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Enforcement of the Assault and Battery Exclusion in Louisiana: *Hickey v. Centenary Oyster House*

David A. Szwak*

I. INTRODUCTION

It is a common view among commentators and practitioners that the insurance contract "is so substantially infused with public policy concepts that it is impossible to discuss the subject of insurance without a heavy dose of public policy considerations."¹ Since insurance contracts, by their very nature, involve many Louisiana citizens, "one finds the parameters of the bargaining arena between the insurer and the insured sharply limited and carefully patrolled by regulatory authorities."² One such example is Louisiana Revised Statutes 37:3276(E) in which the Louisiana Legislature has made a statement that every licensed private contract security company "shall be required to have in effect general liability insurance of at least five hundred thousand dollars."³ This article will discuss whether this statutory provision created by the Louisiana Legislature is a statement of public policy and whether this statutory provision trumps assault and battery exclusions in a licensed private contract security company's commercial general liability policy. This article will discuss the pertinent jurisprudence on the subject matter and will explain why assault and battery exclusions in a Louisiana licensed private contract security company's general liability policy does not subvert the statement in Louisiana Revised Statutes 37:3276 (E) and is binding and enforceable.

A. *The Assault and Battery Exclusion and What It Encompasses*

In order to discuss the subject of this article thoroughly, it is necessary to discuss exclusions in an insurance policy, specifically the assault and battery exclusion. An insurer may contract with the insured as to the particular risks it will not assume provided that neither public policy nor statutory provisions are violated.⁴ Typically, these risks which are not assumed by the insurer are found in the exclusion section of the policy. As one commentator has noted:

In the absence of contrary statutory provision, the insurer may include in the policy any number of exceptions and limitations to which the insured will agree, for insurance companies have the same right as individuals to

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1. William S. McKenzie & H. Alston Johnson, III, *Louisiana Civil Law Treatise Insurance Law and Practice* §3 (1996).

2. *Id.*

3. La. R.S. 37:3276(E) (Supp. 2000).

4. Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3d §22:30 (1997).

limit their liability and impose whatever conditions they please upon their obligations, not inconsistent with public policy.⁵

One such area where insurance policies commonly exclude coverage is assault and battery.

In *Ledbetter v. Concord General Corp.*, the Louisiana Supreme Court evaluated whether an insurance policy's assault and battery exclusion precluded coverage for a rape.⁶ The court was unimpressed with plaintiff's argument that "rape" is a different crime from "assault" or "battery."⁷ Plaintiff sought to suggest an ambiguity existed, but the court determined:

[I]t is neither possible nor desirable for an insurance contract to enumerate the various kinds and degrees of attacks encompassed by the assault and battery exclusion. The clause need not mention rape or strangulation or mayhem, or other greater or lesser invasions of the person; all are subsumed in the broad language employed.⁸

The court found that "'assault' and 'battery' subsume all forms of tortious menacing and unwanted touching."⁹ The court also defined "battery" as involving the "intentional use of force and/or violence upon the person of another."¹⁰ Therefore, the Louisiana Supreme Court concluded that the assault and battery exclusion was very broad and excluded such conduct as rape.

Recently in *Lawrence v. Security Professionals*,¹¹ the second circuit defined "battery" as intentional offensive contact with another person.¹² The court went on to further to define "intentional" as where the actor either consciously desired the physical result of his act, or knows that the result is substantially certain to follow his conduct.¹³

B. The Jackson and Michelet Decisions Provided Sound Guidance for the Interpretation of Assault and Battery Exclusions in Light of Louisiana Revised Statutes 37:3276 (E)

In a 1995 decision, the Louisiana First Circuit Court of Appeal in *Jackson v. Rogers*¹⁴ upheld and enforced a commercial general liability policy issued to a

5. *Id.*

6. *Ledbetter v. Concord General Corp.*, 665 So. 2d 1166 (La. 1996).

7. *Id.* at 1170.

8. *Id.* (citations omitted).

9. *Id.*

10. *Id.* at 1170-71. The court in *Duplechain v. Turner*, 444 So. 2d 1322, 1325 (La. App. 4th Cir. 1984), *writ denied*, 448 So. 2d 114 (La. 1984), noted that, "[I]n general, a person is criminally responsible and civilly liable for the intentional use of force or violence upon the person of another. Such actions constitute a battery."

11. 743 So. 2d 247 (La. App. 2d Cir. 1999), *writ denied*, No. 99-CC-2727, WL 1202368 (La. Nov. 24, 1999).

12. *Caudle v. Betts*, 512 So. 2d 389 (La. 1987).

13. *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981).

14. 665 So. 2d 440 (La. App. 1st Cir. 1995).

private contract security company which contained an assault and battery exclusion. In *Jackson*, the plaintiff, a dance hall patron, was involved in a physical altercation wherein she sustained injuries and damages.¹⁵ The plaintiff sued the private security company that had been retained by the dance hall, the company's general liability insurer and others. The security company's general liability insurer, Northfield Insurance Company, moved for summary judgment, as its policy was an occurrence policy which precluded coverage for damages or injuries arising from assault and battery. The policy also excluded damages and injuries arising out of the failure to prevent or suppress an assault and battery.

