

**BURNHAM BROWN VACATES \$1.9 MILLION JUDGMENT AGAINST
CARRIER'S INSURED ON GROUNDS CARRIER HAD EARLIER
PROPERLY DENIED A DEFENSE OBLIGATION WHILE JUDGMENT
WAS LATER BASED ON NEW FACTS NEVER DISCLOSED TO
CARRIER**

In a significant victory, the Burnham Brown Insurance Group team of Eric Haas and Andrew Shalauta successfully set aside a \$1.9 million judgment that a third party claimant had obtained against a restaurant after its liability insurer had refused to defend. On appeal, Burnham Brown successfully argued on behalf of the insurer that the judgment should be set aside because while the allegations of plaintiff's complaint and facts learned during its investigation suggested that the claimant had been injured during an assault by defendant's bouncer, resulting in injuries expressly excluded under the policy, the theory pursued by the claimant without notice to the carrier at a subsequent 3-day bench trial was that the claimant had instead been injured when he and the bouncer slipped and fell on the premises. The unpublished opinion was issued by the California Court of Appeal, Second Appellate District, Division Four, on August 1, 2007. The claimant's petition for rehearing was denied and the case has subsequently been returned to the trial court for a new trial.

In California, the duty to defend is interpreted broadly in favor of the insured. A duty to defend arises whenever the complaint alleges any damages that are potentially covered under an insurance policy. The "assault and battery" exclusion relied on by the insurer has been interpreted by California courts to exclude coverage for any injury sustained as a result of an assault, regardless of whether it is recast as a negligence claim, e.g. negligent supervision and hiring, or premises liability. The exclusion focuses on the type of *event* that led to the injury, and not the theory of liability that is pled in the complaint.

Here, the only event alleged in the claimant's complaint was the "negligent" ejection of the plaintiff by the "bouncer" from the restaurant. Following its investigation, the carrier denied coverage under the "assault and battery" exclusion based on extrinsic evidence including a police report confirming the claim arose from an assault. In contrast, at trial, the parties introduced evidence of a slip and fall accident and no evidence of an assault and battery. However, neither the claimant nor the insured restaurant provided defendant's carrier with any facts related to a slip and fall accident after it had denied coverage. The trial court awarded the claimant a judgment of \$1.9 Million, including costs.

As six months had not elapsed from entry of the judgment, Burnham Brown's attorneys first intervened on behalf of the carrier into the underlying action to set aside the judgment on the basis of surprise. The trial court granted the carrier's intervention but denied the motion to set aside the judgment because the allegations in the underlying complaint sufficiently pled negligence theories that should have put the carrier on notice of a covered claim.

Burnham Brown's attorneys appealed from this post-trial ruling, arguing that there was no evidence that the appellant carrier should have anticipated the slip and fall claim, and no facts in the complaint or extrinsic information from any source including the insured that put appellant on notice of a potentially covered claim at the time it denied coverage.

Despite an abuse of discretion standard, the appellate court agreed holding that boilerplate allegations of "negligence" alone did not trigger insurance coverage. The appellate court found that the carrier properly denied coverage based on information obtained from a reasonable investigation including information available from the complaint, the police reports, and statements from witnesses. Further, the insurer had no continuing duty to investigate until new factual information concerning the allegations were brought to its attention, which in this case did not occur until after the bench trial.

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