BINDING AUTHORITY
Insurance Coverage Decisions: Issued Today - Impact Tomorrow
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Note: Thank you to the Philadelphia Chapter of the CPCU Society for its kind invitation to serve as the speaker at its February 17 breakfast meeting. If you are in the Philly area I hope you can attend. It is open to non-CPCUs. I can't vouch for the food, but I can promise that I'll do everything possible to make it informative and entertaining. More information here:

http://philadelphia.cpcusociety.org/

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Peach Clobber: Georgia Appeals Court Knocks Out The "Assault & Battery" Exclusion

Another Court Uses the Presumption of Self-Defense to Find Coverage for an A&B Claim

As a short guy with glasses, not to mention at one point in time having a keen interest in the Dewey Decimal System, I've made it my business not to become familiar with assault and battery. But the same cannot be said about assault and battery claims under commercial general liability policies. Those I deal with a lot. They can safely be handled by those best-served to be pacifists.

Assault and battery claims come up frequently. [What that says about society in general is a whole different discussion.] Despite the popularity of A&B claims under CGL policies (and homeowners policies), the subject has never received much attention in *Binding Authority* or the annual *Mealey's Insurance* "Top 10 Cases of the Year" article. That's because the claims are often-times unique – on account of their varying facts and diverse policy language. These are usually not the type of decisions that lend themselves to having relevance to other cases (especially nationally) – and that's a key consideration for deciding if a case should be discussed in BA or the Top 10.

But that has been changing. A trend has been developing across the country in A&B cases that makes the subject worthy of discussion on a macro level.

Last year saw two state supreme court decisions that made it easier for insureds to secure A&B coverage than it should have been. The Supreme Court of Illinois in *Pekin Ins. Co. v. Wilson*, 930 N.E.2d 1011 (Ill. 2010) and the Supreme Court of Virginia in *Copp v. Nationwide Mutual Insurance Company*, 692 S.E.2d 220 (Va. 2010) held that insurers

had a duty to defend assault and battery claims based on the insured's argument that he acted in self-defense -- notwithstanding that nothing to that effect appeared in the complaint.

In general, what's at issue here is that the "expected or intended" exclusion usually has a "self-defense" exception. But a plaintiff in an underlying action would never allege that he was the aggressor and that the defendant-insured therefore attacked him in self-defense. But, of course, what defendant doesn't allege that his conduct was justified on the basis of self-defense? Therefore, because it would never be alleged in the complaint, the courts considered an insured's allegation of self-defense to trigger a duty to defend. As the Illinois Supreme Court observed, if *Pekin* "actually desired to exclude coverage for *all* lawsuits arising from the intentional conduct of its insured, it would be illogical for it to have included the self-defense exception in the policy to begin with." *Id.* at 1023 (emphasis in original).

Earlier this week the Court of Appeals of Georgia continued this trend – but this time with an Assault and Battery Exclusion. In *Landmark American Ins. Co. v. Khan*, the Georgia Appeals Court addressed coverage for Jamil Kahn, as assignee, under a CGL policy issued to Flashers, an Atlanta nightclub. Khan was shot six times in the chest and back leaving the club. Khan settled for $2.3 million and took an assignment of Flashers's rights under its Landmark policy.

The policy contained an endorsement that provided as follows:

1. Notwithstanding anything contained elsewhere in this policy to the contrary, this insurance shall not apply to "bodily injury," "property damage," or "personal and advertising injury" directly or indirectly arising from any actual or alleged "assault" and/or "battery," except as provided in 2, below.

2. This insurance shall apply to "bodily injury," "property damage," or "personal and advertising injury" arising from actual or alleged "assault" and/or "battery" committed by you or your "employees" to protect persons and/or property. . . .

Khan at 3.

Landmark argued that no coverage was owed "because Khan's underlying personal injury claim against Flashers did not specifically allege that the assault and/or battery was committed by Flashers' employees *while they were protecting persons and/or property*." *Id.* at 3-4 (emphasis in original).

The trial court disagreed and held that it was possible that the Flashers's employee was protecting persons or property while committing the assault and battery on Khan. The Georgia Appeals Court affirmed:

In addition, Landmark complains that, the trial court's order "eviscerates the intended effect of the Assault and Battery Exclusion Endorsement" by requiring Landmark to

assume, when determining whether it has a duty to defend an insured, "that an employee must have been acting to protect persons and/or property if a plaintiff alleges that [the] employer is vicariously liable[,]" thereby rendering the exception to the policy exclusion "meaningless." But the trial court's order does not require Landmark to "assume" anything. As the trial court pointed out, if Landmark was uncertain whether the language of Khan's complaint triggered its duty to defend, it could have defended the case under a reservation of rights, requested a stay of the underlying case, and filed a declaratory action to determine its obligation to provide a defense." It is Landmark's failure to exercise this reasonable option, not the trial court's ruling in this case, that has placed Landmark in its present position.

Id. at 5.

Following up on last year's high court decisions from Virginia and Illinois, the Georgia Appeals Court continues the trend of making it easier for insureds to secure coverage for assault and battery claims. Insurers that are troubled by these decisions – especially those that have a lot of risk for A&B claims, such as for insuring bars, and think their A&B exclusion adequately protects them -- would be well-served to consider this issue and address it in their policies – if they haven't already. That's a lot of risk to take on without receiving any premium.

A copy of the Court of Appeals of Georgia's January 25 decision in *Landmark American Ins. Co. v. Khan* can be accessed here:

http://www.lexisone.com/lx1/caselaw/freecaselaw?action=FCLRetrieveCaseDetail&caseID=1&format=FULL&resultHandle=301d2f8b9d060085cffa6598c62c0dd0&pageLimit=10&xmlgTotalCount=3&combinedSearchTerm=landmark+american&juriName=Georgia&sourceFile=STATES;GACTS

Please let me know if you have any questions.

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