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Published in Los Angeles Daily Journal **Thursday, July 26, 2008**

CRUEL INTENTIONS?

By Philip Hunter Thompson

The typical coverage grant of a liability insurance policy provides coverage for damages an insured becomes legally obligated to pay because of injury or damage caused by an "accident."

California places the burden on the insured to establish that a claim or suit falls within the policy's coverage grant. Consequently, for coverage purposes, it is the insured's burden in the first instance to show by facts alleged in a complaint or other known facts that particular claimed damages were caused, or potentially caused, by an "accident." *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635 (2003). Insured defendants characteristically claim that if they can plausibly argue that their conduct was negligent, they satisfy this coverage requirement. This argument appears to be based on the premise that the test to determine whether an insured defendant's conduct is "accidental" is whether he or she intended to cause plaintiff's alleged harm. This argument, however, applies the wrong test, and misconstrues and misapplies California law.

An "accident," for the purposes of liability insurance, does not occur simply because the insured does not subjectively expect or intend to cause the harm complained of. An "accident" occurs when injury or damage follows an insured's mistake about some objective fact. For example, in the auto context, an "accident" occurs when the Mustang driver mistakenly believes that the lane to his right is empty, changes lanes and collides with the Prius occupying that lane. An "accident" does not occur if the Mustang driver knows the Prius is there but cuts it off in order to "get even" for some perceived offense, and instead collides with it. In the former situation, the driver is mistaken about an objective fact - the lane is empty. In the latter, the driver is not mistaken about an objective fact but does not intend to cause injury or damage, only to scare or annoy the Prius driver.

Lyons v. Fire Ins. Exchange, 161 Cal. App. 4th 880 (2008), a recent 2nd District opinion, gives life to this analysis. Here are the facts. Steve Lyons, a former Major League Baseball player turned sportscaster for Fox and the Los Angeles Dodgers, was vacationing with his family in Hawaii, where, at a hotel pool, he met Stacey Roy. They chatted for several hours, during which he claimed she made several suggestive references to her anatomy. When she left the pool to return to her room, he came along. After they got off an elevator, he asked her to show him her breasts. According to him, she demurred because she said she was afraid of being seen in the hall. He then took her by the wrist and led her to a secluded alcove near the elevator, where he again asked to see her breasts. She said "no" again, this time because she said she was afraid her husband might show up. Frustrated, he gave up and returned to the pool. Other than holding her wrist when outside the elevator, he denied any physical contact with her. Roy reported Lyons to hotel security

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and the local police, claiming a sexual assault. Both investigated the matter but concluded that the entire episode was nothing more than a scam on her part to gain money. Not to be deterred, Roy then sued Lyons, seeking damages for bodily injury and emotional distress on several theories, including false imprisonment. He tendered the defense of her suit to Fire Insurance Exchange, his homeowner's insurer, which provided him with liability coverage for damages resulting from false imprisonment caused by an "accident." The insurance company denied his tender, asserting that her claimed damages were not caused by an "accident."

Lyons then sued Fire Insurance Exchange for breach of contract and bad faith. The insurance company moved for summary judgment, which the trial court granted, finding that there was "no possibility of coverage for the grabbing and pulling of Roy's wrist to take her to the alcove in the hallway of the hotel" because "grabbing a person's wrist is not an accident." He appealed, and argued that his wrist grab could be construed as negligent and an "accident" if he could show that he was under the mistaken belief that she welcomed his advances. The 2nd District rejected this argument and concluded that Lyons misunderstood the meaning of "accident" as used in general liability policies. The court explained that this term refers to the nature of Lyons' conduct, not his state of mind, and that, negligent or not, in this case the conduct alleged to have given rise to Roy's claimed injuries was necessarily nonaccidental, not because any harm was intended, but simply because the conduct could not be engaged in by "accident." The court further explained that a mental miscalculation by Lyons of Roy's state of mind simply could not transform intentional conduct, performed with full knowledge of all the objective facts, into an accident. Regardless of his misperception of consent, Lyons intended his sexual advance and the accompanying unwanted detention that was the subject of her claim.

Consequently, Fire Insurance Exchange provided no coverage for Roy's claims because Lyons could not show that he was mistaken about an objective fact. His subjective intent, in light of his intentional acts, was simply not relevant to this issue. This is consistent with how courts deal with the "accident" issue in the child molestation context. A pedophile typically does not intend to harm his victims; he intends to show affection. But his molesting acts are never an "accident" because he is never mistaken about the objective facts of the molestation. Accordingly, the molester's subjective intent, in light of his intentional acts, is simply not relevant to this issue.

This approach has been consistently applied, if not so named, outside of the sexual assault context. For example in *Ray v. Valley Forge Ins. Co.*, 77 Cal.App.4th 1039 (1999), a professional roofing consultant did not accidently provide bad advice. The underlying complaint alleged that the consultant acted deliberately as a professional consultant hired to provide advice, intended the claimant to use the materials he selected, and intended that the claimant would rely on his recommendations. The court found that "[W]here the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an 'accident' merely because the insured did not intend to cause injury." In other words, the consultant did not show he was mistaken about an objective fact. In *Modern Development Co. v. Navigators Insurance Co.*, 111 Cal.App.4th 932 (2003), the court found that a bodily injury claim resulting from an architectural error was not an "accident." The court reasoned that the alleged underlying injuries were caused by an architectural configuration by the insured and its alleged failure to remove an offending architectural barrier, not by an "accident" as required for coverage. The insured intended for the facility to be configured as it was, and therefore the inability to access the facility did not constitute an "accident". Thus, the defendant insured did not show it was mistaken about an objective fact. In

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Golden Eagle Ins. Corp. v. Cen-Fed, Ltd., 148 Cal. App. 4th 976 (2007), the court found that a landlord's failure to discharge its contractual liabilities under a lease agreement was nothing more than a nonaccidental act of breach of contract. Again the insured failed to show that it was mistaken about an objective fact. Accordingly, it is not true that if an insured defendant can plausibly argue that he or she was negligent, the "accident" requirement of a liability policy is met. The focus of the "accident" inquiry should not be whether the insured acted with the intent or expectation that injury would follow. The focus should be on whether the insured's conduct included a mistake about an objective fact. Without such a mistake, there can be no "accident."

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