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Illusory coverage

THE HOMEOWNER'S OR BUSINESS POLICY MAY INCLUDE "PERSONAL INJURY" COVERAGE. EXACTLY WHAT DOES THAT INCLUDE, AND IS IT ILLUSORY COVERAGE?

A client comes into your office and says that he has been sued for wrongful eviction. You look at his insurance policy and it contains coverage for "personal injury" which covers, as part of the insuring agreement, claims for "wrongful eviction" or "invasion of the right of private occupancy." You think: "Great, the client has insurance for this lawsuit."

Or, you file a suit for wrongful eviction and ask for the landlord's insurance policy. He produces it, and it says there is coverage for "personal injury." You think: "Great, there is insurance money to pay to settle the case or cover a verdict."

Or, you personally decide to buy rental property. You go to your insurance broker and ask for coverage for the property. He sells you a "landlord's policy" which contains "personal injury" coverage. You then get sued by a tenant you have evicted. "No problem," you say to yourself, "I am covered."

Not so fast. In each of these situations there may *not* be coverage because some insurers have taken to selling coverage for "personal injury" claims that is illusory.

Illusory personal-injury coverage

If one of these scenarios occurred only a few years ago, there would have been at least a defense provided and, in most instances, the carrier would pay most, or all, of the settlement. More recently, however, some carriers have resorted to a drafting trick to allow them to sell "personal injury" coverage which is illusory. It lets them look like they are selling "personal injury" coverage, continue charging a premium for "personal injury" coverage, but avoid paying for any claims, or even a defense under the coverage.

First, it is important to get the nomenclature straight. Most injury lawyers use the terms "bodily injury" and "personal injury" interchangeably to refer to someone who has filed an injury seeking damages for bodily injury. In the insurance world, however, "bodily injury" and "personal injury" are two distinct types of coverages that cover different types of claims.

Definitions

An example of a standard definition for "bodily injury" in a liability policy is: "…bodily harm, sickness or disease, including required care, loss of services and death that results."

A standard "personal injury" definition (in older policies) is: "Personal injury" means injury arising

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out of one or more of the following offenses:

a. False arrest, detention, or imprisonment or malicious prosecution;

b. libel, slander or defamation of character; or

c. invasion of privacy, wrongful eviction or wrongful entry.

"Personal injury" coverage is usually not included in the basic form of a general liability policy that most carriers sell. It has to be added by endorsement or by adding or switching to a different form of policy (like an umbrella). Adding "personal injury" coverage almost always increases the premium.

Up until recently, the definition of "personal injury" that most carriers used was along the lines of the language set forth above. (There was some variation in the "personal injury" definition, but it would generally cover the types of torts, aka "offenses" listed above.) The "personal injury" policy language set forth above simply requires that the particular tort (called an "offense") be committed, or be alleged to have been committed. For instance, if someone is alleged to have caused wrongful eviction, the claim should be covered. If someone wrongfully detained or imprisoned another, the claim should be covered. In times past, there was some concern about the interplay between coverage for intentional torts and Insurance Code section 533 which prohibits coverage for willful acts of the insured, but generally those disputes revolved around claims for malicious prosecution or some other claim which involved wrongful intent.

In contrast, the trigger of coverage for bodily injury claim is an "occurrence." "Occurrence" is usually defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." By requiring that injury occur as a result of an accident, that also usually means that the injuries are associated with a claim of negligence. As our Supreme Court has explained, however, negligence and an accident are not necessarily the same thing. (See *Delgado v. Interinsurance Exchange. Of Auto. Club of S. Cal.* (2009) 47 Cal.4th 302.

Gutting personal-injury coverage

More recently, however, carriers have begun to gut their personal-injury coverage. They have done this by conflating personal-injury coverage with bodily-injury coverage. They are starting to require that essentially all claims against their insureds be "caused by an occurrence." Thus, when personal-injury claims come in, rather than acknowledge coverage and retain defense counsel, insurers are reserving their rights or refusing to defend entirely. Their reasoning, they say, is that it is impossible to have an accidental "wrongful eviction," "defamation," etc. According to them, these are deliberate acts that require planning and intent. This recent change in policy language and interpretation has come as an unpleasant surprise to insureds, as well as plaintiff and defense counsel. It was slipped into policies over the last few years without any warning.

