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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
Superior Court of New Jersey,Appellate Division.
John LISS, Plaintiff-Appellant/Cross-Respondent,
v.
FEDERAL INSURANCE COMPANY,
Defendant-Respondent/Cross-Appellant,
andAnthony Ilutzi, Grace Holdings, Inc., Gracetech, Inc. and Grace Technologies, Inc., Indispensable Parties.
Federal Insurance Company, Third-Party Plaintiff,
v.
Grace Consulting Inc., Indispensable Third-Party Defendant.
Argued May 10, 2006.
Decided Oct. 6, 2006.

SYNOPSIS

On appeal from the Superior Court of New Jersey, Morris County, Law Division, L-1845-01.

David A. Mazie argued the cause for appellant/cross-respondent (Nagel, Rice & Mazie, attorneys; Mr. Mazie, of counsel; Randee M. Matloff, Mr. Mazie and David M. Freeman, on the brief).
Stacey P. Rappaport argued the cause for respondent/cross-appellant (Courter, Kobert & Cohen and Drinker, Biddle & Reath, attorneys; Anthony J. Zarillo, Jr., James M. Altieri, Frederick P. Marczyk, and Ms. Rappaport, of counsel and on the brief).

Before Judges WECKER, FUENTES and GRAVES
.
PER CURIAM.
*1 This appeal, concerning a question of insurance coverage under a Directors' and Officers' (D & O) policy, arises after a lengthy procedural history, and unfortunately cannot yet be finally resolved.

Plaintiff, John Liss, appeals from a June 2004 order granting summary judgment to defendant, Federal Insurance Company, and dismissing Liss's complaint for coverage. Liss also appeals from a June 2003 order denying his motion for partial summary judgment ordering coverage. Federal cross-appeals, on a protective basis, from several interlocutory orders, including the earlier denial of its summary judgment motion. We now reverse the summary judgment in favor of Federal and remand for trial of Liss's underlying claim.

Here is the background of the underlying claim. Anthony Ilutzi, then President of Gracetech, Inc., Grace Consulting, Inc., and Grace Technologies, Inc., hired Liss as Vice-President of Grace Technologies in February 1997. In late 1998, Ilutzi was negotiating with Raymond James & Company to provide the Grace companies with $2.5 million of venture capital in exchange for 12.5% of the common stock of a newly-created holding company. Under the proposed deal with Raymond James, a new holding company, Gracetech, Inc., would be created as the parent company of Grace Technologies and Grace Consulting.

On November 13, 1998, at the request of Ilutzi and apparently because Raymond James viewed Liss as a key employee, Liss entered into a new employment agreement, this time with Gracetech. [FN1] The agreement with Gracetech provided that in lieu of more than $800,000 in commissions due him from Grace Technologies, Liss would receive shares representing a 9.8% interest in Gracetech, which would own Grace Technologies and Grace Consulting. As a result of differences between Liss and Ilutzi, Liss resigned from his position as Vice-President of Gracetech in January 1999. Pursuant to the November 1998 employment agreement, plaintiff was entitled to redeem his shares in Gracetech at current market value less a 30% discount. The value was estimated by Liss's

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expert at between $1.372 and $1.645 million. Apparently as a result of plaintiff's resignation, Raymond James backed out of the proposed venture capital deal.

FN1. The record does not contain a copy of this subsequent employment agreement.

When Ilutzi learned that Liss had accepted employment with a company thought to be a competitor, Ilutzi decided not to proceed with the redemption of plaintiff's shares. On April 7, 1999, the Grace companies filed a complaint against Liss and his new employer in the Chancery Division, alleging breach of a restrictive covenant and related provisions of Liss's employment agreement. Liss filed a counterclaim seeking redemption of his shares in Gracetech. Liss later amended his counterclaim to add a count against Ilutzi, alleging fraud in the corporate restructuring that rendered shares in Gracetech worthless.

