

1-1-2000

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Recommended Citation

Greg Munro, *Avoiding the Intentional Acts Exclusion in Casualty Insurance* Tr. Trends 15 (2000),

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INSURANCE CONSUMER COUNSEL'S COLUMN

AVOIDING THE INTENTIONAL ACTS EXCLUSION IN CASUALTY INSURANCE

BY PROFESSOR GREG MUNRO

On the morning of January 19, 1994, Thadius Morehead (Morehead) was driving his vehicle in Butte, Montana with three friends, Joseph Wandler, Eric Blom, and Robert Chenoweth. The men were driving around Butte with the stated purpose of picking fights at random. * * * Soon thereafter, the men came upon appellant's vehicle on Harrison Avenue. Appellant was accompanied by a friend and the two were on their way to go fishing. Morehead followed closely behind appellant and began flashing his lights and honking his horn in an effort to get appellant's attention and cause him to pull over his car. Thinking the driver to be an acquaintance, appellant pulled over into the Albertson's parking lot and stopped. Morehead followed and pulled up alongside appellant. Joseph Wandler (Wandler) exited Morehead's vehicle and approached appellant. When appellant rolled down his window, Wandler punched appellant in the face. When appellant opened his door, he was dragged out of his vehicle and beaten, punched, and kicked by Wandler and one or more of the other men. The men continued to punch and kick appellant while he was lying on the ground.¹

MITLA member Greg Skakles found himself in a common dilemma facing plaintiffs' lawyers; his client was injured by the intentional act of tortfeasors who were likely judgment proof. The only hope of obtaining adequate compensation for his client, William Wendell, was through insurance. In the words of your old science teacher, it is intuitively obvious to even the most casual observer that the kind of people who go around "picking fights at random" are probably the same people who lack the type of assets it takes to satisfy the injured victim's personal injury judgment. And, there lies the problem: Public policy forbids the use of insurance to indemnify willful wrongdoing by an insured.²

This policy against insuring the intentional wrongdoer is expressed in casualty insurance policies such as Commercial General Liability policies³ and Homeowners policies⁴ in which the basic insuring agreements restrict coverage to an "occurrence" which is defined in the policies as an "accident." Automobile policies also restrict coverage of the insured's lia-

bility to that arising out of "an accident."⁵ Each of these types of policies contain provisions excluding from coverage "bodily injury" or 'property damage' expected or intended by the insured" (or "from the standpoint of the insured"). The clear intent of the insurance industry in drafting the policies is to exclude coverage for anything that might be deemed an intentional act.

Issues involving restriction of coverage to "accidents" or exclusion of damage "expected or intended by the insured" generally reach the courts in the form of coverage disputes between the insured tortfeasor and the insurer or between the tortfeasor's assignee when the tortfeasor has conveyed his coverage claim and any attendant bad faith claim to the plaintiff in settlement. Montana courts have entertained a range of such coverage issues over the years.

Acts evincing clear intent to injure

For example, in *New Hampshire Ins. Group v. Strecker*,⁶ the insurer denied coverage for defense or indemnity in a suit for Jake

Strecker's sexual abuse of his daughter. New Hampshire insured under a farm-ranch Comprehensive General Liability umbrella policy for Strecker Farms, Inc., which also named Jake Strecker individually as insured. New Hampshire refused coverage or defense on the ground that Strecker's sexual abuse of his daughter was excluded as "personal injury ...arising out of willful violation of a penal statute or ordinance committed by or with the knowledge or consent of the insured." Also the carrier argued that the coverage was only for an "occurrence" defined as "neither expected nor intended from the standpoint of the insured." The court upheld the trial court's summary judgment in favor of New Hampshire. Strecker had testified in deposition that he sexually molested his daughter for ten years, had no mental disabilities, and plead guilty to three felony charges of sexual molestation as a result of his conduct. It is notable that the court said the coverage depended on the acts giving rise to the claims (which acts were intentional) and not on the language of the complaint which the attorney can generally draft to plead a claim within the coverage.

