

# THE EXPECTED OR INTENDED EXCLUSION IN LIABILITY INSURANCE: WHAT ABOUT SELF-DEFENSE?

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## I. INTRODUCTION

Individuals buy liability insurance as a means of shifting liability to an insurer for injuries or damage they may cause. A typical liability insuring clause will provide that the insurer “will pay damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence to which this policy applies. . . .”<sup>1</sup> The insuring clause will go on to state that “[i]f an insured person is sued for these damages, [the insurer] will provide a defense to the lawsuit. . . .”<sup>2</sup>

Payment of damages (indemnification) and provision of a defense are two separate obligations. For instance, the insurer must defend the insured if there is any potentiality that the claim is covered by the policy.<sup>3</sup> However, the duty to indemnify the insured arises only when there is a judgment against the insured. If the insured claims that he<sup>4</sup> acted in self-defense, one of two things will happen: (i) the claim of self-defense will be upheld, and there will be no judgment against the insured; or (ii) the claim of self-defense will not be upheld, resulting in a judgment against the insured, and there will be no duty for the insurer to indemnify the insured because of an exclusionary clause in the liability insurance policy. This exclusionary clause usually provides that the insurer does “not cover any bodily injury or property damage intended by, or which may reasonably be expected to result

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1. Allstate Insurance Co., Allstate Deluxe Plus Homeowners Policy § 2, Coverage X, at 28 (on file with author) [hereinafter Allstate Policy].

2. *Id.*

3. *Cochran v. Aetna Cas. & Sur. Co.*, 637 A.2d 509, 513 (Md. Ct. Spec. App. 1994), *aff'd*, 651 A.2d 859 (Md. 1995).

4. When the gender for a personal pronoun could be either male or female, I use the masculine pronoun generically due to habit and my masculine personal orientation. By using the masculine pronoun generically, I avoid the rather awkward phrase “he or she” and the grammatically incorrect term “they.” I trust that female authors will balance the scales on the other side.

from the intentional or criminal acts or omissions of any insured person."<sup>5</sup>

If that exclusionary clause is applied literally as written, the insurance company that sold the applicable liability insurance policy has no duty to indemnify the insured whenever self-defense is claimed, regardless of the outcome of the litigation against the insured, because the insured's intentional act of defending himself makes the exclusionary clause applicable. Thus, the insurance company that sold the applicable liability insurance policy to the insured would rely on the fact that the insured intentionally protected himself, and in so doing inflicted reasonably expected bodily injury upon his attacker. However, there may still be a dispute concerning the duty of the insurer to defend the insured because the term *intent* is usually defined as the insured's desire to cause the consequences of his act or the insured's belief that such consequences are substantially certain to result from his act.<sup>6</sup> An injury is usually considered *expected* if the insured subjectively has "a high degree of certainty that bodily injury" or property damage will result from his act.<sup>7</sup>

Although assault and battery may give rise to a civil cause of action for damages, the original aggressor may bring an action for injuries he sustains from retaliation to his initial attack.<sup>8</sup> The plaintiff in this action is not necessarily barred from recovery because he committed the initial tort. However, self-defense may bar recovery.<sup>9</sup>

A person may use force against another to protect himself from harm.<sup>10</sup> The permissible amount of force is usually deemed to be that which a "reasonably cautious and prudent" person would use under the circumstances.<sup>11</sup>

Courts often face competing public policy considerations when construing clauses in liability insurance policies which exclude coverage for injuries or damage that were either caused intentionally or should have been reasonably expected by an insured person. On the one hand, disallowing coverage in such cases serves as a deterrent as well as a punishment. On the other hand, most courts favor compensating injured victims by making insurance proceeds available be-

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5. Allstate Policy, *supra* note 1.