After losing the Raymond James capital investment, Ilutzi brokered a new deal with Hudson Venture Partners in June 1999. In connection with Hudson Venture's investment, Ilutzi formed a new holding company, Grace Holdings, as the parent company for Grace Technologies and Grace Consulting. Ownership of those two Grace companies was transferred to Grace Holdings, leaving Gracetech without assets and Liss's shares with no value.

*2 Federal had issued a D & O policy to the Grace companies, providing "executive liability and indemnification" to the company and its officers and directors, including Ilutzi. The effective period of the claims-made policy was June 15, 1999, through June 15, 2000.

Ilutzi filed a claim with Federal within that period, seeking coverage for Liss's claims against him and the Grace companies. Federal responded by letter dated February 2, 2001, denying coverage for Liss's claims in the Chancery Division action. The letter specifically denied coverage on two grounds. First, Liss was Vice-President of Gracetech and both he and Ilutzi were "Insured Persons" under the policy, the terms of which excluded coverage for a claim by one person insured under the policy against another person insured under the same policy (the "Insured versus Insured" exception). Federal also denied coverage on the ground that Liss's counterclaim against the Grace companies and Ilutzi was pending before the effective date of the policy, and the " Pending or Prior" claims exception applied. Finally, the letter included the following disclaimer:

The foregoing statements of Federal's position as to coverage for this matter are premised upon presently known facts. We expressly reserve all rights under the Policy and available at law to further disclaim coverage and/or rescind the Policy on additional and alternative bases as other terms, conditions, exclusions, endorsements and provisions of the Policy, including representation, statements, declarations and/or omissions in connection with the application therefore, are found to be applicable, whether or not based on facts now known or made available to Federal.

On June 21, 2001, Liss filed a separate complaint against Federal in the Law Division, claiming third-party beneficiary status under the policy and seeking a declaratory judgment that Ilutzi was covered for all claims that plaintiff had asserted against him in the Chancery Division action. Federal filed an answer on October 5, 2001, which included a series of separate, affirmative defenses. Liss filed an amended complaint in the Law Division action on February 26, 2002, adding Ilutzi and the Grace companies as indispensable party defendants. Federal's answer to Liss's amended complaint, filed on April 5, 2002, repeated the separate defenses and added cross-claims and a third-party complaint against Grace Consulting (which apparently had been inadvertently omitted from the prior pleadings). On May 13, 2002, the Grace companies, including Grace Consulting, filed an answer, cross-claims, and third-party complaint against Federal, essentially seeking a declaratory judgment that they were entitled to a defense and indemnification for Liss's claims in the Chancery Division action.

Cross-motions for summary judgment on coverage were filed by all parties. The motions were denied by a now-retired Law Division judge, who ordered extensive discovery against Federal and denied

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Federal's motion for a protective order.

*3 When Federal failed to provide the ordered discovery relevant to its two claimed policy exclusions, its pleadings were dismissed without prejudice, subject to reinstatement upon compliance. Instead of complying with the discovery orders, in April 2003 Federal entered into a limited agreement with all parties that would allow reinstatement of its pleadings. The agreement provided for payments of $40,000 to Liss and $75,000 to Ilutzi and the Grace companies, to compensate them for defense costs to date. Federal also waived its two claimed exclusions ("Insured versus Insured" and "Pending or Prior") in exchange for consent to reinstatement of its pleadings and a reservation of rights to pursue certain other potential-and now hotly disputed-defenses.

The agreement entitled "Reservation of Rights/Non-waiver Agreement" was negotiated between counsel. After reciting a history of pleadings and orders in the underlying and coverage actions, the Agreement provided:

1. Subject to paragraph 3. below, Federal agrees to withdraw its denial of coverage with respect to the Subject Liss Claim and agrees not to assert any future coverage defense to the Subject Liss Claim based on the "*Insured v. Insured Exclusion,*" the " Pending or Prior Exclusion" *and/or any other bases based on facts or circumstances that are known (or through reasonable diligence and discovery in the Coverage Action could have been known) to Federal as of the date of the Agreement.*

2. Subject to paragraph 3. below, Federal agrees that, at this time, coverage exists for the Subject Liss Claim and Federal agrees to associate in the defense of Ilutzi with respect to the Subject Liss Claim pursuant to the terms of the Federal Policy, including, but not limited to, Section 11. ("Defense and Settlement").

