INSURANCE COVERAGE FOR BUSINESS TORT CLAIMS ALLEGING INTENTIONAL WRONGDOING

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I. THE PERILS OF PLEADINGS ALLEGING INTENTIONAL WRONGDOING

Have you ever seen a punter in a football game kick the ball so far down the field that his teammates cannot reach the other team's return man before he catches the ball? This is known as out-kicking the coverage. It spells trouble for the kicking team because the returner can build up so much speed before first facing any tacklers that he can blow right by them for a touchdown.

A plaintiff in a commercial litigation can also out-kick his coverage—the insurance coverage the defendant is counting on to defend and resolve the plaintiff's claims. Like the punter who kicks the ball too far, the business litigation plaintiff sometimes pleads or proves that the defendant was not merely negligent, but reckless, intentional, or malicious. Such allegations may go beyond those necessary to prove a particular cause of action. Yet they can allow the defendant's insurers to deny coverage on the theory that the harm was intentional and uninsurable. The plaintiff will watch the coverage blow right by him and be left with an uninsured judgment less likely to be collectible.

Certainly a business plaintiff remains the master of his own complaint and may include whatever allegations he chooses within reason. He has no obligation to draft his complaint to plead into his adversary's insurance coverage and may in fact choose not to do so for strategic reasons. At the same time, however, he should not plead himself and his adversary out of insurance coverage without giving the matter due consideration.

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To avoid out-kicking the coverage, he needs to understand the dividing line between alleging conduct that involves enough "intent" to satisfy the elements of a cause of action and conduct that needlessly smears the adversary as a bad actor.

With that in mind, this article is intended to provide business plaintiffs with an overview of how the allegations in their complaints, particularly allegations that a defendant company or individuals acted intentionally, criminally, maliciously, or fraudulently, may affect the available insurance coverage. As will be seen below, whether insurance coverage is available for a business claim alleging such intentional wrongdoing will largely turn on a comparison of the policy terms addressing coverage for intentional acts with the type or degree of intent alleged in the complaint and ultimately proven with facts. The analysis will differ depending on whether the defendant insured is pursuing coverage under a commercial general liability (CGL) policy, a director's and officer's liability (D&O) policy, or a professional services or errors and omissions (E&O) policy.

To help put these issues in context, this article first provides an overview of key policy provisions and public policy relied upon by insurers to deny coverage for claims alleging that the insured acted intentionally. Next, it discusses how insurance rules of construction guide the ultimate coverage analysis. Finally, it outlines the allegations and proofs of intent that a business plaintiff must establish to succeed on most commonly pleaded causes of action and analyzes how courts have construed the requisite allegations for insurance coverage purposes.

II. PUBLIC POLICY AND INSURANCE POLICY TERMS RELATING TO INTENTIONAL ACTS

A. *Public Policy and Statutory Considerations*

Insurance typically covers only losses that are fortuitous, meaning accidental or unexpected. Some states have codified this requirement and by statute prohibit one party from contracting to indemnify another for losses resulting from intentional acts.[1] Even in states where the rule is not codified,

1. Montana and North Dakota have identical statutes describing a broad prohibition against contracts that purport to shift liability for intentional acts: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law." MONT. CODE ANN. § 28-2-702; N.D. CENT. CODE ANN. § 9-08-02. "Contracts," of course, include insurance policies. North Dakota also has a statute that codifies a similar policy in the insurance context, as does California: "An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." N.D. CENT. CODE ANN. § 26.1-32-04; CAL. INS. CODE § 533. Massachusetts law precludes an insurance company from insuring "any person against legal liability for causing

courts generally recognize that fortuity is a fundamental element of insurance.[2] The rationale for this rule is that an insured cannot indulge in creating moral hazard by inflicting injury on others and expect someone else to foot the bill for the consequences of his actions. For the most part, this public policy prohibition applies to the insurer's duty to indemnify the insured for damages arising from an uninsurable claim, unless an insurance policy expressly states that it applies to the duty to defend the insured against the claim as well.[3]

Insurers may use this public policy to argue that that they owe no coverage whatsoever for claims arising from intentional wrongdoing. An insured's usual response is that the express language of the policy with respect to intentional acts controls; those provisions are discussed in more detail below. When this argument surfaces, however, a key equitable consideration is whether providing coverage will serve or undermine the goal of disallowing an insured to insure himself against the economic consequences of his wrongdoing, or, worse yet, to profit from it.[4] If the insured is not apt to benefit personally from obtaining coverage because the insurance benefits would go to compensate an innocent third party for example, the public policy against covering intentional wrongdoing may not be as strong as if the insured would receive insurance benefits himself.[5]

B. *Key Policy Provisions*

1. CGL Policies

CGL policies protect an insured against amounts the insured is legally obligated to pay as damages because of bodily injury, property damage, and

injury, other than bodily injury, by his deliberate or intentional crime or wrongdoing." MASS. GEN. LAWS ANN. ch. 175 § 47.

2. See Koppers Co., Inc. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1447 (3d Cir. 1996); Melrose Hotel Co. v. St. Paul Fire & Mar. Ins. Co., 432 F. Supp. 2d 488, 507 (E.D. Pa. 2006) (citing United Servs. Auto. Ass'n v. Elitzky, 517 A.2d 982, 986 (Pa. Super. Ct. 1984)); State Farm Mut. Auto. Ins. Co. v. Martin, 660 A.2d 66, 67–68 (Pa. Super. Ct. 1995).

3. *See* Andover Newton Theological Sch., Inc. v. Cont'l Cas. Co., 930 F.2d 89, 95 (1st Cir. 1991) (Massachusetts' "public policy proscribing insuring against *legal liability* for intentional wrongdoing expresses no intent with respect to insurance coverage for the costs of defending against such liability" and policy did not say there could not be a duty to defend against otherwise uninsurable acts.); Am. Mgmt. Ass'n v. Atl. Mut. Ins. Co., 641 N.Y.S.2d 802, 808 (N.Y. Sup. Ct. 1996), *aff'd* 651 N.Y.S.2d 301 (N.Y. App. Div.1996).

4. *See* Ambassador Ins. Co. v. Montes, 388 A.2d 603, 606 (N.J. 1978).

5. *See* Liss v. Fed. Ins. Co., L-1845-01, 2006 WL 2844468, at *7 (N.J. Super. Ct. App. Div. Oct. 6, 2006); Grinnell Mut. Reins. Co. v. Jungling, 654 N.W.2d 530, 541 (Iowa 2002) (public policy against insuring intentional wrongdoing did not bar coverage where it did not induce the insured to defraud the injured party and would not induce others to act fraudulently in the future and where the benefits to the innocent defrauded parties outweighed the concern that the insured would benefit from insurance reducing his out of pocket payment). *See generally* James M. Fisher, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95 (Winter 1990).

in some instances personal injury or advertising injury caused by an "occurrence." CGL policies impose on the insurer the duty to defend the insured against claims that potentially fall within the policy's coverage and the duty to indemnify the insured for claims that actually do.

The specific words that a CGL policy uses to define an "occurrence" shape the element of "fortuity" that the policy requires.[6] Typically, CGL policies define an occurrence as an "accident," "happening," "event," or "continuous or repeated exposure to conditions" that "unintentionally" or "unexpectedly" causes bodily injury; personal injury, including advertising injury; or destruction of property.[7]

CGL policies also may contain one or more exclusionary clauses aimed at barring coverage for damage that the insured causes intentionally. While these clauses may vary from policy to policy, most CGL policies purport to limit coverage for bodily injury and property damage so that the insurer will have no obligation to cover "bodily injury or property damage expected or intended from the standpoint of the insured." The policies further may seek to avoid coverage for "personal injury or advertising injury" that is

> caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict personal injury or advertising injury [or] arising out of oral, written or electronic material published by or at the direction of the insured with knowledge of its falsity.[8]

2. D&O Policies

D&O policies protect a company, its management, its directors and officers, and its employees against claims that their business judgment, acts, or omissions harmed someone else, such as investors. D&O policies are expressly designed to respond to claims alleging that the insureds engaged in intentional acts, including, but not limited to, breach of duty, error, misstatement, misleading statement, acts, or omissions, collectively de-

6. *See* Colony Ins. Co. v. Mid Atl. Youth Servs. Corp., 485 Fed. App'x 536, 540 (3d Cir. 2012); Nationwide Mut. Ins. Co. v. Garzone, Nos. 07-4767, 08-3895, 2009 WL 2996468, at *11(E.D. Pa. Sept. 17, 2009); Am. Ins. Co. v. Midwest Open MRI, Inc., 989 N.E.2d 252, 260 (Ill. App. Ct. 2013) (under Illinois law "for purposes of insurance coverage claims, an accident is an unforeseen occurrence, usually an undesigned sudden or unexpected event of an inflictive or unfortunate character"); West Donegal Mut. Ins. Co. v. Baumhammers, 938 A.2d 286, 292 (Pa. 2007) (citing Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 908 A.2d 888, 898 (Pa. 2006)) ("The term 'accident' within insurance policies refers to an unexpected and undesirable event occurring unintentionally, and the key term in the definition of the 'accident' is 'unexpected' which implies a degree of fortuity."); Gene's Rest., Inc. v. Nationwide Ins. Co., 548 A.2d 246, 247 (Pa. 1988).

7. For a form CGL policy developed by the Insurance Services Office of the type often used as a basis for the policies written by many insurers, see http://www.eqgroup.com/pdf/cg0001ok.pdf.

8. 1998 CGL Form, Part B.2.

scribed as "Wrongful Acts." Unlike CGL policies, D&O policies do not impose on the insurer the duty to defend the insured against claims. Instead, the insured is responsible for maintaining its own defense, but may recover the costs of that defense from the insurer as part of the insurer's obligation to indemnify the insured for "Loss."

The conduct-based exclusionary clauses in D&O policies are fundamentally different from those in CGL policies. In short, D&O policy exclusions require the insurer to show significantly more than that the insured acted intentionally to bar coverage, as might suffice under a CGL policy. As stated above, D&O policies are expressly designed to respond to claims arising from intentional acts. Thus, the conduct-based exclusionary clauses in D&O policies typically bar coverage only for claims in which the intentional wrongdoing rises to the level of "criminal or deliberate fraud." Furthermore, in many instances, D&O policies provide that the insurer may invoke the exclusion only if the criminal conduct or deliberate fraud is established through a final adjudication in the underlying matter.[9]

3. E&O Policies

E&O policies are designed to cover harm that arises as a result of problems in an insured's performance or its delivery of products and services. Thus, E&O policies acknowledge that the insured will act intentionally in providing its services, but exclude coverage for harm that the insured inflicts intentionally in doing so. E&O policies typically impose a duty to defend on the insurer, making them like CGL policies in some key respects. But they also incorporate conduct-based exclusions that are more along the lines of specific exclusions found in D&O policies, as opposed to the broad prohibition on "expected or intended" damage in CGL policies.

