

Lawyers of the Year: Michael F. Aylward

Morrison Mahoney

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Michael F. Aylward (MERRILL SHEA)

In 2022, Boston attorney Michael F. Aylward charted a course for liability insurers to obtain relief when faced with a Hobson's choice of agreeing to settle a claim that the insurer believed wasn't covered or getting sued for bad faith.

Last August, U.S. District Court Judge Richard G. Stearns ruled in *Berkley National Insurance Company v. Granite Telecommunications* that a liability insurer could recoup both defense and settlement costs for a personal injury claim it defended under a unilateral reservation of rights and which was later found not to be covered by the policy.

Aylward represented plaintiff Berkley National Insurance in a coverage dispute arising out of a lawsuit brought by Stephen Papsis, a chef working in the company café of the defendant insured, Granite Telecommunications. Papsis alleged he suffered a severe foot infection when raw sewage backed up into his workspace.



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Berkley defended the personal injury case and paid Papsis a settlement while reserving its right to later deny coverage under a policy exclusion for injuries caused by bacteria or fungi and seek recoupment for its payments.

In his decision, Stearns first ruled that Papsis' suit fell within the bacteria/fungi exclusion. He then broke new ground in Massachusetts insurance law by finding merit to Aylward's argument that, under the doctrine of equitable restitution, Berkley was entitled to reimbursement for its defense and settlement payments.

Although some see the case as a "win" for insurers, Aylward argues that the decision also has positive consequences for policyholders.

"The way this case was resolved, I think it actually encourages insurers to defend under a reservation of rights and, where appropriate, to front the cost of settling even cases that don't appear to be covered, because it gives the insurer the recourse of getting a ruling that they are entitled to be repaid if in fact they never had owed coverage," Aylward says.

Q. *Where does Berkley National Insurance v. Granite Telecommunications rank in terms of your professional achievements?*

A. I wouldn't ordinarily view a trial court ruling as that big a deal, but this was an issue where there has been surprisingly little case law, and sometimes the first court that rules sets a precedent that has an outsized influence on how other judges consider the issue in the years to come.

Q. *Why is this an important decision for liability insurance carriers?*

A. In a way, this case is important because of what didn't happen. If the court had granted the insured's motion for judgment on the pleadings, it would have licensed efforts by policyholders to game the system and squeeze insurers to settle cases that they were defending under a reservation of rights without any remedy to account for the fact that the claims might not be covered.

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Q. *What are the lessons to be drawn from the case by insureds?*

A. This is a case that demonstrates the importance of constructive cooperation in structuring a settlement and the problems that can arise if an insured takes an unreasonably hard line in trying to whipsaw its insurer into paying a settlement that probably isn't covered, by threatening to sue for bad faith.

Q. *Specifically, why is your client entitled to the remedy of equitable restitution of defense and settlement costs?*

A. It's a matter of equity. In light of the allegations against its insured, Berkley could reasonably have refused to defend or pay anything to settle. Instead, it agreed to defend a case while the coverage issues were being sorted out in a separate proceeding and ended up funding 100 percent of a settlement that it didn't cover because its insured insisted on the case being settled but refused to contribute any money to the settlement.

The essence of equitable restitution is that a party that is unjustly enriched by receiving a benefit that it wasn't entitled to must reimburse the third party that conferred that benefit.

Q. *Stearns distinguished Supreme Judicial Court precedent, which had denied reimbursement to insurance carriers that had defended insureds under unilateral reservations of rights. He pointed to the fact that your client, under threat of a Chapter 93A suit by the defendants, was "effectively forced" to pay for the cost of defending and settling the Papsis lawsuit. Does that mean that Stearns' decision should be read narrowly in keeping with the specific facts in the case, or is there a rule of broader application that can be gleaned from the ruling?*

A. The case that Judge Stearns distinguished is the SJC's [1997] decision in [*Medical Malpractice Joint Underwriting Association of Massachusetts v. Goldberg*]. That was a case where a med-mal insurer ended up settling a suit because it was worried that an affirmance on appeal would create a rule that medical malpractice

could impose liability under Chapter 93A that could have devastating financial consequences for the insurer in other cases.

In this case, Berkley National told its insured repeatedly it was reserving its rights to seek recoupment. More importantly, Berkley National was not settling to protect its own interests; it was settling at the insistence of its insured and in the face of a threatened bad faith claim. Judge Stearns focused on the demands that Granite Telecommunications put on Berkley to settle. Given those distinctions, I'd suggest that *Goldberg* is the outlier and that Judge Stearns' ruling is a more mainstream result.

Q. *In your mind, how relevant to the decision on restitution was the fact that there appeared to be no serious dispute that the underlying personal injury suit did not fall within the terms of coverage of your client's policy?*

A. In fact, there was a lot of controversy about whether the bacteria exclusion applied. Even though Granite Telecommunications put a lot of pressure on Berkley National to settle, it argued in the coverage case that there was no evidence that it was liable and that the underlying claimant hadn't suffered any injury due to exposure to bacteria on its premises.

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