COVERAGE FOR CRIMINAL ACTS: HAS *MORRISON* CHANGED THE ANALYSIS?

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I. INTRODUCTION

In *Metropolitan Prop. and Cas. Ins. Co. v. Robert Morrison, Jr.*, 460 Mass. 352 (2011) ("*Morrison*"), the Supreme Judicial Court ("SJC") held that an "intentional and criminal acts" exclusion bars coverage for claims "where the insured *intended to commit the conduct that caused injury* and where that conduct was criminal." *Id.* at 363 (emphasis added). This holding distinguishes earlier Massachusetts jurisprudence espoused in *Preferred Mut. Ins. Co. v. Gamache,* 426 Mass. 93, 94 (1997) ("Gamache") where the Court held that an intentional act exclusion will negate coverage if the insurer can show that the *insured intended the injuries* flowing from the intentional act. *Id.* at 94. The *Morrison* principle provides insurers with a significantly easier evidentiary standard to satisfy when attempting to apply an intentional and/or criminal policy exclusion.[2] The reach of the *Morrison* standard depends on the policy language.

II. *MORRISON*: HOW THE LAW EVOLVED

a. Background

On November 8, 2007, the Marlborough police department was conducting surveillance of a residence where drug trafficking was suspected to be occurring. During the operation,

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[2] For example, in *Quincy Mut. Ins. Co. v. Abernathy*, 393 Mass. 81 (1984), the tortfeasor was a sixteen year old boy who admitted to throwing a rock at a passing car. *Id.* at 87-88. The rock went through the windshield causing a fractured skull to a minor passenger. *Id.* at 82. Despite the adolescent's admission to throwing the rock at the car, the Court held that "[t]he statement tells us nothing about sixteen year old Hannon's state of mind at the time. We do not know whether his act was prompted by a desire to injure or merely to frighten the occupants of the car…" *Id.* at 87. As a result, the Court held that the insurer could not prove that the insured had the requisite intent to harm the third-party. If the *Morrison* standard had been applied, a different result might have been found, because the insurer could show that the insured intended to commit the conduct that caused injury.

Officer Brian Langelier ("Langelier") observed a vehicle leave the residence, which he later pulled over. The driver of the vehicle was Robert Morrison, Jr. ("Morrison"). Langelier ordered Morrison out of his vehicle in order to conduct a patfrisk search of Morrison's person. During the search, Morrison tensed up and fled the scene. In an attempt to stop him, Langelier stuck out his right foot, but instead caught his left boot on the pavement. Langelier fell to the ground and broke his ankle. As a result of this incident, and a subsequent altercation with the three arresting officers, Morrison pled guilty to four counts of assault and battery on a public employee, one count of resisting arrest, one count of disorderly conduct and one count of possession of a Class B substance (cocaine).

After the incident, Langelier's counsel sent Morrison's parents a notice of claim letter requesting that they put their homeowners insurance's provider, Metropolitan Property and Casualty Insurance Company ("Metropolitan"), on notice of Langelier's injuries resulting from their son's attempted arrest.[3] After notifying their insurer, Metropolitan issued a reservation of rights letter to Morrison's parents, but took no further action at that time.

On December 11, 2008, Langelier filed a complaint against Morrison in Middlesex Superior Court alleging that Morrison negligently or recklessly failed to obey a lawful order to submit to arrest and his attempt to flee the scene of arrest caused Langelier's injuries (the "Underlying Action"). Metropolitan did not retain defense counsel for Morrison, but rather filed a declaratory judgment action (the "Coverage Action") against Morrison and Langelier in Middlesex Superior Court seeking a declaration that Metropolitan had no duty to defend or indemnify Morrison in the Underlying Action. On March 10, 2009, the trial court entered a default against Morrison for failing to file an answer or otherwise defend against the Complaint

[3] Morrison's parents were the named insured's on Metropolitan's homeowner's policy. The policy, much like most homeowner's policies, provides coverage for relatives who are residents of the same household.

in the Underlying Action. After an assessment of damages hearing, the trial court awarded Langelier $84,391.79[4] against Morrison.

