



*AN INSURANCE EXPERIENCE BUILT*

**AROUND YOU**

**Expected, Intended,  
Intentional, but Still  
Covered?**



**NATIONAL  
INTERSTATE  
INSURANCE**

CLAIMS





# Disclaimer

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# Introduction

- Public Policy Considerations
- Traditional Policy Language
- Ohio Case Law History
- Mens Rea v. Subject Matter Exclusions
- New Trends in Policy Language
- Current Case Law



# Public Policy Considerations

- Ohio public policy generally prohibits obtaining insurance coverage for intentional acts. *State Farm Mut. Ins. Co. v. Blevins* (1990), 49 Ohio St.3d 165.
- “Liability insurance does not exist to relieve wrongdoers of liability for intentional, antisocial, criminal conduct.” *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34.
- “Courts frequently have held that even in the absence of express provisions, insurance contracts only provide coverage for accidental losses.” Keeton & Widiss, *Insurance Law* (1988) 498
- “Allowing the purchase of such coverage would remove an important disincentive to the commission of intentional torts – the resultant threat, through civil damage claims, to the tortfeasor’s personal assets.” *Preferred Mut. Ins. Co. v. Thompson* (1986), 23 Ohio St.3d 78.

# Underwriting Considerations

- Probability of loss is incalculable
- No basis for computing loss
- Within human control
- Against public policy





# Traditional Policy Language



- Definition of occurrence as an accident.
- 5. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:**
- a. "Bodily injury"; or**
  - b. "Property damage."**



# Traditional Policy Language

- Mens Rea Exclusions – Expected or Intended Injury

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1. **Coverage E – Personal Liability and Coverage F – Medical Payments to Others do not apply to “bodily injury” or “property damage”:**
    - a. Which is expected or intended by the “insured”;

# Ohio Case Law History

*Preferred Mut. Ins. Co. v. Thompson* (1986), 23 Ohio St.3d 78.

- Allows coverage for admitted intentional shooting that occurred in self-defense despite “intended or expected injury” exclusion.
- “An act of self-defense is neither anticipated nor wrongful from the standpoint of the insured.”
- The court reasoned that the cost to insurers was minimal, because indemnification for a verdict will be precluded if an insured is found to not have acted in self-defense.



# Ohio Case Law History

*Preferred Risk v. Gill* (1987), 30 Ohio St.3d 108.

- Allows insurers to bring declaratory judgment actions to determine coverage even when conduct alleged in the complaint is arguably within the scope of coverage.
- “In such an action, the insurer may proceed to demonstrate that the facts alleged in the underlying tort complaint differ from the actual facts ascertained by the insurer, and that the actual facts remove the insured’s conduct from coverage.”

*Cincinnati Ins. Co. v. Anders*, 2003-Ohio-3048, 99 Ohio St. 3d 156, 789 N.E.2d 1094.

- Court issued declaratory judgment finding no coverage even where the insurer agreed to defend even if the even if the suit is “groundless, false, or fraudulent”

# Ohio Case Law History

*Physicians Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St.3d 189.

- Made a distinction between the intention of the act itself and the insured's subject intent
- “[I]n order to avoid coverage on the basis of an exclusion for expected or intentional injuries, the insurer must demonstrate that the injury itself was expected or intended.”





# Ohio Case Law History

*Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34.

- “[I]ntent to injure is inferred as a matter of law from the act of sexual abuse of a child itself, as harm is deemed inherent in the sexual molestation...”
- “In those cases where an intentional act is substantially certain to cause injury, determination of an insured’s subjective intent, or lack of subjective intent, is not conclusive of the issue of coverage.”



# Ohio Case Law History

*Buckeye Union Ins. Co. v. New England Ins. Co.* (1999), 87 Ohio St.3d.

- Opened the door for the doctrine of inferred intent to apply to acts beyond sexual molestation and murder.
- Concurring opinion argued that *Gearing* provided an effective means for analyzing coverage issues regarding a wide variety of intentional torts and criticized limiting “acts that are intentionally injurious by definition” to murder and sexual molestation.

# Ohio Case Law History

*Allstate v. Campbell*, 2010-Ohio-6312, 128 Ohio St.3d 186.

- The doctrine of inferred intent is not limited to cases of sexual molestation or homicide.
- Clarified that the doctrine of inferred intent applies only in cases in which the insured's intentional act and the harm are intrinsically tied so that the act has necessarily resulted in the harm.





# Case Study

## *Simpson v. Monica* (Lucas County/6<sup>th</sup> District)

- Charles Monica and Tijay Simpson were romantic rivals.
- While under the influence of marijuana and alcohol, Charles calls Tijay from a strip club to meet him at his house to settle things like “men.”
- Tijay, unarmed, stands at the edge of Charles’ front yard, while Charles stands on his porch with a shotgun.
- The two men egg each other on for 15 minutes.
- Tijay steps on Charles’ lawn and Charles shoots him at a range of 10-15 feet.



