MODERN OCCURRENCE LITIGATION

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INTRODUCTION

One of the first steps in evaluating a claim pursuant to an insurance policy is in determining whether the act causing the loss constitutes an "occurrence" under the policy. If so, coverage may be "triggered" and indemnity may ultimately be owed. Much of the litigation involved in declaratory judgment actions centers upon the definition of what exactly constitutes an occurrence. The case law is rife with conflicting and contradictory interpretations.

The purpose of this article is to give an introduction into occurrence litigation, and to guide you through the subtleties and nuances of the law in some of the more common types of actions. We hope to provide you with a framework of analysis so that you can avoid the potential problems that are faced by the practitioner, and shed light on some of the idiosyncrasies of this area of insurance law.

WHAT IS AN OCCURRENCE?

Generally, both homeowner's and CGL policies have defined an occurrence as "an accident, including continuous or repeated exposure to

substantially the same general harmful conditions." 1 SUSAN J. MILLER AND PHILIP LEFEBVRE, MILLER'S STANDARD INSURANCE POLICIES ANNOTATED, at 200, 419 (4TH ED. 1995). In the past, courts have interpreted "accident" as having a temporal quality, requiring a sudden or abrupt event. However, since the 1960's, insurance policies have been amended to include the "continuous or repeated exposure" phraseology in order to take into account damage caused by long but accidental exposure to harmful substances (e.g. exposure of workers to asbestos). *See Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.*, 528 A.2d 76, 84 (N.J. Super. 1987). Thus, the occurrence language is understood to offer broader coverage than that offered solely by the former term, "accident." 11 G. COUCH, COUCH ON INSURANCE 3d § 102:21 at 102-49. (1997).

The liability portion of both the typical homeowner's and CGL insurance policies provides coverage for a host of negligence actions against insureds. Courts have stated that an "act of negligence constitutes an accident under a liability insurance policy when the resulting damage was an event that takes place without [the insured's] foresight or expectation." *Sheets v. Brethren Mutual Insurance Co.*, 679 A.2d 540, 548 (Md. 1996) (citations omitted). In other words, when a negligent act causes damage that is unforeseen or unexpected by the insured, the act is an "accident" under a general liability policy, and thus triggers coverage.

However, most policies exclude coverage for injuries that are "expected or intended" by the insured. *See Western Mut. Ins. Co. v. Yamamoto*, 35 Cal. Rptr. 2d 698, 701-02 (Cal. App. 1994). Thus, the typical policy includes an exclusion, usually the first, which provides that "this insurance does not apply to bodily injury or property damage expected or intended from the standpoint of the insured." *See* Mark W. Dykes, Comment, *Occurrences, Accidents, and Expectations: A Primer of These (and Some Other) Insurance-Law Concepts*, 2003 UTAH L. REV. 831, 839 (2003) (citing cases).

Courts have struggled with the interpretation of the "expected or intended" exclusion. Some courts have held that there is no difference between the terms "expected" and "intended," and that they essentially refer to intentional conduct in the traditional tort sense, while others have held that the two are not synonymous. *See* 31 A.L.R. 4th at 981-83. Some courts have gone as far as defining "expected" in terms of foreseeability, *see* Kirk A. Pasisch, Commentary, *The "Expected or Intended" Exclusion and California Insurance Code Section 533*, 10 NO. 21 MEALEY'S LITIG. REP.: INSURANCE 20, 31 (Apr. 2, 1996), whereas others have stated that "expected" usually means "considered more likely than not to occur" rather than "foreseen as being possible," *Allstate Ins. Co. v. Brown*, 16 F.3d 222 (7th Cir. 1994). However, defining "expected or intended" separately may create serious problems, resulting in the denial of coverage in cases both the insured and insurer clearly meant to cover. *See Ohio Cas. Ins. Co. v. Henderson*, 939 P.2d 1337 (Ariz. 1997).