As the scenarios at the top of this article suggest, one area where the change to personal-injury coverage has been having a major impact is landlord-tenant litigation. The common refrain from insurers is that wrongful evictions are only partially covered (or not covered at all) because the defendant's alleged conduct of evicting a person or persons from a dwelling is not an "accident," even if the defendant believes the conduct was justified. Insurers find support for their argument in two cases: *Delgado v. Interinsurance Exch. Of Auto. Club of S. Cal.* (2009) 47 Cal.4th 302 and *Swain v. Cal. Cas. Ins. Co.* (2002) 99 Cal.App.4th 1.

Delgado arose out of a fistfight. The "loser" sued the insured "winner," seeking compensation for his injuries. He alleged that the defendant intentionally assaulted and battered him, and also that the defendant "unreasonably acted in self defense" when punching and kicking the plaintiff. The defendant's insurer refused to defend, the plaintiff dismissed his intentional tort claim, and the case proceeded to judgment (a victory for the plaintiff). The plaintiff took an assignment of the defendant's claims against the defendant's insurer and sued it to collect the judgment. After the Court of Appeal found in the insured's favor, the California Supreme Court granted review.

The Supreme Court determined that the insured's deliberate conduct of punching and kicking the plaintiff was not covered. The court's analysis focused on the definition of "occurrence," which the policy at issue defined as "an accident ... which, during the policy period, results in bodily injury...." (*Delgado*, 47 Cal.4th at 308.) Rather than examining the insured's overall conduct, the Court focused on the conduct most "closely connected" with the harm. Quoting from a case involving a sexual assault where the insured made a similar argument (that he mistakenly believed the plaintiff had consented), the Court explained: "An accident, however, is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage." (*Delgado,* 47 Cal.4th at 315 (quoting *Merced Mutual Ins. Co. v. Mendez* (2000) 213 Cal.App.3d 41, 50).) It emphasized that in order for there to be an accident, the unexpected or unforeseen happening(s) must be "events in the causal chain *after* the acts of the insured . . . ." (*Ibid.*) (emphasis in original). Therefore, in *Delgado*, the insured's mistaken belief in the right to self defense (which arose before he struck the plaintiff) could not convert the insured's conduct into an accident for purposes of coverage.

As a contrasting example, the court quoted further from *Merced Mutual,* utilizing that court's hypothetical of an auto accident caused by speeding. The court explained: "When a driver intentionally speeds and, as a result, negligently hits another car, the speeding would be an intentional act. However, the act directly responsible for the injury – hitting the other car – was not intended by the driver and was fortuitous. Accordingly, the occurrence resulting in injury would be deemed an accident." (*Delgado*, 47 Cal.4th at 316 (quoting *Merced Mutual, supra*, 213 Cal.App.3d at 50).) On the other hand, of course, an insured who

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intentionally rams his or her car into another car will be guilty of intentional conduct and would not be able to call that crash an accident.

The Court acknowledged that "[a]ny given event, including an injury, is always the result of many causes." (*Delgado*, 47 Cal.4th at 315 (quoting 1 Dobbs, The Law of Torts (2001) § 171, p. 414).) By shifting the focus of "accident" away from the reasonableness of the insured's conduct, and moving it to the causal chain, the Court indicated that it was trying to provide more certainty and objective criteria for determining what is an accident. (*Delgado*, 47 Cal.4th at 315-16.) That focus, however, is what creates challenges in personal-injury coverage and landlord-tenant disputes. (***Editor's note:*** The Supreme Court heard argument on March 6, 2018, in *Liberty Surplus Lines, Inc. v. Ledesma & Meyer Construction Co*., a case which asks the Court to conclude that the above-cited rule in *Merced Mutual v. Mendez* does not correctly explain what constitutes an accident. A decision will be issued by June 9, 2018.)

The *Swain* decision (which, incidentally, the *Delgado* court cited), involved a wrongful-eviction claim. In that case, a family purchased a home in Berkeley, California, that was occupied by residential tenants. The purchasers bought homeowners insurance for the house, which contained defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: [¶] a. Bodily injury; or [¶] b. Property damage." (*Swain,* 99 Cal.App.4th at 7.)

The purchasers proceeded to evict the family living at the house on the basis that they supposedly had family members who were going to move in. They never did. Instead, a few months after the original tenants moved out, the property owners re-rented the house to other tenants. The original tenants sued. The insurer for the property owners refused to defend them. The case settled after a mediation, with the property owners paying $125,000 of their own money. They then sued their insurer.

