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# Intentional Injury Exclusionary Clauses: The Question of Ambiguity

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# NOTES

## INTENTIONAL INJURY EXCLUSIONARY CLAUSES: THE QUESTION OF AMBIGUITY

### INTRODUCTION

"Who pays" is a question of concern to all of the parties in an insurance[1] claim. Some policies,[2] such as those providing health insurance, indemnify the policyholders for the cost of injuries or illnesses which they personally suffer.[3] Other policies, such as those providing liability insurance, idemnify policyholders for the cost of injuries to third parties when the policyholder is responsible for those injuries.[4] The goal of either type of indemnification is the same: to use insurance benefits to make the aggrieved party whole.[5] Thus, the frequent answer to the "who pays" question is the

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1. Two commentators define insurance as follows:

> Insurance, other than that of life and accident where the result is death, is a contract of indemnity by which is meant that the party insured is entitled to compensation for such loss as has been occasioned by the perils insured against, the right to recover being commensurate with the loss sustained, or with the amount specified, as in cases of life insurance and valued polices.

1 G. COUCH, COUCH ON INSURANCE § 1:9 (2d ed. 1959).

"Insurance is an arrangement for transferring and distributing risk. It is an arrangement under which one (called an insurer) contracts to do something that is of value to another (usually called an insured but sometimes called a beneficiary) upon the occurrence of a specified harmful contingency."

R. KEETON, BASIC TEXT ON INSURANCE LAW § 1.2(a) (1971).

2. Insurance contracts are either liability policies or indemnity policies, depending on the intent of the parties. The primary difference between the two is when the cause of action occurs. Under a liability policy, the cause of action accrues when liability attaches. Under an indemnity policy, the cause of action does not accrue until the liability has been discharged. 6B J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4261 (1962). The scope of this note is limited to liability policies.

3. *See* R. KEETON, *supra* note 1, at § 3.1(a).

4. The most common forms of liability insurance are the automobile policy, providing coverage for losses arising from the use of an automobile; the comprehensive liability policy, providing coverage for risks not associated with automobiles; the fire policy or homeowner's policy, covering home and family risks; and the owner's, landlord's, and tenant's policy, covering risks of certain commercial enterprises. Farbstein & Stillman, *Insurance for the Commission of Intentional Torts*, 20 HASTINGS L.J. 1219 (1969).

5. *See* 1 G. COUCH, *supra* note 1, at § 1:2.

insurer, either because it has a legal duty to do so or because public policy favors compensating a victim by turning to the party with the "deep pocket."[6]

The "pocket" into which the insurance company reaches to settle a claim contains the premiums paid by its insured.[7] Policyholders, by purchasing insurance policies, transfer a particular risk to the insurance company.[8] The insurance company, in turn, spreads its losses by requiring policyholders to pay a portion of the total expected losses in the form of premiums.[9] If the policyholder is to collect, he must demonstrate, at a minimum, that he suffered a loss and that the cause of the loss was beyond his control.[10] In this manner, insurance accomplishes its contractual goal of indemnification by spreading the risk of fortuitous economic loss throughout a group of policyholders.[11]

The loss protection provided by any insurance policy is not without limits.[12] For example, liability insurers,[13] like individuals, have the contractual right to place limits on their obligations as long as the limitations are against neither statutory provisions nor public policy.[14] To define the scope of coverage provided by the policy, and, in particular, by its limitations, insurance policies include conditions, definitions, and exclusions.[15] Through these contractual provisions, insurance companies place boundaries on the coverage their policies provide.[16]

If these boundaries are not clearly understood by all the parties, a dispute may arise when the insured files a claim, and the courts may be asked to resolve any questions of coverage. One area of liability coverage in which courts have become involved is in the interpretation of an intentional injury exclusionary clause which excludes from coverage intentional acts of the insured resulting in bodily injury or property damage.[17] Jurisdictions are

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6. Kennedy, *The Continuing Search for a Deeper Pocket*, 25 RES GESTAE 704 (1982).

7. *See* Schmit, *Insurance Versus Indemnification: An Argument for Stare Decisis*, 34 DEF. L.J. 125 (1985).

8. King, *The Insurability of Punitive Damages: A New Solution to an Old Dilemma*, 16 WAKE FOREST L. REV. 345, 358 (1980).

9. Schmit, *supra* note 7, at 126.

10. King, *supra* note 8, at 358.

11. King, *supra* note 8, at 357-58.

12. *See* 6B J. APPLEMAN, *supra* note 2, at § 4255.

13. Liability insurance benefits two parties: the insured, by allowing him to substitute a "present certain" payment for the risk of future losses suffered by others, and the public at large, by assuring that financial compensation will be available if a person is injured under circumstances for which another person is found liable. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 72 (1982).

14. 6B J. APPLEMAN, *supra* note 2, at § 4255.

15. Schmit, *supra* note 7, at 131.

16. Schmit, *supra* note 7, at 131.

17. *See infra* text accompanying note 23.

split on how the exclusionary clause is to be interpreted with some holding that it is ambiguous and others that it is not.[18] If the exclusionary clause is interpreted as being ambiguous, under basic tenets of contract law it will be construed against the party which drafted the contract, i.e., the insurance company which, consequently, must provide coverage for the intentional act. The two primary factors considered by the courts have been the language of the clause[19] and the intent of the insured.[20] How the courts interpret the clause determines whether the insured is entitled to coverage under the terms of the policy or whether he forfeits his right to coverage when he commits an intentional act resulting in an injury to a third party.[21] But the court's interpretation also may determine whether the injured party is to be compensated at all, particularly if the insured is judgment proof.[22] The desire of the courts to compensate the injured party may take precedence over an analysis of the policy according to tenets of contract law.[23]

This note will demonstrate that consonant with contract law and punitive damages theory, an intentional injury exclusionary clause in a liability policy should be interpreted as being unambiguous.[24] To accomplish this purpose, the note will examine the approaches taken by jurisdictions in determining whether the clause is ambiguous and the influence of contract law on those decisions.[25] The theory of punitive damages and the impact of court decisions assessing punitive damages against insurers for the actions of their insureds will then be examined.[26] Finally, the note will suggest guidelines for the courts to follow when deciding whether an intentional

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18. Courts in California, Connecticut, Idaho, Indiana, Kansas, Maine, Michigan, Minnesota, and New York have ruled that the intentional injury exclusionary clause is inherently ambiguous. Courts in Arizona, Arkansas, the District of Columbia, Georgia, Louisiana, Montana, North Carolina, Oregon, Washington, and Wisconsin have taken the position that intentional injury exclusionary clauses are not ambiguous. Courts in Minnesota and Illinois have reached both conclusions. Courts in other states reach conclusions on the ambiguity of the clause on a case-by-case basis. *See Annotation, Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R. 4th 957 (1984).

19. The courts have looked to whether the language is clear and plain, lacking obscurity and ambiguity. *See infra* text accompanying notes 45-73.

20. Of specific interest to the courts has been not only whether the insured's act was intentional but also whether the resulting harm or injury was intentional. *See infra* text accompanying notes 74-110.

21. Snodgrass v. Baize, 405 N.E.2d 48, 51 (Ind. Ct. App. 1980). *See also* 11 G. COUCH, *supra* note 1, at § 44:324.

22. "Liability insurance was initially designed to protect an insured against loss caused by his tort liability to a third person. . . . But liability insurance has come to be used openly and extensively as a device for insuring compensation to victims." R. KEETON, *supra* note 1, at § 4.8(a).

23. R. KEETON, *supra* note 1, at § 4.8(a).

24. *See infra* notes 118-41 and accompanying text.

25. *See infra* notes 118-46 and accompanying text.

26. *See infra* notes 168-89 and accompanying text.

injury exclusionary clause is ambiguous.[27]

## INTENTIONAL INJURY EXCLUSIONARY CLAUSES

All parties in a liability insurance policy dispute have a stake in the court's decision as to whether an intentional injury exclusionary clause[28] is ambiguous. The insurance company, which believes it is being asked to pay an unjustified claim, argues that the clause is not ambiguous. But the insured, who believes he is entitled to protection under the terms of his policy and who fears his acts may not be covered, argues that the clause is ambiguous. The third party in the dispute, the injured person who may find that the harm was caused by a judgment-proof defendant and who believes that he is entitled to compensation, also argues that the clause is ambiguous. One question is common to all three positions: Who pays under the contract?

### *Contractual Theories of Analysis*

Two contractual theories underlie the search of the injured party for compensation. The first focuses on the unequal bargaining positions of the

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27. *See infra* notes 190-200 and accompanying text.