Courts also vary in what standard to apply in assessing whether injury or damage was "expected or intended" by the insured, and thus excluded under the policy. The majority view interprets "expected or intended" acts from a purely subjective standard, analyzing "expected or intended" actions literally "from the standpoint of the insured." These courts interpret the meaning of "expected" damage to require a certainty of harm on the part of the insured greater than the general tort standards of foreseeability used to impose liability on the insured. *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 735 (Minn. 1997). Under this subjective approach, an injury is "intended from the standpoint of the insured" if the insured possessed the specific intent to cause bodily injury to another, whereas an injury is "expected from the standpoint of the insured" if the insured subjectively possessed a high degree of certainty that bodily injury to another would result from his or her act. *Tanner & Co., P.C. v. State Farm Fire & Casualty Co.*, 874 So. 2d 1058, 1067 (Ala. 2003).

Other courts interpret acts that are "expected or intended" by the insured from an objective standpoint, a position generally supported by the insurance industry. This interpretation supports the view that the exclusion should be evaluated objectively, as in the tort realm, i.e. what a reasonable person (not necessarily the insured) under the circumstances would have expected as a result of the insured's intentional act. *See, e.g.*, Mark N. Thorsrud, Russell C. Love & Lawrence Gottlieb, *Insurance Coverage for Pollution Liability in Washington. What Constitutes an "Occurrence?" The Insurer's Perspective,* 28 GONZAGA L. REV. 579, 586 (1992/93) (exploring cases). It has been cited in cases where the policies in question inject the word "reasonably" in the "expected and intended" exclusion, and thus does cover bodily injury that may reasonably be expected to result from intentional acts of an insured person. *Allstate Ins. Co. v. Dillard*, 859 F. Supp. 1501, 1502 (M.D. Ga. 1994), *aff'd*, 70 F.3d 1285 (11th Cir. 1995); *contra Allstate Ins. Co. v. McCarn*, 645 N.W.2d 20, 24 (Mich. 2002) (analyzing "reasonably expected" in subjective terms).

In addition, in a typical insurance coverage dispute, the insured bears the initial burden of showing that there is coverage, while the insurer bears the burden of proving the applicability of any exclusions in the policy. Once the insurer has proven that an exclusion applies, the burden shifts back to the insured to show that the claim falls within an exception to the exclusion. *See Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546 (5th Cir. 2004); *see also Critchlow v. First UNUM Life Ins. Co. of Am.*, 378 F.3d 246 (2d Cir. 2004).

In summary, litigation centering on whether an incident constitutes an occurrence and thus triggers coverage under the policy presents a host of challenges. Although the "expected or intended" provision traditionally excluded a range of intentional torts, today there are a number of exceptions to the old rule, and the path to determining whether an event may be excluded under the policy presents many pitfalls to the unwary practitioner. The following categories of cases are illustrative of these changes and of some of the common themes appearing in modern occurrence litigation.

TYPES OF OCCURRENCES

A. Assault and Battery

In assault and battery cases, some courts have held that an assault and battery does not constitute an "occurrence," and is therefore not covered under the policy. In *Gene's Restaurant, Inc. v. Nationwide Ins. Co.*, 548 A.2d 246 (Pa. 1988), the insured allegedly assaulted and battered one of its patrons, causing her serious injuries. The court stated that an "occurrence" was by definition an "accident." Therefore, the court reasoned, the "malicious, willful assault" alleged in the complaint was clearly not an accident but an intentional tort, and thus was not covered under the policy. The court stated that it was unnecessary to analyze whether the conduct was "expected or intended" under the policy, because a "malicious, willful assault" could not possibly constitute an "occurrence."

Other courts have analyze assault and battery claims pursuant to the "expected or intended" exclusion, and have found that coverage is not warranted under the policy. For example, in *Lititz Mut. Ins. Co. v. Bell*, 724 A.2d 102 (Md. App. 1999), the insured, who had been institutionalized in a psychiatric ward, punched the plaintiff who then sued him in the underlying action. The insured had been suffering from "intermittent explosive disorder," a condition recognized by the American Psychiatric Association as an impulse control disorder.

