

Client Alert

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Things Got Saucy for Insurer When It Failed to Cover Disparagement and Defamation Claims and Pay Reasonable Rate for Defense

A Massachusetts appellate court held in *Rass Corp. v. Travelers Co., Inc.*, No. 15-P-358, 2016 WL 6636281, at *1-10 (Mass. App. Ct. Nov. 10, 2016), that disparagement and defamation claims brought against an insured in connection with its food marketing and distributing business were covered under a commercial general liability policy. The court also found that the insurer unreasonably refused to pay defense counsel's reasonable hourly rate and that it was improper for the insurer to condition contribution to a settlement on the insured's waiver of its rights under the policy. Finally, the court found that the insurer's conduct amounted to unfair claim settlement practices under G.L. c. 93A §2.

Background

Rass Corp. involved an attempt by a product distributor, Rass Corporation (Rass), to take over a product line by cutting the product's manufacturer, IAM International, Inc. (IAM), out of the business. The product — Indian sauces — had been developed by the owner of Rass and marketed with IAM to the Trader Joe's Grocery Store chain. During that time, Rass developed its own process for manufacturing and distributing the sauces. Rass then wrote to Trader Joe's, apparently in an attempt to steal the business, stating that a principal at IAM "may approach you directly for making these sauces. Not only will that be unethical but illegal as well as these are our recipes...." After discovering the email, IAM filed a complaint in the Superior Court of New Jersey alleging, among other claims, trade libel, including trade disparagement and defamation.

Rass was insured under a CGL policy issued by The Travelers Companies, Inc., and Travelers Property Casualty Company of America (Travelers). The policy covered Rass for, among other things, claims alleging libel, slander and/or disparagement. After Rass notified Travelers of the lawsuit, Travelers agreed to defend Rass subject to a reservation of rights. Rass retained its own defense counsel to whom Travelers consented, but for whom Travelers unilaterally determined it would pay only \$200 per hour, even though Rass had been paying its attorneys \$250 per hour.

IAM had made an initial settlement demand of \$675,000. As trial approached, IAM's demand dropped to \$175,000. Defense counsel had previously valued Rass's exposure at between \$100,000 and \$500,000. During settlement negotiations, Travelers offered to contribute \$10,000, and only on the condition that Rass waive its right to challenge the attorney rate issue. When Rass rejected that offer, Travelers offered to contribute \$20,000, but conditioned that on a waiver by Rass to later seek indemnification. Rass ultimately settled the case on its own for \$175,000 without any contribution from Travelers. Rass brought an action against Travelers in Massachusetts Superior Court seeking indemnity for the settlement, reasonable attorney's fees and damages for Travelers' violation of G.L. c. 93A § 2 (the Massachusetts statute prohibiting unfair claim settlement practices).

The Superior Court found for Rass and allocated \$140,000 of the \$175,000 settlement to Travelers for indemnification of the covered claims, specifically, the disparagement and defamation claims in relation to the Trader Joe's email. Additionally, the court found that Travelers violated G.L. c. 93A § 2 by failing to contribute to the settlement and refusing to pay reasonable attorney's fees absent a waiver of indemnity rights under the policy.

The Court's Decision

On appeal, the Massachusetts Court of Appeals affirmed the Superior Court's ruling that the disparagement and defamation claims were covered under the policy and that Travelers violated the unfair claim settlement statute by failing to contribute to the settlement and failing to pay reasonable attorney's fees.

The court affirmed that Rass reasonably settled the underlying litigation based on its probable liability for the Trader Joe's email that gave rise to covered disparagement and defamation claims. Disparagement concerns the reputation of a business, while defamation concerns an individual's personal reputation in the community. In the email, Rass' false statements that it owned the sauces and that IAM's principal's actions were "illegal" and "unethical" gave rise to damaging effects to both IAM's business reputation and IAM's principal's personal reputation within the community, which hindered others from doing business with the company. Thus, on the basis of Rass' settlement, Travelers had a duty to indemnify for the disparagement and defamation claims.

With regard to liability under G.L. c. 93A § 2, the court reaffirmed that Travelers violated the claim settlement statute in three ways. First, Travelers understood it was required to indemnify Rass if IAM prevailed on the email-related claims. Because of its duty to investigate, Travelers should have been aware of the strength of IAM's claims, but instead offered a settlement contribution far below Rass' likely exposure. Second, Travelers tried to condition its settlement offers on Rass' waiving its right to seek attorney's fees or indemnification, which failed to foster a fair and equitable settlement when liability was reasonably clear. And third, by surrendering control of the defense to Rass under a reservation of rights, yet refusing to pay reasonable attorney's fees, Travelers unfairly compelled Rass to seek the unpaid fees through litigation.

Insurance Implications

Rass has several important implications for policyholders. First, the decision illustrates the impropriety in the often-seen practice of insurers' refusing to pay reasonable rates for qualified defense counsel. As was the case here, Travelers' refusal to pay defense counsel's reasonable hourly rate was improper, and that impropriety was compounded by Travelers' attempt to leverage settlement of the underlying lawsuit against being held accountable for its improper conduct. Second, *Rass* is important because it illustrates the breadth of the insurer's duty to investigate, even in instances where the underlying dispute is being defended by the insured under a reservation of rights. Third, *Rass* is illustrative of the substantial breadth of personal injury coverage available under standard general liability policies for claims involving allegations of libel, slander and trade disparagement — a broad coverage that is often overlooked under general liability policies.

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