NATIONAL UPDATES FROM THE COURTS

MASSACHUSETTS

Innocent Coinsured: Family Trust Unable to Recover for Damages Caused by Brother's Arson

In *USF Insurance Co. v. Langlois*, No. 13-P-1387 (Mass. App. Ct. July 22, 2014), the insurer (USF) sought declaratory judgment that the policy's Dishonest or Criminal Acts provision excluded coverage under the Policy for damages caused by fire.

The Policy provided by USF listed the "Named Insured" as "Langlois Family Trust" (trust), an entity formed to hold title to various real property, and "Smith's Tavern of Haverill" (corporation), a corporation that leased the insured property in order to operate a bar and restaurant. Several members of the Langlois family served as trustees to the trust and as directors of the corporation.[1] The Policy excluded coverage for losses caused by "dishonest or criminal acts by you, any of your partners, members, officers, managers, employees..., directors, trustees,... or anyone to whom you entrust the property for any purpose."

Motivated by an apparent family dispute, Bruce Longlois set fire to the building in which the corporation operated Smith's Tavern. He later pled guilty to arson. Conceding that the policy barred recovery for the corporation due to Bruce's position as director, his brothers argued that the trust should be able to recover for damages caused by the fire as an innocent coinsured. After summary judgment was allowed for USF, the Appeals Court affirmed.

The Appeals Court concluded that the issue was controlled by *Kosior v. Continental Ins. Co.*, 299 Mass. 601 (1938) (holding that an innocent coinsured could not recover for damages intentionally caused by a blamable coinsured where their interests in the insurance policy were "joint and nonseverable"). Agreeing with trial judge's determination that the interests of the trust and corporation were "inextricably intertwined and thus nonseverable," the court held that the trust could not recover as an innocent coinsured. Moreover, the Policy's plain language prevented the trust from recovering for damages caused by Bruce's intentional acts where the trust entrusted the corporation, of which Bruce was a director, with care of the leased premises.

However, it is worth noting that the court did not consider the insured's standard form policy argument as the issue was not timely raised.

[1] Brothers David, Robert, Richard and Bruce Langlois served as directors of the corporation, whereas only David and Robert served as trustees at the date of loss. All four brothers were named beneficiaries of the trust, as joint tenants with rights of survivorship.

Standard Form Policy Considerations

In *Barnstable County Mutual Ins. Co v. Dezotell*, 2006 WL 2423570 (Mass. Super. Jul. 20, 2006), the Superior Court found that the use of the phrase "an insured" in the homeowners policy's intentional loss exclusion rather than the statutory phrase "the insured" could unacceptably diminish the coverage mandated by MGL c. 175, § 99.

See also Lane v. Security Mut. Ins. Co., 96 N.Y. 2d 1 (2001) (holding that the phrase "an insured" offers an innocent party significantly less coverage than the statutory phrase "the insured")

RHODE ISLAND

Premises Liability: Supreme Court of Rhode Island Declines to Extend the Duty Owed by Landowners

In *Phelps v. Hebert*, 2013 WL 2917029 (R.I. June 27, 2014), the Supreme Court of Rhode Island declined to impose upon the defendant-homeowners, under a theory of premises liability, the duty to protect an adult guest from injuries sustained as a voluntary passenger on an ATV traveling off the premises.

There, the plaintiffs sought to recover for the wrongful death of their daughter, a guest at the home-owners' party, alleging that the homeowners negligently allowed another guest at the party to recklessly operate his ATV, causing injuries to their daughter that ultimately resulted in her death.[2] Plaintiffs claimed that the presence of the ATV, operated in a reckless manner, created a defect in the property from which the homeowners were obligated to protect their guests.

Under Rhode Island case law principled on premises liability, an owner of land owes "an affirmative duty to exercise reasonable care for the safety of all people reasonably expected to be upon the premises." *Bucki v. Hawkins*, 914 A.2d 491, 495 (R.I. 2007).

This duty has been extended to impose liability upon landowners for unreasonably dangerous conditions or activities within their property that cause injuries to individuals outside of the landowners' premises. *See Volpe v. Gallagher*, 821 A.2d 699, 705 (R.I. 2003). However, the court in *Volpe* emphasized that this duty to protect against injuries caused by harmful activity conducted by third parties on a landowner's property exists only where the landowner should reasonably be aware of such activities and *"has the power to control such activities."* *Id.* (emphasis in the original). Specifically, the landowner must "(1) know or have reason to know that they have the ability to control the person(s) using their land, and (2) know or should know of the necessity and opportunity for exercising control." *Id.* at 706.

Additionally, the Rhode Island courts typically require that some "special relationship" exist between plaintiff and defendant before applying an exception to the general rule that "a landowner has no duty to protect another from harm caused by the dangerous or illegal acts of a third party." *Martin v. Marciano*, 871 A.2d 911, 915 (R.I. 2005) (internal citations omitted).

