

Insurance Coverage Bulletin Pennsylvania

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En Banc Panel of Pennsylvania Superior Court Holds Intentional Shooting of Six People Constitutes Multiple Occurrences Triggering Coverage for Negligence Claims Against Shooter's Parents

On February 17, 2006, an *en banc* panel of the Superior Court filed an opinion that will have a significant impact on Pennsylvania occurrence law unless or until the Supreme Court opines to the contrary. Donegal Mut. Ins. Co. v. Baumhammers, 2006 Pa. Super. 32, 2006 Pa. Super. LEXIS 107 (Pa. Super. 2006) (*en banc*). The majority held that claims of negligence against a shooter's parents alleged an occurrence triggering coverage under a homeowners' policy (unanimous decision) and that the claims constituted six occurrences (6-3 decision), one for each victim. In addition, the Court unanimously upheld an exclusion for the intentional acts of "any insured" in holding that the umbrella insurance policy did not provide coverage for the parents. In Baumhammers, a man who lived with his parents went on a shooting rampage, killing five people and critically injuring a sixth. The man was convicted of, *inter alia*, five counts of first-degree murder and one count of attempted homicide. The victims' survivors and the surviving victim filed suit against the shooter and his parents. The parents were only accused of negligence, including for failing to take possession of their son's gun and for failing to alert authorities or mental health care providers about their son "because they knew or should have known of his dangerous propensities and his possession of the gun."

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Pollution Exclusion Rendered Ambiguous By Additional Coverage Extension for Water Damage and Other Liquids And, Alternatively, Agent's Representations Regarding Extent of Coverage After Issuance of Policy Would Also Require Coverage Despite Pollution Exclusion

Judge McVerry of the Western District of Pennsylvania ruled in favor of an insured on his breach of contract action against his insurer which failed to pay for damage sustained to the insured's building after oil leaked from the ceiling-mounted oil furnace, but found in favor of the insurer on the insured's bad faith claim. Hartman v. Motorists' Mut. Ins. Co., 2006 U.S. Dist. LEXIS 1719 (W.D. Pa. 2006). In Hartman, the insured purchased a Motorists' Mutual business insurance policy through Weaver, an authorized insurance agent. The court found that the agent was authorized to sell such policies, to sign documents as an authorized agent and to make representations regarding coverage. The court further found that the insured had several conversations with Weaver specifically regarding the oil furnace and that he would be covered for any problems with the furnace. A seal on the furnace failed causing five gallons of oil to soak the insulation, contact the metal ceiling, damage carpet and cause other damage.

Motorists' Mutual denied the claim based on the pollution exclusion contained in the policy:

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Existence of an Occurrence

The Donegal homeowners’ policy provided coverage for an “occurrence” defined as an “accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results . . . in: Bodily injury or Property damage.” Relying on Mohn v. American Cas. Co. of Reading, 326 A.2d 346 (Pa. 1974) (construing a health and accident policy), the Court held that whether an accident has occurred must be considered from the standpoint of the insured and the fact that an insured’s negligence allows another party to commit an intentional act causing injury does not preclude the existence of an accident. Id. at ¶ 26 (also finding persuasive Nationwide Mut. Fire Ins. Co. of Columbus v. Pipher, 140 F.3d 222 (3d Cir. 1998) (holding insurer owed a duty to defend insured sued for negligently failing to reinstall doors to a tenant’s apartment leading to the tenant being murdered). The court thus disapproved the prior Superior Court opinion in Britamco Underwriters, Inc. v. Grzeskiewicz, 639 A.2d 1208 (Pa. Super. 1994) (holding insurer owed no duty to defend bar owners in suit alleging they were negligent when underlying plaintiff was attacked by another patron because the patron’s intentional assault was not an accident and thus the claims against the insured did not arise out of an occurrence).

The questionable logic of the majority opinion is evident in this sentence from the opinion: “Likewise, under the logic of Grzeskiewicz, an allegation that an insured gun owner negligently secured his gun collection could result in coverage where the insured’s minor child retrieved a gun and accidentally killed a playmate, but could result in the denial of coverage where the insured’s adult child retrieved a gun and intentionally killed an acquaintance. We find this result to be nonsensical.” Id. at ¶ 25 (emphasis added). Contrary to the court’s pronouncement, this result is not nonsensical, it is required by the very language of the policy—coverage is only provided for an occurrence defined as an accident which is the reason the accidental killing would be covered, but the intentional killing should not be covered.

Number of Occurrences

Having found an occurrence triggering coverage to have taken place as to the claims alleging negligence against the parents, the majority considered the question of whether the claims constituted a single occurrence or multiple occurrences and held that the claims alleged six occurrences, one for each victim.

The majority opinion states that courts determining the number of occurrences in situations involving two proximate causes (parents’ alleged negligence and shooter’s intentional conduct) for the underlying claims have come to different conclusions. Courts finding a single occurrence¹ have focused on the event that forms the basis for the insured’s liability whereas those finding multiple occurrences² focus on the immediate cause of the harm. Despite the fact that the Court looked to the parents’ alleged negligence for finding an accident, it looked at the shooter’s acts in determining the number of occurrences. It further stated that the policy’s reference to continuous or repeated exposure to substantially the same general harmful conditions as constituting one occurrence is irrelevant because the victims were not “exposed” to the parents’ failures and if exposed to anything it was the shooter’s bullets.

The court did not address the portion of the policy that also describes one occurrence as bodily injury resulting from any one accident, possibly because Donegal did not focus on that language. The court’s final basis for finding six occurrences seems contrary to that portion of the policy’s plain language:

Finally, we note that it is clear that Parents were “exposed to new liability for each separate and independent act,” . . . by

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¹ See, e.g., RLI Ins. Co. v. Simon’s Rock Early College, 765 N.E.2d 247 (Mass. App. 2002) (holding one occurrence for claims alleging college negligent in failing to prevent student’s shooting rampage resulting in multiple victims).

