I Did Not Expect That! The CGL Exclusion for Expected or Intended Injury

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Raised with three other siblings (an older sister and two younger brothers), the lament "I didn't mean it!" frequently echoed through our ranch house. Of course, this rather feeble excuse was offered repeatedly on the trip to the medical emergency room to treat one of us who received a minor injury when we acted against strict instructions (Don't bounce on your bed! It is NOT a trampoline!).

Whether the medical treatment was a butterfly bandage or the dreaded stitches, one (or all) of us had acted intentionally, but truly did not intend the outcome (the inevitable scolding—we were less concerned with the injury—but we didn't intend that, either). Was this an accident? Who knew that my brother would bounce forward and not straight up? Of course, my parents always said they expected it, in retrospect, of course! It was an accident waiting to happen, they said, and we were old enough to expect this sort of thing too.

Why is any of this important? How the Insurance Services Office, Inc. (ISO) commercial general liability (CGL) insurance policy applies to intentional acts or to deliberate harm or to bodily injury or property damage that is expected are often threshold questions as to whether coverage exists. There is no "right" answer for all situations. Certain jurisdictions interpret the same words differently. Moreover, a slight change of facts may completely change a court's view as to the application of coverage.

Occurrence

The Coverage A Insuring Agreement of the CGL has, for quite some time, required that any bodily injury or property damage be caused by an "occurrence." While a great deal of case law exists on what constitutes an "occurrence," most jurisdictions require some degree of fortuity.

Despite sports broadcasters' continual butchering of this term, most insurance professionals know fortuity is generally defined as accidental. *Black's Law Dictionary* (8th edition) states:

> **Fortuitous**—Occurring by chance. A fortuitous event may be highly unfortunate. Literally, the term is neutral, despite its common misuse as a synonym for fortunate.

However, the above does not address a very fundamental question. What is it that must be fortuitous? Does the act itself need to be unintentional, or does the result of the act—the injury or damage—need to be unintentional?

On one end of the spectrum is a Utah case, *Fire Ins. Exch. v. Rosenberg, 930 P.2d 632* (Utah App. 1997), in which the court declared that any injury caused by an intentional act cannot be an occurrence. In contrast, the New York Court of Appeals case of *Agoado Realty Corp. v. United Int'l Ins. Co.*, 95 N.Y. 2d 141 (2000), quoting from the *Miller v. Continental*, 40 N.Y. 2d 675, 677 (1976), case stated:

> As we have noted in *Miller*, true "accidents," taken literally, may be rare occurrences. Indeed, "in the strictest sense and dealing in the region of physical nature, there is no such thing as an accident." Thus, we concluded that, in deciding whether a loss is the result of an accident, it must be determined from the point of view of the insured, whether the loss was unexpected, unusual, or unforeseen.

The focus of this article is on **Exclusion a.—Expected or Intended Injury** and not the broader issues involved with an occurrence. This is not to suggest that there is not a profound connection between the two; there most certainly is. Further, it is difficult if not impossible to completely separate "occurrence" and Exclusion a. Nonetheless, the subject of this article is what is and what is not excluded by the CGL Exclusion a.

Exclusion a—Expected or Intended Injury

Unlike "occurrence," Exclusion a. is concerned with whether the bodily injury or property damage is either expected or intended. And the view of "expected or intended" is from the *standpoint of the insured* that is alleged to be liable for bodily injury or property damage. Put another way, in order to rely on this exclusion, the insurer must demonstrate bodily injury or property

damage was expected or intended by the insured—whether the *act itself* was intentional is not the measure of this exclusion.

Divergent Views

Similar to "occurrence," courts have put forth different views on how to apply Exclusion a. of the CGL policy. For example, some courts have focused almost exclusively on whether the insured intended to cause harm. The Second Circuit Court of Appeals in *City of Johnstown, NY v. Bankers Standard Ins. Co.*, 877 F.2d 1146 (2d Cir. 1998), illustrates this view:

> It is not enough that an insured was warned that damages might ensue from its actions, or that, once warned, an insured decided to take a calculated risk and proceed as before. Recovery will be barred *only if the insured intended the damages*, or it can be said that the damages were, in a broader sense, "intended" by the insured because the *insured knew* that damages would flow directly and immediately form the intentional act. [Emphasis supplied.]

