

April 17, 2023

# Appellate Court Finds Questions of Fact as to Whether an “Occurrence” Took Place During Altercation Outside of Bar

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In the recent case of *Mapfre Ins. Co. of N.Y. v. Ferrall*, 2023 NY Slip Op 01082 (App. Div. 2nd Dept.), the New York Appellate Division, Second Department, reversed the trial court’s decision that Mapfre Insurance Company was obligated to defend and indemnify a policyholder for an altercation which took place outside of a bar. During the altercation, the policyholder hit the underlying plaintiff in the head with a baton, and the plaintiff brought suit, alleging that the policyholder negligently and recklessly caused the plaintiff’s injuries.

Mapfre commenced an action against both the policyholder and underlying plaintiff seeking a declaration that it is not obligated to defend or indemnify the policyholder. The Supreme Court granted the policyholder’s motion for summary judgment, and Mapfre appealed. The Appellate Division reversed. The court first cited the black letter New York case law that the duty to indemnify requires that the insured establish that he or she is liable for a loss covered by the subject policy. The court then noted that accidental results from intentional conduct can be considered an “occurrence” within the meaning of an insurance policy, but that where harm in intent, an intentional act will be deemed to have intentionally caused such harm. The court noted that, although both the plaintiff and policyholder both gave versions of the incident characterizing the policyholder’s actions as unintentional, “varying inferences regarding [the policyholder’s] intent may nonetheless be drawn from the circumstances described where the incident occurred during a heated altercation between two groups of men in the early morning hours.” The court also pointed to the plaintiff’s sworn statement in support of criminal proceedings against the policyholder, in which the plaintiff did not suggest that the policyholder’s conduct was accidental. In conclusion, the court held that because there are questions of credibility and because various inferences may be drawn from the circumstances, the Supreme Court should have denied the policyholder’s motion for summary judgment.

This case illustrates the more stringent standard for the duty to indemnify in New York. Although the duty to defend has been held to be exceedingly broad, the duty to indemnify, in contrast, is determined by the actual basis for the insured’s liability. Here, the court searched the record and found that the insured did not establish that his conduct was covered under the subject policy.