at 889, and "a contract between parties by which the one conveys lands or tenements to the other for life, for years, or at will, usually in consideration of rent or other periodical compensation," VIII *Oxford English Dictionary* 769 (2d ed. 1989). Neither the state law nor common usage require that a lease for tangible property be in writing, nor do they require that any writing that does exist have a particular wording or substance.

The UIIA is a written agreement signed by both New Start and HSNA. It provides for the transfer of physical possession of equipment from a provider to a motor carrier. It defines the period of the transfer and sets forth responsibilities of the parties for maintenance of the equipment and procurement of insurance. An addendum to the UIIA signed by HSNA's agent lists equipment free time and detention charges as well as specific responsibilities of the motor carrier at the time possession is transferred. The UIIA and addendum therefore possess all of the characteristics expected of a lease under state law.

Because the UIIA can be construed as a "lease," it follows that HSNA is a "lessor" as that term is used in the endorsement. Under the terms of the **[29]** policy, HSNA was therefore entitled to notification of cancellation.

IV.

Turning to the fee issue, Zurich argues that the court erred in its award of attorney's fees in three respects: 1) the hourly rates allowed were too high; 2) there was no apportionment of charges between HSNA and Hamburg; and 3) the award did not distinguish between covered and non-covered claims.

HSNA and Hamburg respond that the findings of the Special Master and the court are reasonable and well-supported by the record. They contend that under the deferential standard of review applied to fee awards, the judgment entered below should be affirmed.

"Although New Jersey generally disfavors the shifting of attorney's fees, a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." *Packard-Bamberger & Co. v. Collier*, 167 N.J. 427, 440, 771 A.2d 1194 (2001) (citations omitted). *Rule* 4:42-9(a)(6) allows the court to award fees for legal services to a successful claimant in an action upon a liability or indemnity policy of insurance. "The rule reposes in the trial court the discretion as to when and under what circumstances to award an allowance." Pressler & Verniero, *Current N.J.* ***[30]*** *Court Rules*, comment 2.6 on *R.* 4:42-9 (2013).

Once the court determines that an award of attorney's fees is appropriate, it is required to make specific findings of fact regarding the reasonableness of those fees. *S.N. Golden Estates, Inc. v. Continental Cas. Co.*, 317 N.J. Super. 82, 91, 721 A.2d 307 (App. Div. 1998). In *Packard-Bamberger, supra*, 167 N.J. at 444-47, the Court adopted the analytical framework set forth in *Rendine v. Pantzer*, 141 N.J. 292, 661 A.2d 1202 (1995), and applied it to the award of attorney's fees in a legal misconduct case. Under that framework, "the focus of a fee determination is to ascertain what fee is reasonable, taking into account the hours expended, the lawyer's customary hourly rate, the success achieved, the risk of non-payment, and other material factors." *Szczepanski v. Newcomb Med. Ctr.*, 141 N.J. 346, 358, 661 A.2d 1232 (1995). Before counsel fees may be awarded, the trial court must carefully consider the fee requested by plaintiff, scrutinize the value of the services plaintiff's counsel provided, and evaluate the disparity between the relief initially requested by plaintiff and that which was ultimately awarded. *Packard-Bamberger, supra*, 167 N.J. at 446.

Here, the court awarded attorney's **[31]** fees based in part on its own findings and in part on findings in the report of the Special Master. Under *Rule* 4:41-5(b), the court was constrained to accept the Special Master's findings of fact "unless contrary to the weight of the evidence." On appeal, the reviewing court considers the findings of the Special Master in the same manner as it does the findings and conclusions of a judge sitting as a finder of fact. *State v. Chun*, 194 N.J. 54, 93, 943 A.2d 114 (2008). It "accept[s] the fact findings to the extent that they are supported by substantial credible evidence in the record, but [it] owe[s] no particular deference to the legal conclusions of the Special Master." *Ibid.* (citations omitted). Also, fee determinations by trial courts will generally be accorded substantial deference and disturbed only on the rarest of occasions. *Packard-Bamberger, supra*, 167 N.J. at 444; *Yueh v. Yueh*, 329 N.J. Super. 447, 466, 748 A.2d 150 (App. Div. 2000).

