

Client Alert

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Second Circuit Finds Crime Insurance Policy's "Overt Felonious Act" Requirement to be Ambiguous

The U.S. Court of Appeals for the Second Circuit, in *VAM Check Cashing Corp. v. Federal Insurance Company*, No. 11-2644-cv, (2d Cir. Nov. 7, 2012), found the "overt felonious act" requirement in a crime insurance policy to be ambiguous. The court held, therefore, that the insured would be entitled to coverage for a theft at the insured's store, even though it occurred as a result of a covert scheme to defraud.

Background

VAM Check Cashing Corp. ("VAM") operated several check cashing stores in New York City. VAM was insured by Federal Insurance Company ("Federal") under a contract for crime insurance. The policy provided that Federal "shall be liable for direct losses: ... within the Premises of Money and other property ... but only when such loss is caused by: ... (2) Robbery or attempt thereat." The policy defined "Robbery," in part, to mean "the unlawful taking of insured property from an Insured, a partner, an Employee or any other person authorized by the Insured to have custody of the property by violence, threat of violence or other *overt felonious act committed in the presence and cognizance of such person* ..."

A group of criminals tricked a VAM employee, Vazquez, into giving them \$120,000 in cash. The fraudulent scheme started when Vazquez received a telephone call from a woman purporting to be the wife of VAM's owner. The caller told Vazquez that a man named Windfrey would meet Vazquez to collect \$120,000 to pay a tax bill in conjunction with the opening of a new check-cashing store. The caller also told Vazquez that she would be able to identify the man by his use of a code number, which the caller provided.

Soon thereafter, a man claiming to be Windfrey came into the store and presented the code number. Vazquez allowed the man to enter the back of the store, where she gave him a box containing \$120,000 in cash. When Vazquez did not hear anything further from the owner that day, she grew suspicious and eventually called the police. The police never caught the perpetrators or recovered the money. Vazquez later testified that she never felt threatened by Windfrey and, at the time, she "did not believe he was dangerous or a thief."

VAM presented a claim to recover the stolen money under its crime insurance policy, contending that the theft was covered based on the policy's definition of "Robbery." Federal denied coverage and VAM filed suit against Federal in the United States District Court for the Eastern District of New York, asserting a breach of contract claim and seeking damages in the amount of \$112,500 (the \$120,000 loss minus the \$7,500 deductible).

On cross motions for summary judgment, the district court granted judgment in favor of VAM, finding that the policy language was ambiguous and finding further that VAM presented a reasonable construction of the ambiguous term. Federal appealed.

Holding

The Second Circuit affirmed the district court's holding in favor of VAM, finding that the policy's "Robbery" definition was indeed ambiguous and that Federal, therefore, had an obligation to provide coverage.

The parties agreed that Vazquez was an "Employee." The parties further agreed that Windfrey employed "neither actual nor threatened violence" and that the acts constituted an "unlawful taking of insured property." Thus, as the court acknowledged, "coverage turned on whether the unlawful taking by Windfrey and his associates was an '(1) overt felonious act (2) committed in the presence or cognizance of' Vazquez."

The court first addressed the "overt felonious act" requirement. Federal argued that the "overt felonious act" requirement refers to a "felonious act" whose "felonious character is 'overt.'" Federal argued, therefore, that Windfrey's actions did not constitute overt felonious acts because, while Vazquez observed Windfrey taking the money, Vazquez did not realize Windfrey was defrauding her or that she was handing the money over to a criminal. VAM, on the other hand, argued that the term "overt" as used in the phrase "overt felonious act" applies only to the act, not its felonious nature. VAM further argued that Windfrey's act was "overt," since the act of taking the money was "open, manifest, and public." VAM further argued that Windfrey's act also was "clearly felonious," since it amounted to larceny by trick.

After determining that the phrase "overt felonious act" was susceptible to more than one reasonable interpretation and, thus, ambiguous, the court adopted VAM's interpretation, explaining that VAM's interpretation was "grammatically more natural" and followed a plain meaning interpretation.

The court next addressed the definition's "presence and cognizance" requirement. There, Federal argued that the phrase requires that an "act's *criminal character* must be possible to observe" and also that an act's "*criminal character* must be actually noticed." VAM argued that the phrase requires only that "the *act* must be observable" and that "the *act* must be in fact observed," even though the criminal character of the act might remain concealed from the insured.

After determining that the phrase "presence and cognizance" also was ambiguous, the court adopted VAM's interpretation, since the presence of an ambiguity required the court to adopt an interpretation in favor of coverage.

Practical Implications

VAM illustrates why policyholders should examine their insurance policies closely to determine whether insurance recovery is available for all forms of loss. Although the fraudulent scheme in VAM did not constitute a robbery, per se, under the common criminal law definition — which is generally limited to larceny committed by force or threat of force — VAM illustrates that coverage under standard crime policies still may be available, particularly in cases of fraud, scheme or deceit. VAM also underscores the fundamental proposition that ambiguous policy language will be interpreted in favor of coverage and, therefore, policyholders should not be dissuaded from pursuing a claim simply because their insurer has taken a narrow and overly restrictive position regarding coverage.

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