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TO AVOID BAD FAITH IN WASHINGTON STATE, INSURERS MUST PROVIDE A DEFENSE IF ANY COURT ARTICULATES AN "ARGUABLE LEGAL INTERPRETATION" THAT A CLAIM IS "CONCEIVABLY COVERED"

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On March 18, 2010, the Washington State Supreme Court decided *American Best Food, Inc. v. Alea London, Ltd.*,[1] --- P.3d ----, 2010 WL 963933 (Wash., Mar. 18, 2010), holding that (1) a complaint alleging injuries caused by an assault, and conduct by the insured following the assault, triggers a duty to defend, despite the policy's exclusion for claims "arising out of assault and/or battery," and regardless of whether the post-assault conduct is alleged to have resulted in injury; and (2) an insurer that relied on Washington law and determined there was no coverage acted unreasonably and in bad faith, as a matter of law, because the insured presented an "arguable legal interpretation" that the claim was "conceivably covered."

Under Washington law, the duty to defend is triggered "if the insurance policy conceivably covers allegations in the complaint." In this case, Alea London, Ltd. ("Alea") issued a commercial general liability insurance policy to a nightclub, American Best Food, Inc. d/b/a Café Arizona ("Café Arizona"). That policy contains the following exclusion for claims arising out of assault and/or battery:

> This insurance does not apply to any claim arising out of-
>
> A. Assault and/or Battery committed by any person whosoever, regardless of degree of culpability or intent and whether the acts are alleged to have been committed by the insured or any officer, agent, servant or employee of the insured or by any other person . . . .

A patron of Café Arizona was seriously injured after he was shot nine times. The patron sued Café Arizona, alleging as follows:

> As a result of the savage assault, [the patron] suffered serious and life-threatening injuries from which he has sustained serious permanent injuries and disfigurement.
>
> Several security guards carried [the patron] into the club, however, the club owner/manager ordered [the] guards to carry [the patron] back outside where the guards dumped him back on the sidewalk.

Café Arizona tendered the complaint to Alea, which conducted an investigation and consulted Washington law. Specifically, Alea looked to similar circumstances addressed in *McAllister v. Agora Syndicate, Inc.,* 103 Wn. App. 106, 11 P.3d 859 (2000), which held that an assault and battery exclusion is properly applied to bar coverage for negligence claims "based on" assault and/or battery. As it is well established under Washington law that the term "arising out of" is broader than the term "based on," Alea concluded that there was no uncertainty that *McAllister*'s holding squarely applied to the allegations as stated in the complaint against Café Arizona. Alea declined Café Arizona's tender on the basis that the assault-derived injuries alleged in the complaint were not conceivably covered under the policy. Café Arizona sought reconsideration, citing to one federal district court case that analyzed a "failure to render aid" allegation (though no such allegation appeared in the complaint against Café Arizona) under Texas law. In response, Alea explained that binding Washington law (not contrary and distinguishable Texas law) was controlling. Café Arizona filed a lawsuit against Alea.[2] The trial court agreed with Alea and confirmed that there was no coverage.

The Washington State Supreme Court, however, disagreed. Although the *McAllister* opinion itself did not differentiate between the timing of the negligence that was "based on" the assault, the court concluded that *McAllister* was not controlling because the negligence in that case took place before the assault and the alleged negligence in this case took place after the assault. The court acknowledged a number of Washington cases that interpreted "arising out of" broadly, but

1. Cozen O'Connor represented Alea London, Ltd. in this case.
2. After Café Arizona sued Alea, the patron filed an amended complaint to add an allegation that the dumping "exacerbated" his assault-derived injuries.

declined to follow them because none expressly addressed "post-assault negligence." For this reason, the court looked to cases from other jurisdictions and identified an alternate "arguable legal interpretation":

> Washington courts have yet to consider the factual scenario before us today. Evaluation of out-of-state cases was appropriate in deciding which rule to apply. The lack of any Washington case directly on point and a recognized distinction between pre-assault and post-assault negligence in other states presented a legal uncertainty with regard to Alea's duty.

After considering various rulings from other jurisdictions (rooted in common law of other states, addressing dissimilar allegations, and interpreting distinct policy language), the court concluded that the allegations against Café Arizona were conceivably covered under Alea's policy. For this reason, the court determined that Alea's decision not to provide a defense to Café Arizona was incorrect.

In a 5-4 decision, the court went on to conclude that although Alea had conducted a proper investigation, did not violate any claims handling regulations, and proceeded in reliance on Washington precedent under similar circumstances, Alea's coverage determination was nonetheless "unreasonable and therefore in bad faith."

The logical extension of this holding is that insurers must provide a defense if any court has articulated an "arguable legal interpretation" of the policy or law such that a claim is "conceivably covered." This is true even if the interpretation comes from out-of-state authority contrary to Washington law. Insurers thus are being forced to defend virtually all claims under a reservation of rights, followed by declaratory judgment actions to obtain judicial confirmation that there is no coverage.

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 J.C. Ditzler (jditzler@cozen.com, 207.864.2005 (London)), Melissa O'Loughlin White (mwhite@cozen.com, 206.373.7240 (Seattle)) or Molly Siebert Eckman (meckman@cozen.com, 206.373.7299 (Seattle)).