

Homeowners' Liability Coverage For Vehicle-Related Injuries

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When our clients are injured in accidents involving automobiles and other motorized conveyances, we understandably focus our attention first upon policies of automobile insurance. There are circumstances, however, in which the liability coverage in a tortfeasor's homeowners' insurance policy may provide coverage in addition to or to the exclusion of automobile insurance policies. This article focuses upon the availability of homeowners' liability coverage (a) as additional coverage for claims for damages arising from automobile accidents and (b) for claims for damages arising from accidents involving off-road recreational vehicles, such as all terrain vehicles (ATVs) and snowmobiles, which are not covered by automobile insurance.

I. HOMEOWNER'S COVERAGE FOR CLAIMS AGAINST NEGLIGENT NON-OWNER/NON-OPERATOR INSUREDS

Homeowners' insurance policies typically provide liability coverage to members of the insured household for bodily injury claims. The limits of such coverage are substantial -- at least \$100,000 and often \$300,000 per occurrence or more -- especially in comparison to the low limits often appearing in auto insurance policies.

Homeowners' coverage is subject to certain exclusions (intentional acts, etc.), including the so-called motor vehicle exclusion. In its most common form, the exclusion states that personal liability coverage does not apply to bodily injury:

arising out of: (1) the ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an insured; (2) the entrustment by an insured of a motor vehicle .. to any person; ...

Part (1) of the above-quoted motor vehicle/conveyance exclusion has two parts, both of which the insurer must prove in order for the exclusion to apply. First, the injury or damage must have arisen out of the ownership, maintenance, use or loading or unloading of a motor vehicle or motorized land conveyance. Second, the motor vehicle in question must have been "owned, operated by or rented or loaned to" an insured. See *American National Property and Casualty Co., v. Gray*, 803 S.W.2d 693 (1990); *Merrimack Mut. Fire Ins. Co. v. Sampson*, 28 Mass. App. Ct. 353, 550 N.E.2d 901 (1990) (interpreting the application of an identical exclusion in another context; the clause "owned or operated" modifies "motor vehicle," thus confirming that the exclusion consists of two parts which must be established in order to deny coverage).

"The word 'use' is clearly broader than the word 'occupy.' The ordinary meaning of 'use' includes the 'legal enjoyment of property that consists of its employment, occupation, exercise or practice.'" *Gordon v. Safety Ins. Co.*, 417 Mass. 687, 690, 632 N.E.2d 1187 (1994) quoting, Webster's New Third Int'l Dictionary 2523 (1961). In the *Gordon* case, the Court ruled that a person who had requested and was receiving a ride to a friend's home in a stolen vehicle, was more than just occupying the vehicle in question; he was also "using" it for his own purposes in the sense of the definitions of the auto policy.

Accordingly, there clearly exists the potential for liability to arise from "use" of a vehicle without the vehicle being "owned, operated by or rented or loaned to" the insured. The exclusionary clause should be inapplicable in such cases where the negligent user is not the owner or the operator of the vehicle nor was the vehicle rented or loaned to him. For example, the language of the exclusion does not encompass a passenger in a motor vehicle unless the passenger is also the owner, lessee, or bailee of the vehicle. See *American Nat'l Property and Cas.Co., v. Gray*, 803 S.W.2d 693 (Tenn. App. 1990) (a passenger's homeowners' insurer was

required to provide coverage because the exclusionary clause did not apply where the vehicle involved was not owned, operated, rented, or loaned to the insured passenger). Even if an insurer were to argue some other meaning, such an interpretation could not be considered clear and unambiguous as required for such an exclusion. See *Royal Globe Ins. Co. v. Schultz*, 385 Mass. 1013, 434 N.E.2d 213, (1982); *Hakim v. Massachusetts Insurer's Insolvency Fund*, 424 Mass. 275, 675 N.E.2d 1161 (1997).

