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THE DUTY TO DEFEND IN LIABILITY INSURANCE POLICIES: HAS IT GONE TOO FAR?

I. INTRODUCTION

Far from being the grand celebration planned, the Boston Symphony Orchestra's 100th birthday turned into a legal nightmare. In 1982, the Boston Symphony Orchestra ("BSO") cancelled a contract with Vanessa Redgrave due to "circumstances beyond [the Orchestra's] reasonable control."¹ BSO took this action after it had received protests over the hiring of Ms. Redgrave due to her political views and support of the Palestine Liberation Organization.² Although other employers of Ms. Redgrave had been pressured to fire her because of her political views,³ this was the first time that an employer had acquiesced to these demands.⁴

Although BSO would likely have paid Ms. Redgrave her contract fee, this was not satisfactory to Ms. Redgrave.⁵ Instead, she brought suit for breach of contract and violation of her civil rights under the Massachusetts Civil Rights Act.⁶ As a result of her suit, Ms. Redgrave received \$27,500 for wrongful breach of contract⁷ and consequential damages of \$12,000.⁸

Subsequently, BSO sued its liability insurer, Commercial Union Insurance Company ("Commercial Union")⁹ for failing to defend BSO in

1. Heins, *Vanessa Redgrave v. Boston Symphony Orchestra: Federalism, Forced Speech, and the Emergence of the Redgrave Defense*, 30 B. C. L. REV. 1283, 1294 (1989).

2. *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 890-91 (1st Cir. 1988).

3. Heins, *supra* note 1, at 1295.

4. *Id.* at note 54.

5. *Id.* at 1295.

6. 855 F.2d at 890. MASS. GEN. LAWS ch. 12, §§ 11H-I (1986).

7. 855 F.2d at 891.

8. *Id.* at 900. Producer Theodore Mann testified that he decided not to hire Ms. Redgrave for an upcoming performance of *Heartbreak House* after hearing of Ms. Redgrave's discharge by BSO. Heins, *The Clearing of Vanessa Redgrave*, 245 THE NATION 713 (1987). As a result of this testimony, Ms. Redgrave was awarded \$12,000 in consequential damages. This amount represents the loss of one identifiable job opportunity for which Ms. Redgrave was able to submit sufficient evidence to prove that the cancellation of "Oedipus Rex" had caused. Brief for Appellants at 10-11, *Boston Symphony Orchestra, Inc. v. Commercial Union Ins., Co.* (Super. Ct. Mass. July 7, 1988) (No. 5038).

9. *Boston Symphony Orchestra, Inc. v. Commercial Union Ins., Co.*, 545 N.E.2d 1156 (Mass. 1989). Although the insurance policy issued to BSO was by American Employers Insurance Company, the superior court entered an order that the judgment would also apply to Commercial Union Insurance Company, which is the parent company of American Employers Insurance Company. Application for Direct Appellate Review at 1, note 1, *Boston Symphony*

this action.¹⁰ The Superior Court of Massachusetts found that Commercial Union did have a duty to defend BSO and, therefore, must pay the BSO's legal expenses for as much as one million dollars.¹¹ This note will examine the consequences of the Massachusetts Supreme Judicial Court's holding in *Boston Symphony Orchestra, Inc. v. Commercial Union Ins., Co.*¹² that an insurance company, which has not provided coverage for actions of breach of contract, must nevertheless defend an action claiming breach of contract with resulting consequential damages that are only potentially within the scope of coverage provided by the insurance policy.¹³

Employers do cancel performances of well-known actors and actresses.¹⁴ The superior court judge, who held that there was a duty to defend, noted that "[c]ontracts are frequently broken, and even willful breach is not unusual."¹⁵ The policy language at issue in this case is used by many insurance companies across the United States.¹⁶ Since breach of contract is a typical cause of action, the interpretation given to the language in this type of personal injury insurance policy is of great significance both to the entertainment industry, which employs well-known personalities, and to insurance companies, which may be called upon to defend these actions.

II. THE UNDERLYING CASE

As part of the festivities to celebrate the BSO's 100th birthday, BSO had planned a series of concerts for Carnegie Hall in New York City and

Orchestra, Inc. v. American Employers Ins., Co., and Commercial Union Ins., Co. (Super. Ct. Mass. July 7, 1988) (No. 89-P-37). Neither the superior nor the supreme court gave any explanation as to why Commercial Union should be held liable for the insurance contract that was issued by American Employers. This note will only refer to Commercial Union. Appellants Petition for Rehearing at 1, note 1, *Boston Symphony Orchestra, Inc. v. Commercial Union Ins., Co.*, 545 N.E.2d 1156 (Mass. 1989).

10. BSO alleged three claims: breach of contract, unfair claims settlement practices in violation of G.L. c. 93A, and unfair claims settlement practices in violation of G.L. c. 176D, § 3(9). Brief for Appellants at 2, *Boston Symphony Orchestra, Inc., v. Commercial Union Ins., Co.* (Super. Ct. Mass. July 7, 1988) (No. 5038).

