

New York Law Journal
Volume 237
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Thursday, April 19, 2007

OUTSIDE COUNSEL

Intentional Act Exclusion: Policy-Interpretation Conflict

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'I really didn't mean to hurt him, just to scare him!'

What happens when an individual intends to do one thing but his actions result in an entirely different set of consequences causing injury or death and resulting in a lawsuit?

Before the suit papers are cold in his hands, he will likely seek defense and indemnification from his homeowner's insurer or his company's general liability carrier. Since policies are drafted to provide coverage for fortuitous events 'neither expected or intended from the standpoint of the insured,' in many cases the insurer will disclaim coverage or defend under a reservation of rights while contesting coverage in a declaratory judgment action.

This has given rise to a multitude of divergent court decisions causing uncertainty as to the availability of insurance coverage where the alleged acts are arguably intentional in nature.

Contract Interpretation

An insured seeking to obtain defense and indemnification under a general liability policy for a claim that may be precluded by the application of an exclusion is afforded the substantial benefit of certain well-established principles of contract interpretation. In particular, where an insurer seeks a declaration that it has no duty to defend or indemnify its insured on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision. [FN1] However, while the timeliness of the disclaimer and the insurer's adherence to the technical requirements of Insurance Law 3420 should be considered, a disclaimer is not required in all instances, as the incident may fall outside the scope of coverage afforded by the policy. <http://web2.westlaw.com/find/default.wl?vc=0&rp=@find®default.wl&DB=605&SerialNum=1997248379&FindType=Y&ReferencePositionTyp>.

Where the conduct for which coverage is sought is arguably intentional in nature, the insurer typically relies upon the policy's definition of an 'occurrence,' as well as any intentional act, criminal act or assault and battery exclusion, depending on the policy and the exclusionary language included. This is particularly true where the timeliness of the disclaimer is at issue, because a disclaimer is not required if the conduct for which coverage is sought falls outside the scope of coverage afforded by the policy. [FN2]

In determining if coverage is available for an assault, the language of the policy must be closely examined, as there exist many variations of the exclusionary

language. The pronouncement by the Court of Appeals in 1995 in the seminal decision, *U.S. Underwriters Insurance v. Val-Blue Corp.*, [FN3] resolved much of the confusion surrounding the application of the assault and battery exclusion in a general liability policy, but there continues to be considerable litigation concerning the application of the intentional and criminal act exclusions. As the cases discussed below illustrate, application of the exclusion is extremely fact sensitive with results that are often seemingly unreconcilable.

Val-Blue involved the shooting of an off duty police officer by the club's security guard. In the complaint, the plaintiff contended that the shooting was negligent and alleged respondeat superior, as well as negligent hiring, supervision and training against the employer. The pertinent exclusion provided that: 'no coverage shall apply under this policy for any claim, demand or suit based on Assault and Battery and Assault and Battery shall not be deemed an accident, whether or not committed by or at the direction of the insured.' Holding that the insurer had no obligation to defend or indemnify its insured, the court found the exclusion unambiguous and concluded that the plethora of claims which arose from the shooting were based on assault and battery and therefore, were excluded from coverage under the policy.

In numerous decisions since Val-Blue, New York courts have determined that the assault and battery exclusion precluded coverage. Recently, in *Haines v. New York Mutual Underwriters*, [FN4] the court, citing to Val-Blue, articulated the generally accepted principle that 'if no cause of action would exist but for the assault, the claim is based on assault and the exclusion applies.' This is so despite the inclusion of other allegations in the complaint such as negligent hiring or supervision.

However, where there are no intentional assault allegations and the injuries may have resulted from 'unintentional acts' including allegations that a bouncer 'negligently and carelessly escorted' a patron from the premises, the insurance carrier was obligated to provide a defense notwithstanding the existence of an assault and battery exclusion. [FN5] http://web2.westlaw.com/find/default.wl?vc=0&rp=®find®default.wl&DB=602&SerialNum=1996158856&FindType=Y&AP=&fn=_top&utid=#.

