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Liberty Surplus Insurance Corp. v. Ledesma & Meyer Construction Co., Inc.: A Solution to the California "Accident" Conundrum?

Part III

by John K. DiMugno

My last two posts (here and here) traced the evolution of the California's narrow understanding of the term "accident" in liability insurance policies and analyzed the doctrinal confusion created by court decisions that refuse to treat the unintended consequences of intentional acts as an accident. This post will discuss an argument raised by the insurer in *Liberty Surplus Insurance Corp. v. Ledesma & Meyer,* 834 F.3d 998 (9th Cir. 2016), certified question accepted by California Supreme Court, Oct. 19, 2016, that would allow the supreme court to repudiate the reasoning of decisions that focus solely on the deliberate nature of the act and still rule for the insurer—that the relevant act in the occurrence analysis is the final injury-producing act of the employee, not the employer's negligent hiring or supervision of the employee.

Liability-Causing Conduct v. Injury-Causing Conduct

The insurer in *Ledesma* convinced the district court that even if the unintended consequences of a deliberate act qualify as an accident, liability policies do not cover negligent hiring or supervision of workers who intentionally harm someone because the relevant act in the accident analysis is the employee's injury-producing act. Relying on *Delgado v. Interinsurance Exchange of Automobile Club of Southern California,* 47 Cal.4th 302, 308, 97 Cal.Rptr.3d 298, 211 P.3d 1083 (2009) (*Delgado*), the district reasoned that Ledesma & Meyer's negligent hiring and supervision of Hecht was "too attenuated" from Hecht's conduct to qualify as the relevant accident in the coverage analysis. The district court therefore based its decision on the inherently harmful nature of "injury-causing event"—Hecht's sexual molestation of the claimant.

Delgado is, however, a thin reed on which to base a ruling that the relevant conduct in the occurrence analysis is the injury-causing conduct rather than the liability-causing conduct. It is true that the *Delgado* court looked to "the event causing damage, not the earlier event creating the potential for future injury" in determining that the assault and battery in question was not accidental. 47 Cal.4th at 315. But the *Delgado* court was not addressing the distinction the district court drew in *Ledesma and Meyer* between liability-causing conduct and injury-causing conduct. Instead, the *Delgado* court refused to consider antecedent acts in the causal chain that might explain the insured's motive or provide a legal justification for an act committed with the intent to inflict harm. Nothing in *Delgado* suggests that in negligent hiring and supervision cases the relevant act in the occurrence analysis is the injury-causing act of the employee. To the contrary, *Delgado* court emphasized that it is the "wrongdoing by the insured" that constitutes "the starting point in the causal series of events" that is examined to determine whether coverage exists. The court explained that, in determining whether the injury was the result of an accident, it would be illogical to take into consideration "acts or events *before the insured's acts."* (Emphasis added). *Id.*

Moreover, nothing in the language of the policy requires courts to focus on the event that directly produced injury in determining whether the injury resulted in an accident. The policy covers *the insured's* liability to pay damages and in other contexts the supreme court has held that the causation standard applicable to the insured's tort liability should apply to the determination of coverage under the insured's liability policy. For example, in *State v. Allstate Insurance Co.,* 45 Cal.4th 1008, 1035 (2009), the supreme court explained:

> In analyzing coverage under a liability policy, a "tort approach"... to causation of damages is precisely what is called for.... When the insurer has promised to indemnify the insured for all 'sums which the Insured shall become obligated to pay ... for damages... because of nonexcluded property damage, or similar language, coverage necessarily turns on whether the damages for which the insured became liable resulted—*under tort law*—from covered causes. Thus, the right to coverage in the third party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty.

The supreme court in *State v. Allstate* was addressing the applicability of an exclusion when covered and excluded causes combine to cause of damage, not whether the insured's act qualified as a covered occurrence. However, no logical reason exists for ignoring the observation that "the right to coverage in the third party liability insurance context draws on traditional tort concepts" in other contexts. Under California law, the proper test for determining Ledesma & Meyer's liability in the underlying action was whether its negligent hiring and supervision of Hecht was a "substantial factor" in causing the claimant's injuries. *See, e.g., Mitchell v. Gonzales,* 54 Cal.3d 1041, 1052-1053 (1991). *State v. Allstate* suggests that the same causation standard should govern the scope of coverage liability under Ledesma & Meyer's liability policies. Thus, if Ledesma & Meyer's negligent hiring or supervision of Hecht can be deemed a

substantial factor in causing the claimant's harm, that same conduct arguably should not be deemed "too attenuated" to constitute a covered occurrence under its liability policies.

Conclusion

As the Ninth Circuit observed in certifying the *Ledesma & Meyer* case to the supreme court, "[g]iven the ubiquity of insurance policies that cover 'occurrences'" and the prevalence of negligent hiring and supervision claims, the supreme court's decision will have profound implications for employers, insurers and third parties injured by the willful acts of employees. One hopes the supreme court will use its decision to bring clarity to the vexing question of what constitutes an "accident" within the meaning of a liability insurance policy.