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Don't Allow Insurers to Weaken the Standard Applicable to the 'Expected or Intended' Coverage Defense

By Joshua L. Blosveren and Bradley J. Nash | July 26, 2024

Introduction

In an insurance coverage action currently pending in New York state court styled *Century Indemnity v. The Archdiocese of N.Y.*, 2023 N.Y. Slip Op. 34420 (N.Y. Sup. Ct. 2023), the trial court granted the policyholders' motion to dismiss, holding, in part, that the Chubb insurers improperly had attempted to shift the burden of proof as to whether the policyholders "expected or intended" the sexual abuse alleged in more than 1,000 underlying Child Victims Act suits to the policyholder. Earlier this year, the Appellate Division, First Department largely reinstated Chubb's complaint without addressing the "expected or intended" defense. *Century Indemnity v. The Archdiocese of New York*, 226 A.D.3d 557 (1st Dep't 2024).

In another recent case involving environmental damages, *Century Indemnity v. Brooklyn Union Gas*, 75 Misc. 3d 1205, 2022 N.Y. Slip Op. 50388, 166 N.Y.S.3d 845 (N.Y. Sup. Ct. 2022), Chubb argued, unsuccessfully, that the standard for whether certain damage was "expected or intended" by a policyholder was whether there had been a "substantial probability of damage."

New York law unequivocally places the burden of proving the enforceability of coverage exclusions or limitations on the insurer. Moreover, New York law is clear that more foreseeability of harm is insufficient to demonstrate that the harm was expected or intended. Thus, permitting insurers to avoid coverage in sexual abuse cases or other third-party liability cases wherever there was a "substantial probability of damage" would turn bedrock insurance jurisprudence on its head.

Coverage for Unexpected and Unintended Damages or Injuries

General liability insurance policies cover liability that arises from damages or injuries caused by an "accident" or "occurrence." As the New York Court of Appeals has explained, "[f]or an occurrence to be covered under the … policies, the injury must be unexpected and unintentional. We have read such policy terms narrowly, barring recovery only when the insured intended the damages." *Cont'l Cas. v. Rapid-Am.*, 80 N.Y.2d 640, 649 (1993). The court of appeals has also made clear while a policyholder bears the initial burden of proving an "accident" or "occurrence" under the policy, "[o]nce coverage is established, the insurer bears the burden of proving that an exclusion applies." *Consolidated Edison Co. of N.Y. v. Allstate Insurance*, 98 N.Y.2d 208 (2002) (*Con Ed*).

In determining what constitutes the relevant damage that must have been expected or intended, New York courts focus on the specific damage for which the policyholder is ultimately held liable and consider the full circumstances in which the damage developed. See *McGroarty v. Great Am. Ins.*, 36 N.Y.2d 358 (1975). Because "the duty to pay is determined by the actual basis for the insured's liability to a third person," *Servidone Construction v. Security Insurance Co. of Hartford*, 64 N.Y.2d 419, 424 (1985), the relevant damage is the "specific damage" for which the insured is held liable. *Olin v. Lamorak Ins.*, 332 F. Supp. 3d 818, 844 (S.D.N.Y. 2018): "[T]he focus is on whether Olin subjectively expected and intended the specific damage that resulted from its waste-disposal practices."

Under this test, insurers are not able to avoid coverage by showing that a risk of harm was foreseeable to the policyholder, "because that is simply another way of saying that the insured was negligent"—the "very thing the policy expressly insures him against." *McGroarty v. Great Am. Ins.*, 43 A.D.2d 368, 377 (2d Dep't 1974), aff'd, 36 N.Y.2d 358 (1975). A policyholder "may engage in behavior that involves a calculated risk without expecting that an accident will occur—in fact, people often seek insurance for just such circumstances." *Rapid-Am.*, 80 N.Y.2d at 649. Taking a "calculated risk" that one's actions may cause damage "does not amount to an expectation of damage" and will not vitiate coverage. *Union Carbide v. Affiliated FM Ins.*, 101 A.D.3d 434, 434 (1st Dep't 2012). This has been the law in New York for over a century. See *Messersmith v. American Fidelity*, 232 N.Y. 161, 165 (1921) (Cardozo, J.): "The field of exclusion would be indefinitely expanded" if intentional acts alone, without an intention to cause injury, were sufficient to exclude coverage.

