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When Should An Accident Be An Accident?

November 27, 2017 | | Insurance,Policyholder Protection

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Standard commercial general liability (CGL) insurance policies provide coverage for damages the policyholder is legally obligated to pay because of property damage or bodily injury caused by an "occurrence." CGL policies typically define "occurrence" as an "accident." Courts define an accident as "an unexpected happening without an intention or design." *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1283 (Ind. 2006). Simple, right? Unfortunately, a trilogy of cases from the Indiana Supreme Court have caused confusion on this issue, particularly where the policyholder may have errors and omissions (E&O) coverage. In *Harvey*, a 16-year-old girl, Brandy, fell into a river and drowned after being intentionally pushed during an altercation with a boy, Toby. Toby admitted that he intended to push Brandy, but denied that he intended to harm her. Brandy's parents filed a wrongful death action alleging Toby's conduct was negligent and reckless and a declaratory judgment action against Toby's homeowner's insurer, Auto-Owners. Auto-Owners denied it had any duty to defend or indemnify Toby, arguing that Toby's conduct was not an "occurrence" and that it fell under the exclusion for "intended and expected harm." The Indiana Supreme Court concluded that, "[u]nder the facts of this case … the meaning and application of this [occurrence] provision is unclear." *Id*. at 1284. If judged by Toby's conduct, there clearly was no accident; but if judged by the result – Brandy's fall and drowning – then there was an accident, because Toby did not intend for that to happen. The court specifically rejected the rule applied by other courts that "a volitional act – which is always intended – does not constitute an accident, even where the results may be unexpected or unforeseen." *Id*. at 1285. The court called such a rule "unclear, potentially confusing, and likely to result in subjective and unpredictable judicial applications." *Id*. at 1285–86. In discussing what constitutes an "occurrence," the court mentioned, but did not expressly follow, a number of cases applying the definition "to circumstances remote from instances of specific personal physical conduct, but rather arising from claims based on commercial or professional conduct." Those cases included *R.N. Thompson & Assoc. v. Monroe Guar. Ins. Co.*, 686 N.E.2d 160, 164–65 (Ind. Ct. App. 1997), in which the Court of Appeals held that economic losses from construction defects are not an occurrence. In 2009, the Indiana Supreme Court

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addressed the occurrence issue in *Tri-Etch, Inc. v. Cincinnati Ins Co*., 909 N.E.2d 997, 999 (Ind. 2009). That case involved a liquor store clerk (Young) who was abducted shortly before midnight, tied to a tree in a local park, and beaten. He was found the next day alive, but later died of his injuries. Young's estate sued the alarm company (Tri-Etch) alleging it negligently failed to notify the store's manager within 30 minutes of closing that the night alarm had not been set, and that if Tri–Etch had acted promptly, Young would have been found earlier and would have survived. The jury in that case found against Tri-Etch and awarded $2.5 million to Young's estate. In the coverage case, the Indiana Supreme Court considered whether Tri-Etch's failure to notify the store manager after the alarm had not been set constituted an occurrence. In holding it was not, the court distinguished *Harvey* by noting that, "in *Harvey*, we noted the distinction between an 'occurrence' as the term is used in CGL policies, and claims based on 'commercial or professional conduct.'" *Id*. at 1284. One of those cases, as mentioned, was *R.N. Thompson*. The *Tri-Etch* court went on to note that, "[c]laims based on negligent performance of commercial or professional services are ordinarily insured under 'errors and omissions' or malpractice policies. For this reason, CGL policies typically exclude claims arising out of professional or other business services." *Id*. Indeed, the court ultimately held that in addition to not being an "occurrence," the claim was excluded by the professional services exclusion. What the *Tri-Etch* court did not discuss, because it was not presented, is that most E&O and malpractice policies exclude coverage for bodily injury or property damage, because those damages are covered by CGL policies. As in *Tri-Etch*, a professional services exclusion may be added to a CGL policy, but that is usually a specific endorsement, which applies only to specific excluded services. Moreover, the mere offering of this exclusion in the insurance marketplace suggests insurers do intend to provide coverage for bodily injury and property damage caused by a professional error or omission in the absence of the exclusion. One year later, the Indiana Supreme Court again visited the "occurrence" issue in *Sheehan Const. Co. v. Cont'l Cas. Co*., 935 N.E.2d 160 (Ind.), *opinion adhered to as modified on reh'g*, 938 N.E.2d 685 (Ind. 2010). In *Sheehan*, the court overturned *R.N. Thompson* and held that faulty workmanship was an "accident" and "occurrence" under a CGL policy "so long as the resulting damage is an event that occurs without expectation or foresight." *Id*. at 169. The court explained: As applied to the case before us, if the faulty workmanship was the product of unintentional conduct then we start with the assumption, from Sheehan's viewpoint, that the work on the Class members' homes would be completed properly. The resulting damage would therefore be unforeseeable and constitute an "accident" and therefore an "occurrence" within the meaning of the Insurers' CGL policies.