The *Jackson* court ruled that the assault and battery exclusion was "an allowable limitation of liability and must be given effect."¹⁶ The first circuit court specifically found that the assault and battery exclusion "is not prohibited by public policy or statute."¹⁷ The court disregarded plaintiff's attempt to artfully plead negligence. The court stood firm in holding that, "[T]here is a difference between the versions relating to the mechanics of the tortfeasor's contact with Ms. Jackson, but there is no issue of material fact."¹⁸

The *Jackson* plaintiff argued that the policy was not in compliance with Louisiana Revised Statutes 37:3276 (E), which provides that a licensed private contract security company must have in effect general liability insurance up to a certain amount, because it contained the assault and battery exclusion which precluded coverage for such conduct. Plaintiff argued for reformation of the policy. The court rejected both arguments. The court found assault and battery exclusions lawful and enforceable and found the "policy met all requirements of La. R.S. 37:3276(E) and the Insurance Code."¹⁹ As noted by the *Jackson* court:

The first issue raised by the plaintiff concerns La. R.S. 37:3276(E), a statutory provision which, at the time, required a private security business to have in effect general liability insurance with limits of at least \$25,000 which names the state as an additional insured. It further requires the private security business to provide a certificate of insurance to the Louisiana State Board of Private Security Examiners.²⁰

The court held that the insurance contract conformed to the legal mandate of Louisiana Revised Statutes 37:3276 (E), notwithstanding the fact that the insurance policy contained an assault and battery exclusion.

15. *Id.* at 441.

16. *Id.* at 444.

17. *Jackson*, 665 So. 2d at 444. "Ms. Jackson's injuries arose either from the altercation in which Mr. Rogers was a part or from the suppression of a battery by Mr. Rogers. In either instance, liability is excluded by the clear provisions of the policy." *Id.*

18. *Id.*

19. *Id.* at 443.

20. *Id.* at 442.

In 1996, the Louisiana Fourth Circuit Court of Appeal decided *Michelet v. Scheuering Security Services*,²¹ a similar case. In *Michelet* an apartment manager sued a security guard, who had kidnaped and assaulted her, the security company, who employed the guard, and the Louisiana State Board of Private Security. The security company's insurer [insurer] was brought into the lawsuit. The trial court granted the insurer's motion for summary judgment, finding, *inter alia*, that the assault and battery exclusion was enforceable and not against public policy. Further, the court upheld an exclusion barring claims alleging damages arising from the security company's alleged direct negligence in hiring and supervising its guard.²²

In *Michelet*, the Louisiana State Board of Private Security argued that "the licensees [guard companies and guards] are required to provide insurance and name it [Louisiana State Board of Private Security] as an insured because the intent is that the public have protection against a security service's negligent hiring and intentional acts of a security guard."²³ The fourth circuit disagreed and held that the arguments of the Louisiana State Board of Private Security had "no merit." The Louisiana State Board of Private Security is charged with reviewing the qualifying criteria and licensing guards. The court specifically stated that the Louisiana State Board of Private Security "accepted the . . . policy as [in] compliance under the statute [La.R.S. 37:3270, et. seq.] and licensed SSS [guards]."²⁴ The Louisiana State Board of Private Security has not adopted any rule, regulation, interpretive memo or other guidance with regard to what may constitute "general liability insurance." It is clear that the Louisiana State Board of Private Security approved the policies supplied by the insurers in *Michelet* and *Jackson*.

II. A NEW LINE OF CASES INTERPRETS THE ASSAULT AND BATTERY EXCLUSION IN LIGHT OF LOUISIANA REVISED STATUTES 37:3276 (E)

The Louisiana Supreme Court recently upheld the right of insurers to limit their contractual exposure through the assault and battery exclusion in *Hickey v. Centenary Oyster House*.²⁵ The Louisiana Supreme Court likewise rejected the intermediate appellate court's suggestion that Louisiana's Private Security Regulatory and Licensing Law,²⁶ specifically Louisiana Revised Statutes 37:3276(E), created statutory liability through a general statement of public policy in the Act.

21. 680 So. 2d 140 (La. App. 4th Cir.), writ denied, 692 So. 2d 371, and writ denied, 692 So. 2d 372 (1996) (writs were denied with only Justices Calogero and Johnson agreeing to hear the case).

22. *Michelet*, 680 So. 2d at 148.

23. *Id.* at 149 (explanations added).

24. *Id.* (explanations added).

25. *Hickey v. Centenary Oyster House*, 719 So. 2d 421 (La. 1998).

26. See La. R.S. 37:3270-3298 (1998 & Supp. 1999).

A. *The Facts and Procedural History of Hickey v. Centenary Oyster House*

Angela Hickey accompanied a group of friends to socialize and drink. Near closing time at the Centenary Oyster House, Hickey and her friends were in a rear parking lot about to leave when an armed robber approached the passenger-side of the car. Hickey did not initially see the robber. As Hickey opened the driver's door and began to step into the car to unlock the other doors, the car light automatically illuminated and startled the robber. The robber turned slightly towards Hickey, aimed and began firing at her through the passenger window. He fired the gun five times, striking Hickey twice in the upper torso. The robber fled on foot and has never been caught. This incident appeared to be a completely random, criminal attack.

