TRAUB LIEBERMAN

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Court Finds No Coverage for Workplace "Prank" With Nail Gun

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In the recent case of Metro. Prop. & Cas. Ins. Co. v. Burby, 2022 NY Slip Op 22070, ¶ 1 (Sup. Ct.) Justice Richard M. Platkin of the Supreme Court of Albany County, New York examined a homeowners insurance policy and determined that a duty to defend was triggered in a case seeking recovery for injuries sustained when the insured, Burby allegedly discharged a nail gun in the bathroom of a work facility at which both Burby and the underlying plaintiff worked. Burby pled guilty to assault in the third degree for recklessly causing physical injury. MetLife, Burby's carrier, disclaimed coverage based on lack of an occurrence, the business activities exclusion and the intentional loss exclusion, which bars coverage for injuries expected or intended by the insured or injuries that are the result of the insured's intentional and criminal acts or omissions. Justice Platkin initially reviewed the intentional loss exclusion and lack of an occurrence and found that, from a duty to defend perspective, neither provided a dispositive coverage defense. However, the court found that the broadly worded business activities exclusion, which was not the subject of MetLife's motion and instead was the subject of a cross motion by Burby, applied to bar coverage. In doing so, the court searched the record and granted summary judgment on the issue, despite MetLife not moving for relief under the exclusion.

With respect to the expected or intended prong of the intentional loss exclusion, the court found that, even if Burby did intend to pull the trigger of the nail gun, it was not pled in the underlying complaint that the harm that resulted to the plaintiff was expected or intended. As such, the court concluded that MetLife did not prove that there was no possible factual or legal basis upon which it could be found that Burby did not reasonably expect or intend to cause injury to the plaintiff.

With respect to the intentional and criminal acts prong of the intentional loss exclusion, the court held that the exclusion is satisfied where the victim's injuries were caused by an intentional act that constitutes a crime. Here, the court noted that Burby clearly engaged in a crime, but that the record did not establish that as a matter of law that the injuries were caused by an intentional act. In this regard, the court noted that, in the underlying complaint, plaintiff alleged that Burby was known to often to engage in horseplay and/or pranks with other employees, such that a reasonable possibility of accidental discharge existed.

With respect to whether the incident was an "occurrence," defined to be an accident, the court also found that MetLife fell short. Although assault is not an occurrence, Justice Platkin noted that the underlying complaint alleged, in the alternative, causes of action for ordinary negligence, gross negligence and recklessness as the result of a "prank" gone wrong. Further, as Burby pled guilty of reckless—not intentional—assault, the plea was not determinative of whether Burby's actions were an "occurrence."

The court then turned to Burby's cross motion seeking a declaration of coverage. After dismissing two non-dispositive exclusions, the court examined the business activities exclusion, noting that the exclusion broadly bars coverage for injuries arising out of or connected with Burby's business activities. "Arising out of," under New York law, is interpreted to mean that coverage does not exist when the injury would not have occurred "but for" the excluded activity. Here, Burby injured a fellow employee at their workplace, involving Burby's misuse of a work tool. As the court noted, had Burby not been present at his workplace, he would not have access to the plaintiff and a nail gun. As such, the court held that Burby's business activities provided both the occasion for the incident and the instrumentality of the injury. The court searched the record and granted summary judgment on the duty to defend to MetLife.

This case illustrates both the broad duty to defend under New York law, in that the court did not preclude coverage based on lack of an occurrence or on the intentional loss exclusion. It also illustrates the broad interpretation of "arising out of" when used in an exclusion.