Under the facts presented in *Phelps*, the court refused to create the duty sought by the plaintiffs. In so holding, the court noted that the mere presence of the ATV on the property did not create an inherently dangerous condition – the manner in which it was driven was the dangerous activity and that activity occurred off of the homeowner's land. Moreover, both the driver and passenger were adults whose conduct the homeowners had no authority to control. Finally, the court acknowledged that granting the plaintiffs' request would have created a duty so vast as to be against public policy, causing landowners to face liability for seemingly harmless situations deemed dangerous only with the benefit of hindsight.

[2] All relevant parties were of the legal drinking age and the plaintiff did not pursue any actions under a theory of social host liability

MICHIGAN

Policy Exclusions: No Coverage for Roof Collapse Caused by Faulty Design

Applying Michigan law, the U.S. District Court for the Eastern District of Michigan considered a coverage dispute following the partial collapse of the plaster ceiling inside the insured church in *Joy Tabernacle – The New Testament Church v. State Farm Fire and Cas. Co.*, 2014 WL 3563468 (E.D. Mich. July 18, 2014).

The insurer, State Farm, denied coverage based on the policy's exclusions for losses caused by "settling, cracking, shrinking or expansion" and losses attributable to faulty design. State Farm's engineer determined that the collapse was caused by structural defects attributable to poor design. Moreover, the insured's own engineer found "inherent problems" in the original design of the church's roof that would complicate the intended repairs. State Farm argued that where both parties' engineers found that the collapse was at least partially attributable to the poor design of the roof trusses, the policy's exclusion applied and summary judgment was proper as to the denial of coverage for the collapse.

The insured sought to show that coverage was appropriate under the policy provision extending coverage for collapse caused by hidden decay, hidden "insect or vermin damage," "weight of people or personal property," or "weight of rain that collects on a roof."

First, relying on expert testimony that there was a "loss of strength" in the structure of the roof, the insured argued that a "loss of strength" was the equivalent of "hidden decay," a covered cause of loss. The court rejected this argument, noting that "decay is not a general, gradual decline of strength, but rather, the organic rot or deterioration from a normal state." (internal citations omitted). Additionally, the insured argued that because the collapse extension provision did not specify that coverage was extended to *only* the listed causes of loss, additional causes of loss should be covered under the policy. The court rejected this argument as contrary to Michigan case law stating that "coverage is preconditioned on the collapse being caused by only one or more of the listed perils... if any cause of the loss is due to a peril not enumerated under the policy, the collapse is not covered." (internal citations omitted).

Accordingly, the court awarded summary judgment to State Farm, finding that coverage was excluded under the policy.

Ambiguity in Connecticut Collapse

The U.S. District Court for the District of Conn. recently denied an insurer's motion to dismiss a breach of contract claim. The insured brought suit after the denial of coverage for cracks and decaying in the basement walls of their home caused by faulty concrete. A chemical compound in the concrete had been found to cause gradual decay, ultimately reducing the concrete to rubble. Failure to replace the walls would result in the total collapse of the home. The insurer argued that the basement walls are the "foundation" of the home and, therefore, their collapse was not covered under the policy. In contrast, the insured argued that the foundations consisted of footing upon which the basement walls rested, and did not include the walls themselves. In finding an ambiguity in the policy's use of the undefined term "foundation," the court denied the motion to dismiss. *See Karas v. Liberty Ins. Corp.*, No. 3:13cv01836 (SRU) (D. Conn. July 21, 2014).

NEW YORK

Post-Sandy Litigation: "Direct Physical Loss" Required for Coverage Under Business Interruption Provision

In the aftermath of Superstorm Sandy, numerous coverage disputes have arisen, particularly in the U.S. District Courts for New York and New Jersey. Recently, the District Court for the Southern District of New York considered an insurer's denial of coverage for loss of business income and extra expense incurred by the insured while its office building went without power for several days. *Newman Myers Kreines Gross Harris, P.C. v. Great Northern. Ins. Co.*, 13 CIV. 2177 PAE, 2014 WL 1642906 (S.D.N.Y. Apr. 24, 2014).

In *Newman Myers*, the utility provider to the plaintiff's office building had preemptively shut off power in anticipation of flooding caused by SuperStorm Sandy. As a result, the building was closed down and the plaintiff's employees were prevented from entering their offices. Though the actual office sustained no flooding or physical damage, the plaintiff filed a claim under its commercial insurance policy for loss of business income and extra expense for the period during which it was without power.

On a motion for summary judgment, the court ruled that the plaintiff's claim was excluded from coverage under the policy because the insured office did not suffer any "direct physical loss or damage."

In so ruling, the court explained, "The words 'direct' and 'physical,' which modify the phrase 'loss or damage,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure." Where the plaintiff could not show any such loss or damage, the insurer rightly denied coverage under the policy.