At the time of the incident, Colony Insurance Company provided insurance to Melvin Ashley d/b/a Security Professionals, the company that provided security for Centenary Oyster House. Centenary Oyster House had hired the security guard service due to several criminal acts inside the premises and had stationed the guard at the main entrance/exit with instructions to check identification cards as patrons entered.

Hickey subsequently sued Centenary Oyster House, the security company, and the security company's insurer, Colony Insurance Company.

Colony denied coverage for Melvin Ashley d/b/a Security Professionals. Colony asserted that its "assault and battery" exclusions precluded coverage.²⁷

Melvin Ashley, the private security company that provided security for Centenary Oyster House, suggested that James Nichols at Nichols Agency, an insurance businessman Ashley used to secure liability insurance, misrepresented facts in the course of obtaining the policy regarding coverage and that such misrepresentation pertaining to coverage should have bound Colony Insurance Company, the insurer that Nichols procured through McIntyre & Associates for Ashley.²⁸ After the first hearing on the coverage motion, additional discovery was taken. The additional discovery showed that Nichols obtained quotes, assisted in completing applications and negotiated with general agents or insurers directly, but as to Colony, Nichols had no authority to act on its behalf. McIntyre & Associates

27. The "Assault and Battery Exclusion" endorsement read, as follows:

This insurance does not apply to damages or expenses due to Bodily Injury, Property Damage or Medical Expenses described in Section I, coverage A. and C. arising from:

1. *Assault and Battery committed by any insured, any employee of any insured, or any other person, whether or not committed by or at the direction of any insured,*
2. *The failure to suppress or prevent assault or battery by any person in (A) above,*
3. *The failure to provide an environment safe from Assault and Battery or failure to warn of the dangers of the environment which could contribute to assault and battery,*
4. *The negligent hiring, supervision or training of an employee of the insured in (A) above,*
5. *The use of reasonable force to protect persons or property intended from the standpoint of the Insured or at the direction of the Insured.*

(emphasis added).

28. See generally *Hickey v. Centenary Oyster House*, 690 So. 2d 858 (La. App. 2d Cir. 1997), *rev'd on other grounds*, 719 So. 2d 421 (La. 1998).

was Colony's general agent and only McIntyre & Associates had authority to bind Colony. Nichols had no authority to bind Colony or McIntyre & Associates or to issue coverage or any insurance. Nichols had no contract or other relationship with Colony. Nichols had no direct communications with Colony.²⁹ It was determined that Nichols Agency did not bind Colony through its coverage representations because an agency relationship did not exist.

Colony filed a motion for summary judgment requesting a dismissal for lack of coverage. Trial Judge Emanuel, in the first hearing on the motion, expressed a desire to defer ruling on the coverage motion pending a ruling from the Louisiana Supreme Court in *Ledbetter v. Concord General Corp.*,³⁰ a case involving similar assault and battery claims and a similar insurance policy exclusions.³¹

1. A Look at Ledbetter v. Concord General Corp., a Prior Case

In *Ledbetter v. Concord General Corp.*,³² the Louisiana Supreme Court upheld the "assault and battery" exclusion in a motel's commercial general liability (CGL) insurance policy. In *Ledbetter*, plaintiff was asleep in her motel room when an intruder made an unauthorized entry and raped her. The rapist then attempted to kidnap the plaintiff. Plaintiff leapt from the rapist's moving vehicle and sustained additional injuries. The insurer who provided CGL coverage to the motel moved for summary judgment based upon their "assault and battery" exclusions. The trial court denied the motion. The Louisiana Second Circuit Court of Appeal reversed, in part, and remanded. The second motion for summary judgment, based upon the same exclusions, which are similar to the exclusions in *Hickey*, was denied by the trial judge. Writs were granted and the second circuit reversed the trial judge and granted the motion, thereby dismissing claims against the insurer. The Louisiana Supreme Court, in *Ledbetter*, vacated the second circuit's ruling and remanded. On remand, the trial judge entered judgment against the owners of the motel and found coverage under the CGL policy. Both parties appealed. The second circuit reversed the judgment against the insurer but affirmed the judgment in other respects. Writ of certiorari was granted by the supreme court on the coverage issue. In its 1996 opinion, the supreme court found that the insurance policy was clear and expressed the intent of the parties. The court enforced the assault and battery exclusions. There was no coverage for the rape and battery-related injuries.

29. The intermediate appellate court in *Hickey v. Centenary Oyster House*, 690 So. 2d 858, 862 (La. App. 2d Cir. 1997), *rev'd on other grounds*, 719 So. 2d 421 (La. 1998), correctly rejected plaintiff's attempts to paint Nichols as Colony's agent. The appellate opinion contains a good discussion of Louisiana law regarding insurance brokers as opposed to general agents.

30. 665 So. 2d 1166 (La. 1996).

31. *Hickey v. Centenary Oyster House*, 719 So. 2d 421, 423 n.2 (La. 1998), quoted the *Ledbetter* policy's assault and battery exclusion:

Notwithstanding anything contained herein to the contrary, it is understood and agreed that this policy excludes claims arising out of Assault and Battery, whether caused by or at the instigation of, the insured, his employees, patrons, or any causes whatsoever.