In *Burns v. Underwriters Adjusting Co.*,⁷ Zeiler plead guilty to felony aggravated criminal assault for striking Burns who then sued him for negligence. The policy language excluded expected or intended conduct except that resulting from reasonable use of force to protect people or property. Underwriters and Consolidated Insurance refused defense or indemnity after taking a statement from Zeiler that

indicated his act was intentional. A default negligence verdict was rendered against Zeiler who then assigned to the plaintiff in settlement his rights against the insurers. The Montana Supreme Court upheld the lower court's decision that there was no duty to defend even though the complaint alleged a claim clearly within the coverage. The court said, "the proper focus of inquiry is the acts giving rise to coverage, not the language of the complaint." Justice Sheehy dissented stating

that the test of whether the insurer must defend is whether the complaint states a claim within coverage, not whether the insurer has evidence outside the complaint that causes it to think it can win.

It is general law that the insurer's duty to defend is determined under the "four corners" rule requiring defense if the complaint states a claim that would fall under coverage if true.⁸ However, the *Strecker* and *Burns* cases would indicate that, in situations involving egregious or violent felony-type wrongs, the insurer may indeed avoid defense even if counsel has plead a claim that is cognizable under the policy. In Wendell's case against Morehead, Wandler, Blom and Chenoweth, State Farm, which insured assailant Morehead's car, backed by the holdings in *Strecker* and *Burns* and the fact that Morehead and his buddies were charged with violating several criminal laws of Montana, refused to defend or indemnify Morehead, its insured driver, or his passengers.

However, the existence of criminal charges or guilty pleas may

not always be dispositive on the issue of whether the act was intentional. In *Bloxham v. Mountain West Farm Bureau Mut. Ins. Co.*,⁹ the insurer denied coverage when its inebriated insured lost a golf bet and caused \$31,000 damage by driving his pickup truck on the tennis courts at Meadowlark Country Club in Great Falls. In the pro-

...the test of whether the insurer must defend is whether the complaint states a claim within coverage, not whether the insurer has evidence outside the complaint that causes it to think it can win.

ceeding for criminal mischief, the insured admitted that the prosecution had probable cause to charge him with the crime. Nevertheless, the insured steadfastly denied that his conduct was intentional insisting his actions were caused by Malathion poisoning in weed spray which he later dropped as unsupported by expert testimony. Judge Cebull denied the insurer's request that it be granted summary judgment that there was no coverage by reason of the insured's intentional acts. He noted that the insured's admission of probable cause in the proceeding for criminal mischief did not amount to an admission of intentional conduct that would as a matter of law void the insurance.

In situations that do not involve violent felonious conduct, the court appears to follow the "four corners" rule and, as noted in *Lindsay Drilling & Contracting v. U.S. Fidelity & Guar. Co.*,¹⁰ requires defense if the claim "sets forth facts which represent a risk covered by the terms of the insurance policy." In *Lindsay Drilling*, the plaintiff

landowner filed a counterclaim against Lindsay Drilling alleging, on the one hand, that Lindsay "fraudulently and deliberately" salted drilling core samples with small quantities of gold and, on the other, that the company negligently allowed bystanders to tamper with the core samples. The court found the negligence allegation did not involve "intended or expected consequences" so that the claim did in fact set forth a covered "occurrence" and vacated the trial court's declaratory

judgment that had been granted for U.S.F.&G.

Alternative pleading of intent and negligence

Rule 8(e)(2) Mont. Rules.Civ.P. allows counsel to plead claims in the alternative or hypothetically. The technique of pleading, in separate counts, that the tortfeasor's conduct was intentional and, in the alternative, negligent, is a common method by which plaintiff's counsel deals with conduct which the insurer may wish to deem intentional for purposes of avoiding coverage. Pleading intentional torts allows plaintiff's counsel to confront the defendant with the risk of punitive damages but also creates risk to the plaintiff that he or she will lose the right to defense and indemnity thereby defeating the only viable source of recovery. Pleading negligence in the alternative makes it fairly certain that the insurer will have to defend and creates risk that it will also have to indemnify while also creating risk that the plaintiff will not be able to maintain the specter of punitive

damages. In any event, counsel should be careful in any case involving egregious conduct, i.e., intentional corporate pollution or minister's sexual relation with a parishioner he is counseling, not to plead into punitive damages and out of insurance.