28. The current standard liability policy came into use in 1966 with further revisions in 1973 by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau. Fish, *An Overview of the 1973 Comprehensive General Liability Insurance Policy and Products Liability Coverage*, 34 J. MO. B. 257, 258 (1978). For examples of standard policy forms *see generally* R. KEETON, *supra* note 1. The central clause of the insuring agreement reads, "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damages to which this insurance applies, caused by an occurrence." The intentional injury exclusionary clause defines "occurence" as an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. The 1973 revisions did not represent a change in philosophy; instead, the revisions were an attempt to clarify ambiguities by putting terms such as "accident," "intended," and "expected" in a "more intelligible verbal framework." Farbstein & Stillman, *supra* note 4, at 1236-37. Among the problems the drafters hoped to clarify was whether the happening of the accident should be viewed from the standpoint of the insured or of the victim. Rynearson, *Exclusion of Expected or Intended Personal Injury or Property Damage Under the Occurrence Definition of the Standard Comprehensive General Liability Policy*, 19 FORUM 513, 521-24 (1984). The drafters also hoped to clarify whether a less ambiguous word could be substituted for accident (explaining the selection of "occurrence") and whether a distinction could be made between harm brought about and harm contemplated. Farbstein & Stillman, *supra* note 4, at 1220, 1237. Appleman gives two reasons to justify the insertion of the intentional injury exclusionary clause in insurance policies. *See* 7A J. APPLEMAN, *supra* note 2, at § 4492.01. First, the insurer's ability to set rates and to supply coverage depends on policyholders not controlling risks, and, second, insertion of the clause prohibits wrongdoers from shifting the responsibility for the consequences of their acts. 7A J. APPLEMAN, *supra* note 2, at § 4492.01.

insurance company and the person purchasing insurance coverage.[29] Insurance policies are generally regarded as contracts of adhesion[30] with the typical purchaser buying a "packaged product"[31] on a "take it or leave it" basis.[32] Because the policy is a contract of adhesion, any ambiguities will be construed in favor of the insured.[33]

The second theory of compensation looks to the parties to the contract.[34] The insurance policy is an agreement between the insurer and the insured.[35] Without a specific contract or statutory provision, an injured third party has no contractual rights against the insurer.[36] The injured party's right to recover is determined by the terms of the contract,[37] and, if a claimant is to recover, he must appear to be covered by the policy.[38] The traditional rule is that the injured person, who is not a party to the contract, only has a right of action against the insured.[39] The insurance com-

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29. Comment, *Punitive Damages and Liability Insurance: Theory, Reality and Practicality*, 9 CUM. L. REV. 487, 497 (1978).

30. Insurance policies are regarded as contracts of adhesion because insurers offer only a limited range of forms, and the purchaser, if he wants insurance, must select one of these forms. R. KEETON, *supra* note 1, at § 2.10(b)(7). The insurer and the purchaser do not follow the contract model of two individuals reaching an agreement by bargaining because the purchaser has no real choice. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 1.3 (2d ed. 1977).

31. R. KEETON, *supra* note 1, at § 2.11(a). Much of the standardization of policy forms is the result of cooperation among insurance companies. The first nationally standardized liability policy came into use in 1935. Standardized policies are both beneficial and detrimental to individuals, offering economic savings and making risk distribution feasible, but at the same time making adjustment of the policy to individual needs more difficult. Standardization is generally controlled by state statutes regulating method and degree. *Id.*

32. *See* Gowing v. Great Plains Mut. Ins. Co., 207 Kan. 78, 483 P.2d 1072 (1971).

> The terms of today's standard insurance policy are predetermined by the insurance carrier itself and, long in advance of the individual insurance sale, those terms have been incorporated into the insurance package presented to the prospective buyer. The free give and take of the open market place does not prevail in the insurance industry. The buyer's freedom of choice in selecting a policy is severely limited; if he desires casualty insurance he must normally accept the printed policy with the usual printed provisions - else he can leave it.

*Id.* at 80, 483 P.2d at 1074-75.

33. 12 G. COUCH, *supra* note 1, at § 44A:3. "Since the insurer chose the form of contract, the ambiguities will be construed against it." Grant v. North River Ins. Co., 453 F. Supp. 1361, 1367 (N.D. Ind. 1978). Reasons advanced by the insured that the intentional injury exclusionary clause is ambiguous and those by the insurer that it is not are discussed *infra* text accompanying notes 50-117.

34. *See* 11 G. COUCH, *supra* note 1, at § 44:4.

35. *See* 11 G. COUCH, *supra* note 1, at § 44:4.

36. *See* 11 G. COUCH, *supra* note 1, at § 44:4.

37. 8 J. APPLEMAN, *supra* note 2, at § 4813.

38. 8 J. APPLEMAN, *supra* note 2, at § 4813.

39. 11 G. COUCH, *supra* note 1, at § 44:324. Cromer v. Sefton, 471 N.E.2d 700 (Ind. Ct. App. 1984), illustrates application of this rule. Cromer brought a negligence action against Sefton who had been convicted of battery after assaulting Cromer. In a separate declaratory

pany owes no duty to a noninsured or to a third party plaintiff.[40] If, in a tort claim, the court finds that the insured is liable for injuries to a third party, the third party may bring suit against the insurer to collect damages.[41] As such, the injured third party may take direct action against the insurer only after the insured's obligation to pay has been resolved in a tort action.[42]

If the injured party decides to proceed in a tort action against the insured, the insured must give proper notice to the insurance company.[43] The insurance company then decides whether to pay the claim or to defend the action.[44] If the insurance company believes that the injury was intentionally caused by the insured and, therefore, is within the purview of the intentional injury exclusionary clause, the company will claim that it has no duty to defend the tort action since the claim is not covered by the policy.[45] The

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judgment, Sefton's insurer, Westfield Insurance Co., had been ordered to defend Sefton in the negligence action and to assume liability for any negligent acts. Westfield then filed a motion for substitution in Cromer's action against Sefton. The trial court granted the motion which allowed the insurer to be joined with defendant Sefton. Westfield resubmitted a motion for summary judgment filed earlier for Sefton. The trial court granted the motion, and Cromer appealed.

The appellate court, with what it described as "great difficulty," identified seven issues raised on appeal, including whether the trial court erred in permitting Westfield to intervene in the personal injury action. Ruling that the trial court erred by forcing the plaintiff to "become embroiled" in a matter in which she did not yet have an interest, the appellate court reiterated that no duty or fiduciary relationship runs from the insurer to the injured plaintiff. The court repeated its position that a tort action on a contract theory by an injured third party directly against the liability carrier is inappropriate, but that a successful personal injury plaintiff can bring an action against a liability carrier if it refuses to honor its contract. *Id.*

The principal reason for barring direct action against the insurer by the injured third party is to prevent jury prejudice against the insurer in the underlying tort action. Courts in some states (West Virginia, Florida, Hawaii, Illinois, Kentucky, New Jersey, and Pennsylvania) have modified the rule on the theory that the insurance policy is a contract to benefit the injured third party. Other states (Louisiana, Rhode Island, and Wisconsin) allow direct action against an insurer under certain circumstances, such as when the insured is insolvent. *See generally* 11 G. COUCH, *supra* note 1, at § 44:324; R. KEETON, *supra* note 1, at § 7.11.

40. *See Cromer*, 471 N.E.2d at 700, discussed *supra* note 39; 11 G. COUCH, *supra* note 1, at § 44:324.

41. *See* 11 G. COUCH, *supra* note 1, at § 44:324.

42. *See* 11 G. COUCH, *supra* note 1, at § 44:324.

43. *See generally* 44 AM. JUR. 2D *Insurance* § 1323 (1964).

44. *Id.*

45. The standard liability insurance policy defines two distinct duties of an insurer if its insured is found liable: the duty to defend and the duty to pay. The duty to defend is included in the policy langauge in which the insurer promises "to defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of the policy, even if any allegations of the suit are groundless, false or fraudulent." Farbstein & Stillman, *supra* note 4, at 1228. The insurer must defend if the act of the insured falls within the provisions of the policy. P. MAGARICK, EXCESS LIABILITY: DUTIES AND RESPONSIBILITIES OF THE INSURER § 2.03 (2d ed. 1982). "The duty to defend arises whenever there is a potential of liability under the policy." Casualty Reciprocal Exch. v. Thomas, 7 Kan. App. 718, 719-20,

insurer's interests, at this point, have come in conflict with those of the insured.[46]

At the heart of the conflict is whether the intentional injury exclusion-

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647 P.2d 1361, 1363 (1982). The duty to defend is triggered when the insured notifies the insurer of an act which may be covered by the policy. The insurer's duty to pay is not triggered until the insured is obligated to pay. Poust, *Insurers' Tender to Insureds of Right to Choose Counsel at Insurer's Expense. When Need This be Done?* 51 INS. COUNS. J. 563, 565 (1984).