² See, e.g., Koikos v. Travelers Ins. Co., 849 So.2d 263 (Fla. 2003) (holding one occurrence for each victim for claims alleging restaurant negligent in failing to provide security where several people shot).

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Baumhammers: his independent acts of shooting each of his victims. Parents’ allegedly negligent acts purportedly resulted in six distinct attacks on six individuals. Accordingly, we find that there were six occurrences under the Donegal policy.

Id. at ¶ 46. The court failed to recognize that Baumhammers proceeded from victim to victim on the same day without any allegation that his parents had any opportunity to commit separate incidents of negligence between each shooting. Thus, this rationale does not appear to be supported by the cause test long recognized under Pennsylvania law that if there is one proximate, uninterrupted and continuing cause, which results in all of the injuries and damage, there is only one occurrence notwithstanding the existence of several discrete items of damage. D’Auria v. Zurich Ins. Co., 507 A.2d 857 (Pa. Super. 1986). That is, the alleged negligence of the parents was an uninterrupted and continuing cause despite the fact that their son shot several different people.

The concurring and dissenting opinion by Judge Lally-Green, in which two other judges joined, recognizes the incongruity of the majority decision:

The only covered event was an act of negligence. Parents, the insureds, allegedly let their son Richard out of the house with a gun on **one** fateful occasion. From the Parents’ standpoint, this is one alleged act of negligence, one accident, and one occurrence. This is a logical result, quite consistent with the Majority’s sound disposition of Issue 1 [whether an occurrence took place].

Id. at ¶ 7 of Concurring and Dissenting Opinion (emphasis in original). Judge Lally-Green also stated that focusing on the basis of the insured’s liability is in keeping with insurance practices of setting premiums and limiting insurer liability and is in keeping with the policy language: “the unambiguous language demonstrates an intent to focus on the insureds’ underlying liability, rather than the most-proximate ‘damaging act’ or the number of victims.” Id. at ¶ 9 of Concurring and Dissenting Opinion (footnote omitted).

The Umbrella Policies’ Exclusions

All nine judges of the panel agreed that the other insurance policy at issue, an umbrella policy issued by USAA, did not provide coverage because of its exclusions for bodily injury caused by the intentional or purposeful act, or arising out of a criminal act of, “any insured.” In so holding, the Court distinguished its prior holding in The Board of Public Education of the School Dist. of Pgh. v. National Union Fire Ins. Co. of Pgh., 709 A.2d 910 (Pa. Super. 1998) (en banc) (holding criminal acts and assault and battery exclusions were not clear as to whether they should apply to claims of negligence against an insured where that insured’s acts were not alleged to be criminal or assaultive), stating the USAA exclusions clearly applied to the acts of “any insured” and the shooter was an insured under the policy. See Baumhammers at ¶ 53. The Court rejected the insureds’ arguments that their reasonable expectations were thwarted, that USAA did not adequately inform them of the changes to the policy and show that they understood the changes, and that the exclusions are against public policy. The Court likewise rejected the underlying plaintiffs’ additional arguments that they and the parents should be able to question the intentional nature of the shooter’s conduct, holding that none of the factual allegations support an argument that the shooter’s conduct was unintentional: “In the absence of facts contradicting what human experience teaches are volitional acts, the shootings indicate that Baumhammers sought to cause the harm that he inflicted and, therefore, acted intentionally.” Id. at ¶ 73.

An appeal of the number of occurrences issue to the Pennsylvania Supreme Court is expected. ♦

**Pollution Exclusion Rendered Ambiguous –
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We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

* * *

Discharge, dispersal, seepage . . . or escape of “pollutants” unless the discharge, dispersal, seepage . . . or escape is itself caused by any of the “specified causes of

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loss.” But if the discharge, dispersal, seepage . . . or escape of “pollutants” results in a “specified causes of loss,” we will pay for the loss or damage caused by that “specified cause of loss.”

The loss was not a “specified cause of loss” and pollutants was defined as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. . . .” The policy also contained the following extension of coverage:

Water Damage, Other Liquids, Powder or Molten Material Damage. If loss or damage caused by or resulting from covered water or other liquid, powder or molten material damage loss occurs, we will also pay the cost to tear out and replace any part of the building or structure to repair damage to the system or appliance from which the water or other substance escapes.

Weaver had written to the insurer that he thought the claim was covered. Relying on the magistrate’s report and recommendation, the court held that the policy was ambiguous and thus provided coverage

because “the policy in this particular case contains yet another provision which seems to distinguish between fuel and pollutants where heating oil is involved since that other provision would provide coverage for damage or loss as a result of leaking liquids—arguably heating oil—from heating equipment.” Id. at *22 (conclusion of law no. 9).

The court further stated that even if the policy were not ambiguous, the court would find coverage under the reasonable expectations doctrine because “Weaver’s representations to Plaintiff concerning the scope of coverage, and particularly those representations regarding oil furnaces, clearly establish that an agent of Defendant created a reasonable expectation of coverage.” Id. at *26-27. The court so held even though the representations were made after the purchase of the policy as opposed to before purchase as in Tonkovic v. State Farm Mut. Auto. Ins. Co., 521 A.2d 920 (Pa. 1987).

Despite finding coverage, the court held that Motorists’ Mutual did not act in bad faith because its interpretation of the pollution exclusion clause was reasonable. ♦

For any questions on the topics addressed in this newsletter, please call Alan Miller at 412-288-4004 or Bridget Gillespie at 412-288-4017. ♦

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