Although Exclusion a. clearly states it applies to exclude coverage if the bodily injury or property damage is *either* expected *or* intended, disallowing insurers to rely solely on "expected" has been justified by the potentially broad application of "expected." The *City of Johnstown, NY*, case addresses this issue very directly:

> To exclude all losses or damages which might in some way have been expected by the insured could expand the field of exclusion until virtually no recovery could be had on insurance.

Other courts have echoed this belief and have stated excluding "expected" injury or damage may eliminate even foreseeable losses—removing coverage for negligent acts which generally are meant to be covered and for which the CGL has been purchased.

Following along the lines of intended harm as the deciding factor is the Kentucky case of *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2.d 273 (Ky. 1991):

> If injury was not actually and subjectively intended or expected by the insured, *coverage is provided even though*

> *the action giving rise to the injury itself is intentional and the injury foreseeable*. While the activity which produced the alleged damage may be fully intended, recovery will not be allowed *unless the insured intended the resulting damages*. **[Emphasis supplied.]**

Expected or Intended

Not all courts have ignored "expected" in Exclusion a. For example, the Supreme Court of Ohio in *Physicians Ins. Co. v. Swanson*, 569 N.E.2d 906 (Ohio 1991), stated:

> To avoid coverage under the expected or intended exclusion, the insurer must show that the insured's act was intentional *and* he expected the injury itself.

In the above case, the exclusion would apply even if the insured did not intend harm by virtue of an intentional act—provided the intentional act resulted in expected injury or damage. The Supreme Court of Ohio also commented that they were following the majority view as respects this issue.

In applying "expected" as a litmus test of the exclusion, most courts will look to whether the resulting injury or damage was practically or substantially certain to occur as a result of the insured's actions. As can be seen, this is a significantly higher standard than foreseeable injury or damage. In the California Appeals case of *Armstrong World Indus. v. Aetna Cas. & Sur.*, 52 Cal. Rptr. 2d 690 (Cal. App. 1996), the court discussed "expected or intended":

> Several out-of-state courts have determined that the two words "expected" and "intended" within the phrase "neither expected nor intended" language cannot be treated as synonymous. These courts have reasoned that the purpose of adding the phrase "neither expected nor intended from the standpoint of the insured" was to broaden the class of excluded injuries beyond intentional injuries. Accordingly, the courts have concluded that unless the terms are given different meanings, "expected" would serve no purpose within the exclusionary clause. In light of these authorities, we conclude that in the present

> case the exclusion within the Commercial Union policy for "expected" injuries applies to injuries that the *insured subjectively knew or believed to be practically certain to occur even though the insured did not act for the purpose of causing injury*. **[Emphasis added.]**

Other courts may have a different standard. "Expected" may be judged by whether the natural and probable consequences of the act result in injury.

In the Kansas Supreme Court case of *Harris v. Richards*, 867 P.2d 325 (Kan. 1994), a defendant fired two shotgun blasts into the back window of a pickup truck he knew was occupied. Instead of hitting his ex-wife (who he apparently intended to shoot), the shots hit another person, who the insured maintained was shot by accident. The courts found coverage was not provided as the injury was the "natural and probable consequences" of the insured's actions.

Subjective or Objective Standard

In determining whether injury or damage was expected or intended, two approaches are generally applied, but usually with a caveat.

Objective Standard

This standard would determine whether the insured intended injury or expected injury not from the view of the insured, but from the view of a "reasonably objective person." In other words, the question is not what the insured actually intended or expected, but rather what an objectively reasonable person would have intended or expected in the same circumstances.

One of the obvious advantages to the objective standard is avoiding self-serving testimony by an insured after the injury or damage has taken place. However, Exclusion a. is quite clear and does not support the objective standard—the injury or damage must be expected or intended from the standpoint of the insured. Due to this wording, the majority view of the courts is the subjective standard is to be applied.

Subjective Standard

Simply put, and consistent with the Exclusion a. wording, the actual, subjective intent, or expectation of the insured is the chief consideration.

Caveat

In general, the law will infer intent to cause harm or injure for certain types of acts. For example, most states will consider child molestation or sexual assault as acts of intentional injury or harm, subjective intent of the insured to the contrary.