11. *The National Law Journal*, November 20, 1989, at 6, col. 2.

12. 545 N.E.2d 1156 (Mass. 1989).

13. Application for Direct Appellate Review at 20, *Boston Symphony Orchestra Inc. v. Commercial Union Ins., Co.* (Super. Ct. Mass. July 7, 1988) (No. 89-P-37) [hereinafter Application for Direct Appellate Review].

14. Brief for Appellants at 34, *Boston Symphony Orchestra, Inc. v. Commercial Union Ins., Co.* (Super. Ct. Mass. July 7, 1988) (No. 5038) [hereinafter Brief of Appellants].

15. *Redgrave v. Boston Symphony Orchestra, Inc.*, 557 F. Supp. 230, 236 (D. Mass. 1983).

16. Appellant's Petition for Rehearing at 5, *Boston Symphony Orchestra, Inc. v. Commercial Union Ins., Co.*, 545 N.E.2d 1156 (Mass. 1989) [hereinafter Appellant's Petition for Rehearing].

Symphony Hall in Boston.¹⁷ BSO entered into a contract with Vanessa Redgrave Enterprises, Limited ("Redgrave Enterprises") on March 22, 1982, to have Ms. Redgrave narrate six performances of Igor Stravinsky's "Oedipus Rex" beginning in April 1982.¹⁸ BSO publicly announced its choice of Ms. Redgrave on March 25, 1982, and on March 26 the *Boston Globe* reported that the hiring of Ms. Redgrave was a "theatrical coup" for BSO.¹⁹

BSO immediately began receiving angry protest calls concerning the hiring of Ms. Redgrave.²⁰ According to Ms. Redgrave, these threats were made because of her "public statements on public issues involving Israel and the Palestine Liberation Organization."²¹ On March 29, BSO learned that a local Anti-Defamation League would be meeting to discuss the possibility of censuring BSO.²² That same day Irving W. Rabb, a BSO trustee and an influential figure in Jewish philanthropic affairs, called Thomas W. Morris, the General Manager of BSO, to express his concerns over the hiring of Ms. Redgrave.²³

At a meeting with the Boston Police Commissioner, Joseph Jordan, on March 30, Morris was warned that if the Jewish Defense League were to become involved, the Boston police would be unable to prevent an interruption of the performance.²⁴ On that same day, Morris gave instructions to remove Ms. Redgrave's name from a scheduled advertisement that was due to appear in the Sunday edition of the *New York Times*.²⁵ BSO explained its dilemma to Ms. Redgrave who refused to withdraw from the performance.²⁶ With only two weeks until rehearsals were to begin, Morris felt his only alternative was to cancel the perform-

17. Heins, *supra* note 1, at 1284.

18. *Redgrave*, 557 F. Supp. at 233.

19. Heins, *supra* note 1, at 1288.

20. *Id.* According to trial testimony in 1984, the BSO received more than 100 telephone calls and four letters opposing the hiring of Vanessa Redgrave due to her support of the Palestine Liberation Organization. *Boston Globe*, January 24, 1989, (Arts & Film), at 22.

21. 557 F. Supp. at 233. Opposition to Ms. Redgrave's political views began after she produced and financed (by selling her house in Britain) a documentary film that supported the Palestine Liberation Organization. During her 1978 acceptance speech for an Academy Award as Best Supporting Actress for "Julia," as Jewish groups picketed outside and members of the Jewish Defense League burned her in effigy, Ms. Redgrave praised the Academy voters for having "stood firm and refus[ing] to be intimidated by a small band of Zionist hoodlums who have insulted Jews all over the world in their struggle against fascism and Nazism." Henry, *Vanessa Ascending*, *TIME*, October 9, 1989, at 109 and Heins, *supra* note 8, at 713.

22. Heins, *supra* note 1, at 1289.

23. *Id.*

24. *Id.* at 1291.

25. *Id.* at 1292.

26. Heins, *supra* note 1, at 1293.

ance of "Oedipus Rex."²⁷ BSO cancelled its contract with Redgrave Enterprises²⁸ and on April 1, 1982, BSO issued a press release which "announced the cancellation of the Stravinsky program, and substitution of the Berlioz *Requiem*, because of 'circumstances beyond [the Orchestra's] reasonable control.'"²⁹

III. FACTS GIVING RISE TO BSO'S CLAIMS AGAINST COMMERCIAL UNION

Ms. Redgrave sent BSO a letter demanding that BSO apologize and reinstate her contract.³⁰ She threatened a lawsuit if these demands were not met, to vindicate her rights, "including among others, her 'right' to speak freely, her 'right' to perform without fear of blacklisting or discrimination, and her 'right' not to be subjected to public ridicule or embarrassment."³¹

BSO sent Ms. Redgrave's letter to its liability insurer, Commercial Union, along with a letter stating BSO's expectations that Ms. Redgrave's suit "would involve claims for damages to her personal and business reputation."³² BSO also sent Commercial Union a copy of its contract with Ms. Redgrave and all correspondence and relevant material concerning the potential suit.³³

On October 22, 1982, Ms. Redgrave and Redgrave Enterprises filed suit against BSO claiming that BSO had breached its contract with Ms. Redgrave and that "BSO's repudiation and breach of contract ha[d] led

27. *Id.* When attempts to persuade Ms. Redgrave to withdraw from the program failed, Peter Sellars, who was staging and producing the event, accused the BSO of blacklisting and refused to go forward without Ms. Redgrave. At this point the BSO cancelled the entire program. Heins, *supra* note 8, at 713.

