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Is *Ledesma* a solution to the 'accident' conundrum?

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SEPTEMBER 14, 2018

The existence of an "accident" is essential for coverage under not just liability insurance policies but under certain types of life insurance policies as well. Whether an "accident" has occurred is also one of the most frequently litigated insurance coverage issues.

Standard liability policies obligate insurers to defend and indemnify their insureds against liability for damages caused by an "occurrence," which is defined to mean an "accident." Life and disability insurance policies often provide additional benefits when an insured's death or injury is "accidental."

Despite the critical importance of the term, the insurance industry has never attempted to define "accident" in its policies, and courts have struggled to fill in the gap. As the Pennsylvania Supreme Court observed more than 50 years ago in *Brenneman v. St. Paul Fire & Marine Insurance Co.*, 411 Pa. 409, 192 A.2d 745 (1963):

> Everyone knows what an accident is until the word comes up in court. Then it becomes a mysterious phenomenon and, in order to resolve the enigma, witnesses are summoned, experts testify, lawyers argue, treatises are consulted and even when a conclave of 12 world-knowledgeable individuals agree as to whether a certain set of facts made out an accident, the question may not yet be settled and it must be reheard in an appellate court.

The California Supreme Court's recent decision in *Liberty Surplus Insurance Corp. v. Ledesma & Meyer Construction Co. Inc.*, 5 Cal. 5th 216, 233 Cal. Rptr. 3d 487, 418 P.3d 400 (2018), is the most recent attempt by a state's highest court to clarify the meaning of "accident" in a liability policy.

The issue before the court was whether a construction contractor's liability insurer must defend a claim alleging that the contractor negligently hired, retained and supervised an employee who molested a 13-year-old child on a construction site.

The court held that the child's injuries were accidental from the contractor's perspective. Neither the fact that the employee intended to molest the victim nor the fact that the contractor intended to hire the employee precluded a finding that the molestation was an "accident" from the standpoint of the contractor. This commentary will examine the court's decision and its implications.

FACTUAL BACKGROUND

A school district hired the insured, Ledesma & Meyer Construction Co., to manage the construction of a middle school. L&M's assistant superintendent, Darold Hecht, allegedly molested Jane Doe, a 13-year-old student.

Doe sued L&M for negligently hiring, retaining and supervising Hecht. L&M's commercial general liability insurer, Liberty Surplus Insurance Co., defended L&M under a reservation of rights. L&M's policy provided coverage for "bodily injury" caused by an "occurrence." The term "occurrence" was defined as an "accident."

Liberty sought declaratory relief in federal court, contending it had no obligation to defend or indemnify L&M because Doe's injury was caused by an intentional act, not by an accident. The district court granted Liberty's motion for summary judgment.

L&M appealed, and the 9th U.S. Circuit Court of Appeals certified to the California Supreme Court the following question: "When a third party sues an employer for the negligent hiring, retention, and supervision of an employee who intentionally injured that third party, does the suit allege an 'occurrence' under the employer's commercial general liability policy?"

HIGH COURT ANSWERS QUESTION

The Supreme Court answered the certified question in the affirmative, holding that an employer's negligent failure to prevent the molestation of a minor by an employee may qualify as an "accident" within the meaning of the occurrence definition in the employer's liability policy.

In *Delgado v. Interinsurance Exchange of Automobile Club of Southern California*, 47 Cal. 4th 302, 97 Cal. Rptr. 3d 298, 211 P.3d 1083 (2009), the court had defined an "accident," which the standard form commercial general liability policy at issue did not and still does not define, as "an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause."

The *Delgado* decision emphasized that "under California law, the word 'accident' in a coverage clause of a liability policy refers to the conduct of the insured for which liability is sought to be imposed."

As the *Ledesma* court put it, "because liability insurance is a contract between insurer and insured, and the policy is read in light of the parties' expectations, the relevant viewpoint is that of the insured rather than the injured party."

The principle that the term "accident" refers to the conduct of the insured was fundamental to the court's ruling that the molestation victim's injuries were caused by an "accident" for coverage purposes, as Hecht's sexual misconduct was indisputably an uninsurable "willful act" under Cal. Ins. Code § 533. The court emphasized that "a cause of action for negligent hiring, retention or supervision seeks to impose liability on the employer, not the employee."