In the Coverage Action, Morrison filed a counterclaim against Metropolitan alleging that Metropolitan breached its duty to defend and indemnify him in the Underlying Action. Thereafter, Morrison filed a partial motion for summary judgment seeking a declaration that Metropolitan could not deny coverage in the Underlying Action because the default judgment entered against him established that his negligence caused Langelier's injuries and that the intentional and criminal exclusion clause was inoperable. Metropolitan cross-moved for summary judgment seeking a declaration that Langelier's injuries had resulted from Morrison's intentional and criminal acts and were therefore excluded from coverage under the policy.[5]

The Court denied Morrison's partial motion for summary judgment, allowed Metropolitan's cross-motion for summary judgment and issued a declaration that Metropolitan had no duty to defend Morrison in the Underlying Action. Specifically, the trial court held that "[t]he meaning of the intentional and criminal acts clause is plain. The policy does not cover bodily injury resulting from an act or omission by the insured that is both intentional and criminal." *Morrison,* 460 Mass. at 356. The judge's ruling was predicated, in part, upon Morrison's guilty plea to assault and battery and resisting arrest, both of which require a general intent to do the acts that ultimately caused Langelier's injuries. Subsequently, Morrison filed an application for direct appellate review to the SJC, which was granted.

[4] Officer's Langelier's wife also recovered $10,000 under a loss of consortium theory of liability.

[5] Metropolitan also sought a declaration that (1) Morrison's false statement to Metropolitan's investigator regarding his residence at the time of the incident constituted an act of non-cooperation and (2) Morrison's false statement was a breach of the policy's concealment or fraud clause. While addressed by the *Morrison* decision, this paper does not discuss these issues.

b. *Gamache* Revisited

On appeal, the Massachusetts Supreme Judicial Court addressed the question of whether "an exclusion in a liability policy for 'intentional and criminal acts' appl[ies] where the insured intended to commit the conduct that caused injury and where the conduct was criminal, or does it apply only where the insured intended the harm resulting from the intentional and criminal acts?" *Id.* at 353. The Court held that "the exclusion applies where the insured intended to commit the conduct that caused injury and where the conduct was criminal." *Id.* In reaching its decision, the Court discussed its prior holding in *Gamache*, in which it held that the intentional act exclusion in a liability policy requires a showing that the insured intend to cause the harm to the injured party. In *Gamache*, the Court reasoned that the policy exclusion[6] was overbroad and posed a significant risk that "the exclusion [could potentially] bar[] any accident resulting from a volitional act of the insured irrespective of the insured's intent to cause injury..." *Gamache*, 426 Mass. at 94. The *Gamache* Court's primary concern was that any other result "would logically tend to negate coverage in a substantial number of, if not all, accidents." *Id.* at 94.

The logic of the *Gamache* Court's decision applies to most negligence cases because, as the SJC observed, "much negligent conduct involves some intentional act." *Guzman v. Pring-Wilson*, 81 Mass. App. Ct. 430, 435 (2012). For example, in a car accident case where excessive speed was at issue, one might argue that the tortious driver intended the act of driving excessively, but did not intend to contact the other vehicle. In that situation, under the *Morrison* standard, the insured's intentional act of driving excessively potentially negates coverage under an intentional act exclusion because he intended the conduct that caused the harm. In avoiding that result, the *Gamache* Court reasoned that "insurers can deal with the problem created by

[6] The exclusion negated coverage for "bodily injury … which results directly or indirectly from … an intentional act of an insured." *Gamache,* 426 Mass. at 94.

cases like this one by drafting appropriately worded exclusions for injuries to a third party resulting from an insured's intentional torts or criminal acts." *Gamache*, 426 Mass. at 95.

Metropolitan followed the *Gamache* Court's instruction and narrowly tailored its exclusion by limiting coverage for bodily injury or property damage resulting from an insured's "intentional *and* criminal" act. The *Morrison* Court reasoned that "[b]y limiting the exclusion to acts that are *both* intentional and criminal, the Metropolitan policy poses no risk that the exclusion may be interpreted so broadly as to effectively negate the policy's liability coverage for accidents." *Morrison*, 460 Mass. at 363 (emphasis in original). As a result, in cases where the policy expressly requires an "intentional *and* criminal" act, the insurer need only prove that the insured intended the conduct that caused the injury.

c. Applicability Of Insured's Criminal Conviction or Guilty Plea

Under either analysis, if the insured is convicted or pleads guilty to a criminal charge as result of the tortious incident, the insurer may use that conviction and/or guilty plea as evidence in proving the insured's intent. "A plea of 'guilty' is an admission of the material facts alleged in the complaint or indictment, . . . and in so far as it amounts to an admission of facts material in the trial of a civil case in which the person so pleading is a party, it is admissible as evidence against him." *Aetna Cas. & Sur. Co. v. Niziolek*, 395 Mass. 737, 747 (1985) (quoting *Dzura v. Phillips*, 275 Mass. 283, 289 (1931)); *see also Mass. Prop. Ins. Underwriting Assoc. v. Norrington*, 395 Mass. 751, 756 (1985) (a guilty plea may not be used to support a finding of issue preclusion against a claimant not a party to the insured's criminal proceeding, but may be used to evidence the insured's intent). Moreover, in *Niziolek*, the Court held that "a party to a civil action may invoke the doctrine of collateral estoppel to preclude the criminal defendant from relitigating an issue decided in the criminal prosecution." *Niziolek*, 395 Mass. at