28. 545 N.E.2d at 1157.

29. Heins, *supra* note 1, at 1294. Ms. Redgrave tried to invoke the Massachusetts Civil Rights Act of 1979 "to protect her against the actions of the public who were opposed to her politics." Boston Globe, Jan. 24, 1989, (Arts & Film), at 22. In a post-trial decision, Judge Robert Keeton overruled the consequential damages that the jury had awarded Ms. Redgrave on the unprecedented theory that the BSO "could have caused the damages only by communicating its opinion by implication . . . that Redgrave was too dangerous to employ." Keeton reasoned that because the communication of opinions is protected by the First Amendment, the BSO could not be held liable for the consequences of its cancellation. Heins, *supra* note 8, at 713-14. On appeal, the First Circuit agreed with Judge Keeton, noting that BSO had also been a victim of public opinion. According to the First Circuit, BSO had a right to cancel public concerts if the artistic "integrity" of the performance would be compromised by protesters that competed with Ms. Redgrave's right to political beliefs. Boston Globe, Jan. 24, 1989, (Arts & Film), at 22.

30. 545 N.E.2d at 1157.

31. *Id.*

32. *Id.*

33. *Id.*

others to refrain from hiring Ms. Redgrave for professional engagements."³⁴ Four days after BSO forwarded the complaint to Commercial Union, Commercial Union disclaimed coverage and refused to defend BSO.³⁵

On two subsequent occasions, BSO provided Commercial Union with information regarding the lawsuit.³⁶ This information stated that the damages that Ms. Redgrave would be seeking were uncertain.³⁷ Although Ms. Redgrave claimed consequential contract damages, the damages sought during the litigation appeared to flow from implications of BSO's act of cancelling "Oedipus Rex."³⁸ Commercial Union still refused to defend BSO.³⁹

BSO brought suit against Commercial Union in Superior Court of Massachusetts on two counts.⁴⁰ The first count alleged that Commercial Union "wrongfully failed to defend the BSO" in the action brought against it by Ms. Redgrave.⁴¹ The second count alleged that Commercial Union "engaged in unfair claims settlement practices."⁴²

34. 545 N.E.2d at 1157. See also Application for Direct Appellate Review, *supra* note 13, at 9-10. The relevant portion of Ms. Redgrave's complaint is as follows:

10. On or about March 22, 1982, BSO entered into a contract with Enterprises
11. After the contract was entered into but before the scheduled dates of the performances, the BSO repudiated and breached its contract with Enterprises. . . .
13. BSO's repudiation and breach of contract has led others to refrain from hiring Ms. Redgrave for professional engagements.
14. As a result of BSO's repudiation and breach of contract, plaintiffs have sustained monetary damages, including, incidental and consequential loss

Id.

35. 545 N.E.2d at 1157. When suit was filed against BSO, Commercial Union consulted with the law firm of Morrison, Mahoney & Miller seeking coverage advice. Commercial Union was advised that the policy did not cover the claim asserted against BSO and Commercial Union disclaimed coverage in a letter dated October 29, 1982. Application for Direct Appellate Review, *supra* note 13, at 3-4.

36. 545 N.E.2d at 1157.

37. *Id.*

38. *Id.*

39. *Id.* Commercial Union received a copy of the "Memorandum of Law in Opposition to Defendant BSO's Motion to Dismiss" which was forwarded to Morrison, Mahoney & Miller. A letter dated February 4, 1983, advised BSO that the additional submission still did not indicate coverage. Commercial Union also requested any specific facts that BSO might have on which Ms. Redgrave's claim could be covered under the policy. On September 7, 1984, BSO forwarded documents to Commercial Union for their review and advice. BSO then filed suit against Commercial Union on October 22, 1984. Application for Direct Appellate Review, *supra* note 13, at 7-8.

40. 545 N.E.2d at 1157.

41. *Id.*

42. *Id.*

IV. THE SUPERIOR COURT OF MASSACHUSETTS' RULING

The policy issued to BSO obligated Commercial Union to defend any action brought against BSO that sought damages for personal injuries that were covered by the policy.⁴³ The policy issued to BSO provided coverage for personal injuries:

arising out of one or more of the following offenses committed in the conduct of the named insured's business:

B. The publication or utterance of a libel or slander or other defamatory of [sic] disparaging material, or a publication of [sic] utterance in violation of an individual's right of privacy, except publications or utterances in the course of or related to advertising, broadcasting or telecasting activities conducted by or on behalf of the named insured.⁴⁴

