ALLSTATE INS. CO. V. CAMPBELL – THE OHIO SUPREME COURT REJECTS THE "SUBSTANTIAL CERTAINTY" TEST FOR INFERRED INTENT, WITH A CATCH

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Liability insurance policies, whether they are general commercial liability policies, homeowner policies, or automobile policies, generally contain exclusions designed to bar coverage for injury or damages that the insured intended to inflict on another. Though they are commonly referred to as "intentional act" exclusions, such provisions usually are framed to exclude coverage for bodily injury or property damage "expected or intended" by the insured.

In *Allstate Ins. Co. v. Campbell*[1], the Ohio Supreme Court resolved an important question regarding the interpretation of such provisions. Clarifying an ambiguity in its prior case law on the issue, the Court rejected what is commonly referred to as the "substantial certainty" test, in which intent is inferred when harm is "substantially certain" to result from an insured's actions, and instead held that intent to harm will only be inferred when the insured's actions and the harm caused "are intrinsically tied so that the act has necessarily resulted in the harm."[2]

The resulting test is not as narrow as the tort victims, who argued that inferred intent should be limited to cases of murder and sexual molestation, had urged. At the same time, it is far narrower than the "substantial certainty" standard urged by the insurance companies.

The catch, however, is that the Court concluded its opinion with a potential bombshell. While rejecting the "substantial certainty" test, the Court also held that a policy provision excluding coverage for injury or harm resulting from an "intentional act" (as opposed to an act resulting in harm that was expected or intended by the insured) could be enforced to bar coverage for harm resulting from *any* intentional act, regardless of whether the ensuing harm was, in fact, intended.

As the two justices who dissented from this aspect of the majority opinion noted, "[t]he exclusion cannot be as broad as envisioned by the majority," since "[m]ost accidents are the result of intentional acts – it is the result that is unintended."[3] Luckily, however, the policy language the Court construed so broadly is markedly different from the standard policy form language one is likely to encounter.

INTENTIONAL ACT EXCLUSIONS

The Insurance Service Office (ISO) standard homeowner's policy form, though it has changed somewhat over the years, incorporates "intentional acts" exclusions framed in terms of excluding coverage for bodily injury or property damage "expected or intended by the 'insured.'"[4] Standard CGL policies, most of which rely on ISO forms as well, are framed to exclude coverage when the injury or damage was "expected or intended from the standpoint of the insured."[5]

As the Ohio Supreme Court first recognized in *Physicians Ins. Co. v. Swanson*,[6] the applicability of such provisions normally depends not on whether the insured acted intentionally, but on whether the insured intended to cause the harm resulting from his or her acts.[7] At the same time, the Court has held that there are instances in which an intent to cause harm can be inferred from the nature of the act itself – most famously in the case of *Gearing v. Nationwide Ins. Co.*,[8] in which the Court held that an intent to cause harm could be inferred as a matter of law from the act of sexual molestation, but also in *Preferred Risk Ins. Co. v. Gill*,[9] where the Court held that an insurance company had no duty to indemnify or defend an insured with respect to tort claims arising from a murder, regardless of how the claims had been framed.

After *Gearing* and *Gill*, it was safe to say that intent to injure would be inferred as a matter of law in cases of murder or sexual molestation of minors. The extent to which

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intent to injure might be inferred in other contexts, however, was left unanswered. Based on certain language in *Gearing*, however, an argument was advanced that the Court had determined that intent should be inferred in any instance where injury was not simply inseparable from the act, but "substantially certain" to occur as a result of the conduct at issue.

GEARING V. NATIONWIDE INSURANCE COMPANY – AN OPINION TAKEN TOO FAR?

In *Gearing*, the defendant in a civil suit for damages arising from his sexual molestation of three minors sought coverage under his homeowner's insurance policy, claiming that his lack of any subjective intent to cause harm to the children meant that the "intentional act" exclusion in his homeowner's policy did not apply. The Court rejected this argument, and went so far as to say that (a) child molestation cannot even constitute an "occurrence" under an insurance policy and that (b) public policy precludes insuring acts of child molestation providing coverage for injury caused by criminal molestation of a minor was precluded as a matter of public policy, regardless of whether it was subject to a coverage exclusion in the policy.[10]

Given that the ultimate holding in *Gearing* was that child sexual molestation can *never* be the subject of insurance coverage, *Gearing* arguably did not actually involve the interpretation of an "intentional act" exclusion. However, in discussing case law on the issue from other jurisdictions, some of which applied a "substantial certainty" test, the Court also arguably implied that it too had adopted a rule in *Swanson, supra*, that an intentional act exclusion could bar coverage in cases where harm was "substantially certain" to occur as a result of the conduct in question.[11]

Three years later, this dicta began to take on a life of its own. In *Buckeye Union Ins. Co. v. New England Ins. Co.*,[12] the Court addressed two certified questions arising from an action brought in federal court by Buckeye Union Insurance Company against its own insurer seeking indemnification for an insurance bad faith claim – specifically, whether "'bad faith' with 'actual malice'" in failing to settle a tort claim constituted an uninsurable tort under Ohio law, and whether a jury finding of bad faith estopped Buckeye Union from relitigating the issue of its intent for purposes of insurance coverage. The Court ultimately answered no to both questions, but without a majority opinion as to the basis for its conclusions.

