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HOMEOWNER, COMMERCIAL INSURANCE: COVERAGE FOR ASSAULTS

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In representing a client accused of an assault, an individual injured by an assault or an insurer considering coverage options, certain fundamental issues must be considered initially and failing to do so may irrevocably affect the outcome of your case.

The typical homeowner's and commercial general liability policies contain several pertinent provisions that an insurer may rely on to deny coverage when presented with a claim where the gravamen of the action is an alleged assault. Initially, the insuring agreement of the policy declares that coverage is provided for an 'occurrence,' which is typically defined as 'an accident... resulting in bodily injury.' Thus, without even resorting to a policy exclusion, the very definition of coverage, as set forth in the insuring agreement of the policy, arguably excludes coverage for claims involving an assault.

In addition, the policy will likely include an intentional or intentional and criminal act exclusion that bars coverage for bodily injury or property damage intended by, or that may reasonably be expected to result from, the intentional or criminal acts or omissions of an insured. Some policies also contain an exception to the intentional act exclusion, that makes the exclusion inapplicable to bodily injury resulting from the insured's use of reasonable force to protect persons or property. Alternatively, the policy may contain an assault and battery exclusion precluding coverage for any claim, demand or suit based on assault and/or battery and further declaring that assault and/or battery shall not be deemed an occurrence whether or not committed by or at the direction of the insured.

Certainly, the variations in the exclusionary language illustrate the importance of examining the particular exclusion before conducting a coverage analysis.

Generally, in analyzing the applicability of the exclusions, the courts apply a 'but for' reasoning--that is, 'but for' the assault, there would be no claim for negligent supervision and thus, the inclusion of negligent supervision or hiring claims does not foreclose the application of the exclusion. [FN1]

In addition, the courts focus on the resulting injury and whether it was intended, rather than on the act itself, construing the term 'accident' as pertaining not only to an unintentional or unexpected event which would foreseeably cause death, but equally to an intentional or expected event which unexpectedly or unintentionally has that result. [FN2] This construction is supported by the exclusionary language itself, which refers not to the act, but to bodily injury or property damage intended or to be reasonably expected to result from the conduct.

In assessing the availability of coverage, consideration must also be given to the timeliness of notice given by or on behalf of the insured and the concomitant timeliness of any disclaimer or partial disclaimer issued by the insurer, although the significance of timely notice by the insured will be diminished upon the effective date of the amendment of New York's Insurance Law [FN3] requiring an insurer to demonstrate prejudice in order to disclaim based upon late notice.

The cases analyzing the application of these exclusions are quite fact-sensitive and often seemingly irreconcilable.

However, a review of recent decisions issued by our appellate courts is instructive in determining whether the exclusion will preclude coverage in a given situation.

Before examining recent case law interpreting the exclusions, a review of the Court of Appeals' decision in [Automobile Ins. Co. of Hartford v. Cook](#), [FN4] provides perspective on the narrow construction of the exclusion which has been afforded by New York's highest court. In *Automobile Ins. Co. of Hartford*, supra, the court held the insurer was obligated to afford its insured a defense despite his admission that he knew shooting the claimant with a 12 gauge shotgun from a short distance would injure him, since he claimed he did not anticipate it would kill him.

In concluding the insurer owed a defense, the court focused on the negligence claims in the complaint, the well established law vis-à-vis the breadth of an insurer's duty to defend when the allegations of a complaint suggest a reasonable possibility of coverage, and the function of a liability policy as litigation insurance. Of course, juxtaposed against these principles is the contrasting public policy that militates against insurance coverage for criminal acts.

In [State Farm Fire & Casualty Co. v. Whiting](#) [FN5] the Fourth Department distinguished the Court of Appeals' seminal decision in *Automobile Insurance Co. of Hartford*, supra, and granted the insurer's motion for summary judgment, finding that State Farm had no duty to defend or indemnify its insured where it was alleged in the underlying action that the defendant-insured had assaulted the claimant while the claimant was attending a party at the insured's home. Initially, the court held that the incident was not an 'occurrence,' defined as an accident, noting that this analysis is to be made from the

point of view of the insured. In reaching its conclusion, the court relied on the insured's deposition testimony to the effect that he intended to hit the claimant and that he knew when he hit him that the claimant could be hurt from the punch, unlike the insured in Automobile Insurance Co. of Hartford, supra, where the insured testified that he knew the victim would be injured, but he did not anticipate that the victim would be killed when he fired a shotgun at him.

The Second Department in [Desir v. Nationwide Mutual Fire Ins. Co.](#), [FN6] also held as a matter of law that there was no obligation to defend or indemnify the insured where the operative act giving rise to any recovery was an assault, which was not an occurrence within the meaning of the policy and which, in any event, was precluded by the policy's intentional act exclusion. The court articulated the principle that where the operative act giving rise to any recovery is an assault, the inclusion of causes of action alleging negligence and carelessness is not fatal to an insurer's motion for summary judgment--the court looking beyond conclusory theories of liability to the operative facts.

The court was also not persuaded by the inclusion of negligence claims in [Kantrow v. Security Mutual Ins. Co.](#), [FN7] where it was alleged that the insured's minor son had assaulted a minor female in their home. While the underlying complaint alleged negligence against the homeowners, asserting that they permitted or failed to stop their son, the court noted that the gravamen of the underlying action involved their son's intentional conduct. The homeowner's insurer disclaimed to their insureds with respect to the negligent supervision claim, arguing that the conduct at issue was not a covered occurrence and/or was excluded by the intentional act exclusion to the policy. The court agreed, noting also that the exclusion precluded coverage for bodily injury caused intentionally by or at the direction of any insured and that the son was an insured as defined by the policy. In fact, many policies include a 'joint obligations' clause which states that the policy imposes joint obligations on persons defined as insureds and that the responsibilities, acts and failures to act of a person defined as an insured person will be binding upon another person defined as an insured person.

