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The Intentional Act Exclusion

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Résumé de l'article

L'exclusion des dommages causés intentionnellement par l'assuré est une exclusion légale – d'ordre public – et contractuelle. Tous les contrats d'assurance, y compris l'assurance responsabilité civile, ne répondent pas de la faute intentionelle ou volontaire de l'assuré. Il appartient à l'assureur d'établir que le dommage a été prévu ou voulu par l'assuré. Cet article passe en revue divers aspects problématiques, dans le contexte de cette exclusion : assaut, discrimination, molestation.

The Intentional Act Exclusion

by

the Legal Division of NAC Re Corporation[1]

L'exclusion des dommages causés intentionnellement par l'assuré est une exclusion légale — d'ordre public — et contractuelle. Tous les contrats d'assurance, y compris l'assurance responsabilité civile, ne répondent pas de la faute intentionelle ou volontaire de l'assuré. Il appartient à l'assureur d'établir que le dommage a été prévu ou voulu par l'assuré. Cet article passe en revue divers aspects problématiques, dans le contexte de cette exclusion : assaut, discrimination, molestation.

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The intentional act exclusion would probably win the prize as the currently most litigated provision of the homeowner's policy. Although the exact language varies across insurance policies, the general theme is that injury "expected or intended by an insured" is not covered. The exclusion has been at the center of assault and battery, discrimination and now child molestation cases, where the insured argues that there was no intent to injure and that coverage should be available. The intent issue is not limited to homeowner's policies; the occurrence definition and pollution exclusion of the CGL also hinge on the presence and extent of the policyholder's intent, and a growing line of decisions evidences disparate views. On the homeowner's side of the fence, however, the results are far more uniform. We review the legal trends for the conduct most often raising intentional act exclusion question, and then examine specific policy language that has influenced the result in several courts.

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Assault, Self-Defense, Insanity and Intoxication

The earliest challenges to the intentional act exclusion concerned assault and battery. The courts denied coverage absent other factors affecting intent. In arguing coverage, insureds have alleged that self-defense, intoxication and insanity precluded any true intent to harm another.

Self Defense

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Most but not all courts have held that the exclusion does not apply where the insured acted in self defense, even if excessive force was used against the injured aggressor. Although *California, Arizona, Michigan, Minnesota* and *Ohio* adopt the self-defense exception, there are still many courts holding that the insured acted deliberately to cause harm and that motive should not be considered. The *Florida* Supreme Court recently joined the minority by noting that the insurance policy does not distinguish between assaults and acts of self-defense; *Indiana, Washington* and *Iowa* also apply this reasoning. *State Farm Fire and Casualty Co. v. Marshall*, 554 So.2d 504 (Fla. Sup. Ct. 1989).

Insanity

Lack of mental capacity to form an intent is frequently cited as a means to avoid the exclusion. A growing number of jurisdictions recognize an insanity defense to the intentional act exclusion, including *Arizona, California, Florida, Illinois* and *New Jersey*. The test often applied is whether the insured was capable of forming the *intent to act,* and not whether the harm was intended. For example, when an insured shot a friend while suffering from delusions that he was acting under God's orders, the court found that he understood and intended the shooting, hence finding the exclusion applicable. *Johnson v. Insurance Co of North America*, 350 S.E.2d 616 (Va. Sup. Ct. 1986). See also *Allstate Insurance Co. v. Miller*, 438 N.W.2d 638 (Mich. Ct. App. 1989).

Another issue involves a minor's capacity to form an intent to harm. A split in opinion has already occurred. Courts in *Massachusetts* and *Michigan* have found intent for criminal acts despite the young age of the insured while a *Nevada* court held that knowledge of an adult cannot be inferred in a child. See *City of*

Newton v. Krasnigor, 536 N.E.2d 1078 (Mass. Sup. Ct. 1989) and *Allstate v. Jack S.*, 709 F.Supp. 963 (D. Nev. 1989).

Intoxication

It might seem inconsistent that in a society condemning drunk driving and drugs, courts would allow insurance coverage where the insured was voluntarily intoxicated or under the influence of drugs. However, a small number of jurisdictions led by *New Jersey, Georgia* and *Wyoming,* have recognized that intoxication can negate intent and therefore preclude application of the exclusion. See *Morris v. Farmers Insurance Exchange*, 771 P.2d 1206 (Wyo. Sup. Ct. 1989). However, courts from *Michigan, Minnesota* and *Wisconsin* have, in recent years, refused to allow the use of outside stimuli to become a defense to one's actions. One would expect that growing intolerance with drug and alcohol use to cause less acceptance of an intoxication exception to the exclusion.