6. Ala. Farm Bureau Mut. Cas. Ins. Co. v. Dyer, 454 So. 2d 921, 925 (Ala. 1984).

7. Dyer, 454 So. 2d at 925.

8. State v. Brigham, 758 P.2d 559, 560 (Wash. Ct. App. 1988).

9. Brigham, 758 P.2d at 560-61.

10. Robison v. La Forge, 27 P.2d 585, 586-87 (Wash. 1933).

11. Robison, 27 P.2d at 587.

cause tortfeasors often do not have sufficient assets to provide compensation.<sup>12</sup>

## II. EXCLUSION IS UNAMBIGUOUS

As the court in *Espinet v. Horvath*<sup>13</sup> pointed out:

The contractual language excludes *any* bodily injury intended or expected by the insured. Though justified, an injury inflicted by an act taken in self-defense may be expected and/or intended. To accept [the] theory that injuries inflicted in the course of self-defense are included in coverage, we would be forced to read into the policy that only injuries inflicted wrongfully are excluded. We may not read such a requirement into the contract.<sup>14</sup>

Furthermore, as stated in *State Farm Fire & Casualty Company v. Marshall*,<sup>15</sup> it seems clear that a "majority of jurisdictions . . . hold that self-defense is not an exception to the intentional acts exclusion and the clear terms of the [liability insurance] policy control. . . . [T]he sanctity of the parties to freely contract prevails."<sup>16</sup> The court in *Marshall* went on to point out that people who want to have insurance covering their acts of self-defense may do so, but they must bargain for and pay for such coverage.<sup>17</sup> Therefore, the court in *Marshall* determined that a court should not "rewrite a [liability insurance] policy . . . to provide coverage where the clear language of the [liability insurance] policy does not; nor . . . [should public policy be invoked] to override [an] otherwise valid contract."<sup>18</sup>

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12. Preferred Mut. Ins. Co. v. Thompson, 491 N.E.2d 688, 691 (Ohio 1986); John D. Ingram, *The "Expected Or Intended" Exclusion Clause In Liability Insurance Policies: What Should Be Excluded?*, 13 WHITTIER L. REV. 713, 713 (1992).

13. 597 A.2d 307 (Vt. 1991).

14. *Espinet v. Horvath*, 597 A.2d 307, 310 (Vt. 1991).

15. 554 So. 2d 504 (Fla. 1989).

16. *State Farm Fire & Cas. Co. v. Marshall*, 554 So. 2d 504, 505 (Fla. 1989).

17. *Marshall*, 554 So. 2d at 506.

18. *Id.*; see also *Nationwide Mut. Fire Ins. Co. v. Mitchell*, 911 F. Supp. 230, 234-35 (S.D. Miss. 1995) (stating the insured "intended to do harm," so even though he acted in defense of his mother, it "was an intentional act within the meaning of the . . . policy exclusion"); *State Farm & Cas. Co. v. Sanders*, 805 F. Supp. 1453, 1462 (S.D. Ind. 1992) (stating the insured testified "that he intended to fire his shotgun at [the injured people], making [the] injuries clearly 'expected or intended,'" and therefore excluded from coverage); *Hartford Accident & Indem. v. Krekeler*, 363 F. Supp. 354, 357-58 (E.D. Mo. 1973), *rev'd on other grounds*, 491 F.2d 884 (8th Cir. 1974) (stating if the injury was caused intentionally, even in self-defense, the exclusion applies); *Jackson v. State Farm Fire & Cas. Co.*, 661 So. 2d 232, 235 (Ala. 1995) (Houston, J., dissenting) (stating the rule in Alabama is that "acts of self-defense are undeniably intentional and fall within the scope of 'intentional injury' exclusions"); *Lockhart v. Allstate Ins. Co.*, 579 P.2d 1120, 1122 (Ariz. Ct. App. 1978) ("[T]he possible legal justification of self-defense does not save an otherwise intentional act from the 'intentional injury' exclusion.") (internal citations omitted); *Aetna Cas. & Sur. Co. v. Griss*, 568 So. 2d 903, 904 (Fla. 1990)