3. Subject to paragraphs 1. and 2. above, Liss, Ilutzi and the Grace Entities agree that neither Federal's association in the defense of Ilutzi with respect to the Subject Liss Claim nor this agreement shall act as a waiver of Federal's rights under the Federal Policy and available at law to deny or limit coverage for the Subject Liss Claim based on:

(A) any of the Grace Entities not coming within the definition of "Insured Person" in the Federal Policy;
(B) the "Wrongful Act," as defined in the Federal Policy, not having been committed, attempted, or allegedly committed or attempted, by Ilutzi in his " Insured Capacity," as defined in the Federal Policy, or not having been claimed against Ilutzi solely by reason of his serving in such "Insured Capacity";
(C) the definition of "Defense Costs" in the Federal Policy;
(D) *the definition of "Loss"* (including, but not limited to, a denial of coverage for punitive damages) in the Federal Policy;
(E) Exclusions 6(a), (b) and/or (c) in the Federal Policy;
(F) Section 12 of the Federal Policy ("Allocation");
(G) Section 13 of the Federal Policy ("Other Insurance");
*4 (H) Exclusion 5(i), as amended by Endorsement No. 2; or
(I) on alternative basis, as other terms, conditions, exclusions and provisions of the Federal Policy are found applicable, based on facts or circumstances that are unknown (and through reasonable diligence and discovery in the coverage action could not have been known) to Federal as of the date of this Agreement.

4. The Signatories agree to present to the Court in the Coverage Action a Consent Order, which restores Federal's Answer and Affirmative Defenses, Cross-Claims and Third-Party Complaint and dismisses the Coverage Action without prejudice and without costs against any party. The Signatories shall do other things, including, but not limited to, the execution of additional documents, necessary to cause Federal's pleadings to be restored and the Coverage Action to be dismissed without prejudice and without costs.

[Emphasis added.]

After entering into that Agreement, the parties attempted mediation to resolve the entire dispute. However, a disagreement arose during the mediation sessions over the scope of the defenses that were reserved to Federal under Paragraph 3(D) of the Agreement. Federal argued for the first time that any damages Liss might recover against Ilutzi would not constitute a "loss" under the policy because such damages would be "restitutionary" in

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nature; that is, Liss would be receiving a return of funds that Ilutzi and the Grace companies wrongfully withheld. Thus in 2003, Federal first raised the so-called restitution defense to Ilutzi's September 2000 claim for coverage, contending that the claim was "uninsurable under the law" and " beyond the scope of the Policy's coverage." As a result, mediation broke down.

Shortly after mediation failed, on May 23, 2003, Liss entered into a so-called "*Griggs*[FN2] agreement " settling his claims against Ilutzi and the Grace companies in exchange for an assignment of Ilutzi's claims against Federal. Under their settlement, Ilutzi admitted that plaintiff was entitled to the redemption of his Gracetech shares when he resigned his position with Gracetech, and that he, Ilutzi, had taken actions that rendered Liss's shares worthless. The parties agreed that Liss was owed the value of his shares at the time of his resignation, agreed to be $1.45 million. In exchange, Liss released Ilutzi and the Grace companies from all related claims and agreed that satisfaction of the judgment could be obtained only from the proceeds of the Federal policy. In addition, Ilutzi and the Grace companies released all claims asserted against plaintiff.[FN3]

FN2. *Griggs v. Bertram,* 88 *N.J.* 347 (1982).

FN3. These parties have neither explained nor referred to paragraph nine of their settlement agreement, dismissing Ilutzi's and the Grace companies' claims against Liss with prejudice, but providing for arbitration of those claims. Nor have they explained paragraph eight, which appears to provide that the claims against Liss are preserved, to be collected only out of Liss's recovery, if any, against Federal.