The Maryland court set forth the definition of a battery, noting that "if the act is done with the intention of making the offensive contact, it is immaterial that the actor is not motivated by any personal hostility or intent to injure." *Lititz*, 724 A.2d at 108 (quoting Restatement (Second) of Torts § 13 (1965)). The court stated that since the insured intended to bring about the offensive contact of the plaintiff, his conduct fit the definition of a battery. Thus, the court stated it was not necessary to make a separate inquiry into the insured's subjective intent or expectation of injury, since the harm in a battery is the contact itself. The court therefore stated that the battery was excluded under the policy.

In *Farm Bureau Ins. Co. v. White*, 594 N.W.2d 574 (Neb. 1999), the court applied the "inferred-intent" rule in reviewing the insured's claim pursuant to the "expected or intended" provision of the policy. In *Farm Bureau*, the insured admitted to shaking her infant nephew while babysitting him, causing extensive neurological injuries. At the time of the incident, the insured was high on methamphetamine and had been consuming alcohol. The court subsequently denied coverage for the insured.

In explaining the rationale for its decision, the court in *Farm Bureau* stated that

> [A]n injury is expected or intended from the standpoint of the insured if a reason for the insured's act is to inflict bodily injury or

> if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law. If an intentional act causes injuries which are the natural and probable consequences of the act, the injuries as well as the act itself may be deemed intentional.

Farm Bureau, 594 N.W.2d at 583. Thus, the court stated that as a matter of law the intent to inflict bodily injury could be inferred in the case where an adult performs the act of shaking an infant, since the act is so certain to cause the particular harm. The court refused to consider the insured's subjective intent, stating that shaking a baby is "an act so certain to cause a particular kind of harm that we can say a person who performed the act intended the resulting harm, and her statement to the contrary does nothing to refute that rule of law." *Id.* at 585 (citations omitted). The court analogized this "inferred-intent" case with cases involving the killing of a third person by intentionally aiming a gun and firing at him and sexual assault upon a minor child by an adult.

Some courts have found that in certain cases in which there is an allegation of assault and battery against the insured, that there is coverage under the policy. In *Norris v. State Farm Fire & Cas. Co.*, 16 S.W.3d 242 (Ark. 2000), the insured teenager punched another teenager in the face, causing the latter to fall and hit his head on ground and sustain a serious concussion. The insured stated that although he intended to punch the other teenager, he did not intend to hit him so hard as to knock him to the ground. The court subsequently held that coverage was warranted under the policy.

The *Norris* courts stated that only the intended injuries flowing from an intentional act are excluded, and that a homeowner's policy otherwise covers bodily injury from unintended results of an intentional act. Thus, the court reasoned, if the consequences consisting of damage from intentional acts are not intended and are unexpected, they are accidental under the policy. Applying this subjective standard, the court found that it was possible that the insured, although he intended to hit the other boy, did not expect that the latter would suffer such extensive injuries.

A subset of cases in the assault and battery context include cases in which the insured alleges a "negligent" or "reckless" assault and battery claim. In *United National Ins. Co. v. The Tunnel, Inc.*, 988 F.2d 351 (2d Cir. 1993), the Second Circuit stated that an assault and battery could only be the result of intentional, and not negligent, conduct and found that the insured's claim was excluded under the policy. In *United National*, the insured nightclub was sued by a patron when he was struck by the insured's bouncer, causing the patron severe injuries and placing him in a coma. In the subsequent declaratory judgment action, the Second Circuit stated that there was no such thing as a "negligent assault and battery claim," and that even if it did, the fact that the bouncer intended to hit the patron excluded the claim under the policy. Other courts, however, have held that an assault and battery could be the result of negligent. *See*

Nationwide Mutual Ins. Co. v. Sedicum, Civ.A.No. 93-2996, 1997 U.S. Dist. LEXIS 19197 (E.D. Pa. Dec. 27, 1993) (holding insurer had duty to defend where complaint alleged negligence as well as intentional behavior in assault and battery claim).