The intent-based exclusionary clauses in E&O policies are not uniform from policy to policy. They may exclude coverage for claims "arising out of . . . intentional acts, including . . . acts of dishonesty, fraud, criminal conduct [or] malice. . . ."[10] They also may adopt other formulations, including a requirement that a jury, court, or arbitrator must conclude that the insured's acts or omissions were, in fact, knowingly wrongful. The fact that these provisions are not uniform suggests that they are open to different interpretations depending on the specific facts of a particular case.

9. *See In Re* Enron Sec. & ERISA Litig., 391 F. Supp. 2d 541, 572 (S.D. Tex. 2005). *See also* AT&T v. Clarendon Am. Ins. Co., No. 04C-11-167, 2008 WL 2583007 (Del. Super. Ct. Feb. 11, 2008) (settlement of securities fraud claims precluded insurer from establishing final adjudication of intent that would trigger exclusion; it must be established in the underlying litigation, not the later coverage litigation).

10. Westport Ins. Corp. v. Black, Davis & Shue Agency, Inc., 513 F. Supp. 2d 157, 167 (M.D. Pa. 2007).

III. PRINCIPLES FOR INTERPRETING INSURANCE TERMS ABOUT INTENTIONAL CONDUCT

Deciding whether an insured acted intentionally, willfully, or fraudulently so as to bar coverage for a particular business claim under a particular policy requires comparing the claim with the specific policy language at issue.[11] The following section of this article outlines the contract interpretation framework that applies to insurance policies under Pennsylvania law as of the time this article was written. Different states' laws currently apply different standards, some of which are outlined below, as well. Given the differences from state to state, however, this section of the article is not intended to provide an exhaustive discussion of the rules of contract construction that necessarily apply in the context of litigating intentional acts exclusions for business claims. Rather, it is meant to illustrate how rules of construction and policy interpretation may affect the analysis of whether an insurer can deny coverage based on allegations and proof of specific intentional conduct in those litigated claims.

- In Pennsylvania, courts interpret coverage provisions broadly and exclusionary provisions narrowly.[12]
- Ambiguity in a policy is resolved in favor of the insured and in line with the insured's objectively reasonable expectations.[13]
- Even the plain meaning of a policy provision can be overcome in Pennsylvania if an insured's "reasonable expectations" contravene that plain meaning.[14]

11. *See generally* Babcock & Wilcox v. Am. Nuclear Insurers, 76 A. 3d 1, 11–12 (Pa. Super. Ct. 2013), *appeal granted in part*, 84 A.3d 699 (Pa. 2014).

12. Penn Nat'l Ins. v. HNI Corp., 482 F. Supp. 2d 568, 607–08 (M.D. Pa. 2007) (citing Eichelberger v. Warner, 434 A.2d 747, 750 (Pa. Super. Ct. 1981)).

13. Cigna Corp. v Exec. Risk Indem., Inc., 111 A.3d 204, 211 (Pa. Super. Ct. 2015); Regent Ins. Co. v. Strausser Enters., Inc., 902 F. Supp. 2d 628, 636 (E.D. Pa. 2012); Sparks v. St. Paul Ins. Co., 495 A.2d 406, 412 (N.J. 1985); DiOrio v. N.J. Mfrs. Ins. Co., 398 A.2d 1274, 1280 (N.J. 1979). Ambiguity can even lead to coverage for intentional conduct that would otherwise not be covered. *See* Corporate Realty, Inc. v. Gulf Ins. Co., No. Civ.A. 04-2933, 2005 WL 236182, at *7–8 (E.D. La. Jan. 31, 2005) (holding that the definition of "Wrongful Acts" as "errors, omissions or negligent acts" is ambiguous and therefore includes even "intentional" errors, not just negligent errors; ambiguity arises because subsequent exclusion clause is limited to "only certain intentional conduct such as libel, slander, defamation . . . or any dishonest, fraudulent or criminal act or omission," and "there would be no need for these specific exclusions if all intentional acts were excluded by the 'Wrongful Act' definition."); *accord* S.E.C. v. Credit Bancorp, Ltd., 147 F. Supp. 2d 238, 263 (S.D.N.Y. 2001); *compare Cigna*, 111 A.3d at 212–13 ("Wrongful Act" defined to include "any actual or alleged misstatement, misleading statement, act or omission on the part of the insured" does not negate a fraudulent acts exclusion.).

14. Med. Protective Co. v. Watkins, 198 F.3d 100, 106 (3d Cir. 1999); *Black, Davis & Shue*, 513 F. Supp. 2d at 165; Werner Indus., Inc. v. First State Ins. Co., 548 A.2d 188, 190–91 (N.J. 1988); Schmidt v. Smith, 684 A.2d 66, 73–74 (N.J. Super. App. Div. 1996), *aff'd*, 713 A.2d 1014 (N.J. 1998); USX Corp. v. Adriatic Ins. Co., 99 F. Supp. 2d 593, 610 (W.D. Pa. 2000).

Pennsylvania courts apply these rules of insurance contract interpretation together with some other guiding principles of substantive law in evaluating the insurer's coverage obligations:

- The insurer relying on a policy exclusion is asserting an affirmative defense for which it has the burden of proof.[15]
- The duty to defend is usually determined at the outset of the underlying litigation and is broader than the duty to indemnify.[16]
- The decision on whether the insurer has the duty to defend is based almost exclusively on the allegations in the underlying complaint against the insured.[17] The specific factual allegations, not labels or conclusory allegations, control the analysis.[18]
- Pennsylvania courts look beyond a plaintiff's pleading allegations to make the defense coverage decision and may consider other facts

15. Colony Ins. Co. v. Mid-Atl. Youth Servs. Corp., 485 Fed. App'x 536, 540 (3d Cir. 2012); Butterfield v. Giuntoli, 670 A.2d 646, 651–52 (Pa. Super. Ct. 1995) ("[t]he insured must show that the policy covers its claim, and then the burden shifts to the insurer to establish an exclusion."). *See also* Erie Ins. Exch. v. Transamerica Ins. Co., 533 A.2d 1363, 1366 (Pa. 1987); Amquip Corp. v. Admiral Ins. Co., No. Civ.A. 03-4411, 2005 WL 742457 (E.D. Pa. Mar. 31, 2005); Exec. Risk Indem., Inc. v. Cigna Corp., 74 A.3d 179, 182 (Pa. Super. Ct. 2013).

16. *Kvaerner Metals Div.*, 908 A.2d at 896 n.7; see also Sikirica v. Nationwide Ins. Co., 416 F.3d 214, 225 (3d Cir. 2005).

17. *Black, Davis & Shue*, 513 F. Supp. 2d at 163–64; Capano Mgmt. Co. v. Transcontinental Ins. Co., 78 F. Supp. 2d 320, 324 (D. Del.1999). *See also* Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 821 (Tex. 1997) (Texas follows the "eight corner rule," a/k/a the "complaint allegation rule;" insurer's duty to defend is determined by the factual allegations in the four corners of the complaint and four corners of the policy); *cf.* Butler & Binion v. Hartford Lloyd's Ins. Co., 957 S.W.2d 566, 568 (Tex. App. 1995) (the duty to defend is unaffected by facts ascertained before suit, developed in the process of litigation, or by the ultimate outcome of the suit); *USX Corp.*, 99 F. Supp. 2d at 614 ("it is the actual basis for liability in the underlying action which determines whether there is a duty to indemnify, not whether the underlying course of conduct involved historical facts which could be marshaled to support a covered claim").

Florida courts are especially strict in applying the rule that the right to a defense from the insurer is decided only on the basis of the allegations in the complaint. *See* National Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533 (Fla.1977). The principle has even been applied to bar coverage where the actual facts as later shown by discovery disprove the allegation in the complaint that the defendant acted with the intent to injure. Fed. Ins. Co. v. Applestein, 377 So. 2d 229, 232–33 (Fla. Dist. Ct. App. 1979).

18. *See* Lemko Corp. v. Fed. Ins. Co., No. 12 C 03283, 2014 WL 4924403 (N.D. Ill. Sept. 30, 2014) (conclusory legal allegations do not give rise to duty to defend; allegation that theft of trade secrets and confidential information "impaired" the "protected computer" in which they were stored did not make the case one that involved potentially covered property damage to that computer); St. Paul Fire & Mar. Ins. Co. v. Compaq Computer Corp., 539 F.3d 809, 817 (8th Cir. 2008) (disregard of conclusory phrase in complaint alleging that defendant acted "knowingly" where complaint contains no supporting allegations of the facts supposedly known).

known to the insurer or brought to its attention reasonably promptly by the insured.[19]

- The duty to defend arises whenever the complaint makes allegations that *may* potentially fall within the scope of the coverage.[20]
- When only a single claim in a multiclaim lawsuit is potentially covered, the duty to defend exists for the entire litigation until there is no possibility that the underlying plaintiff could recover on the covered claim. If indemnity coverage depends upon the existence of facts yet to be determined, the insurer is obligated to provide a defense "until such time as those facts are determined, and the claim is narrowed to one patently outside of coverage."[21]
- Conversely, an exclusion may eliminate a duty to defend if every allegation of the underlying complaint falls "solely and entirely" within specific and unambiguous language in the exclusion.[22]

19. Steinle v. Knowles, 961 P.2d 1228, 1234 (1998) ("insurer must look beyond the effect of the pleadings and must consider any facts brought to its attention or any facts which it could reasonably discover in determining whether it has a duty to defend. If those facts give rise to a 'potential of liability,' even if remote, under the policy, the insurer bears a duty to defend.") (citing MGM, Inc. v. Liberty Mut. Ins. Co., 855 P.2d 77 (1993)); *cf.* Jubin v. St. Paul Fire & Mar. Ins. Co., 653 N.Y.S.2d 454, 455 (N.Y. Sup. Ct. 1997) (facts extrinsic to the complaint can be considered if known to the insurer or brought to its attention reasonably promptly by the insured, but the insurer has no duty to investigate the conduct complained of to determine if there are facts not alleged which might trigger duty to defend); SL Indus., Inc. v. Am. Motorists Ins. Co., 607 A.2d 1266, 1273 (N.J. 1992) (when the insured's delay in providing relevant information prevents the insurer from assuming control of the defense, the insurance company is liable only for that portion of the defense costs arising after it was informed of the facts triggering the duty to defend). It has been held that the court must also consider an affirmative defense by the insured. *See generally* Allstate Ins. Co. v. Novak, 313 N.W.2d 636 (1981) (considering affirmative defense of self defense).

