

THE POLICYHOLDER ADVOCATE/IP COUNSELOR

NEWSLETTER

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ISSUES AND OPPORTUNITIES UNDER HOMEOWNERS / “PERSONAL LIABILITY” POLICIES “PART 1”

I. INTRODUCTION

Express personal liability coverage for the offenses of defamation and malicious prosecution should not be impaired by an “intentional acts” exclusion that permits an insurer to bar coverage for the insured’s intentional acts.

Business owners and executives of corporations who are likely recipients of this Newsletter may share in common one defining characteristic: they are likely to be homeowners. Where the residence is in California or other high-value metropolitan locations throughout the United States, that residence may represent a substantial asset. Protecting it can be as significant to the individual fortunes of policyholders as a derivative interest in businesses where they either have ownership stakes or are employees.

This article will explore, **in two parts**, two problems, **using California as an example**, and focusing on the products from three principal insurers in that market – AIG, Chubb, and Fireman’s Fund:

First, where “personal injury” liability coverage is expressly extended to the offenses of defamation and malicious prosecution, what rights to a defense and/or indemnity exist where an express “intentional acts” exclusion is also included in the policy?

Second, what is the impact of a California statute that purports to classify a typical homeowners policy in a way that appears to not only set a floor for the coverage which must be provided (a shield) but also appears to add a requirement that the insured, upon each renewal, verify that the full value of the home rebuilding cost is the amount covered (a sword) – where the policy is silent on this issue?

II. AIG’S INTENTIONAL ACTS EXCLUSION IS INCONSISTENT WITH ITS EXPRESS COVERAGE FOR THE INTENTIONAL TORTS OF “DEFAMATION” AND “MALICIOUS PROSECUTION”

17. Intentional Acts

Personal injury or **property damage** resulting from any criminal, willful, intentional or malicious act or omission by any person. We also will not cover claims for acts or omissions of any person which are intended to result in, or would be expected by a reasonable person to cause **personal injury** or **property damage** . . . even if the injury or damage is of a different kind or degree, or is sustained by a different person, than expected or intended.

AIG provides express “personal injury” coverage for the offenses of defamation, libel or slander, and malicious prosecution:

Occurrence means: . . .

. . . .

b. An offense . . . committed during the Policy period that results in **personal injury** or **property damage**:

Personal Injury means injury . . . arising out of . . .

. . . .

e. defamation, libel or slander

f. malicious prosecution.

III. “PERSONAL INJURY” COVERAGE FOR THE OFFENSES “DEFAMATION” AND “MALICIOUS PROSECUTION” EXPRESSLY EXTENDS INDEMNIFICATION/DEFENSE BENEFITS TO THESE COVERED “INTENTIONAL TORTS”

Each of these is an intentional tort that has not been limited to an “occurrence,” as is true of coverage for “property damage,” which is limited to accidental events.

- *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1032 (2002) (“2. *Principles of Personal Injury Coverage* . . . Unlike coverage for bodily injury and property damage, which is ‘occurrence’ based, there is no requirement for personal injury coverage that there be an ‘accidental’ occurrence. All that is required is that the injury arise out of the conduct of the insured’s business. Thus, even an *intentional* tort, such as those alleged in the Continental complaint, may be covered. The triggering event is the insured’s *wrongful* act, not the resulting injury to the third party claimant.”).

IV. ANY OTHER CONSTRUCTION WOULD RENDER THE PERSONAL LIABILITY POLICY COVERAGE FOR “DEFAMATION” AND “MALICIOUS PROSECUTION” ILLUSORY

A layperson would presume that AIG (or any comparable insurer) does not intend to issue an illusory policy. This follows because a policy will not be interpreted to create illusory coverage.