It should be noted here that insurance of punitive damages is an issue collateral to that of insurance of intentional acts. While courts in some states hold as a matter of public policy that insurance cannot cover punitive damages,¹¹ in 1984, the Montana Supreme Court held in *First Bank (N.A.)-Billings v. Transamerica Ins. Co.*,¹² that providing insurance coverage for punitive damages is not contrary to public policy and said, "we leave the decision of whether coverage will be permitted to the insurance carriers and their customers." The enactment of MCA §33-15-317 in 1987, stating that punitive damage coverage only exists insofar as it expressly appears in the insurance policy language, implicitly confirmed the court's declaration of public policy. This is important because with the passing of the insurance "crisis" of the 1980s, punitive damage coverage has again appeared in the softer insurance market in policies including, for instance, those auto policies issued by State Farm.

Where the act is volitional but not intentional

Some acts are volitional but not intentional. For example, in *Millers Mut. Ins. Co. v. Strainer*,¹³ an ASARCO employee and safety officer, Strainer, attempted a practical joke on a fellow employee by removing a filter tube on his respirator with the expectation that the fellow employee would inhale harmless

smoke. In fact, the smoke turned out to be dangerously toxic, causing damage. The court, considering whether Strainer's act was intentional so as to bar coverage, cited the earlier case of *Northwestern National Cas. v. Phalen*.¹⁴

Phalen clearly established that intentional acts are not excluded under an insurance policy unless the intentional act results in injuries which would be expected or intended. A person may act intentionally without intending or expecting the consequences of that act.¹⁵

The court found that Strainer's act was volitional but that the results were not intended. This meant the act could be intentional for purposes of avoiding the workers' compensation bar for the injured employee, but not be intentional under the insurance policy exclusion. On the other hand, courts frequently refuse insurance coverage for what Keeton¹⁶ calls "incredibly foolish conduct." This doctrine, called the "Damn Fool" doctrine, refers to that body of cases where courts have refused insurance coverage for acts "too ill conceived to warrant allowing the actor to transfer the risk of such conduct to an insurer."

Judge Molloy relied on *Phalen* and *Millers Mutual in deciding Safeco Ins. Co. of America v. Tunkle*.¹⁷ Larson was entering Tunkle's house when Tunkle shot him several times. A criminal jury acquitted Tunkle by reason of self defense. Safeco, Tunkle's homeowner's insurer, refused to defend on the ground that the shooting was not an "accident" so as to be a covered "occurrence" and thus, it was excluded as an intentional act. However, Judge Molloy found self defense to be volitional and not

intentional and held the policy exclusion did not apply.

However, if the court can see from the nature of the act that it evinces an intent to injure, it will bar coverage under the intentional acts exclusion as it did in *American States Ins. Co. v. Willoughby*.¹⁸ There, Neilsen's conduct included hitting, biting, and kicking two security guards who were attempting to restrain him. The guards later sued Neilsen for their injuries. The court found no separation between the volitional act and the intent to cause the resulting damage.

Where the act is intentional, but the damage was not expected or intended

Because the policy language generally excludes "damage expected or intended by the insured," the logical method of securing coverage of an act that may be deemed intentional is to prove that the defendant didn't expect or intend the damage. Success in gaining the coverage probably depends on the nature of the act itself. *Mutual Service Cas. Ins. Co. v. McGehee*,¹⁹ stands for the broad proposition that there is no coverage under standard policy language for acts intended even if there is no subjective intent to cause specific injuries. However, the court in that case also noted that the insured assailant "aggressively and intentionally" struck another in the face. In such circumstances, the court held that it was irrelevant that the insured caused an injury different in character or magnitude from the harm he subjectively intended.

Where the type or nature of the act itself is less egregious, the court will be more liberal in finding that the damage was unexpected or unin-

tended. For example, in *Grindheim v. Safeco Ins. Co. of America*,²⁰ plaintiffs alleged that the Deerfield Hutterite Colony in Fergus County, Montana, had for years disposed of human and animal sewage in a coulee upstream from plaintiff's property so that their property was damaged by sewage pollution. The Colony's insurer denied coverage for defense or indemnity on the ground that the event was not a covered

"occurrence"

defined under the policy as an "accident" and that it was excluded as

"property damage

which is expected or intended by the insured." The court disagreed on that point finding that the policy "was intended by the parties to that contract to insure both intentional and unintentional acts or omissions of the Deerfield Colony, excluding from coverage only bodily injury or property damage that was expected or intended by the Deerfield Colony."²¹ Quoting from *Portal Pipe Line Co. v. Stonewall Ins. Co.*,²² the court stated "the intent of the policy is to insure the acts or omissions of the insured, including [its] intentional acts, excluding only those in which the resulting injury is either expected or intended from the insured's standpoint."