Restrictive Interpretation

The subjective nature of the exclusion combined with the courts' understandable desire to find coverage for the 'innocent victim,' has led to a restrictive interpretation of the exclusion which is highly fact-sensitive. The Court of Appeals' decision in *Cook v. Automobile Insurance Company of Hartford* [FN6] is illustrative.

In *Cook*, supra, the insured shot and killed Richard Barber, a 360-pound acquaintance of the insured, who burst into the insured's home, leading the insured to retrieve a shotgun from his bedroom. After warning him to leave or he would shoot, Mr. Cook shot Mr. Barber, who later died. Mr. Cook was acquitted of intentional and depraved indifference murder, as well as the lesser included offenses of manslaughter.

The complaint in the wrongful death action alleged that Mr. Cook negligently pointed and discharged the gun and, during depositions, Mr. Cook testified that he knew firing the shotgun would injure Mr. Barber but he did not intend to kill him. The court determined that the incident fell within the policy's coverage for an 'occurrence,' which included an accident, observing that their previous definition of an accident, albeit in a different context, included not only an unintentional or unexpected event which would foreseeably cause death, but equally to an intentional or expected event which unintentionally or unexpectedly had that result. The court held that the insurer was obligated to afford the insured a defense, with its indemnity obligation, if any, to be determined after the underlying trial.

This decision was followed by the Third Department in *Merchants Insurance Company of New Hampshire v. Weaver*. [FN7] In *Weaver*, the insured's son pleaded guilty to attempted assault in the first degree, admitting that he aimed and fired what he

knew was a loaded and operable flare gun. The flare struck Mr. Weaver, causing serious physical injuries, including the loss of his left eye. The policy contained the identical expected or intended exclusion considered by the Court of Appeals in Cook and the complaint similarly alleged the insured had negligently fired the weapon. Not surprisingly, the court concluded that the insurer owed its insured a defense, with indemnity to await the underlying trial.

Perspective of the Insured

The applicability of the exclusion is further complicated because it is determined from the perspective of the insured. In RJC Realty v. Republic Franklin Insurance Co., [FN8] the Court of Appeals held that an alleged sexual assault by an employee of a beauty salon/health spa was an occurrence within the meaning of a general liability policy and that coverage was not precluded by the exclusion for injuries expected or intended from the standpoint of the insured. The claimants alleged that the spa negligently hired and retained the masseur and failed to properly supervise his activities. The court identified the critical question as whether the masseur's intention and expectation in committing the assault should be attributed to his employer. The court concluded that the acts of the masseur were a departure from his duties and were thus unexpected, unusual and unforeseen from the perspective of the insured, thereby constituting an accident within the meaning of the policy.

Injury Is Inherent

In a narrow group of cases, the courts have held that the intentional act exclusion applies regardless of the insured's subjective intent, essentially concluding that with respect to certain behavior, the injury is inherent in the nature of the wrongful act, i.e., 'to do the act is necessarily to do the harm which is its consequence; and that since unquestionably the act is intended, so also is the harm.' Progressive, supra, citing Allstate Insurance Co. v. Mugavero. [FN9]

In Progressive, supra, the insured and the claimant were fighting. The insured got into his car and the claimant stood in front of his vehicle placing himself between the vehicle and a garage door while a friend of the claimant stood behind the insured's vehicle. The insured stepped on the accelerator injuring the claimant. Progressive obtained a judicial declaration that it owed neither defense or indemnity because the act was intentional. The insured and claimant appealed, arguing that the insured only stepped 'lightly' on the accelerator intending to scare the claimant, not injure him. The court disagreed, holding that the injuries were inherent in the act of placing a car in forward motion when but two feet of space existed between the car, a pedestrian and an immovable object, clearly invoking the intentional act exclusion of the policy.

In these types of cases, 'the theoretical possibility that the insured lacked the subjective intent to cause the harm does not preclude a finding that, for purposes of the policy's intentional act exclusion, such injuries are, as a matter of law, 'intentionally caused.' [FN10]

In Tangney v. Burke, [FN11] the court held that the plaintiff's fall from a ledge during a fight with the insured was not an 'occurrence' within the meaning of the policy since the injuries sustained by the plaintiff were inherent in the assault.