32. 665 So. 2d 1166 (La. 1996).

a. The Clear Language of the Policy Controls

In *Ledbetter*, the Louisiana Supreme Court stated that "the rule of strict construction does 'not authorize a perversion of language, or the exercise of inventive powers for the purpose of creating an ambiguity where none exists.'"³³ The *Ledbetter* court, like lower appellate courts in Louisiana, ruled that when language in a policy and its endorsements is clear and unambiguous, a reasonable interpretation consistent with the obvious meaning and intent of the policy must be given and perversion of the language should not be attempted.³⁴ The court noted that, "[I]nsurance companies have the right to limit coverage in any manner they desire, so long as the limitations do not conflict with statutory provisions or public policy."³⁵ Provisions in an insurance contract must be given effect as they constitute the entire basis for any responsibility or liability between the insured and insurer.³⁶

B. Subsequent Procedural History of Hickey v. Centenary Oyster House After the Louisiana Supreme Court Decision in Ledbetter v. Concord General Corp.

After the Louisiana Supreme Court's ruling in *Ledbetter v. Concord General Corp.*,³⁷ Colony reset its motion and a second hearing was held before Trial Judge Emanuel in *Hickey v. Centenary Oyster House*. Trial Judge Emanuel granted the motion and dismissed Colony from the suit, with prejudice. The evidence proved to Trial Judge Emanuel's satisfaction that Nichols Agency was a mere broker of insurance. Trial Judge Emanuel was also satisfied that Colony's policy did not afford coverage for Hickey's claims and damages. He found Colony's assault and battery exclusions applicable and enforceable. He stated that Colony's policy was lawful and *not against public policy*.³⁸ *After all, Colony's insurance policy and its provisions were accepted by the Insurance Commissioner of Louisiana and the Louisiana State Board of Private Security, who was made an additional insured*

33. *Id.* at 1169.

34. *Ledbetter*, 665 So. 2d 1166 (La. 1996); *See also* *Maggio v. Manchester Ins. Co.*, 292 So. 2d 255 (La. App. 4th Cir. 1974); *Smith v. Western Preferred Cas. Co.*, 424 So. 2d 375 (La. App. 2d Cir. 1982), *writ denied*, 427 So. 2d 1212 (La. 1983).

35. *Ledbetter*, 665 So. 2d at 1169 (quoting *Reynolds v. Select Properties, Ltd.*, 634 So. 2d 1180, 1183 (La. 1994).

36. *Gonsalves v. Dixon*, 487 So. 2d 644, 645 (La. App. 4th Cir. 1986); *Smith v. Western Preferred Cas. Co.*, 424 So. 2d 375 (La. App. 2d Cir. 1982), *writ denied*, 427 So. 2d 1212 (La. 1983).

37. 665 So. 2d 1166 (La. 1996).

38. "Public policy" has been generally defined as:

[C]ommunity common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare, and the like; it is that general and well-settled public opinion relating to a man's plain, palpable duty to his fellowmen, having due regard to all circumstances of each particular relation and situation.

Black's Law Dictionary 1231 (6th ed. 1990), citing *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F.Supp. 793, 796 (N.D. Ohio 1965).

on the policy as required by law and who received a certified copy of the policy when it was first issued to Ashley and then subsequently renewed Ashley's licensing on other occasions.

The trial judge granted Colony summary judgment, dismissing the case. Hickey appealed to the second circuit court of appeal. The second circuit reversed the trial judge and Colony made application for writs to the Louisiana Supreme Court.³⁹ The Louisiana Supreme Court granted Colony's application pursuant to the supervisory jurisdiction of that Court.⁴⁰ The Louisiana Supreme Court reversed the second circuit, finding that it erred in reversing the summary judgment. The second circuit had squarely rejected and held contrary to other sound decisions of the first and fourth circuits, in *Jackson v. Rogers*⁴¹ and *Michelet v. Scheuering Security Services*.⁴²

C. A Look at *Matthews v. City of Shreveport*

In a second, independent case, which was unfolding at the same time as *Hickey*, the second circuit, in *Matthews v. City of Shreveport*,⁴³ reversed another summary judgment dismissal in favor of Colony Insurance Company based upon the same assault and battery exclusions. In a rather bizarre twist, the *Matthews* case involved the same exact issues, same appealing and responding parties, same insured, same insurance policy, same insurance policy exclusions, *same counsels of record, and the same trial judge* as in the *Hickey* case.⁴⁴ Both cases were essentially rendered in the trial and appellate levels at the same time. On page three of the unreported *Matthews* opinion, the second circuit acknowledged that its *Hickey* opinion, rendered days earlier by a different panel, and its *Matthews* opinion were in direct conflict with *Jackson v. Rogers* and *Michelet v. Scheuering Security Services*.⁴⁵

In *Matthews*, the plaintiffs [the *Matthews* family] attended a semi-professional football game at a stadium owned and operated by the city of Shreveport. Security for the event was provided, under contract, by Melvin Ashley d/b/a Security Professionals. At the game, a group of rowdy, drunken men shouted profanities

39. The Second Circuit's decision in *Hickey v. Centenary Oyster House*, 690 So. 2d 858 (La. App. 2d Cir. 1997), *rev'd*, 719 So. 2d 421 (La. 1998), reversed the summary judgment dismissal of Colony Insurance Company entered by Trial Judge Emanuel.

