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Liquor Liability Coverage Can Be Confusing

Plaintiffs, defense should both check provisions of 'other policy'

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Liquor liability insurance policies are unique creations and are usually separate from a standard commercial liability policy. They were created for a specific, narrow purpose and vary in their language and coverage much more than other types of policies.

Further, liquor liability policies contain exclusions and coverage limitations specific to the liquor industry which can create surprising uninsured and underinsured situations regardless of what the insured thought when the policy was purchased.

By way of background, a Connecticut liquor establishment would traditionally buy a "restaurant package" of policies, which consisted of a commercial general liability policy (CGL) to cover mishaps and a "dram shop policy" to cover liquor-related liability. The CGL excluded all alcohol-related claims and the dram shop policy specifically covered liability pursuant to Connecticut General Statute 30-102, the Dram Shop Act.

The insuring agreement in the dram shop policy expressly stated that it covered all liability resulting from a violation of C.G.S. 30-102. As the Dram Shop Act created a liability where none had existed under the common law, the dram shop policy covered any and all possible liquor-related claims. The combination of the two policies was essentially a seamless web covering all possible liquor-related and non liquor-related claims.

The two-policy approach is very significant from a practical perspective. We recently had a case where the defense counsel for a bar sent over a copy of the CGL policy with a letter stating that as the CGL excluded liquor-related claims, there was no coverage. My first question was, "Where is the other policy?" On further review of her file, the defense counsel realized that the CGL was not the only coverage and that the "other policy" from her client's restaurant package had $300,000 in liquor liability coverage.

Reckless Service

The seamless web of coverage under the restaurant package was breached in the 1970s with the pivotal decision of *Kowal vs. Hofher,* 181 Conn. 355 (1980), which established a common law cause of action for reckless service of alcohol. *Kowal* was followed by *Ely vs. Murphy,* 207 Conn. 88 (1988), which created a common law claim for negligent provision of alcohol to a minor, and later by *Craig vs. Driscoll*, 262 Conn. 312 (2003), which did away with all restrictions by creating a claim for simple negligent service of alcohol.

Although the generic negligent service of alcohol cause of action was legislatively overruled by an amendment to C.G.S. 30-102, the Dram Shop Act cap was increased from $20,000 per person and $50,000 per occurrence to $250,000 per occurrence effective upon the governor's signature. The unforeseen result was that almost every liquor establishment in the state was left severely underinsured for dram shop claims and uninsured for recklessness and negligent sale to minors. As the "bad act" in the sale to a minor is sale to an underage rather than intoxicated person, there were claims for sales to sober minors to which the dram shop policy didn't even apply.

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The response by the insurance industry was to create a "liquor liability" rather than dram shop policy. The new policy had an insuring agreement which covered all injuries caused by the sale of alcohol rather than restricting itself to the Dram Shop Act. The policy limits were typically either $300,000 or $1 million rather than the statutory $20,000 per person/$50,000 per occurrence. The policy still stands separate from the CGL policy, but provides both increased limits and broader coverage than the old dram shop policy. As a practical matter, the policy does not require a sale to an "intoxicated" person, so it goes much farther than the Dram Shop Act. While it took some months for the shift to occur, the dust finally settled and it appeared that proper coverage was finally available.

The liquor liability policy had one restriction, however, which was quite rare in the old dram shop policies, an assault and battery exclusion. For the most part, the exclusion was inserted into policies with-

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out much fanfare and insureds generally learned of the exclusion when they received a letter from the carrier denying coverage for a claim. The A&B exclusion is quite broad and has been uniformly enforced by Connecticut courts. See *Kelly vs. Figueiredo,* 223 Conn. 31 (1992), *Harris v. Hermitage Ins. Co.,* No. CV-08-5021329S (Oct. 13, 2009), and *Clinch v. Generali-U.S. Branch,* 110 Conn. App. 29 (2008).

Notably, the same exclusion was also inserted into the CGL policies which left the liquor seller without coverage regardless of whether alcohol was involved or not. As an alternative to a broad exclusion, some carriers did include coverage for assaults, but at a reduced limit. For example, although the overall liquor liability coverage was $1 million, the coverage for assault and battery might be $50,000 or $100,000. Depending on the policy, the assault and battery coverage might also be reduced by defense costs. Like a CGL policy, the liquor liability policy is an "occurrence" policy, which means that the policy in place on the date of the occurrence is exposed.

Drafted By Carriers

The ultimate result is that a liquor liability policy may or may not have an assault and battery exclusion, may have lower limits for assault and battery, and may even have variations in the exclusion language that make it inapplicable to particular circumstances.

Unlike auto policies, which are taken from a template and have statutorily required conditions, the assault and battery exclusions are often drafted by the carriers themselves and may be broader or narrower than the drafters intended. Take a look at this exclusion from a liquor liability policy:

"We have no duty to defend or indemnify any insured or any other person against any claim or <u>suit</u> for <u>bodily</u> <u>injury</u>, <u>property</u> <u>damage</u>, <u>personal</u> <u>injury</u>, or <u>advertising</u> <u>injury</u>, including claims or suits in <u>negligence</u> arising out of or related to any:

1) Assault
2) Battery
3) Harmful or offensive contact
4) Threat

Can you see the error? By leaving out a comma between "negligence" and "arising," the policy either excludes negligent assault only, or all claims regardless of type. No court would endorse an exclusion of all claims, and "negligent assault" is very limited if it exists at all.

While I assume that the carrier corrected the error by now, they wound up providing coverage on two assault cases once the error was pointed out to them (pointed out forcefully and repeatedly, I might add).

In short, assessing the scope of the coverage and the limits is critically important both for plaintiffs' attorneys and the insureds alike. Although plaintiffs and defendants may be adversarial in court, neither wants to find out post-trial that the liquor liability coverage they had both counted on doesn't exist. ■