IADC COMMITTEE NEWSLETTER

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IN THIS ISSUE

For nearly 30 years, the term "occupying" a vehicle has been subject to the same standard in Rhode Island's courts. General Accident Ins. Co. of America v. Olivier, 574 A.2d 1240. The Olivier decision offered litigants a four (4) prong analysis for scrutinizing whether an individual was "occupying" a vehicle. The Olivier standard had withstood challenges from both sides. General Acc.Ins.Co v. D'Alessandro, 671 A.2d 1233 (R.I.1996), Liberty Mutual Ins. Co. v. Tavarez, 754 A.2d 778 (R.I. 2000) and Elgar v. National Continental, 849 A.2d 324 (R.I. 2004). Recently, however, in May of 2017, the Rhode Island Supreme Court saw fit to revisit the definition and divide its meaning based upon whether an insurer is seeking to exclude an insured from the protection or benefits of a policy, or conversely, an altogether different standard is applied when an insured is seeking inclusion of benefits from the policy. See Jackson v. Quincy Mutual Fire Ins. Co., 2017 WL 1843873 (R.I. 2017) and Hudson v. GEICO Ins. Agency, Inc., 2017 WL 262277 (R.I. 2017). The Jackson decision requires that insuring draftsmen respond, in kind, and amend the definition of "occupying" to best reflect the insurers' intentions concerning the "owned-but-not-insured" exclusion.

Why Auto Insurers May Need to Consider Redrafting the "Owned-But-Not-Insured" Exclusion

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Donna M. Lamontagne has over 20 years of jury trial and civil litigation/appellate experience in courts throughout Rhode Island and Massachusetts. Ms. Lamontagne is a recognized Super Lawyer among her peers; a distinction given to the top 5% of attorneys. In addition to trial work, Attorney Lamontagne has volunteered her time for the improvement of civics education through the iCivics program pioneered by Justice Sandra Day O'Connor. She was Rhode Island State Coordinator for iCivics from 2010-2014 and is now an iCivics Ambassador. As a member of the International Association of Defense Counsel, Attorney Lamontagne serves on the IADC Foundation Board. She is a registered arbitrator for the Rhode Island Superior Court-Annexed Arbitration Program. She can be reached at dlamontagne@lshattorneys.com.

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The Rhode Island Supreme Court recently addressed the issue of whether an insured decedent was 'occupying' his owned-but-not-insured motorcycle within the meaning of the underinsured motorist policy exclusion. Jackson v. Quincy Mut. Fire Ins. Co., – A.3d – , 2017 WL 1843873 (R.I. 2017). It concluded that, as the policy language in question was exclusionary in nature and intended to exclude an owner from the protections of his policy, Rhode Island courts are directed to employ a strict interpretation of the policy language, rather than a broad and liberal interpretation.

Plaintiff, Jeanne Jackson, the executrix of the estate of decedent, Anthony Esposito, Jr., brought a declaratory action seeking a declaration that the estate was entitled to underinsured motorist coverage under a policy issued by Quincy Mutual Fire Insurance Company ("Quincy Mutual"). The Motion Judge held that as decedent was occupying his motorcycle at the time of his death, the exclusion clause in the Quincy Mutual policy barred plaintiff from recovery, and granted summary judgment in favor of Quincy Mutual. Plaintiff appealed this decision and the Rhode Island Supreme Court vacated the judgment of the Superior Court finding that summary judgment was precluded as a genuine issues of material fact existed as to what impact caused decedent's fatal injury and the time between the two impacts. Jackson v. Quincy Mut. Fire Ins. Co., – A.3d – , 2017 WL 1843873 (R.I. 2017). As described herein, the Supreme Court focused on that fact that there were two distinct collisions – one with the roadway resulting from the impact with the trash barrel and the second resulting from the vehicle traveling in the adjacent lane.

The underlying accident occurred on September 9, 2011 when decedent was operating his motorcycle on Route 6 in Providence, Rhode Island. The facts showed that a trash barrel fell from a passing truck into decedent's lane of travel. Decedent collided with this barrel and, as a result, was thrown from his motorcycle into the adjacent lane of travel where he was struck by a vehicle. Foremost Insurance Company provided limited liability insurance for the motorcycle, but not uninsured motorist coverage. Decedent had an automobile policy with Quincy Mutual which did have uninsured motorist coverage.

> The Quincy Mutual policy included the following exclusion:
>
> We do not provide Uninsured Motorists Coverage for 'bodily injury' sustained: By an 'insured' while 'occupying', or when struck by, any motor vehicle owned by that 'insured' which is not insured for this coverage under this policy.
> Exclusion Section (A.1.) of the Quincy Mutual policy.

The same policy states that term "occupying" "means in, upon, getting in, on, out or off." Exclusion Section (G) of the Quincy Mutual policy.

The Superior Court Motion Judge relied on General Accident Ins. of Am. v. Olivier, 574 A.2d 1240 (R.I. 1990) to determine that decedent was occupying his motorcycle at the time of his death, and thus, coverage was excluded. Plaintiff appealed the decision to the Rhode Island Supreme Court, contending that there were two separate collisions and that decedent's fatal injuries were sustained as a result of the second collision when he was no longer occupying the motorcycle.

