RECENT COURT DECISIONS

Contributed by Patrick F. Maroney
Florida State University

Mortgagee's Right to Recover for Intentional Loss Caused by Homeowner

Jones v. Wesbanco Bank Parkersburg, 460 S.E. 627 (W.Va. 1995)

Husband and wife homeowners purchased an insurance policy from Motorist Mutual Insurance Company. The policy listed the bank as mortgagee. The property suffered a loss by fire during the policy period. The homeowners sought to recover $42,000 for the dwelling, $29,400 for personal property, and $4,200 for other structures.

The insurer denied coverage based on policy language that excludes loss caused intentionally by, or at the direction of, an insured and with the intent to cause such a loss.

Subsequently, the husband was convicted of arson and the wife was acquitted. Prior to the criminal trial, the couple filed a complaint against the insurer to recover under the insurance policy. Nine months after the fire, the mortgagee (bank) learned that the property had been destroyed. However, during that nine-month period, mortgage payments had continued to be made to the bank.

The insurer denied the bank's claim as mortgagee. The bank subsequently intervened in the lawsuit filed by the homeowners, alleging that it was owed payment under the insurance policy from the date of the fire loss and that the insurer had acted in bad faith.

The insurer responded that the mortgagee had sustained no loss by the insurer's refusal to pay because the loan indebtedness had continued to be paid up until the date the complaint was filed by the bank. The insurer argued that the insurance policy at issue contained a loss payable or open mortgage clause rather than a standard mortgagee clause and, thus, under such a clause a loss due to the misconduct of the insured would prevent recovery by the insured and the mortgagee.

The trial court found for the insurer and the bank appealed. The appellate court determined that the policy issued to the homeowners contained a standard mortgagee clause rather than an open mortgage clause. The court agreed that, if the policy contained an open mortgage clause, the bank would not be able to recover because of the insured's misconduct. However, the court found that, while the language was not identical to the language contained in a standard mortgagee clause that the West Virginia legislature had declared, the standard mortgage clause was the exclusive form of fire insurance to be used in the state.

The court noted that, under a standard mortgagee clause, there are two separate, distinct contracts of insurance—one with the owner of the property and one with the mortgagee. The court contrasted this with the open mortgage clause. Pursuant to an open mortgage clause, the mortgagee is considered to be the appointee to receive the proceeds to the extent of his interest. However, such a policy is subject to being voided by the acts of the insured. Thus, if the acts of the insured affect the coverage, and if the policy is not collectible by the insured, it is not collectible by the appointee—that is, the mortgagee.

Having concluded that the mortgage clause was a standard mortgagee clause and thus that the bank was entitled to the proceeds, the court then addressed the issue of whether the bank was entitled to the proceeds as of the date of the fire, even though the monthly payments on the loan had been made in a timely fashion. The court held that the bank was entitled to payment of the insurance proceeds as of the date of the fire, because, under a standard mortgage clause, the right of a lender to the insurance proceeds becomes vested at the time of the fire damage.

On the issue of bad faith, the court agreed with the bank's contention that the trial court erred in denying its bad faith claim against the insurer for its refusal to pay the bank the proceeds and satisfy the mortgage debt as of the date of the fire. The appellate court found the bank entitled to reasonable attorney's fees.

Applicability of Assault and Battery Endorsement: Insurer's Duty to Defend

Liquor Liability JUA v. Hermitage Insurance Company, 664 N.E. 2d 964 (Mass. 1995)

The Liquor Liability Joint Underwriting Association (JUA) is a nonprofit association created by the Massachusetts legislature to provide liquor legal liability insurance to sellers of alcohol who are unable to obtain liability insurance in the private market. Lamplighter, Inc., a business licensed to serve alcohol, purchased an insurance policy with the JUA providing coverage for negligence in the distribution, sale, or serving of alcoholic beverages. Lamplighter also purchased a special multiple peril policy from Hermitage that provided coverage for liability due to bodily injury and property damage. An endorsement to the policy stated that "assault and/or battery shall not be deemed an accident under the policy." Lamplighter believed that coverage was provided for damages arising from fights among its patrons and that it would not have purchased the policy if it had known that such coverage was not provided.

A Lamplighter patron was injured and filed suit against Lamplighter. In Count I of the complaint, the plaintiff alleged that the assailant had been negligently served alcoholic beverages by Lamplighter. In Count II of the complaint, the plaintiff alleged that Lamplighter had negligently failed to provide adequate security.

Hermitage indicated that it had no liability because, even though Count II of the complaint alleged failure to provide adequate security, Hermitage took the position that the assault and battery endorsement would preclude coverage. The JUA undertook Lamplighter's entire defense. The trial proceeded, and the plaintiff was awarded in excess of $80,000. The JUA settled for $90,000 including costs and obtained from the plaintiff a general release. The JUA, pursuant to the subrogation clause in its policy, brought suit against Hermitage for declaratory relief.

The court found that the assault and battery endorsement in the special multiple peril policy did not exclude coverage for a claim alleging negligent failure to supply security and that the insurer was liable for the entire settlement and prejudgment interest, which began to accrue when the JUA paid the settlement.

The court found that Hermitage had a duty to defend its insured if any allegations in the tort complaint were reasonably susceptible to interpretation that they stated a claim covered by the policy. The court noted that the language in the Hermitage policy was not as broad as language in other policies. Some policies contain assault and battery provisions which are more comprehensive than the endorsement in the Hermitage policy. These policies usually provide that "any claim arising out of, or based on an assault and battery, is excluded from coverage whether committed by, or at the direction of, the insured or third parties." However, the endorsement exclusion here merely provided that "assault and/or battery shall not be deemed an accident under the policy, nothing in the policy to the contrary."