40. See R. La. Sup. Ct. 10(5)(b).

41. 665 So. 2d 440 (La. App. 1st Cir. 1995).

42. 680 So. 2d 140 (La. App. 4th Cir.), *writ denied*, 692 So. 2d 371, and *writ denied*, 692 So. 2d 372 (1996).

43. 693 So. 2d 16 (unreported) (La. App. 2d Cir. 1997), *writs granted*, 731 So. 2d 272 (1998), *rev'd on remand*, 726 So. 2d 1059 (La. App. 2d Cir. 1999).

44. Interestingly, there has now been a third decision, *Lawrence v. Security Professionals*, 743 So. 2d 247 (La. App. 2d Cir. 1999), *writ denied*, No. 99-CC-2727, WL 1202368 (La. Nov. 24, 1999), involving the same insured, same policy, and similar facts. Trial court denied summary judgment based on assault and battery exclusions. The second circuit granted writs but affirmed the decision, finding genuine issues of material fact precluding judgment dismissing Colony.

45. *Jackson*, 665 So. 2d at 440; *Michelet*, 680 So. 2d at 140.

and insults, which were mainly directed at the Pelican Cheerleaders, as well as other spectators and one female security guard. One of the plaintiffs approached the men intending "to put an end to the mob's threatening behavior."⁴⁶ A *mélée* broke out and two of the plaintiffs were beaten and the others allegedly incurred mental injuries from witnessing the beatings.

At the time of the alleged injuries to plaintiffs, Colony Insurance Company provided insurance to Melvin Ashley d/b/a Security Professionals. The aforementioned and listed "assault and battery" exclusions were contained in the policy. Colony filed its motion for summary judgment on the coverage issue.⁴⁷ As in *Hickey*,⁴⁸ plaintiffs attempted to argue that Nichols Agency⁴⁹ was an agent of Colony. As in *Hickey*, Trial Judge Emanuel found that Nichols Agency was not Colony's agent. Again, as in *Hickey*, the trial judge found Colony's policy and assault and battery exclusions enforceable and applicable, thereby relieving Colony of coverage for plaintiffs' alleged damages. The trial judge again found *Ledbetter v. Concord General Corp.*,⁵⁰ dispositive on the assault and battery exclusions.

The second circuit,⁵¹ as in *Hickey*, reversed the trial judge. The court acknowledged that its recent *Hickey* and *Matthews* decisions directly conflicted with other Louisiana case law. Since the appellate circuits were now in conflict, the supreme court granted writs.

D. The Louisiana Supreme Court Reverses the Second Circuit Decision in *Hickey*

The Louisiana Supreme Court issued a written ruling reversing the second circuit's decision in the *Hickey* case.⁵² The court found that the Louisiana Second Circuit Court of Appeal erred in ruling that Colony Insurance Company's general liability insurance policy, including the "assault and battery" exclusions, issued to Melvin Ashley d/b/a Security Professionals, was against the public policy⁵³ stated in the purpose of the Private Security Regulatory and Licensing Law⁵⁴ and contrary to the general liability insurance provision in Louisiana Revised Statutes

46. Petition, Para.28.

47. Suit No. 402,202-F, 1st Jud. Dist. Ct., Caddo Parish, La.

48. 690 So. 2d 858 (La. App. 2d Cir. 1997), *rev'd on other grounds*, 719 So. 2d 421 (La. 1998).

49. Nichols Agency was the insurance broker for Melvin Ashley d/b/a Security Professionals.

50. 665 So. 2d 1166 (La. 1996).

51. *Matthews v. City of Shreveport*, No. 9629396-CA, 693 So. 2d 16 (unreported), *writ granted*, 731 So. 2d 272 (1998), *rev'd on remand*, 726 So. 2d 1059 (La. 1999).

52. 719 So. 2d 421 (La. 1998).

53. See La. R.S. 37:3270 (A) and (B) (1988 & Supp. 1999). Section (A) provides that:

(A) The Legislature of Louisiana declares that it is necessary to require the *licensure* of private security agents and businesses to be in the best interest of the citizens of this state.

(1) The purpose of this Chapter is to *require qualifying criteria* in a professional field in which *unqualified* individuals may injure the public. The requirements of this Chapter will contribute to the safety, health, and welfare of the people of Louisiana."

(emphasis added).

54. La. R.S. 37:3270-3298 (1988 & Supp. 1999).

37:3276(E).⁵⁵ The court rejected the second circuit's decisions and upheld the first and fourth circuits' decisions in *Jackson v. Rogers*,⁵⁶ and *Michelet v. Scheuering Security Services*, respectively.⁵⁷ The Louisiana Supreme Court rejected the court of appeal's opinion in *Hickey* which allowed coverage of all claims "if the insured [guard company or guard] causes, partly or wholly, the injury to the person." The Louisiana Supreme Court likewise rejected the second circuit ruling "that no exclusion or qualification of coverage will be enforced if it is based upon the cause[s] of the contemplated injury."

