Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Calif. High Court Has A Chance To Define 'Accident'

By **Gretchen Hoff Varner and Broer Oatis** (February 27, 2018, 2:00 PM EST)

Gretchen Hoff Varner

Broer Oatis

On March 6, in Liberty Surplus Insurance Co. v. Ledesma and Meyer Construction Co. Inc., S236735, the California Supreme Court has the opportunity to answer, once and for all, the following question: When insurance policies refer to an "accident," what does that mean? For most occurrence-liability insurance based policies, whether the underlying harm is caused by an accident is the key to coverage — if no accident took place, there is no coverage. Over the past decade, California Courts of Appeal have modified and revised the traditional "accident" test, applying new requirements and interpretations in a way that often results in a loss of coverage for policyholders. The Ledesma case should resolve this issue once and for all, and in doing so, is likely to clarify significant issues of both insurance law and tort law generally. This article provides a preview of the Ledesma issues.

The Ledesma Case: Background and Facts

The Ledesma case arises out of a tragic event. In 2006, a San Bernardino County student was sexually assaulted by an employee of a construction company that had been hired to perform construction work at a middle school. In 2010, the student filed a Jane Doe tort action against the employee, the construction company, the school district and others. She alleged, among other things, that the construction company was liable for her injuries under the tort theories of negligent hiring and supervision of the employee. The school district and construction company sought insurance coverage for the tort action under the construction company's general liability policy. The insurer denied coverage and filed an action in the Central District of California seeking a declaration that it owed no duty to defend or indemnify for the underlying tort action, arguing that since the employee had committed an intentional tort, the construction company could not prove that an "accident" had taken place. When the construction company responded by arguing that the tort at issue was not the employee's intentional tort but the company's negligent hiring and supervision, the district court rejected that argument, holding that the negligent supervision claims were too attenuated from the injury-causing conduct (the sexual assault committed by the employee) to

constitute an “occurrence” — defined as an “accident” — under the liability policy. In short, the district court concluded that there was no coverage under a commercial general liability policy for an employer when an injured third party brings claims against the employer for the negligent hiring, retention and supervision of an employee who intentionally injured the third party.

The construction company appealed to the Ninth Circuit Court of Appeals, which certified the meaning of “accident” to the California Supreme Court, citing “issue[s] of significant precedential and public policy importance” and noting that resolution of the question will “extend beyond the employment context, affecting many insured entities and persons, and the third parties that are injured by the willful acts of those individuals supervised by the insured.”

The Narrow Issue: Coverage for Negligent Supervision of an Employee Who Intentionally Injures a Third Party

Narrowly, the Ledesma appeal is about whether liability insurance coverage exists for negligent supervision of an employee who intentionally injures a third party. Under California Insurance Code Section 533, a statutory exclusion that eliminates insurance coverage for losses caused by willful acts of an insured, California courts have held that some acts, like child molestation, are so inherently harmful that an insured simply cannot show that harm was unintended.[1] As a result, California has made clear that there is not insurance coverage for an individual’s liability for the intentional conduct of child molestation.

However, the Ledesma case is not about an individual’s liability for a direct act of child molestation — the rapist is not the one seeking insurance coverage. Rather, the case is about the employers’ negligent supervision, retention and hiring. In analogous cases, California courts have consistently upheld coverage for employers’ vicarious liability for the intentional torts committed by their employees.[2] Moreover, just a few years before, the California Supreme Court had depublished Los Angeles Checker Cab Coop. Inc. v. First Specialty Insurance Co., 186 Cal. App. 4th 767 (2010),ordered not to be officially published (Oct. 27, 2010), which had rejected insurance coverage for an employer’s vicarious liability for its employee’s intentional tort. Thus, if the California Supreme Court were to adopt the district court’s position in Ledesma, California would have the counterintuitive rule that provides insurance coverage for an employer’s vicarious liability for an intentional tort committed by an employee but precludes coverage for the employer’s own lesser tort of negligence in the hiring, supervising or retaining of the employee. We expect the California Supreme Court to address this issue direct and may even resolve the case on these narrow grounds.