46. Ingram, *Conflicts of Interest in the Insurer's Duty to Defend in Illinois*, 17 J. MAR L. REV. 379, 380 (1984). Conflicts of interest are most likely to occur when the damages sought exceed the policy limits, when the insured and insurer are in conflict as to whether the claim is covered, and when the insurer has a defense to his liability. *Id.* When the insurer believes it is not obligated to defend, its options are to deny liability and to refuse to defend the claim against the insured; to defend the claim under a reservation of rights under the policy; to defend the claim without reservation of rights thereby waiving any policy defenses; or to seek a declaratory judgment prior to the third party's action or subsequent to the judgment therein. *Id.* at 381-82. The fourth option may be the most frequently used device to resolve a conflict of interest. As the court noted in Group Ins. Co. of Mich. v. Morelli, 111 Mich. App. 510, 515, 314 N.W.2d 672, 675 (1981), "[O]ur literature abounds with case law where the insured or insurer has sought a declaratory action to determine disputed issues of coverage."

In Snodgrass v. Baize, 405 N.E.2d 48 (Ind. Ct. App. 1980), insurer, perceiving a conflict of interest in a civil tort suit brought by an injured third party against its insured, paid the fees of its insured's personal attorney rather than defend the suit itself. The jury found for the injured third party, who then filed a motion for proceedings supplemental against the insurer and the insured. The insurer defended on the ground that the injury was intentional and, thus, excluded from coverage. The trial court agreed. In affirming the trial court's finding, the court of appeals observed that the insurer's actions, described in detail, were "a model to be followed in such situations." *Id.* at 53.

Resolving the conflict of interest is important to the insurer because, if it makes the wrong choice, it can be sued for breach of contract for failure to defend. 7C J. APPLEMAN, *supra* note 2, at § 4686. The insurer's refusal to defend makes it liable for any damages the insured sustained because of the breach of contract. *Id.* at § 4689. In Travelers Indem. Co. v. Armstrong, 384 N.E.2d 607 (Ind. Ct. App. 1979), *modified* 442 N.E.2d 349 (Ind. 1982), an insured brought a breach of contract suit against her insurer, charging it with deceitful and fraudulent conduct because of its refusal to settle a claim. The trial court, in a verdict upheld by the court of appeals, awarded both compensatory and punitive damages. The court of appeals in its 1979 ruling observed that while as a general rule punitive damages were not awarded in contract actions, an exception could be made "where the conduct of the party, in breaching a contract, independently establishes the elements of a common law tort." *Id.* at 618. The court of appeals held the jury "reasonably could have found elements of fraud, malice, gross negligence or oppression mingled with the breach of contract." *Id.* However, in 1982 the Indiana Supreme Court modified the ruling when it adopted the "clear and convincing evidence" standard for the awarding of punitive damages. It then vacated the earlier award of punitive damages as unsupported by clear and convincing evidence. Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 358-65 (Ind. 1982). *See generally* K. REDDEN, PUNITIVE DAMAGES §§ 4.2, 4.4(c); Kornblum, *Extra-Contract Actions Against Insurers: What's Ahead in the Eighties?* 19 FORUM 58 (1983); Royal Globe Ins. Co. v. Super. Ct., 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979)

ary clause is ambiguous.[47] In resolving this question courts generally look to two areas: the langauge of the clause and the intent of the insured.[48] But identical questions of language and intent have not produced identical answers.[49]

*Language of the Clause*

Whether the final ruling is that the language of the intentional injury exclusionary clause is ambiguous or free from ambiguity, the courts begin their analysis with the wording of the policy itself.[50] The insured, seeking to prove that the clause is ambiguous, will argue that the wording is open to more than one interpretation.[51] Conversely, the insurer will argue that the clause lacks ambiguity. In determining whether the clause is ambiguous, courts have taken three positions: that the clause's ambiguity depends on the particular factual situations of the case; that the clause is inherently ambiguous; or that the clause is *per se* free from ambiguity.[52]

Courts in those jurisdictions ruling that an intentional injury exclusionary clause is free from ambiguity and that its language is plain and clear have done so with little difficulty. The court in *Pachucki v. Republic Ins. Co.* used an objective standard to find the clause not ambiguous.[53] The suit involved an action under a homeowner's insurance policy in which a third party was injured in an office "greening pin war" which the court compared to shooting paper clips with rubber bands.[54] The court ruled the language of the intentional tort exclusion was not ambiguous because "a reasonable person in the position of the insured would interpret the policy language as specifically applying only to injuries intentionally caused."[55]

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47. *See generally* Annotation, *Division of Opinion Among Judges on Same Court or Among Other Courts or Jurisdictions Considering Same Question as Evidence that Particular Clause of Insurance Policy is Ambiguous*, 4 A.L.R. 4th 1253 (1981). "Language in contract is 'ambiguous' when it is reasonably capable of being understood in more than one sense. Test for determining whether a contract is 'ambiguous' is whether reasonable persons would find the contract subject to more than one interpretation." BLACK'S LAW DICTIONARY 41 (5th ed. 1983).

48. Annotation, *supra* note 18, at 972.

49. Annotation, *supra* note 18, at 972.

50. Annotation, *supra* note 18, at 972.

51. *See generally* 43 AM. JUR. 2D *Insurance* § 291 (1984).

52. Annotation, *supra* note 18, at 957. Scope of this note will be limited to states finding that the intentional injury exclusionary clause is ambiguous or free from ambiguity.

53. 89 Wis. 2d 703, 278 N.W.2d 898 (1979). The plaintiff in *Pachucki* brought suit to recover damages under a homeowner's liability policy. The Wisconsin Supreme Court affirmed the lower court's finding that plaintiff's injuries were not covered by the policy since the insureds knew that some harm could be caused. *Id.* at 713-14, 278 N.W.2d at 903-04.

54. *Id.* at 705, 278 N.W.2d at 899.

55. *Id.* at 708, 278 N.W.2d at 901.

Other courts have looked to the wording of the clause itself to hold that it is free from ambiguity. One approach has been to look to the "plain, ordinary and popular" meaning of the words to find the clause free from ambiguity.[56] A similar "plain meaning" approach has been to hold that the clause can be given only one reasonable interpretation.[57]

Another approach taken by state courts ruling that an intentional injury exclusionary clause is free from ambiguity has been to emphasize the result of the insured's actions. These courts dispense with an analysis of the language of the clause and begin their reasoning with a finding of no ambiguity.[58] They further reason that because the clause is unambiguous, the effect of its application is to exclude from coverage intentional acts of the insured that result in harm to a third party.[59] Courts in Arizona,[60] Arkansas,[61] the District of Columbia,[62] and Louisiana[63] have also utilized the

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56. "Such a construction of the insurance policy is not strained or forced, but rather is an interpretation of the plain, ordinary and popular meaning of the words used by the insurer in defining the coverage extended. It should be interpreted in that sense." Northwestern Nat'l Casualty Co. v. Phalen, 182 Mont. 448, 456, 597 P.2d 720, 724 (1979). In *Phalen*, the insurer brought a declaratory judgment action to determine policy coverage after the insurer reserved rights in an action involving the insured's son. The son was defendant in a civil action brought by a man whom the son assaulted. The son pleaded guilty to a felony charge of aggravated assault. The trial court granted the insurer's motion for summary judgment. The Montana Supreme Court reversed and remanded with instructions to dismiss the declaratory judgment action. *Id.* at 462, 597 P.2d at 728.

57. "Such words are clear and unambiguous and capable of only one reasonable interpretation." Continental Casualty Co. v. Parker, 161 Ga. App. 614, 616, 288 S.E.2d 776, 778 (1982). The insurer filed a motion for declaratory judgment to resolve coverage questions after a third party, who had been involved in an altercation with the insured, filed suit against the insured. The insurer contended that because the insured's act was intentional it was not covered by the policy. The lower court denied the insurer's motion for summary judgment. The Georgia Court of Appeals affirmed. *Id.* at 618, 288 S.E.2d at 780.

58. *E.g.*, "There is no ambiguity in the sentence. . . . The sentence obviously means that the policy is excluding from coverage injury caused by the insured's intentional acts, determining whether the act is intentional from the insured's point of view." Commercial Union Ins. Co. v. Mauldin, 62 N.C. App. 461, 463, 303 S.E.2d 214, 216 (1983). The court of appeals in Mauldin affirmed the lower court's ruling that the policy did not provide coverage for the shooting in a suit arising out of the efforts of a murder victim's estate to collect from a homeowner's insurance policy. *Id.*

59. *Id.*

60. "The exclusion here is unambiguous. By its language it excludes from coverage the intentional acts of the insured which result in injury. It follows that if the injury results from the natural and probable consequences of the intentional act, the subjective intent of the actor is simply immaterial - the exclusion applies." Steinmetz v. Nat'l Ins. Co., 121 Ariz. 268, 271, 589 P.2d 911, 914 (1979).

61. "The clear language of the policy exclusion itself . . . states there is no coverage for injury that is expected or intended." Talley v. MFA Mut. Ins. Co., 273 Ark. 269, 272, 620 S.W.2d 260, 262 (1981).