The parties filed cross-motions for summary judgment, each seeking to enforce its own interpretation of the Reservation Agreement. Federal sought to raise a "restitution" defense, based upon Judge Posner's opinion for the Seventh Circuit in *Level 3 Commc'ns, Inc. v. Federal Ins. Co.,* 272 *F.*3d 908 (7th Cir.2001) (*Level 3(II)*), contending that such a defense was "reserved" by Paragraph 3(D) of the Reservation Agreement. Liss contended that the new defense was waived by Paragraph 1 of the Agreement. After a lengthy argument, the judge invited the parties to file new summary judgment motions on the merits of the restitution defense.

*5 Federal's reliance on the *Level 3* restitution defense apparently was based upon the definition of "loss" in the Federal policy, which "does not include ... matters uninsurable under the law pursuant to which this coverage section is construed. " Federal sought to establish that Liss's claim against Ilutzi represented an "uninsurable" matter. But *Level 3* is not "the law pursuant to which [the Federal policy] is construed," and we find no public policy that makes the Liss claim "uninsurable" as a matter of law.

The motion judge adopted the *Level 3* defense, concluding that the claims against Federal were barred by an implied public policy exception to its insurance contract: a public policy against insuring a loss that constitutes "restitution." While we reject rather than adopt the restitution defense, our resolution of Federal's proposed defense on its merits renders the disputed scope of the Reservation Agreement a moot point.[FN4]

FN4. Following the order granting summary judgment in favor of Federal, Liss's attorney wrote to the judge, noting that the issue whether Federal reserved its right to assert the restitution defense remained open. The judge responded by letter, stating that her earlier order disposed of the matter in its entirety because such coverage would violate public policy.

In *Level 3(II),* Judge Posner addressed a coverage dispute involving a Federal D & O policy. There, several shareholders had filed a securities-fraud complaint against Federal's insured, which then settled the suit and sought indemnification from Federal. One of the plaintiffs was a director of the

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insured corporation's subsidiary, and thus also an insured under the Federal policy. The circuit court had previously reversed and remanded a summary judgment granted in favor of Federal on the basis of the "Insured versus Insured" exclusion. *Level 3 Commc'ns, Inc. v. Federal Ins. Co.,* 168 *F.*3d 956 (7th Cir.1999) (*Level 3(I)*). The circuit court remanded to the district court to distinguish the portion of the settlement attributable to the plaintiff who was also an insured, which was not to be covered, from claims made by other plaintiffs, which were to be covered. Federal filed an appeal from the district court's order on remand. This time, Federal argued that no part of the settlement was "a 'loss' within the meaning" of the policy because it was "restitutionary in nature." 272 *F.*3d at 909-10.

The court agreed. "The interpretive principle for which Federal contends-that a 'loss' within the meaning of an insurance contract does not include the restoration of an ill-gotten gain-is clearly right." *Level 3(II), supra,* 272 *F.*3d at 910. "An insured incurs no loss within the meaning of the insurance contract by being compelled to return property that it had stolen, even if a more polite word than 'stolen ' is used to characterize the claim for the property's return." *Id.* at 911.[FN5]

FN5. Despite the 2001 decision in *Level 3(II),* Federal did not raise its restitution defense in this case until 2003, after entering into the Reservation Agreement.

The few reported cases in other jurisdictions that have cited *Level 3(II)* have described an uninsurable loss as one requiring repayment for an insured's retention of "ill-gotten" gains. *E.g., United W. Grocers, Inc. v. Twin City Fire Ins. Co.,* 457 *F.3d* 1106 (9th Cir.2006).

California case law precludes indemnification and reimbursement of claims that seek the restitution of an ill-gotten gain. This public policy exclusion for restitutionary relief applies in limited circumstances. ... The defendant is asked to return something he wrongfully received; he is not asked to compensate the plaintiff for injury suffered as a result of his conduct.

***6** The label of "restitution" or "damages" does not dictate whether a loss is insurable. The fundamental distinction is not whether the insured received " some benefit" from a wrongful act, but whether the claim seeks to recover only the money or property that the insured wrong-fully acquired.

