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

Part II

by John K. DiMugno

My last post discussed the narrow understanding of the term "accident" in liability insurance policies adopted by California appellate courts in cases such as *Albert v. Mid-Century Insurance Company*, 236 Cal.App.4th 1281, 1291 (2015) (*Albert*); *State Farm General Ins. Co. v. Frake,* 197 Cal.App.4th 568, 579, 128 Cal.Rptr.3d 301 (2011) (*Frake*); *Fire Ins. Exchange v. Superior Court (Bourguignon),* 181 Cal.App.4th 388, 392, 104 Cal.Rptr.3d 534 (2010). This post will examine criticism of those cases currently being raised before the California Supreme Court in *Liberty Surplus Insurance Corp. v. Ledesma & Meyer Construction Co., Inc,* S236765.

Accidental Means v. Accidental Results

The widespread importation of accidental means analysis into the liability insurance context, wrought by *Albert, Bourguignon,* and *Frake,* has inflicted liability insurance coverage analysis with the type of confusion that has plagued accidental death coverage in the life insurance arena for years. The concept of accidental means is used in the life insurance context to define coverage, or to identify a particular type of death for which a policy's beneficiaries are entitled to higher indemnity payments, and it has been fraught with analytical difficulties. While certain types of deaths, such as a death following an inadvertent slip and fall, are obviously accidental, and others, such as death from a progressive disease, are obviously not, the line separating accidental and non-accidental loss is not always clear and courts have struggled to articulate workable rules for distinguishing the two. Courts, for example, have reached widely divergent results in deciding whether death from an accidental drug overdose or from engaging in highly risky recreational activities qualify as deaths by accidental means. *See generally,*

Douglas R. Richmond, Drugs, Sex, and Accidental Death Insurance, 45 Tort Trial & Ins. Prac. L.J. 57, 66-70 (2009)*;* Adam F. Scales, Man, God, and the Serbonian Bog: The Evolution of Accidental Death Insurance, 86 Iowa L. Rev. 173 (2000). Courts struggling with accidental means analysis in the liability insurance context have reached similarly irreconcilable results. *Compare State Farm Fire & Casualty Company v. Superior Court (Wright)*, 64 Cal.App.4th 317, 328, 78 Cal.Rptr.3d 828, 836 (2008) (failing to throw claimant far enough into pool, causing him to land on pool steps and suffer serious injury was "accident" under *Merced Mutual* test because "throwing too softly so as to miss the water, was an unforeseen or undesigned happening") *with State Farm General Ins. Co. v. Frake, supra,* 197 Cal.App.4th at 579-580 (striking claimant in the groin without any intent as part of a consensual game was deliberate, and thus non-accidental, under *Merced Mutual* test).

California Supreme Court Precedent

The court of appeal decisions denying coverage for the unintentional consequences of deliberate acts also arguably lack consistency with California Supreme Court guidance on the meaning of "accident." While refusing to adopt an "all-inclusive definition of the word 'accident'" in liability policies, the supreme court cases have defined the term to include both "happenings" and "consequences" from either a known or unknown cause, as long as that happening or consequence is "unexpected, unforeseen, or undesigned." *See, 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*); *Hogan v. Midland National Ins. Co.,* 3 Cal.3d 553, 559, 476 P.2d 825 (1970); *Geddes & Smith, Inc. v. Saint Paul-Mercury Indemnity Co.,* 51 Cal.2d 558, 563-564 (1959). *See also, Minkler v. Safeco Insurance Company of America,* 49 Cal.4th 315, 325 (2010) (recognizing the possibility, but not deciding, that the independent tort of negligent supervision of a child molester may constitute an accident). A minority of court of appeal cases applying this standard have allowed coverage when for the unintentional consequences of intentional acts. *See, e.g., State Farm Fire & Casualty Company v. Superior Court (Wright)*, 64 Cal.App.4th 317, 325, 78 Cal.Rptr.3d 828, 835 (2008) (insured's attempt to throw his friend into a swimming pool, which unintentionally resulted in friend's injury when he landed on pool step, qualified as an "accident"); *Chu v. Canadian Indemnity Co.*, 224 Cal.App.3d 86, 96, 274 Cal.Rptr. 20 (1990) (developer's sale of defective condominium units qualified as "accident" under Geddes where developer was unaware of defects); *Meyer v. Pacific Employers Ins. Co.*, 233 Cal.App.2d 321, 323 (1965) (insured's act of drilling well on its property, resulting in vibrations that inadvertently caused damage on neighbor's property, qualified as an accident).

In applying the restrictive accidental means test, most court of appeal decisions have ignored the broader accident definition in these cases and instead have focused on language in *Delgado* stating that "an insured's mistake of fact or law" does not "transform[] a knowingly and purposefully inflicted harm into an accidental injury." *Delgado,* 47 Cal.4th at 312. Relying on this language, courts of appeal have found that mistakes as to how hard an insured could strike a claimant without inflicting injury (*Frake),* or as to a claimant's consent to a sexual encounter (*Lyons, Quan, Gonzales),* or as to whether a construction defect would cause property damage (*Navigators),* or as to ownership of land (*Bourguignon*) or trees (*Albert)* do not transform deliberate acts committed *without* the intent to injure into accidents. These courts, however, overlook the context in which the *Delgado* court made the

statement about the relevance of mistakes of law or fact. In *Delgado,* and in every case *Delgado* cited, the insured had attempted to invoke his mistake to transform a deliberate act committed *with* the attempt to harm into an accident. In *Delgado,* for example, the supreme court held that an insured's unreasonable belief that he was acting in self-defense did not convert an assault and battery into an accident. The insured's motivation for his intentionally harmful conduct was, in the court's view, irrelevant.

Recognition of *Delgado*'s factual context avoids the need to draw distinctions between factually indistinguishable cases in order to explain the relevance of evidence of the insured's motive and purpose. In *Frake, Albert, Bourguignon,* and *Navigators,* the courts deemed evidence the insured's motive and purpose irrelevant because there was no factual dispute regarding whether the insured intended the liability-producing action. By contrast, in *State Farm Fire and Cas. Co. v. Superior Court (Wright)*, 164 Cal. App. 4th 317, 320-321, 78 Cal. Rptr. 3d 828 (2d Dist. 2008), as modified, (July 9, 2008), the court deemed motive and purpose evidence relevant because there was a factual dispute over whether the insured intended to commit the liability-producing act. In *Wright*, the insured picked up a man and tried to throw him into a swimming pool. The man fell short of the pool and broke his clavicle. The appellate court concluded that the injury was caused by an accident, reasoning that the act directly responsible for the injury--throwing too softly so as to miss the water--was an unforeseen or undersigned happening or consequence and was thus fortuitous. The court reasoned that like a speeding driver who intended to speed but not to hit another car, the insured intended to throw the other man but did not intend for him to hit the concrete. The *Wright* court could have avoided these analytical gymnastics had it understood *Delgado*'s rejection of motive and purpose evidence to apply only to the insured's attempt to use the legal justification of self-defense to transform intentionally inflicted injury into an "accident" within the meaning of a liability policy.

My next post will examine the insurer's contention in *Ledesma* 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.