

## Coverage Team Obtains Summary Judgment in Case Involving Insurability of Punitive Damages

5.15.17

In *Bensalem Racing Association v. ACE Property & Casualty Insurance Company*, No. 4858, 2017 Phila. Ct. Com. Pl. LEXIS 11 (Jan. 20, 2017), Judge Djerassi (Commerce Court) granted summary judgment in favor of Chubb (formerly ACE Property & Casualty Insurance Company) dismissing claims by the plaintiff-insured alleging breach of contract and "bad faith" claims arising out of a multi-million dollar punitive damages settlement in an underlying wrongful death action stemming from a fatality at the Philadelphia Racetrack.

The principal coverage issue was whether an exception to Pennsylvania's long-standing rule against the insurability of a punitive damages award applied in this case. In Pennsylvania, public policy and long-standing precedent prohibit the insurability of punitive damages unless the insured's liability for the punitive damages awarded is *solely* vicarious. The insured argued that, pursuant to the Pennsylvania Superior Court's decision in *Butterfield v. Giuntoli*, 448 Pa. Super 1 (1994), Chubb had the burden of proving that the jury in the underlying action awarded punitive damages solely on the basis of the insured's direct liability. The insured argued that Chubb could not meet this burden because, in its view, the underlying trial record contained evidence upon which the jury could have based the award upon the insured's vicarious liability, and it was impossible to determine whether the jury based its punitive damages award on the insured's direct liability or its vicarious liability.

The White and Williams team argued that the insured's suggested application of *Butterfield* to this case was inconsistent with and contrary to settled Pennsylvania law, and that the overwhelming evidence presented to the jury in the underlying action was focused upon the insured's direct liability.

Judge Djerassi agreed, explaining that "prior holdings of other courts discussing the same issue and cited within the *Butterfield* opinion do not stand for the proposition [that the insurer has the burden to show that the jury assessed the punitive damages *solely* on the basis of direct liability] and only hold that Pennsylvania does not preclude recovery of punitive damages from an insurer where the insured is *only* vicariously liable for such damages." Judge Djerassi further explained that "[w]here there is direct liability, punitive damages are not insurable because the responsible party for outrageous conduct should be punished and not have an insurance company pay and effectively mitigate the penalty of the wrongdoer."

The court further distinguished *Butterfield* on the grounds that the court in that case "examined punitive damages in the context of liability based *solely* on vicarious liability" whereas that was not the case in the underlying action against the racetrack. The court also observed that, unlike in *Butterfield*, no individual employees were sued in the underlying action in this case. Finally, the court held that the jury's punitive damages award was clearly based on the insured's own direct liability because the underlying trial record was "filled with evidence of [the insured's] own direct negligence..." and was therefore uninsurable under Pennsylvania law and public policy.

The insured, represented by Morgan Lewis & Bockius, has appealed Judge Djerassi's decision.

Patti Santelle, Sean Mahoney, and Adam Berardi represented Chubb in this case.