Thus, in *McGroarty*, the court of appeals held that the insured, a contractor, was entitled to coverage despite the fact that it knew that its conduct was causing a certain type of damage, because it did not intend the worse damage for which it was eventually held liable. Id. at 361-65. Likewise, in *Automobile Insurance Company of Hartford v. Cook*, 7 N.Y.3d 131, 136 (2006), the court of appeals reversed the lower court's grant of summary judgment to the insurer regarding an underlying wrongful death action where the insured testified that he knew shooting the decedent would injure him, but that he did not anticipate killing the decedent. Id. at 137; see also *Allegany Co-op. Ins. v. Kohorst*, 254 A.D.2d 744, 744 (4th Dep't 1998) (burning a person was accidental where insured intended to set fire to the building but did not intend to injure the person inside).

The Expected or Intended Exclusion

Insurers frequently cite allegations of intentional conduct in an attempt to avoid their coverage obligations pursuant to exclusions purporting to bar coverage for "expected or intended" damages. That a reasonable person would have anticipated the resulting injury, insurers argue, is dispositive of the policyholder's expectations or intent. This position is directly contrary to New York law.

When considering whether the expected or intended defense applies, New York courts focus on the policyholder's subjective expectations and intent. *See Olin*, 332 F. Supp. 3d at 844.

At least one New York court has held that the mere fact that the liability of an organization for an employee's sexual assault sounded in negligence results in the insurer's "expected or intended" defense inapplicable as a matter of law. See *NYAT Operating v. GAN Nat'l Ins.*, 46 A.D.3d 287, 287-88 (1st Dep't 2007): "It does not avail [the insurer] to argue that the assault was foreseeable." Id.

In determining whether an organization's potential liability for an employee's sexual misconduct is covered, the relevant question is whether the harm was expected or intended from the organization's standpoint, and the employee's knowledge is not attributed to the organization. See *RJC Realty Holding v. Republic Franklin Ins.*, 2 N.Y.3d 158, 163-65 (2004) (knowledge of masseur who had sexually assaulted customer could not be attributed to employer for purposes of "expected or intended" analysis of coverage for respondeat superior liability of employer); see also *NYAT Operating v. GAN Nat. Ins.*, 46 A.D.3d 287, 287–88, (1st Dep't 2007): "On the merits, because [the insured's] liability in the underlying action was based on its negligent hiring and retention of the employee, not respondeat superior, the sexual assault was a covered 'accident' within the meaning of the policy, and the exclusion for injuries expected or intended from the standpoint of the insured does not apply."

Moreover, the application of the defense hinges on the policyholder's subjective intent at the time of the act. See *Century Indemnity v. Brooklyn Union Gas*: "The expected-or-intended inquiry necessarily focuses on the time of the act itself—the point in time when the party chooses to act or to refrain from acting, based on its knowledge of the consequences of its acts."; see also *Olin v. OneBeacon Am. Ins.*, 864 F.3d 130 (2d Cir. 2017):

"Before giving the case to the jury, the district court rejected OneBeacon's proposed jury interrogatory regarding expected or intended injury, which asked the jury to find a specific date by which Olin expected or intended the damage. Instead, the court asked the jury, with respect to each site, whether '[b]y the time of the policy period of 1970 … Olin expect[ed] or intend[ed] the property damage that it was obligated to remediate.'"