Other assault and battery cases include negligence claims for failing to prevent plaintiff's alleged injuries. In *Acceptance Ins. v. Seybert*, 2000 Pa. Super 207; 757 A.2d 380 (2000), the plaintiff in the underlying negligence action sued a bar, hotel and several individuals for an alleged attack which occurred in a hotel parking lot. Plaintiff's complaint alleged that the insured, Belmont Bar, was responsible for plaintiff's injuries because its agents, servants and/or employees were negligent and their negligence contributed to the defendants violently attacking him in the parking lot of the Monroe Hotel.

In denying coverage for the insured, the Pennsylvania Superior Court noted that the plaintiff's complaint, although including claims of negligence, still alleged that plaintiff's injuries were caused by an assault and battery. Plaintiff's complaint did not contain any allegations of another source for his injuries. No independent acts or omissions were alleged. Thus, it was clear that the negligence allegations stemmed directly from the alleged assault and battery. The Superior Court rejected Belmont Bar's arguments holding that the exclusion clearly and unambiguously excluded from coverage the plaintiff's claim. Consequently, the assault and battery exclusion excluded both assault and battery and negligence claims. Critical to the Superior Court's decision was the fact that plaintiff did not suggest that his injuries were accidental in nature.

In contrast, in *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185 (Tex. 2000), the Texas Supreme Court held that where an employee of the insured assaults another, that such an incident was an "accident" triggering coverage under the policy. In *King*, the employee of the insured, who was working on a building site, assaulted an employee of another company working on the same site.

The Texas Supreme Court refused to impute the employee's intent to the insured to determine whether there was an occurrence under the policy. The policy in question contained a "separate of insureds" provision, which expressly created separate insurance policies for the employer and the employee, but treated the insureds as if each were the named insured, i.e. the employer. Thus, since the employee's actions were neither expected or intended from the standpoint of the insured employer, the *King* court stated that there was coverage under the policy.

B. Gun Related Incidents

Another type of incident which courts have struggled with in occurrence litigation are gun related cases, in which the insured has allegedly shot the plaintiff. The insurer usually responds by bringing a declaratory judgment action. In cases that involve a clear inadvertent shooting, courts have usually found that such incidents constitute an occurrence under the policy, and are not subject to the

"expected or intended" exclusion. For example, in *Allstate Ins. Co. v. McCarn*, 645 N.W.2d 20 (Mich. 2002), a sixteen-year-old insured and his teenage friend were playing with the insured's grandfather's shotgun, when the insured, believing the gun to be unloaded, pointed the shotgun at his friend's head and pulled the trigger. The gun was loaded, however, and discharged, killing the insured's friend instantly.

Determining that the shooting constituted an occurrence under the policy, the Michigan Supreme Court applied a subjective standard in evaluating whether the incident was "expected or intended" by the insured. The Court's rationale was that "there is no coverage where the consequences of the insured's acts were either 'intended by the insured' or 'reasonably should have been expected *by the insured*." *Allstate*, 645 N.W.2d at 24. Since the insured neither intended to actually shoot his friend, nor expected that the shotgun was loaded and would discharge upon pulling the trigger, the Court found that the "expected or intended" exclusion did not apply. Therefore, the incident constituted an occurrence triggering coverage under the policy.

In other types of gun related cases, where the insured intended to shoot at the putative plaintiff's to the underlying cases, courts have usually found such acts to be "expected or intended" by the insured, and thus excluded under the policy. Additionally, in some of these cases, where there is a question as to the intent of the insured, courts have stated such intent may be inferred due to the nature of the acts involved. For example, in *Stone v. Kentucky Farm Bureau Mut. Ins. Co.*, 34 S.W.3d 809 (Ky. App. 2000), the insured, who was involved in divorce proceedings with his wife, shot and killed their infant son and then committed suicide. Subsequently, the administrators for the son's estate brought suit against the father's estate, and claimed the insurer owed a duty to defend the father's estate.

