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Special Interrogatories in Coverage Disputes: the Hidden Risk

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When insurance coverage disputes turn on answers to questions of fact or the nature of the claim for which an insured may be held liable, a special verdict or answers to special interrogatories should be considered. *Public Service Mutual Ins. v. Goldfarb*, 53 N.Y.2d 392, 399 (1981); *Utica Mutual Ins. v. Cherry*, 45 A.D.2d 350, 355 (2d Dep't 1974), aff'd, 38 N.Y.2d 735 (1975); *New York Mutual Underwriters v. Cavallaro*, 90 A.D.2d 962, 963 (4th Dep't 1982); *American Home Assurance v. Weissman*, 79 A.D.2d 923, 924 (1st Dep't 1981). This device may obviate the need for a separate trial and will avoid the risk of inconsistent determinations. Besides these potential gains, there are serious risks in not moving to intervene. Absent special answers from the jury, it may be impossible to allocate damages between covered and uncovered (or excluded) claims.

In *Butterfield v. Giuntoli*, 448 Pa. Super. 1 (Superior Ct. Pa. 1995), the plaintiff sued a hospital and four doctors for medical malpractice, seeking compensatory and punitive damages. An excess insurer notified the insurance broker that public policy precluded insurance against punitive damages and therefore there would be no coverage for punitive damages. The broker responded that *vicariously assessed* punitive damages were insurable and that the policy was broad enough to provide coverage. The insurer had the right to participate in and control the defense of the action, and an attorney representing the insurer attended the trial, including settlement conferences and discussions in chambers. No one requested special interrogatories to determine whether the jury awarded punitive damages directly, vicariously or both.

In the garnishment action that followed, the court found that Pennsylvania law does *not* preclude insurance for punitive damages when the insured is found vicariously liable and that it was impossible to determine whether the jury awarded punitive damages directly, vicariously or both. The court also found that the insurer had the burden of showing that punitive damages were excluded from coverage as a matter of law and therefore had to establish that the jury assessed punitive damages based *solely* on direct liability.[1] The court found that the insurer was "in the best position" to request special interrogatories and had the "option" to intervene. 448 Pa. Super. at 25. The court granted summary judgment for the plaintiff.

In *Pharmacists Mutual Ins. v. Myer*, 187 Vt. 323 (2010), a defamation action, the jury answered "Yes" to two special questions—Were certain defamatory statements made negligently? Were certain other defamatory statements made recklessly or with knowledge of their falsity?—and awarded damages of $150,000, without differentiating between the two categories. The defendant's insurer sought declaratory judgment that it did not have to indemnify the insured because the policy excluded coverage for injury caused by statements the insured knew or had reason to believe were false. The court reversed summary judgment for the insurer because the policy did not exclude coverage for statements made negligently, but left the insurer free, on remand, to show that *all* of the statements fell within the exclusion.

However, the court also ruled that it was impossible—absent special interrogatories—to allocate defamation damages between statements made negligently and those made recklessly or with knowledge of their falsity. The insurer had monitored the trial and maintained regular contact with defense counsel. Because the allocation of damages was most important to the insurer, the court found it "incumbent upon [the insurer] to notify the trial court and the parties of the potential apportionment issue and the need for special interrogatories allocating damages" and—if necessary—to attend the charge conference "or even to intervene in the litigation if all else failed." 187 Vt. at 333. Since the insurer failed to seek an allocated verdict, if, on remand, any of the statements were ultimately found covered by the policy, the insurer would be responsible for the defamation award in its entirety.

The risks exposed by *Butterfield* and *Pharmacists Mutual* can readily be avoided by moving for leave to intervene to offer special interrogatories targeted at the subjects of potential coverage issues. But will such a motion be granted? We discuss the courts' response to insurers' motions to intervene in "Special Interrogatories in Coverage Disputes: How to Pop the Question," forthcoming.[2]

Endnotes:

1. In *J. Barrow v. Uvino*, discussed in our forthcoming article "Special Interrogatories in Coverage Disputes: How to Pop the Question," the question was whether the policy *covered* the claim, as opposed to being *excluded.* The distinction may determine who has the burden of establishing liability.

2. Other reasons to consider motions to intervene are addressed in "Strategic Intervention in Insurance Coverage Disputes," E. Paul Kanefsky and Nicholas A. Secara, New York Law Journal, March 12, 2014. Among other subjects, that article discusses whether such motions may be made as of right or only by permission.

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