The court determined that there was no coverage. It explained that the act of evicting the family from the house was not an accident. Rather, an eviction "inflicts an obvious harm to an important interest – the claimant's interest in a leasehold . . . . The harm is obvious, it is substantially certain to occur, and in the eyes of the law, it is intentional." (*Swain*, 99 Cal.App.4th at 9.)

An important distinction between the policy in *Swain* and the typical policies that residential landlords have is that the policy in *Swain* was a homeowner policy that did not contain "personal injury" coverage or otherwise specifically cover claims of wrongful eviction. However, that has not stopped insurers from making the same argument when their landlord insureds make "personal injury" coverage subject to the definition of "occurrence." Consequently (although there have not been changes in marketing or pricing), claims against landlords that were clearly covered a few years ago are now being defended under reservations of rights or not at all.

This trend in coverage negatively affects litigants on all sides. Some landlords are denied coverage entirely, and those who get a defense are being asked to contribute significant sums of money to resolve cases that would not have required them to make any financial commitment in the past. Tenants and former tenants are being forced to either accept smaller settlements or unnecessarily try cases because defendant landlords cannot afford to make sufficient contributions to settlement. The only ones who benefit from the state of affairs are the insurers.

But is it illusory? And, so what if it is?

The application of the "occurrence" requirement to personal injury claims raises the question of whether the coverage in landlord and other policies is illusory. If a wrongful eviction (as opposed to a constructive eviction, which can be caused by things like fires or other events that damage the building) always involves intentional conduct, how could it ever be an accident covered by the policy? The problem becomes even more obvious when looking at the other forms of personal injury. Malicious prosecution by definition requires the defendant to have acted with an improper purpose and without a reasonable belief in the righteousness of the claim. (See CACI 1501 and supporting authorities.) How can filing a lawsuit without reasonable belief in your claim be an accident? Defamation claims also require that whoever publishes the damaging statements either know they are false, have serious doubts about their truth, or fail to use reasonable care to determine whether they are true. (See CACI 1700-1705.) How can uttering false statements without regard for their truth and knowing that they will likely expose the subject to ridicule or shame be accidental?

Is personal injury coverage being wiped out? Unfortunately, the newness of the change to the policy language means there is no authority on point yet. The question of illusory coverage has come up before, however, so we do have some useful guidelines. In 2001, the California Supreme Court decided the case of *Safeco Ins. Co. of Am. v. Robert S.* (2001) 26 Cal.4th 758. That case involved a shooting. A teenage boy at home with his friends found a .22-caliber Beretta pistol in the pocket of his mother's coat. Having been taught how to safely handle the somewhat similar 9mm model, he attempted to unload the gun by removing the magazine and pulling back the slide. Thinking it was unloaded, he pulled the trigger. The gun fired and killed the boy's friend. He was later convicted of involuntary manslaughter in juvenile court. The victim's parents sued the shooter and his parents for wrongful death.

Safeco responded to the wrongful lawsuit by filing a declaratory relief action against its insureds. It contended that because its policy excluded coverage for "illegal acts," there was no coverage for the shooter or his parents. The trial court found in favor of the insureds, interpreting "illegal acts" as meaning "intentional legal acts." The Court of Appeal reversed, holding that "illegal" meant "unlawful," including any act in

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violation of civil or criminal law, regardless of intent.

The Supreme Court reversed the Court of Appeal and affirmed the trial court's decision. The Supreme Court's decision turned, in large part, on the unreasonable consequences of the Court of Appeal's interpretation of the policy, which would have rendered the policy illusory. It explained that ". . . Safeco's homeowners policy promised coverage for liability resulting from the insured's negligent acts. That promise would be rendered illusory if, as discussed above, we were to construe the phrase 'illegal act,' as contained in the policy's exclusionary clause, to mean violation of any law, whether criminal or civil."(*Robert S.*, 26 Cal.4th at 765.) After examining various potential definitions of the term "illegal," and determining they all conflicted with the reasonable expectations of the insureds, the Court concluded that "the illegal act exclusion cannot be reasonably given meaning under established rules of construction or contract, it must be rejected as invalid." (*Robert S.*, 24 Cal.4th at 767). Although *Robert S.* does not deal with personal-injury coverage, we now know that the consequence of having policy language that makes coverage illusory is deletion of the offending language.