Coverage for Other Insureds

It is not unusual for a claim to be made not only against one insured, such as an employee, who did commit an act in which injury was intended, but also against the employer of that employee, also an insured under the CGL insurance policy. For example, in the New York Appeals Court case of *RJC Realty Holding Corp. v. Republic Franklin Ins. Co.*, 2 N.Y. 3d 158 (N.Y. 2004), a masseur of a spa was alleged to have committed a sexual assault against a customer of the spa. Claim was made against both the masseur and the employer, RJC. The court reasoned:

> … the alleged perpetrator of the assault was the insured's employee. If, as we must assume for the present purposes, the assault occurred at all, it was obviously expected or intended by the masseur, and not an accident from his point of view. Thus, the critical question is whether the masseur's expectation should be attributed to his employers, RJC. The parties here have agreed that the policy would cover only an "accident" and would not apply to certain acts "expected or intended" by RJC. When they did so, they could reasonably have anticipated that the rules of respondeat superior would govern the question of when a corporate entity is deemed to expect or intend its employee's actions. Since the masseur's actions here were not RJC's actions for the purposes of the respondeat superior doctrine (the masseur departed from his duties for solely personal motives unrelated to the furtherance of RJC's business), they were "unexpected, unusual and

> unforeseen" from RJC's point of view, and were not "expected or intended" by RJC. Accordingly, they were an "accident," within the coverage for the policy, and were not excluded by the "expected or intended" clause.

The above case also implicitly recognizes the "Separation of Insureds" condition of the CGL policy, which states that:

> Except with respect to the Limits of Insurance, and any rights and duties specifically assigned in the Coverage Part to the first Named Insured, this insurance applies:
> b. Separately to each insured against whom claim is made or "suit" is brought.

In other words, a CGL exclusion may apply to one insured but not to another insured for the same incident or event, as was the ruling in the RJC case. It is also worth noting that the RJC court determined that the masseur had "departed from his duties for solely personal motives unrelated to the furtherance of RJC's business." Should the courts have found that RJC had participated in, condoned, or allowed such actions, the decision may have been very different with respect to whether the courts would attribute the intentional act to RJC.

Exception to the Exclusion

Intentional harm to others may still be covered by the CGL in some limited circumstances. A close reading of exclusion reveals an express exception—Exclusion a. does not apply to bodily injury:

> 1) resulting from "reasonable force"
> 2) while protecting persons or property

Both of the above elements must be present—the intentional harm must be caused by an act to protect persons or property *and* the bodily injury is covered only if "reasonable force" was used. Damage to property is not an exception to Exclusion a.

Black's Law Dictionary addresses the concept of "reasonable force" by defining it as:

> Force that is not excessive and that is appropriate for protecting oneself or one's property. The use of reasonable force will not render a person criminally or *tortiously liable*. [Emphasis supplied]

The inference that can be drawn from *Black's* is that an insured would not be liable in tort for the use of reasonable force. Therefore, the major benefit of the exception to Exclusion a. is the insurer will likely be required to provide a defense. If it is ultimately determined the insured used reasonable force in self-defense, the insured will not be liable and therefore the insurer will not be obligated to pay damages; if it is ultimately determined that the insured used excessive force in self-defense, the exception does not apply (and thus Exclusion a. does apply), and no damages will be paid by the insurer on behalf of the insured.

Conclusion

The scope of **Exclusion a. Expected or Intended Injury** varies greatly not only with the facts of the situation but also with the jurisdiction interpreting the CGL policy.

Some jurisdictions will require that the insured subjectively intended to harm others for the exclusion to apply. Other jurisdictions will also consider whether the insured "expected" the injury or damage, but will deem injury to be "expected" only if the insured subjectively knew that the injury or damage was *substantially certain* to result from their acts. Still other jurisdictions will take into consideration whether the injury or damage was the natural and probable consequence of the actions of the insured. And certain acts, such as sexual abuse or molestation, are often presumed to be acts of intentional harm, subjective intent notwithstanding.

Finally, whether the intentional harm will be attributed to other insureds, such as an employee's employer, depends heavily on the facts of the incident. For example, if the employer instructs their employees to use force in the performing their job (such as a bouncer in a bar), intentional injuries will likely be attributed to such an employer.

Of course, the *RJC* case facts are such that the court determined the employee was not furthering the purpose of their employer's business and thus the intentional harm was not attributed to the employer. And the CGL separation of insurance condition does require the insurer to view the exclusions on the policy separately for each insured.

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