- *Tews Funeral Home, Inc. v. Ohio Cas. Ins. Co.*, 832 F.2d 1037, 1045 (7th Cir. 1987) (“In effect, one part of [the insurer’s] policy insures against intentional torts or acts, while another part of the policy attempts to exclude coverage for these same acts. We therefore must resolve this ambiguity against [the insurer].”).
- *Horace Mann Ins. Co. v. Peters*, 948 P.2d 80, 86 (Colo. Ct. App. 1997) (“[W]e recognize that, if an exclusion in a policy allows a liability insurer to receive a premium with no realistic chance of incurring any risk of liability, the exclusion will be held to violate public policy.”).
- *Monticello Ins. Co. v. Mike’s Speedway Lounge*, 949 F. Supp. 694, 701 (S.D. Ind. 1996) (“[A]n insurer cannot avoid an illusory coverage problem by simply conceiving of a single hypothetical situation to which coverage would apply.”).
- *North Bank v. Cincinnati Ins. Cos.*, 125 F.3d 983, 987 (6th Cir. (Mich.) 1997) (“[T]he defendant insurance company should not be permitted to sell the bank a policy covering discrimination claims and then to refuse to cover garden variety discrimination claims” pursuant to exclusionary language in the policy.).

Therefore, the personal liability insurer’s coverage for slander, libel, and malicious prosecution cannot be impaired by this exclusion in any way and should not impact a policyholder’s right to a defense.

- *Atlantic Mutual Ins. Co. v. J. Lamb Inc.*, 100 Cal. App. 4th 1017, 1033 & 1040 (2002) (“The defense duty is a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded . . . Even though it may ultimately be determined that Atlantic Mutual has a viable defense to coverage by virtue of the application of the ‘first publication’ exclusion, this can *only* affect its liability for indemnification. . . . That *potential* was never conclusively negated and obviously cannot be negated short of an actual trial to resolve what is clearly a genuine factual dispute.”).

V. CALIFORNIA INSURANCE CODE § 533 WILL BAR INDEMNITY BUT NOT A DEFENSE FOR “MALICIOUS PROSECUTION”/“DEFAMATION” PROVEN TO BE UNDERTAKEN WITH AN INTENT TO HARM

The term “intent” means an intent to act with an understanding that such conduct would be injurious and harmful to the party complaining. So understood, it would dovetail with limitations implied under California Insurance Code § 533.

- *Downey Venture v. LMI Ins. Co.*, 66 Cal. App. 4th 478, 503-504 (1998) (indemnity but not defense barred under Cal. Ins. Code § 533 for expressly covered “personal injury” offense of “malicious prosecution”).

The same would be true of the allegations of willfulness which would require proof of an intent to harm. Evidence that the insured “should have known” merely connotes negligence.

- *Park University Enters. v. American Cas. Co.*, 314 F. Supp. 2d 1094, 1103 (D. Kan. 2004) (“ ‘Should have known’ is a term connoting negligence, not intention.”).

No provision of the policy should bar a defense. Nor should it preclude coverage for any settlement entered into, absent an adjudication against the insured which establishes liability directly within the scope of the referenced exclusion.

- *Liberty Mut. Ins. Co. v. Continental Ins. Co. and Geysers Prods. of Wyoming, LLC*, No. 04-8053, 2005 WL 3418636, at *5, 6 (10th Cir. (Wyo.) Dec. 14, 2005) (“7-Up’s conduct was a willful attempt to drive Geysers out of business and increase 7-Up’s profits from the sale of a copied product. . . . The damages to Geysers and the Vances were inherent in 7-Up’s desire to ‘kill’ Geysers products and replace them with Aqua Ice. . . . In this case, the circumstantial evidence is sufficient to infer knowledge and intent on the part of 7-Up. . . . We must, therefore, construe § 533 to give effect to its purpose. *Id.* Its purpose is to ‘discourage willful torts.’ What 7-Up did was willful, and § 533 bars insurance coverage here. As such, 7-Up could not have had any reasonable expectation of coverage for its actions at the time of contract. In order for a contract to be ambiguous or illusory, it must be subject to *one or more objectively reasonable* interpretations. *Mez Indus.*, 90 Cal. Rptr. 2d at 729-30. The insurance policy language here, therefore, is unambiguous and not illusory.”).