20. Air Prods. & Chems., Inc. v. Hartford Acc. & Indem. Co., 25 F.3d 177, 179 (3d Cir. 1994); Allstate Ins. Co. v. Drumheller, 185 Fed. App'x 152, 154 n.2 (3d Cir. 2006) (citing Gedeon v. State Farm Mut. Auto. Ins. Co., 188 A.2d 320, 321–22 (Pa. 1963)); I.C.D. Indus., Inc. v. Fed. Ins. Co., 879 F. Supp. 480, 488 (E.D. Pa. 1995) (discussing the concept that coverage can be allowed for claims that "potentially fall" within the scope of coverage, but only insofar as those "potential" claims are grounded in the complaint itself); Britamco Underwriters, Inc. v. Emerald Abstract Co., 855 F. Supp. 793, 798–99 (E.D. Pa. 1994) (holding that "to make pleadings determinative and ignore whether a claim potentially may become one which is within the scope of the policy would be to turn the issue of coverage over to the vagaries of an opponent's pleadings. . . . The overstatement of a claim or the hyperbole of the pleader should not control whether an insured is entitled to a defense."); *accord* Am. & Foreign Ins. Co. v. Jerry's Sport Center, Inc., 2 A.3d 526, 541 (Pa. 2010).

21. HNI Corp., 482 F. Supp. 2d at 607–08 (quoting Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d 742, 746 (3d Cir. 1999)); *Black, Davis & Shue*, 513 F. Supp. 2d at 166–68; MP III Holdings, Inc. v. Hartford, No. 05-1569, 2006 WL 2645156, at *10 (E.D. Pa. Sept. 14, 2006).

22. USX Corp. v. Liberty Mut. Ins. Co., 444 F.3d 192, 202 n.18 (3d Cir. 2006); *Capano Mgmt. Co.*, 78 F. Supp. 2d at 324; Nat'l Union Fire Ins. Co. v. Rhone-Poulenc Basic Chems. Co., No. 87C-SE-11 1992, 1992 WL 22690 (Del. Super. Ct. Jan. 16, 1992). If there is no duty to defend, there can be no right to indemnity. Nat'l Am. Ins. Co. v. Progressive

IV. WHAT MAKES CONDUCT "INTENTIONAL" SO AS TO BE UNINSURED?

Even with the contract-interpretation framework outlined above, deciding whether intentional conduct will bar insurance coverage is a thorny question. Conduct is intentional if it is done on purpose, not by accident. Unless an insured is sleepwalking or drugged, he is presumed to understand and intend his actions, making his conduct intentional. This is true even when he performs his actions negligently or by mistake and even when his conduct results in errors or harm for which he must seek insurance coverage. This part of the article discusses the question of what constitutes "intentional" conduct sufficient to exclude coverage under a CGL insurance policy and outlines various approaches that courts have taken with respect to the issue over time.

Most intentional act exclusions in CGL insurance policies focus on whether the insured intended to cause harm by his conduct, not whether the insured intended to do the act that results in the harm.[23] This focus limits the exclusion for intentional acts to situations in which the insured actually engages in some degree of an intent to injure beyond the normal intent to act and thus leaves intact coverage for negligence, honest mistakes, and errors of judgment. Despite this uniform interpretation, however, the issue of what constitutes intentional harm has clogged court dockets for decades, and multiple courts have reached different conclusions about how best to analyze the issue. Some courts have adopted an objective standard that considers what a hypothetical reasonable person would have expected to happen as a result of his conduct. Other courts compel the parties to delve into the subjective mind of the insured and his self-serving claim that he did not mean to do it. Unsurprisingly, the approach that a particular court applies to a given case goes a long way to determining the outcome of this issue.

Corp., No. 13 CV 1290, 2014 WL 1978470, at *6 (N.D. Ill. May 15, 2014); *Cf. Babcock & Wilcox Co.*, 76 A. 3d at 11–12 (insured faced with an insurer's tender of a defense with a reservation of rights on a policy requiring the insurer's consent to any settlement has two choices: accept the defense and control of the litigation by the insurer's appointed counsel and be bound by consent provision; or retain and pay for its own counsel and control the decision to settle, but then be entitled to indemnification and defense costs only if it proves that the claims were covered and the settlement was fair, reasonable, and not collusive). *See also* 3 LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION § 33:28.

23. *See* Aetna Life & Cas. Co. v. Barthelemy, 33 F.3d 189, 192 (3d Cir. 1994) (finding coverage where the plaintiff conceded in the underlying action that the defendant did not intend the harm she suffered); *USX Corp.*, 99 F. Supp. 2d at 630; Voorhees v. Preferred Mut. Ins. Co., 607 A.2d 1255, 1263 (N.J. 1992); Cunningham & Walsh, Inc. v. Atl. Mut. Ins. Co., 744 P.2d 1317, 1319 (Or. Ct. App. 1987) (to deny coverage, the plaintiff must allege or infer that some harm was intended by the defendant's intentional act); Mohn v. Am. Cas. Co., 326 A.2d 346, 348 (1974); *Elitzky*, 517 A.2d at 987; *cf.* Slayco v. Sec. Mut. Ins. Co., 774 N.E.2d 208 (N.Y. 2002) ("Insurable 'accidental results' may flow from 'intentional causes.").

The objective-standard approach described above echoes proximate causation principles found in tort law, i.e., a person necessarily intends the natural and probable consequences of his own actions and is legally responsible for everything that is reasonably foreseeable.[24] Such an objective approach leads to the most expansive application of an intent exclusion and is therefore most favorable to the insurer because it puts aside what the insured actually thought or subjectively intended.[25]

The subjective-standard approach, in contrast, considers whether the insured actually "desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result."[26] Insureds routinely contend that this standard is most in keeping with the language and spirit of their CGL insurance policy, which often defines coverage and exclusions as being viewed "from the standpoint of the insured." In making this argument, insureds should take into account that their proffered standard, in fact, incorporates two alternative subjective inquiries—first, what did the insured actually "desire," and second, what did he actually "know." In practice, the second alternative, whether the insured actually knew that the harm was substantially certain to result, is not far removed from the objective inquiry into what a reasonable person would know. Indeed, the second prong is sometimes phrased in the passive voice, making the issue whether the harm "was substantially certain" to result from the act.[27] Construing the subjective-standard approach to allow for an objective inquiry may favor the insurer seeking to deny coverage because the insurer does not have to prove the actual mindset of the insured.[28]

24. Eckroth v. Pa. Elec., Inc., 12 A.3d 422, 427 (Pa. Super. Ct. 2010); Powell v. Drumheller, 653 A.2d 619, 622 (Pa. 1995) ("proximate" means the actor's conduct was a substantial factor in bringing about the injury, and the injury was reasonably foreseeable as a result of his conduct such that he should be held responsible for its consequence). Some policies actually define an intentional act as one whose consequences could have been foreseen by a reasonable person.

25. Freightquote.com, Inc. v. Hartford Cas. Ins. Co., 397 F.3d 888, 893 (10th Cir. 2005); Lemko Corp. v. Fed. Ins. Co., No. 12 C 03283, 2014 WL 4924403 (N.D. Ill. Sept. 30, 2014) (in theft of trade secrets case "there is no way to meaningful distinguish between the intentional acts—stealing—and the injury—loss. The natural and ordinary consequences of an act do not constitute an accident under an insurance policy."); Stoneridge Dev. Co. v. Essex Ins. Co., 888 N.E.2d 633, 652 (Ill. App. Ct. 2008) (even "if the person performing the act did not intend or expect the result, if the result is the rational and probable consequence of the act, or, stated differently, the natural and ordinary consequence of the act, it is not an accident.").

26. Tibert v. Nodak Mut. Ins. Co., 816 N.W.2d 31, 39–40 (N.D. 2012); Thomas v. Benchmark Ins. Co., 179 P.3d 421, 428 (2008); Elitzky, 517 A.2d at 987; *cf. Voorhees*, 607 A.2d at 165 n.12 (a "reckless" act under tort law does not meet the subjective intent-to-injure requirement under insurance law).

27. *See Thomas*, 179 P.3d at 428.

28. *Cf.* RESTATEMENT (SECOND) OF TORTS § 8A: "The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Id.* "As

Another question that routinely arises in the CGL context is whether the insured can be deemed to have intended the injury for which coverage is sought if the specific injury is different in kind or degree from the type of injury that was either natural and probable or substantially certain to occur. Some courts find that the differences are immaterial if the insured intended to cause any injury.[29] Other courts have concluded that intent will not extend to an injury that is improbable or not generally within the realm of what a reasonable person would expect to occur.[30] Still other courts, albeit fewer, consider whether the actions resulted in the specific injury intended by the insured.[31]

A further question often litigated in this area is whether a corporate insured may lose coverage based on the intentional acts of third parties, including the company's own employees. As discussed above, whether liability for which coverage is sought is fortuitous or intentional is generally determined from the point of view of the insured, so that intentional wrongdoing by a third-party should not trigger coverage exclusions.[32] Thus, an insured employer often may recover insurance for the intentional acts of its employees. The company may be vicariously liable to the plaintiff, but that liability does not necessarily mean that the company itself acted intentionally. If vicarious liability exists either as a matter of law because the employee was acting within the scope of his employment, or only because the company itself is liable for negligent supervision, the company should still be entitled to coverage, and no intentional

the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness, as defined in § 500. As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence, as defined in § 282. All three have their important place in the law of torts, but the liability attached to them will differ." *Id.* § 8A cmt. b.

29. *Thomas*, 179 P.3d at 428; Knapp v. Smiljanic, 847 F. Supp. 1428, 1437 (W.D. Wis. 1994), *aff'd sub nom.* Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272 (7th Cir. 1995) ("It is immaterial whether defendant intended to cause plaintiff the degree of harm she claimed to have suffered.").

30. *SL Indus., Inc.*, 607 A.2d at 1278 (if wrongdoer subjectively intends or expects to cause some sort of injury, that intent will generally preclude coverage; but if the extent of the injuries was improbable, and if the insured subjectively did not intend to cause that injury, the injury was "accidental" and coverage will be provided); Elitzky, 517 A.2d at 989 (an intentional-act clause excludes only injury and damage of the same general type which the insured intended to cause).

31. Ethicon, Inc. v Aetna Cas. & Sur. Co., 737 F. Supp. 1320, 1334 (S.D.N.Y. 1990); *cf.* Hanover Ins. Grp. v. Cameron, 298 A.2d 715, 720–21 (N.J. Super. Ct. Ch. Div. 1973) (intent would only be found when the actual consequences that resulted from the act were intended, or when the actor was substantially certain they would result).