In Other Post-Sandy News

In a similar case, the District Court for the Southern District of New York considered a claim by an insured who's office power was also preemptively shut off by the power company in an attempt to minimize damages caused by flooding. Here, however, the insured's policy covered loss of business income caused by direct physical loss or damage to their own premises as well as to power supply services property. Where flood waters ultimately damaged the power network that serviced the insured's office, the court ruled that coverage did not apply only for those few hours between when the power was preemptively shut off and when Sandy hit, damaging the servers with its rising floods. Once the flood waters hit, the loss of business income was deemed caused by "direct physical loss or damage" to power supply services and coverage applied.

See Johnson Gallagher Magliery, LLC v. Charter Oak Fire Ins. Co., 13 CIV. 866 DLC, 2014 WL 1041831 (S.D.N.Y. Mar.

MASSACHUSETTS

Economic Loss Rule Inapplicable to Condominium Construction Suit

Ruling on a matter of first impression, the Supreme Judicial Court recently held that "the economic loss rule is not applicable to the damage caused to the common areas of a condominium building as a result of the builder's negligence." *Wyman v. Ayer Properties, LLC.*, 49 Mass. 64 (2014).

The economic loss rule, commonly applied in defective product suits, requires a plaintiff-purchaser to prove personal injuries or physical damage to property other than the defective product in order to recover in tort from a negligent supplier. *See Berish v. Bornstein*, 437 Mass. 252, 267 (2002). The rule bars recovery in such cases for "purely economic losses," including "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits without any claim of personal injury or damage to other property." *Id.* (internal citations omitted).

In *Wyman*, the plaintiff condo association sought to recover from the defendant developer for damages caused by the negligent installation of the window frames, roof and exterior masonry, all considered common areas subject to undivided ownership by individual unit owners. The negligent installation of the window frames and roof resulted in additional damage to individual units – no separate damages were attributable to the faulty masonry.

Applying the economic loss rule and finding that the individual units and common areas were separate products for the rule's application, the trial judge ruled that damages were only recoverable for the negligent installation of the windows and roof, both of which caused separate, additional property damage. However, the plaintiff could not recover for the cost of repairing the faulty masonry. The Appeals Court reversed as to the judge's decision regarding recovery for masonry work, holding that the economic loss rule did not apply.

On appeal to the SJC, the defendant argued that the entire condo constituted a single, integrated product; under the economic loss rule, no damages were recoverable in tort for building defects absent a showing of personal injury or physical damage separate from that to the building itself. Looking to the purpose of the rule and concluding that to hold otherwise would unjustly leave condo associations without a remedy for the negligent construction of common areas, the SJC held that the economic loss rule did not apply and reversed the Superior Court ruling as to the faulty masonry.

One rationale behind the economic loss rule is that where the only damage is to the defective product itself, the complaint is essentially that the purchaser did not receive his or her bargained for value and, therefore, the remedy should be contractual. *See Bay State-Spray & Provincetown S.S. Inc. v. Caterpillar Tractor Co.*, 404 Mass. 103, 109-10 (2002). Moreover, the rule serves to bar recovery for intangible and indeterminate damages such as lost profits or goodwill, which may be difficult for courts to calculate and impossible for parties to anticipate. *See FMR Corp. v. Boston Edison Co.*, 415 Mass. 393, 394-95 (1993).

The SJC concluded that neither rationale supported the application of the rule to the facts in *Wyman*. First, a condo association does not actually purchase common areas, but gains control from individual unit owners who share an undivided interest in the areas; therefore, no remedy in contract existed for the plaintiff. Additionally, the replacement costs of the window frames, roof and masonry were readily calculable (and in fact were calculated in a highly detailed decision by the trial judge) and also could easily be anticipated by condo developers.

Damage Calculation in *Wyman*

The trial judge had originally reduced the damages awarded to the plaintiffs by 20% in an apparent attempt to reflect the cost of replacement at the time of the negligent installation. Concluding that this reduction was aimed at offsetting the statutory interest applied to the damages pursuant to MGL c. 231, § 6B, the SJC reversed this decision and awarded the full damages calculated at trial, plus interest. According to the SJC, such damages, measured as the replacement cost at the time of actual replacement, were not unreasonable

MASSACHUSETTS

Fundamental Changes in Superior Court Procedures

On August 6, 2014, Governor Deval Patrick signed a bill into law that will incorporate significant changes into the manner in which *voire dires* are conducted in the Massachusetts Superior Courts. The statutory amendment allows parties and their attorneys to conduct an oral examination of the jury venire, subject to reasonable limitations imposed by the court. The change applies to both civil and criminal trials conducted in the Superior Courts.

See MASS. GEN. LAWS c. 234, § 28

The same bill included an amendment that allows parties to civil actions in the Superior Courts to suggest a specific monetary amount for damages at trial.

See MASS. GEN. LAWS c. 231, § 13B

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