Coverage

Homeowner's act of assault and battery, even if due to mistaken, unreasonable belief in need for self-defense, is not within policy coverage for accidents.

Delgado v Interinsurance Exch. (2009) 47 C4th 302, 97 CR3d 298

Plaintiff was assaulted by a third party, who had a homeowner's policy. As part of a settlement, the homeowner assigned his claims for coverage under his insurance policy to plaintiff. Plaintiff then sued defendant, the homeowner's insurance company, alleging that his injuries fell within the policy's coverage for accidents. Specifically, plaintiff alleged that the assault and battery had been the result of the homeowner's mistaken and unreasonable belief in the need for self-defense. Defendant successfully demurred.

The supreme court affirmed the trial court's decision. First, plaintiff erroneously contended that whether an event is unexpected, unforeseen, and undesigned, *i.e.*, accidental, must be determined from the injured person's perspective independent of the insured's intention. However, as the court opined in *Geddes & Smith, Inc. v St. Paul Mercury Indemn. Co.* (1959) 51 C2d 558, 334 P2d 881, it is the unexpected, unforeseen, and undesigned nature of the *injury-causing event* that determines whether there is an accident within the policy's coverage. Thus, a deliberate act causing an injury is not an accident. *Hogan v Midland Nat'l Ins. Co.* (1970) 3 C3d 553, 563, 91 CR 153. Moreover, under California law, the word "accident" in the coverage clause of a liability policy refers to the conduct of the insured for which liability would be imposed.

Plaintiff also erroneously argued that an insured's mistaken and unreasonable belief in the need for self-defense converts an assault into an accidental event. However, when the insured's acts are intentional, the conduct would not be deemed an accident. See *Merced Mut. Ins. Co. v Mendez* (1989) 213 CA3d 41, 261 CR 273. The accident coverage would only apply if something unexpected happened and caused the injury *after* the deliberate acts of the insured. Therefore, under the facts of this case, the insurance company had no duty to defend.

COMMENT: The California Supreme Court has issued a unanimous opinion defining the word "accident" as it is commonly used in liability insurance policies. It holds that it is an "an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause." 47 C4th at 308. As such, the court holds that acts in self-defense are not accidents.

It seems simple enough until we start talking about the seminal case of *Gray v Zurich Ins. Co.* (1966) 65 C2d 263, 54 CR 104, in which the insured was alleged to have "willfully, maliciously, brutally and intentionally assaulted" the plaintiff. In *Gray,* the court held that there was a duty to defend the insured. The policy did not contain the accident language, but it did contain an exclusion for intentional acts, which the court equated with the exclusion for willful acts under Ins C §533. In *Gray,* the court held that it was possible that the insured was acting in self-defense and thus his acts would not be intentional and coverage would lie. Here, Delgado had argued that the unreasonable belief in the need for self-defense was, in the words of *Gray,* "nonintentional tortious conduct" and should then be considered an accident. 47 C4th at 312. The court states that *Gray* held that "an unreasonable belief in the need for self-defense . . . makes the act "nonintentional.'" 47 C4th at 314. *Gray* did not say, however, that such a belief would convert an intentional act into an unintentional act. I see little difference between "nonintentional" and "unintentional," and I doubt most persons, be they laypersons or attorneys, could either. I do think that the best description of "accident" is from *Merced Mut. Ins. Co.,* 213 CA3d at 50, cited by the court, that "an 'accident' exists when any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity."—*Arnold R. Levinson*

COMMENT: The highly anticipated *Delgado* opinion has come down, and it turns out not to be the blockbuster either policyholders or insurers had hoped for. On the insurer side, there was some thought—perhaps fanciful—that the California Supreme Court would give carriers some relief by retrenching a bit from the "any potential for coverage" standard of *Gray v Zurich Ins. Co., supra.* Policyholders, by contrast, hoped that the supreme court would affirm the court of appeal on all counts, thus confirming and validating the breadth of *Gray*'s holding. The court did neither.

In contrast to *Gray,* which dealt with the construction of the policy's exclusion for intentional injuries, the issue in *Delgado* was whether the alleged act—an assault committed by the insured based on an unreasonable belief that he was acting in self-defense—was within the scope of a liability policy's insuring agreement. The insurer denied coverage, including any defense obligation, on the ground that the assault did not constitute an "accident," and thus was not an "occurrence" within the meaning of the policy. The trial court agreed, but the court of appeal reversed.

The California Supreme Court reversed the court of appeal, rejecting the plaintiff's contention that "the act fell within the policy's definition of 'an accident,' because from the perspective of the injured party the assault was 'unexpected, unforeseen, and undesigned.'" *Delgado,* 47 C4th at 308. Looking at the controlling case law, the court held that whether there was an "accident" was not to be determined from the injured party's perspective. 47 C4th at 308. According to the court, if it accepted the plaintiff's argument that the existence of an "accident" could be "based solely on whether the injury-causing event was expected, foreseen, or designed by the injured party, then intentional acts that by no stretch could be considered accidental" nevertheless would constitute an "accident" and fall within the policy's coverage. 47 C4th at 310. Under this reasoning, "even child molestation could be considered an 'accident' within the policy's coverage, because presumably the child neither expected nor intended the molestation to occur." 47 C4th at 310.