In Monter v. CNA Insurance Cos., [FN12] the court held that the intentional act exclusion precluded coverage where the insured hired someone to break the claimant's legs and they instead shot and killed him, finding that the harm was inherent in the nature of the acts alleged and, thus, the resultant injuries were, as a matter of law, intentionally caused within the meaning of the policy.

Applying the principle articulated in these cases to Cook v. Hartford and Merchants v. Weaver supra, would have, arguably, led to a contrary result, as the injury resulting from the act of pointing and firing a loaded gun certainly seems inherent in the nature of the act.

Public Policy

In Slayko v. Security Mutual Insurance Co., [FN13] the Court of Appeals interpreted a criminal activity exclusion in a homeowner's policy, saying that public policy did not prohibit its application, which barred coverage for the insured's shooting of a friend while the two were drinking and smoking marijuana. The court noted that while public policy does not prohibit coverage for liability arising from criminal acts, neither does it require such coverage.

The courts' desire to compensate an innocent victim must be weighed against the countervailing concern that an ordinary person would be startled, to say the least by the notion that someone would receive insurance protection for the consequences of criminal acts of which he was found guilty after a trial. [FN14]

(T)he average person purchasing homeowner's insurance would cringe at the very suggestion that [the person] was paying for such coverage. And certainly [that person] would not want to share that type of risk with other homeowner's policyholders. [FN15]

Conclusion

Determining if the intentional, criminal or assault and battery exclusion precludes coverage under a homeowner's or general liability policy is a fact-sensitive inquiry which is shaped by the competing desire to find coverage for an innocent victim and the public policy against affording coverage for criminal conduct. Establishing the subjective intent of the insured is often difficult, but a narrow line of cases which hold that the injury is inherent in the act provide a means for the insurer to establish that coverage is not available, where otherwise they would likely be unable to do so.

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FN1. Continental Casualty v. Rapid American Corp., 80 NY2d 648 (1995); Utica First Ins. Co. v. Stan-Brite Painting & Paperhanging, 36 AD3d 794 (2007).

FN2. Ciasullo v. Nationwide Insurance Co., 32 AD3d 889 (2nd Dept. 2006); National Union Fire Insurance Company of Pittsburgh, Pa. v. Utica First Insurance Co., 6 A.D.3d 681 (2nd Dept. 2004).

FN3. U.S. Underwriters Insurance v. Val-Blue Corp., 85 NY2d 821 (1995).

FN4. Haines v. New York Mutual Underwriters, 30 AD3d 1030 (4th Dept. 2006) (emphasis added).

FN5. Anastasis v. American Safety, 12 AD3d 628 (2nd Dept. 2004); Essex Insurance Company v. Zwick, 27 AD3d 1092 (4th Dept. 2006).

FN6. Cook v. Automobile Insurance Company of Hartford, 7 NY3d 131 (2006).

FN7. Merchants Insurance Company of New Hampshire v. Weaver, 31 AD3d 945 (3rd Dept. 2006).

FN8. RJC Realty v. Republic Franklin Insurance Co., 2 NY3d 158 (2004).

FN9. Allstate Insurance Co. v. Mugavero, 79 NY2d 153 (1992).

FN10. Progressive Northern Insurance Co. v. Rafferty, 17 AD3d 888 (3rd Dept. 2005).

FN11. Tangney v. Burke, 21 AD3d 367 (2nd Dept. 2005).

FN12. Monter v. CNA Insurance Cos., 202 AD2d 405 (2nd Dept. 1994).

FN13. Slayko v. Security Mutual Insurance Co., 98 NY2d 289 (2002).

FN14. Massachusetts Bay Insurance v. National Surety Corp., 215 AD2d 456 (2nd Dept. 1995) citing Allstate Insurance Co. v. Mugavero, supra at 161.

FN15. Rodriguez v. Williams, 42 Wash. App. 633, 713 P2d 135, 137-138, aff'd 107 Wash. 2d 381, 729 P2d 627.

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