MASSACHUSETTS Lawyers Weekly

Property insurer may have to pay death claims despite 'UL' exclusion

Portable generator caused carbon monoxide fatalities

By: Eric T. Berkman March 11, 2020

An "uninsured location" exclusion in a homeowner's policy did not bar liability coverage stemming from the improper use of a portable generator at the policyholder's vacation cabin, the Supreme Judicial Court has ruled.

Represents estate of decedent

Four people died of carbon monoxide poisoning when the gasoline-powered generator, left at the cabin by the policyholder, was used indoors to run a small refrigerator. The policy's UL exclusion disclaimed coverage for bodily injury or death "arising out of a premises" not insured under the policy but owned by the insured.

Plaintiff Green Mountain Insurance Co., the insurer, sought a declaration that the exclusion applied to wrongful death claims it anticipated the estates of two of the decedents would bring.

The decedents argued in response that the exclusion did not apply because the generator did not "arise out of" the premises.

The SJC agreed.

"The generator here did not resemble any property condition that typically gives rise to personal liability, such as 'the loose board, the falling roof slate, the defect in the walkway, [or] the failure of outdoor lighting,'" Justice Scott L. Kafker wrote for the court, quoting Callahan v. Quincy Mut. Fire Ins. Co., a 2001 case in which the Appeals Court ruled that a dog bite did not "arise out of the premises" for purposes of a UL exclusion. "Inspection of the property would not have revealed a correctable defect, as it would have had the generator been hard wired inside the house. Nor was the generator a permanent fixture of the cabin."

'Closer case'

J. Michael Conley of Braintree, the attorney for the estate of one of the decedents, likened the case to Vermont Mutual

Green Mountain Insurance Company, Inc. v. Wakelin, et al.,

Insurance Company v. Zamsky, et al., a 2013 decision in which the 1st U.S. Circuit Court of Appeals ruled that a portable fire pit did not constitute a condition of the premises under a UL exclusion.

In the absence of on-point precedent from the SJC, the 1st Circuit looked to Callahan and a 2005 Appeals Court decision, Commerce Insurance Co. v. Theodore for guidance in Zamsky. In Theodore, a UL exclusion was deemed applicable to an injury caused by a dying tree on uninsured property.

"Our case sounded like Zamsky and that was our argument," Conley said. "This was a little bit of a closer case because of the potential for the generator to be used to power the house, but it was never used for that purpose."

Boston attorney James T. Scamby, who represented the policyholder in Zamsky, said it is helpful to have the SJC finally weigh in on the issue.

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THE ISSUE: Did an "uninsured location" exclusion in a homeowner's policy bar liability coverage stemming from the improper use of a portable generator at the policyholder's vacation cabin?

DECISION: No (Supreme Judicial Court)

LAWYERS: Brian P. Harris of Harris & Associates, Boston (plaintiff)

J. Michael Conley of Kenney & Conley, Braintree; William J. Doyle of Leavis & Rest, Boston; Peter E. Heppner of Lynch & Lynch, South Easton (defense)

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>
> — James T. Scamby, Boston

"As someone who does a significant amount of coverage work, what stood out for me was the court's comment that this exclusion as worded was ambiguous," Scamby said. "That's the death knell for an insurance company trying to rely on an exclusion, because courts construe them narrowly. If they find it ambiguous, they'll apply it in the insured's favor."

Thomas R. Murphy of Salem, co-author of an amicus brief submitted by the Massachusetts Academy of Trial Attorneys, said Wakelin is an important case for that precise reason.

"Insurers write their policies and people don't, generally speaking, have a choice in what the exclusions are," Murphy said. "When they're vague, they should be read in favor of the person who did not write them. … It's a pro-consumer decision, and we're delighted to see that."

Harvey Nosowitz of Boston, who handles complex coverage disputes, said the decision follows an increasingly familiar pattern of cases involving exclusions that bar coverage for liability "arising out of" a specified conduct or condition.

