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ALSO IN THIS ISSUE:

Massachusetts: Appeals Court Clarifies Assault and Battery Exclusion in Commercial General Liability Policy

The Massachusetts Appeals Court has determined, as a matter of first impression, that a specific assault and battery exclusion in a commercial general liability policy unambiguously excluded from coverage a claim that stemmed from an assault and battery by a third party who was not an employee or agent of the insured.

In Certain Interested Underwriters at Lloyds, London v. LeMons, 85 Mass. App. Ct. 400 (2014), Underwriters brought an action for declaratory judgment that they had no duty to defend or indemnify their insured, Luigi's V, Inc., doing business as Gigi's Pub, with respect to injuries suffered by a patron of the Pub. The patron, Raymond LeMons, was attacked and injured at Gigi's Pub on February 22, 2001. Underwriters had issued a commercial general liability policy that excluded from coverage bodily injury "arising out of an assault or battery, provoked or unprovoked, or out of any act or omission in connection with prevention or suppression of an assault or battery, committed by any Insured or an employee or agent of the insured."

Initially, LeMons and his wife filed suit against Gigi's Pub to recover for bodily injuries and loss of consortium based on the Pub's negligent security. Underwriters initially assumed the defense of Gigi's Pub under a reservation of rights, but then disclaimed any duty to defend or indemnify based on the assault and battery exclusion in the policy.

Underwriters filed an action seeking a judgment that they had no duty to defend or indemnify the Pub with respect to LeMons' accident and injuries. The parties filed cross motions for summary judgment. The Superior Court granted summary judgment to Underwriters on the grounds that the assault and battery exclusion relieved them from any duty to defend or indemnify the Pub. The judge denied LeMons' motion for reconsideration, and he appealed.

The Appeals Court was faced with interpreting the policy's assault and battery exclusion. After stating that it interprets insurance contracts in the same manner as any other contract, giving the words of the policy their usual and ordinary meaning, the Court noted that its interpretation of the specific phrasing of the assault and battery exclusion at issue was a matter of first impression. In particular, the parties disputed the effect of the last phrase in the exclusion: "committed by any Insured or any employee or agent of the insured." LeMons argued that the exclusion only applied when the assault or battery was committed by an employee or agent of the insured. Conversely, Underwriters contended that the last phrase of the exclusion only applied to an act or omission in connection with preventing an assault or battery, and that the policy excluded bodily injury arising out of any assault or battery whether committed by the insured's employee, agent, or an unrelated third party.

The Court concluded that the exclusionary clause consisted of two distinct phrases. The first phrase excluded from coverage those injuries arising out of an assault and battery, regardless of who committed the assault or battery. The second phrase excluded from coverage those injuries arising out of any act or omission in connection with preventing or suppressing an assault or battery, where such acts or omissions were committed by an insured or an employee or agent of the insured. The Court observed that every word in the exclusion must be presumed to have a purpose, and each word must be given meaning and effect. Therefore, the Court concluded that the first phrase in the exclusion unambiguously excluded from coverage injuries sustained by an individual as the result of an assault and battery regardless of who committed the assault or battery.

Looking forward

Massachusetts courts likely will continue to enforce broad assault and battery exclusions as long as they are unambiguously worded. However, insurers should carefully review the language of their policies' exclusions, to ensure that their language is clear and unamguous, and accurately reflects the insurers' intent.

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Massachusetts Allows Attorney-Conducted Voir Dire and Specified Damages Amount

"A recent amendment to Massachusetts General Laws c. 231, § 13B allows the parties in civil actions to suggest a specific monetary amount for damages at trial. That change brings Massachusetts law in line with 39 other states that allow plaintiffs to value damages, including pain and suffering."

Massachusetts recently amended certain trial procedures of the Massachusetts Superior Court. The new enactment amended General Laws c. 234, § 28 to permit any party, or the party's attorney, to conduct a jury voir dire in both civil and criminal jury trials. The court may impose "reasonable limitations" upon the questions posed by the attorneys during such examination, such as setting a limit on the amount of time allocated for voir dire or restricting the nature of the questions asked of the potential jurors.

The change was enacted despite objections from the Superior Court, which feared that attorney-conducted voir dire would result in added costs and delays at trial. The Massachusetts Bar Association strongly supported the bill.

The provision also amended Massachusetts General Laws c. 231, § 13B to allow parties in civil actions to suggest a specific monetary amount for damages at trial. That change brings Massachusetts law in line with 39 other states that allow plaintiffs to value damages, including pain and suffering. Under existing law, attorneys were not allowed to request a particular dollar figure for damages at trial. The amendment is intended to give plaintiffs a fair jury trial, by enabling the jury to better assess the plaintiffs' claimed damages.