The superior court granted summary judgment, finding that Commercial Union was on notice that Ms. Redgrave felt that the public cancellation coupled with the press release constituted more than a contract claim.⁴⁵ The court found that Ms. Redgrave's claim maintained that "the BSO's actions sent a false message that she was the one at fault for the cancellation and that she was risky and unemployable, and thus her professional career had been harmed."⁴⁶

The court looked to the rule stated in *Sterilite Corp. v. Continental Casualty Co.*⁴⁷ in determining whether Commercial Union had a duty to defend.⁴⁸ The appellate court in *Sterilite* described the process of determining if there is a duty to defend as "one of envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy."⁴⁹

The superior court found that the consequential contract damages sought by Ms. Redgrave appeared to be similar to tort damages in that she claimed "damage to her professional reputation because she alleged

43. *Id.*

44. Application for Direct Appellate Review, *supra* note 13, at 8-9. The word "of" appearing before "disparaging" and after "publication" is apparently an inadvertent error and the word "or" was intended. *Id.* at note 6.

45. *Boston Symphony Orchestra v. Commercial Union Ins., Co.*, No. 71823 at 3 (Mass. July 15, 1988).

46. *Id.*

47. 17 Mass. App. Ct. 316, 318, 458 N.E.2d 338 (1983).

48. *Boston Symphony Orchestra v. Commercial Union Ins., Co.*, No. 71823, slip op. at 4 (Mass. July 15, 1988).

49. *Sterilite*, 17 Mass. App. Ct. at 318.

that others would not hire her after BSO's actions."⁵⁰ Therefore, the court found that issues relating to defamatory and disparaging material were fairly raised by Ms. Redgrave's complaint,⁵¹ and that Commercial Union should have defended BSO in its suit with Ms. Redgrave.

V. SUMMARY OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS' REASONING

After the lower court's grant of summary judgment to BSO on this count, the Supreme Judicial Court of Massachusetts granted Commercial Union's request for direct appellate review.⁵² In upholding the superior court's decision, the supreme judicial court found that the essence of Ms. Redgrave's claim was that BSO's breach of contract "somehow spoke slightly about her and damaged her reputation."⁵³ The court further found that the terms "other defamatory or disparaging material" were ambiguous since they were not defined in the policy.⁵⁴ Since the language of the policy permitted more than one interpretation, the court held that "other defamatory or disparaging material" should be interpreted in a light most favorable to BSO.⁵⁵

The more inclusive definition of disparagement and, therefore, the more favorable to BSO, was the Webster's New International Dictionary of the English Language definition which is "to lower in rank and estimation by actions or words" or "to speak slightly of."⁵⁶ Since Ms. Redgrave claimed that the breach of contract "somehow spoke slightly of her," her claim did allege an injury for which Commercial Union's policy provided coverage and Commercial Union did have a duty to defend BSO.⁵⁷

VI. SIGNIFICANCE OF THE HOLDING

The holding of the Supreme Judicial Court of Massachusetts that Commercial Union did have the duty to defend BSO in the breach of contract suit is extremely significant to the entertainment industry. Even though Commercial Union's policy did not specifically provide coverage for claims brought against BSO for breach of contract, the court never-

50. *Boston Symphony Orchestra v. Commercial Union Ins., Co.*, No. 71823, slip op. at 5 (Mass. July 15, 1988).

51. *Id.*

52. 545 N.E.2d at 1157.

53. *Id.* at 1159.

54. *Id.*

55. *Id.*

56. 545 N.E.2d at 1157.

57. *Id.* at 1159.

theless found that the complaint alleged facts which could reasonably be interpreted to fall within the coverage as provided by the policy.⁵⁸ Even though BSO was unable to point out a case in any jurisdiction where a court had held that there was a duty to defend a claim for breach of contract that sought consequential damage for injury to reputation, the supreme judicial court still found that Commercial Union did have such a duty.⁵⁹

Although there were no Massachusetts cases directly on point, there were several cases outside of Massachusetts which had interpreted identical policy language where the cause of action was for breach of contract that sought consequential damages for injury to reputation.⁶⁰ Without exception, these cases held that there was no duty to defend claims for breach of contract where the plaintiff alleged damage to reputation.⁶¹

Unless personal injury contracts are rewritten to specifically exclude indemnification and defense of claims for breach of contract, the Massachusetts court's decision compels insurers to defend breach of contract suits where facts exist which remotely could be interpreted as somehow damaging a reputation. An analysis of this suit in the context of the tests that courts use to determine whether or not an insurer has the duty to defend will further illustrate the ramifications of the court's holding.