In *Hingham Mut. Fire Ins.Co. v. Niagara Fire Ins.Co.*, 46 Mass. App. Ct. 500 (1999), the Appeals Court considered a dispute between an auto insurer and a homeowners' insurer as to defense obligations in a case in which a passenger caused or contributed to an accident by grabbing the wheel. The Court ruled that the auto insurer had a duty to defend the passenger in its insured's vehicle where the underlying complaint alleged that the passenger had grabbed the steering wheel of the car in response to a perceived emergency. Such allegations were sufficient to support the conclusion the driver impliedly consented to the passenger's use of the vehicle as required for auto coverage to apply. The Court ruled that the passenger's homeowners' insurer shared the duty to defend because an exclusion for accidents arising out of the "operation" of a motor vehicle is ambiguous. "Operation" could be construed narrowly to include exercise of control over all the parts of the car that allow it to move, or it could be interpreted broadly to include any voluntary act that affects the movement of the vehicle. Resolving this ambiguity against the insurer, the Appeals Court construed the policy in favor of providing coverage and ordered the homeowners' insurer to contribute to the defense of the case. Thus it appears that when a tortfeasor contributes to an accident while using but not operating (or owning) a vehicle, he or she may have coverage available from *both* an auto insurance policy *and* a homeowners' policy.

In a Superior Court decision, Justice Zobel has concurred in this conclusion. *Thompson V. Arbella Mut. Ins. Co.*, 1999 WL 1325975 (Mass.Super.). In *Thompson*, the Court considered the availability of homeowners' coverage (in addition to auto coverage) to a claim against an insured who the plaintiff alleged was negligent in asking an intoxicated friend for a ride home. Justice Zobel synthesized the claim as follows:

[T]he entire basis of the claim is that without Maher's request Heikkila would not have been driving at all that night. The Second Amended Complaint specifically alleges that Maher "induced or solicited or otherwise caused [Heikkila] to operated [sic] motor vehicle while Maher knew, or should have known that Heikkila was intoxicated." In short, *Thompson* asserts that absent Maher's conduct, a drunken Heikkila would never have been on the road at any time, and more specifically, at the time of the collision.

While expressing some skepticism concerning the underlying liability case (which was not before the Court) Justice Zobel ruled that because the defendant (Maher) was a user but not an owner or operator of the accident vehicle, the motor vehicle exclusion was inapplicable and the homeowners' coverage applied.

In a case of passenger interference, like *Hingham Mutual*, or other circumstances in which an alleged tortfeasor is a user but not an owner or operator of the vehicle, there may be coverage from the occupied vehicle, from the optional bodily injury coverage of the passenger's household vehicles (assuming the passenger is not from the same household or a regular user of the accident vehicle), and from the passenger's homeowners' policy.

When evaluating the applicability of the motor vehicle exclusion, it is extremely important to determine whether the homeowners' policy contains standard severability of interests language -- providing that the insurance applies separately to each insured as if he/she had a separate policy. If there is such a severability clause, the motor vehicle exclusion will not exclude coverage for an insured who is neither owner nor operator of the accident vehicle, even

where the injury is produced by motor-vehicle-related negligence on the part of another insured to whom the exclusion would apply. *Worcester Mut. Ins. Co. v. Marnell*, 398 Mass. 240, 496 N.E.2d 158 (1986) (in presence of severability clause, parent's coverage for alleged negligent supervision not excluded even though injuries arose from motor vehicle accident in which minor child was owner/operator of vehicle); see also *Merrimack Mut. Fire Ins. Co. v. Sampson*, 28 Mass. App. Ct. 353, 550 N.E.2d 901 (1990) (negligent supervision claim brought against insured but unlike in *Marnell* exclusion found applicable because named insured was owner of vehicle); cf. *Roe v. Lawn*, 34 Mass. App. Ct. 726, 727 n 5 (1993) (with severability clause, operator of taxi company not excluded from coverage under automobile policy for intentional sexual assault by driver) aff'd on other grounds 418 Mass. 66 (1994)

In recent years there had been some conflict among Superior Court decisions as to whether coverage would extend where the negligent supervision alleged actually related to supervision of the use of a vehicle.