32. Nationwide Mut. Fire Ins. Co. v. Pipher, 140 F.3d 222, 227 (3d Cir. 1998); Lambrecht & Assocs., Inc. v. State Farm Lloyds, 119 S.W.3d 16, 21–22 (Tex. App. 2003) (intentional conduct by outside computer hacker causing damage to insured's computers is not attributable to the insured, from whose standpoint the conduct was unexpected and unintentional).

conduct exclusions should apply.[33] The company is more apt to lose coverage only if its own corporate conduct or corporate policy made its actions tantamount to intentional conduct.[34]

V. ISSUES RELATED TO BASING COVERAGE DECISIONS ON THE ALLEGATIONS OF THE UNDERLYING COMPLAINT

The fact that an insured's coverage may turn on whether a business plaintiff alleges or proves that the insured acted intentionally in harming the plaintiff arguably gives the plaintiff significant control over the extent to which insurance will be available to respond to the plaintiff's claims. After all, the plaintiff is free, subject only to sanctions for signing meritless claims, to characterize the nature of the defendant's wrongdoing however it pleases; it is by no means unusual for a plaintiff to take liberties in describing the defendant's state of mind as malicious, wanton, or intentional. Indeed, a plaintiff may make the strategic decision that incorporating intentional act allegations in his complaint, even if they are not necessary to the cause of action, will incentivize the defendant to settle the case early before the plaintiff has the opportunity to prove facts that might nullify the defendant's insurance coverage.[35]

The fact that a business plaintiff alleges intentional wrongdoing against its adversary is not necessarily the lynchpin for insurance coverage, however. As demonstrated above, for example, in Pennsylvania and elsewhere, most CGL policies require an insurer to defend its insured unless the con-

33. Mendel v. Home Ins. Co., 806 F. Supp. 1206, 1211–12 (E.D. Pa. 1992) (law firm corporation, which itself participated in tortious interference, was not an innocent party and was subject to exclusion for "deliberately wrongful" acts of the insured); Schmidt v. Smith, 684 A.2d 66, 73–74 (N.J. Super. App. Div. 1996) *aff'd*, 713 A.2d 1014 (N.J. 1998) (corporate liability for discrimination based on sexual harassment by one of its employees is not intentional conduct for insurance coverage purposes if corporation had no policy or practice of discrimination and did not know of the employee's propensity for harassing when it put him in a position to do so); *SL Indus., Inc.*, 607 A.2d at 1279 (allowing coverage for an entity's vicarious liability for its members or employees as long as the insured entity did not actively participate in the wrongdoing, even when the employee's conduct itself was not covered"); Dart Indus., Inc. v. Liberty Mut. Ins. Co., 484 F.2d 1295, 1296 (9th Cir. 1973) (notwithstanding California Insurance Code § 533 that "an insurer is not liable for a loss caused by the willful act of the insured," a corporation is still entitled to coverage when it is only liable under the principle of respondeat superior for a libel verdict based on the actual malice found to have motivated its employee). *See also* Sean W. Gallagher, *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, 92 MICH. L. REV. 1256, 1256–63 (1994).

34. *Schmidt*, 684 A.2d at 73–74; *see also* Pipher, 140 F.3d at 227.

35. *See In Re* Enron Sec. & ERISA Litig., 391 F. Supp. 2d 541, 572 (S.D. Tex. 2005). *See also* AT&T v. Clarendon Am. Ins. Co., No. 04C-11-167, 2008 WL 2583007 (Del. Super. Ct. Feb. 11, 2008) (settlement of securities fraud claims precluded insurer from establishing final adjudication of intent that would trigger exclusion; the intent had to be proven in the underlying litigation, not the later coverage litigation).

duct and resulting damage alleged in a complaint clearly and completely falls outside the scope of what the insurer promised to cover. Thus, allegations that an insured acted maliciously, wantonly, or intentionally will not automatically nullify an insurer's duty to defend; the insurer must establish that no set of facts could possibly exist that would bring the insured's conduct or the resulting harm within the policy coverage.

Indeed, accepting a plaintiff's intentional act claims as true as pleaded, and basing coverage decisions on those unproven allegations, would contravene the CGL insurer's obligation to defend the insured against claims that are "groundless, false, or fraudulent." If the CGL insurer denies defense coverage based on an allegation that the insured intended to cause harm and that allegation turns out to be groundless, false, or fraudulent, the insurer will have breached its duty to defend and opened itself to damages potentially far in excess of the defense costs. In most instances, thus, the insurer will agree to defend subject to a reservation of rights until such time as it can determine the merits of the allegations.

While the duty-to-defend analysis discussed above is most significant with respect to policies imposing a defense obligation on the insurer, such as CGL policies and some E&O policies, all of the insurance policies addressed in this article require that an insurer seeking to avoid its indemnity obligations must prove as a factual matter that the insured acted intentionally, as defined by the specific terms of the policy. This analysis depends on the actual facts of the claim against the insured, as sometimes decided in a coverage litigation, but most often developed in the underlying claim.

Insureds seeking to protect against the application of an intentional acts exclusion may try to place an "adjudicated acts" condition in the exclusion. Adjudicated-acts provisions are commonplace in D&O policies and, to a lesser extent, in E&O or malpractice policies. Adjudicated acts provisions have not yet been widely imported into CGL policies, however. With such a provision in place, an intentional-act exclusion will apply only if the insured is actually adjudicated to have acted with the intent to injure, or if the insured did so "in fact."[36] Many "adjudicated

36. *See* Fed. Ins. Co. v. Tyco Int'l Ltd., 784 N.Y.S.2d 920 (N.Y. Sup. Ct. 2004); PepsiCo, Inc. v. Cont'l Cas. Co., 640 F. Supp. 656, 660 (S.D.N.Y. 1986). *But cf.* Am. Cas. Co. v. United S. Bank, 950 F.2d 250, 254 (5th Cir. 1992) (when the policy does not require an adjudication on the issue of intent and the insurer was not a party to the underlying litigation, collateral estoppel does not preclude the insurer from raising it in a coverage litigation after a settlement); *see also* Stargatt v. Avenell, 434 F. Supp. 234, 241–43 (D. Del. 1977) (where policy exclusion does not require adjudication of dishonesty, settlement of securities fraud claims does not preclude insurer from proving dishonesty in later coverage litigation). Regardless of the existence of an adjudication clause, if the underlying case by the injured party against the insured results in a final judgment, principles of collateral estoppel apply to any subsequent coverage litigation. There, both the insured and the insurer will be

action" provisions further require that the adjudication take place in the underlying action, as opposed to a coverage action or other forum.

Insurers selling policies with adjudicated-action provisions often agree to advance defense costs to their insureds when litigation arises, contingent on their right to recover those costs if the insured ultimately is adjudicated to have committed an intentional act outside the coverage. They may, for example, seek to recoup defense costs after a criminal sentencing or a judgment in a civil case.[37] Many corporate and individual defendants with adjudicated-action provisions therefore choose to settle their disputes rather than risk resolving them in a way that could jeopardize their indemnity coverage and require repayment of defense costs advanced by the carrier.

Without the benefit of an adjudicated-acts provision, the insured needs to make the most of the principle that conclusory statements or labels in the complaint regarding his state of mind are to be disregarded unless the pleading contains specific factual allegations to support them. The insured can argue that the policy terms describing the intent that is excluded from coverage should be compared not with the words the plaintiff happens to choose to plead the claim, but with the level of intent required as a matter of law to prove it. If, for example, mere negligence would state the claim, a defense should not be denied simply because the plaintiff chooses inflated rhetoric to label the alleged wrongdoing as malicious or intended to cause injury.[38]

VI. INTENTIONAL ACTS COVERAGE FOR SPECIFIC CLAIMS

This section of the article reviews the level of intentional wrongdoing that business plaintiffs must plead to allege the causes of action that are typically the subject of business litigation. As will be seen, for some causes of

bound by any facts which were necessarily determined in order to reach the earlier verdict.); Builders Supply Co. v. McCabe, 77 A.2d 368, 372 (Pa. 1951).

37. *See* Herley Indus., Inc. v. Fed. Ins. Cos., Inc., No. 08-5377, 2009 WL 2596072 (E.D. Pa. Aug. 21, 2009).

38. Although outside the focus of this article on commercial litigation, notable is how courts deal with an intentional acts exclusion in cases involving sexual abuse of a minor. Harm from the sexual abuse of a child is deemed to have been caused intentionally regardless of any claim by a defendant of lack of intent or even the inability to form the intent. Wiley v. State Farm Fire & Cas. Co., 995 F.2d 457 (3d Cir. 1993) (harm from the sexual abuse of a child is deemed to have been caused intentionally regardless of any claim by a defendant of lack of intent or even the inability to form the intent); Minn. Fire & Cas. Co. v. Greenfield, 805 A.2d 622 (Pa. Super. Ct. 2002) (because a child lacks the capacity to give consent, sexual activity foisted upon that child by an insured adult raises the irrebuttable inference that the adult intended to harm that child, regardless of the insured's subjective intent); *compare Barthelemy*, 33 F.3d at 189 (intent will not be inferred and coverage will therefore exist for sexual harassment of an adult who pleaded that defendant acted negligently or recklessly and did not intend to injure her).

action, the degree of intent that a business plaintiff must plead to state a claim will necessarily bar insurance coverage, no matter how the plaintiff tries to soft pedal his claim. For others, how the plaintiff chooses to word his complaint can make the difference between insurance as a source of recovery and a worthless judgment.

A. *Statutory Violations*

1. Securities Fraud

The Supreme Court has made clear[39] that scienter, "a mental state embracing intent to deceive, manipulate, or defraud" is necessary to state a claim under SEC Rule 10b-5 and the Private Securities Litigation Reform Act (PSLRA).[40] Although the Court has never addressed the matter,[41] circuit courts have uniformly considered some form of recklessness as meeting the standard for scienter. Especially since the PSLRA mandated that only "a strong inference" of a defendant's requisite state of mind could prove a securities fraud violation, those courts have made clear that it is not ordinary recklessness, as commonly defined, that will state a claim.[42] Showing that a defendant acted without thought of resulting harm, rashly, or irresponsibly will not suffice. A plaintiff must prove "recklessness plus." This is evident in formulations of scienter requiring "a high degree of recklessness,"[43] "deliberate recklessness,"[44] "conscious misbehavior or recklessness,"[45] or recklessness that is severe.[46] Even courts that do not apply a modifier to signal the type of recklessness required incorporate the same idea by how they define the term itself, e.g., "an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it."[47]

These formulations of "recklessness plus" are arguably tantamount to a defendant having substantial certainty that harm will result from his actions, such that the typical intent exclusion in a CGL policy might apply. Most securities cases, however, are evaluated for coverage under

39. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007).

