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Criminal and Intentional Act Exclusions Reviewed Where Oil Drum Thrown From Second Story Window

The Appellate Division, Third Department, recently considered an appeal involving the application of criminal and intentional acts exclusions under a homeowner's liability policy. In *Massa v. Nationwide Mutual Fire Ins. Co.*, 2010 N.Y. App. Div. LEXIS 5492 (June 24, 2010), plaintiff, Edmond Massa, an intoxicated college student, threw or pushed a 55-gallon oil drum out of the second story window of a fraternity house. The oil drum struck and injured a student below who commenced a personal injury action alleging negligence against Massa. Massa was charged criminally with assault in the second degree, and pled guilty to disorderly conduct, a violation.

Plaintiff was insured under a homeowner's policy issued to his parents by Nationwide Mutual Fire Insurance Company ("Nationwide"). Nationwide disclaimed coverage based upon its policy's exclusions for criminal and intentional acts. Thereafter, Plaintiff commenced an action against Nationwide for a declaration that Nationwide was obligated to defend and indemnify him. Both Plaintiff and Nationwide moved for summary judgment. Supreme Court granted Plaintiff's motion for summary judgment, determining that neither policy exclusion was applicable and that Nationwide had a duty to defend and indemnify Massa, and denied Nationwide's cross-motion for summary judgment.

On appeal, the Appellate Division initially noted that as the underlying personal injury complaint alleged negligence and Plaintiff was intoxicated, the evidence failed to conclusively establish that he knew someone would be injured by his actions. Plaintiff testified that he became very intoxicated at the fraternity house, but did not recall the events leading to the personal injury claim. A fraternity member stated that the plaintiff was "visibly intoxicated" and was asked to leave the fraternity house. Therefore, the Court found that there was a possible basis for Plaintiff's assertion that the consequences were unforeseen and unintended from his standpoint.

Nationwide contended that Plaintiff's actions were inherently intentional. However, the Court stated that without proof that plaintiff saw or knew someone was standing below the window, the lower court properly determined the intentional act exclusion was inapplicable. The Court found that as no witnesses had been deposed or cross-examined, there was no decisive finding that plaintiff intended to throw the oil can out of the window, thus there was a triable issue of a fact as to "whether

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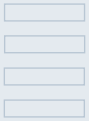

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plaintiff consciously disregarded a substantial risk that his conduct would cause injury."

In considering the application of the policy's criminal act exclusion, the Court stated that disorderly conduct is a violation, not a misdemeanor. The Court noted that the policy excluded coverage for injury "caused by or resulting from an act or omission which is criminal in nature and committed by an insured." The Court found that the policy was ambiguous as it did not specifically define what acts were "criminal in nature."

The Court ruled that summary judgment was properly granted to the Plaintiff as to the insurer's duty to provide a defense. However, the Court reversed the lower court's decision granting summary judgment on the issue of Nationwide's narrower duty to indemnify the Plaintiff in the underlying action.

The foregoing is another illustration of the restrictive application of the criminal and intentional act exclusions by New York Appellate Courts. It is also an example of the effect of alleged intoxication on the part of the insured regarding the criminal and intentional act exclusions as well as the necessity to clearly define terms within the policy, including the phrase "criminal in nature" in order to be successful on a motion for summary judgment.

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