While Justice Pfeiffer opined that insurance bad faith was insurable because intent to injure was not a necessary element of the tort, Justice Cook wrote a separate opinion concurring in the judgment, but disagreeing with the analysis by which it was reached. According to Justice Cook, the question should have resolved through the application of an objective "substantial certainty" test that Justice Cook maintained had been adopted in Gearing.[13]

ALLSTATE INS. CO. V. CAMPBELL – THE REJECTION OF "SUBSTANTIAL CERTAINTY"

In *Allstate Ins Co. v. Campbell*,[14] the Court has eliminated some of the confusion arising from the plurality in *Gearing*, at least with respect to policies in which the "intentional act" exclusions that follow standard ISO form language. With respect to these policies, the Court rejected the notion that inferred intent should be limited to instances involving homicide or sexual molestation. At the same time, the Court also rejected the substantial certainty rule, and instead held that the inferred intent rule "applies only in cases in which the insured's intentional act and the harm caused are intrinsically tied so that the act has necessarily resulted in the harm."[15]

Campbell involved claims arising from the unfortunate decision by a group of teenage boys to steal a styrofoam target deer (normally used for shooting or archery), and place it just past the crest of a hill on a rural roadway so they could watch how drivers reacted.[16] Unfortunately, shortly after the deer was placed in the roadway, a driver reacted by swerving and losing control of his car, resulting in a crash and serious injuries to himself and a passenger. Three of the boys involved in the prank later pleaded no contest to two felonies and a misdemeanor theft charge.[17]

The injured driver and his passenger brought negligence actions against the boys and their parents. Some of the boys and their families were insured under homeowners' insurance policies issued by Erie Insurance Exchange, while Grange Mutual Casualty Company and Allstate Insurance Company insured others. The Erie, Grange and Allstate policies contained "intentional act" exclusions that generally followed ISO form policy language – namely, they purported to exclude coverage for damages "expected or intended" by the insured.[18] One boy and his father, however, were insured under a policy issued by American Southern Insurance Company that featured nonstandard exclusionary language.[19] All four insurers brought actions against their insureds seeking that the conduct at issue fell within the intentional act exclusions of their respective policies.

Relying on Justice Cook's opinion in *Buckeye Union*, the insurers argued for a "substantially certain" test for coverage, maintaining that the rule of inferred intent should be applied in any instance where the insured's act is substantially certain to cause harm.[20] The tort plaintiffs, on the other hand, argued that inferred intent should remain narrowly construed, and that the issue of the boys' intent presented a matter of fact to be determined by a jury.[21]

With respect to the Erie, Grange and Allstate policies, the Court agreed with the tort plaintiffs, at least in rejecting the insurers' argument for a "substantial certainty" test. In so doing, the Court specifically rejected Justice Cook's argument that *Gearing* represented an adoption of a two-part analysis:

> Instead of outlining a two-part analysis, *Gearing* treats the "substantially certain" test as being subsumed within the newly adopted rule of inferred intent. *Gearing* never addressed whether the insured's action was substantially certain to result in harm. Instead, it concluded that "*intent to harm* inconsistent with an insurable incident *is properly inferred* as a matter of law from deliberate acts of sexual molestation of a minor."
>
> We now clarify that the doctrine of inferred intent applies only in cases in which the insured's intentional act and the harm caused are intrinsically tied so that the act has necessarily resulted in the harm. Because this test provides a clearer method for determining when intent to harm should be inferred as a matter of law, we hold that courts are to examine whether the act has necessarily resulted in the harm – rather than whether the act is substantially certain to result in harm.[21]

After determining that intent to harm will not be inferred unless the act "necessarily resulted in the harm," the Court then ostensibly addressed whether inferred intent is objective or subjective in nature – with no clear indication as to either. The insurers urged an objective test, which the Court apparently rejected, but without any clear guidance as to what the proper test might be.[23] Instead, the Court simply stated that it affirmed the judgment of the court of appeals , and that the trial court "must conduct a factual inquiry on remand to determine whether a duty to defend and indemnify arises from the Allstate, Grange and Erie policies," all of which contained language excluding coverage for injuries "expected or intended" by the insured.[24]

No indication was given in the Court's opinion as to what parameters such a factual inquiry might take. Nor, though it was affirmed by the Supreme Court, does the Tenth District's treatment of the issue.

