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

Part I

by John K. DiMugno

Standard liability insurance policies obligate the insurer to defend and indemnify the insured against liability for damages caused by an "occurrence," defined to mean an "accident." Most insurance consumers assume that if they inadvertently injure someone or cause property damage while going about their daily business, an accident has occurred and they are covered for any resulting injury or damage. In California, however, a majority of intermediate appellate court decisions have construed "accident" narrowly, focusing entirely on the insured's conduct, and not on its unintended consequences, in order to hold that an accident does not include the unexpected consequences of the insured's intentional acts. *See, e.g., Navigators Specialty Insurance Company v. Moorefield Construction, Inc.,* 6 Cal.App.5th 1258, 212 Cal.Rptr.3d 231 (4th Dist. 2016) (*Navigators)* (negligent construction not an accident); *Albert v. Mid-Century Insurance Company*, 236 Cal.App.4th 1281, 1291 (2015) (*Albert)* (homeowner's act in deliberately hiring contractor to trim trees, which she believed were on boundary of her property, was not an "accident"); *State Farm General Ins. Co. v. Frake,* 197 Cal.App.4th 568, 579, 128 Cal.Rptr.3d 301 (2011) (*Frake*) (horse play not an accident); *Fire Ins. Exchange v. Superior Court (Bourguignon),* 181 Cal.App.4th 388, 392, 104 Cal.Rptr.3d 534 (2010) (accidental trespass not an accident); *Collin v. American Empire Ins. Co.*, 21 Cal.App.4th 787, 810 (1994) (misunderstanding of legal rights did not turn conversion of property into an accident).

The California Supreme Court may soon provide guidance on whether the state's lower courts have construed the term "accident" in liability policies properly. The supreme court has agreed to answer the following question certified to the court by the Ninth Circuit in *Liberty Surplus Insurance Corp. v. Ledesma & Meyer Construction Co., Inc.,* 834 F.3d 998 (9th Cir. 2016): "Does an employer's

negligent hiring, retention, and supervision of an employee who intentionally injures a third party qualify as an 'occurrence' under the employer's commercial general liability insurance policy?"

My next three posts will examine the issues before the California high court in *Ledesma.* This post will trace the evolution of the California's narrow understanding of the term "accident" and the scope of coverage under a liability policy's insuring agreement. My next post will analyze the doctrinal confusion created by court decisions that refuse to treat the unintended consequences of intentional acts as an accident and examine whether those decisions are consistent with California Supreme Court authority. My final post on the topic will discuss an argument raised by the insurer in *Ledesma* 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.

One Decision's Undue Impact

Nearly every District Court of Appeal decision that refuses to treat the unintended consequences of an intentional act as an accident, derive their reasoning from *Merced Mutual Ins. Co. v. Mendez*, 213 Cal.App.3d 41, 51, 261 Cal.Rptr. 273 (1989), which one court described "the most comprehensive discussion of the term *[accident]." Collin,* 21 Cal.App.4th at 810. *Merced Mutual* introduced the rule that if the insured intends the act that causes damage, there is no "accident" and thus no coverage "unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage." Under Merced Mutual, both the means and the result must be accidental. There is no accident when the insured deliberately performs all of the acts that resulted in the victim's injury, even though the insured did not intend to cause injury.

Applied literally, the *Merced Mutual* test precludes coverage for many events that most insureds would consider "accidents" covered under their liability policies. Take an often-cited scenario that probably occurs every day across America. While playing catch in his or her back yard, a homeowner attempts to throw the ball to a child, but due to the homeowner's lack of skill, the ball sails over the child's head and breaks a neighbor's window. Under *Mendez* and its progeny, the intentional act of throwing the ball would not constitute an accident and the homeowner would have no coverage for the neighbor's claim unless some intervening act that was independent of the throw collided with the ball and directed it toward the window.

Sexual Misconduct Cases Distinguished

What *Albert, Frake, Bourguignon*, *Navigators* and similar cases overlook are the circumstances confronting the court in *Merced Mutual,* where the insured sought coverage for a brutal sexual assault on the ground that he did not intend to harm the victim, and how those circumstances may have influenced the court's reasoning. When confronted with particularly repugnant conduct, such as sexual assault or child molestation, courts make a public policy choice to infer the intent to harm from the nature of the insured's conduct, rather than let juries decide the issue. *See, e.g.*, *Gonzalez v. Fire Insurance Exchange*, 234 Cal. App. 4th 1220, 184 Cal. Rptr. 3d 394 (6th Dist. 2015) (sexual assault not an

accident); *Shanahan v. State Farm General Ins. Co.*, 193 Cal. App. 4th 780, 122 Cal. Rptr. 3d 572 (4th Dist. 2011) (insured employer's act of "groping" the employee's buttocks was not an "accident"); *Lyons v. Fire Ins. Exchange*, 161 Cal. App. 4th 880, 74 Cal. Rptr. 3d 649 (2d Dist. 2008) (insured's mistaken belief that victim consented does not transform sexual assault into an accident); *Quan v. Truck Ins. Exchange*, 67 Cal.App.4th 583, 79 Cal.Rptr.2d 134 (1998) (rape not an accident despite insured's mistaken belief that victim consented). As the California Supreme Court explained in applying California Insurance Code § 533's prohibition of insurance coverage for "wilful" to child molestation, Child molestation is "always intentional ... always wrongful ... always harmful." *J. C. Penney Casualty Ins. Co. v. M. K.*, 52 Cal.3d 1009, 1025, 278 Cal.Rptr. 64, 73, 804 P.2d 689 (1991).

Few will quarrel with the public policy behind creating an irrebuttable presumption that a rapist or child molester intends harm. And it is possible to imagine other types of conduct that are so inherently likely to cause injury that an insured should not be allowed to contend to the contrary. *See, e.g. Upasani v. State Farm General Insurance Company*, 227 Cal. App. 4th 509, 173 Cal. Rptr. 3d 784 (4th Dist. 2014) (lawsuit alleging conspiracy to aid child abduction raised claims of nonaccidental conduct not covered by policies). But these are hard cases, and as it has been said, hard cases make bad law. The absence of a limiting principle for constraining the rule set forth in *Merced Mutual* has spawned decisions such as *Albert, Bourguignon,* and *Frake* which adopt a general rule that a liability policy's coverage for accidents should be limited to injury caused by accidental means, a concept that appears nowhere in the text of standard form liability policies. They do so without explanation for why a rule adopted for sexual misconduct cases should be applied generally to deny coverage for a variety of types of conduct, including negligent construction, from which the intent to harm cannot reasonably be inferred.

My next post will examine the consequences of importing accidental means analysis from the life insurance field to determine coverage under liability insurance policies.

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