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Intentional Acts

by David Goodman

In my experience, insurance isn't the first thing most people think about when they wake up in the morning. Whether something will be covered isn't even a thought until a person has a claim against them or they experience a loss and are seeking reimbursement for damages.

The "general liability insurance policies" through which most businesses protect themselves will include an exclusion from coverage for "intentional acts." After all, insurance companies cannot be expected to insure a business for the intentional consequences of that business' conduct. An intentional act is when the insured party acted with the expectation that the harm that followed was intended, and that the consequences of that act were (reasonably) foreseeable. In litigation, claims are often pled in "the alternative" with one count of a complaint asserting that the conduct giving rise to the claim was "negligent" and another count alleging that it was "intentional." As a result, more often than not, there is a dispute about whether the conduct on which an insurance claim is based took place or whether the claim arises from "intentional conduct."

Consequently, the issue of whether a claim is excluded from coverage as an "intentional act" is frequently presented when a business or individual faces a claim against a them and seeks to have their insurance carrier pay for a defense or to cover the losses. However, most insurance policies contain language that excludes coverage of claims resulting from intentional acts. In these instances, the claim would be outside the policy's coverage. But, if a claim states the insured party was negligent, or that they acted with intent but did not intend to cause harm, then this may not constitute an intentional act. For example, a chemical manufacturer may have intended to dispose of waste in a pit designed to store the waste. The act of storing waste is therefore "intentional." However, it may not have been foreseeable that the waste would leech from the storage pit into the ground water. If someone sues the manufacturer over this incident, the company may be able to argue that their defense or losses should be covered by their insurer. (Incidentally, this example raises some complications around what is known as the "pollution exclusion," but that is an article for another day!)

Determining intent can be difficult if allegations in the claim are generic or ambiguous, but this is to the benefit of the insured. If there is even a possibility that the act could have been negligent rather than intentional, then it may still be within coverage of the policy and the insurer is obligated to provide a defense. But if the claim evolves and the court finds the act was intentional, making the claim fall outside coverage, then the insurer can terminate the defense. Sometimes, savvy attorneys will intentionally plead claims in a vague or generic manner in the hope of triggering insurance coverage for the claim.

So, you receive a reservation of rights letter that supposedly contains an explanation of why the claim may not or allegedly is not covered — what are your options?

- Seek out somebody who can explain the coverage position.

It is important to understand the circumstances identified by the insurer in which the policyholder would and would not have coverage. In many cases a policyholder has the right to independent counsel paid for by the insurance carrier, but much of the time the insurer will not tell the insured that this is a possibility.

- The insurer's coverage position is not set in stone.

Just because the reservation of rights letter takes a certain position on the coverage, it does not mean that position cannot be revisited and reconsidered. Frequently, the insurer's first response is a hard "no," but appropriate pushback can cause it to reevaluate.

- Don't let the insurance carrier go fishing.

It is always a good idea to consult with coverage counsel after receiving a reservation of rights letter because the insurer may be fishing for information that would exclude coverage. The insurer does this by asking for more information from the insured so that it can "evaluate" coverage, when really it is asking for information to help establish that the claim is outside the policy's coverage. Coverage counsel can assist in presenting the claim or responding to requests for information in a way that ensures that communication is not used by the insurer to avoid coverage.

- Don't accept "no."

Remember, insurance carriers do not make money paying claims. Reservation of rights letters identify anything that could arguably avoid insurance coverage. There is often a basis to push back on the insurer's position, and coverage counsel can help you enforce your rights.

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