Id. at 170. This holding was consistent with the court's earlier holding in *Harvey*, in that it focused on whether the act was intended to cause the result. *Sheehan* should have put an end to any confusion caused by *Tri-Etch* and returned us to the clear rule of *Harvey* and clear focus on whether the act – even if intentional – was intended to cause the result. Unfortunately, it appears from a recent decision that *Tri-Etch's* reliance on *Harvey's* reference to pre-*Sheehan* cases and speculation about E&O policies may still have some traction. In *Allstate Ins. Co. v. McColly Realtors, Inc*., No. 2:16-CV-00142, 2017 WL 4938154 (N.D. Ind. Oct. 31, 2017), a family died as a result of carbon dioxide emitted from a generator in the garage of a home they were renting. The estate filed suit against the realtor (McColly) for failure to warn of latent or concealed dangers and failure to register the home as a rental in McColly's dealings with the owner of the home. McColly sought coverage

under its CGL policy. The court concluded that Allstate did not have a duty to defend or indemnify McColly, following *Tri-Etch's* discussion of E&O insurance. The court concluded that, "[t]his claim alleges a professional error or omission, rather than an accident or occurrence." *Id*. at *8. The court's conclusion likely means little to McColly if its E&O policy contains exclusions for bodily injury or property damage. The interplay between CGL coverage and E&O coverage is illustrated by *Wayne Twp. Bd. of Sch. Comm'rs v. Indiana Ins. Co*., 650 N.E.2d 1205, 1207 (Ind. Ct. App. 1995). That case involved a school that was sued for its negligence in connection with its principal's alleged molestation of a student. The school sought coverage under both its CGL policy and its E&O policy. The court held that the allegations against the school did allege an occurrence, noting that "Indiana Insurance has not designated any evidence demonstrating that the school's alleged conduct was not an accident: there is no evidence that the school intended or expected Barger's misconduct or that the molestation was the result of the school's intent or design." *Id*. at 1209. The court held that the claims against the school were, however, excluded under the E&O policy, which excluded "any damages, whether direct, indirect or consequential, arising from, or caused by, bodily injury, personal injury, sickness, disease or death." *Id*. 1211–12. *Wayne Township* reflects the correct "occurrence" analysis when evaluating CGL coverage for a company sued for negligently inflicted bodily injury or property damage. Courts should not speculate about what is or is not covered by any E&O policy. Nor should they determine the "occurrence" issue based on whether the claim is based on commercial or professional conduct, or alleges a professional error or omission. Many companies do not have E&O coverage (because they do not engage in professional services), and many E&O policies contain exclusions for bodily injury or property damage (precisely because those items of damage are covered by CGL policies). The sole focus, instead, should be on whether the complaint alleges an accident, which should be governed by *Harvey/Sheehan* rule – whether the conduct unintentionally results in bodily injury or property damage.