These amendments to the General Laws will take effect in January 2015.

Looking forward

At this point, it is unclear whether the Supreme Judicial Court will propose recommendations on how judges determine "reasonable limitations" on the voir dire process, and whether formal guidelines for judges will be implemented. Additionally, with respect to the right to suggest a specific monetary amount for damages, it is unclear how attorneys will deal with this issue, as they attempt to arrive at an appropriate damages amount that will not seem excessive to a jury, while at the same time seeking adequate compensation for their clients.

Rhode Island: Pre-Judgement Interest Due on Part Payment Offer of Judgement

In October, the Supreme Court of Rhode Island ruled, as a matter of first impression, that a tender made in connection with an offer of judgment does not include pre-judgment interest if accepted as part payment only under Rule 68(b)(3).

In November 2003, Timothy Raiche d/b/a Raiche Builders, entered into a written agreement with defendants, Timothy and Pamela Scott, for construction work to be completed on defendants' home. The Scotts agreed to pay $240,000 for the work; however, several changes were made during the construction project and Raiche sent a final invoice for $318,242.80. Defendants had previously paid $189,500 and refused to pay the balance.

Raiche filed suit, alleging breach of contract and unjust enrichment. The defendants made an offer of judgment to plaintiff on October 2, 2008, and deposited a sum of $50,000 into the Superior Court in accordance with Rule 68. Raiche accepted the offer of judgment as part payment only under Rule 68(b)(3) and proceeded with the action on the sole issue of damages. He collected the $50,000 payment from the Registry on October 30, 2009.

After a bench trial and subsequent hearings in September 2010, a judge found that plaintiff was entitled to $240,000 on his contract claim, minus the $189,500 already paid and the $50,000 deposited with the Registry, and $4,955.50 on his unjust enrichment claim, for a total of $5,455.50, plus interest and costs. The judge determined that prejudgment interest was due on the $50,000 deposited in the Registry approximately two years prior to the verdict, and the defendants appealed.

The Supreme Court of Rhode Island affirmed the ruling, holding that an offer of judgment accepted as part payment under Rule 68(b)(3) ordinarily does not include prejudgment interest. The Court went on to note that if an offer of judgment explicitly states that prejudgment interest is included, no interest shall accrue. The Court also determined that in cases where interest accrues, the amount will be calculated from the date of accrual of the damages to the date the offer amount is deposited with the Registry.

Looking forward

Attorneys should be aware that an offer of judgment presented under Rule 68 and accepted as a part payment under Rule 68(b)(3) does not, without explicit language to the contrary, include pre-judgment interest. To avoid paying pre-judgment interest on the amount offered, an offer of judgment should explicitly state that it includes pre-judgment interest.

Maine: Insurer's Duty to Defend Triggered by Facts That Could Be Developed at Trial

A June, 2014 decision by the Supreme Judicial Court of Maine, Howe v. MMG Ins. Co., 95 A.3d 79 (2014), expanded an insurer's broad duty to defend its insured. In 2013, the Court handed down Cox v. Commonwealth Land Title Ins. Co., which described the insurer's duty as, "triggered if the complaint tendered contains any allegations that, if proved, could fall within the coverage afforded by the policy… [I]f the complaint – read in conjunction with the policy – reveals a mere *potential* that the facts may come within the coverage, then the duty to defend exists." (emphasis in original). In Howe, the court expanded that duty, ruling that it was triggered not only when facts are alleged in the complaint, but also when, "facts could be developed at a trial … that would support claims potentially falling within the coverage of the policy." (emphasis added).

In April 2013, the River Knoll Farms Condominium Association ("Association") sued Janet Howe and Rajesh Mandekar (collectively, "Howe"), alleging nuisance and negligence based on incidents involving Howe's dog and alleged violation of the Maine statute that prohibits "keeping a dangerous dog." The complaint alleged that Howe's dog was, "vicious, threatening, and has bitten people," and that Howe, "failed to control the dog." MMG, which had issued a homeowner's policy to Howe, declined to defend Howe in the litigation on the grounds that the Association's complaint sought only equitable relief and did not make any claim for "bodily injury" or "property damage" caused by Howe's dog. Howe moved for a judgment on the pleadings after MMG answered with a general denial, and the Superior Court ruled in favor of MMG.