The Broad Issue: What Is An Accident?

The California Supreme Court may, however, decide to resolve Ledesma on broader grounds, and thus provide clarity on the definition of an “accident.” This question has bedeviled California appellate courts, resulting in two competing lines of decisions that are in tension. California insurance law would be well-served by guidance from the state’s highest court.

In 1959, the California Supreme Court surveyed possible meanings of the term “accident” and adopted the following definition for commercial general liability policies: an accident is “an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause.”[3] Applied by California courts in numerous cases and recently reaffirmed by the California Supreme Court in Delgado v. Interinsurance Exchange of Automobile Club of Southern California, 47 Cal. 4th 302, 308 (2009), this definition is framed in the disjunctive. An accident takes place if an act or the consequences of an act are unexpected, unforeseen or undesigned. For example, if a pitcher on the San Francisco Giants (let’s call him Juan Marichal) intentionally swings a baseball bat in the air to showcase his prowess, and in doing so, unintentionally hits and injures the catcher for the L.A. Dodgers (whom we will call Johnny Roseboro), then the cause of the bump on the catcher’s head would have been an accident. This is true even if Marichal was negligent in how he swung the bat, because the consequence of the act (injury to Roseboro) was unexpected or undesigned. From a policyholder perspective, the Delgado definition makes perfect sense. It reflects the common meaning of the term “accident” and is in line with reasonable expectations of insureds.

Unfortunately for legal clarity, a number of California appellate court decisions disregard the “unexpected consequences” prong of the definition of “accident.” These cases look only at the specific act that caused the injury when determining whether an accident took place. For example, in State Farm General Insurance Co. v. Frake, 197 Cal. App. 4th 568 (2011), a few college students were roughhousing when one, the insured, threw his arm out to the side and struck another in the groin. The injured student sued the insured student for his bodily injuries. The testimony showed that the first student did not intend to hit or hurt his friend and the jury accordingly imposed liability solely on the basis of negligent conduct. No doubt the insured, and most likely all the other undergrads who witnessed the strike, considered and described it as “an accident.” Nevertheless, the Court of Appeals held that there was no coverage because “the term ‘accident’ does not apply to an act’s consequences, but instead applies to the act itself.”[4] Numerous courts, including the district court in Ledesma, have followed this line of arguments, holding that the unintended consequences of intentional acts are not accidents and thus are not eligible for coverage.

Impact

Ledesma is an important case in California, and, regardless of how the court decides it, will have a significant impact in several contexts. First, it has wide-ranging implications for the value of and coverage provided by numerous commercial general liability policies purchased by California businesses. Second, Ledesma may also have serious implications for the tort of negligent supervision and California’s tort system writ large, including the ability of tort victims to recover damages from tortfeasors who have insurance but are otherwise judgment-proof. With a number of relatively new and generally pro-policyholder justices, the California Supreme Court, in addition to providing guidance on the narrower issue of coverage for negligent supervision claims, may very well use Ledesma as an opportunity to clarify California insurance law and re-establish that unintentional consequences of intended acts are accidents.

***DISCLOSURE**: Covington & Burling LLP represents United Policyholders, which filed an amicus brief in the Ledesma matter.*

Gretchen Hoff Varner and Broer Oatis are attorneys at Covington & Burling LLP, where they represent policyholders in a wide range of insurance coverage disputes.

[1] See, e.g., J. C. Penney Cas. Insurance Co. v. M. K., 52 Cal. 3d 1009, 1028 (1991)

[2] Lisa M. v. Henry Mayo Newhall Memorial Hospital, 12 Cal. 4th 291, 305 fn.9 (1995) (citing Arenson v. Nat. Automobile & Cas. Insurance Co., 45 Cal. 2d 81, 83-84 (1995))

[3] Geddes & Smith Inc. v. St. Paul Mercury Indemnity Co., 51 Cal. 2d 558, 563-65 (1959)

[4] Id. at 579