Zurich argues that the court failed to follow New Jersey law in determining the reasonableness of the hourly rates charged by Montgomery, McCracken, Walker & Rhoads (MMWR), counsel for HSNA and Hamburg. It contends that the Special Master refused to consider either the nature **[32]** of the work performed or the prevailing rates for such work in Mercer County. It maintains that had the Special Master analyzed the situation properly, he would have found that MMWR was providing insurance defense work, which is routinely billed at a significantly lower hourly rate than other legal services.

In his written decision, the Special Master observed that MMWR had been retained by a "through transport mutual club," an organization of intermodal operators who are self-insured through a cooperative entity. The reason that MMWR was selected was that the firm had expertise in intermodal trucking operations.

The Special Master summarized the law concerning fee awards as set forth in three cases: *Microsoft v. United Computer Resources of N.J., Inc.*, 216 F. Supp. 2d 383 (2002); *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 860 A.2d 435 (2004); and *Rendine, supra*, 141 N.J. at 292. In so doing, he listed numerous factors to be considered in determining the reasonableness of the fee including "[t]he fee customarily charged in locality for similar legal services".

The Special Master rejected Zurich's argument that the rate should be based on the fee normally charged for insurance defense work. He observed **[33]** that if Zurich had honored its obligations under the insurance policy in the first place it could have hired an insurance defense firm of its own choosing. He further observed that Zurich's argument was "somewhat disingenuous" because insurance defense firms are able to charge low hourly rates because they receive a high volume of work from their insurance company clients. Here, there was no evidence that MMWR would receive the volume that would ordinarily be accorded an insurance defense firm. He also disagreed with Zurich's characterization of the matter "as a simple rear-end hit insurance case," finding that view to be a "gross oversimplification" and observing that there had been novel issues presented relating to the intermodal trucking industry.

The Special Master concluded that the fees set forth in MMWR's application were fair and reasonable with certain exceptions. He blended the rates billed by two of the associates, decreased the rates billed by two summer associates and two paralegals, and awarded an "of counsel" attorney the lower of two billed rates. The final hourly rates approved by the Special Master were $325 for partners, $310 for senior associates, $300 for "of **[34]** counsel" attorney, $250 to $180 for associates, $160-$125 for paralegals, and $150 for summer associates.

The motion judge confirmed the Special Master's findings as to hourly rates. He acknowledged that the Special Master had not made any specific findings with regard to the prevailing rates in Mercer County, but noted that the Special Master had provided a rationale for rejecting Zurich's argument concerning insurance company defense rates. He found that it was reasonable for the Special Master to conclude that insurance defense rates did not apply because MMWR was not "an assigned insurance counsel providing regular and continuous services to an insurance company".

With regard to the rates themselves, the judge found that

> per *R.* 4:41-5 it is the burden of Zurich to establish that the hourly rate award is contrary to the evidence. Zurich does not meet this burden. It does not cite any evidence outside of the insurance company hourly rates to show MMWR hourly rates should be reduced. It only relies upon the certification of its within counsel to establish that MMWR's rates are reasonable [sic].
>
> Furthermore, this Court does not find a basis to reject the Special Master's conclusions of **[35]** MMWR's hourly rates. The rates are reasonable given the attorneys' experience and the rates charged by a firm the size of MMWR. The absence of findings of facts concerning the prevailing rates in Mercer County does not warrant rejection where the rates do not appear unreasonable. *Yueh v. Yueh*, 329 N.J. Super. 447, 466, 748 A.2d 150 (App. Div. 2000).

The judge also noted that MMWR's rates must be viewed in the context of comparably-sized firms, which given the reality of the marketplace, charge higher rates. "Yet, the rates charged herein are lower than MMWR's normal rates and did not increase over the six plus years of litigation[.]"