40. *Id.* at 319.

41. *Id.* at 319, n.3.

42. Black's Law Dictionary defines "reckless" as meaning "careless and indifferent to the welfare of other people." BLACK'S LAW DICTIONARY, http://thelawdictionary.org/reckless.

43. *In Re* Genzyme Corp. Sec. Litig., 754 F.3d 31, 40 (1st Cir. 2014) (citing Miss. Pub. Emps. Retirement Sys. v. Boston Sci. Corp., 523 F.3d 75, 85 (1st Cir. 2008)).

44. Oregon Pub. Emps. Retirement Fund v. Apollo Grp. Inc., No. 12-16624, 2014 WL 7139634, at *6 (9th Cir. Dec. 16, 2014).

45. City of Pontiac Policemen's & Firemen's Retirement Sys. v. UBS AG, 752 F.3d 173, 184–85 (2d Cir. 2014).

46. *In Re* Comshare, Inc. Sec. Litig., 183 F.3d 542, 550 (6th Cir. 1999).

47. *In Re* Advanta Corp. Sec. Litig., 180 F.3d 525, 539–40 (3d Cir. 1999).

D&O policies, not CGL policies. D&O policies expressly cover individual and corporate insureds for "Securities Claims," including claims brought by shareholders alleging that the insureds engaged in some acts or omissions that harmed them or the value of their shares. They also incorporate more stringent intent exclusions, which come into play only if the insured commits, in fact, a deliberate criminal or fraudulent act. Even allegations of "recklessness plus" likely do not rise to this level. The criminal or fraudulent activity must be proven as a matter of fact, often as part of an adjudication in the securities litigation.

Alstrin v. St Paul Mercury Insurance Company[48] illustrates the significance of the higher intent standard in D&O policies as applied to the scienter element in a securities fraud case. Directors and officers sought coverage for settlement of a 10b(5) claim under a policy that specifically *included* coverage for "securities claims" under the Securities Act of 1933 and the Securities Exchange Act of 1934.[49] The policy also contained a clause excluding coverage for "deliberate" fraud, however.[50] The insured argued that applying the exclusion would deny the exact same coverage provided by the insuring clause and that the policy was therefore ambiguous.[51] The insurer responded to the contrary, that the policy would still cover 10b(5) violations based on recklessness as opposed to deliberate fraud.[52] The court declined to address how proof of recklessness might be tantamount to "deliberate fraud," such that it would not be covered.[53] Instead, the court reasoned that applying the exclusion as the insurer proposed would eviscerate coverage for many claims and be inconsistent with the reasonable expectations of someone buying insurance for all types of "securities claims."[54]

Courts in other jurisdictions may reach different results. One California state court, for example, has concluded that liability for securities claims is not insurable, even under D&O insurance because state law requires such liability to be predicated on the insured's "willful" participation in a fraudulent securities transaction, which equates with conduct excluded under a D&O insurance policy.[55] In a comparable federal case, the Ninth Circuit reached the opposite conclusion and found allegations that a company either recklessly *or* knowingly misleads investors was not en-

48. 179 F. Supp. 2d 376 (D. Del. 2002).
49. *Id.* at 382.
50. *Id.* at 384.
51. *Id.* at 391.
52. *Id.*
53. *Id.* at 396.
54. *Id. See also Tyco Int'l Ltd.*, 784 N.Y.S.2d at 920 (defining "Wrongful Acts" as any "misstatement, misleading statement, act, omission, neglect, or breach of duty" included securities fraud claims).
55. Cal. Amplifier, Inc. v. RLI Ins. Co., 94 Cal. App. 4th 102, 110 (2001).

ough to bar coverage.[56] There, the Ninth Circuit granted summary judgment to the insured because the insurer failed to satisfy its burden to prove that the insured's conduct was "willful" so as to be uninsurable.[57]

2. Antitrust Violations

A violation of Section 1 of the Sherman Act requires a defendant's participation in an agreement or conspiracy to unreasonably restrain trade with the intent to further the purpose of the agreement.[58] Although specific intent to commit the offense is not required in a civil case,[59] the antitrust plaintiff must prove that the defendant "had a conscious commitment to a common scheme designed to achieve an unlawful objective."[60]

Someone who conspires to unreasonably restrain trade might not know who would be victimized by the conspiracy, but he would know or be substantially certain that a restraint of trade in general would result. If the harm to competition in general is the focus, a Section 1 violation should come within a policy exclusion for intentional acts under a typical CGL policy. Indeed, these CGL exclusions have applied when losses suffered by a competitor from the harm to competition are "generally within" the harms intended by the conspirator.[61] But this result does not follow if a court focuses on harm to a particular competitor as opposed to competition generally. One court applying this standard held that "there must be a direct, intentional relationship between the willful act and the injury for which coverage is sought in order for an insurer successfully to deny coverage due to the allegedly intentional nature of the injury."[62] The court reasoned that even though the defendant intended to injure competition in the relevant market, the specific injury suffered was not caused intentionally as to come within the policy exclusion absent evidence that it intended to directly cause the specific loss of profits by the plaintiff competitor in that market.[63]

A violation of Section 2 of the Sherman Act by attempting or conspiring to monopolize requires specific intent to monopolize, i.e., proof that the defendant intends to exercise its power to control prices or exclude

56. Raychem Corp. v. Fed. Ins. Co., 853 F. Supp. 1170, 1179–80 (N.D. Cal. 1994).

57. *Id.*

58. Am. Tobacco Co. v. United States, 328 U.S. 781, 809–10 (1946); Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc., 256 F. Supp. 2d 249, 273 (D.N.J. 2003); *In Re* Processed Egg Prods. Antitrust Litig., 821 F. Supp. 2d 709, 742 (E.D. Pa. 2011).

59. *In Re* Mushroom Direct Purchaser Litig., 2014 Trade Cases ¶ 78,939, 06-0620, 54 F. Supp. 2d (E.D. Pa. 2014).

60. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984).

61. *USX Corp.*, 99 F. Supp. 2d at 631, 634–35. In *USX*, the court also reasoned that the conspiracy's effect on competition was so pernicious that it would be against public policy to allow the company to recover any contractual benefit from insurance. *Id.*

62. Ethicon, Inc. v Aetna Cas. & Sur. Co., 737 F. Supp. 1320, 1334 (S.D.N.Y. 1990).

63. *Id.* at 1334–35.

competition.[64] Actual exclusion of a competitor or the specific intent to do so is not required to establish the violation.[65] Nonetheless, proof that a defendant generally intended to cause harm to its competition may be enough to trigger an intentional act exclusion under a CGL policy.[66]

A Section 2 violation for actual (as opposed to attempted) monopolization exists if monopoly power is willfully and intentionally acquired or maintained as opposed to being obtained through normal growth and development.[67] Intent directed at a specific competitor or the actual exclusion of competition is not required to prove the violation.[68] Arguably, therefore, the intent inherent in a Section 2 violation does not necessarily trigger an intentional act exclusion in a CGL policy. Yet, as above, courts may find that the intent to cause harm that accompanies monopolization is sufficient to make it apply.[69]

Price discrimination in violation of the Robinson–Patman Act has been deemed to be intentional so as to come within an exclusion for acts done with the knowledge or consent of the insured.[70] But when read together with another policy term that expressly provided coverage for "discrimination," the court found that "discrimination" included price discrimination and that the resulting inconsistency between the two provisions created an ambiguity that required resolution in favor of the insured.[71]

3. Unfair Competition and Violations of the Lanham Act

Unfair competition is sometimes listed among coverages in CGL policies insuring against personal or advertising injury. As such, it is most often interpreted to cover harm to the goodwill of a business through the insured's use of misleading advertising or passing off its product as that of a better known competitor.[72] Unfair competition claims are therefore often paired with claims under the Lanham Act[73] for causing confusion as to the origin of a product, false advertising, or trademark infringement.

Proof that a defendant acted "willfully" may be an element of a Lanham Act claim depending on the type of violation alleged and the remedy

64. United States v. Grinnell Corp. 384 U.S. 563, 570–71 (1966); Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 154 (3d Cir. 1981).
65. *Am. Tobacco Co.*, 328 U.S. at 809–10.
66. *USX Corp.*, 99 F. Supp. 2d at 634.
67. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992).
68. *Am. Tobacco Co.*, 328 U.S. at 809–10.
69. *See* Humphreys v. Niagara Fire Ins. Co., 590 A.2d 1267, 1272 (Pa. 1991).
70. Fed. Ins. Co. v. Stroh Brewing Co., 127 F.3d 563, 569–71 (7th Cir. 1997).
71. *Id.*; *but cf. USX Corp.*, 99 F. Supp. 2d at 623–24 ("discrimination" interpreted in the context of its listing among the types of injuries defining "personal injury" could not reasonably have been expected to include antitrust injury); *accord* Mylan Labs., Inc. v. Am. Motorists Inc., 700 S.E.2d 518, 526 (W.Va. 2010).
72. *USX Corp.*, 99 F. Supp. 2d at 619.
73. 15 U.S.C. § 1125.

sought.[74] Coverage issues in unfair competition and Lanham Act cases deal with the interplay between the willfulness either expressly or implicitly alleged and policy terms that typically exclude coverage when the insured acts "with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'"[75] Some courts have concluded that this type of exclusion does not relieve an insurer of its duty to defend regarding alleged false advertising violations of the Lanham Act because the violation could exist even without proof of intentional conduct.[76] Other courts further reason that since the allegations of intent are necessary only to support a claim for enhanced damages, they should not be the basis for triggering the exclusion.[77]

The same is true in the context of patent infringement litigation.[78] In California, however, the statute prohibiting indemnification for liability based on conduct that the insured intended or knew would cause damage means that there cannot be any coverage on a claim for inducing patent infringement.[79]

74. Acting "willfully" is not an element of a claim for false advertising or trademark infringement where the remedy sought is limited to injunctive relief, disgorgement of defendant's profit, plaintiff's damages, and court costs. 115 U.S.C. §§ 1117(a), 1125(a). Whether the defendant acted willfully can be relevant where the plaintiff seeks the court's discretionary award of enhanced damages or attorney fees. Acting "willfully" is an element of a damage claim for blurring or tarnishing a famous mark, 15 U.S.C. § 1125(c)(5), and an award of treble damages for the use of a counterfeit mark requires proof that the defendant acted "intentionally" and "knowingly." 15 U.S.C. § 1117(b).