In its opinion, the Tenth District clearly gave some weight to the boys' subjective intentions, but also held that the intent to injure, though it posed a question of fact, was nonetheless subject to an objective standard:

> In the case before us, there is no dispute that the boys' conduct was intentional; that is, they did not accidentally place the target deer . . .. The disputed issue here is whether they also intended harm or injury to follow from their intentional act. Appellants argue that the boys' intention is a question of fact for the jury. **Accordingly, we must determine whether the boys' conduct supports an objective inference of the intent to injure.** [25]

The facts considered in the Tenth District's opinion, in turn, involved weighing both the boys' statements regarding their subjective intentions as well as the objective likelihood of harm resulting from their actions. On the one hand, the Tenth District considered the boys' subjective testimony to be relevant, including testimony as to miscalculations regarding the level of danger inherent in their actions.[26] On the other, the Tenth District clearly expected that a jury would make an objective assessment of whether the conduct was likely to result in harm. Among the facts the Tenth District found relevant was that target deer are not instrumentalities like guns or cars, which are "known to cause harm under certain circumstances," as well as evidence of negligent conduct on the part of the driver of the accident car.[27]

Thus, it appears that insured's subjective reports of intent are relevant to determining whether intent to injure can be inferred, though the test appears to be objective in nature, but further clarification will have to wait.

THE AMERICAN SOUTHERN POLICY

As noted above, one boy and his father were insured under a policy issued by American Southern Insurance. This policy contained exclusionary language that differed from the language n the Erie, Grange and Allstate policies, in that it purported to exclude coverage for damage or loss if such loss could be attributed to "an intentional act of any insured," as opposed to excluding coverage for damage "expected or intended" by an insured.[28] The Tenth District did not treat this as a meaningful distinction; the Supreme Court, however, held otherwise.

According to the Supreme Court, by using "broad exclusionary language excluding coverage for harm caused by any intentional act – regardless of whether the harm is expected or intended by the insured – American Southern [had] worded its policy in a way that free[d] it from the line of analysis found in *Gill, Swanson and Gearing* . . ."[29] Because the policy purported to exclude coverage for intentional *acts* (as opposed to intentional or expected *injury*), the Court held that American Southern had no duty to indemnify or defend its insureds for any liability stemming from the insured boy's intentional participation in the placement of the target deer in the roadway.[30]

As Justice Pfeiffer noted in a dissenting opinion joined by former Chief Justice Eric Brown, construing American Southern's policy language to include the results of any intentional act would have the effect of rendering the coverage essentially illusory, since "[m]ost accidents are the result of intentional acts – it is the result that is unintended."[31] Noting rhetorically that the majority's interpretation would bar coverage if, for example, a homeowner intentionally left his rake in the yard, meaning to work with it later, only to have a neighbor step on the rake and sustain injury, Justice Pfeiffer maintained that the policy exclusion had to be interpreted as being materially identical to the other policies' exclusions, "[o]therwise, there would be no coverage for any injury that resulted from any waking, nonreflexive act of an insured."[32]

That being said, American Southern's policy language is not a common formulation. Unlike the Erie, Grange and Allstate policies, it does not follow or resemble any industry standard, such as ISO form policy language.[33] Thus, at least from a practical standpoint, the potential for this particular aspect of *Campbell* to wreak havoc is limited.