VII. THE DUTY TO DEFEND

Even though there were no allegations that BSO published any libelous, slanderous, defamatory, or disparaging material concerning Ms. Redgrave, both the superior court⁶² and the supreme judicial court found

58. *Id.*

59. Appellant's Petition for Rehearing, *supra* note 16, at 5.

60. *Id.*

61. *Id.* Commercial Union cited to the following cases in support of its contention that the precedent in these cases was that there was no duty to defend in breach of contract cases seeking damage to reputation: Associated Indemnity Corp. v. Louisiana Industries Prestressed Corp., 259 So. 2d 89, 90-1 (La. Ct. App. 1972) (no duty to defend contract claim even though complaint alleged that "as a direct and proximate result of the" breach of contract the claimant suffered "the loss of his reputation . . ."); Aetna Casualty & Surety Co. v. First Security Bank of Bozeman, 662 F. Supp. 1126, 1127, 1132 (D. Mont. 1987) (no duty to defend breach of employment contract claim even where third party complaint alleged "damage to his professional reputation" arising from alleged violation of civil rights and breach of contract); Brooklyn Law School v. Aetna Cas. & Sur. Co., 661 F. Supp. 445, 451 (E.D.N.Y. 1987), *aff'd* 849 F.2d 788 (2d Cir. 1988) (no duty to duty [sic] to defend claims of breach of contract and tortious interference with contractual relations); and Angelina Cas. v. Pattonville-Bridgeton Terr., 706 S.W.2d 483, 484-85 (Mo. Ct. App. 1986) (no duty to defend suit alleging "that 'in terminating the plaintiffs, the defendants have so tarnished plaintiff's employment records that plaintiffs have been able [sic] to obtain other' equivalent employment"). *Id.*

62. Application for Direct Appellate Review, *supra* note 13, at 11.

that Ms. Redgrave's complaint alleged a personal injury against which Commercial Union had agreed to defend. To determine if this finding is valid, one must look at how insurance policies are interpreted when there is a question as to whether the insurer has a duty to defend.

A. Coverage Provided by Liability Insurance Contracts

Liability insurance contracts generally contain two promises.⁶³ The first promise is that the insurance company will indemnify the insured, which means that it will pay all covered claims and judgments that are brought against the insured.⁶⁴ The second promise is that the insurance company agrees to defend the insured in any suit brought against the insured which alleges and seeks damages for an injury which is covered by the insurance policy.⁶⁵ These two promises are interrelated because the insurance company ("insurer") is promising to indemnify and defend against only those claims which are within the insurance policy's coverage.⁶⁶ Although interrelated, the promise to defend is separate from the promise to indemnify in that the insurer will have to defend the insured even if the claims brought against the insured later prove to be false or groundless.⁶⁷

An insurer does not wish to breach its duty to defend because it may be held liable for the insured's cost of defending the lawsuit plus reasonable attorney's fees,⁶⁸ up to the limits of the policy.⁶⁹ If the insurer has the duty to defend, it is to its advantage to take control of the lawsuit at the earliest date, since an experienced insurance lawyer is more likely to minimize the effects of any adverse judgments.⁷⁰ For example, the suit brought against the BSO by Ms. Redgrave lasted seven years and the estimated cost of the defense of the suit is as much as one million dollars.⁷¹ Therefore, insurance companies want precise rules to enable them to decide whether or not there is a duty to defend a suit that is brought against their insured.⁷²

Because an insurance policy is a written contract, the policy must be

63. Garbett, *The Duty to Defend in a Liability Insurance Policy: Should the Exclusive Pleading Test be Replaced?*, 36 U. MIAMI L. REV. 235, 236 (1982).

64. *Id.*

65. *Id.*

66. *Id.*

67. Garbett, *supra* note 63, at 236.

68. *Id.* at 237.

69. 7c JOHN APPLEMAN & JEAN APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4689, at 210 (1979).

70. Garbett, *supra* note 63, at 237.

71. *The National Law Journal*, November 20, 1989, at 6, col. 2.

72. Garbett, *supra* note 63, at 237.

construed by the principles that control other contracts.⁷³ The duty of the insurer to provide a defense for claims brought against its insured is contractual in nature.⁷⁴ As a result, the court must look at the insurance policy and determine from its language, if possible, what defense obligations the insurer has.⁷⁵

A court uses one of two tests to determine if the insurer has a duty to defend: the exclusive pleading test or the factual test. Either test uses one or more of the four rules of insurance policy construction: the plain meaning rule, use of extrinsic evidence rule, the contra-insurer rule, or the reasonable expectations doctrine.

B. Exclusive Pleading Test

The traditional rule for determining if there is a duty to defend is the exclusive pleading test.⁷⁶ This test looks at the allegations in the complaint to see if the complaint states facts that would fairly bring the claim within the policy's coverage.⁷⁷ The exclusive pleading test does not allow the court to consider any facts that are not pleaded in the complaint.⁷⁸ A court applying the exclusive pleading test, however, will find a duty to defend, even if the complaint is "inartfully drafted," as long as the facts that are pleaded give rise to a claim for which the policy has promised to indemnify the insured.⁷⁹ In addition, the insurance company must defend if the claim as pleaded states a cause of action for which indemnity has been provided even if there are demonstrable grounds to prove that the claim is "groundless, false, or fraudulent."⁸⁰ Hence, the insurer's duty to defend is triggered solely by the facts alleged in a claim against the insured.⁸¹

In *Boston Symphony Orchestra, Inc.*, Commercial Union had promised to defend any claim brought against the BSO for damages arising out of the "publication or utterance of a libel or slander or other defamatory [or] disparaging material."⁸² Under the exclusive pleading test, therefore, if Ms. Redgrave's complaint against BSO stated facts that al-

73. B. OSTRAGER & T. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 1.01, at 3 (2d ed. 1989).

74. *Id.* at § 5.01, at 105.