In *Shamban v. Worcester Insurance Co.*, 47 Mass. App. Ct. 10 (1999), a case involving an off-road vehicle, the Appeals Court confirmed that, in the presence of severability language, negligent supervision claims against *non-owner* parents may be covered by homeowners' insurance, even if the failure of supervision relates to the use of a vehicle. Applying the plain language of the exclusion, the Court based its coverage determination on the fact that the subject insured neither owned nor operated the vehicle, and not on whether the negligence alleged was vehicle-related. Furthermore the court noted that allowance of coverage was further supported by language in the exception to the exclusion pertaining to off road vehicles not owned by the named insured.

In *Phoenix Ins. Co. v. Churchwell*, 57 Mass. App. Ct. 612 (2003) the Appeals Court ruled that the motor vehicle exclusion of homeowners' insurance policy barred coverage to a parent who allegedly negligently supervised her child by failing to put the child passenger in safety seat because the liability for the injury to the child arose from use of vehicle and the parent's ownership of vehicle brought the parent into exclusion, distinguishing the case from *Marnell* and *Shamban*.

Aetna Cas. & Surety Co. v. Home Ins. Co., 44 Mass. App. Ct. 218 (1998) provides a puzzling counterpoint, seemingly irreconcilable with the later decisions of *Hingham Mutual* and *Shamban*. The Court denied defense coverage under a homeowners' policy to the parents of driver/tortfeasor for a negligent supervision claim, reasoning that homeowners' insurance should protect only from risks associated with the home. The vehicle involved was owned by a business owned by the parents. In ruling that there was no coverage under the homeowner's policy, the Court distinguished the negligent supervision claim in this case from that asserted in *Marnell* in which coverage was found. The Court emphasized that in *Marnell*, unlike in this case, the complaint contained specific allegations that the negligent failure of the parents to supervise and to prevent their son from drinking and driving took place in the home. Yet, unlike in *Marnell* the Court in *Aetna Cas.* ignored entirely the language of the policy, which the Court conceded did not exclude coverage.

There is no limitation that homeowner's policies protect only from risks associated with the home, written in the personal liability coverages of homeowners' policies. This part of the decision should be viewed at best, as a potential back up argument for an insurer which cannot prevail based on the policy language. This case by itself should not be interpreted as necessarily representing a trend adverse to coverage, due to the absence of any policy related reasoning on

this point, the fact that the issue was treated dismissively at the end of an opinion which focuses extensively on large liability coverages, and the fact that the decision is irreconcilable with the Court's subsequent rulings in *Shamban* and *Hingham Mutual*.

II. HOMEOWNER'S LIABILITY COVERAGE FOR ACCIDENTS INVOLVING OFF ROAD VEHICLES

Off road vehicles such as ATVs, snowmobiles and dirt bikes or trail bikes are excluded from the definition of "auto" in the current Massachusetts auto insurance policies, and thus accidents involving such devices will only be covered, if at all, under policies of homeowners' insurance.

The most common form of homeowners' personal liability coverage includes exceptions to the motor vehicle exclusion, including one for off road vehicles:

"This exclusion does not apply to:

- (2) a motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and
 - (a) not owned by an insured; or
 - (b) owned by an insured and on an insured location."

There are several pending or recently settled issues concerning this exception.

First, is the question of whether such off road vehicles are "not subject to motor vehicle registration." In *MacLean v. Hingham Mut. Fire Ins. Co.*, 51 Mass.App.Ct. 870 (2001), *further appellate review denied*, 434 Mass. 1108, the Appeals Court established that ATVs and other off road vehicles, at least when not used on public roads, are outside the definition of motor vehicle and thus are "not subject to motor vehicle registration."