The court in *Stone* found that the shooting did not constitute an occurrence under the policy, noting that in these types of cases, "it is almost irrelevant whether an objective or subjective test is applied because of the circumstances." *Stone*, 34 S.W.3d at 811 (citations omitted). Citing earlier case law, the court reasoned that the shooting was clearly not an "accident," but in fact was the result of a plan, design or an intent on the part of the insured. The court did not make a distinction between "expected or intended conduct," but rather stated that intent to harm could be inferred from the nature of the act in question, which in this case was the pointing and shooting a rifle at an infant at close range. *See also Harris v. Richards*, 867 P.2d 325 (Kan. 1994) (holding insured's intent to injure was inferred since serious bodily injury was natural consequence of shooting gun into back of truck with occupants still inside).

In another shooting case, *Ohio Cas. Ins. Co. v. Henderson*, 939 P.2d 1337 (Ariz. 1997), the insured and two of his co-conspirators, while armed with guns, entered a movie theater for the purpose of robbing it. They instructed one of the movie theater employees to open the safe, but when he failed to open it, one of the

conspirators shot the employee in the head, killing the employee. The parents of the deceased employee then sued the insured and sought recovery from his homeowner's insurance policy. A few days prior to the shooting at the movie theater, the three conspirators had shot and killed a restaurant worker.

The Arizona Supreme Court in *Ohio* found that there was no coverage for the insured's acts under the "expected or intended" exclusion under the policy. The Court applied a three-part subjective standard regarding "expected or intended" injury, stating that in order for coverage to be excluded, the insured must subjectively intend both the act and to cause some injury. *Ohio*, 939 P.2d at 1343. However, the Court stated that the intent "may be actual or inferred by the nature of the act and the accompanying substantial certainty that some significant harm will occur," and that once this was proven, "it is immaterial that the actual harm caused is of a different character or magnitude than that intended or expected." *Id*. Even though there was a question in *Ohio* as to whether the insured was the actual shooter in the murder, because of the prior shooting at the restaurant, and because of the likelihood of serious bodily injury in the subsequent robbery at the theater, that intent could be inferred on the part of the insured.

In an interesting twist to some of the more typical gun related fact patterns, at least one court has held that where an insured intended to fire a warning shot near the plaintiff, but inadvertently hit the plaintiff, such an action constituted an occurrence and was not excluded under the "expected or intended" provision of the policy. See *Southern Farm Bureau Casualty Ins. Co. v. Allard*, 611 So.2d 966, 968 (Miss. 1992) (stating that farmer who was familiar with firearms did not intend to shoot trespasser since he could have easily killed him if he had intended to do so).

C. Sexual Assault / Molestation

In cases involving sexual assault, courts normally have held that such actions constitute "expected or intended" injury, and therefore are not "occurrences" under the applicable policy. *See Farmers Union Mut. Ins. Co. v. Kienenberger*, 847 P.2d 1360 (It. 1993) (holding rape intentional act excluded under policy); *but see RJC Realty Holding Corp. v. Republic Franklin Ins. Co.*, 808 N.E.2d 1263 (N.Y. 2004) (holding insured spa was entitled to coverage where masseaur's alleged sexual assault of customer was "accident" from spa's standpoint).

Where insureds have been accused of having molested minor children, courts have inferred the requisite intent and expectation of injury as a matter of law, and have almost invariably denied coverage in such cases. Under the so call "inferred-intent" rule, courts conclusively presume intent to harm as a matter of law based on the nature and character of the insured's acts. Courts do so regardless of whether the insured asserted that he or she had no subjective intent to injure. Courts justify this position due to the gravity of the crimes involving the exploitation of minor children.

For example, in *Petitt v. Erie Ins. Exchange*, 709 A.2d 1287 (Md. 1998), the insured allegedly sexually molested his girlfriend's minor children. The Court stated that sexual activity between an adult and minor child is *per se* injurious, since a minor child could never legally consent to sexual activity. Moreover, the Court held as a matter of law that in situations involving sexual relations between an adult and a minor child, that the insured's intent to harm was inferred from these acts. Thus, the Court declined to apply a subjective standard in determining whether the insured intended the harm the minor children, stating the inquiry was irrelevant in such a case.

