

Motion to Dismiss – Scope of Duty to Defend

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Clarifying the scope of an insurer's duty to defend where no suit has been filed, the Suffolk Superior Court recently held in *Thomas W. Eagar v. Safety Insurance Company* that neither a deposition subpoena nor related litigation to enforce such subpoena qualified as a "claim or suit" requiring an insurer to retain counsel to defend its insured under a Homeowners or Personal Umbrella policy.

In *Eagar*, the insured sought reimbursement of legal fees incurred in contesting a deposition subpoena and responding to related filings in federal litigation in Illinois. Safety disclaimed coverage, asserting that a duty to defend was triggered only by a "claim or suit" that sought damages because of "bodily injury" caused by an "occurrence," and that neither the subpoena nor the related litigation was a "claim or suit" against the insured seeking damages of any kind. The insured filed suit against Safety for breach of contract, violations of G.L. c. 93A, and declaratory judgment.

Safety, represented by Peter L. Bosse and Tanya T. Austin of Boyle | Shaughnessy Law, moved to dismiss all counts, arguing as a matter of law that its duty to defend under the policies had not been triggered. The Court agreed, noting that (unlike the EPA demand letter in [Hazen Paper Co. v. U.S. Fidelity and Guar. Co.](#), 407 Mass. 689, 695 (1990)) none of the Illinois litigation required a response from the insured or exposed the insured to any risk of financial harm if he failed to respond; rather, all litigation appeared to have been aimed solely at forcing the insured to appear for deposition. Further, no "damages because of bodily injury" were sought, precluding coverage under the policy. The Court dismissed all claims against Safety, concluding that Safety's proper disclaimer could not form the basis of a breach of contract or 93A claim, and held that given the absence of any remaining controversy between the parties, it had no jurisdiction under G.L. c. 231A to consider the declaratory judgment claim.

The Court's decision serves to reiterate that not all litigation involving an insured will trigger an insurer's duty to defend, even where the insured is forced to retain counsel to represent his interests—rather, such litigation must actually constitute a "claim" against an insured that seeks payment of damages for covered losses.