

McKENNA Insurance Coverage Review

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Two Deaths Caused by Single, Continuous Negligent Act Constituted Multiple “Occurrences” Under Liability Policy

The Illinois Supreme Court recently held in *Addison Insurance Co. v. Fay*, 2009 WL 153859 (Jan 23, 2009), that the deaths of two boys caused by a property owner’s single but continuous negligent act constituted multiple “occurrences” under the owner’s liability policy.

Two boys became trapped in an excavation pit partially filled with water. Evidence in the underlying case showed that one of the boys became trapped while attempting to free his friend, who was also trapped in the pit. Medical experts could not provide an exact time of death for the boys or how closely in time they had died. The property owner’s liability insurer, Addison, agreed to settle the subsequent wrongful death claims for an amount equal to its policy’s limits. The liability policy provided a “General Aggregate Limit” of \$2 million and an “Each Occurrence” limit of \$1 million.

Addison filed a declaratory judgment action to resolve whether the boys’ deaths constituted one or two occurrences, and therefore whether Addison was obligated to pay \$1 million or \$2 million to the boys’ estates. The policy defined an “occurrence” to mean “an accident including continuous or repeated exposure to substantially the same general harmful conditions.” The trial court found that the boys’ deaths were the result of two occurrences. The Appellate Court reversed the trial court’s decision, holding that the boys’ deaths were “so closely linked in time and space to be considered by a reasonable person as one occurrence.”

The Addison policy did not indicate when an injury would be treated as a separate occurrence. Previous decisions utilized a “cause theory”, which referred to the cause or causes of the damage to determine the number of occurrences. In *Nicor, Inc. v. Associated*

Electric & Gas Ins. Services Ltd., 223 Ill.2d 407 (2006), the Illinois Supreme Court refined the “cause theory” and concluded that “where each asserted loss is the result of a separate and intervening human act, whether negligent or intentional, or each act increased the insured’s exposure to liability,” each loss is deemed to have arisen from a separate occurrence. However, the prior decisions involved affirmative acts of negligence rather than an ongoing negligent omission.

The *Addison* Court refused to apply the “cause theory” because “focusing on the sole negligent omission of failing to secure property would allow two injuries, days or even weeks apart, to be considered one occurrence.” Instead, the *Addison* Court relied upon a “time and space” test articulated by a New Jersey appellate court in *Doria v. Ins. Co. of North America*, 509 A.2d 220 (1986). Under that test, “if cause and result are so simultaneous or so closely linked in time and space as to be considered by the average person as one event,” then the injuries would be deemed the result of one occurrence. The *Addison* Court found that a “time and space” test effectively limits a potential bundling of injuries into a single occurrence where negligence is the result of an ongoing omission rather than separate affirmative acts. Using the “time and space” test, the *Addison* Court found that the boys’ deaths constituted two occurrences under the terms of Addison’s liability policy.

Common Law Conversion and Trespass Claims Arising from Unsolicited Faxes Covered as “Property Damage”

An Illinois appellate court recently considered whether claims for common law trespass and conversion, as well as statutory violations, were covered under a general commercial liability policy as “property damage”. *Insurance Corp. of Hanover v. Shelborne Assoc.*, 2009 WL 884898 (1st Dist. 3/31/2009).

Hanover filed a declaratory judgment action against its insured, Shelborne, seeking a determination that it did

not owe a duty to defend Shelborne in an underlying lawsuit involving unsolicited fax advertising. The underlying tort plaintiff brought claims against Shelborne for violations of the Telephone Consumer Protection Act of 1991, common law trespass and common law conversion. On cross-motions for summary judgment, the trial court held that Hanover had a duty to defend Shelborne under its policy's coverage for "advertising injury" and "property damage".

On appeal, the court did not consider whether there was a duty to defend under the policy's "advertising injury" coverage as the Illinois Supreme Court previously found in *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 223 Ill.2d 352 (2006). Instead, the *Shelborne* court considered whether coverage on the common law trespass and conversion claims existed under the Hanover policy's "property damage" provision. The parties did not dispute that the receipt of fax advertisements constituted "property damage" under the policy. However, Hanover contended that the "property damage" was not caused by an accident as required by the policy because Shelborne's acts were intentional.

Relying on the Tenth Circuit Court of Appeals decision in *Park University Enterprises, Inc. v. American Cas. Co. of Reading*, 442 F.3d 1239 (10th Cir. 2006), the *Shelborne* court disagreed with Hanover's assertion that the intent to send a fax correlates with an intent to cause property damage. Instead, the *Shelborne* court agreed with the Tenth Circuit's reasoning that as long as an insured believes its fax is welcome, then any injury was not expected or intended. Based upon this reasoning, the *Shelborne* court found potential coverage under the "property damage" provision of Hanover's policy because the common law trespass and conversion claims raised the possibility of both intentional or negligent conduct, which created the possibility that the property damage was an occurrence that was not expected or intended.

Auto Policies' "Entitlement Exclusion" is Ambiguous

Illinois' First District Appellate Court recently considered whether automobile insurance policies' provisions excluding coverage for drivers who did not have a reasonable belief that they were entitled to use a motor vehicle, barred coverage for claims involving drivers who did not have valid driver's licenses. *Founders Ins. Co. v. Munoz*, 2009 WL 839946 (1st Dist. 03/27/2009). In the consolidated appeal, the drivers involved in the various accidents giving rise to third-party claims were permissive users who did not have valid driver's licenses. The trial court granted summary judgment to the insurers but the Appellate Court reversed.

Founders Insurance and Safeway Insurance filed declaratory judgment actions seeking a finding that they had no duty to defend or indemnify the drivers because none of them had a reasonable belief that they were entitled to drive the insured vehicles. The relevant language in the "entitlement exclusion" common to each of the Founders and Safeway policies excluded coverage for "bodily injury and property damage arising out of the use of a vehicle without a reasonable belief that the person is entitled to do so." The court considered whether the exclusion language was ambiguous. Previous decisions focused on the term "reasonable belief" when considering if the exclusion was ambiguous, but the *Munoz* Court examined the term "entitled". Founders and Safeway contended that the term "entitled" should have been interpreted to mean "legally entitled" or "having a valid driver's license". The drivers maintained that the term was synonymous with "authorized," "permitted" or "directed". In the absence of Illinois decisions addressing the issue, the court found that each of the interpretations was reasonable and, therefore, the entitlement exclusion was ambiguous. Accordingly, the court held that the exclusion could not be utilized to deny coverage to an unlicensed driver.

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