LOWER COURT APPLIED FLAWED REASONING

In granting summary judgment, the district court in *Ledesma* offered two grounds for its decision. First, it reasoned that any negligent hiring or supervision by L&M was "too attenuated from the injury-causing conduct committed by Hecht."

Second, the court construed California law to reject the argument that intentional acts of hiring, supervising and retaining are accidents, simply because the insured did not intend for the injury to occur.

The California Supreme Court disagreed with the district court's reasoning on both points. With respect to the district court's causation analysis, the Supreme Court pointed out that California uses a "tort approach" to the causation of damages when analyzing insurance coverage.

Under that approach, causation is established if the defendant's conduct was a "substantial factor" in bringing about the plaintiff's injury. Contrary to the district court's position, the Supreme Court noted that California cases "expressly recognize that negligent hiring, retention, or supervision may be a substantial factor in a sexual molestation perpetrated by an employee."

Turning to the district court's view that the unintended consequences of a deliberate, intentional act cannot constitute a covered accident, the Supreme Court examined and rejected the authority on which the district court relied, starting with the Supreme Court's own decision in *Delgado*.

In *Delgado*, the Supreme Court merely held that the insured's unreasonable belief that he was acting in self-defense did not transform his intentional act of assaulting the claimant into an accident.

Relying on *Delgado*, however, courts in California have held that mistakes of law or fact regarding the consequences of a deliberate act do not transform deliberate acts committed without the intent to injure into accidents.

The district court was consistent with this line of authority in holding that the mere fact that L&M did not expect Hecht to harm anyone did not transform L&M's deliberate act of hiring and supervising him into an accident. The Supreme Court in *Ledesma* found no support in *Delgado* for the accidental-means test the district court employed.

The Supreme Court pointed out that *Delgado* prevented the insured from invoking a mistake of fact, his belief that he was acting in self-defense, to transform a deliberate act committed with the intent to harm (an assault) into an accident.

Delgado thus did not support the district court's holding that conduct — hiring and supervising an employee — committed *without* the intent to inflict harm cannot qualify as an accident under a liability policy. To the contrary, it was L&M's lack of expectation that Hecht would harm anyone that made its decision to hire Hecht an accident under the *Delgado* definition.

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The *Ledesma* court distinguished *Merced Mutual Insurance Co. v. Mendez*, 213 Cal. App. 3d 41, 261 Cal. Rptr. 273 (1989), on which numerous state appeals courts have relied in refusing to treat the unintended consequences of an intentional act as an accident.

The insured in *Merced Mutual* argued that his sexual assault of the claimant was an accident because he mistakenly believed the claimant had consented.

In denying coverage for the sexual assault, the court of appeal ruled that "[a]n accident ... is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage."

The Supreme Court found the district court's reliance on *Merced Mutual* to be misplaced for several reasons. It noted that the insured's intentional acts in *Merced Mutual* were the only cause of injury, whereas Hecht's misconduct was the immediate cause of injury. Moreover, the insured in *Merced Mutual* acknowledged that he intended the acts that caused injury. By contrast, "Hecht's acts were neither expected nor intended from [L&M's] perspective."

Thus, in the *Ledesma* court's view, *Merced Mutual* "provides no support for the district court's conclusion that L&M's negligent hiring, retention, and supervision of Hecht cannot

be an accident." To the contrary, the court found support for L&M's coverage position in the *Merced Mutual* test.

"Even though the hiring, retention, and supervision of Hecht may have been "deliberate act[s]' by L&M," the Supreme Court observed, "the molestation of Doe could be considered an 'additional, unexpected, independent, and unforeseen happening ... that produce [d] the damage.'"

JUSTICE LIU'S CONCURRING OPINION

In a concurring opinion, Justice Goodwin Liu called into question the principles underlying *Delgado* and the *Merced Mutual* court's application of the law set forth in its own opinion. Justice Liu took issue with *Delgado*'s statement that the acts of the insured must be the starting point in any causal analysis.