In light of this analysis, an insured's unreasonable, subjective belief in the need for self-defense does not convert a purposeful act intended to inflict injury into an accident. To the contrary, under California law, an injury-producing event is not an "accident" when all of the

acts, the manner in which they are done, and the objective accomplished occur as the actor intended. 47 C4th at 311. Nor does it matter that the victim's provocative acts were "unforeseen and unexpected from the perspective of the insured." 47 C4th at 314. The term "accident" refers to the acts of the insured, not the victim, and the victim's antecedent acts cannot turn an intentional act into an accident. 47 C4th at 315. Accordingly, "an insured's unreasonable belief in the need for self-defense does not turn the resulting purposeful and intentional act of assault and battery into 'an accident' within the policy's coverage clause." 47 C4th at 317.—*Susan M. Popik*

Duty to Defend

Because insurer denied coverage and refused to defend, it did not have right to intervene in litigation between insured and third party.

Hinton v Beck (2009) 176 CA4th 1378, 98 CR3d 612

The insured was sued by a third party for personal injuries. The insurance company denied the insured's claim and refused to defend the insured in the third party's action. Subsequently, the insured and the third party entered into an agreement that plaintiff would not execute judgment against the insured in exchange for an assignment of the insured's rights against the insurer. The court entered a default judgment against the insured. The insurance company sought leave to file a complaint in intervention to determine whether the default was void. The third party successfully moved to strike the complaint in intervention.

The Third District Court of Appeal affirmed. A party may intervene in litigation when, among other things, it has a direct and immediate interest in the litigation. *Truck Ins. Exch. v Superior Court* (1997) 60 CA4th 342, 346, 70 CR2d 255. A direct and immediate interest is one that adds to or detracts from the intervener's legal rights without reference to rights and duties not involved in the litigation. 60 CA4th at 349. When an insurer denies coverage and refuses to defend its insured, it has lost its right to control the litigation and, therefore, does not have a direct interest to warrant intervention. *Eigner v Worthington* (1997) 57 CA4th 188, 196, 66 CR2d 808. The policyholder who is denied a defense for covered claims may make a reasonable settlement with the plaintiff, in good faith, and then maintain or assign an action against the insurer for breach of its defense duties. *Hamilton v Maryland Cas. Co.* (2002) 27 C4th 718, 728, 117 CR2d 318.

COMMENT: This is another case discussing the consequences of an insurer's wrongful refusal to defend. In such circumstances, the insured has the right to agree to an uncontested judgment wherein the insured's liability and damages are determined in an uncontested trial in return for the claimant granting the insured a covenant not to execute and an assignment of claims against the insurer. The parameters of this rule are generally set out in *Pruyn v Agricultural Ins. Co.* (1995) 36 CA4th 500, 515, 42 CR2d 295, and this is what the claimant and the insured did here. The insurer then sought to intervene in the action, but it was too late. The insurer had already abandoned the insured, and the insured and the claimant had settled in a manner contemplating an uncontested trial with an assignment. Now that the gun was pointed directly at the insurer instead of the insured, the insurer decided that it had a real interest in the case. As the court explains (176 CA4th at 1385),

> . . . the insurer, is in no position to complain about this circumstance when it has consistently denied coverage and refused to provide [the insured] with any defense. When an insurer denies coverage and a defense, the insured is entitled to make a reasonable noncollusive settlement without the insurer's consent and may seek reimbursement for the settlement amount and for any breaches of the covenant of good faith and fair dealing.
> —*Arnold R. Levinson*

COMMENT: *Hinton* is yet another reminder to insurers of the risks they face when disclaiming a duty to defend or indemnify their insureds. In this case, the Third District Court of Appeal held that the trial court did not abuse its discretion in refusing to allow an insurer to intervene in an action between its insured and the injured claimant when the insurer had previously denied coverage and refused to defend the insured. Surveying decisions in California and elsewhere, the court held that in this circumstance, the insurer does not have the requisite "interest in the matter in litigation" to justify intervention under CCP §387(a). 176 CA4th at 1382 n3.

The fact that the insurer may ultimately have an obligation to pay any judgment entered against the insured is not sufficient to create this interest. In reaching this result, the court declined to reach the insurer's arguments that its intervention would not enlarge the issues or that its need for intervention outweighed the parties' opposition, finding the insurer's lack of interest dispositive. Moreover, though the court reiterated that the decision of whether to allow intervention is discretionary, the court's analysis makes plain that it will be the unusual circumstance when a nondefending carrier will be accorded that privilege. 176 CA4th at 1382.—*Susan M. Popik*

Medical Coverage

The "made whole" rule, as applied to med-pay policies, does not apply to attorney fees expended by insured.

21st Century Ins. Co. v Superior Court (2009) 47 C4th 511, 98 CR3d 516

The insured was injured in an automobile accident. She paid her medical bills under her med-pay policy. The insured then settled for three times the amount of her injuries with the third party. Under the terms of the policy, the insurer requested reimbursement. The insured reimbursed the insurer minus a certain amount representing the insurer's prorata share of her attorney fees. Subsequently, the insured sued the insurer based on her contention that, under these circumstances, she had not been "made whole." The insurer unsuccessfully demurred. The court of appeal reversed, holding that the "made whole" requirement in the med-pay insurance context does not apply to attorney fees.

The California Supreme Court affirmed the decision of the court of appeal. Although California recognizes that the "made whole" rule applies to med-pay reimbursement