Similarly, in *Doe v. Liberty Mut. Ins. Co.*, 667 N.E.2d 1149 (Mass. 1996), the insured, a junior high school principal, engaged in sexual relations with a minor fourteen year old. In denying coverage to the insured, the Massachusetts Supreme Court stated that "intent to injure" was inferred as a matter of law in cases where an adult engages in unlawful sexual behavior toward a minor, even though the adult may not subjectively intend to harm the child. The Court also stated that sexual misconduct involving a minor is inherently harmful to the child. Thus, in cases involving child molestation or sexual misconduct involving a minor, the Court stated that both intent to harm and the harm itself is inferred.

In cases involving sexual abuse and molestation of a minor child by an insured minor child, at least one court has held that such actions constitute an "occurrence," triggering coverage under the policy. In *N. Sec. Ins. Co. v. Perron*, 777 A.2d 151 (Vt. 2001), the Vermont Supreme Court stated that the inferred-intent rule did not apply in a sexual abuse case where the perpetrator is a minor child. Thus, in such a case, the Court stated it was proper to inquire as to whether a minor child could have subjectively been aware that injury would have resulted from his sexual acts against another child. The Court stated that although the potential for intent to harm is possible, that it could not be presumed that every child could possess it. Other courts, however, apply the inferred-intent rule in cases where a minor is accused of sexually abusing another minor. *See, e.g.*, *Allstate Ins. Co. v. Steele*, 74 F.3d 878 (8th Cir. 1996); *State Farm Fire & Cas. Co. v. Watters*, 644 N.E.2d 492 (Ill. App. 1994).

Another cause of action in the sexual abuse/molestation category of cases involve suits against insureds for negligently allowing others, usually their spouses, to sexually abuse their own children. Some courts have held that such actions constitute an "occurrence," triggering coverage under the policy. In *Hanover Ins. Co. v. Crocker*, 688 A.2d 928, 930 (Me. 1997), the insured witnessed her husband repeatedly engage in sexual activity with their minor daughter, but did nothing to stop him. The court stated that such conduct constituted negligence, since she had knowledge that the abuse occurred and but failed to protect her daughter from further abuse. Because negligent conduct is considered "accidental" and not "expected or intended," the injuries sustained by the minor child were caused by an occurrence within the language of the policy. Other courts, however, have declined to hold that such "negligent" conduct could constitute an occurrence under the policy. *See Mut. of Enumclaw v. Wilcox*, 843

P.2d 154 (Ida. 1992) (stating insured's failure to report ex-husband's molestation of foster children was not "accident" or "occurrence" under policy because it was not conduct that caused injury).

Another category of cases in this area involve sexual abuse by members of the clergy. A number of the underlying cases involve suits based upon *respondeat superior* liability, in which the churches are held liable for the acts of their priests. In many of these cases, churches are sued specifically for negligent supervision of their clergymen.

Some courts have found that coverage did not apply in instances where churches are alleged to have been negligent in supervising their clergy members. In *American States Ins. Co. v. Bailey*, 133 F.3d 363 (5th Cir. 1998), a minister engaged in a number of sexual improprieties with seven women attending his church. In reviewing one of the policies that applied to the coverage period in question, the Court held that the sexual acts did not constitute an "occurrence" under the policy. The Court stated that the minister's acts, which included exposing himself before one of the plaintiff's, could not possibly constitute an "accident" and thus an "occurrence" under the policy, since it was done intentionally. The Court reasoned that a person's acts are not accidental when he commits an intentional act that results in injuries that ordinarily follow from or could be reasonably anticipated from the intentional act. Thus, the Court stated that since the minister's underlying acts were not an occurrence under the policy, that the church could not be held liable, since a claim against a principal is related to and interdependent with a claim against the agent.

