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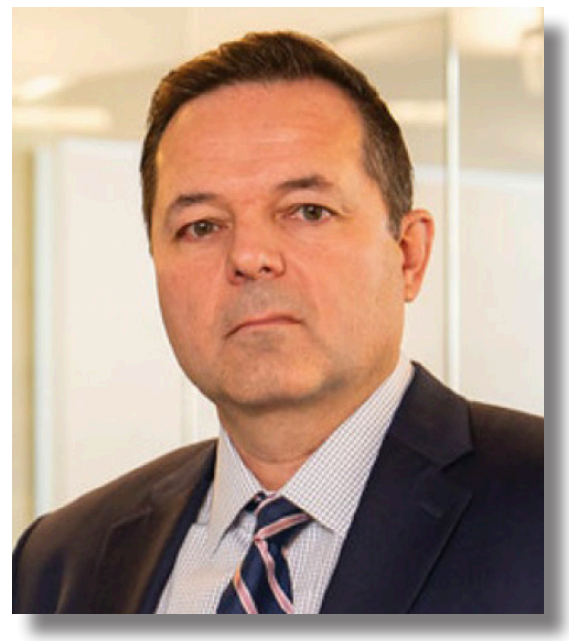
Lawyers of the Year 2024



TIMOTHY H. MADDEN

DONNELLY, CONROY & GELHAAR, *BOSTON*

In 2022, U.S. District Court Judge Richard G. Stearns made waves by ruling that a liability insurer could claw back defense and settlement costs for a personal injury claim it defended under a unilateral reservation of rights and which was later found not to be covered by the policy.

The dispute arose when a chef working in the company café of policyholder Granite Telecommunications brought suit alleging that he suffered a debilitating foot infection when raw sewage backed up into his workspace.

Granite's liability insurer, Berkley National Insurance, defended the case and paid a settlement to the chef while reserving the right to later disclaim coverage under a policy exclusion for injuries caused by bacteria or fungi.

Stearns ruled in Berkley's subsequent reimbursement action that the exclusion barred the claim and that the doctrine of "equitable restitution" demanded that Berkley be reimbursed for its payments.

Granite's attorney, **Timothy H. Madden** of Boston, felt in his gut that the ruling was incorrect, given the Supreme Judicial Court's 1997 decision in Medical Malpractice Joint Underwriting Association of Massachusetts v. Goldberg. Th e ruling laid out specific situations in which an insurer can seek reimbursement, none of which were present in his client's case, Madden believed.

Still, Madden anticipated a tough appeal, given the relative rarity of reversals at the 1st U.S. Circuit Court of Appeals.

But the 1st Circuit overturned the decision last March. Madden says the ruling, Berkley National Insurance Company v. Granite Telecommunications LLC, et al. is critical for the insurance industry.

"Th e decision means policyholders can rely on their policy, and an insurer can do the same," he says. "If there's no right to reimbursement in the insurance policy, … there is no right to be reimbursed."

Q. What was your reaction when Judge Stearns ruled that the insurer could recoup defense and settlement costs once the PI claim was determined not to be covered?

A. The case is a bit of a mindbender because instinctively a lot of people are of the view that if the underlying claim isn't covered, the insurance company shouldn't have to pay to settle the case. Th at makes some sense in the abstract, and that's what, to some extent, Judge Stearns seems to have latched onto.

But in my view, this ignored the terms of the policy itself, which is really just a contract between insurer and insured. … Here, Berkley effectively chose to settle knowing Granite disagreed with its position as to reimbursement. And Goldberg is not a case that's been applied very much, but it has been the law for some time.

Q. What was the most daunting aspect of the case on appeal?

A. The fact that we lost in the District Court. It's always an uphill battle trying to get a reversal. I don't know the exact statistics, but something like 10 percent of cases or less get reversed on appeal. And there's some instinctive appeal to Berkley's position. But when you boil it down essentially to just a contract interpretation case, which is what we tried to do, that's how we overcame the instinctive gut reaction Judge Stearns may have had and what we feared the 1st Circuit might have.

Q. Why, in your opinion, was Stearns' original decision that the doctrine of equitable restitution entitled the insurer to reimbursement of defense and settlement cost incorrect?

A. There had been some letters exchanged between Granite and Berkley where Granite staked out a position that the claim was covered, and if you didn't settle consistent with defense counsel's recommendations, then you'd have exposure under Chapter 176D. I think Judge Stearns viewed that as heavy handed and inequitable in some way, or as rendering Granite's retention of the benefits of the settlement as unjust. There are two problems with that. One is that insureds have to be able to push back or there's no level playing field at all. And then, as a legal problem, doubling back to the idea that an insurance policy is a contract between the parties, equitable remedies don't really apply.

Q. Critics might say this ruling just encourages policyholders to aggressively threaten Chapter 93A/176D litigation to whipsaw insurers into settling a claim of questionable coverage. How would you respond to that?

A. I would say a couple things. One is that if the insurance company is confident in its position, it shouldn't settle the case. It should exercise one of the options that the SJC laid out in Goldberg, which is that if there's no existing agreement to be reimbursed, then the insurer should say to the insured, "We'll settle, but only if you agree to reimburse if we prevail on our coverage position." Or they should say to the insured, "Our determination is that the claim is not covered so we won't settle the case. But you're free to settle, and we've negotiated this settlement, and if you don't settle, you'll take on defense yourself." … The insurance company can't just say, "I'll just pay the settlement and negate coverage and if we win, we'll get to be reimbursed." That doesn't give an insurance company any real incentive to minimize the settlement. And 176D is in place in order to address these types of issues as well, where an insurance company has questions about if the claim is covered.

Q. People might also say that the inability of insurers to recoup settlement and defense costs in these situations will just drive up the cost of insurance. | How would you respond?

A. A way to address that would be for insurers to incorporate a right to reimbursement in the policy.

Q. Where does this case rank in terms of your professional achievements?

A. It's up there. You don't get to argue before the 1st Circuit all the time, so when you do, obviously it takes on an elevated significance. And to get a reversal is also significant. At the end of the day, it was satisfying to get that decision because we pressed the case, the client put resources toward it, and we believed we were on the right side.