MacLean involved a claim by a passenger who sustained injuries while riding on an ATV that was being operated by an insured under a Hingham Mutual homeowners' policy, and that was not owned by the insured. The insurer disputed coverage, claiming that the ATV was subject to motor vehicle registration as a recreational vehicle under G.L. c. 90B and thus did not fall within the exception. The Appeals Court rejected the insurer's argument and ruled in favor of coverage. The Appeals Court decided that an ATV is not a "motor vehicle" subject to motor vehicle registration, and thus that the ATV involved in the accident came within the exception to the policy's motor vehicle exclusion because it was a motorized land conveyance designed for recreational use off public roads that was not subject to motor vehicle registration, and was not owned by the insured.

The *MacLean* decision is consistent with the prior decision, *Arbella Mut. Ins. Co. v. Vynorious*, 34 Mass. App. Ct. 121 (1993), *rev. denied*, 414 Mass. 1105, in which the court interpreted a Massachusetts Auto Insurance policy to provide no uninsured motorists coverage for a snowmobile accident because snowmobiles are recreational vehicles designed principally for off-road use, and are not subject to Department of Motor Vehicle registration under c. 90 when not used on public highways. More recently in *Farm Family Mutual Ins. Co. v. Whelpley*, 54 Mass. App. Ct. 743 (2002), the Appeals Court, interpreting a homeowner's policy's exclusion for recreational vehicles used off of insured premises, ruled that the term "recreational vehicle" clearly and unambiguously included ATVs.

A second issue pertains to whether the description "on an insured location" refers to the scene of the operation or accident, or to the locus of ownership or garaging of the vehicle. In *Farm Family Mutual Ins. Co. v. Whelpley*, 54 Mass. App. 743 (2002), the Appeals Court determined that an ATV accident on a public way was "away from" the insured premises and

therefore excluded, even if the ATV was garaged and regularly used on the insured location. 54 Mass. App. Ct. at 746. Moreover, it is important to consider the policy's definition of insured location or premises, which may include property adjacent to or used in connection with the insured's property. See, e.g., *Nationwide Mutual Insurance Co. v. Prevatte*, 423 S.E.2d 90 (N.C. App.1992)(ATV accident, which occurred on land adjacent to insured's residence, occurred on an "insured location" within meaning of the policy; policy defined "insured location" to include any premises used in connection with insured's residence premises); *Uguccione v. United States Fidelity and Guar. Co.*, 597 A.2d 149 (Pa. Super. 1991) (roadway in private residential development was "insured location" under homeowners' policy; policy defined insured location as "the residence premises" and "any premises used by you in connection with" the residence premises); *Northern Sec. Ins. Co., Inc. v. Rossitto*, 762 A.2d 861 (Vt. 2000) (easement where collision occurred between ATVs was "insured location" within meaning of homeowners' policy which made the motor vehicle exclusion of liability coverage inapplicable if motorized land conveyance not subject to registration was used on an insured location; policy defined "insured location" to include residence premises and premises used in connection with them). The Appeals Court has posited the following construct. "To determine whether a site is covered by reason of its use in connection with the specifically insured residential premises, courts will examine (1) the character of the use as a residentially related activity; (2) the distance between the residence and the site; and (3) the resulting reasonable foreseeability of the risk of the connected activity on the site to the insurer. Under these criteria one would anticipate that common residential behavior close to home and foreseeable to the insurer will increase the probability of coverage of the site. The probability of coverage will decline as the activity becomes more unusual, more remote from the residence, and therefore less foreseeable to the

insurer. As author of the policy terms, the insurer has inserted the concept of an insured separate site. These rational determinants of a covered location should not inflict unfair surprise or burdensome risk upon the insurer.” *Utica Mut. Ins. Co. v. Fontneau*, 70 Mass.App.Ct. (2007); *see Massachusetts Property Ins. Underwriting Assn. v. Wynn*, 60 Mass.App.Ct. 824, 830 (2004).

Accordingly, when our clients are injured by the use or operation of vehicles - automobiles or off-road vehicles - it is essential to review and consider carefully the provisions of any homeowners' policies or other personal liability policies, rather than simply to assume that such policies do not cover vehicle accidents.