The supreme court found that "general liability insurance," as required in Louisiana Revised Statutes 37:3276(E), placed an obligation on the security guard company, not the insurer, to obtain general liability insurance, as specified in the statute, and the statute did not call for unrestricted insurance and may exclude actions and damages resulting from assault and battery and the like. The court found it unnecessary to address the various constitutional attacks levied by Colony in response to the second circuit's interpretation. The court rejected the second circuit's idea that the general public policy statement found in the Private Security Regulatory and Licensing Law⁵⁸ created statutory liability for insurers to cover claims for assaults and batteries.⁵⁹

The Private Security Regulatory and Licensing Law⁶⁰ has a stated public policy of protecting the public from *unqualified* security agents [guards]. It is a regulatory Act providing "detailed rules regarding training, uniforms, and license fees and renewals. Overall, the Act is a detailed licensing scheme for the profession of private security agents."⁶¹ In this case, the insured's guards were all licensed and trained by the State Board of Private Security, the governing Board mandated by the Private Security Regulatory and Licensing Law.⁶² The security company was properly licensed and had obtained general liability insurance in the required limits and named the State Board as an additional insured, as required by Louisiana

55. *Hickey*, 719 So. 2d at 424-26. At the time of the incident made subject of this suit, section 3276(E) stated: "*The licensee shall be required to have in effect general liability insurance of at least one hundred thousand dollars with the state of Louisiana named as an additional insured and shall provide to the board a certificate of insurance issued by the carrier.*" La.R.S. 37:3276(E) (1988 & Supp. 1994) (emphasis added).

56. 665 So. 2d 440 (La. App. 1st Cir. 1995).

57. 680 So. 2d 140 (La. App. 4th Cir.), *writ denied*, 692 So. 2d 371, and *writ denied*, 692 So. 2d 372 (1996).

58. La. R.S. 37:3270-3298 (1988 & Supp. 1999).

59. The second circuit suggested that the legislature, in enacting the Act dictated compulsory insurance beyond an ordinary insurance contract. *Hickey*, 719 So. 2d at 422. The second circuit erroneously ruled that "[a] liability insurer who writes the required coverage for a private security company may not, by a policy provision, narrow the liability coverage reasonably contemplated and required by the statute." *Hickey v. Centenary Oyster House*, 690 So. 2d 858, 863 (La. App. 2d Cir. 1997), *rev'd on other grounds*, 719 So. 2d 421 (La. 1998).

60. La. R.S. 37:3270-3298 (1988 & Supp. 1999).

61. *Hickey*, 719 So. 2d at 423.

62. La. R.S. 37:3270-3298 (1988 & Supp. 1999).

Revised Statutes 37: 3276(E).⁶³ Thus, the security company and its guards were "qualified" as described in the Act. The court found that the purpose and goal behind the Act was to regulate and raise the standards of guards and to legitimize and professionalize these agents. In essence, it was to "drive the crooks out of the industry."⁶⁴ The court found that the requirement of general liability coverage is "simply one aspect of the qualifying criteria required to obtain a license."⁶⁵

The court rejected plaintiff's arguments that the "extremely broad assault and battery exclusion"⁶⁶ would effectively remove from coverage almost every injury for which a security company would be liable to a person whose injury was caused solely or partially by the negligent or intentional fault of a guard.⁶⁷ The policy provided a wide array of coverages.⁶⁸ Hickey had contended that everything a guard company does involves assault and battery. That allegation was simply unfounded and not supported by any evidence before the court. Assault and battery is but a limited part of the potential exposure of a guard company.

III. INSURANCE DOES NOT MEAN COVERAGE FOR EVERYTHING

The *Hickey* decision⁶⁹ explained that "general liability insurance" has never been "intended to cover injuries arising from intentional acts."⁷⁰ All policies generally contain specific exclusions from coverage for injuries which are intentionally inflicted upon the plaintiff. In fact, most assault and battery endorsements exclude coverage for intentionally inflicted injuries regardless of whether the insured was a participant.⁷¹ In short, insurers may preclude coverage

63. In the past, the legislature altered La. R.S. 37:3276(E) solely to raise and lower the dollar figure of coverage. It has not tried to explain or define "general liability insurance." Even the Louisiana State Board of Private Security has admitted that if the *Hickey* and *Matthews* decisions in the second circuit are upheld, no insurer would insure a security company thereby forcing them into a self-insured fund, at best.

64. *Hickey v. Centenary Oyster House*, 719 So. 2d 421, 423 (La. 1998), quoting Comment, *Reality and Illusion: Defining Private Security Law in Ohio*, 13 U. Tol. L. Rev. 377, 386 n.38 (1982). The Supreme Court explained the state's exercise of its police power to clean up and legitimize the private security industry. Similar enactments were adopted in other states and with regard to other industries, such as private investigators.

65. *Hickey*, 719 So. 2d at 423.

66. *Id.* at 421. The High Court described the policy as containing an "extremely broad assault and battery exclusion."

67. *Id.* at 422.

68. *Id.*

69. *Id.* at 421.

70. *Id.* at 423. Justice Johnson, in her solo dissent in *Hickey*, argued that the Private Security Regulatory and Licensing Law had a purpose and goal of assuring some recovery for persons injured as a result of a legally liable security guard. She also suggested that assault and battery exclusions somehow allow the guard and security company to "be completely shielded from liability." *Id.* at 426. However, it seems clear that the Private Security Regulatory and Licensing Law was not designed to assure insurance recovery and, regardless of insurance coverage, the guard and his/her company do not escape liability due to enforcement of the assault and battery exclusions. That appears to be the position of the majority.