# Case Study

## *Simpson v. Monica* (Lucas County/6<sup>th</sup> District)

- Charles pleads no contest and is convicted of felonious assault.
- Tijay sues Charles for battery.
- In his deposition, Charles says he didn't mean to injure Tijay.
- The complaint is tendered to Charles' homeowner insurer.
- The insurer intervenes and files a Complaint for Declaratory Judgment - arguing that the claim does not arise out of an "occurrence" and/or is precluded from coverage by the exclusion for "expected or intended injury."



# Case Study

## *Simpson v. Monica* (Lucas County/6<sup>th</sup> District)

- In his second deposition, Charles is shown the video and now claims he doesn't actually remember the shoot at all.
- The insurer files for summary judgment based primarily on the video.
- The court finds that there is a genuine issue of material fact as to whether Charles acted in self-defense, because you can't see what Tijay is doing.
- The insurer deposes three eye witnesses, and Tijay, who testify that Charles invited Tijay over to fight and that Tijay was not charging at Charles before he was shot.





# Case Study

## *Simpson v. Monica* (Lucas County/6<sup>th</sup> District)

- The trial court grants the supplemental motion for summary judgment.
- Applied the doctrine of inferred intent based on Charles' stated intentions, the close proximity of the shooting, and Charles' lack of remorse or surprise immediately following the shooting.
- No evidence or argument in support of self-defense.
- On appeal, the decision was affirmed.



# Subject Matter Exclusions

- Exclusions for injury arising out of acts, regardless of intent.
- Usually also includes associated negligence claims.
- Makes subjective intent irrelevant.
- Instead of an exclusion, insurers may also add in coverage for associated negligence claims via an endorsement – this coverage is usually limited and is eroded by defense costs and expenses.

# Associated Negligence Claims

*Safeco Ins. Co. of Am. v. White*, 2009-Ohio-3718, 122 Ohio St. 3d 562, 913 N.E.2d 426.

- [W]hen a liability insurance policy defines an “occurrence” as an “accident,” a negligent act committed by an insured that is predicated on the commission of an intentional tort by another person, e.g., negligent hiring or negligent supervision, qualifies as an “occurrence.”
- Even though the stabbing was an intentional tort committed by son; whether the underlying act for which coverage was sought was intentional had to be determined from the perspective of the persons seeking coverage, and neighbor's injury was accidental from the perspective of insureds.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**EXCLUSION - ASSAULT & BATTERY**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., **Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability** and Paragraph 2., **Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability**:

1. Assault, battery or any other violent crime; or
2. Any act or omission in connection with the prevention or suppression of assault, battery or any other violent crime.
3. The negligent:
  - a. Employment;
  - b. Investigation;
  - c. Supervision;
  - d. Reporting to the proper authorities, or failure to so report; or
  - e. Retention;of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraphs **1.** and **2.** above

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**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **ASSAULT AND BATTERY LIABILITY COVERAGE FORM**

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM

GARAGE COVERAGE FORM

MOTOR CARRIER COVERAGE FORM

TRUCKERS COVERAGE FORM

### **SCHEDULE**

<b>LIMITS OF LIABILITY</b>	
<b>\$ 50,000</b>	each claim
<b>\$ 50,000</b>	aggregate

## **I. ASSAULT AND BATTERY LIABILITY**

### **I. INSURING AGREEMENTS**

We will pay on your behalf all sums which you shall become legally obligated to pay as "damages" because of injury to any person arising out of the following:

1. Assault, battery or any other violent crime; or
2. Any act or omission in connection with the prevention or suppression of assault, battery or any other violent crime; or
3. The negligent:
  - a. Employment;
  - b. Investigation;
  - c. Supervision;
  - d. Reporting to the proper authorities, or failure to so report; or
  - e. Retention;

of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph **1.** and **2.** above.

## **2. EXCLUSIONS**

This policy does not apply:

- (a) to any actual or alleged assault and battery by you or PERSONS INSURED in Section II below;
- (b) to liability of others assumed by you under any contract or agreement, either oral or in writing, unless specifically endorsed hereon;
- (c) to any obligation for which you or any carrier as your insurer may be held liable under any workers' compensation, unemployment compensation or disability benefits law, or under any similar law;
- (d) to "bodily injury" to, or assault and battery, or death sustained by any of your "employees" arising out of, and in the course of employment by you;
- (e) to any loss or claim either directly or indirectly arising from your activities as an officer or director of any corporation, company, organization or business other than that of the Named Insured;
- (f) to any claim for punitive or exemplary damages.

### **III. LIMITS OF LIABILITY**

Regardless of the number of insureds under this policy, our liability is limited as follows:

The Limit of Liability stated in the SCHEDULE as applicable to each claim is the limit of our liability for all "damages" because of each claim or "suit" covered hereby. The Limit of Liability stated in the SCHEDULE as aggregate, subject to the above provision regarding each claim, is the total limit of our liability under this Coverage for all "damages." All expenses incurred by the company and all costs taxed against the Insured in any suit defended by the Company will be subject to and not in addition to the applicable limit of liability.