Uhrich v. State Farm

Two years after *Robert S.*, the Court of Appeal decided a case that gives us more guidance on the question of illusory coverage in the context of personal injury. (*Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598.) *Uhrich* involved allegations of malpractice and other misconduct against a psychologist, including an improper business relationship with a patient and various bad acts intended to set the patient up for arrest and/or criminal prosecution. The patient sued, alleging several causes of action against the doctor, including "personal injury" claims of malicious prosecution, false imprisonment, assault, defamation, and invasion of privacy. The doctor eventually pleaded guilty to felony conspiracy to obstruct justice. The doctor's insurer, State Farm, reacted by withdrawing its defense on the grounds that the doctor's alleged conduct was not an accident. The civil case against the doctor proceeded to trial, resulting in a seven-figure verdict for the plaintiff.

The plaintiff sued State Farm to collect on the judgment. The Court of Appeal affirmed summary judgment in favor of State Farm on several grounds, one of them being the issue of illusory coverage. The plaintiff contended that there should be coverage for claims of assault, wrongful detention and defamation because those are inherently intentional torts expressly covered by the policy's "personal injury" language. The insured argued that to exclude coverage for those claims on the basis that they are intentional would make those coverages illusory. The Court's response is significant. It explained:

> But the torts Uhrich mentions can be committed via negligent conduct. A claim of assault may give rise to a duty to defend, because a jury could conclude the insured unreasonably responded to a perceived threat. . . . A wrongful detention could be found if a store detained a customer without reasonable cause. . . . Contrary to Uhrich's claim, an insured could be liable for defamation for negligently publishing a defamatory statement.

(*Uhrich*, 109 Cal.App.4th at 610 (internal citations omitted.)

According to the *Uhrich* court, because there were possible scenarios where the personal injury coverages could apply, they were not illusory. The analysis in *Uhrich* is important here because the Supreme Court's subsequent decision in *Delgado* seems to have overruled that line of reasoning. The *Delgado* decision eliminated the insured's unreasonable belief that their conduct is justified as a basis for finding that the conduct was accidental. In other words, it appears that the options that *Uhrich* provided as ways to find personal-injury coverage to be non-illusory are gone.

By eliminating the insured's state of mind as way of showing that conduct is accidental, it seems that the Supreme Court's *Delgado* decision has made it effectively impossible to provide personal injury coverage at all when it is tied to the definition of "occurrence." That would make the coverage illusory. If so, we are left with the question of what courts will do. (We do not know what the Supreme Court intended to do about personal injury coverage, because it did not cite *Uhrich* when it decided *Delgado*). Will our courts follow *Robert S.* and delete the offending language to give insureds the coverage they thought they were getting? Will our courts find ways to say there is still some personal injury coverage left as in *Uhrich* (and give insurers an out)? It is impossible to say.

What do we do about this?

The issue of whether the changes to personal injury coverage truly makes coverage illusory has not made its way through the courts. We do not know where the road will lead. So, when these issues arise, what do we do? Here are some helpful steps that we all can take to avoid being trapped, and deal with the issue of illusory coverage when it arises: When we file Complaints, keep them general, and use the word "accidental," not just "negligent" when describing defendants' conduct. An overly specific complaint could plead you out of coverage. Using the word "accident" helps target the parts of the policy that have coverage.

Find a defendant whose conduct is passive. A failure to supervise, a negligent entrustment, a failure to maintain something like a piece of property or equipment can be the kinds of accidental oversights that will keep a case within coverage. (***Editor's Note**:* This is the precise issue being addressed in the Liberty Surplus case referenced above.)

Always demand a copy of the defendant's policy as soon as possible. Defendants are required to produce it, and reading reveals exactly what a defendant's coverage problems are. That makes it possible to tailor discovery (both requests and responses) to avoid coverage problems. Also, it may be possible to request prior versions of the policy to see if there were changes to the relevant sections. If there were (for instance if new

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limitations were added), without a corresponding reduction in premium, then the new language may not be enforceable.

Ask about *Cumis* counsel. Often, when insurers reserve their rights they also have a conflict of interest with their insureds but want to save money by not retaining a second set of lawyers. By raising this issue with defense counsel, it will get back to the carrier, who will then have to evaluate it, and potentially appoint this additional counsel for the defendant. The possibility of having to appoint *Cumis* counsel not only creates financial pressure on the insurer to settle, it also helps ensure that the case proceeds in ways that preserve coverage.

Talk to clients about their landlord policies and umbrella policies. The kinds of changes addressed in this article are the kinds of changes that may have snuck by them. They may want to change carriers or obtain different endorsements for the policies they currently have.

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