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