75. *Id.*

76. Garbett, *supra* note 63, at 238.

77. *Id.*

78. *Id.*

79. Ostrager & Newman, *The Insurer's Duty to Defend*, in 343 INSURANCE, EXCESS, AND REINSURANCE COVERAGE DISPUTES 24 (1988).

80. *Id.* at 25.

81. Garbett, *supra* note 63, at 240.

82. 545 N.E.2d at 1158-59.

leged damages for "the publication or utterance of a libel or slander or of other defamatory or disparaging material," Commercial Union was required to defend BSO in the suit.

C. *The Factual Test*

With the advent of notice pleading in federal and state courts, where the complaint merely serves as notice without truly informing the defendant of the nature or extent of the plaintiff's claims, courts began to deviate from the exclusive pleading test.⁸³ The new test is called the factual test.⁸⁴ Under this test the courts look "beyond the complaint to the actual facts in determining whether an insurer is obligated to defend."⁸⁵ This test is often applied when the allegations in the complaint are inadequate to determine if there is a duty to defend.⁸⁶ In such a case the court can look beyond the allegations in the complaint to look at the objective facts to determine if there is a duty to defend.⁸⁷

Massachusetts, and other jurisdictions following the factual test, would be the only jurisdictions which would find a duty to defend in this case. Since Massachusetts case law holds that "the duty to defend is based on facts alleged in the complaint and those facts which are known by the insurer,"⁸⁸ the Supreme Judicial Court of Massachusetts used the factual test to determine that Commercial Union had the duty to defend BSO in this breach of contract claim. In *Boston Symphony Orchestra, Inc.*, the supreme judicial court looked beyond the complaint to evidence that Commercial Union knew Ms. Redgrave was seeking damages for injury to her reputation.⁸⁹

D. *Rules of Construction*

The Massachusetts court determined that there was an injury alleged which fell within the zone of coverage.⁹⁰ For a court to determine that the damages are within the coverage of an insurance policy, it must examine the insurance contract and apply the rules of construction that are applicable to an insurance contract. The facts outside the complaint, indicating that Ms. Redgrave was actually seeking damages for injury to

83. Garbett, *supra* note 63, at 259.

84. *Id.*

85. *Id.* at 249.

86. *Id.* at 251 (footnote omitted).

87. *Id.*

88. 545 N.E.2d at 1158 (quoting *Desrosiers v. Royal Ins. Co.* 393 Mass. 37, 40, 468 N.E.2d 625 (1984)).

89. 545 N.E.2d at 1158.

90. *Id.* at 1159.

her reputation, only become significant if these facts state a claim that is within the coverage of the policy issued to the BSO.

1. The Plain Meaning Rule of Construction

The general rule for determining if an allegation falls within the zone of coverage is that "the language of an insurance policy will be given its plain meaning and there will be no resort to rules of construction unless an ambiguity exists."⁹¹ Insurance contracts are to be construed in the same way that other contracts are construed and must be interpreted to reflect the intention of the parties to the contract at the time the contract was made.⁹² The first step for a court that is interpreting an insurance contract is to give to the language of the contract its plain meaning.⁹³

The superior court found that Commercial Union's policy did not limit the definition of defamatory material to libel and slander because the policy recognized other "defamatory or disparaging material."⁹⁴ Further, since the policy did not define the term "disparaging material"⁹⁵ the court found the language to be ambiguous, and looked to extrinsic evidence to determine the intent of the parties.⁹⁶

2. The Extrinsic Evidence Rule

If there is an ambiguity in the insurance policy, the court must consider extrinsic evidence to determine the actual intent of the parties.⁹⁷ Extrinsic evidence is often submitted to explain the meaning of the policy, or to show that the interpretation offered by the insurer is either not the only reasonable interpretation of the policy language or that the insurer's interpretation is inconsistent with the insurer's internal documents.⁹⁸

Confusion exists over the type of extrinsic evidence which is admissible.⁹⁹ Some courts have held that only evidence relating to the mutual

91. OSTRAGER & NEWMAN, *supra* note 73, at § 1.01[a], at 3.

92. *Id.* at § 1.03, at 9.

93. *Id.* § 1.01[a], at 3.

94. Boston Symphony Orchestra v. Commercial Union Ins., Co., No. 71823, slip op. at 5 (Mass. July 15, 1988).

95. *Id.* at 6.

96. *Id.* at 5.

97. OSTRAGER & NEWMAN, *supra* note 73, at § 1.01[b], at 5.

98. Caton, Russell, & Levin, *The Rules of Insurance Policy Construction and the Myth of the "Sophisticated Insured"*, in 385 INSURANCE, EXCESS, AND REINSURANCE COVERAGE DISPUTES 62-63 (B. Ostrager & T. Newman ed. 1990).