[*Id.* at __ (internal citations and quotation marks omitted)].

See also Vigilant Ins. Co. v. Credit Suisse First Boston Corp., 782 *N.Y.S.*2d 19, 20 (App.Div.2004) ("Restitution of ill-gotten funds does not constitute ' damages' or a 'loss' as those terms are used in insurance policies.")

To conclude that *Level 3(II)* reflects New Jersey law would be inconsistent with the Supreme Court's decision in *Ambassador Ins. Co. v. Montes,* 76 *N.J.* 477 (1978). In *Ambassador,* the Court found coverage under a commercial general liability (CGL) policy for the benefit of an innocent victim of the insured's intentional criminal act. The insurance policy in dispute had no express exclusion for intentional wrongs, but the carrier relied on the argument "that public policy prohibits insurance indemnity for the civil consequences of an insured's intentional wrongdoing." *Id.* at 482. The Supreme Court recognized and accepted that " general principle," but held that it does not apply " under all circumstances [and][c]ertainly it should not come into play when the wrongdoer is not benefited and an innocent third person receives the protection afforded by the insurance." *Id.* at 483. The Court held that in such circumstances, the insurer would be subrogated to the victim's rights against the wrongdoer, who must indemnify the insurance company.

When the insurance company has contracted to pay an innocent person monetary damages due to any liability of the insured, such payment when ascribable to a criminal event should be made so long as the benefit thereof does not enure to the assured. In furtherance of that justifiable end, under most circumstances it is equitable and just that the insurer be indemnified by the insured for the payment to the injured party. In subrogating the insurer to the injured person's rights so that the insurer may be reimbursed for its payment of the insured's debt to the injured person, the public policy principle to which we adhere, that the

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assured may not be relieved of financial responsibility arising out of his criminal act, is honored. The insurer's discharge of its contractual obligations by payment to an innocent injured third person will further the public interest in compensating the victim.
[*Id.* at 484.]

The Court has not deviated from *Ambassador* in the intervening years. In the only two Supreme Court cases citing *Ambassador,* specific policy exclusions not present in this case barred coverage. In each case, however, the Court restated the principles of *Ambassador.* In *Allstate Ins. Co. v. Malec,* 104 *N.J.* 1, 11-13 (1980) (holding that an automobile policy exclusion for injuries caused by an intentional wrongful act did not violate public policy), the Court summarized *Ambassador's* holding: [FN6]

> FN6. The Court noted that although the two justices who had disagreed in *Ambassador* had not changed their positions, it was unnecessary to "revisit" that decision in order to resolve the instant case.

*7 The circumstances that led the Court to find coverage in Ambassador were that (1) the policy provided on its face for coverage, (2) there was no exclusionary clause or other pertinent limitation in the policy, (3) payment of the policy proceeds would protect an innocent third person without benefitting the wrongdoer-insured, and (4) the insurer could indemnify itself by being subrogated to the third party's rights against the insured-tortfeasor.
[*Id.* at 12.]

In *Princeton v. Chunmuang,* 151 *N.J.* 80, 94-95 (1997) (holding that an explicit exclusion for " injuries resulting from the performance of a criminal act" insulated the medical malpractice insurer from liability for damages resulting from a physician's sexual assault), the Court recognized that Ambassador resolved competing public policies:This Court has acknowledged the policy considerations that justify restricting an insurer's obligation to indemnify an insured against the civil consequences of his or her own wilful criminal act, as well as the competing public interest in compensating innocent victims. Thus, in *Ambassador* ..., this Court held that where the beneficiary of liability insurance is an innocent third party, rather than the insured, payment should be made "so long as the benefit thereof does not enure to the assured." Accordingly, we held that the insurer should be indemnified by the insured for payments made to cover the insured's civil liability for a criminal event.
[*Ibid.* (quoting *Ambassador,* 76 *N.J.* at 484) (internal citations omitted).]

A fortiori, no overriding public policy bars coverage for damages resulting from a civil wrong such as Liss alleges.

