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Illinois Coverage Basics

Illinois Appellate Court Finds That Assault and Battery Allegations Can Trigger a Duty to Defend

Illinois insurance coverage law evolves continuously, developing by increments with each new decision that is issued by the Illinois courts of review. Traditionally, Illinois' coverage law has maintained its integrity during this evolutionary process by adhering to certain immutable foundational rules of insurance law. However, when courts ignore or abandon those foundational rules, the integrity and predictability of the coverage rules is lost.

Few concepts of general liability insurance are more basic than the principle that intentional torts are not covered. There are two basic reasons why intentional torts are not covered by general liability insurance. First, most general liability policies limit coverage to damages caused by an accident. Second, most such policies exclude coverage for damages expected or intended by the insured. Consequently, one of the bedrock rules of general liability insurance in Illinois has always been that insurers do not have a duty to defend or indemnify claims based upon allegations of intentional torts.

Yet, the continued vitality of that bedrock rule is now in some doubt following the recent ruling of the First District Appellate Court in Country Mutual Insurance Company v. Olsak (No. 1-07-2273, filed May 13, 2009). The groundbreaking conclusion of the Appellate Court in the Country Mutual case was that allegations of assault and battery can give rise to a duty to defend.

In Country Mutual, the plaintiff was a hockey coach who was allegedly attacked by one of the teenage boys on his club hockey team. The defendant minor's parents were named insureds on a Country Mutual homeowners policy and on a Country Mutual personal umbrella policy, and the minor was a resident of their household at the time. The coach's complaint alleged that the defendant minor deliberately missed two consecutive conditioning sessions in violation of the team practice rules, knowing that he would not be allowed to play in the next game. Nevertheless, the minor dressed in his hockey equipment and appeared in the team locker room before the game solely for purposes of triggering a confrontation with his coach. The minor engaged in a verbal confrontation with the coach, and when the coach turned to walk away the minor threw his hockey stick at the coach's back. When the coach turned to face the minor, the minor struck the coach in the temple, causing the coach to fall backwards and hit his head on the concrete floor. The injured coach lapsed into a coma for several days and sustained permanent brain damage as a result of the attack. According to the complaint, the coach did not strike or touch the assailant at any time during the altercation.

In response to the complaint, the minor defendant filed an affirmative defense alleging that the plaintiff coach had instigated the altercation and provoked the physical contact. The minor filed

another affirmative defense alleging that he perceived imminent harm and had "snapped" or suffered a "mental lapse" after the plaintiff coach insulted the minor and the minor's family.

Country Mutual took the position that it did not owe the minor a duty to defend because the allegations pleaded against him were all framed in terms of intentional conduct. The Country Mutual homeowners policy provided coverage only for certain "occurrences," which the policy defined as an "accident . . . which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." The Country Mutual umbrella policy defined covered "personal injury" as "assault and battery not committed by or at the direction of the insured, unless committed . . . for the purpose of protecting persons or property." Further, coverage was excluded for "any act committed by or at the direction of the insured with the intent to cause persona injury or property damage."

Notwithstanding the allegations of the coach's complaint and the language of the Country Mutual policies, the First District of the Illinois Appellate Court found that "the allegations of the underlying complaint reveal a *potential* for coverage" that triggered a duty to defend. (Emphasis in original.) In reaching that groundbreaking conclusion, the Appellate Court did not focus on the allegations of the coach's complaint or on the language of the Country Mutual policies. Instead, the Appellate Court devoted its analysis of the duty to defend issue to proving that "even in cases of criminal conduct, a potential for coverage has been found." However, that point was not even material to the facts of the Country Mutual case because no argument was ever made by Country Mutual that it should avoid coverage based upon a criminal conviction.

It is tempting to simply dismiss the Appellate Court's analysis in Country Mutual out of hand, because the opinion is so analytically deficient. However, the Country Mutual ruling will undoubtedly attract the attention of insureds who seek coverage for intentional torts. Ironically, the Country Mutual opinion may create difficulty with respect to future claims precisely because the analysis in the Appellate Court's opinion was so insubstantial and disjointed. Ignoring how the Appellate Court supported (or, more accurately, how it failed to support) its conclusion, insureds will remember and cite to the Country Mutual opinion simply for its ultimate conclusion, which is that assault and battery allegations can trigger a duty to defend.

It will be difficult for insurers to effectively challenge the conclusion reached in Country Mutual directly by rebutting the reasoning and legal authority cited by the Appellate Court, because the Appellate Court offered almost no reasoning or authority to support its conclusion. Consequently, the most effective argument that an insurer might make in opposition to the Appellate Court's analysis in Country Mutual is to simply argue that the ruling in Country Mutual is not binding because it is contrary to well established law set forth in the opinions of the Illinois Supreme Court. *See* American Family Mutual Insurance Co. v. Savickas, 193 Ill.2d 378, 393 (2000); State Farm Fire & Casualty Co. v. Martin, 186 Ill.2d 367, 377 (1999); Bay State Insurance Co. v. Wilson, 96 Ill.2d 487, 493 (1983); Thornton v. Illinois Founders Insurance Co., 84 Ill.2d 365, 373 (1981); Maryland Casualty Co. v. Peppers, 64 Ill.2d 187, 193 (1976). In Illinois, the opinions of the Supreme Court always trump the opinions of the Appellate Court.

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If you have questions or would like to discuss the implications of this report further, please feel free to contact James K. Horstman at Cray Huber Horstman Heil & VanAusdal LLC, 303 West Madison, Suite 2200, Chicago IL 60606; 312-332-8494; jkh@crayhuber.com.