

## THE YARON DECISION AND ITS IMPACT ON INSURERS

Richard J. Bortnick • 610.832.8357 • [rbortnick@cozen.com](mailto:rbortnick@cozen.com)

Andrea Cortland • 215.665.2751 • [acortland@cozen.com](mailto:acortland@cozen.com)

On July 5, 2011, the Philadelphia County Court of Common Pleas published its decision in *Yaron, et al. v. Darwin National Insurance Company, et al.*, No. 502, a declaratory judgment coverage action brought by two policyholders against their professional liability insurers. The court, in an opinion authored by Judge Arnold L. New, granted summary judgment in favor of the insurers, holding that they were not obligated to pay the policyholders' defense costs in connection with an underlying action.

### The Underlying Action and Associated Defense Costs

In 2010, Harisse Yaron (Yaron), president of the Pennsylvania Society for the Prevention of Cruelty to Animals' (PSPCA) board of directors, and Jodi Goldberg (Goldberg), a member of the PSPCA board of directors, along with others, were named as defendants in an action filed by six Pennsylvania dog breeders (the Myer action). Yaron and Goldberg claimed coverage under a "Not-for-Profit Organization Directors & Officers Liability Insurance" policy issued by Philadelphia Indemnity Insurance Company (PIIC) and a "Police Professional Liability Insurance Policy" issued by Darwin National Insurance Company (Darwin).

Darwin acknowledged a duty to defend and appointed defense counsel to jointly represent Yaron and Goldberg. Darwin later determined that the interests of Yaron and Goldberg could become adverse and, as such, appointed separate counsel to represent Yaron. Darwin's appointed counsel continued to defend Goldberg. At the same time, Yaron and Goldberg retained their own counsel to represent their interests in the Myer action and initiated coverage litigation against PIIC and Darwin seeking payment of their personal attorneys' fees and expenses.

### The Darwin Policy

Although the Darwin policy prohibited its policyholders from incurring defense costs without the insurer's consent, Yaron and Goldberg argued that Darwin's interest conflicted with their own, allowing them to retain personal defense counsel at Darwin's expense. The court disagreed, holding that Darwin's reservation of rights did not create a conflict of interest:

Under Pennsylvania law, the general rule is that an insurance company may not assume the defense of a suit which entails the defendant's relinquishing to the insurer the management of the case and then later deny liability under the policy. The insurer may protect its rights under the policy by timely issuing a reservation of rights which fairly informs the insured of the insurer's position. In issuing the reservation of rights letter, the insurer is merely putting the insured on notice of what the insurer believes are its existing rights under the policy. Whether the policy exclusion may apply to limit or preclude coverage does not create an actual conflict of interest. At best, the reservation of rights letter presents the possibility of a conflict of interest.

In other words, the court was "unwilling to adopt a *per se* rule that a reservation of rights letter creates a conflict of interest between the insurer and insured." Rather, the court stated that "[a]ctual proof that attorneys have disregarded their ethical duties to their clients as set forth in the professional rules of conduct is necessary to establish the conflict of interest." According to the court, to hold otherwise would require recognition of a "conclusive presumption."

### The PIIC Policy

With regard to the PIIC policy, the court noted that the policy's "Not-for-Profit Organization Directors & Officers Liability" part defined "Loss" to include "Defense Costs," and, in turn, defined "Defense Costs" as:

1. Any reasonable and necessary legal fees and expenses incurred in the defense of a Claim, whether by the Insured with the Underwriter's consent or directly by the Underwriter, in the investigation, adjustment, defense and appeal of a Claim, except that Defense Cost shall not include:
  - a. any amounts incurred in the defense of any Claim for which any other insurer has a duty to defend, regardless of whether or not such insurer undertakes such duty...

PIIC argued that because Darwin undertook a duty to defend Yaron and Goldberg, the costs for which the policyholders sought reimbursement were not "Defense Costs" under the PIIC policy. Yaron and Goldberg countered that the language constituted an unenforceable "escape clause."

Once again, the court sided with the insurer, PIIC, stating that there is "a distinct difference between an escape clause that seeks to avoid all liability and an excess clause that seeks to limit the insurer's liability to the excess over any collectible insurance[.]" because "[u]nlike an escape clause, an excess clause affords protection to the insured after exhaustion of the primary coverage." The court further held that the policy's

definition of "Defense Costs" did not constitute an escape clause because it does not eliminate other components of Loss that would remain applicable, e.g., damages such as a monetary judgment, award or settlement, including punitive, exemplary, or violence damages. Accordingly, the court granted PIIC's motion for summary judgment.

### Impact on Insurers

In rendering its decision, the Philadelphia County court considered the applicable case law, the text of the policies at issue, the facts presented, and the practical implications of the policyholders' arguments. The *Yaron* court's coverage analysis and approach to policy interpretation is a positive sign for insurers deciding if a reservation of rights requires the insurer to pay the fees and costs incurred by an insured's independent counsel, particularly in light of the *Cumis*-type approach utilized in other jurisdictions. Significantly, the court did not adopt a results-oriented approach, but rather followed the facts and the law to their natural conclusion. Additional Cozen O'Connor Alerts will continue to highlight those decisions in which courts reasonably utilize this even-handed approach.

---

*Cozen O'Connor is a global leader in representing the insurance industry in all coverage areas. For further analysis of this case and how it may impact various coverage issues, please contact Richard J. Bortnick at 610-832-8357 (rbortnick@cozen.com) or Andrea Cortland at 215-665-2751 (acortland@cozen.com).*