Child Molestation, Communicable Diseases and Discrimination

Molestation

The more current challenges involve the very tragic cases of child molestation, where the insured's intent to harm the victim is at issue. To date, the vast majority of courts have held that intent to harm can be inferred from the nature of the act; the subjective intent of the insured is irrelevant for determining liability insurance coverage for child molestation injuries. The list of states with high or appellate courts adopting the inference rule include *California, Colorado, Florida, Michigan, Minnesota, Pennsylvania* and *Washington,* although the California districts are not uniform in their rulings. The *Maine* Supreme Court recently summarized the rationale for the majority rule, when it stated that "the intent to commit the [sexual molestation] act inherently carries with it the intent to cause the resulting injury." *Perreault v. Maine Bonding & Casualty*, 568 A.2d 1100 (Me. Sup. Ct. 1990). The minority view is that intent to harm should not be inferred from the intent to act, but even then the insured must overcome a strong presumption that intent was present. A bill was passed by the California legislature (SB 1061) mirroring the minority view and providing some child

molesters with liability coverage under homeowner's policies. The bill was vetoed by the governor. (For a discussion of "repressed memory syndrome" and statutes of limitations in molestation cases, see FYI.)

Communicable Disease

The transmission of herpes and AIDS has opened up a new challenge to the intentional act exclusion, and an interesting question. If the insured intended the sexual act, should a court infer that intent to pass the disease was also present? Only a few courts have
544 addressed it, but all have held that a question of fact exists as to whether the insured intended to transmit the disease. As a result, insurers in *California, Minnesota* and *New York* have defended insureds in such cases. In *State Farm Fire & Casualty Co. v. Eddy*, No. H005255 (Cal. Ct. App. Dist. 6, March 13, 1990), the court would not infer intent to harm if it was unclear whether the insured knew of his herpes infection. If he had such knowledge, which a trial court will determine, the court could infer that the injury was expected or intended.

Discrimination

Finally, we note that most courts have upheld the intentional act exclusion against claims that personal injuries were not intended by acts of discrimination. See *Greenman v. Michigan Mutual Insurance Co.*, 433 N.W.2d 346 (Mich. Ct. App. 1988) and *State Farm Fire & Casualty Co. v. Hiermer*, 720 F.Supp. 1310 (S.D. Ohio 1988) (See FYI for discussion of policy language). However, courts will not as readily infer an intent to injure, as is evident from the *Maine* Supreme Court in *Burns v. Middlesex Insurance Co.*, 558 A.2d 701 (Me. Sup. Ct. 1989). The court would apply the exclusion for slander and invasion of privacy claims only where the insured *in fact* subjectively wanted or intended bodily injury to result, or in fact did foresee that the injury was practically certain. Note that the same court followed the inference rule in molestation cases.

Policy Language May Influence Result

Before leaving the topic, the specific language of the intentional act exclusion must be examined as it may well affect the coverage

outcome. Consider the *Washington* appellate decision in *Farmers Insurance Co. of Washington v. Hembree*, 773 P.2d 105 (Wash. Ct. App. 1989), as an example of strict construction of policy language. In a sexual molestation case involving negligent supervision by the molester's parents, the issue was whether the claims against the child and the parents fell within the exclusion. The policy denied coverage for "bodily injury ... arising as a result of intentional acts of *an* insured"; "insured" was defined to include the named insured and all residents of the household. The appellate court found that, as the parents and child all were "insureds," the exclusion applied to the molestation and negligent supervision claims. What about intentional act exclusions referring to "*the* insured" or to the "*named* insured?" The Washington court cited cases finding coverage where "the insured" language was used, and indicated that it would have ruled differently if only "the insured" was the subject of the intentional act exclusion.

The Washington court is not the only panel to distinguish intentional act exclusions on the basis of "an insured" vs. "the insured" language. The 9th Circuit Court of Appeals also relieved the insurer of a duty to defend a child molestation and negligent supervision case where the intentional acts of "an insured" were excluded. *Allstate Insurance Co. v. Gilbert*, 852 F.2d 449 (9th Cir. 1988). Courts in *Alaska, Louisiana, Michigan, Minnesota,* and *New Hampshire* have applied similar analyses in tort cases.

The homeowner's policy may never rival the CGL for litigation on the issue of intent, but the increase of child abuse awareness and the spread of AIDS will certainly spur more insured challenges and insurer attention to its provisions — even the "an"s and "the"s.