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Is Liability Coverage for Negligent Hiring And Supervision No More?

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Counsel for policyholders and insurers have long debated whether negligent hiring and supervision constitutes an accident covered under liability insurance when the "negligently" hired or supervised person intentionally injures another. The "fat lady" just might be "singing" because that debate appears to be over.

In *L.A. Checker Cab Cooperative Inc. v. First Specialty*, 2010 Cal. App. LEXIS 1131, a Checker Cab driver ordered a drunken passenger out of his cab. The passenger spat in the driver's face, kicked him, punched him on the back of his head, and threatened to kill him. The driver, who described the passenger as "deranged" and "out of control," warned that he was armed. When words failed, he reached into his pocket for his gun and "racked the slide, chambering the round to make sure that *the passenger understood it was not* a toy gun." The passenger leaped from the cab, jerked opened the driver's door and attempted to drag him onto the pavement. With the passenger only inches away, the driver fired one shot and the passenger ran away.

The passenger sued the driver for assault and battery and Checker Cab for negligent supervision. Asked in deposition whether he intended to shoot the passenger, the driver answered: "There was no time to intend or not to intend. I just shot him because it was [i]n the spur of the moment," and "[b]ecause of the danger to my life."

Checker Cab tendered its defense to its liability insurer, which declined coverage based on its conclusion that the passenger's alleged injuries were not caused by an "occurrence," defined as an "accident." Checker Cab sued its insurer for coverage. The trial court granted the insurer's motion for summary judgment, and the Court of Appeal affirmed.

The court noted that in the context of liability insurance, an "accident" is an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause. Relying on *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, the court held that because the driver admitted that he intentionally chambered a bullet in his gun and shot the passenger at point blank range in self-defense, any bodily injury was not caused by an "accident" as a matter of law. The court reasoned that under *Delgado*, the driver's claim of self-defense could not convert his intentional act into an "accident," and although the passenger's acts of spitting at, assaulting and threatening the driver were unforeseen and unexpected from the driver's perspective, the term "accident" refers to the injury-producing acts of an insured, not of an injured party. Accordingly, the driver's intentional firing of the gun was the cause of the passenger's injury, and intentionally firing a gun is not an "accident."

Furthermore, the court held that only a direct cause of damage can qualify as an "accident." A remote cause cannot. *Delgado* required the court to focus on conduct that directly produced the passenger's injury and not on remote acts that only had the potential for producing future injury. The driver's intentional firing of the gun was the direct cause of the passenger's injury. Checker Cab's alleged negligence in supervising the driver was at most a remote cause of the injury. Therefore, Checker Cab's alleged negligent supervision of the driver was not an "accident."

Thus, under *Checker Cab's* rule, the "accident" term of a liability policy is satisfied only if the conduct of an insured directly causes an unexpected, unforeseen, or undesigned happening or consequence. Negligent supervision, and presumably negligent entrustment, negligent hiring and any other tort that requires an additional act to be tortious, cannot be a direct cause of injury for the purposes of this "accident" analysis. Thus, if this analysis is liberally applied, "accident" based liability coverage for these types of torts will be eliminated in many, if not most cases.

To understand the significance of *Checker Cab*, one needs only to review the most recent Supreme Court insurance coverage decision. In *Minkler v. Safeco Ins. Co. of America* (2010), 49 Cal. 4th 315, a mother was the named insured under a series of homeowners policies. Her son

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qualified as an additional insured. The policies' liability coverage promised to defend and indemnify "an" insured for personal injury arising from a covered occurrence, but specifically excluded coverage for injury that was expected or intended by "an" insured, or was the foreseeable result of "an" insured's intentional act. The policies' "Conditions" provisions provided: "This insurance applies separately to each insured."

The victim sued the mother, alleging that her son sexually molested him while at the mother's home as a result of her negligent supervision. Safeco declined coverage for the mother based on the exclusion asserting that the son was "an" insured, and litigation followed. The state Supreme Court held that the exclusion applied separately to each insured and that the mother's coverage turned on whether her (as opposed to his) acts fell within the exclusion.

The court, however, noted: "Safeco does not contend that *the victim's* claims against *the mother* fell outside the scope of this basic coverage provision.... The policies defined an 'occurrence' as 'an accident, which results, during the policy period, in bodily injury or property damage.' Safeco does not assert that *the victim's* claims related to his alleged molestations by *the son* are beyond the scope of this basic coverage because the molestations were not 'accident[s],' and we have not been asked to address that issue. We therefore do not do so. (But see *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308-317.")

Under these new cases, an insurer in Safeco's position need not rely exclusively on the intentional acts exclusion but can also argue that there was no "accident" with respect to the son, and, therefore, no "accident" with respect to the mother.

The debate is over. Let the fat lady sing.