Endnotes

1. ___ Ohio St.3d ___, 2010 Ohio 6312.
2. *Id.* at ¶ 56.
3. *Id.* at ¶ 67 (Pfeiffer, J. dissenting in part; Brown, C.J., concurring in dissent).
4. *See, e.g.*, Hazel Glenn Beh, *Tort Liability for Intentional Acts of Family Members: Will Your Insurer Stand by You*, 68 TENN. L. REV. 1, 33, n. 230 (Fall 2000) (summarizing changes to ISO H0-3, the most common homeowner's insurance form). The phrase "expected or intended from the standpoint of the Insured" first made its way into general liability policies in 1966, replacing standardized policy language that excluded coverage for "bodily injury . . . caused intentionally by or at the direction of the insured." *Patrons-Oxford Mut. Ins. Co. v. Dodge* (Me. 1981), 426 A.2d 888, 890 (discussing history of intentional act exclusions).
5. Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. AND MARY L. REV. 1489, 1548 (March 2010) (quoting standard CGL language). Similar language has been standard in ISO forms for decades. *See* F. Malcolm Cunningham, Jr. and Amy L. Fischer, *Insurance Coverage In Construction – the Unanswered Question*, 33 TORT & INS. L.J. 1063 (Summer 1998) (discussing history of "intentional act" exclusions in ISO form policies).
6. (1991), 58 Ohio St.3d 189.
7. Id. at syllabus.
8. 76 Ohio St.3d 34, 1996 Ohio 113.
9. (1987), 30 Ohio St.3d 108.
10. *Gearing*, 76 Ohio St.3d 34, syllabus at ¶¶ 1-2; *see also id.* at 40 ("The public policy of the state of Ohio precludes issuance of insurance to provide liability coverage for injuries produced by criminal acts of sexual misconduct against a minor.").
11. *Id.* at 39-40 ("Indeed, in *Swanson* we approved of the premise that '"resulting injury which ensues from the volitional act of an insured is still an 'accident' if the insured does not specifically intend to cause the resulting harm *or is not substantially certain that such harm will occur.*"' (Emphasis added.) *Swanson, 58 Ohio St. 3d at 193, 569 N.E.2d at 910*, quoting *Quincy Mut. Fire Ins. Co. v. Abernathy (1984), 393 Mass. 81, 84, 469 N.E.2d 797, 799.*").
12. 87 Ohio St.3d 280, 1999 Ohio 67.
13. *Buckeye Union* at 288-294. The only justice to join Justice Cook's opinion was Justice Lundberg-Stratton. *Id.* at 294. Notably, the only justice who joined Justice Pfeiffer's opinion was former Chief Justice Thomas Moyer, who had authored the majority opinion in *Gearing*. *See Gearing* at 35 (opinion by Chief Justice Moyer); *see also Buckeye Union at 287* (concurring with Justice Pfeiffer's opinion).
14. ___ Ohio St.3d ___, 2010 Ohio 6312.
15. *Id.*, syllabus at 2.
16. The facts behind the claims are set forth in detail in the Tenth District's opinion, and are summarized in the Ohio Supreme Court's opinion as well. *See Allstate Ins. Co. v. Campbell* (10th Dist.), 2009 Ohio 6055 at ¶¶ 1-6 (*Campbell I*); *Allstate Ins. Co. v. Campbell*, ____ Ohio St.2d _____, 2010 Ohio 6312 at ¶ 2 (*Campbell II*).
17. The felonies to which the juveniles pleaded were second-degree felony vehicular vandalism (R.C. § 2909.(B)(1)(c)) and fifth-degree possession of criminal tools (R.C. § 2929.24(A)).
18. *See Campbell II* at ¶¶ 11-31 (quoting exclusionary language in Allstate, Erie and Grange's policies).
19. *See id.* at ¶ 60 (quoting policy language).
20. *Campbell II* at ¶ 32, 34.
21. *Id.*
22. *Id.* at ¶¶ 55-56 (citations and footnote omitted). In a footnote to this analysis, the Court also rejected the proposition that the "substantial certainty" test had been adopted in *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003 Ohio 3373, calling *Penn Traffic* "inapposite" since it "concerned employer liability for intentional torts, an entirely separate area of the law that has undergone significant change since that opinion was issued." *Campbell II* at ¶ 55 n. 5 (citing *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010 Ohio 1027).
23. *See Campbell II* at ¶¶ 57-59.
24. *Id.* at ¶ 57.
25. *Campbell I*, 2009 Ohio 6055 at ¶ 50 (emphasis added).
26. The Tenth District noted that "the majority of the boys testified that they desired only to observe motorists' reactions to the target deer," *Id.* at ¶ 53. In addition, the Tenth District concluded that even if the boys expected the deer to be hit by a car, their subjective assessment of the risk posed thereby was relevant as well. Noting that "[s]everal of the boys testified that they did not worry about or even contemplate an injury resulting from their actions," the Tenth District also observed that the deer was made of styrofoam, and that their assessment of the risk, even if incorrect, "was not enough to bring them within the intentional acts exclusions in the policies as a matter of law." *Id.* at ¶ 55. The dissent, however, would not have considered any of the boys' testimony regarding their subjective impressions and intent. *See id.* at ¶¶ 59-66 (Sadler, J, dissenting).
27. *Id.* at ¶¶ 55-56 (discussing evidence).
28. The policy language is quoted in full in the Tenth District's opinion, but not in the Supreme Court's opinion. *See Campbell I*, 2009 Ohio 6055 at ¶¶ 19-21 (quoting relevant policy language).
29. *Campbell II* at ¶ 61.
30. *Id.*
31. *Id.* at ¶ 67 (Pfeiffer, J. dissenting).
32. *Id.*
33. A LEXIS survey of state and federal case law conducted by the author of this article revealed no opinions addressing the precise policy language contained in the American Southern policy, though it turned up a handful of opinions involving coverage exclusions for damage that "results from any occurrence caused by an intentional act of any insured *where the results are reasonably foreseeable.*" *See, e.g., Farmers Ins. of Columbus, Inc. v. Martin* (12th Dist.), 2005 Ohio 556 at ¶ 8 (emphasis added). Though not as common as the ISO approach, exclusions with such qualifying language clearly would fall within the scope of the inferred intent analysis.