The motion judge's reliance on *Level 3* to bar coverage here is inconsistent with the Court's resolution of potentially conflicting public policies in *Ambassador,* and inconsistent with the facts before us. Under *Ambassador,* Ilutzi's conduct, even if wrongful in a civil sense, does not preclude coverage for the benefit of Liss, if he is an innocent injured party, as long as Ilutzi does not profit thereby.

Moreover, Liss's claims here are not analogous to the claims of the *Level 3* shareholders. There the plaintiffs claimed that they had been induced by fraudulent misrepresentations to sell their shares to an acquiring corporation at an undervalued price. They sought damages (instead of rescission) because the acquired company was no longer viable, making it impossible to unwind the transaction and return the shares. In other words, the settlement paid by the insured in *Level 3* was money it owed to the plaintiffs for the property it acquired from them.

While we reverse the summary judgment in Federal's favor, on the record before us, we cannot resolve the coverage issue as a matter of law in Liss's favor as he seeks in his appeal from denial of his motion for partial summary judgment. Where litigation on coverage arises during the course of the underlying litigation of a claim against the insured, there is always a question whether first to

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resolve the underlying claim or the coverage issue. Here, despite the parties' and the judge's understandable attempt to resolve the coverage dispute first, Federal's obligation to cover Liss's claim against Ilutzi cannot be resolved without a trial on those claims, irrespective of the so-called *Griggs* settlement between Liss and Ilutzi. That settlement may remain effective between the two; for reasons we shall come back to, it does not necessarily bind Federal as to the amount of the settlement, even if the Federal policy is determined to afford coverage for Ilutzi's liability to Liss. *See Griggs v. Bertram,* 88 *N.J.* 347, 364-67 (1982); *Pasha v. Rosemount Mem'l Park, Inc.,* 344 *N.J.Super.* 350, 356 (App.Div.2001), *certif. denied,* 171 *N.J.* 42 (2002).

*8 Although the effect of the Liss-Ilutzi settlement agreement is not before us on this appeal, we digress briefly to explain *Griggs* . In *Griggs,* the Court held that after the insured's carrier declined coverage, a settlement reached between the injured claimant and the insured tortfeasor would be enforced against the insurer if the settlement was fair and reasonable. The Court recognized the usual rule that a settlement entered into without the carrier's participation normally prohibits recovery on the policy. *Griggs, supra,* 88 *N.J.* at 363-64. But the carrier had waited eighteen months after receiving the claim to decline coverage, thereby justifying the insured in pursuing settlement on his own.[FN7] It was later determined that the third party's injuries resulted from a fight with the insured, thereby falling within the policy's "intentional tort" exclusion. Nonetheless, the Court held the carrier estopped from denying coverage. *Id.* at 364. "The only qualifications to this rule [that the carrier's belated denial of coverage estops it from maintaining the defense] are that the amount paid in settlement be reasonable and that the payment be made in good faith." *Ibid.* (citations omitted).

FN7. A distinction between *Griggs* and the case before us is that in this case, Federal declined coverage early on, but for different reasons.

As to whether those conditions have been met, the Court in *Griggs* held that while "it is entirely appropriate that the ultimate burden of persuasion should rest with the insurer[,] .... [t]his does not mean ... that it is fair or practical to require the carrier also to assume the burden of producing evidence." *Id.* at 366-67. The Court explained that "placing the initial burden of production on the insured will adequately serve to protect the carrier from having to pay a settlement reached through collusion between the insured and the injured third party or which is otherwise unreasonable and the product of bad faith." *Id.* at 367.

We therefore hold that a settlement may be enforced against an insurer in this situation only if it is reasonable in amount and entered into in good faith. The initial burden of going forward with proofs of these elements rests upon the insured and the ultimate burden of persuasion as to these elements is the responsibility of the insurer. This rule reasonably accommodates and compromises the competing interests of the parties and considerations of public policy. It will discourage collusive or overreaching impositions upon insurance carriers and, at the same time, will be conducive toward encouraging settlement and protecting an insured in its efforts amicably to resolve a claim against it after having been abandoned by its carrier.
[*Griggs, supra,* 88 *N.J.* at 368.]