However, in *Daly Ditches Irrigation Dist. v. National Surety Corp.*,²³ the insurer refused coverage under a CGL policy when an employee sued the irrigation district for wrongful discharge and breach of the covenant of good faith and fair dealing. The policy defined "occurrence" as "an accident...neither expected nor intended

from the standpoint of the insured." The irrigation district said that the emotional and mental injury claimed by plaintiff was not the intended or expected consequence of the discharge. However, the court held that "the alleged intentional conduct of Daly could be expected to cause the injury claimed by the employee." The court further stated that "[t]here is no injury alleged which could not be expected to flow from the termination."

...**"for purposes of UM coverage, an insured's injuries 'arise out of the use' of an uninsured vehicle if the injuries originate from, or grow out of, or flow from the use of the uninsured vehicle."**

Avoiding the "accident" requirement

In *Tunkle*, Judge Molloy found the word "accident" to be ambiguous. He noted that among the definitions in Webster's Third New International Dictionary were "lack of intention or necessity, often opposed to design" and "an unforeseen unplanned event." Such dictionary definitions leave room for intended acts with unintended results, so that, as in *Tunkle*, the court might find them to be a covered "occurrence." There are many situations in which the insured's volitional act may still be "an unforeseen unplanned event," i.e., engaging in a fight or committing violence in self defense.

Where one insured is innocent

If a policy covers co-insureds, and one of them commits the intentional act which excludes coverage that would normally provide benefits to the other, then the other insured is deemed an "innocent"

insured and, absent a policy provision denying coverage to the innocent insured, may recover. For example, in the Washington case of *Unigard Mutual Ins. Co. v. Argonaut Ins. Co.*,²⁴ the court allowed defense and indemnity to the parents whose 11-year-old son had damaged a school with fire, but refused coverage for the son. The court held that each insured is treated as having a separate policy with the insurer. In

Montana, however, the court refused Patricia Woodhouse coverage as an innocent insured where the homeowner's policy

contained a clear exclusion barring coverage where any insured committed an intentional act that resulted in the damage. In *Woodhouse v. Farmers Union Mut. Ins. Co.*,²⁵ Woodhouse's coinsured ex-husband committed suicide by burning himself to death in the couple's mobile home which he had been awarded in their divorce. She sued the insurer for coverage of her personal belongings which were still in the home. The court found the exclusion to be clear in barring coverage for the intentional acts of "an insured" even if that meant the innocent insured could not recover.

Where the intentional act is an "accident" from the vantage point of the insured

Returning to the *Wendell* case with which this article started, State Farm insured the vehicle driven by assailant Morehead and his buddies and also insured the vehicle driven by the injured Wendell. Wendell claimed against assailant Morehead, and State Farm refused coverage on

the ground that the acts of their insured, Morehead, were intentional. Wendell then made a claim under his Uninsured Motorist (UM) coverage, and State Farm refused that claim on the ground that the policy did not provide coverage for injuries which were not caused by an accident arising out of the ownership, maintenance, or use of an uninsured motor vehicle. Hence, the Montana Supreme Court ultimately considered two issues: (1) Was the injury caused by an "accident"? and (2) did it arise out of the use of an uninsured motor vehicle?