62. "However, the Court cannot find that this exclusion is in any way ambiguous. The language, an accident 'neither expected nor intended from the standpoint of the Insured,' means simply that if Mr. Walburn either intended to do serious bodily injury to 'Corky' Nalls

"end-result" reasoning.

Nevertheless, other courts, reading and interpreting the same clause, have held its language to be ambiguous and subject to more than one meaning. For example, in *Gray v. Zurich Ins. Co.*, a suit brought by an insured against his insurer for failure to defend in a third party suit resulting from an alleged assault, the court used doctrines of contract law to decide that the language of the clause was ambiguous.[64] The *Gray* court based its analysis on an insurance policy being a contract of adhesion,[65] and held that the meaning of the contact should be one which the insured would "reasonably expect."[66] Notice of noncoverage should therefore be "conspicuous, plain, and clear."[67] The court further held that the insurer's duty to the insured could have been clarified by the use of plain English, by a more conspicuous placement of the clause, and by the use of capital letters to call attention to the clause.[68]

Concern about the clarity of policy langauge led courts in Indiana[69] and Kansas[70] to rule that the intentional injury exclusionary clause is ambiguous. Factors considered by the courts were the adhesion nature of the policy contract, the clarity of the langauge of the policy clause, and the expectations of the insured.[71] Both the Indiana and Kansas courts, like the Wisconsin court in *Pachucki*,[72] applied an objective standard to decide whether the clause was ambiguous. But, while in *Pachucki* that test resulted in a finding of no ambiguity,[73] the courts in Kansas and Indiana reached another conclusion using the same standard on the same language.[74] According to the Kansas and Indiana courts, the intentional injury

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or expected such a result from his action, then there is no coverage." Travelers Indem. Co. v. Walburn, 378 F. Supp. 860, 866 (D.C. Cir. 1974) (applying District of Columbia law).

63. "The policy plainly, simply and unequivocally states that it does not cover personal liability arising from a bodily injury either expected or intended by the insured." Kipp v. Hurdle, 307 So. 2d 125, 129 (La. Ct. App. 1974).

64. 65 Cal. 3d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

65. *Id.* at 269, 419 P.2d at 171, 54 Cal. Rptr. at 107.

66. *Id.*

67. *Id.* at 271, 419 P.2d at 172, 54 Cal. Rptr. at 108.

68. *Id.* at 273, 419 P.2d at 174, 54 Cal. Rptr. at 110.

69. Travelers Indem. Co. v. Armstrong, 384 N.E.2d 607, 613 (Ind. Ct. App. 1979), *modified*, 442 N.E.2d 349 (Ind. 1982).

70. Gowing v. Great Plains Mut. Ins. Co., 207 Kan. 78, 83, 483 P.2d 1072, 1076 (1971).

71. "Unclear and obscure clauses in a policy of insurance should not be permitted to defeat the coverage which is reasonably to be expected by the insured." *Gowing*, 207 Kan. at 81, 483 P.2d at 1075.

72. *Pachucki*, 89 Wis. 2d at 703, 278 N.W.2d at 898.

73. *Id.* at 708, 278 N.W.2d at 901.

74. "An insurance contract is ambiguous if reasonably intelligent men, upon reading the contract, would honestly differ as to its meaning." *Armstrong*, 384 N.E.2d at 613. "[T]he test is not what the insurer intends the printed words of the policy to mean, but rather what a

exclusionary clause failed the objective test because different conclusions could be reached as to the clause's meaning.[75] Therefore, both courts held that the clause was ambiguous.[76]

## INTENT OF THE INSURED

A second area typically examined by the courts in determining whether the intentional injury exclusionary clause is ambiguous is the intent of the insured.[77] The argument most often advanced by the insured is that he intended only minor bodily contact, not the resulting injury.[78] If he intentionally caused the injury, the intentional injury exclusionary clause is triggered.[79] Once the clause is triggered, the policy will not cover the insured, and the insurance company has no duty to defend him or to pay the claim.[80] However, if the injury was caused by accident,[81] the insurance

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reasonable person placed in the position of the insured would have understood the words to mean." *Gowing*, 207 Kan. at 82, 483 P.2d at 1076.

75. *Gowing*, 207 Kan. at 82, 483 P.2d at 1076; *Armstrong*, 384 N.E.2d at 613.

76. *Id.*

77. The intentional injury exclusionary clause refers to "bodily injury . . . neither expected or intended from the standpoint of the insured." *See infra* notes 190-200 and accompanying text. When deciding if an act is intended, courts look to the intent of the insured.

78. Farbstein & Stillman, *supra* note 4, at 1234. Other positions which the insured may take are that his act was privileged and, therefore, not wrongful; that the injury was unintended and that he was not negligent nor at fault; or that he did not commit the act. *Id.* at 1239.

79. Farbstein & Stillman, *supra* note 4, at 1222.

80. *See generally* 43 AM. JUR. 2D *Insurance* § 291 (1984).

81. Some insureds, in order to obtain coverage for their acts, have apparently hoped the court would apply a liberal definition of "intent" to find their acts were accidental. For example, Commercial Union Ins. Co. v. Mauldin, 62 N.C. App. 461, 303 S.E.2d 214 (1983), the insured fired a gun into a car several times, intending to kill his wife. Instead, he killed her female companion. The administrator of the estate of the deceased filed a wrongful death action against the insured. The insured argued that he should be covered under his homeowner's liability policy since his intent was to kill his wife, not her companion. The court denied coverage, holding that the insured "obviously knew it was probable that he would hit Pugh when he fired four or five shots into her moving car." *Id.* at 463, 303 S.E.2d at 217.

In Horde v. Foucha, 396 So. 2d 441 (La. Ct. App. 1981), an injured third party brought suit against an insured and the insurer to recover under a homeowner's liability policy. The insured shot the injured party after chasing him and firing at him three or four times with a rifle. The court denied coverage, ruling that it "strains our credulity to suppose that this defendant who fired on an unarmed plaintiff several times and finally struck him . . . did not intend to hurt him." *Id.* at 443. The courts showed a similar skeptical approach to allegedly accidental shootings in Kermans v. Pendleton, 62 Mich. App. 576, 233 N.W.2d 658 (1975) in which the court of appeals upheld the trial court's ruling that "plaintiffs' distinction between intended felonious acts and unintended felonious results was a distinction without a difference" and denied coverage. *Id.* at 579-80, 233 N.W.2d at 660. In Marines v. Hinrichs, 357 So. 2d 1358 (La. Ct. App. 1978) in which the court of appeals noted that plaintiff's memory loss was possibly "motivated by her desire to reach a more solvent defendant" and denied coverage. *Id.* at 1359-60. Finally, in Casualty Reciprocal Exch. v. Thomas, 7 Kan. App. 718, 721, 647 P.2d

company has a duty to defend and, depending on the outcome of the suit, to compensate the victim.[82] The court must decide whether the insured wanted to cause the consequences of his act and whether a reasonable person would believe those consequences would result from his act;[83] whether the insured desired to harm the plaintiff;[84] and whether the insured's intent can be determined by the nature of his act.[85] In seeking an answer, courts typically will not hesitate to look to the insured's subjective intent.[86]

An intentional injury exclusionary clause excludes from coverage those acts which were intentionally caused by the insured and which resulted in injury to a third party. The definition of intent thus becomes crucial to determining whether an insured's acts fall within policy provisions. Just as they are split on determining whether the language of the intentional injury exclusionary clause is ambiguous, courts are split on how to define intent.

A starting point for jurisdictions ruling that the intentional injury exclusionary clause is free from ambiguity is the definition of intent. The terminology the courts have adopted in defining intent has its roots in tort law and can be traced to the Restatement of Torts[87] and Prosser's Law of Torts.[88] Key elements of both definitions are the desire of the actor to cause the consequences of his act and his understanding or belief that certain consequences will probably follow from his act.[89] Jurisdictions defining intent have adopted similar wording.[90]

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1361, 1364 (1982), the court held "to say that the act of aiming and firing the gun was intentional, but the injury was not, draws too fine a distinction" and denied coverage.

82. Farbstein & Stillman, *supra* note 4, at 1228.

83. 11 G. COUCH, *supra* note 1, at § 44:289.

84. 11 G. COUCH, *supra* note 1, at § 44:289.

85. Annotation, *supra* note 47, at 1253.

86. Farbstein & Stillman, *supra* note 4, at 1237.

87. RESTATEMENT (SECOND) OF TORTS § 8A (1977).

88. W. PROSSER & W. KEETON, THE LAW OF TORTS § 8 (5th ed. 1984).

89. The Restatement refers to the actor who "desires to cause the consequences of his act, or . . . believes that the consequences are substantially certain to result from it." RESTATEMENT, *supra* note 87, at § 8A. Prosser's definition contains the phrasing "to those consequences that are desired, but also to those which the actor believes are substantially certain to follow what he does." W. PROSSER & W. KEETON, *supra* note 88, at § 8.