In *NYAT Operating Corp. v. GNA National Ins. Co.*, [FN8] which also involved sexual assault and battery, the complaint included claims of negligent hiring and retention of the offending employee by the insured. The court held that since the claim was based on negligent hiring and retention, not respondeat superior, the sexual assault was a covered 'accident' within the meaning of the policy and the intentional act exclusion did not apply, citing [RJC Realty Corp v. Republic Insurance Co.](#) [FN9] However, the court held that the insurer's disclaimer was untimely and thus, precluded application of the exclusion.

Similarly, the Second Department in *Medrano v. State Farm Fire & Casualty Co.*, [FN10] concluded that the insurer was obligated to defend and, if necessary, indemnify the infant insured in an action involving an assault at the middle school. The plaintiff was monitoring the cafeteria when a food fight broke out and it was claimed that the defendant insured threw a garbage can into the air, striking the plaintiff and causing injury. In the underlying personal injury action it was alleged that the insured had negligently, carelessly and recklessly caused the injuries. State Farm denied coverage, asserting that the incident did not qualify as an occurrence and citing the intentional act exclusion in the policy.

In holding that the insurer had a duty to defend, the court noted that the underlying

complaint alleged negligence and referred to the deposition testimony of the insured, who indicated a lack of intent to injure the plaintiff.

#### Reservation of Rights

An issue that frequently affects the coverage available, where the claim involves an alleged assault, is the timeliness of notice by or on behalf of the insured and the insurer's issuance of a timely and otherwise statutorily compliant denial.

It is well-established, though not well-known, that a reservation of rights does not serve as a substitute nor does it toll the time for an insurer to issue a disclaimer of coverage. [FN11] The court's decision in *NYAT Operating Corp. v. GNA*, supra, illustrates the importance of a timely issued denial. It was the contention of the insurer that they did not receive timely notice of the assault, but the court held that their failure to include the insured's breach of the notice condition of the policy in a timely disclaimer resulted in the waiver of same. The court specifically noted that the carrier had merely served a reservation of rights which had no relevance to its timely issuance of a disclaimer of coverage.

#### Uninsured Motorist Claims

The intentional act exclusion will preclude claims under other portions of a policy as well, although as discussed below, a recent decision of the Second Department calls into question its applicability in the No Fault context.

The decision by the Second Department in *MetLife Auto & Home v. Calendarev*, [FN12] follows a long line of cases which hold that where an innocent claimant is involved in an incident which is not an 'accident' because of the intentional conduct of the other involved party, they will also be barred from recovering under the uninsured motorist endorsement of their own policy. This situation arises where the offending tortfeasor's carrier disclaims based upon the intentional nature of the conduct. Despite the gap in coverage created, it is well-established that where the claimant's injuries are not the result of an 'accident,' she will not be entitled to uninsured benefits even where the incident was unintended from her perspective. [FN13]

#### No Fault

However, in [State Farm v. Langan](#), [FN14] after reiterating this well-established rule, the court held that the claimant was entitled to no-fault benefits, noting that absent an express provision in the policy to the contrary, the nature of the conduct with respect to such benefits was to be viewed from the point of view of the insured. The court also cited New York Insurance Department Regulation §60-1.1[f], which requires every owner's policy of liability insurance to include a provision that assault and battery shall be deemed an accident unless committed by or at the direction of the insured and acknowledged that their holding, affording different interpretations of the term 'accident' within the same policy, was the 'inevitable consequence of the fact that current New York law makes uninsured coverage in this State narrower than would be expected under general insurance principles....'

In determining whether coverage is available for an act which is arguably intentional in nature, the courts perform a fact-specific analysis which requires a close reading

of the exclusionary language contained within the policy, as well as an assessment of the conduct from the viewpoint of the insured. Often, the critical consideration is not whether the conduct itself is intended, but whether the resulting injury is. In addition, the courts must balance the desire to compensate the innocent victim with a predilection against providing insurance coverage for criminal conduct.

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1. See, for instance, [U.S. Underwriters v. Val-Blue Corp., 85 NY2d 821 \(1995\)](#).
2. [Miller v. Continental, 40 NY2d 675 \(1976\)](#).
3. §3420--A11541 an act to amend the CPLR and the Insurance Law in relation to liability insurance policies.
4. [7 NY3d 131 \(2006\)](#).
5. [53 AD3d 1033 \(4th Dept. 2008\)](#).
6. [50 AD3d 942 \(2nd Dept. 2008\)](#).
7. [49 AD3d 818 \(2nd Dept. 2008\)](#).
8. [46 AD3d 287 \(1st Dept. 2007\)](#).
9. [2 NY3d 158 \(2004\)](#).
10. 2008 Slip Opinion 06699 (2nd Dept. 2008).
11. [Hartford v. County of Nassau, 46 NY2d 1028 \(1979\)](#).
12. [2008 WL 4260799 \(2nd Dept. 2008\)](#).
13. [Travelers Indemnity Co. v. Cruz, 40 AD3d 362 \(1st Dept. 2007\)](#); [Eagle Ins. Co. v. Gueye, 26 AD3d 192 \(1st Dept. 2006\)](#); [Liberty Mutual Ins. Co. v. Goddard, 29 AD3d 698 \(2nd Dept. 2006\)](#).
14. [2008 WL 4256241 \(2nd Dept. 2008\)](#).