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Insurance Coverage Decisions: Issued Today - Impact Tomorrow
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Now *That's* A Conflict: Illinois Federal Court Pummels Insured's Right to Independent Counsel

When you see a coverage decision with the name "Lenny's Tavern" in the caption, you have a pretty good sense of what the issue is going to be. There are a couple of strong possibilities. Hint – One of them is not patent infringement. So it comes as no surprise that last week's Southern District of Illinois decision in *Atlantic Cas. Ins. Co. v. Harris, Inc. d/b/a Lenny's Tavern* involved an Assault & Battery exclusion and a bar patron that is probably never going to be imbibing at Lenny's again.

I've read a lot of Bar Fight – Assault & Battery coverage decisions and they are all fairly similar – a loaded-up patron or eager-beaver bouncer roughs someone up. Clearly it is not a fun night out for the victim. But *Lenny's Tavern* makes the typical bar brawl look about as combative as Olympic curling.

In *Lenny's Tavern*, Joe Hays, a patron of Lenny's, alleged that, upon exiting the men's restroom and returning to the bar area, another patron placed him in a bear-hug hold and held him while other bar patrons hit him in the head and body with beer bottles, baseball bats, sticks and bricks, kicked and punched him in the face and then stabbed him twice in the back. *Lenny's* at 3. Of course, Mr. Hays alleged that all of this was committed "without provocation." *Id.* Come on Mr. Hays -- not even a teensy-weensy bit?

Click here to read a newspaper account of the beating, plus see a picture of Lenny's Tavern and get the location -- in case you find yourself in Granite City, Illinois and are feeling parched.

http://www.madisonrecord.com/news/211306-brutal-beating-at-granite-city-tavern-prompts--150k-suit

Lenny's has all the makings of an Assault and Battery coverage case. As you read the decision – facts, followed by the relevant policy provisions -- there is no doubt that that is where it is headed. But then, just as you are being lulled into a routine A&B coverage

case, ready to hear some argument that the exclusion doesn't apply for this reason or that -- Ka-Pow! -- Lenny's veers off into a different direction. It hits you like a ton of bricks. You never saw it coming.

The Insurer undertook Lenny's defense in the action brought by Mr. Hays. The defense was provided pursuant to a reservation of rights, including the right to seek reimbursement of defense costs, in the event of a determination that no defense was owed [the policy actually contained a provision that gave the insurer such right]. *Id.* at 4.

The insurer sought summary judgment on the basis of the Assault and Battery exclusion. In response, Lenny's did not argue that the A&B exclusion did not apply. Instead, Lenny's argued that the insurer was estopped to disclaim coverage because it failed to inform the Lenster that, because of the alternate theories of recovery plead in the underlying action (negligence and intentional conduct), there was a conflict of interest for the counsel that the insurer had retained. *Id.* at 11. Lenny's cited to Illinois case law holding that "when such a conflict of interest exists, the insurer (or its appointed counsel), must notify its insured, of the conflict so that the insured can make a fully-informed decision regarding whether to continue with the representation from counsel appointed by the insurer or to obtain its own counsel." *Id.*

The *Lenny's Tavern* Court went on to describe the rationale for such disclosure:

> The reason behind requiring such a disclosure is that sometimes, with alternate theories of recovery, a finding of liability in the underlying suit as to one theory (i.e., an intentional tort) may preclude coverage while a finding as to liability as to the other alternate theory of liability (i.e., negligence) will trigger coverage by the insurer. Therefore, counsel appointed by the insurer (as part of its duty to defend obligation) to represent the insured may be conflicted as whether to vigorously defend the insured or whether to shape the defense in an attempt to evade coverage, maintaining allegiance to the insurer.

Id. at 11-12. [This oft-cited alleged rationale for allowing independent counsel impugns the integrity of all insurance defense counsel. But don't get me started. This is an issue for another day.]

The *Lenny's* Court seemed to be in agreement that this alleged rationale was a legitimate basis for requiring an insurer to allow an insured to retain independent counsel to be paid for by the insurer. Nonetheless, the court concluded that no conflict of interest existed in

this particular case, despite there being alternate theories of recovery plead in the underlying action (negligence and intentional conduct):

> [T]he Court finds the language of this [A&B] Exclusion is applicable to the allegations for the negligence cause of action as well as the allegations for the intentional tort cause of action in the underlying suit. Thus, there is no conflict of interest, as neither theory of recovery would not potentially trigger coverage. Instead, neither theory of recovery appears to trigger coverage, due to the broad scope of the Exclusion.

Id. at 16-17.

The Lessons from *Lenny's Tavern*

Courts that are inclined to conclude that a conflict of interest exists, requiring an insurer to allow an insured to retain independent counsel to be paid for by the insurer, often do so on the basis that the complaint in the underlying action pleads the alternate theories of recovery of negligence and an intentional tort. *Lenny's* demonstrates that an insurer may be able to prevent a court's knee-jerk reaction that the simple fact of the existence of these alternate theories gives an insurer the right to independent counsel.

When it comes to an insured's right to independent counsel, California steals all the attention with its fancy *Cumis* statute. But the fact is that, if you look at the issue on a 50 state basis, about 40 have addressed it in one way or another and many have decisions that are similar to California. That is, IF an insured can prove that an insurer-provided defense, under a reservation of rights, creates a conflict of interest for defense counsel, the insured is permitted to retain independent counsel at the insurer's expense. The big question -- and this is where the battle will be -- is whether a conflict of interest does in fact exist, despite the insurer defending under a reservation of rights.

My personal view is that, in many reservation of rights-defense cases, the insurer is better served allowing the insured to defend itself. Some insurers are reluctant to allow their insureds to defend themselves out of concern that the litigation expenses will be higher (they may be, but not necessarily) or that counsel will be derelict in its reporting requirements. However, even if the defense costs are higher, that may be a small price compared to the benefits that the insurer will likely achieve when later trying to enforce its reservation of rights and disclaim coverage for a verdict or settlement (or portion thereof).

In this situation, the insurer's conduct regarding the handling of the defense will likely be the subject of an autopsy in coverage litigation. Every communication between insurer and retained defense counsel will be scrutinized and attempts will be made to have them look sinister. But if the insured were permitted to retain its own counsel, at the insurer's expense, many issues concerning the insurer's handling of the claim are taken off the table. When the insurer's coverage defenses are strong, insureds need to divert attention away from the substantive issues. Their approach will likely be to attempt to make hay out of the manner in which the insured's defense was handled by the insurer. Not to mention that the complex issue of how to achieve allocation between covered and uncovered claims or damages is usually made easier when the insured has been defended by its own counsel.

Again, issues for another day.

A copy of the Southern District of Illinois's February 18 decision in *Atlantic Cas. Ins. Co. v. Harris, Inc. d/b/a Lenny's Tavern* is attached.

If you have any questions, please let me know.

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