Other courts, however, have found that coverage may apply to sexual abuse by clergy members. In *Diocese of Winona v. Interstate Fire & Casualty Co.*, 89 F.3d 1386 (8th Cir. 1996), the Court applied a subjective standard in determining whether the damages caused by a pedophilic priest employed by the insured diocese and archdiocese were "expected" under the terms of their respective policies. The Court inquired as to whether a reasonably prudent person in the position of the insured diocese knew or should have known that the priest's abuse was substantially probable as a result of the continuing exposure caused by their willful indifference. In *Diocese of Winona*, the Court found that the church knew about the abuse by one of their priest, who had been shuffled from parish to parish over the course of fifteen despite having molested a number of minor children. Thus, the Court held that where the abuse of a priest is known to church officials, it is "expected" and thus excluded under the policy.

However, in *Diocese of Winona*, the Court also stated that the acts which occurred in the year prior to when church leaders became aware of them were covered under the policy. The Court stated that where the conduct of a member of the clergy occurs without the knowledge of church officials, that such conduct was covered under the policy, since church officials could not "expect" such an occurrence. In *Diocese of Winona*, the Court found that church officials were

ignorant of the priest's acts of sexual abuse for over one year, thus triggering coverage under several insurance policies which covered that policy period.

D. Contract Cases

Most courts have held that a breach of contract does not constitute an occurrence under the policy, and that it is excluded as intentional conduct. However, the challenge for many courts in breach of contract cases is in the characterization of the case itself, i.e. whether the complaint sounds in breach of contract, or (as the insured's often argue) whether the complaint constitutes a tort action. If it is the former, coverage is usually denied, whereas if the complaint is characterized as the latter, coverage may be found for the insured.

For example, in *Phico Ins. Co. v. Presbyterian Medical Servs. Corp.* 663 A.2d 753 (Pa. Super. 1995), the insured, a medical services corporation, was sued by a convalescent home with whom it had contracted to provide management services. The convalescent home alleged that the insured mismanaged the home in a myriad of ways, from the quality of patient care and the excessive use of temporary nurses to the failure to ensure that the home complied with appropriate regulations.

The court in *Phico* stated that the case was essentially a breach of contract, and denied coverage for the insured. The court stated that if the complaint is to be construed as a tort action, the wrong ascribed to the defendant must be the "gist of the action" with the contract being collateral. *Phico*, 663 A.2d at 757. In addition, the court noted that a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly. The court also stated that the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus. Because the gist of the action was essentially contractual in nature, and that there was otherwise no duty of the insured to the convalescent home other than they duty caused by the contract, the court denied coverage.

In other breach of contract cases, the dispute centers more on the language of the policy itself. In *Erie Ins. Prop. & Cas. Co. v. Pioneer Home Improvement, Inc.*, 526 S.E.2d 28 (W.Va. 1999), the insured builder was sued by a customer for breach of contract for allegedly poor workmanship in the work the insured performed in the installation of siding, doors and windows to the customer's home. The insured sought coverage under its CGL policy, which the insurer denied.

The court in *Erie* asserted that the typical CGL policy did not insure the work or workmanship which the contractor or builder performs. Rather, CGL policies insure personal injury or property damage arising out of the work. Thus, as the court opined, if a craftsman applies stucco to an exterior of a home in a faulty and poorly performed manner, the work will have to be replaced or repaired

by him. However, should the stucco peel and fall from the wall, causing injury to the homeowner or his neighbor, an occurrence of harm arises which is properly covered under the policy.

E. Arson

In the prototypical arson case, an act of arson is considered an intentional act that is excluded under the policy. In *Frankenmuth Mut. Ins. Co. v. Masters*, 595 N.W.2d 832 (Mich. 1999), the insureds set fire to their own clothing store. They had intended to start a small smokey fire that would damage their clothing inventory and allow them to collect casualty insurance, but the resulting fire ended up destroying their building and some of the neighboring buildings.