The Standard Is Not Whether There Was a Substantial Probability of Damage

Over the years, insurers have repeatedly argued that the correct test under New York law for determining whether damage was expected or intended was whether there was a "substantial probability of damage." One recent attempt by Chubb to lower the standard to a "substantial probability" test was rejected by the court in *Century Indemnity v. Brooklyn Union Gas*. In *Brooklyn Union*, Chubb pointed to the jury instruction in *Con Ed* that there was no coverage "if the operator of the plant was aware of a substantial probability of damage as a result of the manner in which the plant was operated," and argued that the trial court's reference to "damage" means "any" damage, without regard for the type of damage or whether it was the same damage for which the insured was held liable. The court rejected these contentions, holding instead that "the proper test asks whether the damage at issue flowed directly and immediately from an intentional act or is connected to that act only through an ensuing chain of unintended (if foreseeable) events." Id., at *14.

In a post-trial decision, the *Brooklyn Union* court reiterated its rejection of Chubb's proposed jury instruction. *Brooklyn Union*, at *3: "This court does not agree that the accidental-damage instruction should include a 'substantial probability of damage' sentence." The court explained that its decision was consistent with the First Department's decision in *Certain Underwriters at Lloyd's London v. NL Industries*, 164 N.Y.S. 3d 607 (1st Dep't 2022). Id., at *4.

Chubb's arguments in *Brooklyn Union* ignore that the court of appeals in *Con Ed* did not rule on the question of whether a policyholder's intent to cause "any" damage results in a loss of insurance coverage. The issue decided in *Con Ed* was whether a jury questionnaire "improperly focused the jury on whether the acts causing the property damage were intentional, rather than on whether the resulting property damage was intended." *Con Ed*, 98 N.Y.2d at 220. The court observed that the parties were in agreement that the jury charge was accurate in stating that the damage is what must be intended, not the act—and, thus, there was no harm from the questionnaire. This is completely different from Chubb's claim that an intention to cause "any" type of damage vitiates all coverage, which is an issue *Con Ed* never decided. The court in *Brooklyn Union* expressly rejected Chubb's attempt to broadly read *Con Ed* in support of its position. *Brooklyn Union*, at *14: "This court does not read *Con Ed* so broadly … [T]he *Con Ed* court did not indicate whether it intended to endorse the 'substantial probability of damage' formulation …"

Accordingly, the court in *Brooklyn Union* properly gave, in part, the following verdict form question and jury instruction:

"Verdict form asked for each policy period:

Did Brooklyn Union prove by a preponderance of the evidence that the property damage at the Citizens site during the period February 18, 1946, to November 30, 1951, was accidental?

Jury instructions read as follows:

Environmental damage to property, such as the damage here, is accidental if it was not intended or expected. Property damage is intended or expected when the insured party not only intended the action that caused the damage, but also took that action knowing that the damage would result. An insured party is not considered to

have expected or intended property damage by its actions if the party took a calculated risk in acting despite the possibility of damage, or because it was foreseeable at the time of the actions that damage might later result. An insured party is considered to have expected or intended property damage, on the other hand, if it knows that this damage will flow directly from its actions."

The *Brooklyn Union* court's rejection of the "substantial probability" test was consistent with the Second Circuit's decision in *City of Johnstown, N.Y. v. Bankers Standard Insurance*, 877 F.2d 1146, 1151 (2d Cir. 1989), where the Second Circuit held that a interpreting the "expected or intended" exclusion so broadly as to preclude coverage for "any damage that was, objectively speaking, substantially probable, that interpretation appears to conflict with … [the New York Court of Appeals' decision in] *McGroarty* and its progeny." 877 F. 2d 1146, 1151 n.1.

Conclusion

Under New York law, a policyholder's liability for an injury is covered unless it knew, when it took the actions that are alleged to have caused the injury, that its actions would cause that specific injury. In the context of sexual abuse cases, a claim of negligent oversight of alleged perpetrators of sexual abuse should be covered by a standard liability insurance policy unless the evidence shows that the policyholder's executives subjectively intended that the specific injury would flow directly from the entity's acts or omissions at the time they happened. Mere foreseeability or "substantial probability of damage" is insufficient. Irrespective of which party bears the burden, insurers will be hard-pressed to demonstrate that this standard was met.

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