75. Bridge Metal Indus., L.L.C. v. Travelers Indem. Co., 812 F. Supp. 2d 527, 544–45 (S.D.N.Y. 2011).

76. CGS Indus., Inc. v. Charter Oak Fire Ins. Co., 751 F. Supp. 2d 444, 452 (E.D.N.Y. 2010), *aff'd* 720 F.3d 71 (2d Cir. 2013); *accord Bridge Metal Indus.*, 812 F. Supp. 2d at 544–45 (exclusion inapplicable to trade dress confusion claims for unfair competition under New Jersey law, which does not require proof of intent); *CGS Indus.*, 751 F. Supp. 2d at 452; Capitol Indem. Corp. v. Elston Self Serv. Wholesale Groceries, Inc., 551 F. Supp. 2d 711, 726 (N.D. Ill. 2008), *aff'd*, 559 F.3d 616 (7th Cir. 2009); Westfield Cos. v. O.K.L. Can Line, 804 N.E.2d 45, 52–53 (Ohio Ct. App. 2003). *But see* Educ. Training Sys., Inc. v. Monroe Guar. Ins. Co., 129 S.W.3d 850, 853 (Ky. Ct. App. 2003) (ruling of no duty to defend or indemnify made after liability finding that defendant intentionally caused confusion in selecting the name for his business); ABC Distrib., Inc. v. Lumbermens Mut. Ins. Co., 646 F.2d 207, 208–09 (5th Cir. 1981) (applying strict Florida law that insurer duty to defend is determined solely based on allegations of the complaint; even though liability could have existed without proof of intent, intentional-act exclusion applied to repeated allegations that the insured's trademark infringement was "willful and deliberate, and without any claim of right, and . . . attended by circumstances of fraud, malice or wanton and reckless disregard of [plaintiff's] rights").

77. Bridge Metal Indus., 812 F. Supp. 2d at 544–45; Citizens Ins. Co. v. Pro-Seal Serv. Grp., Inc., 710 N.W.2d 547, 554–55 (Mich. Ct. App. 2005), *rev'd on other grounds*, 730 N.W.2d 682 (Mich. 2007).

78. TIG Ins. Co v. Nobel Learning Cmtys., Inc., Civ A 01-4708, 2002 WL 1340332 (June 18, 2002).

79. Mez Indus., Inc. v. Pac. Nat. Ins. Co., 90 Cal. Rptr. 2d 721, 735–36 (Cal. App. 1999) (inducing patent infringement requires proof of specific intent to induce another to infringe the rights of the patent holder; such specific intent carries with it the knowledge that the rights would be infringed upon and that the patent holder would be damaged).

4. Violation of the Computer Fraud and Abuse Act

While largely a criminal statute aimed at tampering with government computers, the Computer Fraud and Abuse Act (CFAA)[80] also allows a private cause of action for compensatory damages. Such actions most often come within the sections of the CFAA that address liability for "knowingly . . . and as a result . . . intentionally caus[ing] damage . . . to a protected computer" or which involves "intentionally access[ing] a protected computer . . . and as a result of such conduct [either] recklessly caus[ing] damage, or . . . caus[ing] damage and loss."[81]

This language distinguishes the state of mind of the actor from the damage that may follow. *Acting* "knowingly" or "intentionally" can be followed by *damage* that is caused either intentionally or recklessly, regardless of a lack of due care. Presuming that the injury rather than the act that caused the injury is the relevant inquiry for determining the applicability of an intentional act exclusion, at least under a CGL policy, the insurability of the claim depends on whether the actor intentionally caused the damage for which compensation is sought in the claim.[82]

5. RICO Violations

Alleged violations of the RICO statute[83] most often fall within an intentional-acts exclusion. This is the case because wire or mail fraud is most often the

80. 18 U.S.C. §§ 1030.

81. Fraud and related activity in connection with computers:

(a) Whoever—

(5)(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss;

shall be punished as provided in subsection (c) of this section.

18 U.S.C. § 1030(a)5(A)–(C).

82. Eyeblaster, Inc. v. Fed. Ins. Co., 613 F.3d 797, 803–05 (8th Cir. 2010) (insured intentionally placed software on a remote computer by having the computer owner use the insured's website, but did not intend the resulting infection of the computer with a spyware program that caused computer damage and loss of data; insured committed an intentional non-negligent act that was not intentionally wrongful and insurer had duty to defend claim for violation of CFAA); *cf.* Compaq Computer Corp. v. St. Paul Fire & Mar. Ins. Co., C3-02-2222, 2003 WL 2203955, at *6 (Minn. Ct. App. 2003) (even if a complaint does not specify the subsection of the CFAA allegedly violated, but generally alleges that the defendant intentionally caused damage, an exclusion in a technical errors and omissions policy for criminal conduct will apply even if the allegations could have been tied only to the sections addressed to damage caused other than intentionally).

83. 18 U.S.C.A. § 1962(a–c).

predicate act, and the use of those channels with the intent to execute a fraudulent scheme is an element of those statutory violations.[84]

By way of illustration, an intentional acts exclusion in a CGL policy barred coverage when the operator of a youth detention facility used the mail to receive kickbacks from judges who sentenced youth offenders to the facility.[85] The court refused to determine the intentional acts issue by focusing on how the complaint characterized the wrongful conduct as either reckless or intentional, recognizing instead that the underlying facts alleged reflected willful and intentional conduct.[86]

On the other hand, courts may refuse to apply intentional acts exclusions in the context of RICO claims where the exclusionary language is ambiguous on its face or as applied to the particular claim.[87] One court reached this conclusion with respect to a policy that promised to cover directors and officers for "*any* negligent act, error or omission *or* breach of duty of [the] directors and officers while acting in their capacity as such."[88] The court found that this language could be read to provide coverage for any breach of duty, including intentional breaches, and not just negligent breaches.[89] Therefore, this particular coverage language created an inconsistency with the exclusion that was resolved in favor of coverage.

B. *Common Law Violations*

1. Common Law Fraud and Violations of Consumer Fraud Statutes

Proof of common law fraud generally requires proof of either a misrepresentation "uttered fraudulently" or conduct involving the intent to deceive, plus justifiable reliance by the victim that proximately causes his injury.[90] Even the narrowest conduct based exclusions tend to bar coverage for actual "fraud or dishonesty," so an express fraud claim logically will

84. 18 U.S.C. §§ 1341, 1343. *See* United States v. Indelicato, 865 F.2d 1370, 1378 (2d Cir. 1989); *Humphreys*, 590 A.2d at 1267.

85. Colony Ins. Co. v. Mid-Atl. Youth Servs. Corp., 485 Fed. App'x 536, 540 (3d Cir. 2012).

86. The exclusion has also applied to RICO violations involving a sheriff's extortion of campaign re-election contributions from car towing businesses and denial of territory to non-contributors. *See* West Bend Mut. Ins. Co. v. Crichton, 319 F. Supp. 2d 887, 889 (N.D. Ill. 2004) ("There is no such thing as accidental participation in a conspiracy.") (citing Adcock v. Brakegate, Ltd., 645 N.E.2d 888, 894 (Ill. 1995)). It has applied to a contractor's pattern of failing to file grant applications with HUD. Nationwide Mut. Fire Ins. Co. v. City of Rome, 601 S.E.2d 810 (Ga. Ct. App. 2004).

87. Volney Residence, Inc. v. Atl. Mut. Ins. Co., 600 N.Y.S.2d 707 (N.Y. App. Div. 1993).

88. *Id.* at 707.

89. *Id.* at 707–08.

90. Greenberg v. Tomlin, 816 F. Supp. 1039, 1054 (E.D. Pa. 1993); Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994); Sevin v. Kelshaw, 611 A.2d 1232, 1236 (Pa. Super. Ct. 1992).

fall within an intentional acts exclusion under any kind of insurance policy.[91]

Such may not be the case for negligent misrepresentation claims as long as there is no allegation or proof that the insured expected or intended the injury (the standard under a CGL policy) or engaged in deliberately fraudulent acts (the D&O standard).[92] Labeling the misrepresentation negligent, however, will not necessarily avoid an intent exclusion when it amounts to only a relabeling of a systematic and intentional course of conduct intended to interfere with the business of a third party.[93]

Because violations of unfair trade practice or truth-in-lending statutes covering consumer fraud can be based on negligent, as opposed to intentional, conduct, the application of an exclusion for intentional acts depends on the specific facts alleged and proven in a particular case.[94]

2. Defamation or Product Disparagement

Sometimes a defamation claim requires proof that a false statement was published with actual malice, e.g., when a public official or public figure is the plaintiff. In such cases, the plaintiff proves actual malice by showing that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[95] Since actual knowledge of

91. Tower Ins. Co. v. Dockside Assocs. Pier 30 LP, 834 F. Supp. 2d 257, 266 (E.D. Pa. 2011); *Cunningham & Walsh*, 744 P.2d at 1319 (deceit, by its nature, is an act from which an intention to cause harm must necessarily be inferred); Moscarillo v. Prof'l Risk Mgmt. Servs., Inc., 921 A.2d 245 (Md. 2007) (example of policy exclusion for fraud in psychiatrist professional liability policy); *SL Indus., Inc.*, 607 A.2d at 1276–77 ("the intent element in fraud, consisting of the intent to induce reliance, constitutes a subjective intent to injure").

92. *SL Indus., Inc.*, 607 A.2d at 1279 (N.J. 1992) ("although the insurer must defend an insured who is accused of reckless, negligent, or innocent misrepresentations, no defense is required when the insured is accused of intentional misrepresentations").

93. Kubit v. MAG Mut. Ins. Co., 708 S.E.2d 138, 148–49 (N.C. Ct. App. 2011).

94. Auto Europe, LLC v. Ct. Indem. Co., 321 F.3d 60 (1st Cir. 2003); *CGS Indus.*, 751 F. Supp. 2d at 452; USAA Cas. Ins. Co. v. McInerney, 960 N.E.2d 655, 661 (Ill. App. Ct. 2011) (home purchaser's underlying claim for insured seller's negligent misrepresentation of extent of leakage problems was not necessarily excluded from coverage as long as the insured did not expect or intend the injury); Serv. Lloyd's Ins. Co. v. J.C. Wink, Inc., 182 S.W.3d 19, 30 (Tex. App. 2005); Reins. Ass'n of Minn. v. Timmer, 641 N.W.2d 302, 312 (Minn. Ct. App. 2002) (claims for fraud and consumer fraud against insured cattle seller for selling diseased cows; where complaint does not distinguish between a misrepresentation which the defendant knew was false (fraud) and one which he did not intend to be false (consumer fraud), it can reasonably be construed to include both; so insurer has a duty to defend since intentional-acts exclusion should apply only where misrepresentation is made falsely); *but see* F.T.C. v. Affiliate Strategies, Inc., No. 09-4104-RDR, 2013 WL 5304082, at *8 (D. Kan. Sept. 20, 2013) (intentional-act exclusion applies to liability under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 1601–1608, for substantially assisting a telemarketer knowing that the telemarketer is engaged in deceptive or abusive telemarketing conduct); Allstate Ins. Co. v. Chaney, 804 F. Supp. 1219, 1221–22 (N.D. Cal.1992) (under California law, negligent misrepresentation is treated as a type of fraud and therefore cannot be an "accident" or an "occurrence" under an insurance policy).

95. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

falsity is probative of the defendant's intent to cause injury, an intent exclusion may apply to deny a defense and indemnity where knowledge of falsity is the only degree of culpability pleaded or proved.[96] This will be the case even when a policy includes defamation as a covered occurrence.[97]

In other cases, however, the pleading more broadly describes the insured's mindset as negligence or recklessness. In the libel context, recklessness means that the defendant in fact entertained serious doubts as to the truth of his publication.[98] But proceeding despite the existence of serious doubts is not the equivalent of acting with an intent to injure.[99] Thus, unless there are further facts alleged that would actually establish the degree of culpability, a better approach may be to allow for the possibility that the defamation could be established based only on mere negligence or recklessness.[100]

3. Misappropriation of Trade Secrets or Confidential Information

The Uniform Trade Secrets Act (UTSA) defines "misappropriation" in part as the acquisition of a trade secret by a person who "knows or has reason to know" that the trade secret was acquired by "improper means."[101] "Improper means" is defined to include "theft, bribery, misrepresentation,

96. Shapiro v Glens Falls Ins. Co. 347 N.E.2d 624, 626 (N.Y. 1976); Hodgson v. United Servs. Auto. Ass'n, 691 N.Y.S. 2d 137, 138 (N.Y. App. Div. 1999); Willard v. Preferred Mut. Ins. Co., 662 N.Y.S.2d 342, 343 (N.Y. App. Div. 1997); Elitzky, 517 A.2d 989.

97. *E.g.*, *Shapiro*, 347 N.E.2d at 624 (policy defined "occurrence" to mean "an accident resulting in personal injury neither expected nor intended from the standpoint of the insured" and "personal injury" to include slander; but policy also contained endorsement excluding any personal injury caused intentionally by the insured; held no coverage for slander allegations that insured spoke maliciously with intent to injure:); *accord* Weinberg v. Ins. Co. of N. Am., 388 N.Y.S.2d 69 (1976); Finger v. State Farm Fire & Cas. Ins. Co, No. 11–13300, 459 Fed. App'x (11th Cir. 2012); *cf. Voorhees*, 607 A.2d at 1265.

98. St. Amant v. Thompson, 390 U.S. 727, 732 (1968) (publishing with serious doubts as to the truth of a statement shows reckless disregard for truth or falsity and demonstrates actual malice.)

99. *USX Corp.*, 99 F. Supp. 2d at 630; Elitzky, 517 A.2d at 989 (where it is "possible that the [insured] recklessly disregarded the truth and libeled [the third-party] yet did so with [a] pure heart," the insurer may be called upon to defend the defamation action); Williamson v. Historic Hurstville Ass'n, 556 So. 2d 103, 108 (La. Ct. App. 1990) (intent exclusion inapplicable to negligently uttered defamation);

100. Empl'rs Commercial Union Ins. Co. v Kottmeier, 323 So. 2d 605 (Fla. Dist. Ct. App. 1975) (unless and until proofs showed the specific intent to harm which is equivalent to actual malice, intent to cause personal injury exclusion not applicable where slander complaint alleged merely "legal malice"). *See* Safeguard Scientifics, Inc. v. Liberty Mut. Ins. Co., 766 F. Supp. 324, 330 (E.D. Pa. 1991) *aff'd in part, rev'd in part on other grounds*, 961 F.2d 209 (3d Cir. 1992) (complaint alleging intentional defamation that did not fall within the scope of coverage could have potentially been amended or could have potentially been for reckless or negligent slander; insurer therefore required to provide coverage); *but cf. I.C.D. Indus., Inc.*, 879 F. Supp. at 488 (declining to follow *Safeguard*; potential for coverage must be based on the four corners of the complaint, not how it could be amended).

101. Uniform Trade Secrets Act § 1(1), (2) (1979).

breach or inducement of a breach of a duty to maintain secrecy or espionage through electronic or other means."[102]

These UTSA definitions imply that where the insured actually knows that certain information was acquired by improper means, he intends to profit using someone else's trade secret. Coverage decisions generally reason that the insured's intent in these circumstances should not be considered "accidental" so as to qualify as an "occurrence" and should come within an intentional acts exclusion of a CGL policy.[103] This conclusion might not be warranted, however, if the insured only had "reason to know" of the improper means, rather than actual knowledge.[104]

4. Tortious Interference with Contract or Prospective Economic Advantage

Restatement (Second) of Torts provides for liability for tortious interference to "[o]ne who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome. . . ."[105] The concept of acting intentionally in the Restatement has been held to mean that the actor actually intended harm to the contractual relationship.[106] This

102. *Id.*

103. Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Sharpe Images, Inc., 3:11-CV 150, 2012 WL 3962747, at *3 (W.D.N.C. 2012); PICA Corp. v. Clarendon Am. Ins. Co., 2:07-cv-1126, 2008 WL 2872274, at *5 (S.D. Ohio 2008), *aff'd,* 339 Fed. App'x 540 (6th Cir. 2009); Grumman Sys. Support Corp. v. Travelers Indem. Co., 828 F. Supp. 11, 12 (E.D.N.Y. 1993) (violation of injunction prohibiting further use of trade secret is intentional conduct not insurable as a matter of public policy).

Coverage for trade secret misappropriation is sometimes decided in the context of whether it is covered as an advertising injury. In such cases, there is no coverage unless the misappropriated information is actually used for advertising by the insured. *See* Aselco, Inc. v. Hartford Ins. Grp., 21 P.3d 1011, 1018–19 (Kan. App. Ct. 2001) (coverage exists for use of trade secret in insured's product catalogue*)*; Winklevoss Consultants, Inc. v. Fed. Ins. Co., 991 F. Supp. 1024 (N.D. Ill. 1998); Select Designs, Ltd. v. Union Mut. Fire Ins. Co., 674 A.2d 798, 803–04 (Vt. 1996) (coverage denied for insured's use of misappropriated competitor customer list to contact the customers as not the type of "solicitation" covered by policy for advertising injury).

104. Flodine v. State Farm Ins. Co., No. 99 C 7466, 2001 WL 204786 (N.D. Ill. Mar. 1, 2001); Tri-Clover Inc. v. DSO Sanitary Supply Co., 97-C-1290, 2000 WL 35627444 (E.D. Wis. Mar. 31, 2000); Air Eng'g, Inc. v. Indus. Air Power, LLC, 828 N.W.2d 565, 573–75 (Wis. 2013) (since UTSA covers situations where defendant either knows or has reason to know that the trade secret was acquired using improper means, the violation can be proved without showing intent to injure; duty to defend exists notwithstanding "knowing violation" exclusion).

105. *See* RESTATEMENT (SECOND) OF TORTS § 766A (1979).

106. State Auto Prop. & Cas. Ins. Co. v. LaGrotta, 529 Fed. App'x 271, 274 (3d Cir. 2013); InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 168 n.10 (3d Cir. 2003) (citing Windsor Sec., Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 663 (3d Cir. 1993)); Degiovanni Sharp v. Whitman Council, Inc., No. CIVA 05-CV-4297, 2006 WL 2261623, at *12–13 (E.D. Pa. Aug. 3, 2006).

interpretation would seem to mandate a finding that the resulting harm is uninsurable.[107] Nonetheless, decisions on whether tortious interference claims are covered are often fact sensitive, rather than automatic.[108]

In *Tibert v. Nodak Mutual Insurance Company*, the court barred indemnity coverage to insured property owners when a jury concluded the owners had acted "in concert" to tortiously interfere with the operations of an adjacent grain elevator business.[109] The court concluded that the jury's finding meant as a matter of law that the insureds intended to achieve a preconceived objective and that the injury inherent in that objective was what a reasonable person would have deemed substantially certain to result.[110] The intentional act exclusion therefore applied to preclude indemnity for the damages paid by the insureds for their tortious interference.[111]

The *Tibert* court reached the opposite conclusion, however, on the insurer's duty to defend, however. Apart from alleging intentional wrongdoing, the complaint had also alleged that the conduct that caused the injuries was negligent and reckless.[112] The court acknowledged that the insurer's defense obligation should have been based on the allegations in the complaint as of the time the defense was tendered to the insurer.[113] Because some of the conduct as alleged would have been insurable, the insureds were entitled to reimbursement for the cost of defense that the insurer

107. *See* RESTATEMENT (SECOND) OF TORTS § 767 (1979).

108. *See Mendel*, 806 F. Supp. at 1211–12; S. Md. Agric. Ass'n v. Bituminous Cas. Corp., 539 F. Supp. 1295 (D. Md. 1982) (no coverage for allegations that insured caused meritless indictments to be issued against former employees resulting in their termination by other employers because occurrence definition in commercial general liability policy required that the harm suffered be neither expected nor intended by the insured); *Freightquote.com*, 397 F.3d at 893 (applying the "natural and probable consequences" approach to intent analysis; intentional-acts exclusion precluded coverage for defense or indemnity of tortious interference claim, even where plaintiff owed insured money, insured did not intend to injure plaintiff, and insured acted on advice of counsel in writing to plaintiff's customers that they should not pay plaintiff and implying its officers were involved in racketeering); *cf.* Bankwest v. Fid. & Deposit Co. of Md., 63 F.3d 974, 980 (10th Cir. 1995) (no intentional-act exclusion in the policy; policy coverage for personal injury which expressly included publishing defamatory or disparaging material is broad enough to include claims for intentional interference with contract based on insured's letters to plaintiff's banks falsely claiming that they could not loan plaintiff money); Custom Hardware Eng'g & Consulting, Inc. v. Assurance Co. of Am., 295 S.W.3d 557, 562 (Mo. Ct. App. 2009) (exclusion for acts done knowing that they would violate rights of another applied to allegations that tortious interference by misrepresenting authority to service competitor's product was done "deliberately, knowingly . . . maliciously . . . oppressively . . . willfully . . . and with the intent to cause injury").

109. 816 N.W.2d 31, 39–40 (N.D. 2012).

110. *Id.* at 39.

111. *Id.*

112. *Id.* at 43.