As a general rule, courts recognize that insurance policies are contracts and thus are governed by the usual rules of contract interpretation.<sup>19</sup> While most courts agree that "exclusionary provisions are not favored and . . . will be construed against the insurer," this presumption should apply only when the language of the exclusionary provision is *ambiguous*.<sup>20</sup> Conversely, the language of an exclusionary provision should be applied as written when the "exclusion language regarding expected or intended injury [is] unambiguous."<sup>21</sup>

In most jurisdictions where an insured claims to have acted in self-defense, there is no possibility that the insurer will be required to pay a victim's claim for damages against the insured. If the court finds that the insured's use of force was not justifiable self-defense, his admittedly intentional act is clearly excluded from coverage. However, if the court finds that the insured's use of force was justifiable self-defense, the insured would not be liable to the victim and there would be no duty for the insurer to indemnify the insured.<sup>22</sup> It is generally accepted that an insurer has no duty to defend the insured against a claim if there can be no duty to indemnify the insured.<sup>23</sup>

### III. EXCLUSION DOES NOT APPLY

Despite the fact that many courts have held that liability insurance policy provisions that provide an exclusion for expected or intended injuries are unambiguous and must be construed to deny coverage to the insured, some courts hold to the contrary. The court in *Berg v. Fall*<sup>24</sup> held that a liability insurance policy's provision that excluded coverage for damage or injury intended or expected by the

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("[S]elf-defense is not an exception to an insurance policy's intentional act exclusion."); *Ga. Farm Bureau Mut. Ins. Co. v. Lane*, 466 S.E.2d 272, 273 (Ga. Ct. App. 1995) ("[Where] the evidence. . . shows that [the insured] intended to cause injury to [the other party], the fact that he may have acted in self-defense is insufficient to vitiate the element of intent so as to remove such act from the ambit of the exclusionary clause."); *Sperli v. Guitierrez*, 772 So. 2d 805, 807 (La. Ct. App. 2000) ("[T]he intentional act exclusion applies when the insured acts intentionally in self-defense."); *Erie Ins. Group v. Buckner*, 489 S.E.2d 901, 904 (N.C. Ct. App. 1997) (stating, in an application of Virginia law, even if insured did not intend to injure the other person, he should have expected that injury was likely to occur; so, exclusion precludes coverage); *Grange Ins. Co. v. Brosseau*, 776 P.2d 123 (Wash. 1989) (stating exclusion applies even if insured acted in self-defense).

19. *Auto-Owners Ins. Co. v. Harrington*, 565 N.W.2d 839, 841 (Mich. 1997).

20. *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 412 S.E.2d 318, 321 (N.C. 1992).

21. *Harrington*, 565 N.W.2d at 841.

22. *See Century Mut. Ins. Co. v. Paddock*, 425 N.W.2d 214, 217 (Mich. Ct. App. 1988) ("Regardless of whether trier of fact accepts the [insureds'] contention that they [acted] in self-defense, [the insurer] will have no obligation to pay damages on their behalf").

23. *Paddock*, 425 N.W.2d at 217; *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 177 (Cal. 1966).

24. 405 N.W.2d 701 (Wis. Ct. App. 1987).

insured was "not clear as to whether it covers bodily injury caused by privileged acts of self-defense."<sup>25</sup> The court then noted that the state "supreme court ha[d] recognized that an insurance policy should not be interpreted to penalize a person who is innocent of wrongdoing,"<sup>26</sup> and that "reasonable acts of self-defense are . . . not wrongful."<sup>27</sup>

Based on this view of public policy and the rules of contract interpretation, the court in *Berg* went on to reason that:

[w]ithout specific contract language to the contrary, we cannot assume the insured intended to bargain away coverage for acting in a manner immune from any criminal or civil sanction. Accordingly, we conclude that a reasonable insured would not expect to be denied coverage under [his liability insurance] policy in [the] exercise of a legal privilege, regardless of the intentional character of the privileged act.<sup>28</sup>

The court then held that because the policy did not "exclude bodily injuries caused by privileged acts of self-defense," the insurer owed the insured a duty to defend.<sup>29</sup>

