
Is Coverage Barred?



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Assault and Battery Exclusions in Commercial General Liability Policies

By Brian R. Lehrer and Thomas N. Gamarello

As the COVID pandemic recedes, life will gradually return to normal. Normal includes the opening of bars and—inevitably—bar fights. This article will examine the assault or battery exclusions in commercial general liability policies.

A number of New Jersey cases have interpreted assault or battery exclusions in a bar's commercial general liability policy. It is important to understand that each exclusion is not worded the same and the issue of coverage may turn on the facts plead in a plaintiff's Complaint.

The principles governing a Court's interpretation of an insurance policy are longstanding and straightforward. If the plain language of the policy is unambiguous, the Court will not engage in a strained construction to support the imposition of liability or write a better policy for the insured than the one purchased. A provision is ambiguous if it is subject to more than one reasonable interpretation and only where there is a genuine ambiguity, where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage, should a review in Court read a policy in favor of the insured. Consistent with these rules, New Jersey Courts will enforce exclusionary clauses if specific, plain, clear, prominent and not contrary to public policy, notwithstanding that exclusions generally must be narrowly construed and the insurer bears the burden to demonstrate that the exclusion applies.

Guided by these fundamental principles, New Jersey Courts have interpreted assault or battery exclusions on multiple occasions. The earliest case in New Jersey to interpret an assault or battery exclusion found the provision unambiguous and rejected an argument that the exclusion should be limited to bar only claims related to assault or batteries committed by the insured's own employees. In *Stafford*, the underlying suit involved bodily injury claims of three nightclub patrons who were shot by fellow patrons. The plaintiffs asserted, *inter alia*, claims of inadequate security and negligent employee hiring, training and supervision. The insured nightclub, Club Mirage, was insured under a general liability policy issued by T.H.E. Insurance Company. The policy contained an exclusion for injuries resulting from assault and battery which stated as follows:

"In consideration of the premium charge, it is agreed that NO coverage of any kind (including, but not limited to, cost of

defense) is provided by this policy for bodily injury and/or property damage arising out of or caused in whole or in part by an assault and/or battery. Further, NO coverage is provided if the underlying operative facts constitute an assault and/or battery irrespective of whether the claim alleges negligence hiring, supervision and/or retention against the insured or any other negligent action."

The injured patrons filed suit and the carrier disclaimed coverage based upon the exclusion. The trial judge found the exclusion to be ambiguous, but the Appellate Division reversed, determining that the exclusion was unambiguous. The Court observed the language plainly indicates to the average reader that no matter who commits the assault and battery no coverage will be provided. The Court conceded case law provides that if there is a second fair interpretation of an exclusion available to an injured plaintiff, the insurance policy will be construed for coverage against the insurer. The Court cautioned, however, this case law does not stand for the proposition that any far-fetched interpretation of a policy exclusion will be sufficient to create an ambiguity requiring coverage. The Court thus recognized the validity of the exclusion, which barred the patrons' claims under the policy.

Contrary to *Stafford*, a later Appellate Division case found a differently worded policy exclusion did *not* bar coverage where plaintiff's underlying claims included counts for a bar bouncer's negligence. In *L.C.S.*, the policy exclusion stated that the insurance did not apply to bodily injury and certain other claims "arising out of assault and battery or of any act or omission in connection with the prevention or suppression of such acts... whether caused by or at the instigation of or direction of the Insured, his employees, patrons or other persons." The three count complaint filed by the

bar patrons claimed: (1) a bar's bouncer intentionally assaulted him by punching him in the face; (2) the bouncer negligently performed his duty; and (3) the bar negligently hired, trained, employed and supervised its bouncers and employees. The bar's alleged negligence in managing its bouncers was both (1) an act or omission in connection with a bouncer's assault; and (2) an act or omission in connection with a bouncer's negligence.