He envisaged "myriad situations" in which events or acts before the insured acts would be relevant to whether the insured's acts resulted in an accidental injury. He posited the example of an insured driver who steps on the accelerator after a passenger spills coffee on the driver and, as a result, the car hits another car and causes injury to its occupants.

"Even in an alleged self-defense case like *Delgado*," he observed, "it is not clear why the acts of the injured party preceding the insured's actions are irrelevant to whether the injury was an accident."

IMPLICATIONS

Unfortunately, much of the jurisprudence on the meaning of the term "accident" is reminiscent of Justice Potter Stewart's famous observation about pornography, "I know it when I see it." Courts tend to reach a conclusion about whether a loss is accidental based on the totality of the circumstances and then adopt or adapt a definition designed to fit those circumstances.

The California Supreme Court in *Ledesma* said it believed that general liability policies were intended to cover negligent hiring and supervision claims and devoted much of its opinion to harmonizing California case law with that result.

In so doing, the court clarified the meaning of the term "accident" in a liability policy. But its failure to address conflicting lines of authority in the California appellate courts leaves doubt about how the term will be applied when the insured's deliberate acts are the only cause of unexpected and unintended injury.

On one hand, the court's recognition that "the term 'accident' is more comprehensive than the term 'negligence' and thus includes negligence" should put to rest the argument that the California Supreme Court has excluded deliberate conduct from the "accident" definition.

By defining "accident" to encompass all negligence, the court necessarily treats many deliberate acts — such as driving a car, constructing a building and engaging in horseplay — committed without the intent to harm as accidents.

Indeed, it was because L&M did not expect that Hecht would molest the claimant that the intentional acts of hiring and supervising Hecht were negligence rather than an intentional tort and, thus, an "accident" within the meaning of the policy.

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In observing that "accident" has a broader meaning than "negligence," the *Ledesma* court also calls into question *Delgado*'s refusal to consider the context in which an assault and battery occurs. Recall that, in *Delgado,* the Supreme Court addressed whether an assault with the intent to injure was an accident because the insured unreasonably believed he was required to act in self-defense.

But suppose the insured *reasonably* believes self-defense is necessary. Does the insured's reasonable but mistaken belief that he is under attack make an assault a non-negligent accident? Justice Liu certainly thinks so. Whether the rest of the court agrees remains to be seen.

However, in distinguishing and harmonizing *Merced Mutual*, the court left in place a decision that has had an undue impact on the meaning of "accident" under California law.

Nearly every California appeals court decision[1] that refuses to treat the unintended consequences of an intentional act as an accident derives its reasoning from *Merced Mutual,* which one court described "the most comprehensive discussion of the term [accident]." *Collin v. Am. Empire Ins. Co.*, 21 Cal. App. 4th 787 (1994).

By failing to discuss these cases, the Supreme Court in *Ledesma* missed an opportunity to bring greater clarity to California law on the meaning of a key term in liability insurance policies. The Supreme Court was, however, careful to point out in a footnote that "[t]he question whether *Merced* was correctly decided is, of course, not before us here."

Justice Liu seemed to acknowledge in his concurring opinion the circumstances confronting the court in *Merced Mutual*, where the insured sought coverage for a brutal sexual assault on the grounds 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.

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. 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 that 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.

These rulings do so without explaining 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.

NOTES

[1] *See, e.g., Navigators Specialty Ins. Co. v. Moorefield Constr. Inc.*, 6 Cal. App. 5th 1258, 212 Cal. Rptr. 3d 231 (4th Dist. 2016); *Albert v. Mid-Century Ins. Co.*, 236 Cal. App. 4th 1281, 1291 (2015); *State Farm Gen. Ins. Co. v. Frake,* 197 Cal. App. 4th 568, 579, 128 Cal. Rptr. 3d 301 (2011); *Fire Ins. Exch. v. Super. Ct. (Bourguignon),* 181 Cal. App. 4th 388, 392, 104 Cal. Rptr. 3d 534 (2010).

This article first appeared in the September 14, 2018, edition of Westlaw Journal Insurance Coverage.

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