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COZEN O'CONNOR

Observations on *Erie Insurance Exchange v. Moore*: A Misapplication of Precedent

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The duty to defend is a critical threshold determination in all liability coverage disputes. The Pennsylvania Supreme Court has provided a clear and consistent directive on the issue: facts alleged in the complaint control whether an insurer has the duty to defend, not legal characterizations of the *facts*. *Donegal Mutual Ins. Co. v. Baumhammers*, 9388 2d 286 (Pa. 2007); *Kvaerner Metals Div. of Kvaerner U.S. Inc. v. Commercial Union Ins. Co.*, 908A.2d 888 (Pa. 2006); *Mutual Benefit Ins. Co. v. Haver*, 555 Pa. 534 (Pa. 1999). A narrow majority of the Pennsylvania Supreme Court recently departed from this precedent, finding a duty to defend for a complaint seeking damages for an injury caused by intentional conduct, in which only the degree of injury exceeded the intent to injure. *See Erie Insurance Exchange v. Moore*, 20-WAP-2018, 2020 PA LEXIS 22394. (Pa. April 22, 2020).

In the underlying complaint, the plaintiff sought damages for gunshot injuries sustained during a physical altercation with the insured, in which the insured brandished a gun after committing a murder. Erie sought a declaration that it did not owe a defense because the complaint did not allege an "occurrence." The Erie primary policy defined occurrence as "an accident, including continuous repeated exposure to the same harmful conditions" — the same definition supporting the holdings in *Baumhammers*, *Kvaerner*, and *Haver*. Erie also asserted its exclusion for "personal injury …. expected or intended by anyone we protect" even if "the degree, kind or quality of the injury or damage is different then what was expected or intended …"

The trial court agreed with Erie; on appeal by the insured's estate, the Pennsylvania Superior Court reversed. Erie then sought review of the Superior Court's opinion by the Pennsylvania Supreme Court, and reinstatement of the trial court holding.

Four justices of the Pennsylvania Supreme Court comprised the narrow majority that affirmed the Superior Court. The majority opinion summarized the underlying facts in which the claimant was pulled into a home by the insured, and "a fight ensued between the two and at the time, [and the insured] continued to have the gun in his hand." The court also observed that the underlying complaint further alleged that during the "struggle," the policyholder "negligently, carelessly and recklessly caused the weapon to be fired which struck [the claimant] in the face," causing severe injuries.

The Supreme Court cited to the correct body of law but went astray in its application. The court recognized that the duty to defend is recognized by facts alleged in the four corners of the complaint, citing *Kvaerner* and *Haver*. The court also recognized that legal characterizations do not control. Nonetheless, the court found that the allegations of negligence and recklessness were not designed to artfully characterize intentional acts as accidental, for purposes of insurance coverage. The court instead found that although the altercation was intentional, the discharge of the gun was not. The Pennsylvania Supreme Court further stated that it was not constrained by *Haver*. The court reasoned that, in *Haver*, the insured provided the drugs on purpose but the underlying complaint did not allege that the policyholder discharged the gun on purpose.

The dissenting opinion recognized that the hairsplitting, which formed the basis of the majority opinion, was supported neither by the factual allegations of the complaint nor Pennsylvania case law. The dissenting opinion, authored by Justice Mundy and joined by Supreme Court Justice Saylor and Justice Todd, accurately stated that, under the case law, "we are tasked with looking at the facts" and not speculation. The dissent also accurately pointed out that in addition to *Kvaerner*,

Haver, and *Baumhammers*, the majority's conclusion that the discharge of the firearm during the altercation was contrary to the Supreme Court's holding in *Gene's Restaurant, Inc. v. Nationwide Mutual Ins. Co.*, 548 A. 2d 246 (Pa. 1988), in which the court held that a malicious assault was not an accident. The dissent concluded, "to view purely the discharge of the weapon, without referenced to context, is contrary to our precedent that requires us to view the complaint as a whole."

As an additional observation, the majority could have found an occurrence under the umbrella policy, and remained consistent with Pennsylvania cases interpreting different versions of the occurrence definition. Unlike the primary policy, the umbrella policy defined occurrence as "an accident, including continuous or repeated exposure to conditions which results in personal injury or property damage neither expected nor intended from the standpoint of the insured." This different definition, which considers the intent of the insured in causing the injury, supported the finding of coverage in *Indalex Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA.*, 83 A.3d 418 (Pa. Super. 2013). On October 24, 2019, the Third Circuit Court recognized that under Pennsylvania law, an occurrence definition that considers the insured's subjective intent may warrant a different interpretation than the occurrence definition in *Kvaerner*, *Haver*, *Baumhammers*, which like the occurrence definition in the Erie primary policy, does not consider the insured's intent. *See Sapa Extrusions, Inc., v. Liberty Mutual Ins. Co.*, 939 F. 3d 243 (3d Cir. 2019).