It is widely recognized that allowing individuals to contract for indemnification for injuries resulting from their own willful wrongdoing is not in the public interest because this would reduce deterrence of such acts.<sup>30</sup> However, increasing the likelihood of compensation for victims of injuries caused by an insured person is in the public interest. To increase that likelihood, some courts take the position that neither the deterrence factor nor any other interest of "public policy is served by application of the exclusion to an insured who claims to have acted in self-defense."<sup>31</sup> As the court stated in *Stoebner v. South Dakota Farm Bureau Mutual Insurance Company*,<sup>32</sup> a person "acting in self-defense is . . . not acting unreasonably . . . [and] is not engaging in the type of conduct that intentional acts exclusions are intended to discourage."<sup>33</sup>

Some courts go beyond requiring coverage based on ambiguity and simply hold that "an act committed in self-defense should not be considered an 'intentional act' within the meaning of the [liability insurance policy's] exclusion."<sup>34</sup> Furthermore, while an act done "in self-defense is intentional in a narrow sense, in a broader sense it is

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25. *Berg v. Fall*, 405 N.W.2d 701, 704 (Wis. Ct. App. 1987).

26. *Berg*, 405 N.W.2d at 704.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Preferred Mut. Ins. Co. v. Thompson*, 491 N.E.2d 688, 691 (Ohio 1986).

31. *Thompson*, 491 N.E.2d at 691.

32. 598 N.W.2d 557 (S.D. 1999).

33. *Stoebner v. S.D. Farm Bureau Mut. Ins. Co.*, 598 N.W.2d 557, 560 (S.D. 1999).

34. *Fire Ins. Exch. v. Berray*, 694 P.2d 191, 193 (Ariz. 1984).

not."<sup>35</sup> Rather, "[w]hen faced with a harm-threatening situation, the decision to defend one's self is not a choice. It is an instinctive necessity."<sup>36</sup>

Typical of the courts which take the position that an act that is done in self-defense should not be considered an intentional act within the meaning of a liability insurance policy's provision excluding coverage for expected or intended acts of the insured is this statement of the court in *Farmers & Mechanics Mutual Insurance Company of West Virginia v. Cook*:<sup>37</sup> "[A] loss which results from an act committed by a [liability insurance] policyholder in self-defense or in defense of another is not, as a matter of law, expected or intended by the policyholder."<sup>38</sup> These courts support this position by reasoning, like the court in *Transamerica Insurance Group v. Meere*,<sup>39</sup> "that when one acts in self-defense the actor is not generally acting for the purpose of intending any injury to another but, rather, is acting for the purpose of attempting to prevent injury to himself."<sup>40</sup> Therefore, these courts hold that a liability insurance policy's exclusionary clause applies only "when the insured intentionally acts *wrongfully* with a purpose to injure."<sup>41</sup>

However, the courts which take the position that an act that is done in self-defense should not be considered an intentional act within the meaning of a liability insurance policy's expected or intended exclusionary clause never seem to go on to discuss the fact that even if the injury was not *intended*, it almost surely was *expected*. Nor do these courts effectively rebut the dissent of Chief Justice Holohan in *Transamerica*.<sup>42</sup> Chief Justice Holohan argued that the court's decision was actually "based on policy to distribute the consequences of the loss on an insurance company."<sup>43</sup> Furthermore, Chief Justice Holohan stated that an insurance company "ha[s] the right to limit its liability and to impose conditions and restrictions upon its contractual obligations not inconsistent with public policy."<sup>44</sup> However, in *Transamerica*, the court mandated that there would be coverage any time an insured contended that "his intentional acts were done in self-de-

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35. *Berray*, 694 P.2d at 193.

36. *State Farm Fire & Cas. Co. v. Poomaihealani*, 667 F. Supp. 705, 708 (D. Haw. 1987).

37. 557 S.E.2d 801 (W. Va. 2001).

38. *Farmers & Mechs. Mut. Ins. Co. of W. Va. v. Cook*, 557 S.E.2d 801, 810 (W. Va. 2001).