90. In Lockhart v. Allstate Ins. Co., 119 Ariz. 150, 153, 579 P.2d 1120, 1122-23 (1978), the court affirmed a ruling of the trial court that a homeowner's liability policy did not cover a shooting. The court of appeals affirmed its earlier ruling that it recognized some acts were so certain to cause a particular kind of harm that the person who performed the act must have intended the harm. In Cavanagh v. Ohio Farmers Ins. Co., 20 Ariz. App. 38, 46, 509 P.2d 1075, 1082 (1973), an action to resolve insurance coverage following a homicide, the court of appeals ruled, "The inference that one intends the natural and probable consequences of his act is founded upon a logical mental process, that when a person voluntarily commits an act he usually intends the natural consequences thereof." In Tobin v. Williams, 396 So. 2d 562, 565 (La. Ct. App. 1981), a third party injured in a shooting incident brought suit against the insured and insurer. The trial court ruled against the insured but dismissed the action against

After defining intent, courts must decide how to apply the definition. In *Northwestern Nat'l Casualty Co. v. Phalen*, in a declaratory judgment action to determine whether an insured's assault of a third party was covered by a homeowner's policy, the court developed a two-fold test to determine applicability of the intentional injury exclusionary clause.[91] The court asked if the act was intended and if the injury was foreseen by the insured.[92] Applying the test, the court concluded that the act was intended and that the insured should have foreseen the resulting injury. Because the insured demonstrated the requisite intent, the clause precluded coverage.[93]

The issue before the *Phalen* court was whether the word "intent" in the exclusionary clause referred to the insured's intent to act or the intent to do harm.[94] The insured argued that because the clause was not clear in its application, it was ambiguous and should be construed in his favor.[95] The *Phalen* court found that the clause was unambiguous.[96] The courts in *Pachucki*[97] and *Commercial Union Ins. Co. v. Mauldin*[98] also considered whether an intent to act meant an intent to harm. The *Pachucki* court, ruling that the clause was not ambiguous, upheld the trial court's finding that the intent to inflict injury could be inferred from the defendant's intentional acts.[99] Similarly, the *Mauldin* court held that the clause disallowed coverage for bodily injury resulting from the insured's intentional acts.[100] The court in *Cavanagh v. Ohio Farmers Ins. Co.* concisely summarized whether "intended," as used in the clause was ambiguous.[101] The *Cavanagh* court held that if a person voluntarily performs an act, he must intend its natural consequences.[102]

The definition of intent, however, is not so clear cut for other courts whose questions about the word's meaning have resulted in rulings that an intentional injury exclusionary clause is inherently ambiguous. The court in *Home Ins. Co. v. Neilsen* cited three possible ways of defining the phrase "caused intentionally."[103] The first possible interpretation provided by the

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the insurer. The court of appeals affirmed, supporting the trial court's judgment that the insured intended or expected to injure the third party.

91. 182 Mont. at 457, 597 P.2d at 725.
92. *Id.*
93. *Id.* at 459, 597 P.2d at 726.
94. *Id.* at 456, 597 P.2d at 724.
95. *Id.*
96. *Id.*
97. Pachucki v. Republic Ins. Co., 89 Wis. 2d 703, 278 N.W.2d 898 (1979).
98. 62 N.C. App. at 461, 303 S.E.2d at 214.
99. *Pachucki*, 98 Wis. 2d at 712, 278 N.W.2d at 903.
100. *Mauldin*, 62 N.C. App. at 463, 303 S.E.2d at 216.
101. 20 Ariz. App. at 45, 509 P.2d at 1082.
102. *Id.*
103. 165 Ind. App. 445, 448, 332 N.E.2d 240, 242 (1975). The insured, defendant in a separate civil suit for assault and battery, brought an action for declaratory judgment against

*Neilsen* court looked to the volition of the insured; if the insured acted intentionally, the resulting injury was intentional. The second interpretation looked to the result achieved. The question was not whether the act was intentional but whether the resulting harm was intended. The third possible interpretation was somewhere between the other two. Under the third definition, the important factor was whether the insured intended any harm, not just the harm that resulted. Because of the possible differences in definition, the *Neilsen* court ruled that the language was "arguably ambiguous" and that the court must accept the contract interpretation most favorable to the insured.[104] The court then held that the policy language excludes coverage for insured's intentional acts intended to cause injury.[105]

The definitions suggested by the *Neilsen* court have provided some guidance for courts seeking to define intent. The court in *Farmers Ins. Group v. Sessions*, hearing a suit brought by an insurer against its insured and an injured third party to determine applicability of the exclusionary clause, referred to the three definitions used by the *Nielsen* court.[106] The *Sessions* court reached the same conclusion as the *Nielsen* court that the exclusionary clause was ambiguous.[107] The *Sessions* court then held that the clause would apply if the insurer could show that its insured acted "willfully, intentionally or maliciously" in causing the injury which resulted.[108] Its remand of the case for factual determination[109] is indicative of the case-by-case analysis of intent and of its differing definitions by courts holding that the intentional injury exclusionary clause is ambiguous.[110]

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his insurer who refused to defend him in the civil suit. The court of appeals ruled that the intentional injury exclusionary clause was ambiguous, but it also ruled that under the particular circumstances of the case to allow coverage would be to rewrite the contract. The court of appeals reversed the trial court's ruling and ruled that judgment should be entered for the insurer.

104. *Id.* at 451, 332 N.E.2d at 244.

105. *Id.* An earlier case, American Ins. Co. v. Saulnier, 242 F. Supp. 257 (D. Conn. 1965), foreshadowed the *Nielsen* ruling. The *Saulnier* court, hearing a suit brought by an insurer for declaration of nonliability under a homeowner's policy, ruled that the intentional injury exclusionary clause was ambiguous because it could be interpreted two ways. In Patrons-Oxford Mut. Ins. Co. v. Dodge, 426 A.2d 888 (Me. 1981), the court found the insurer had a duty to defend its insured in a tort action, even though the insured had been criminally prosecuted for the shooting, because the language of the policy was ambiguous.

106. 100 Idaho 914, 607 P.2d 422 (1980).

107. *Id.* at 916, 607 P.2d at 424.

108. *Id.* at 918, 607 P.2d at 426.

109. *Id.*

110. A ruling that the intentional injury clause is ambiguous does not guarantee that the insurer is obligated to defend. After the court has determined the clause is ambiguous and, therefore, the policy provisions must be weighted in favor of the insured, the court examines the factors of the case and decides whether the insurer has a duty to defend. Thus, after the initial finding that the clause is ambiguous, the court may decide that the insurer has a duty to defend, as in Patrons-Oxford Mut. Ins. Co. v. Dodge, 426 A.2d 888 (Me. 1981), or that the insurer does not have a duty to defend, as in Casualty Reciprocal Exch. v. Thomas, 7 Kan.

These differing interpretations of the intentional injury exclusionary clause, based on whether it is ambiguous, have made case law difficult to reconcile.[111] Applying the doctrine of *contra proferentum*,[112] some courts have taken unambiguous clauses, labeled them ambiguous, and applied them against insurance companies, thus remaking the contract.[113] In some states, a developing trend requires the insurance company to pay if the insured did not understand the exclusionary clause, even if it was not ambiguous.[114] These rulings, which have the effect of compensating an injured third party who under a stricter reading of the clause would not have been compensated, may be an outgrowth of judicial concern for victims, once largely ignored.[115] Whatever the reasoning, the effect has been to increase the number of such cases being litigated.[116] What has developed since the insurance industry changed the wording of its policies is an inconsistent area of case law as courts try to compensate victims and not reward wrongdoers.[117]

## EFFECTS OF RULING THE INTENTIONAL INJURY EXCLUSIONARY CLAUSE TO BE AMBIGUOUS

Judicial interpretation of an intentional injury exclusionary clause as ambiguous increases compensation for third parties and increases litiga-

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App. 718, 647 P.2d 1361 (1982), or Heshelman v. Nationwide Mut. Fire Ins. Co., 412 N.E.2d 301 (Ind. Ct. App. 1980).

111. Kennedy, *supra* note 5, at 705. Kennedy concludes that based on rulings in *Neilsen*, 165 Ind. App. at 445, 332 N.E.2d at 240, and Indiana Lumbermen's Mut. Ins. Co. v. Brandum, 419 N.E.2d 246 (Ind. Ct. App. 1981), Indiana has a three-prong test for an insurer to successfully invoke the intentional injury exclusionary clause. The insurer must show that the insured intended to do the act, that he intended to inflict harm, and that he intended to harm the individual actually harmed.

112. As a general theory of contract interpretation, *contra proferentum* means that ambiguities in contracts are interpreted against the draftsman. *Kelly*, *supra* note 29, at 497.