The Appellate Division stated that the relevant inquiry is the "nature of the claim for damages, not the details of the accident or the ultimate outcome, which triggers the obligation to defend...and when multiple alternative causes of action are set forth, the duty to defend will continue until every covered claim is eliminated." The Court pointed out that at the trial of the underlying personal injury action, neither the patron-plaintiff nor his witnesses stated whether he was intentionally assaulted or negligently injured while being escorted from the bar. The plaintiff ultimately settled with the bar based upon his complaint's negligence count. The Appellate Division held that if a negligent act unrelated to the assault and battery caused the patron's injuries (as he alleged in count two), then the carrier's reliance on the exclusion was inapplicable and unavailing.

More recently, the Appellate Division addressed a differently worded exclusion and upheld the denial of coverage to the insured bar. In that case, plaintiff, Pickett, and defendant, Corley, got into an argument in Moore's Lounge in Jersey City. As Pickett turned to walk away, Corley shot him three times killing him. A jury later convicted Corley of aggravated manslaughter, culminating in a term of imprisonment. In the civil action, Pickett's estate alleged the tavern staff subjected Pickett and other customers to a weapon search before they entered, but Corley, a retired police offi-

cer and a regular customer, was allowed to enter with a concealed weapon. The estate also alleged that the staff continued to serve Corley after he had already consumed excessive amounts of alcohol and displayed signs of intoxication.

The estate's complaint against the bar included claims for negligent hiring, negligent management and negligent retention of employees. The bar sought a defense and indemnification from its insurer, Northfield Insurance Co., under its CGL policy. Northfield denied coverage based upon the policy's assault or battery exclusion which barred coverage for:

"Bodily injury or property damages arising out of any act of assault or battery committed by any person, including any act or omission in connection with the prevention or suppression of such assault or battery."

The trial Court entered summary judgment in favor of Northfield on the coverage claim. The Appellate Division affirmed. The Court noted the policy exclusion barring claims arising out of an assault or battery expressly included any act or omission in connection with the prevention or suppression of the assault or battery. Thus, the exclusion plainly encompassed negligent acts or omissions that failed to prevent or suppress the assault or battery.

"That embraces the estate's general allegation that [the bar] negligently failed to exercise reasonable care to assure the tavern was a safe place. The exclusion also embraces the estate's allegation that, as a result of [the bar's] negligent personnel management (i.e. hiring, training and retention), [the bar's] staff did not prevent Corley from shooting Pickett. Specifically, staff allowed Corley to enter with a gun, allowed him to retain the gun throughout the evening as he became more intoxicated, and did not intervene when he began arguing with Pickett."

The Court specifically rejected the bar's contention that *L.C.S.* compelled the Court to find the Northfield exclusion did not clearly exclude coverage for the estate's negligent-based claims against the bar. The Appellate Division pointed out the policy exclusion in *L.C.S.* was similar to Northfield's language. The *L.C.S.* Court had recognized that it is the nature of the claim for damages, not the details of the accident or ultimate outcome, which triggers the obligation to defend, and the plaintiff ultimately settled with the bar based on his complaints of the bouncer's alleged negligence. In contrast, the Pickett estate did not alternatively allege that Corley negligently shot Pickett and the bar's alleged negligence was connected only with an assault or battery and thus the Northfield policy's

exclusion encompassed the estate's claim against the bar.

If there is a common thread in the case law, it is that the court's interpretation depends both upon the wording of the exclusion and the pleading. Where the language is plain and the average reader could not conclude any other way, courts will not find an ambiguity in a policy exclusion, even where a far-fetched second interpretation is proffered. If the exclusion is broad enough to encompass "any act of assault or battery," courts may also find that negligent acts will also be excluded. Prudent practitioners will want to scrutinize the express language of policy exclusions. ▯

Endnotes

1. *Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 224 N.J. 189 (2016).
2. *Flomerfelt v. Cardiello*, 202 N.J. 432 (2010).
3. *Stafford v. T.H.E. Insurance Co.*, 309 N.J. Super. 97 (App. Div. 1998).
4. *Butler v. Bonner Barnewall, Inc.*, 56 N.J. 567 (1970).
5. *L.C.S. Inc. v. Lexington Insurance Co.*, 371 N.J. Super. 42 (App. Div. 2004).
6. *Id.* at 490.
7. *Pickett v. Moore's Lounge*, 464 N.J. Super. 549 (App. Div. 2020).
8. *Id.* at 556.