The Superior Court reasoned that (1) the nuisance count sought only injunctive relief, which was not covered under Howe's homeowner's policy; (2) the complaint did not claim any bodily injury or property damage caused by the dog and, thus, failed to allege the elements of negligence; and (3) there was no private right of action under the "dangerous dog" statute. Howe appealed from that decision.

With respect to the nuisance claim, Howe argued that "it might be shown at trial that the dog 'had scratched, bitten, and otherwise damaged' Association property," and because the Association in its nuisance count requested "damages, interest, penalties, costs, and [attorney] fees," the Association could be awarded monetary damages in addition to injunctive relief. As for the negligence claim, Howe pointed to the same request for "damages" in the negligence count as well as the allegations in the complaint that "unit owners have been assaulted". Howe asserted that, as it stood, the complaint, "outlines a claim of bodily injury for which Howe might be answerable to the Association, depending on the facts developed as the case proceeds."

In vacating the judgment of the Superior Court, the Supreme Judicial Court of Maine stated

that, "reviewing the complaint in light of the liberal notice-pleading standard, facts could be developed at trial on the Association's complaint, as currently drafted, that would support claims potentially falling within the coverage of the policy. Accordingly, MMG has a duty to defend Howe against them."

Looking forward

Maine courts will find that an insurer has a duty to defend not only where the facts alleged in the complaint may potentially come within the coverage provided by the policy, but also where, based on the complaint, facts might be developed at trial that come within the policy's coverage.

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Rhode Island Superior Court: Non-Settling Defendant Not Entitled to Credit for Settlement Payment by Co-Defendant with No Liability

In June 2014, a Rhode Island Superior Court judge ruled that a defendant was not entitled to a $1 million settlement credit against a $3.3 million verdict, where the settlement was paid by a defendant to whom the jury allocated no liability. The non-settling defendant, Steelarc, Inc., appealed the ruling.

In September 2006, Jose Santos suffered permanent brain damage when a stack of metal racks fell on him as they were unloaded from his truck at the Yankee Supply, Inc. facility in Johnston, Rhode Island. The racks had been loaded by Steelarc's employees in North Carolina for shipment on Santos' truck. Plaintiff sued Steelarc for negligently loading his truck and Yankee Supply for negligently unloading. Yankee Supply tendered a settlement of $1 million to the plaintiff and was subsequently dismissed from the case. The plaintiff's claim against Steelarc proceeded to trial and the jury allocated 60% liability to the Steelarc, 40% to Santos, and 0% to Yankee Supply. After reduction for

contributory negligence, plaintiff and his wife were awarded $1,676,000, which totaled approximately $3.3 million with interest.

Under the Rhode Island joint tortfeasor statute, a non-settling defendant receives credit against a jury award for the amount that was paid by the settling defendant, or the pro rata share of liability of the settling defendant, whichever is greater. In this case, Steelarc sought a credit of $1 million to offset the $3.3 million jury award. However, the judge ruled that no such credit was available to Steelarc because the jury had found that Yankee Supply was not at fault and therefore Yankee Supply not a joint tortfeasor under the statute. Steelarc has appealed.

Looking forward

If the Superior Court ruling is upheld by the Rhode Island Supreme Court, settlement credits will no longer be automatic under Rhode Island law. That is, if a party is adjudged to bear no liability with respect to the plaintiff, the joint tortfeasor statute and corresponding credit will not apply. Attorneys will be watching the development of this case as it may change analyses and calculations with respect to settlement and trial of claims with multiple defendants.

FROM THE NEWSROOM

Thomas B. Farrey, III

Frank S. Puccio, Jr.

John T. Farrey

Caitlin Bearce

Elizabeth Marshall

May 2014

Senior Partner Thomas B. Farrey, III was recognized by *Chambers USA Guide 2014* in the Rhode Island "Leading Individual" and "Litigation – General Commercial" categories.

October 2014

Thomas B. Farrey, III and **Frank S. Puccio, Jr.**, of our Boston office were named Super Lawyers for 2014. **John T. Farrey** of our Boston office was named a Rising Star.

November 2014

Burns and Farrey was listed among the "Best Law Firms" for 2015 by *U.S. News and World Report* and *Best Lawyers*.

November 2014

John T Farrey attended the Professional Liability Underwriting Society (PLUS) annual conference in Las Vegas, Nevada. The conference provides a forum for underwriters, claims professionals and brokers to discuss current challenges, risks and opportunities within the professional liability industry.

Elizabeth Marshall and **Caitlin Bearce** have joined the firm as associates. Both will be working primarily from our Boston office.