



Insurance Coverage Alert

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RECENT DECISION BY THE SOUTHERN DISTRICT OF NEW YORK ON THE USE OF SPECIAL INTERROGATORIES AND ALLOCATION OF COVERED AND UNCOVERED DAMAGES

When it comes to handling claims involving covered and uncovered damages, New York courts have provided insurers with little guidance regarding the liability to pay damages on behalf of an insured for an undifferentiated verdict. This month, however, the Southern District of New York issued a novel decision on the issue in *Uvino v. Harleysville Worcester Insurance Company*, 2015 WL 925940, No. 13-4004 (S.D.N.Y. Mar. 4, 2015).

The Uvinos asserted construction defect claims in New York Supreme Court against J. Barrows, Inc. ("JBI"). Harleysville agreed to defend JBI subject to a reservation of rights because the allegations included potentially covered property damage as well as uncovered claims for repair of faulty work and breach of fiduciary duty.

Shortly before trial, Harleysville moved to intervene to submit special interrogatories to the jury to allocate between covered and uncovered damages, arguing that that it would be burdensome to prove allocation in a subsequent litigation. JBI opposed on grounds that it would be harmed by jury confusion and the Uvinos simply reserved the right to participate in the interrogatory submission. Harleysville's motion was denied and the case proceeded to trial and a general verdict.

The Uvinos brought an enforcement action against Harleysville. Harleysville argued that it had no duty to indemnify JBI because the Uvinos could not prove what portion of the general verdict was awarded for the covered claims. The court first acknowledged that under ordinary circumstances, the burden would rest with the insured/claimant to demonstrate what element of the verdict was covered. However, the burden may shift to the insurer if it does not "adequately make known to the insured the availability and desirability of receiving a special verdict" or of the insurer's "interest in receiving a special verdict." Since Harleysville took measures to forestall an allocation dispute by raising the use of special interrogatories and alerted the parties to their divergent interests, the court ruled that the burden to prove allocation did not shift to Harleysville.

Curiously, the court did not simply grant summary judgment to Harleysville based on the *fait accompli* of the general verdict. Rather, it held that the Uvinos were entitled to an allocation proceeding although the court remained highly skeptical that they could meet their burden. The

court seemed to justify hold a hearing because Harleysville had originally argued that the matter would be subject to an allocation hearing if it was not permitted to obtain a special verdict. Nevertheless, the court required the Uvinos to first demonstrate in writing how they intended to identify what covered damages were incorporated in the general verdict.

The Takeaway

Uvino appears to be the first judicial endorsement under New York law of the use of special interrogatories in an underlying action to obtain an apportionment of damages. It also serves as a cautionary tale to insurers to take special care to avoid a shifting of the burden to prove that a claim does not include covered damages. Insurers are well advised when defending claims with a substantial uncovered component to explicitly reserve their rights at the outset to seek a determination as to what, if any, aspect of a verdict would fall within the obligation to pay damages on behalf of their insureds. This reservation should expressly include the right to intervene in the underlying litigation for allocation of damages. Insurers should also be cautious not to engage or implicate defense counsel in this regard to avoid any claims of conflict and potential relinquishment of control of the defense.