"The starting point in awarding attorneys' fees is the determination of the 'lodestar,' which equals the 'number of hours reasonably expended multiplied by a reasonable hourly rate.'" *Furst, supra*, 182 N.J. at 21 (quoting *Rendine, supra*, 141 N.J. at 335). In setting the lodestar, a trial court first must determine the reasonableness of the rates proposed by prevailing counsel in support of the fee application, applying the factors set forth in *RPC* 1.5(a). *Id.* at 22. "'[T]he court should evaluate the rate of the prevailing attorney in comparison to rates 'for similar services **[36]** by lawyers of reasonably comparable skill, experience, and reputation.'" *Ibid.* (quoting *Rendine, supra*, 141 N.J. at 337). *See also Litton Indus., Inc. v. IMO Indus., Inc.*, 200 N.J. 372, 387, 982 A.2d 420 (2009) (applying the test for reasonable attorney's fees in a contract case). Further, the hourly rate should be calculated according to the prevailing market rates in the relevant community. *Rendine, supra*, 141 N.J.

at 337 (citing *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990); *see also R.M. v. Supreme Court of New Jersey*, 190 N.J. 1, 10, 918 A.2d 7 (2007) (noting that market rate analysis incorporates equitable considerations). In general, a reasonable hourly rate is one "'that would be charged by an adequately experienced attorney possessed of average skill and ordinary competence--not those that would be set by the most successful or highly specialized attorney in the context of private practice.'" *Walker v. Giuffre*, 209 N.J. 124, 132-33, 35 A.3d 1177 (2012) (quoting *Singer v. State*, 95 N.J. 487, 500-01, 472 A.2d 138, *cert. denied*, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984)).

Both the Special Master and the court distinguished MMWR's situation from that of an insurance defense firm by noting that MMWR could not compensate **[37]** for low hourly rates through business volume. That distinction is well supported by the record. The record also supports the finding that MMWR was not simply providing insurance defense. Rather, the circumstances of this case required experience and expertise in the field of intermodal transportation. The fact that MMWR was retained by a cooperative formed by intermodal operators attests to the need for such expertise. For these reasons, it would be inequitable to limit the rates charged by MMWR to those charged by insurance defense firms.

As to what rates would be reasonable for lawyers of comparable skill, experience and reputation in Mercer County, neither the Special Master nor the court made any specific findings. The situation is thus comparable to that in *Walker v. Giuffre*, 415 N.J. Super. 597, 607, 2 A.3d 1165 (App. Div. 2010), *rev'd in part on other grounds*, 209 N.J. 124, 35 A.3d 1177 (2012),[9] where the trial court had made specific findings regarding the *RPC* 1.5(a) factors, but with regard to the fee customarily charged in the locality for similar legal services merely stated: "I have handled a significant number of class actions and ruled on a number of fee requests. The fees requested in this case **[38]** are generally consistent with what I have seen and awarded in the past. In my opinion, they are reasonable." We found this statement insufficient to support the fee determination. *Ibid.* We explained that "[t]he personal opinion of a trial judge predicated solely on his or her own professional experiences does not satisfy the analysis required by the Court under *Rendine* to determine a reasonable hourly rate." *Ibid.*

At least one court has been willing to overlook the lack of findings as to local market rates, however. In *Yueh, supra*, 329 N.J. Super. at 466, we found that "[a]lthough the judge's acceptance of the hourly rate is not accompanied by any findings of fact concerning the prevailing rates in the community, the rates for counsel's work do not appear unreasonable. Defendant has not challenged plaintiff's attorney's hourly rate of $200."

The same situation exists here. Zurich did not object to any aspect **[39]** of the rates charged by MMWR other than that they exceeded the rates commonly billed by insurance defense firms. It provided the court with no data concerning billing rates for Mercer County firms who do other types of civil practice, nor did it suggest what reasonable hourly rates would be for the MMWR attorneys. The only data provided by Zurich concerned the billing practices of insurance defense firms, which as previously discussed, was not relevant under the circumstances.

The judge noted the deficiency in Zurich's proofs and found that the fees charged by MMWR, as adjusted by the Special Master, were reasonable. He considered this to be so especially in light of the fact that those fees did not increase over the course of the litigation and that they represented lower rates than billed to other MMWR clients. Given the substantial deference accorded to fee determinations by a trial court, *Packard-Bamberger, supra*, 167 N.J. at 444, the court's findings with regard to hourly rates are affirmed.

Zurich complains that even though it was only required to provide coverage to one of the defendants, the court allocated 97.5% of the total defense costs to that defendant. It argues that the **[40]** Special Master failed to conduct an independent analysis of the fees that MMWR attributed to HSNA and left MMWR's division of time entries unchallenged. It further argues that there was no basis to support the Special Master's conclusion that HSNA was the "target defendant," which should bear the bulk of the fees at issue. It asserts that "it was a complete miscarriage of justice to require Zurich to reimburse MMWR for fees it incurred for the defense of the three non-covered defendants".