113. *Id.* at 44.

had refused to provide.[114] The insurer could not hold back providing the costs of defense until after the liability was determined.[115]

In *State Auto Property & Casualty Insurance Co. v. LaGrotta*, the court denied coverage for claims of tortious interference with contract and prospective contractual relations against a state legislator who allegedly acted outside the scope of his jurisdiction in causing the county to breach its contract for management of its health care facility.[116] The court rejected the insured's argument that he was entitled to a defense because his alleged tortious interference was pleaded as both intentional and negligent.[117] Noting that there was no cause of action in the first place for negligent interference with contract, the court focused on the underlying factual allegations, rather than the labeling of them as negligent.[118] The court concluded that the allegations could be understood only as intentional acts committed with the knowledge that they would cause injury and held that the insured had no duty to defend or indemnify.[119]

5. Malicious Prosecution

A claim for malicious prosecution of a civil action can require proof that the action lacked probable cause or that it was motivated by malice or an improper purpose. Where proof that the defendant sued for an improper purpose is required, an intentional act exclusion would logically apply because the improper purpose would necessarily reflect a desire to harm an adversary.[120] That would not be the case if the malicious prosecution claim was based on merely on gross negligence, recklessness, or lack of probable cause.

In *Regent Insurance Co. v. Strausser Enterprises, Inc.*,[121] however, the court concluded that a plaintiff could not state a malicious prosecution claim without alleging intentional injury because "malice" was a key element of the cause of action under Pennsylvania law, and "malice" implied

114. *Id.* at 47.

115. *Id.* at 43–44.

116. No. 2:11-CV-00457, 2012 WL 4009520, at *8–10 (W.D. Pa. Aug. 14, 2012), *report and recommendation adopted*, No. CIV.A. 11-457, 2012 WL 4006234 (W.D. Pa. Sept. 12, 2012), *aff'd*, 529 Fed. App'x 271 (3d Cir. 2013).

117. *Id.* at *9.

118. *Id.*

119. *Id.* at *10.

120. *E.g.*, Downey Venture v. LMI Ins. Co., 78 Cal. Rptr. 2d 142, 155 (Cal. Ct. App. 1998) (coverage for defense costs, but not indemnity, for settlement of malicious prosecution claim brought under California law; California Insurance Code § 533 (see *supra* text accompanying note 48) bars indemnification for malicious prosecution because the plaintiff must prove either "actual hostility or ill will on the part of the defendant or a subjective intent to deliberately misuse the legal system.")

121. 902 F. Supp. 2d 628, 638–40 (E.D. Pa. 2012).

having an improper purpose or motive.[122] Thus, the court held that merely alleging that a case was filed with gross negligence or without probable cause was not enough.[123]

Against this backdrop, the court considered whether there was coverage for defendants who allegedly filed a *lis pendens* against the plaintiff's property knowing that the filing was without merit and for improper purposes.[124] The insuring clause of defendant's "personal and advertising injury" insurance policy expressly covered injury arising from "malicious prosecution."[125] An exclusion, however, said that there was no coverage for "'personal and advertising injury' caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'"[126] Having concluded that malicious prosecution required proof of an improper purpose, the court reasoned that the language of the exclusion appeared to negate the very same coverage provided for in the insuring clause.[127] It therefore found that the two provisions created an ambiguity that had to be resolved in favor of the insured and coverage.[128]

Other courts have focused their analysis on the fact that a claim for malicious prosecution of a criminal case requires proof that the defendant acted without probable cause and with malice—a primary purpose other than bringing the accused to justice—so that an intent to cause harm can be inferred.[129] Under this approach, an alleged malicious prosecution may not give rise to an insurable "occurrence" because it resulted in a bodily injury that was either expected or intended from the standpoint of the insured.[130]

In the related area of abuse of process, where proof is required of an ulterior purpose or motive, it has been held that intent is the essence of

122. *Id.* In Pennsylvania, the elements of malicious prosecution are codified as the "wrongful use of civil proceedings" in the Dragonetti Act, 42 PA. CONS. STAT. ANN. § 8351(a) (1980). The Act requires proof that the defendant acted "in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing proper discovery, joinder of parties or adjudication of [his] claim. . . ."

123. *Id.* at 638–40.

124. *Id.* at 639.

125. *Id.* at 641.

126. *Id.*

127. *Id.* at 643.

128. *Id.*; *see also* Bhd. Mut. Ins. Co. v. Salem Baptist Church of Jenkintown, 985 F. Supp. 2d 624, 634 (E.D. Pa. 2013) (coverage provision including malicious prosecution read with exclusion for losses from acts expected or intended by the insured created ambiguity resolved in favor of coverage interpretation most favorable to insureds).

129. Ledford v Gutoski, 855 P.2d 196, 199 (Or. Ct. App. 1993) (injury is natural and probable consequence of malicious prosecution).

130. *Id.*

the claim.[131] An insured therefore cannot avoid an intentional acts exclusion where harm to the opposing party in the form of attorney fees and costs would necessarily result from the abuse.

6. Breach of Contract

Commercial general liability policies often contain express exclusions for contractual liabilities.[132] Even without such an exclusion, when a party breaches a contract due to economic self-interest, the breach usually will not be considered accidental or fortuitou.[133] This result is consistent with the general principle, often applied to interpret the definition of "Loss" in D&O policies, that an insured should not be entitled to coverage for the disgorgement of ill-gotten gains or money wrongfully acquired.[134] Where, however, the breach is due to a clerical error or honest mistake, there is room for the argument that an intentional act exclusion should not apply.[135]

The principle that contract damages are not insurable has logically been applied to make an insured's breach of the implied covenant of good faith and fair dealing subject to a policy exclusion for intentional acts.[136]

131. Town of Orland v. Nat'l Fire & Cas. Co., 726 N.E.2d 364, 371–72 (Ind. Ct. App. 2000) (intentional-act exclusion applies because injury would necessarily be direct result of asserting a frivolous counterclaim and seeking to disqualify counsel).

132. *See*, *e.g.*, Liberty Corp. Capital Ltd. v. Sec. Safe Outlet, 577 Fed. App'x 399 (6th Cir. 2014); Northstar Educ. Fin., Inc. v. St. Paul Mercury Ins. Co., No. A12-0959, 2013 WL 141712, at *1 (Minn. Ct. App. Jan. 14, 2013); Pennsylvania Mfgrs. Ass'n Ins. Co. v. L.B. Smith, Inc., 831 A.2d 1178, 1181 (2003) (Pennsylvania law does not recognize the applicability of a general liability policy to breach of contract and breach of warranty claims.).

133. *Timmer*, 641 N.W.2d at 312; *Select Designs*, 674 A.2d at 803–04 (party breaching a contract necessarily expects or intends the other party to suffer economic injury regardless of whether it knew the precise consequence of its actions); Smartfoods, Inc. v. Northbrook Prop. & Cas. Co., 618 N.E.2d 1365, 1367 (Mass. App. Ct. 1993).

134. Unified W. Grocers, Inc. v. Twin City Fire Ins. Co., 457 F. 3d 1106, 1115 (9th Cir. 2006); Level 3 Commc'ns, Inc. v. Fed. Ins. Co., 272 F.3d 908, 910 (7th Cir. 2001); Vigilant Ins. Co. v. Credit Suisse First Boston Corp., 782 N.Y.S.2d 19, 20 (N.Y. App. Div. 2004) (restitution of ill-gotten funds does not constitute "damages" or a "loss" as those terms are used in insurance policies").

135. In *Compaq Computer Corp.*, a technology E&O policy excluded coverage for "intentionally wrongful" acts, but defined a covered "error" as "any *error*, omission, or negligent act." Since the definition included the word being defined, the court looked to common usage describing an "error" as an unintentionally incorrect act, assertion, or belief, or a mistake. It reasoned that "any error" therefore "encompasses intentional, non-negligent acts like those associated with the breach of a contract as well as omissions and negligent acts . . . [but] not intentionally wrongful conduct." It held that conclusory allegations that the insured committed a "knowing breach" were insufficient to allege intentionally wrongful conduct and that there was a duty to defend. *Compaq Computer Corp.*, 539 F.3d at 815.

136. Hoyle v. Utica Mut. Ins. Co., 48 P.3d 1256, 1259 (Idaho 2002); Intermountain Gas Co. v. Indus. Indem. Co. of Idaho, 868 P.2d 510, 514 (Idaho Ct. App. 1994).

7. Breach of Fiduciary Duty

A fiduciary duty can arise either as a matter of law, as in an attorney-client or trustee relationship, or from a moral, social, domestic, or purely personal relationship of trust and confidence.[137] In any case, the breach of the duty can result from conduct that is either negligent or intentional. The coverage issue will, therefore, be fact sensitive.[138] If, however, the liability does not turn on whether the breach was negligent or intentional, i.e., it exists under either scenario, then there should at least be a duty to defend because the claim is potentially within coverage for mere negligence.

VII. CONCLUSION

Business plaintiffs should familiarize themselves with the law on insurance coverage for intentional acts before filing commercial claims. While a plaintiff is not obligated to conduct a full insurance analysis or plead his claims to bring them within the scope of insurance coverage, he would be wise to at least consider the implications of his pleadings on that source of recovery so that he does not inadvertently plead himself out of coverage.

Litigants and the court face a series of questions in deciding whether a claim is insurable notwithstanding policy terms relating to intentional wrongdoing. Does the complaint against the insured allege specific facts that can form the basis of a decision on whether the plaintiff is targeting the defendant's intentional conduct or harm? Or does it contain only labels or conclusory phrases? How do principles of insurance contract interpretation influence whether the plaintiff's choice of words in describing the insured's state of mind should determine if the exclusion applies? Do all the causes of action pleaded require proof of the intent necessary to trigger an intentional act exclusion?

The answers to these questions will greatly impact the approaches that a defendant and his insurer take in response to the complaint brought by a business plaintiff. For the defendant, they will inform his decision to defend the case or try to settle early either because a defense or indemnity

137. Meyer v. Cathey, 167 S.W.3d 327, 330–31 (Tex. 2005).

138. *See e.g.*, Burkhart, Wexler & Hirschberg, LLP v. Liberty Ins. Underwriters, Inc., 875 N.Y.S.2d 590, 591 (N.Y. App. Div. 2009) (claims against law firm for "wanton, willful and malicious" breach of fiduciary duty for misappropriating its clients' confidential information and trade secrets are not claims alleging negligence covered by malpractice insurance for any "act, error or omission" arising from providing or failing to provide professional legal services); *Butler & Binion*, 957 S.W.2d at 568 (breach of fiduciary duty claim that law firm constructively expelled a partner after she reported unethical conduct by another partner was not an "occurrence" because it was not an "accident" and was in any event conduct within exclusion for intentional conduct).

might not be forthcoming or because it could be cut off at a later date. For the insurer, they will impact whether to defend, whether to reserve rights, and whether to fund a settlement or liability verdict. For the business plaintiff himself, they will frame a strategy decision based on a variation of a familiar proverb: Be careful what you plead. It may cost you the defendant's insurance coverage.