71. *Id.* at 423.

for all damages, notwithstanding who commits the intentional tort or assault and battery, if the damages arose from the intentional conduct. The *Ledbetter*⁷² court noted that the exclusion dealt with "assault and battery" and therefore, "kidnaping," assuming injuries arose from that tort, could be covered, but any damages connected to any assault and battery, including the rape, would not be covered.

In *Hickey*,⁷³ the Louisiana Supreme Court found that assault and battery exclusions are now "commonplace in policies issued to operators of bars, restaurants and similar businesses with a party atmosphere."⁷⁴ Indeed, Louisiana courts have frequently and consistently interpreted and upheld summary judgments based on assault and battery exclusions.⁷⁵ Louisiana courts facing similar facts, as in *Hickey*, have enforced assault and battery exclusions where the "assault and battery" was rendered by a patron or third person unconnected with the insured. In *Cortinez v. Handford*,⁷⁶ an unidentified patron at Jack's Lounge, in Bossier City, attacked the plaintiff. The plaintiff was injured and sued various defendants including the liability carrier of the club alleging negligence and other fault of the club employees. The trial court dismissed the insurer, finding the assault and battery exclusion in the policy precluded claims for damages arising from assault and battery. This second circuit affirmed that ruling. The *Cortinez* panel stated:

The effect of the endorsement is clear: there is simply no coverage for the insured's potential liability resulting from an occurrence of battery—whether the battery is by an employee or representative of Ray's or instead by a bar patron, whether or not the insured or any agent of the insured is involved in the battery in any capacity, and irregardless of the theory or theories of law that the tort claimant advances in a potential action against Jefferson's insured. The language of the policy is unambiguous, the intent of the contracting parties is clear: liability of the insured for batteries at Ray's is not covered.⁷⁷

In *Taylor v. Duplechain*,⁷⁸ the plaintiff was injured in a bar fight with another patron. Plaintiff sued the liability insurer of the lounge and other defendants. Plaintiff alleged negligence of the bartender in taking action to cause the fight and not taking appropriate actions to prevent or end the fight. As suggested above, the trial court granted summary judgment and the third circuit affirmed the dismissal of the insurer based upon the assault and battery exclusion. The third circuit

72. 665 So. 2d 1166, 1170-71 (La. 1996).

73. 719 So. 2d 421 (La. 1998).

74. *Id.* at 422.

75. See generally *Cortinez v. Handford*, 490 So. 2d 626, 628 (La. App. 2d Cir. 1986) (similar facts as *Hickey*); *Schexnayder v. Fed Ventures*, 625 So. 2d 530 (La. App. 5th Cir. 1993); *Alvarado v. Doe*, 613 So. 2d 166 (La. App. 4th Cir. 1992); *Taylor v. Duplechain*, 469 So. 2d 472 (La. App. 3d Cir. 1985); *Gonsalves v. Dixon*, 487 So. 2d 644 (La. App. 4th Cir. 1986); *Duplechain v. Turner*, 444 So. 2d 1322 (La. App. 4th Cir. 1984), *writ denied*, 448 So. 2d 114 (La. 1984).

76. *Cortinez v. Handford*, 490 So. 2d 626 (La. App. 2d Cir. 1986).

77. *Id.* at 629 (quoting *Taylor v. Duplechain*, 469 So. 2d 472 (La. App. 3d Cir. 1985)).

78. 469 So. 2d 472 (La. App. 3d Cir. 1985).

reinforced its approval of *Taylor*,⁷⁹ in *Gaspard v. Jefferson Insurance Co. of New York*.⁸⁰ In *Gaspard*, one bar patron attacked and severely beat another patron. Suit was filed against various defendants including the bar's liability carrier. The third circuit ruled that *Taylor*⁸¹ was dispositive. The assault and battery exclusion excluded claims regardless of who committed the assault and battery. Plaintiff's damages arose from the assault and battery.

Louisiana courts are in full accord that, "[E]ven if any negligence of the organization [the insured] led up to the assault, the injuries plaintiff suffered nevertheless arose out of an assault and battery. Therefore, there is no coverage in this instance either."⁸²

The *Hickey* court, like the others, found evidence proving that the armed robber meant to fire his weapon at Hickey. The robber turned and repeatedly fired his weapon at Hickey. It was no accident. The second circuit in *Freeman v. Bell*,⁸³ noted that a "doorman's aggressive action in pulling a loaded pistol out of his pocket supports a conclusion that he intended the result which was almost certain to follow." There is no question that the armed robber intended to shoot Hickey.⁸⁴

In *Hickey*, the plaintiff argued that the "protection of public safety"⁸⁵ is a prominent aspect of liability insurance in general.⁸⁶ Insurance should protect innocent accident victims. This does not mean that exclusions are not to be enforced. Absent contractually provided coverage, which is excluded by clear endorsement, there must be some illegality⁸⁷ of the exclusion in order to find coverage. Plaintiff argued that the assault and battery exclusion violated the generally-stated public policy espoused in the Private Security Regulatory and Licensing Law. The intermediate appellate court in *Hickey* analogized to automobile liability insurance policies and compulsory insurance laws mandating coverage in various instances. The Louisiana Supreme Court in *Hickey* found such an attempt to analogize to be an "uphill battle" and, in this case, a "long leap."⁸⁸ The supreme court declined to make that leap and reversed.