In discussing the facts underlying the insurance coverage, the Special Master wrote:

> In the course of its representation of [HSNA], MMWR also represented other co-defendants such as Interpool, Inc., Hamburg and Trac Lease. This joint representation was done for judicial economy since many of the issues were similar to all defendants. At a prior hearing, Zurich American argued that the fee to MMWR should be divided equally by the number of parties they represented.
>
> [MMWR's counsel] represented to the court that she would only bill, for the purposes of my decision, work done for [HSNA]. In reviewing the extensive time sheets, this is exactly what she has done. Accordingly, I make no allocation as to fees **[41]** for representing other parties.

Later, in addressing allocation arguments raised by Zurich, the Special Master referred extensively to the motion hearing of February 18, 2009. He noted that MMWR's counsel had argued that Hamburg owned the container, but Interpool and Trac Lease had nothing to do with the case and "were along for the ride". "The theories of liability have always been against [HSNA] who is the real party in interest". Noting that he had "reviewed the time sheets, line by line," the Special Master found that MMWR's counsel had submitted billable time only as it related to work done on behalf of HSNA, except in "one or two small instances where work was done for another defendant" and he did not allow the fee.

The motion judge rejected Zurich's argument that the Special Master erred in not establishing a greater allocation of fees to the non-covered defendants. He agreed that HSNA was the primary client and that MMWR's itemized billing statement credibly allocated time spent on HSNA defense. He reasoned:

> The Special Master's Decision properly concluded that [HSNA] was the primary target because New Start was basically out of business during the lawsuit. He copiously reviewed **[42]** MMWR's billing statement as evidenced by his 69 pages of detailed analysis of each billing activity. The statement satisfied his request that MMWR submit billing only for legal services provided to [HSNA]. . . . [T]he Court will not reduce the attorney fees and costs owed to [HSNA]. It[s] fees do not include services for parties not covered by Zurich's insurance policy.

New Jersey courts follow the general rule that "when the insurer has wrongfully refused to defend an action and is then required to reimburse the insured for its defense costs, its duty to reimburse is limited to allegations covered under the policy, provided that the defense costs can be apportioned between covered and non-covered claims." *SL Indus., Inc. v. Am. Motorists Ins. Co.*, 128 N.J. 188, 214 -15, 607 A.2d 1266 (1992). When defense costs cannot be apportioned, however, "the insurer must assume the cost of the defense for both covered and non-covered claims." *Ibid.* Although "courts will rarely be able to determine the allocation of defense costs with scientific certainty," they will presumably be "able to analyze the allegations in the complaint in light of the coverage of the policy to arrive at a fair division of costs." *Id.* at 216. **[43]** Thus, "[w]hen a party is entitled to attorney's fees for only some of the work performed, the relevant services should be identified or a reasonable explanation made for the failure to do so." *Ricci v. Corporate Express of the E., Inc.*, 344 N.J. Super. 39, 48, 779 A.2d 1114 (App. Div. 2001), *certif. denied*, 171 N.J. 42, 791 A.2d 220 (2002). *See also Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 598 n.17, 610 A.2d 903 (App. Div.) (noting that prevailing party may not be able to isolate covered services, but should be required to do so or show why it cannot), *certif. denied*, 133 N.J. 429, 627 A.2d 1135 (1992).

The law set forth in *SL Industries* was properly applied by the Special Master and the court. Counsel for MMWR stated that the affidavit of services and billing records submitted to the court represented only those defense costs that were incurred by HSNA. Thus, counsel identified and isolated the relevant services as required by *Ricci* and *Shuttleworth*. After a thorough review of MMWR's submissions in which he examined each itemized charge, the Special Master found counsel's representation to be credible. The court found no basis to disturb the Special Master's determination.

For these reasons, the court did not abuse its discretion **[44]** in its allocation of defense costs among the Hamburg Süd defendants.

Zurich argues that the court erred by allowing HSNA to recover fees incurred in prosecuting claims against other third-party defendants, specifically Capacity Coverage Company of New Jersey, Inc. and Falcon Trust Commercial Risk Specialists. It asserts that the Special Master dismissed its arguments on

this point in a conclusory fashion without explaining why these claims could not be isolated from those against Zurich. Further, they contend that even if there were some overlap of claims, the Special Master was nevertheless obligated to undertake a fair apportionment.