99. *Id.* at 64.

intent of the parties is admissible.¹⁰⁰ Internal documents and communications which are evidence of undisclosed unilateral intent have also been admitted against an insured.¹⁰¹ However, a party cannot offer against another party evidence of its own undisclosed intent because this evidence is nothing more than self-serving hearsay.¹⁰² If extrinsic evidence of custom or usage exists which gives a particular meaning to a word or phrase, it is admitted if the policy language is ambiguous.¹⁰³ If the court determines that there is a particular meaning according to custom or usage, that meaning will prevail unless the parties have expressly excluded it.¹⁰⁴ Custom or usage, however, is not established by a showing that an expert in the field would have understood the policy terms.¹⁰⁵

Commercial Union contended that "disparaging material" refers to the torts of product disparagement and disparagement of property.¹⁰⁶ BSO pointed out that the policy did not use the term "disparagement," and therefore, the policy did not refer to disparagement torts.¹⁰⁷ Rather the policy used the term "disparaging material" which is susceptible to a broader meaning which is to "demean or to lower the reputation of."¹⁰⁸

Although the evidence submitted by BSO did not relate to the mutual intent of the parties, the evidence did show that the interpretation offered by Commercial Union was not the only reasonable interpretation. Commercial Union's interpretation did, however, show evidence of custom or usage of the term "disparaging material" by the insurance industry.¹⁰⁹ The superior court held that because this language was contained in a form contract, Commercial Union could not rely on the narrowest meaning found in the custom or usage of insurance companies.¹¹⁰ Because the superior court did not accept Commercial Union's interpretation, it must have decided that only an expert in the insurance field would have defined "disparaging material" as disparagement of property

100. *Id.*

101. *Id.* at 65.

102. Canton, Russell, & Levin, *supra* note 98, at 66.

103. Ostrager & Newman, *Rules of Construction Applied in Insurance Coverage Disputes in 343 INSURANCE, EXCESS, AND REINSURANCE COVERAGE DISPUTES* 565 (1988).

104. *Id.*

105. *Id.*

106. 545 N.E.2d at 1159. The tort of disparagement protects injuries produced by a communication that damages the quality of what a person has to sell or the character of a person's business. W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS 964 (1984).

107. Brief for Appellee at 42, *Boston Symphony Orchestra, Inc. v. Commercial Union Ins., Co.*, 545 N.E.2d 1156 (Mass. 1989) (No. 5038).

108. *Id.* at 43.

109. See Brief for Appellants, *supra* note 14, at 45-49.

110. *Boston Symphony Orchestra v. Commercial Union Ins., Co.*, No. 71823, slip op. at 6 (Mass. July 15, 1988).

or product disparagement. Because the examination of the extrinsic evidence failed to determine the intent of the parties, the superior court then turned to the rules of construction applicable to an insurance contract in order to resolve the ambiguity of this language.¹¹¹

3. Contra-Insurer Rule of Construction

If the court is unable to determine the actual intent of the parties by examining the extrinsic evidence, the court must use as a last resort other rules of construction to resolve the ambiguity.¹¹² Many courts apply the contra-insurer rule, which provides that ambiguous insurance contracts must be construed in favor of the insured and against the insurer.¹¹³ The insured need only supply the court with a reasonable interpretation.¹¹⁴ The rationale for this rule is that the insurance company drafted the policy and primarily had its own interest in mind.¹¹⁵ Therefore, if the policy language is ambiguous, the insured, who had no part in drafting the language, is entitled to the more favorable interpretation.¹¹⁶

The court, however, cannot automatically construe the language against the insurer.¹¹⁷ The court must first consider the sophistication of the parties and their abilities to bargain.¹¹⁸

Both the superior court¹¹⁹ and the supreme court found that Massachusetts case law uses the contra-insurer rule to resolve ambiguities in insurance policy language.¹²⁰ Because BSO's definition of disparaging material, "to speak slightingly of," was more favorable to BSO, the supreme judicial court held that this was the interpretation that should be given this policy term.¹²¹ Given this broad definition, Ms. Redgrave's complaint did allege facts that stated a cause of action for which Commercial Union had agreed to defend BSO.¹²²

4. Reasonable Expectations Doctrine

A variation of the contra-insurer rule has been adopted by many

111. See 545 N.E.2d at 1159.

112. OSTRAGER & NEWMAN, *supra* note 73, § 1.01[c], at 6.

113. *Id.* at 7.

114. *Id.* at § 1.03[b][1], at 11.

115. *Id.* at 12.

116. OSTRAGER & NEWMAN, *supra* note 73, § 1.03[b][1], at 12.

117. *Id.* at § 1.01[c], at 7.

118. *Id.*

119. *Boston Symphony Orchestra v. Commercial Union Ins., Co.*, No. 71823, slip op. at 6 (Mass. July 15, 1988).

120. 545 N.E.2d at 1159.

