

“DRESSING UP” A CLAIM TO GET COVERAGE
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Say you are a lawyer with a good plaintiff’s case: good facts, good law, substantial damages, and a sympathetic client. There is just one problem: the prospective defendant has no money and, even worse, no insurance covering your client’s claim. This happens, for example, where the claim is for battery, sexual abuse or molestation, intentional infliction of emotional distress, and other torts in which the defendant actually intended harm. If the defendant has neither money nor insurance, your client will be left with a worthless judgment, even if he wins. The case is not economically viable, regardless of its merits. What are you to do?

What some lawyers have tried to do is “dress up” such claims by alleging a cause of action that typically is covered by insurance, such as one for negligence. The lawyer hopes that, by triggering at least the insurer’s duty to defend, he will eventually be able to convince the insurer to settle what would otherwise be a non-covered claim.

When confronted with a plaintiff attempting to plead his way into coverage for a non-covered claim, remember that, in some courts, a plaintiff’s characterization of his legal theories is not controlling. Rather, such courts determine whether a claim is potentially covered by analyzing the *facts* alleged in the complaint, not the legal conclusions the pleader draws from them or the formal theories of liability pleaded. *E.g.*, *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 581 N.Y.S.2d 142, 589 N.E.2d 365 (1992); *see generally*, Windt, A.D., INSURANCE CLAIMS & DISPUTES, § 4.01 (3rd ed., 1995).

For example, consider a plaintiff who has an argument with another customer at a night club. Suddenly, the club’s bouncer steps in and beats the plaintiff within an inch of his life, fracturing his skull and leaving him comatose. The plaintiff’s next memory is of waking up in a hospital weeks later. The plaintiff sues the nightclub and the bouncer. His complaint alleges the above facts, but characterizes his claims as ones for “negligence”; *i.e.*, that the club negligently hired an unsuitable bouncer, that the bouncer negligently used excessive force, that the bouncer negligently created a violent atmosphere at the club, *etc.*

Those were the basic facts before the U.S. Court of Appeals for the Second Circuit in *United National Ins. Co. v. The Tunnel, Inc.*, 988 F.2d 351 (2nd Cir. 1993). The club's liability insurer, denied any duty to defend or indemnify, citing a policy exclusion for "[c]laims arising out of an assault and/or battery, whether caused by or at the instigation of, or at the direction of, or omission by, the Insured and/or his employees." The Second Circuit, looking beyond the legal theories pleaded in the complaint, focused instead on the *facts* alleged in the complaint, which the plaintiff had by then confirmed under oath at a deposition. Those facts made it clear the claim was one "arising out of an assault and/or battery," so it was excluded by the exclusion's plain language despite the plaintiff's effort to "dress up" his claim as one for negligence.

Other courts have reached similar conclusions, through similar reasoning. For example, in *Mount Vernon Fire Ins. Co. v. Creative Housing, Ltd.*, 88 N.Y.2d 347, 645 N.Y.S.2d 433 (1996), the plaintiff tried to "dress up" an assault claim as one for "negligent failure to maintain safe premises." The New York State Court of Appeals held the claim was nevertheless excluded by an exclusion for claims "arising from assault." *See also, U.S. Underwriters Ins. Co. v. Val-Blue Corp.*, 85 N.Y.2d 821, 623 N.Y.S.2d 834, 647 N.E.2d 1342 (1995) [shooting claim was excluded by exclusion for claims "based on Assault and Battery," even though plaintiff attempted to "dress up" his claim with allegations of "negligent shooting" and "negligent hiring and supervision."] Such decisions are usually based on two factors: (a) a well-worded exclusion, clearly excluding coverage for claims arising from the facts alleged in the complaint and (b) a clear attempt by the plaintiff to do an "end run" around that exclusion, such as by mischaracterizing a vicious beating as "negligence."

However, there are at least two instances in which such reasoning does not work. First, it does not work in courts that focus on the complaint's legal theories, either instead of or in addition to the alleged facts. Such courts are apt to find at least a duty to defend if the complaint alleges a legal theory within coverage, even if the factual allegations would put the claim outside coverage. Such courts may follow a "concurrent cause" analysis, which allows a plaintiff to get around otherwise clear exclusions by "dressing up" his claim as one resulting from a concurrent cause (such as the defendant's negligence) that is not expressly excluded from coverage. For example, in *Braxton v. United States Fire Ins. Co.*, 651 S.W.2d 616 (Mo.App.1983), the plaintiff

was shot by a drunk gas station attendant following a dispute over the making of change. The gun was the attendant's property and was not furnished for his use by the gas station. The plaintiff sued the gas station on a theory of negligent supervision. The gas station's insurer denied coverage on the basis of a policy exclusion for "bodily injury...arising out of the ownership or use of any firearm." The Missouri Court of Appeals held the exclusion did not apply, for two reasons: (a) it was "ambiguous," because an insured might reasonably understand it to apply only to firearms owned or used by or on behalf of the gas station itself, not to firearms owned and used by its employee, and (b) even if the exclusion were not ambiguous, coverage could be found under a concurrent cause analysis because an insured risk (negligent supervision) and an excluded risk (use of a firearm) had constituted concurrent proximate causes of the injury.

The second instance in which the above reasoning does not work is where a claim that seems at first blush to be a "dressed up" claim, really is not one. This can happen where the plaintiff does not know the defendant's actual state of mind and therefore pleads alternative legal theories. For example, the plaintiff may know the defendant shot him, but is not sure whether the defendant (a) intended to do so or (b) was merely careless. To cover both contingencies, a careful plaintiff will normally plead alternative theories of battery and negligence. That is not "dressing up" a claim to secure coverage: the plaintiff is merely being careful. The insurer will normally have a duty to defend, but determining its duty to indemnify will often have to await the jury's findings of fact.