The Supreme Court, citing Peerless Ins. Co. v. Luppe, 118 A.3d 500, 510 (R.I. 2015), focused on the fact that the policy language in question in Jackson was exclusionary in nature, rather than inclusionary, and as such, a strict interpretation of the policy language was required, rather than a board and liberal view of the terms, distinguishing this case from Olivier.[1] The Court stated that, "[b]ecause the owned-but-not-insured provision of the Quincy Mutual policy is a clause of exclusion designed and intended to limit the protection afforded to Quincy Mutual's insureds, a strict interpretation of the term "occupying," as defined in the Quincy Mutual policy must be employed." Jackson v. Quincy Mut. Fire Ins. Co., – A.3d – , 2017 WL 1843873 at * 3 (R.I. 2017). The Court then determined that pursuant to a strict interpretation, while it is undisputed that decedent was occupying his motorcycle at the time of the first impact with the barrel, the "question governing this controversy . . . is whether he was "in upon, getting in, on, out or off" the motorcycle at the time he was struck by the passing motor vehicle." Id. at *4.

The Supreme Court then looked to case law from other jurisdictions considering the terms "occupying," giving greater weight to those cases defining the term in an exclusionary, narrow way. The Court initially examined Famers Ins. Co. of Washington v. Clure, 702 P.2d 1247 (Wash. Ct. App. 1985) in which an exclusionary policy provision precluded coverage. That court found that the insured was occupying the motorcycle at the time of his injuries as the injury was "a result of the *immediate impact* with the ground after being thrown from the motorcycle." Jackson v. Quincy Mut. Fire Ins. Co., – A.3d – , 2017 WL 1843873 at * 4 (R.I. 2017), *quoting* Famers Ins. Co. of Washington, 702 P.2d at 1264.

The Court next focused on Mid-Century Ins. Co. v. Henault, 905 P.2d 379 (Wash. 1995) as it was most similar to the case at bar in that it too involved two collisions and required that court to decide whether the insured was deemed to be occupying a motorcycle under an exclusionary clause in an insurance policy that was to be strictly construed against the insured. In Henault, plaintiff was

[1] The Court quoted the general principle from Peerless as "[W]here the policy provision under examination related to the inclusion of persons other than the names insured within the protection afforded, a broad and liberal view is taken of the coverage extended. But, if the clause in question is one of exclusion or exception, designed to limit the protection, a strict interpretation is applied." Peerless Ins. Co. v. Luppe, 118 A.3d 500, 510 (R.I. 2015) *quoting* Mazzilli v. Accident Cas. Ins. Co. of Winterthur, Switzerland, 170 A.2d 800, 804 (N.J. 1961).

seeking coverage for injuries she sustained when she was struck by a motor vehicle after having been ejected from her motorcycle. The facts in Henault supported a finding that the plaintiff had been lying in the road "for an unspecified period of time" prior to getting struck, and that court therefore concluded that plaintiff "clearly was not 'in, on, getting into, or getting out of' her motorcycle and therefore she was not 'occupying' it" at the time of the second impact. Jackson v. Quincy Mut. Fire Ins. Co., – A.3d – , 2017 WL 1843873 at * 4 (R.I. 2017), *quoting* Mid-Century Ins. Co., 905 P.2d at 383.

The Court also looked to Miller v. Amica Mut. Ins. Co., 931 A.2D 1180 (N.H. 2007), a case in which decedent motorcyclist was ejected from his motorcycle when a tire became caught in a rut and was ejected therefrom, and fatally struck while lying in the road by an oncoming vehicle. The Miller Court found that decedent's estate was not precluded from recovery of UM benefits by exclusionary policy language because no reasonable person would "view someone lying in the middle of the highway forty feet from his motorcycle for a period of time between thirty seconds [and] one and a half minutes as 'in, upon, getting in, on, out or off' [the definition of the term 'occupying'] that motorcycle." Jackson v. Quincy Mut. Fire Ins. Co., – A.3d – , 2017 WL 1843873 at * 4 (R.I. 2017), *quoting* Miller, 931 at 1186.

The Jackson Court concluded that, given the plain language of the Quincy Mutual policy and the fact that it is to be construed against the insured as it is exclusionary in nature, a fact-finder must determine "which impact caused decedent's fatal injuries, and the time or distance between them." Jackson v. Quincy Mut. Fire Ins. Co., – A.3d – , 2017 WL 1843873 at * 6 (R.I. 2017). Should the fact-finder determine that the case at bar is most similar to Clure, in that the decedent died as a result of the initial impact with the trash barrel or that the second impact was so close in proximity and time with the initial impact as to essentially be simultaneous, then there could be a finding that decedent was occupying his motorcycle at the time of the injury, and thus, coverage would be precluded. Id. at *5. If however, a fact-finder were to determine that the case at bar is most similar to Henault and Miller in that the fatal injuries were caused by the second impact, and that impact did not occur simultaneously with the impact with the trash barrel, then there could be a finding that decedent was not occupying his motorcycle at the time of the injury, and thus coverage would not be precluded. As the coverage determination depended on issues of fact, the Supreme Court found that summary judgment was not appropriate and vacated the judgment from the Superior Court.

Justice Robinson concurred in part and dissented in part, departing from the majority opinion insofar as the finding that a genuine issue of material fact existed as to whether decedent was occupying or "getting off" his motorcycle. Jackson v. Quincy Mut. Fire Ins. Co., – A.3d – , 2017 WL 1843873 at * 6 (R.I. 2017). He opined that, under the

plain meaning of the term 'occupying,' decedent could not be found to be occupying his motorcycle when he sustained his fatal injuries. Id.

The Jackson v. Quincy Mut. Fire Ins. Co. decision marks a significant change in the Rhode Island courts' analysis of exclusionary policy provisions. If the motorcycle exclusion language in an automobile policy is exclusionary in nature insofar as it is designed to exclude an owner from the protections of his policy, then Rhode Island courts are directed to employ a strict interpretation of the policy language, rather than a broad and liberal interpretation. In light of the Jackson decision, it would be wise for insurers to review the non-owned vehicle exclusion language in their policies and potentially draft around the definition of "occupying" to include, for example, broader language excluding coverage for losses "arising out of the use" of an owned-but-not-insured vehicle.

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