# Underwriting Considerations

- By limiting coverage to negligent acts only, insurers do not run afoul of public policy concerns.
- Coverage is limited and reduced by defense costs, so the potential exposure is known and easy to calculate.
- Within human control (somewhat).





# Ohio Case Law

*World Harvest Church v. Grange Mut. Cas. Co.*, 148 Ohio St.3d 11, 2016-Ohio-2913.

- No coverage for negligence claims arising out of an intentional act because of an “abuse exclusion.”
- “We do not find any language in the abuse exclusion that limits its application to damages awarded for an insured's direct liability. The failure to include an express denial of coverage for claims of secondary, or vicarious, liability does not support the interpretation advanced by WHC, i.e., that the policy must therefore cover vicarious liability. Nor does it render the exclusion ambiguous.”
- “The exclusion covers a narrow category of conduct—actual or threatened abuse by anyone. But construing the exclusion to apply only to that which is clearly excluded, as we must, its plain wording states that there is no coverage as long as the claim is for bodily injury that arises out of the abuse by anyone of any person while in the care, custody, or control of the insured.”



# Other Ohio Cases

*Royal Paper Stock Co. v. Robinson*, 2013-Ohio-1206, 2013 WL 1286698 (10<sup>th</sup> Dist.).

- No coverage for damage caused by children lighting papers on fire in a warehouse. Policy excludes coverage for harm caused by intentional conduct, not for harm intentionally caused, therefore, an inferred intent analysis is not necessary.

*Essex Ins. Co. v. Mirage on the Water, Inc.* (8<sup>th</sup> Dist.) 2006-Ohio-5023.

- “The plain language of the endorsement to the policy excludes coverage for injuries such as though sustained by appellee because the actor’s intent is irrelevant.”



# Other Ohio Cases

*Carter v. Adams* (1<sup>st</sup> Dist.), 2007-Ohio-4322, 877 N.E.2d 1015.

- Holding that the assault and battery exclusion applies regardless of how the assault or battery occurs or who may have contributed to its occurrence.

*Colter v. Spanky's Doll House* (2d Dist.), 2006-Ohio-408.

- Applying assault and battery exclusion to bar coverage for injuries arising out of a shooting.

*Monticello Insurance Company v. Hale* (6th Cir. 2004), 114 Fed.Appx. 198.

- (Same)



## Other Non-Ohio Cases

### ***Sexual/Physical Abuse Exclusions***

*Farmer v. Allstate Ins. Co.* (C.D. Cal. 2004), 311 F.Supp.2d 884, 887.

*Atlantic Cas. Ins. Co. v. Harris*, S.D. Ill. No. 08-cv-647, 2010 WL 623198 (Feb. 18, 2010).

*West Am. Ins. Co. v. Embry* (Apr. 25, 2005), W.D. Ky. No. 3:04CV-47-H, 2005 WL 1026185.

*Harper v. Gulf Ins. Co.*, 2002 WL 32290984 (D. Wyo.)

*Hingham Mut. Fire Ins. Co. v. Smith* (2007), 69 Mass. App. Ct. 1, 3-4, 865 N.E.2d 1168.

*Houg v. State Farm Fire & Cas Co.* (Minn. App. 1994), 509 N.W.2d 590.

*Northwest G.F. Mut. Ins. Co. v. Norgard* (N.D. 1994), 518 N.W.2d 179.

*Philbrick v. Liberty Mut. Fire Ins. Co.* (2007), 156 N.H. 389, 934 A.2d 582.



## Other Non-Ohio Cases

### ***Assault/Battery Exclusions***

*Moulton v. Thomas* (La. App. 3 Cir. 2006), 924 So. 2d 394.

- Holding that self-defense assertion does not alter determination that assault has occurred so as to trigger exclusion

*Mt. Vernon Fire Ins. Co. v. Creative Housing LTD* (N.Y. App. 1996), 88 N.Y.2d 347, 668 N.E.2d 404.

- Holding that who committed the assault is immaterial for application of the exclusion.



## Other Non-Ohio Cases

### ***Assault/Battery Exclusions***

*Atain Specialty Ins. Co. v. Reno Cab Co., Inc.*, D. Nev. 2018, 341 F.Supp.3d 1168.

- Court held that the assault and battery exclusion was ambiguous and should be construed in favor of the insured.
- The self-defense exception to the expected or intended injury exclusion conflicted with the assault and battery exclusion.



## Other Non-Ohio Cases

### ***Assault/Battery Exclusions***

*Cohne v. Navigators Spec. Ins. Co.* (D. Mass. February 19, 2019), 2019 WL 688429.

- Held that an assault and battery exclusion precluded coverage for the acts of a bouncer in forcibly removing a patron (including the use of a baton).
- Also held that the bouncer was not a named insured so as to be entitled to the limited \$250,000 coverage (damages and claim expenses) available under the endorsement.

# Questions?



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