BINDING AUTHORITY
Insurance Coverage Decisions: Issued Today - Impact Tomorrow
White and Williams LLP
Randy J. Maniloff
maniloffr@whiteandwilliams.com

November 1, 2009

New Jersey Appellate Court Uses Nifty Trick To Treat An Insured To Coverage For Assault & Battery

Frightening Decision for Insurers

I can remember as a kid, coming home after a night of trick or treating, pouring my take out on the kitchen table and being intoxicated by what lay before me. There they were -- little Mr. Goodbars, shrunken boxes of Milk Duds, mini Reese's Peanut Butter Cups, and, if it had been a very good year – Snow Caps. But it never failed that somewhere in that sea of wrappers and boxes, containing instantly recognizable colors and logos, was something that stood out of place.

No matter what, someone had thrown loose candy corn into your bag. You could always count on one. Now don't get me wrong. I love candy corn. But loose candy corn -- from a stranger on Halloween. What were they thinking? Needless to say, it didn't long for the candy police, a.k.a. mom, to take the candy corns into custody.

Unfortunately for insurers that write risks associated with assault and battery claims, the New Jersey Appellate Division's Halloween-eve decision in *Cotungo v. Euro Lounge v. QBE Insurance* (unpublished) was an entire bag of loose candy corn.

Coverage decisions addressing assault and battery claims arise with frequency. But the decisions are generally not the type that address over-arching issues that have the potential for widespread applicability. The reason being that they are usually very fact and policy language intensive and, therefore, may be distinguishable from other claims. But *Euro Lounge* could turn out to be an exception.

The scary story goes like this. Plaintiff in the underlying action, along with some friends, were patrons at the Euro Lounge. They went to the bar to order drinks and were denied, being told "this is a private bar." Plaintiff's friend indicated they were "not looking for any trouble." Another person came over and sucker punched the plaintiff. At that point, the bouncers came over and escorted plaintiff out a side exit door. Each bouncer held underneath one of the plaintiff's arms and walked him backward out of the lounge. In the parking lot, plaintiff, still in that position, tripped over a parking block, fracturing his ankle. In a non-jury trial, plaintiff was awarded close to $63,000 in damages. *Euro Lounge* at 2-3.

Eventually, coverage litigation ensured. At issue before the New Jersey Appellate Division was the availability of coverage for Euro Lounge under its general liability policy. The trial court concluded that coverage was owed.

The CGL policy at issue [like most] contained an "expected or intended" exclusion, but with a typical exception for bodily injury that results from the use of reasonable force to protect persons or property. *Euro Lounge* at 3. The policy also contained, by endorsement, an Assault and Battery exclusion as follows:

> A. This insurance does not apply to actions and proceedings to recover damages for 'bodily injury,' 'property damage' or 'personal and advertising injury' arising from the following and the Company is under no duty to defend or to indemnify an insured in any action or proceeding alleging such damages:
>
> 1. Assault and Battery or any act or omission in connection with the prevention or suppression of such acts . . . . (omitted text in original).
>
> The exclusion also refers to:
> 2. Harmful or offensive contact between or among two or more persons;
>
> 3. Apprehension of harmful or offensive contact between or among two or more persons . . . . (omitted text in original).

The insurer argued that the plaintiff's injury was either caused by the bouncers attempting to prevent a physical altercation from taking place on the premises, which is excluded under the assault and battery exclusion, or the injury was caused by the bouncers when plaintiff was harmfully escorted out the side exit door for reasons unrelated to the prevention of an assault, resulting in him tripping over the parking block. Under either scenario, the insurer contended that the A&B exclusion would be applicable. *Euro Lounge* at 6.

The Appellate Court disagreed. It concluded that the insurer "ignore[d] the basic policy provision which indicates that 'bodily injury' resulting from the use of reasonable force to protect persons is not excluded from coverage. The use of reasonable force contemplates physical contact. Indeed, it would be expected that security personnel, whether it be bouncers, a bartender, or a member of the wait staff, could be put in a position of having to remove an individual from the premises for misconduct. The line that cannot be crossed is the use of unreasonable force to do so." *Id.* The court concluded that the Assault and Battery exclusion reinforced the use of reasonable force, which is covered under the policy, where the force used in connection with the prevention or suppression of assault and batter is reasonable. *Id.* at 7.

The court's money paragraph was as follows:

> In reading the main exclusion in the policy with this added exclusion together, as we have here, shows how the provisions work together and are consistent with each other. Moreover, it gives primary consideration to the coverage provided where reasonable force is used by those responsible for maintaining order. Under QBE's interpretation, coverage by the use of reasonable force would be usurped by the assault and battery exclusion, which is not a replacement of any policy provision.

Id.

On one hand, the impact of *Euro Lounge's* interpretation of the CGL policy on A&B claims could be seen as questionable. The facts were not typical of an A&B claim. The plaintiff's was not hit by a bouncer, but, rather, another patron. Also, the plaintiff was injured as a result of tripping over a parking block while being escorted out of the bar. Lastly, the court cited not a single coverage case in support of its policy interpretation. This silence was deafening.

On the other hand, *Euro Lounge's* reading of the policy – that the "use of reasonable force" exception to the Expected or Intended Exclusion impacts the interpretation of the Assault & Battery exclusion – could be something that policyholders argue in the pursuit of coverage (or at least a duty to defend). Moreover, plaintiff's attorney's may use this interpretation as a basis to "plead into coverage" (which the New Jersey Appellate Division in *L.C.S. v. Lexington* acknowledged goes on and allowed).

It is not unusual for an A&B Exclusion to contain a provision that deletes the "use of reasonable force" exception to the Expected or Intended Exclusion. If *Euro Lounge's* interpretation catches on, perhaps this practice will become more prevalent by insurers.

A copy of the New Jersey Appellate Division's October 30th decision in *Cotungo v. Euro Lounge v. QBE Insurance* is attached. Please let me know if you have any comments or questions.

Randy

Randy J. Maniloff
White and Williams LLP
1800 One Liberty Place | Philadelphia, PA 19103-7395
Direct Dial: 215.864.6311 | Direct Fax: 215.789.7608
maniloffr@whiteandwilliams.com