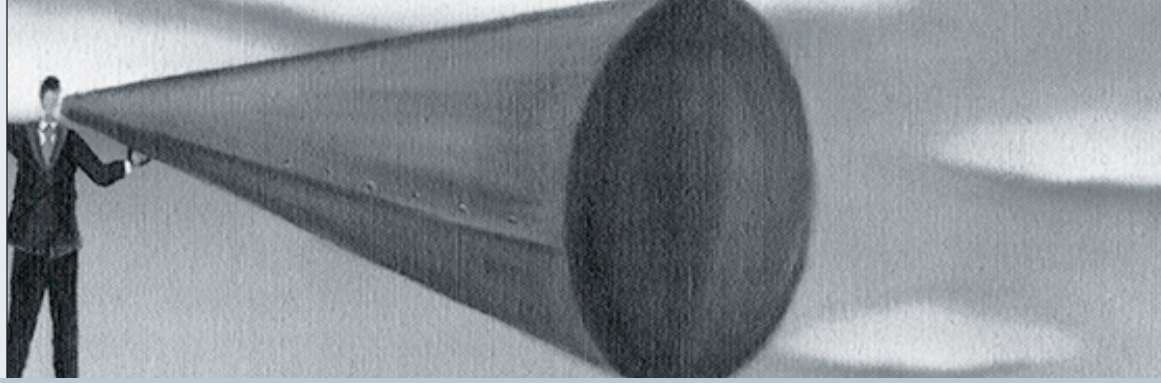


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Intentional Acts Exclusion Inapplicable to Struggle and Fall Through Plate Glass Window

The Appellate Division, Third Department, recently considered an appeal involving the application of an intentional acts exclusion under a homeowner's liability policy. In *Clayburn v. Nationwide Mutual Fire Ins. Co.*, ___ A.D.3d ___ (November 12, 2008), plaintiff, Robert T. Clayburn, was walking with his brother, Mark Clayburn, when he became involved in a verbal exchange with Robert Tamsett. Ultimately, Tamsett pushed Robert Clayburn to the ground and subsequently placed him in a bear hug. The two struggled, lost their balance and fell through a plate glass window of a nearby store with the plaintiff sustaining severe facial lacerations.

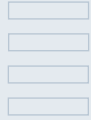
Tamsett notified Nationwide Mutual Fire Insurance Company ("Nationwide"), the homeowners' insurer for Tamsett's parents, of the potential claim. Nationwide disclaimed coverage based upon its policy's exclusion for intentional acts and refused to defend Tamsett in the plaintiff's negligence action which ensued. The negligence action culminated in a non-jury trial with Supreme Court finding Tamsett negligent and entering a judgment against him.

Thereafter, plaintiff commenced an action against Nationwide for a declaration that Nationwide was obligated to indemnify Tamsett for his liability in the underlying negligence action and to satisfy the judgment against him. Both plaintiff and Nationwide moved for summary judgment. The lower court denied both motions and ordered a trial *de novo* while also suggesting to the parties that rather than retrying the matter, the Court would review the record from the negligence trial and decide the matter based on that record. The parties agreed and after the Court's review of the record, the Court granted plaintiff's motion and denied the cross motion, holding that Nationwide was required to indemnify Tamsett. Nationwide appealed. The Appellate Division initially noted that Nationwide could not rely upon its policy's criminal acts exclusion, despite the fact that Tamsett had pleaded guilty to harassment based on his involvement in the incident. Nationwide had failed to include that exclusion in its disclaimer letter and thus waived the right to assert the exclusion.

In considering the application of the policy's intentional acts exclusion, the Court noted that the policy excluded coverage for bodily injury "caused intentionally by or at the direction of an insured, including willful acts the result of which the insured knows or ought to know will follow from the insured's conduct." The burden upon Nationwide to exclude coverage based upon the policy exclusion, required it to establish that "there is no possible legal or factual basis to support a finding that, from the point of view of the insured, the bodily injuries inflicted were unexpected, unintended and unforeseen ***."

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The Court recognized that where harm is “inherent in the nature and force” of the wrongful act, courts will not excuse the actions as the unintended results of an intentional act (citing *Pennsylvania Millers Mutual Ins. Co. v. Rigo*, 256 A.D.2d at 771 and *New York Central Mutual Fire Ins. Co. v. Wood*, 36 A.D.3d 1048, 1049 (2007)).

The Appellate Division accepted the lower court’s finding that Tamsett did not expect, intend or foresee that plaintiff would be injured when the pair crashed through a plate glass window. “Tamsett and plaintiff did not exchange any punches, or even any words. Tamsett merely wrapped his arms around plaintiff in response to plaintiff approaching him after Tamsett pushed Clayburn to the ground. *** Plaintiff’s injuries were not inherently likely to result from the nature and force of a defensive bear hug. Under the circumstances, the intentional acts exclusion does not apply ***.”

The foregoing is an illustration of the restrictive approach by New York Appellate Courts to the application of the intentional acts exclusion under liability policies. The courts are very liberal in considering what are the unintended consequences of an intentional act and will only exclude coverage where the ultimate harm is clearly intended by the insured. This case also demonstrates the potential hazard of disclaiming the obligation to defend, even where negligence is alleged against the insured, resulting in a monetary award against the insured with no opportunity for the insurance company to litigate the issue of damage. ■

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