742. Like in *Morrison*, the insured's guilty plea provides evidence that his acts were intentional and criminal for purposes of establishing that the insurer has no duty to defend and/or indemnify; but the plea "does not undisputedly demonstrate[] that an exclusion applies that negates an insurer's duty to defend." *Id.* Along with this evidence, the insurer must establish its insured's intent through his conduct and/or statements.[7]

III. *Morrison* Pitfalls To Avoid

In Massachusetts, "[a]n insurer has a duty to defend an insured when the allegations in a complaint are reasonably susceptible of an interpretation that states or roughly sketches a claim covered by the policy terms." *Ruggerio Ambulance Serv., Inc. v. Nat'l Grange Mut. Ins. Co.*, 430 Mass. 794, 796 (2000). The duty to defend is determined by the facts alleged in the complaint and the facts known or readily knowable by an insurer. *Boston Symphony Orchestra, Inc. v. Comm. Union Ins. Co.*, 406 Mass. 7, 10-11 (1989). When the allegations of the complaint fall outside the policy coverage, the insurer is not obligated to defend the insured. *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.,* 439 Mass. 387, 394-95 (2003). However,

> [w]here there is uncertainty as to whether an insurer owes a duty to defend, the insurer has the option of providing the insured with a defense under a reservation of rights, filing a declaratory judgment action to resolve whether it owes a duty to defend or to indemnify, moving to stay the underlying action until a declaratory judgment enters, and withdrawing from the defense if it obtains a declaration that it owes no duty to the insured.

Morrison, 460 Mass. at 358-59.

In *Morrison*, Metropolitan opted not to defend Morrison in the Underlying Action by relying, *inter alia*, on Morrison's guilty plea to charges that he resisted arrest and committed an assault and battery on Langelier. Metropolitan took the position that the guilty plea established

[7] The SJC has held that certain acts, because of their direct and forcible nature, are such that Courts "must conclude, as a matter of law, that the insureds intended to cause at least some injury to the tort plaintiffs." *Worcester Ins. Co. v. Fells Acres Day Sch., Inc.*, 408 Mass. 393, 399-400 (1990) (citations omitted).

that Langelier's injury was the result of Morrison's intentional and criminals acts and was, therefore, excluded from coverage. The trial court did not raise or address the duty to defend issue and the SJC remanded the matter for further proceedings on that issue. If it is determined that Metropolitan breached its duty to defend, then there will be significant ramifications on Metropolitan's duty to indemnify.

The *Morrison* Court held that if the:

> insurer disclaims a duty to defend and the underlying case has gone to judgment, the duty to defend remains entwined with the duty to indemnify because, where the insurer has committed a breach of the duty to defend, the breach yields two consequences that may affect the duty to indemnify. The first is that a breach of the duty to defend is a breach of the insurance contract, and the insured is entitled to contract damages caused by the breach.

Id. at 359. In the situation where a defendant defaults, the underlying factual allegations in the complaint as to liability are deemed admitted by the insurer in the coverage action and treated as true. In *Morrison*, the complaint alleged negligence, even though the insured's actions may have been intentional. As a result, Metropolitan must accept the facts supporting the negligence claim as true in the Coverage Action if it is found to have breached its duty to defend, effectively negating the application of the intentional and criminal act exclusion. However, the insurer is not bound by the factual allegations in the Complaint at the time that a default judgment enters where no breach of the duty to defend occurs. In order to avoid this risk and uncertainty, an insurer may be more inclined to: (1) issue a reservation of rights; (2) defend the Underlying Action; and (3) seek a stay in order to pursue declaratory relief.

IV. Impact On Future Claims

The *Morrison* decision did not overturn *Gamache's* holding; rather it provided a new standard to apply when confronting an "intentional and criminal" act exclusion. The prior *Gamache* standard still applies when analyzing an intentional act exclusion that does not

encompass a criminal component. As a result, when presented with an incident which may implicate an intentional act exclusion, the insurer's first must look at the policy and determine the appropriate analysis. If the analysis falls under *Morrison*, then the insurer need only prove that the insured intended the conduct that caused the injury; conversely, if the analysis falls under *Gamache*, the insurer needs to prove that the insured intended the harm caused by his intentional conduct.