The Michigan Supreme Court evaluated the incident from the subjective standpoint of the insured. The court stated that where the insured acts intentionally, as was the case in *Frankenmuth*, that

> [a] determination must be made as to whether the consequences of the insured's intentional act were either intended by the insured or reasonably should have been expected because of the direct risk of harm intentionally created by the insured's actions. When an insured acts intending to cause property damage or personal injury, liability coverage should be denied, irrespective of whether the resulting injury is different from the injury intended. Similarly,…when an insured's intentional actions create a direct risk of harm, there can be no liability coverage for *any* resulting damage or injury, despite the lack of an actual intent to damage or injure.

Frankenmuth, 595 N.W.2d at 839 (emphasis in original, citations omitted). Since the insureds intentionally caused the fire, and intended to do property damage, it was irrelevant that the harm that resulted was different or exceeded from the harm they originally intended. The court distinguished the facts of this case with the hypothetical case of an insured starting a fire by a faulty electric cord in a coffee maker. Although the act of turning on the coffee maker is "intentional," the fire is an occurrence because the insured lacked the intent to cause harm.

In some instances, courts have found that an act of arson may constitute an occurrence, triggering coverage under the policy. In *Allstate Ins. Co. v. Sparks*, 493 A.2d 1110 (Md. App. 1985), the insured's son drove to the property of a store owner and attempted to siphon gas from the store owner's truck. It was dark, so the son tried to illuminate the area with a cigarette lighter, which caused a fire resulting in extensive property damage. The insured's son had only intended to steal gas, but did not intend to burn the property. The court held that the fire was caused "by accident" and constituted an occurrence under the policy, and that the exclusions section did not apply.

An interesting dilemma raised in arson cases is the fate of the "innocent co-insured." In many of these cases, the arsonist acts independently, leaving the co-insureds (usually family members) with a catastrophic loss in which they had no part in causing. Whether an innocent co-insured will be allowed to recover under an insurance policy after another co-insured has intentionally destroyed the insured property usually depends upon whether the interests of the co-insureds are joint or several. Policies offering joint coverage impose a duty on any policyholder to be responsible for the acts of another policy holder, whereas several coverage covers insureds irrespective of the actions of their co-insureds. *See Kundahl v. Erie Ins. Group*, 03 A.2d 542, 544 (Pa. Super 1997). Thus, if the parties' interests in the policy is joint, then the innocent co-insured is denied coverage if the actions of any insured would preclude coverage. Conversely, if the parties' interest are several, an innocent co-insured cannot be denied coverage as a result of the actions of another insured.

In the exclusions section of the typical homeowner's policies, "intentional loss" is sometimes defined as an act committed by or at the direction of an insured. Courts have held that the use of the article "any" or "an" in front of the word "insured" in such an exclusion, as opposed to the article "the," clearly and unequivocally indicates the insureds' obligations under the policy are joint, and not several. *See Spezialetti v. Pacific Employers Ins. Co.*, 759 F.2d 1139, 1141 (3d Cir. 1985).

However, the many homeowner's policies contains a severability provision, usually located outside the exclusions section, such as the conditions section. Some jurisdictions have held that such a provision may make the policy ambiguous with regards to joint or several liability, and have ruled in favor of the insured, whereas others have held the opposing view. *See Litz v. State Farm Fire and Casualty Co.*, 695 A.2d 566 (Md. 1997) (holding severability provision entitled co-insured to coverage despite use of the article "an" to describe insured in exclusionary clause); *but see USAA Casualty Ins. Co. v. Gordon*, 707 So. 2d 1185 (Fla. App. 1998) (stating severability provision in conditions section of policy was inapplicable to rest of policy).

CONCLUSION

In conclusion, the definition of an occurrence is often the first point of attack in litigation between the insurers and the insureds. Over the years, the types of situations which fall under the definition of an occurrence has broadened, presenting a number of challenges to litigators and the courts alike. Although the litigation over occurrences spans many decades, there are yet to be fully settled methods and presumptions for determining what exactly constitutes an occurrence, and whether certain conduct is "expected or intended" by the insured.