



Second Circuit Affirms that Party Seeking Coverage Under Liability Policy Bears the Burden of Allocating a General Verdict between Covered and Uncovered Damages

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Last week, we obtained a significant victory for the insurer in [Uvino v. Harleysville Worcester Insurance Company](#), --- Fed. Appx. ---, 2017 WL 4127538 (2nd Cir., Sept. 19, 2017). In this decision, the United States Court of Appeals for the Second Circuit addressed the burden of proof in allocating damages between claims which are and are not covered under the insurer's policy. The decision teaches important lessons as to how an insurance company should handle underlying cases involving both covered and uncovered damages, and provides authority for the proposition that a carrier should seek to intervene in underlying cases in appropriate circumstances.

Specifically, the Second Circuit affirmed a decision by the United States District Court for the Southern District of New York which held on summary judgment that Harleysville did not owe coverage for a jury verdict against its insured resulting in a judgment in excess of \$650,000. The underlying action involved construction defect claims against Harleysville's insured, John Barrows, Inc. ("JBI"), relating to JBI's work as a construction manager for plaintiffs' new home in East Hampton, New York. Harleysville defended JBI in the underlying action under a reservation of rights, and prior to trial, sought to intervene for the purpose of submitting special interrogatories to the jury to allocate damages between claims potentially covered under Harleysville's policy (i.e., for damage to other property) and claims not covered (i.e., for costs relating to the repair and replacement of JBI's work). Importantly, Harleysville also informed the insured and its personal counsel of the potentially significant uncovered exposure, of the need to get advice from coverage counsel, and of Harleysville's intent to deny coverage for the bulk of the alleged damages. JBI (through personal counsel) opposed Harleysville's intervention request, plaintiffs took no position, and the Court

ultimately denied Harleysville's motion to intervene.

At trial, plaintiffs asked the jury to award them nearly \$1.9 million in damages from JBI, most of which related to budgetary overruns and costs from construction delays, neither of which were covered under the Harleysville policy. The jury ultimately awarded plaintiffs \$317,840 in general damages and \$83,788 in consequential damages which, with interest, resulted in the \$650,000 judgment against JBI. Neither JBI nor plaintiffs requested the use of special interrogatories to allocate the jury's verdict.

After Harleysville denied indemnity on JBI's behalf, plaintiffs commenced a direct action against Harleysville, claiming that the general and consequential damages award was covered by Harleysville's policy. Ultimately, the District Court granted summary judgment to Harleysville, finding that plaintiffs had "simply not presented ... an intelligible method of separating those damages awarded to them by the jury that the Harleysville policy covers and those that it does not." On appeal, the Second Circuit affirmed, holding that under New York law, the insured (or a judgment creditor standing in the shoes of an insured) bears the burden both of establishing coverage under a policy and establishing what portion of an unallocated general verdict against it relates to covered damages under a liability insurance policy. The Second Circuit rejected plaintiffs' argument that the burden to allocate damages should shift to Harleysville because Harleysville failed to advise its insured of its interest in utilizing special interrogatories and because Harleysville suggested that if intervention were denied, there may be the need for a trial to allocate damages. The Second Circuit found that Harleysville satisfied its obligation by making both plaintiffs and the insured "fully aware" of the allocation issue and uninsured exposure.

While the decision is not precedential, Uvino is significant because it reaffirms the basic principle that the party seeking coverage under a policy bears the burden to prove what portion of a general verdict is attributable to covered damages. It also underscores the importance for insurers to seek to intervene in an underlying case which involves covered and uncovered damages, while taking affirmative steps to advise insureds of the need to obtain an allocated verdict, to obtain separate legal advice with respect to its coverage rights, and to advise of the potentially uninsured exposure.

Feel free to call any member of our team if you have questions concerning this case or its effect on your claims.

The decision is available for download [here](#).

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