"In a case with a causal chain of any complexity, that language is often not enough to bar coverage," Nosowitz said, adding that courts, in such cases, often point out that insurers can use broader language if they choose.

For example, he pointed to a coverage case involving allegations that comedian Bill Cosby defamed several women by publicly denying their claims of sexual assault.

The 1st Circuit held in that case that Cosby was entitled to a defense despite an exclusion for liability "arising out of" alleged sexual assault, pointing to a different exclusion used by the same insurer in another policy that barred coverage for claims "arising out of, or in any way involving, directly or indirectly" alleged sexual assault.

In fact, Nosowitz said, the SJC observed in a footnote in Wakelin that the insurer used broader language in a separate exclusion inapplicable to Wakelin barring coverage for damage "arising out of any act or omission in connection with a premises."

The insurer "could have but did not use that language in the exclusion at issue" he said.

"This was a tragic case," said Brian P. Harris of Boston, who represented the insurer. "Given the very unique facts of this case, however, and while insulating its own insured from any monetary exposure, Green Mountain made the correct decision to seek declaratory judgment relief regarding the existence of insurance coverage."

Tragic accident

Mark Wakelin was the named insured on a homeowner's policy issued by Green Mountain on his property in Braintree.

The policy, which covered property loss and insured Wakelin against personal liability for harm to others, had an exclusion for bodily injury or property damage "arising out of a premises" owned by an insured that was not an "insured location."

Wakelin owned a cabin and property in Byron, Maine, that was not insured by the policy, nor was it covered by any other policy.

The cabin, which had battery-powered lights and a wood stove, was not supplied with town electricity. Accordingly, Wakelin purchased a portable gasoline-powered generator that he kept at the cabin to charge power tools.

At some point, Wakelin also brought a small refrigerator to the cabin that he had never plugged in.

When he was not there, Wakelin chained the generator to the garage door so it could not be stolen, and whenever he used it he always ensured it was outside. Wakelin also apparently plugged a microwave oven into the generator to heat food, but only when it was already started to power tools.

In July 2015, Wakelin's daughter Brooke and son Matthew brought two friends, Keith Norris and Deana Powers, to the cabin to celebrate Brooke's 22nd birthday.

Shortly after arriving, all four individuals died from carbon monoxide poisoning. Afterward, it was discovered that they had plugged the refrigerator into the generator with an extension cord and ran the generator inside without opening any windows or doors.

That October, Norris' estate notified the insurer of its wrongful death claim against Wakelin, who it alleged failed to instruct his children about safe use of the generator.

The insurer then filed a declaratory action against Wakelin, Norris' estate and Powers' estate seeking a judgment that the UL exclusion barred their claims. In the meantime, the insurer entered an agreement with the defendants that insulated Wakelin from liability beyond policy limits if coverage was not excluded, making him a party in name only.

Superior Court Judge Mark A. Hallal denied the insurer's motion for summary judgment, and the SJC took up the subsequent appeal on its own motion.

Ambiguous language

The SJC looked to Callahan, Theodore and Zamsky for guidance on whether the UL exclusion applied here.

"In [those] three cases … as well as in the great weight of authority on this subject, there is a distinction between cases of tortious conduct that occur on an uninsured premises and personal liability that arises out of a condition of a premises," Kafker said.

While Wakelin presented a "close question," Kafker continued, it was Wakelin's failure to instruct his children on how to properly use the generator rather than any condition or defect on the property that formed the basis for any potential liability, placing the case in the latter category.

Additionally, he said, "the relevant language of the policy is ambiguous enough to require that it be read against the insurer, particularly since the policy language at issue is an exclusion from coverage. … The judgment of the Superior Court is therefore affirmed."

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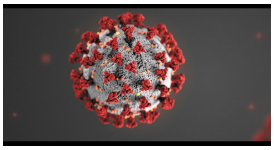

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