79. *Id.*

80. 488 So. 2d 350 (La. App. 3d Cir. 1986).

81. *Id.* at 352.

82. *Kiefer v. Whitaker*, 468 So. 2d 587, 588 (La. App. 4th Cir. 1985) (emphasis added).

83. 366 So. 2d 197, 199 (La. App. 2d Cir. 1978).

84. *See also* *Vascocu v. Singletary*, 434 So. 2d 597 (La. App. 3d Cir. 1983).

85. La. R.S. 37:3270 (1988 & Supp. 1999); *see supra* notes 35-36 and accompanying text.

86. If the licensure is designed to protect our citizens then the Louisiana State Board of Private Security Examiners has the obligation to review insurance policies and assure they meet the currently questioned criteria for "general liability insurance."

87. There must be some conflict with statutory law or clearly stated public policy. Absent a conflict, parties are free to contract with each other and set forth the terms of their agreements. Insurers are not to be treated differently from other individuals and may limit their liability and impose and enforce reasonable conditions upon the obligations they assume by contract. Parties are free to contract as long as the terms are not contrary to good morals, public policy or violative of some law. *Lewis v. Liberty Ind. Life Ins. Co.*, 185 La. 589, 170 So. 4 (1936).

88. 719 So. 2d 421, 424-25 (La. 1998).

The court noted that when the statute asserted as the basis of a public policy attack does not require a certain element of insurance coverage or prohibit a certain exclusion, then the court must examine whether the insurance policy language at issue is "in harmony" with the statute and its underlying goals and purposes.⁸⁹ The purported conflict involved the broadly stated public policy of the Private Security Regulatory and Licensing Law and the exclusion. The alleged conflict did not involve the express language of the public policy of the Private Security Regulatory and Licensing Law.⁹⁰ Attempting to use the broad, general public policy statement⁹¹ in a licensing and regulatory enactment to support purported compulsory coverage is impermissible.⁹²

The Louisiana Supreme Court declined to apply the analogy for two main reasons: (1) neither Louisiana Revised Statutes 37:3276(E), nor the Louisiana Insurance Code require any particular form of general liability insurance policy; and (2) the public policy statement in the Act⁹³ neither requires a certain element of coverage nor prohibits a certain exclusion. The real issue is "whether the language of the policy is 'in harmony' with the enactment, requiring that the enactment's underlying goals and purposes be ascertained."⁹⁴

The Louisiana Insurance Code merely defined liability insurance as "insurance against the liability of the insured for the death, injury or disability of an employee or other person, and insurance against the liability of the insured for damage to or destruction of another person's property."⁹⁵ The same code allows insurers to "impose limitations on its liability in the form of exclusions."⁹⁶

The history behind the Private Security Regulatory and Licensing Law did not indicate that the legislature intended certain coverages or to prohibit certain exclusions. Further, the governing Board of Private Security routinely examined and approved policies just like the one at issue. The Act placed the duty on the security company to obtain insurance and the duties under the Private Security Regulatory and Licensing Law are all directed at the security company, not the insurers.⁹⁷ The legislative purpose was to prevent the use of unlicensed and untrained guards, who are more likely to commit offenses and injure citizens who come into contact with them. Again, the legislative concern was not with requiring unrestricted insurance but was with the risks created by unqualified guards acting in an ignorant, irrational and illegal manner. The law is designed to promote responsible conduct by those in the security field. The law created the Louisiana

89. *Id.* at 425 (quoting *Lee Russ & Thomas Segall*, 7 *Couch Insurance* 3d § 101:18 (1997)).

90. *Id.*

91. That being the protection of public safety.

92. *Hickey*, 719 So. 2d at 425.

93. La. R.S. 37:3270 (1988 & Supp. 1999); see *supra* notes 35-36 and accompanying text.

94. *Hickey*, 719 So. 2d at 925 (quoting *Lee R. Russ & Thomas F. Segalla*, 7 *Couch on Insurance* 3d §101:18 (1997)).

95. La. R.S. 22:6(4) (1995).

96. La. R.S. 22:620 (1995), which reads "Any insurer may insert in its policies any provision or conditions required by its plan of insurance or method of operation which are not prohibited by the provisions of this Code." See *Hickey*, 719 So. 2d at 425.

97. *Hickey*, 719 So. 2d at 425.

State Board of Private Security Examiners as a state agency to oversee, administer and enforce the law. The board was given powers and duties to examine and test applicants, adopt rules, issue, suspend, modify and revoke licenses, and report on its findings for administrative or enforcement purposes.⁹⁸

IV. CONCLUSION

The enforcement of assault and battery exclusions allows insurers to better gauge the risks they are willing to accept and contract for. Attempts to use broad public policy provisions in statutory enactments, whether designed for insurance licensing, regulation or other control, should not become the bases for policy attacks in favor of coverage of the insurers. The Louisiana Supreme Court has now provided guidance for other states choosing to enforce the rights of insurers to contract and to deny attempts to distort policy and statutory language. Insurance is not a lottery for all who seek to cash in.

98. La. R.S. 37:3274 (1988).