In *Pasha,* although a settlement agreement between the insured (who had been denied coverage) and the third-party claimant did not bar coverage, we concluded that the very terms of the agreement in that case demonstrated collusion and a lack of good faith. The parties' agreement therefore was unenforceable against the insurer. *Pasha, supra,* 344 *N.J.Super.* at 355.

*9 Returning to the issue before us, we conclude that material issues of fact require a trial on Liss's claims against Ilutzi and the Grace companies before coverage can be resolved. Liss's underlying claims against Ilutzi (and originally, against the several Grace entities) must be determined on their merits. Liss's first claim against the companies was for breach of contract in failing to redeem his shares. Liss filed that claim in response to the

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complaint brought against him, alleging his breach of a restrictive covenant and related non-competition and confidentiality provisions of his employment agreement. There has never been a determination of the merits of Liss's contract claim against Ilutzi and the companies, and the settlement between Liss and Ilutzi, as we explained, is not binding against Federal. In the event that Liss's contract claim for redemption is rejected at trial (or if its value is offset by the breach of contract claims against him), Ilutzi's conduct will not have been the proximate cause of any loss, and the coverage issue will be moot. But if Liss's contract claim for redemption prevails, that is only the first step for Liss in proving a claim against Ilutzi that is covered by the D & O policy, because the Federal policy clearly does not cover breach of contract claims.

But Liss also has tort claims against Ilutzi as a Director and President of the company, roles that are covered by the Federal policy. The second step in Liss's case against Federal is to prove that Ilutzi breached a duty of care as a Director or President that resulted in Liss being unable to collect his contract claim. Liss claims that Ilutzi breached his duty to redeem the shares promptly, that he unreasonably delayed the redemption until the shares had lost their value, and that his decision to restructure the Grace companies rendered Liss's shares in Gracetech worthless. Assuming, without deciding, that Liss had a meritorious claim for redemption, the value of that claim, which is not itself a covered claim, would be determined at trial. Liss's coverage claim against Federal would depend upon whether Ilutzi's conduct as a Director or President prevented Liss from recovering the value of his claim. Thus a trial on Liss's underlying claim is required in order to determine whether the Federal policy affords coverage, and if so, for what amount.

In separate points in their briefs, the parties appeal earlier rulings as well. Plaintiff appeals from the earlier denial of its motion for partial summary judgment in June 2003, as well as the summary judgment in favor of Federal in June 2004. Federal cross-appeals from interlocutory orders denying its motions for summary judgment; denying its motion for a protective order and ordering discovery; and striking its pleadings, cross-claims, and third-party complaint.[FN8] In light of our decision reversing summary judgment and remanding for trial, there is no reason to address the parties' appeals from earlier denials of summary judgment.

FN8. This court need not consider the appeals from the June 20, 2003 order because the judge wilson considered the same arguments on the parties' subsequent cross-motions for summary judgment, on which Federal prevailed and from which plaintiff appeals.

***10** Federal's cross-appeal respecting discovery orders and sanctions has insufficient merit to warrant extended discussion. *See R.* 2:11-3(e)(1)(E). We add only this brief comment. We agree that Federal was not obligated to seek leave to appeal interlocutory orders in order to preserve its right to appellate review, *see* Pressler, *Current N.J. Court Rules,* comment 2.3.2 on *R.* 2:2-3 (2006). But Federal is barred from challenging the discovery orders that pertained to its "Insured versus Insured" and "Prior or Pending" coverage exceptions because in the Reservation Agreement, Federal obtained consent to restore its pleadings by agreeing not to assert those defenses. Having accepted the benefit of the restoration provision, Federal cannot avoid the burden.

We reverse summary judgment in favor of Federal and remand for trial of Liss's underlying claims. Only after Liss's claims are determined on the merits will the question of coverage be answered.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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Not Reported in A.2d, 2006 WL 2844468 (N.J.Super.A.D.)

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