

Washington Court: Firearms Exclusion Excludes Coverage for Pre-Shooting Negligence and Shooting Claims

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In *Capitol Specialty Insurance v. JBC Entertainment Holdings, Inc., et al.*, No. 68129-0-1, 2012 Wash. App. LEXIS 2835 (Ct. App. Dec. 10, 2012), the Washington Court of Appeals held a firearms exclusion in a commercial general liability (CGL) policy unambiguously excludes coverage for all claims arising from a nightclub shooting regardless of who used the firearm, including those claims characterized as pre-shooting negligence. The court distinguished the holding from those claims where there are allegations of post-shooting acts that lead to further injury or harm to the claimant.

Policy and Firearms Exclusion at Issue

Capitol Specialty Insurance Corporation (Capitol) issued a CGL insurance policy to JBC Entertainment Holdings, Inc. (JBC) that provided “[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.” The policy contained a firearms exclusion at issue in the case, which excluded from coverage “[b]odily injury’ or ‘property damage’ that arises out of, relates to, is based upon, or attributable to the use of a firearm(s).”

Underlying Facts and Complaint

JBC operated Jillian’s nightclub in Seattle. On March 21, 2010, an unidentified person at Jillian’s fired a gun, injuring a patron. Following this incident, the patron filed a complaint against JBC, JBC employee Michael Knudsen, JBC owners Gemini Investors (Gemini) and Alpha Capital Partners, Ltd. (Alpha), and non-employee event promoter Marquis Holmes. The complaint included causes of action for negligent hiring, training and supervision and negligent failure to provide adequate security. All of the claims related to the shooting

incident itself, and none related to alleged negligence after the shooting. Capitol agreed to defend JBC, Alpha, Gemini and Knudsen subject to a reservation of rights.

Coverage Action

Capitol filed a declaratory judgment action to determine whether the policy covered the patron’s claims. Capitol moved for summary judgment, arguing the firearms exclusion directly applied to all claims “[r]egardless of the ‘dressing up’ of the shooting into different negligence theories.” The trial court granted Capitol’s motion for summary judgment, and JBC, Alpha, and Gemini (collectively JBC) appealed.

Firearms Exclusion Unambiguously Excluded Coverage

The Washington Court of Appeals affirmed the trial court and held the firearms exclusion unambiguously excludes coverage. In so holding, the court rejected the following two major arguments advanced by JBC:

1. Concurrent Cause Theory: JBC contended the patron’s claims for negligent hiring, training, supervision and security alleged a concurrent and independent cause of his injuries and, therefore, fell outside the exclusion.

In rejecting this argument, the court relied upon *McAllister v. Agora Syndicate, Inc.*, 103 Wn. App. 106, 11 P. 3d 859 (Ct. App. 2000), which rejected a similar argument in the context of an assault and battery exclusion, and concluded the patron’s claims alleged exclusively pre-assault negligence and *depended* entirely on the shooting. Therefore, the claims “arise out of, relate to, are based upon, or attributable to the use of a firearm,” and the firearms exclusion accordingly precluded coverage.

2. Ambiguous Policy Language: JBC contended the firearms exclusion was ambiguous such that “an average purchaser of insurance could fairly conclude that the firearms exclusion applies only if the insured itself uses a firearm in connection with its business.”

In support of this argument, JBC relied upon the Missouri decision of *Braxton v. United States Fire Insurance Co.*, 651 S.W.2d 616 (Mo. Ct. App. 1983). In *Braxton*, the policy at issue provided that the insurance did not apply to bodily injury or property damage arising out of certain enumerated acts “by,” “for,” or “on behalf of” the named insured. The firearms endorsement excluded coverage for “bodily injury and property damage arising out of the ownership or use of any firearm.” Read together, the *Braxton* court held the firearms exclusion did not apply since a “reasonable person reading the exclusion in context could fairly conclude that the exclusion applied only if the insured himself owned or used a firearm in connection with his business, or if someone else used the firearm ‘for’ him or ‘on his behalf.’”

The *Capitol* court rejected JBC’s application of *Braxton* to the case, since the *Capitol* policy simply provided that “[t]his insurance does not apply to” an enumerated list. Importantly, the policy did not contain the “by, for, or on behalf of” language

that created ambiguity in *Braxton*. The court, therefore, concluded that to interpret the firearms exclusion to apply only to the insured would be contrary to the plain language of the provision, given that the exclusion unequivocally excluded coverage from bodily injury arising from the use of a firearm, regardless of the user of the firearm.

Conclusion

The firearms exclusion will bar coverage in Washington if the facts and allegations depend entirely on the shooting. The operative pleading needs to be read carefully to determine if the claims arise out of the use of a firearm. If the claims do not exclusively arise out of the use of a firearm, or there is any doubt, then the insurer should consider defending the insured subject to a reservation of rights and initiating a declaratory judgment action.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:

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