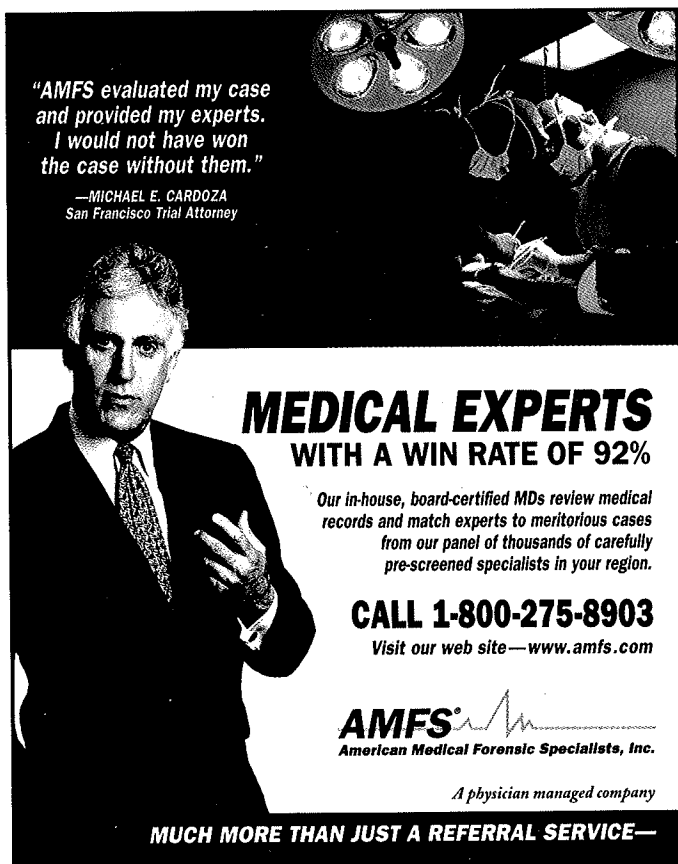
The court found "accident" to be ambiguous, because it was unclear from whose vantage point it was defined. The court held that, for purposes of UM coverage, whether an "accident" has occurred must be viewed from the standpoint of the insured, so that the intentional act of another may be an "accident" for the insured. The court further held that, "for purposes of UM coverage, an insured's injuries 'arise out of the use' of an uninsured vehicle if the injuries originate from, or grow out of, or flow from the use of the uninsured vehicle." Consequently, Wendell had been injured in an "accident" arising out of the use of an uninsured motor vehicle.

Greg Skakles secured compensation for his client and a good piece of law for plaintiffs' lawyers. *Wendell* is important to plaintiffs' lawyers who will face the frustration of attempting to find a source of compensation for victims of intentional conduct involving automobiles. Consider, for example, the implications of this case for insurability of injuries arising from sexual assaults in vehicles, road rage, and robberies involving motor vehicles.

Conclusion

Securing adequate compensation for victims of intentional torts is often hopeless. Commonly, the only asset available to the plaintiff in settlement or satisfaction of a verdict is an assignment of whatever rights the tortfeasor has for defense and indemnity under a casualty insurance policy. In a case where the tortfeasor's conduct may be deemed by the insurer to be intentional, it is important to know how to plead and develop the facts so that the claim comes within the coverage for an "occurrence" which is defined as "an accident" and to avoid the intentional acts exclusion of the policy. ■

1. *Wendell v. State Farm Mutual Auto. Ins. Co.*, 974 P.2d 623, 626 (Mont. 1999).
2. *Smith v. State Farm Ins. Co.*, 870 P.2d 74, 76 (Mont. 1994).
3. Insurance Services Office, Inc., form CG 00 01 10 93.
4. Insurance Services Office, Inc. form HO 00 03 04 91.
5. Insurance Services Office, Inc. form CA 00 01 12 90.
6. 798 P.2d 130 (Mont. 1990).
7. 765 P.d. 712 (Mont. 1988).
8. *Grindheim v. Safeco Ins. Co. of America*, 908 F.Supp. 794 (D. Mont. 1995); *Stillwater Condominium v. American Home Assur. Co.*, 508 F.Supp. 1075 (D. Mont. 1981).
9. 43 F.Supp.2d 1121 (D.Mont. 1999).
10. 676 P.2d 203, 205 (Mont. 1984).
11. See e.g. *St. Paul Ins. Co. v. Talladega Nursing Home, Inc.*, 606 F.2d 631 (5th Cir. 1979).
12. 679 P.2d 1217, 1223 (Mont. 1984).
13. 663 P.2d 338 (Mont. 1983).
14. 597 P.2d 720 (Mont. 1979).
15. *Strainer*, 663 P.2d at 341.
16. Keeton & Widiss, INSURANCE LAW, § 5.4(e)(6) at 539 (student ed. 1988).
17. 997 F.Supp. 1356 (D.Mont.1998).
18. 836 P.2d 37 (Mont. 1992).
19. 711 P.2d 826 (Mont. 1985).
20. 908 F.Supp. 794 (D.Mont. 1995).
21. *Id.* at 801-02.
22. 845 P.2d 746, 749 (Mont. 1993)(citing *Northwestern National Cas. Co. v. Phalen*, 597 P.2d 720, 726 (Mont. 1979).
23. 764 P.2d 1276 (Mont. 1988).
24. 579 P.2d 1015 (Wash. 1978).
25. 785 P.2d 192 (Mont. 1990).



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