113. Kelly, *supra* note 29, at 498.

114. Pace, *In Defense of Policy Exclusions*, 24 FOR DEF. 9, 11 (Nov. 1982). Keeton uses the doctrine of reasonable expectations to explain what he describes as "deviant decisions." When courts apply the doctrine, "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." R. KEETON, *supra* note 1, at § 6.3(a). *See* American Ins. Co. v. Saulnier, 242 F. Supp. 257 (D. Conn. 1965).

115. Crouse, *Negligence Liability for the Criminal Acts of Another*, 15 J. MAR. L. REV. 459, 461 (1982). Crouse refers to several areas in which third-party liability is being tested in the courts, including suits against a bus driver who allows a passenger to be criminally assaulted, against a landlord when a tenant is attacked, and against a psychologist who does not warn of a patient's intent to attack a third party.

116. Kennedy, *supra* note 111, at 705.

117. Kennedy, *supra* note 111, at 705.

tion.[118] But these are not the only effects. Ruling that the clause is ambiguous also contravenes general rules of contract law and undermines the doctrine of punitive damages.

Even though an insurance policy is a contract of adhesion,[119] courts are still bound by principles of contract law in their interpretation of policies.[120] For example, the court cannot rewrite the contract of the parties.[121] The court's objective must be to "ascertain and give effect to the intent of the parties who negotiated the contract"[122] and to give "plain, usual ordinary meaning" to the policy terms.[123] Any other interpretation would be a remaking of the contract.[124]

Some jurisdictions recognize that an interpretation of the intentional injury exclusionary clause as ambiguous will result in broadening coverage of a liability policy. For example, in North Carolina, where the exclusionary clause is viewed as free from ambiguity, the Court of Appeals in *Mauldin* held that courts must enforce the contract as written.[125] The courts could not rule that the clause was ambiguous in order to impose new liabilities on the parties by, in effect, rewriting the contract.[126] In Indiana, where the exclusionary clause is viewed as inherently ambiguous, the Court of Appeals in *Nielsen* refused to order the insurer to defend an insured whose actions fell within the scope of the exclusionary clause because to do so would be to rewrite the contract.[127] The *Neilsen* court also found that the intentional injury exclusionary clause is ambiguous and generally should be construed in favor of the insured.[128] However, the court held that the insured's acts fell within the scope of the clause and, therefore, should not be covered by the policy.[129]

The balancing of interests undertaken by the *Neilsen* court is indicative of the type of analysis used by the courts which view an intentional injury exclusionary clause as ambiguous. In a case-by-case approach, the

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118. *See supra* text accompanying notes 111-17.

119. *See supra* text accompanying note 30.

120. *See* 12 G. COUCH, *supra* note 1, at § 44A:2.

121. *See* 12 G. COUCH, *supra* note 1, at § 44A:2.

122. Grant v. North River Ins. Co., 453 F. Supp. 1361, 1365 (N.D. Ind. 1978). The *Grant* court heard a declaratory judgment action brought by a city and individual police officers to clarify their rights under certain liability policies.

123. *Id.* at 1366. The court cannot extend the liability of the insurer by implying meanings to terms, nor can it apply a definition that is not customary. *See* 11 G. COUCH, *supra* note 1, at § 44:7.

124. *See* 11 G. COUCH, *supra* note 1, at § 44:7.

125. Commercial Union Ins. Co. v. Mauldin, 62 N.C. App. 461, 303 S.E.2d 214 (1983).

126. *Id.* at 463, 303 S.E.2d at 216.

127. Home Ins. Co. v. Neilsen, 165 Ind. App. 445, 452, 332 N.E.2d 240, 244 (1975).

128. *Id.* at 451, 332 N.E.2d at 244.

129. *Id.*

courts must balance the competing interests of contract law, which prohibit courts from rewriting the contract, against the insured's belief that he is entitled to coverage. Attempts by the courts to balance these competing interests can result in broadened policy coverage.

Interpretation of the intentional injury exclusionary clause as ambiguous also negates the right of a contracting party to limit its liability.[130] The insurance industry has deemed certain acts, identified as implied exceptions, beyond the scope of insurance coverage.[131] Included in the list of implied exceptions are death by execution for a crime, death by suicide while sane, inherent vice, "friendly fire," losses caused by the insured's gross negligence or recklessness, and injuries or losses from intentional torts caused by the insured.[132] Courts will sometimes create an implied exception for a criminal act, such as assault, depending on the circumstances of the case.[133] Two underlying principles justify the existence of these implied exceptions.[134] First, insurance contracts do not ordinarily cover losses which occur with such regularity that they can be considered a cost of doing business.[135] Second, insurance policies usually do not cover losses that are not fortuitous from the viewpoint of the insured.[136] Put more simply, a person should not be able to take advantage of his intentional wrongdoing.[137]

By holding that the intentional injury exclusionary clause is ambiguous, courts allow persons to insure themselves against their own intentional wrongful acts.[138] A number of cases recognize that the purpose of the intentional injury exclusionary clause is to prevent extending to the insured a license to commit "wanton and malicious acts."[139] If persons can insure

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130. 6B J. APPLEMAN, *supra* note 2, at § 4255.

131. *See generally* R. KEETON, *supra* note 1, at § 5.3.

132. *See generally* R. KEETON, *supra* note 1, at § 5.3. The inherent vice exception applies to marine insurance and refers to the natural decay of goods resulting from delay caused by an insured against peril. *Id.* at § 5.3(c). A friendly fire is one contained in an ordinary place for a fire in use, such as a stove or furnace. *Id.* at § 5.3(d).

133. 7C J. APPLEMAN, *supra* note 2, at § 4685.01. Some commentators argue for a flat denial of coverage. *See* P. MAGARICK, *supra* note 45, at 299. Others contend the better view is to investigate the circumstances of the claim to determine if the assault could have been an accident. *See* 7C J. APPLEMAN *supra* note 2, at § 4685.01; 11 G. COUCH, *supra* note 1, at § 44:298. The key question in the analysis of such cases is the intent of the insured. Rynearson, *supra* note 28, at 526-27.

134. R. KEETON, *supra* note 1, at § 5.3.

135. R. KEETON, *supra* note 1, at § 5.3.

136. R. KEETON, *supra* note 1, at § 5.3.

137. P. MAGARICK, *supra* note 45, at 287.

138. R. KEETON, *supra* note 1, at § 5.3.

139. Annotation, *supra* note 18. *See* MacDonald v. United Pac. Ins. Co., 210 Or. 395, 411, 311 P.2d 425, 432 (1957) ("If there were any doubt as to the construction to be given to the policy we would be influenced in favor of that which we have adopted by the decisions holding that it is contrary to public policy to insure against liability arising directly against the insured from his own willful and illegal act."); Home Ins. Co. v. Neilsen, 165 Ind. App. 445,

their intentional wrongful acts, they might be inclined to physical violence or to use excessive force to defend personal and property rights.[140] Insurance for such conduct "might well lead to irresponsibility."[141]

The argument can be made that persons would commit intentional torts because they can get insurance. For example, a large number of property owners carry insurance to indemnify themselves in case their buildings are destroyed by fire. A property owner who burns his insured building is gambling that he will be able to collect under his policy rather than be found guilty of arson. Similarly, a person who deliberately harms a third party may be gambling that his acts will be covered by his insurance policy so he does not bear the loss. While arguments can be advanced that the presence of insurance does not necessarily mean that the number of wrongful acts would increase, the fact that such coverage is available could mean that persons would be more inclined to behave irresponsibly since they would not have to bear the financial responsibility for their acts.[142]

Courts which interpret the intentional injury exclusionary clause as ambiguous are also rewriting the policies to provide coverage for an insured's wrongful acts and are imposing on the insurer a nonexistent duty.[143] Such interpretations are not only contrary to the tenets of contract law but also are unwarranted since policies can be written in which insurers assume

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450-51, 332 N.E.2d 240, 244 (1975) ("[P]ublic policy recognizes the public benefit from liability insurance and yet dictates that a person should not be permitted to insure against harms he may intentionally and unlawfully cause others, and thereby acquire a license to engage in such activity.")

140. Farbstein & Stillman, *supra* note 4, at 1252. Farbstein & Stillman present an interesting commentary on the number of liability claims based on "auto bump" suits and the relation between the number of such cases and the availability of insurance. *Id.* at 1251-52.