VI. AIG’S “INTENTIONAL ACTS” EXCLUSION CAN BE CONSTRUED MORE BROADLY AND THUS RESULT IN MORE RESTRICTIVE COVERAGE THAN THAT OF ITS PRINCIPAL COMPETITORS IN THE HIGH-END RESIDENTIAL MARKET – CHUBB AND FIREMAN’S FUND

AIG’s personal liability coverage appears narrower than that of its only competitors in the residential market, with Fireman’s Fund offering the least objectionable product:

- Chubb’s California Personal Liability Coverage, in its 1985 Form 46100045/85, states:

Intentional Acts: We do not cover any damages arising out of an act intended by the covered person to cause personal injury or property damage, even if the injury or damage is of a different degree or type than actually intended or expected. An intentional act is one whose consequences could have been foreseen by a reasonable person. . . . This exclusion does not apply to Employment practices liability coverage

- Chubb distinguishes “Personal Injury” coverage from Employment Practices Liability coverage, which includes a more onerous exclusion:

Malicious or criminal acts. We do not cover any damages arising out of a willful, malicious, or criminal act or omission by any person whether or not the injuries or damages are actually intended, expected, or foreseeable by a reasonable person.

- Fireman's Fund's policy, under Form Policy Number 5250B11-02 ©2001, states:

Occurrence means:

.....

(2) An act or series of acts of the same or similar nature that occurs during the policy period and which results in **personal injury**.

Personal Liability

If a claim is made or suit is brought against an **insured**, anywhere in the world, for damages because of . . . **personal injury** . . . caused by an **occurrence** we will:

2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent . . .

LOSSES NOT COVERED - LIABILITY . . . TO OTHERS

A. Personal Liability . . . to Others Coverages do not apply to damages resulting from . . . **personal injury** . . . arising out of:

1. any criminal, willful, malicious or other act or omission that is reasonably expected or intended by any insured to cause damage . . . even if the damage is of a different kind or degree, or is sustained by a different person, than expected or intended
2. **personal injury** caused by the knowing violation of a penal law or ordinance caused by or at the direction of any insured.

The "reasonably expected to cause damage" test adopted by Fireman's Fund would appear to provide a defense for defamation claims where the policyholder did not know the statements made at the time were either false or injurious even if one could objectively say the policyholder "should have known" of their falsity or injurious character.

VII. THE INSURER COULD ACQUIESCE, IN WRITING, TO A PROPOSED CONSTRUCTION OF ITS "INTENTIONAL ACTS" EXCLUSION OR AGREE BY ENDORSEMENT TO REMOVE IT

First, one understanding of the legal effect of California Insurance Code § 533, as applied to the personal liability policy's indemnification obligation, would be that it would bar indemnification for an adjudication against an insured for malicious prosecution although not necessarily any lesser included offense, where the "intent to cause harm" element was not established.

Second, should the insured or his/her spouse be found responsible for libel or slander based on an "intent to harm," the insured would be barred under Cal. Ins. Code § 533 from receiving indemnity but not a defense. One might construe these exclusions as having the same effect. Should it only be established that the insured or spouse had a lesser state of mind, then they would be entitled to a defense for both such claims but perhaps not indemnification. Any other construction would render the insurer's express "personal injury" coverage for libel and slander illusory.

Third, in the alternative, the insurers simply remove by endorsement the "personal injury" offenses of "libel/slander and malicious prosecution" from the "intentional acts" exclusion. This would still permit the insurer the benefit from Cal. Ins. Code § 533. This is also a fair construction of its existing exclusion, but would clarify that point. ■

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David A. Gauntlett is the author of *Insurance Coverage of Intellectual Property Assets* published by Aspen Law & Business. The book and supplements are available for \$160.00 plus tax where applicable; shipping and handling are free when full payment is enclosed with the order. To order, call Aspen Law & Business at **1-800-638-8437**.

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If you have a topic you would like to see addressed in future issues, please feel free to contact us with your suggestions.

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