121. *Id.*

122. *Id.*

courts.¹²³ This variation, known as the reasonable expectations doctrine, honors the insured's expectation as to the nature and terms of the insurance coverage,¹²⁴ even if a careful review of the policy language reveals a particular limitation or exclusion.¹²⁵ The test for the meaning of a term under the reasonable expectations doctrine is not what the drafter intended, but rather what a reasonable person in the insured's position would have understood it to mean.¹²⁶ If the reasonable expectations doctrine had been applied in this case, the court would have had to determine what reasonable expectations BSO had when it received the policy. In order for the policy to be interpreted in its favor, BSO would have needed to have reasonably believed that the policy language of "other disparaging material" provided coverage for any publication or utterances that spoke slightly of another person.

VIII. EFFECTS ON THE ENTERTAINMENT INDUSTRY

Commercial Union speculated that the Massachusetts court's interpretation would "require personal injury insurers to defend contract actions anytime an insured is found to be in breach of a contract with a famous person."¹²⁷ The Massachusetts court disagreed, pointing out that Commercial Union could change the language of its policy to only defend against libel, slander or product disparagement if that was what it intended to cover.¹²⁸ The effects of this decision may cause insurance companies which issue policies to employers of well-known personalities to reword their policies to insure that there is no coverage for any damages that would flow from a breach of contract suit.

Never before has a court decided that an insurance company must defend a suit for breach of contract when the complaint has alleged damage to reputation.¹²⁹ The true ramifications of this holding to employers of well-known personalities are unknown. One result could be the one suggested by the supreme judicial court—that insurance companies may

123. OSTRAGER & NEWMAN, *supra* note 73, § 1.03[b][2][B], at 16. The courts in the following 30 states have recognized some variation of the reasonable expectations doctrine: Alabama, Alaska, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Rhode Island, Texas, and Wisconsin. *Id.* at 16-20.

124. *Id.* at § 1.03[b][2], at 14.

125. *Id.*

126. *Id.* at 1.03[b][2][A], at 15.

127. 545 N.E.2d at 1159.

128. *Id.*

129. Appellant's Petition for Rehearing, *supra* note 16, at 5.

rewrite their policies to specifically exclude coverage of these actions.¹³⁰ If insurance companies do respond to this suit by changing their policies to exclude coverage for other disparaging material and to specifically exclude breach of contract actions, many employers will find themselves unable to acquire needed liability insurance coverage. If this change in insurance coverage does occur, employers may decide not to hire people who have a past history of breach of contract suits or who are controversial personalities.¹³¹ Employers will not want to risk the chance of exposing themselves to possible suits if there is a chance that they will not be covered by their liability insurance policy.

A reaction of this kind would have a chilling effect on the entertainment industry, in that employers will severely limit their involvement with controversial projects and personalities. This would not only harm the entertainment industry itself, but would also harm the public in that the opportunity to view controversial works and performers will be lost. Political satire has traditionally been a mechanism for social change, and if the public never sees these works, society as a whole will be injured.

Another result will be an increase in the cost of personal injury policies. The amount of the premium paid in exchange for receiving insurance coverage is determined by the dollar amount of losses that are expected or anticipated by the insurance company.¹³² Personal liability insurance policies only cover losses for particular actions that are listed in the policy.¹³³ The holding in *Boston Symphony Orchestra, Inc.*,¹³⁴ which extends coverage beyond what Commercial Union had anticipated, will most likely have the effect of increasing insurance premiums to cover the potential cost of defending breach of contract actions.

This suit will affect employers of any employee whose livelihood depends on his or her reputation and image as perceived by potential employers and the general public. Athletes, coaches, managers, actors and actresses who make their living not only by their current contract, but also by their ability to sell their image for commercials, product endorsements, and public appearances will be affected by this holding. Because

130. 545 N.E.2d at 1159.

131. In discussing the possibility of hiring Raquel Welch for the movie "Cannery Row," the producers questioned Ms. Welch about rumors of problems between her and her previous directors. *Welch v. Metro-Goldwyn-Mayer Film Co.*, 207 Cal. App. 3d 164, 254 Cal. Rptr. 645, 648. (Review granted March 2, 1989, and cause transferred Nov. 22, 1989, to Cal. App. 2d Dist. with directions to vacate opinion and reconsider in light of *Newman v. Emerson Radio*, 48 Cal. 3d 973 (1989)).

132. Brief for Appellants, *supra* note 14, at 40.

133. *Id.*

134. 545 N.E.2d 1156.

of the large amount of money that is at stake when a public person's reputation has been damaged, breach of contract suits will be litigated.¹³⁵ Therefore, insurance companies will either have to raise their premiums or specifically exclude the potentiality for defending causes of action resulting from breach of contract. Because of the broad reaching effects of this holding, the Supreme Judicial Court of Massachusetts may very well have extended the duty to defend too far.

*Sarah Ambrose Eddy**

135. Timothy Hutton sued MGM for fraud and breach of contract when MGM cancelled plans to make the movie "Roadshow." The jury awarded him \$9.75 million. Raquel Welch sued MGM for breach of contract in 1989 for firing her from the movie "Cannery Row." She was awarded \$10.8 million. Neumeier, *Sue Crazy!*, 34 LOS ANGELES MAGAZINE 100 (1989).

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