141. Farbstein & Stillman, *supra* note 4, at 1251-52.

142. Courts are split on whether conviction for a criminal act automatically demonstrates that the insured intended to harm a third party. Courts in Georgia, Montana, and Wisconsin, where the intentional injury exclusionary clause is held to be free from ambiguity, and in Indiana, which holds the clause is ambiguous, have ruled that a criminal conviction cannot be used to prove in a separate tort claim that the insured intended to harm the third party. Among the reasons given by the courts for their ruling was that conviction in a criminal case does not establish any of the elements of a civil case. *See* Continental Casualty Co. v. Parker, 161 Ga. App. 614, 288 S.E.2d 776 (1982); Northwestern Nat'l Casualty Co. v. Phalen, 182 Mont. 448, 597 P.2d 720 (1979); Poston v. United States Fidelity & Guarantee Co., 107 Wis. 2d 215, 320 N.W.2d 9 (1982); and Cromer v. Sefton, 471 N.E.2d 700 (Ind. Ct. App. 1984). However, in North Carolina, where the intentional injury exclusionary clause is held to be free from ambiguity, courts have allowed a criminal conviction to be used to prove the intent of the insured. *See* Commercial Union Ins. Co. v. Mauldin, 62 N.C. App. 461, 303 S.E.2d 214 (1983). For a more detailed discussion, see Annotation, *Criminal Conviction as Rendering Conduct for which Insured Convicted Within Provision of Liability Insurance Policy Expressly Excluding Coverage for Damage or Injury Intended or Expected by Insured*, 35 A.L.R. 4th 1063 (1985).

143. 7C J. APPLEMAN, *supra* note 2, at § 4685.01.

duties to third parties and which cover intentional torts.[144] In short, the courts do not need to do what the contracting parties can do for themselves. However, such contracts might not be valid since they would allow the insured to "freely contract away the consequences of his own wrongdoing."[145] Courts could view the insured's efforts to protect himself from the consequences of his own intentional wrongful acts as contrary to public policy and declare the agreements illegal and void.[146]

Another effect of a court ruling which holds the intentional injury exclusionary clause to be ambiguous is an undermining of the doctrine of punitive damages.[147] Seven reasons have been given for assessing punitive damages: punishing the defendant, deterring the defendant from repeating the offense, deterring others from committing an offense, preserving the peace, inducing private law enforcement, compensating victims for otherwise uncompensable losses, and paying the plaintiff's attorney fees.[148] Of these, the two most widely recognized purposes are to punish and to deter.[149] Redressing the injury is not a purpose of punitive damages.[150] The doctrine is weakened if, through an interpretation of the exclusionary clause as ambiguous, punitive damages assessed to the insured in a tort action can be passed on to the insurer.

Insureds would thus be able to commit intentional wrongful acts without bearing the responsibility for those acts through the payment of punitive damages, as they now can avoid responsibility when courts order insurers to pay actual damages. In *Gray v. Zurich*, the insured was found guilty of assault in a tort action.[151] His insurer refused to defend, claiming the act

144. Farbstein & Stillman, *supra* note 4, at 1238.

145. Haskell, *Punitive Damages: The Public Policy and the Insurance Policy*, 58 ILL. B.J. 780, 789 (1970).

146. *See* 17 AM. JUR. 2D *Contracts* § 174 (1964).

147. *See generally* K. REDDEN, *supra* note 46, at §§ 2.1-.9. Punitive damages, Redden notes, are also known as vindictive or exemplary damages or "smart money" and are awarded to plaintiffs who "prove themselves victims of a willful, wanton, reckless, malicious, oppressive or brutal act. . . . Their goal is to punish the wrongdoer and to deter others from similar conduct." *Id.* at § 2.1. The state has an interest in punitive damages because they provide private incentive to redress wrongs when the state is not in a position to address the grievance. King, *supra* note 8, at 345. After stating a cause of action in his complaint, the plaintiff first asks for nominal or compensatory damages; he then must ask specifically for punitive damages. K. REDDEN, *supra* note 46, at § 3.1. Punitive damages can be recovered in a majority of the jurisdictions; however, punitive damages may not be recovered, or may be recovered only when authorized by statute, in Louisiana, Massachusetts, Nebraska, Puerto Rico, and Washington. M. MINZER, J. NATES, C. KIMBALL, D. AXELROD, DAMAGES IN TORT ACTIONS § 400.00 (1985).

148. Ellis, *supra* note 8, at 3.

149. Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS L.Q. 241, 249 (1985).

150. *Id.*

151. 65 Cal. 3d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

was intentional and was within the scope of the exclusionary clause.[152] The insured then brought suit against the insurer for failure to defend.[153] The court ruled that the exclusionary clause was ambiguous.[154] It ordered the insurer to pay actual damages assessed against the insured in the tort action.[155] Similarly, in *American Ins. Co. v. Saulnier*, a thirteen-year-old boy threw a bottle into a wading pool where several small children were playing, hitting one of them on the head.[156] The court ruled that although the act was intentional, the injury was not.[157] The court held that the exclusionary clause was ambiguous and that the insurer was liable for actual damages.[158] Using similar reasoning, the court in *Indiana Lumbermens Mut. Ins. Co. v. Brandum* ruled that an insurance company was liable for injuries to various third parties, even though the insured deliberately rammed the vehicle in which they were riding with his car.[159] In each case, actual damages were paid by the insurer for the intentional wrongful acts of the insured.

Courts that order insurers to pay actual damages do not agree on whether liability insurers should pay punitive damages awarded against their insureds.[160] This disagreement stems from the basic conflict between the concept of punitive damages, which seeks to punish wrongdoers through economic loss, and liability insurance, which seeks to indemnify the insured against judgments rendered against him.[161] Consequently, American jurisdictions have divided about equally on whether liability for punitive damages may be "shifted" to an insurer.[162]

When deciding whether an insurance policy covers an award of punitive damages, courts make a two-level inquiry.[163] First, they determine whether the terms of the policy can be reasonably interpreted to cover punitive damages; if so, they determine whether such coverage is precluded by public policy.[164] The language of the policy usually resolves the first issue.[165] If the court finds that the insurer did not contract to indemnify the insured for a particular claim, coverage is precluded.[166] But if the langauge is ambiguous, as some courts have held in cases involving an intentional

152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. 242 F. Supp. 257, 259 (D. Conn 1965).
157. *Id.* at 260.
158. *Id.* at 260-61.
159. 419 N.E.2d 246, 247-48 (Ind. Ct. App. 1981).
160. Kelly, *supra* note 24, at 487.
161. Kelly, *supra* note 24, at 496.
162. Grass, *supra* note 149, at 283.
163. Minzer, *supra* note 147, at § 40.90.
164. Minzer, *supra* note 147, at § 40.90.
165. King, *supra* note 8, at 358.
166. Minzer, *supra* note 147, at § 40.92[2].

injury exclusionary clause, courts will rule either that coverage is not allowed, because coverage is limited to fortuitous losses, or that coverage is allowed under the doctrine of *contra proferentum*.[167]

Courts generally look to two areas when deciding if the langauge of the policy precludes punitive damages.[168] They first look to the language which states that the insurance company agrees to "pay all sums which the insured shall be obligated to pay as damages because of bodily injury . . . sustained by any person."[169] The majority of courts hold that this general insuring language includes coverage for punitive damages.[170] Second, the courts look to whether punitive damages were specifically excluded from policy coverage.[171] If punitive damages are not specifically excluded, some courts reason that coverage must be included.[172] Since coverage is not excluded, the courts reason that it would be unjust to allow the insurance company to refuse to cover an "unsuspecting and uninformed" insured who assumes that he is covered.[173] However, since few policies expressly exclude punitive damages, only a few cases have held that punitive damages are not covered.[174]

If, after completing the first level of inquiry, the court finds that the policy language does not preclude punitive damages, the court then decides whether punitive damages are precluded from coverage as a matter of public policy.[175] A number of jurisdictions,[176] but still a minority,[177] have held that liability policies preclude punitive damages as a matter of public policy.[178] They reason that the primary purpose of punitive damages—punishment—would be defeated by allowing an insurance policy to protect against such damages.[179] But the majority of jurisdictions holds that

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167. King, *supra* note 8, at 359. *See* the doctrine of *contra proferentum*, *supra* note 112.

168. Generally, punitive damages are not awarded in contract actions. However, if the breach constitutes or is accompanied by an independent or wanton tort, punitive damages are available. J. CALAMARI & J. PERILLO, *supra* note 30, § 14-3.

169. For examples of standard policies see R. KEETON, *supra* note 1, at apps. E-H.

170. Burrell & Young, *Insurability of Punitive Damages*, 62 MARQ. L. REV. 1, 8 (1978).

171. The insurance industry through its Insurance Service Office attempted in recent years to insert in its liability policies an exclusion that would have removed coverage for punitive damages. The proposal was withdrawn because of objections of agents who disagreed with the broad wording of the clause and of a number of state insurance departments which refused to permit such an exclusion. *See* P. MAGARICK, *supra* note 45, at § 16.06[2].