39. 694 P.2d 181 (Ariz. 1984).

40. *Transamerica Ins. Group v. Meere*, 694 P.2d 181, 188 (Ariz. 1984) (quoting *All-state Ins. Co. v. Novak*, 313 N.W.2d 636, 640-41 (Neb. 1981)).

41. *Transamerica*, 694 P.2d at 189.

42. *Id.*

43. *Id.* at 190.

44. *Id.*

fense.”<sup>45</sup> In Chief Justice Holohan’s opinion, such a holding was “neither supported by logic nor good public policy . . . .”<sup>46</sup>

Those courts which refuse to apply a liability insurance policy’s expected or intended exclusionary clause in cases of self-defense will necessarily hold that the insurer must defend the insured, even though there is no possibility that the insurer will end up with a duty to indemnify the insured.<sup>47</sup> These courts’ refusal to apply a liability insurance policy’s expected or intended exclusionary clause seems to be based on the general rule that an insurer must defend false, fraudulent, or groundless suits against its insured, “even though it may not ultimately have an obligation to pay.”<sup>48</sup> However, this misconstrues the duty to defend. There should not be a duty to defend when there is *no* possibility of a judgment against the insured that will require indemnification by the insurer.

#### IV. CONCLUSION

To avoid disputes in the future, insurance companies should explicitly state in their liability insurance policies whether the act of self-defense is an intentional act which precludes coverage to the insured. In explicitly stating whether the act of self-defense is an intentional act which precludes coverage, the insured will know exactly what his expectations about his liability insurance policy should be when a self-defense situation arises. Additionally, the insured has a right to know what he is being protected against when obtaining a liability insurance policy. Furthermore, it is in the best interest of public policy for the insured to know what is covered and what is excluded by his liability insurance policy, as expressed in clear, unambiguous policy language.<sup>49</sup> Indeed, some liability insurance policies are now being issued with language which expressly provides for coverage when force is used in defense of person or property.<sup>50</sup> The exclusionary clause in the policies involved in *Cochran v. Aetna Casualty & Surety Company*<sup>51</sup> provided that:

This insurance does not apply to:

- a. ‘Bodily injury’ or ‘property damage’ expected or intended from the standpoint of the ‘insured.’ This exclu-

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45. *Id.* at 190-91.

46. *Id.* at 191.

47. *See supra* notes 5-6 and accompanying text.

48. *Novak*, 313 N.W.2d at 641.

49. *See Home Ins. Co. v. Nielsen*, 332 N.E.2d 240, 244 (Ind. Ct. App. 1975) (“We do not perceive that it would be a violation of public policy to permit an insurance company to defend an action where its insured is excused because he acted in self-defense.”).

50. *Cochran v. Aetna Cas. & Sur. Co.*, 637 A.2d 509, 513 (Md. Ct. Spec. App. 1994), *aff’d*, 651 A.2d 859 (Md. 1995).

51. 637 A.2d 509 (Md. Ct. Spec. App. 1994).

sion does not apply to 'bodily injury' resulting from the use of reasonable force to protect persons or property.<sup>52</sup>

By the same token, if an insurer does not want to provide coverage, including any duty to defend for acts of self-defense, it can expressly state this in its policies.

It is entirely within the power of insurers to clearly and expressly state what coverage they choose to provide. If properly done, the insurers' insurance policies will no longer be subject to interpretation by the courts. Indeed, some courts have invited insurers to do so, as exemplified by *United Services Automobile Association v. Elitzky*.<sup>53</sup> The court in *Elitzky* stated that "[i]f the industry feels that our decision is in error and in serious conflict with its interests, its task is a simple one. It can protect itself by re-writing its policies to clearly exclude those risks against which it does not want to insure."<sup>54</sup>

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52. *Cochran*, 637 A.2d at 510.

53. 517 A.2d 982 (Pa. Super. Ct. 1986).

54. *United Servs. Auto. Ass'n v. Elitzky*, 517 A.2d 982, 991 (Pa. Super. Ct. 1986).