The court did note that there was a split of authority in those cases involving language similar to the Hermitage policy, but found that the Hermitage endorsement was susceptible to at least two interpretations. The court found that, if Hermitage had intended to preclude coverage for a claim based on an allegation of negligent failure to provide security, it could have done so in clearly unmistakable language. Therefore the court found that Hermitage's failure to defend Lamplighter on Count II of the lawsuit was in violation of its obligations under its policy to defend and indemnify. Thus, Hermitage was liable for the full amount of the settlement, one-half of the defense costs, and interests.

Ownership and Permissive Use of Vehicle

Verriest v. INA Underwriters Insurance, 662 A.2d 967 (N.J. 1995)

James Curley Pierce was involved in an auto accident resulting in the death of one person and serious injuries to another. The question involved was whether the INA insurance policy covered Pierce for liability arising out of the accident.

Pierce's cousin, James, purchased a car for $150. Apparently, he purchased the car for Pierce, and Pierce was to repay him. The owner of the car, Mr. Janulewicz, accepted the $150, removed the license plates from the car, and signed and dated a certificate of title; however, he left the name of the owner blank. He gave the certificate and keys to James, who turned the keys and certificate of title over to Pierce. The car was to remain at James's detailing lot until Pierce was able to pay for and register the car. With James's permission, Pierce performed repair work on the vehicle. James contacted his insurance agent and arranged a meeting at which Pierce was to have insured the car. Unfortunately, this meeting was to have occurred the day after the accident.

Prior to the accident, James left town and left Pierce in charge of his business. Pierce removed from a locked drawer in James's office the automobile dealer plates and put them on the vehicle. James and Pierce agreed that Pierce had received no authorization to use the plates. Pierce went out drinking with a couple of friends and caused the accident resulting in the death.

James and his business were insured under a business auto policy issued by INA. A lawsuit was brought against Pierce, James, the business, and a Lincoln Mercury dealer to whom the plates were registered. Pierce did not respond, and a default judgment was entered against him. The jury found that Pierce had not been acting in the scope of his employment with James or James's company, and that neither James nor the company had been negligent in employing him. The jury awarded almost $500,000 in damages against Pierce, but he was judgment proof.

The issue on appeal is whether there is coverage for Pierce under the INA policy. The court found that James was the owner of the auto at the time of the accident. As buyer, he retained authority to impose on Pierce the conditions that he not take title or drive the vehicle until he had paid for it. The court found that James had intended to retain effective control over the vehicle and was the true owner. The court also found that Pierce's use of the vehicle was permissive use because he had been granted permission to repair the vehicle. Thus, INA was liable. The dissent viewed the facts differently and wrote that the transfer of the title and keys to Pierce transferred effective control of the car. The dissent found no case which would support finding someone who was not the registered owner, who never intended to own it, who did not possess the title or keys, and who never used the car, to be the owner.

Professional Liability Policy Does Provide Coverage for Sexual Abuse

St. Paul Fire & Marine Insurance Company v. F.H., 55 F.3d 1420 (9th Cir. 1995)

In this case, the Big Brothers and Big Sisters of Alaska and its executive director were defendants in a civil action seeking damages for injuries sustained by K. W., a minor, and his mother. The defendants requested that the insurance carrier, St. Paul, provide a defense. St. Paul defended Big Brothers and Big Sisters, but declined to defend the executive director. Big Brothers and Big Sisters was held not liable under *respondeat superior* for the executive director's acts of sexual abuse.

The plaintiffs then entered into a settlement agreement with the executive director, who confessed judgments for over $1 million. The executive director assigned any rights he might have against St. Paul as a result of the sexual abuse liability to the plaintiffs. In exchange, K. W. and his mother, F. H., agreed to not execute against the executive director on the confessed judgments. St. Paul then filed declaratory action seeking a declaration that the executive director was not an insured under any St. Paul policy and that St. Paul did not provide coverage to the executive director for acts of sexual abuse and did not owe a duty of defense and, further, that the rights transferred by the executive director to the plaintiffs were not enforceable against St. Paul.

The victim and his mother counter-claimed against St. Paul seeking a declaratory judgment that the executive director's acts of sexual abuse were covered by St. Paul's insurance policies and sought damages from St. Paul. The trial court found in favor of St. Paul, holding that it was against Alaska's public policy to permit a person to be insured against a claim of sexual abuse and also that, while the policy permitted coverage of executive employees where the claim was for a violation of law, the policy did not protect executive employees for nonaccidental injuries, particularly where their intentional act caused the injury.

The court of appeals reversed and held that the policy exclusion for criminal acts did not apply to the executive director and that Alaskan public policy would permit coverage. The court found that the executive director's acts were within the scope of employment that caused sexual abuse. The court found that the professional liability insurance policy excluded coverage for criminal acts by volunteers, but that the exclusion did not apply to sexual abuse by the program's executive director. The policy also excluded coverage for individual big brothers and big sisters if they engaged in an illegal act; however, the policy provided that the exclusion did not apply to other insureds, and the agent of the insurer stated that the policy covered illegal acts by insureds other than volunteers.

The court found that, since the liability policy could be construed by a reasonable insured to create an expectation that it provided coverage for claims arising from the executive director's sexual abuse, the policy did provide coverage. Therefore, the district court summary judgment in favor of St. Paul was reversed.