With regard to Zurich's arguments concerning allocation of fees for third-party claims, the Special Master noted that MMWR's counsel argued that the claims against Capacity Coverage and Falcon Trust were "inextricably bound" to the claims against Zurich, and it was impossible to sever the fees and costs associated with the Zurich claim from those associated with the other third-party claims. MMWR's counsel also argued that the claims against Capacity Coverage and Falcon Trust were necessitated by Zurich's wrongful denial of coverage. The Special Master **[45]** agreed with these arguments, finding that "Capacity Coverage and Falcon Trust were indeed intertwined with Zurich regarding the coverage given to New Start[.]"

The motion judge accepted the Special Master's decision to reimburse HSNA for attorney's fees and costs related to claims against Capacity Coverage and Falcon Trust. He agreed that the decision by the defendants to pursue claims against other third-party defendants was necessitated by Zurich's denial of coverage to New Start. Noting that HSNA's allegations were in good faith and supported by an expert witness, he found that HSNA's decision to sue all parties that played a role in the procurement and cancellation of the coverage was consistent with the allowance of attorney's fees under *Rule* 4:42-9(a)(6).

As discussed previously, in order to recover attorney's fees when only a portion of an insured's claims are covered under the insurance policy, the insured is required to isolate and identify the services related to the covered claims or explain why it is unable to do so. *SL Indus., supra*, 128 N.J. at 214-15; *Ricci, supra*, 344 N.J. Super. at 48. While the burden of production lies with the insured, "the burden of persuading the **[46]** trial judge, by a preponderance of the evidence, as to whether those fees can be allocated and, more importantly, how they should be allocated, should fall upon the insurer who allowed the difficulties of allocation to accrue through its refusal to defend." *Hebela v. Healthcare Ins. Co.*, 370 N.J. Super. 260, 280, 851 A.2d 75 (App. Div. 2004).

Here, defendants' claims against Capacity Coverage and Falcon Trust were necessitated by Zurich's refusal to provide insurance coverage under the policy. It was well within the court's discretion to award attorney's fees to HSNA for the cost of pursuing those claims

Affirmed.

Footnote 1

An intermodal container is "a reusable, transportable enclosure that is especially designed to be used with integral locking devices that secure it to a container chassis vehicle to facilitate the efficient and bulk shipping and transfer of goods by, or between various modes of transport, such as highway, rail, sea, and air."

Footnote 2

The UIIE-1 requires the motor carrier to indemnify the provider against **[6]** any losses arising out of the motor carrier's negligent or intentional acts or omissions during the interchange period It requires the motor carrier's insurer to furnish the President of the IANA with a certificate of insurance and thirty days' notice of cancellation.

Footnote 3

The IANA maintains and collects documentation, including insurance information, that is required for parties to do intermodal business. Carriers and providers have access to this information via the internet.

Footnote 4

The cancellation common policy condition required that written notice be sent to "the first Named Insured and any person entitled to notice under this policy."

Footnote 5

Whether the UIIA may be considered to be a lease for purposes of the policy is addressed *infra*.

Footnote 6

A "schedule" is a sheet of paper annexed to an instrument, "exhibiting in detail the matters mentioned or referred to in the principal document." *Black's Law Dictionary, supra*, at 1344.

Footnote 7

The court's order granted partial summary judgment in favor of Hamburg, as well. Zurich later argued that Hamburg was not signatory to the UIIA and hence not entitled to notice under the policy. **[23]** Hamburg has abandoned claims for coverage for itself and other related entities and seek attorney's fees and costs for HSNA only.

Footnote 8

Despite its request for relief on this basis, Zurich argues in its reply brief that "the trial court found that 'no lessor/lessee agreement existed as in a documentary fashion such that Hamburg would be covered under the insurance policy'."

Footnote 9

The Supreme Court's grant of certification was limited to the issue of the contingency enhancement of the fee award in *Walker*. 209 N.J. at 147. The Court thus left undisturbed the Appellate Division's findings on the trial court's assessment of the reasonableness of the fees. *Ibid.*

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