172. P. MAGARICK, *supra* note 45, at 517.

173. Kelly, *supra* note 24, at 517.

174. Kelly, *supra* note 24, at 499.

175. Burrell & Young, *supra* note 170, at 8.

176. Minzer, *supra* note 147, at § 40.92[2].

177. Kelly, *supra* note 24, at 508.

178. Kelly, *supra* note 24, at 508.

179. Long, *Insurance Protection Against Punitive Damages*, 32 TENN. L. REV. 573, 577-78 (1964).

because of the broad langauge of the policies and because of the expectations of the insured, liability policies should cover punitive damages.[180]

The effectiveness of punitive damages lies in the economic principle that the frequency of an activity decreases as its cost increases.[181] If the insured can shift the burden of liability through insurance, the wrongdoer will go unpunished,[182] and he will no longer be personally responsible for his conduct.[183] The award would be determined not by the magnitude of the offense but by the amount of the insurance.[184] The punishment would ultimately fall on the consumer,[185] with the loss passed on to other policyholders through higher premiums.[186] Since no deterrent effect is served by assessing punitive damages against the insurer for the intentional wrongdoings of the insured, the shift of the burden of financial responsibility from the insured results in a definitional shift of the compensation paid by the insurer. Punitive damages become compensatory damages. Punitive damages are generally recognized as having compensatory aspects,[187] and their frequent after-tax effect is to compensate the plaintiff[188] to windfall proportions since he has already received an award for actual damages.[189] Thus, to maintain the goals of deterrence and punishment inherent in the doctrine of punitive damages, courts should refrain from interpreting the intentional injury exclusionary clause as ambiguous.

## GUIDELINES FOR INTERPRETATION OF AN INTENTIONAL INJURY EXCLUSIONARY CLAUSE

Interpretation of the intentional injury exclusionary clause as ambiguous has a three-fold effect: increasing litigation and compensation, contravening general rules of contract law, and undermining the doctrine of punitive damages. These conclusions seem simple. Yet, when litigants become involved, the issues become more complex. Hence, guidelines to assist the courts in applying an intentional injury exclusionary clause are needed.

Contract law provides a starting place for the development of such

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180. Kelly, *supra* note 29, at 417.

181. Farbstein & Stillman, *supra* note 4, at 1245.

182. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages*, 56 S. CAL. L. REV. 133, 136 (1982).

183. King, *supra* note 8, at 351.

184. Grass, *supra* note 149, at 284.

185. Grass, *supra* note 149, at 284.

186. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 74 (1982).

187. Sprentall, *Insurance Coverage of Punitive Damages*, 84 DICK. L. REV. 221, 234 (1980).

188. King, *supra* note 8, at 362.

189. Christovich, *Spare the Rod*, 49 INS. COUNS. J. 4 (1982).

guidelines. Courts are prohibited from rewriting contracts. The rationale for this policy is clear; presumably, under ideal situations, parties in relatively equal positions have bargained with each other until they reached agreement. However, if the parties are not in equal bargaining positions, the courts will generally assist the weaker party. Thus, when litigation involves a contract of adhesion, such as an insurance policy, any ambiguities will be construed against the stronger party who provided the contract and in favor of the weaker party.[190] The result is that while courts may not rewrite a contract, they do, in actuality, have the authority to alter the terms to some extent, i.e., rewrite the contract.

The question then becomes determining when the court crosses the line between permissible clarification of ambiguities and impermissible rewriting of the contract, and, more importantly, its incentive in doing so. Courts are fully aware of the basic dispute in insurance claims. Through all the arguments about intent and language, the court perceives that the underlying question is "who pays."[191] The court also knows that it must provide an answer. Interpreting the intentional injury exclusionary clause as ambiguous gives the court more leeway in reaching its decision. The court sees before it a person injured through no fault of his own, a person seeking compensation for injury done to him. Thus, the court may use an interpretation of the intentional injury exclusionary clause as ambiguous to change the question it must resolve. "Who pays" with its possible answer of a judgment-proof insured becomes "who can pay." Then, the answer is the insurer, the party with the deep pocket.

The need for guidelines for courts to use when applying the intentional injury exclusionary clause thus becomes apparent. Without such guidelines, courts, ruling that the exclusionary clause is ambiguous, contravene the general rules of contract law and punitive damages. With such guidelines, the courts can answer the "who pays" question in a manner consistent with those doctrines.

The first step the courts should take is not to view conflicts of interest between the insured and the insurer as a basis for ruling the intentional injury exclusionary clause is ambiguous. Application of the exclusionary clause results in an almost automatic conflict of interest between the insurer and the insured. The insured benefits from a finding of negligence which could fall within the coverage of the policy.[192] The insurer favors a finding of an intentional tort, which would not be covered by the policy.[193] In *Dochod v. Central Mut. Ins. Co.*, the court regarded the competing provi-

190. *See supra* text accompanying notes 29-33.
191. *See supra* text accompanying notes 1-6.
192. Snodgrass v. Baize, 405 N.E.2d 48 (Ind. Ct. App. 1980).
193. *Id.*

sions of the policy pertaining to the duty to defend as resulting in an ambiguity.[194] The court described the policy provision and the exclusionary clause as being "at odds" and resolved its doubts in favor of the insured.[195] Thus, one conflict leading to a ruling of ambiguity can be found in the duty to defend.

A second conflict between the insurer and the insured can arise in the duty to pay which is separate from the duty to defend.[196] Courts have found a conflict between the clause obligating the insurer to pay those sums which the insured is obligated to pay as damages and the exclusionary clause.[197] The courts have viewed both provisions as ambiguous because of a perceived conflict in the duty to pay.[198]

Courts should not resolve conflicts between the insured and the insurer by holding that the intentional injury exclusionary clause is ambiguous. Instead, either the insured or the insurer can resolve the conflict by filing a declaratory judgment seeking a declaration of rights and duties under the policy.[199] The declaratory judgment is a binding adjudication of the rights and status of the litigants.[200] In insurance disputes, the declaratory judgment is generally used to determine whether the insurer has a duty to defend the insured.[201] Arguably, that duty may involve a determination of whether the insured's acts fall within the scope of an exclusionary clause. But before it can rule, the court must consider whether the insured's acts were intentional and whether the occurrence was accidental. If the court proceeds without a declaratory judgment, simply reasoning that because of a conflict of interest the exclusionary clause is ambiguous, the court has eliminated the need to examine the rationale for its ruling. A conflict of interest between the insurer and the insured is not indicative of ambiguity *per se*, but instead reflects a dispute about the application of the clause, a dispute best resolved with a declaratory judgment which clearly defines the rights of the litigants.

Courts should also adopt a definition of intent patterned after that formulated in the Restatement of Torts and Prosser: a desire to cause the consequence and a belief that those consequences are likely to follow from the insured's acts.[202] This definition, or variations of it, is used in those

194. 81 Mich. App. at 67, 264 N.W.2d at 124.
195. *Id.* at 69, 264 N.W.2d at 124.
196. *Id.* at 67, 264 N.W.2d at 123-24.
197. Baldinger v. Consolidated Mut. Ins. Co., 15 A.D.2d 526, 222 N.Y.S.2d 736, 738 (1961).
198. *Id.*
199. *See supra* text accompanying notes 84-87.
200. BLACK'S LAW DICTIONARY 368 (5th ed. 1979).
201. *See supra* note 46.
202. *See supra* text accompanying notes 87-89.

jurisdictions which view the intentional injury exclusionary clause as free from ambiguity.[203] Its use allows the courts to take a common-sense approach to situations in which the insurer and the insured disagree. When courts apply this definition, the meaning of the exclusionary clause is not ambiguous. The clause means what a careful reading suggests it means: an insured cannot expect his insurance policy to cover his own intentional torts. A clear definition of intent would lead courts to rule that the exclusionary clause is free from ambiguity.

If the parties to the litigation were to expand the use of the declaratory judgment in resolving whether the intentional injury exclusionary clause is ambiguous and, consequently, whether the insured has a duty to defend, and if the courts were to use a more specific definition of intent, courts would have less difficulty in determining whether an insured's acts fall within the scope of the exclusionary clause. Defining the exclusionary clause as ambiguous has in some instances allowed an injured third party to be compensated when perhaps otherwise he would not have been. But the innocent victim's compensation has come at the expense of the doctrines of contract law and of punitive damages.

## CONCLUSION

"Who pays" is a question which does indeed concern the insurer, the insured, and an injured third person in an insurance claim. Their stakes are obvious. But another party also has something at stake. That party is the court. Its concern is what is just and lawful.

Interpretation of the intentional injury exclusionary clause as free from ambiguity assists the court by keeping decisions consistent with the doctrines of contract law and of punitive damages. The "who pays" question is then answered not on the basis of who has the "deep pocket," but who has a legal duty.

The decision to hold an insurer liable for the intentional acts of its insured should be made on the basis of a duty established by the terms of the contract as they reflect the reasonable expectations of the insured. An insured, who commits an intentional wrongful act which results in harm to a third party should not be able to pass the responsibility of his wrongful act to his insurer. Interpretation of the intentional injury exclusionary clause as free from ambiguity, along with judicial procedure to resolve conflicts and a clear definition of intent, will result in a fair answer to the "who pays" question.

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203. *See supra* text accompanying notes 87-89.