INSURANCE LAW

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Court of Appeals: Deciding Not to Decide

In our previous column[1] we observed that in two recent high-profile decisions, the Court of Appeals took pains not to decide certain key issues raised by the parties. In the second part of this discussion, we address the issue left unanswered by the Court in *Automobile Insurance Co. of Hartford v. Cook*, 7 NY3d 131, 818 NYS2d 176 (2006)—i.e., "whether acts of self-defense are intentional acts precluding coverage under a homeowner's policy"—by elucidating the positions and contentions of both sides to this dispute.

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Facts

On Feb. 20, 2002, Alfred Cook shot and killed Richard Barber. The incident occurred in Cook's home, an insured premises under a homeowner's policy issued by Automobile Insurance Company of Hartford (AICOH). Cook and Barber knew one another since childhood, but became involved in a dispute about a business relationship, which, apparently, was never resolved. Barber was a substantially larger man than Cook, approximately three times his weight. Sometime in 2001, Barber had kicked Cook in an unprovoked attack, causing injury to Cook's leg.

On the day of the incident, Barber and another man went to Cook's home and began throwing objects at the house. They eventually left the premises, but Barber returned later accompanied by two companions. When Cook saw Barber and the others heading to his home, he directed a visitor to depart, indicating that he thought he had "a problem on his hands." Expecting trouble, Cook, who kept a number of guns in his bedroom and was experienced in their use, retrieved a .25 caliber semi-automatic hand gun, which he put in the pocket of his coveralls. From his bedroom, Cook heard the front door "slam" open, and Barber and his companions entered Cook's house.

While in the kitchen, Barber demanded that Cook give him money, and told him that he would not leave until Cook had done so. Barber was adamant, and Cook believed that he was intoxicated. Barber grew more and more angry, and began to pound on the kitchen table with sufficient force to cause Cook's end of the table to leave the floor. At that point, Cook stood up and stepped back from the table, drew the small handgun from his pocket, pointed it at the floor, and told Barber and the others to leave. When Barber remained seated and laughed at the small size of the "parlor pistol," Cook realized he needed a bigger gun. He returned to his bedroom and grabbed the first gun on the rack, a single barrel pump shotgun. Hoping that the larger gun would motivate Barber to leave, Cook stood in his living room on the far side of a regulation-size pool table, and said "I have a real gun now," and ordered Barber and his companions to leave his home. The two companions made their way from the kitchen to the front door, and Barber began to walk toward the door. Cook, standing at the other end of the pool table, said to Barber, "this is a real gun, it is loaded, follow your friends out of this house right now."

Barber slammed his coat down on the pool table and slammed the rail of the table with his fist. He told his companions to "take anything of value, and that he would meet them outside because he had some business to attend to." Barber walked toward Cook, who repeatedly told him to halt, and warned that he would shoot. Barber continued to advance and raised his hands in the direction of Cook, who was uncertain whether Barber was reaching for the gun or his neck. Cook aimed the gun as low as he could, just above the rail of the pool table and in the vicinity of Barber's navel. When Barber was approximately six or seven feet away from Cook, and just one step from being close enough to grab the shotgun, Cook released the safety on the shotgun, pulled the trigger, and shot Barber in the abdomen. Cook stated that with the corner of the pool table still between them, he aimed at Barber's navel, as the lower parts of his body were behind the pool table. Barber took another step toward Cook, who jumped back while pumping another round into the firing chamber. Barber then stepped backward, and when he neared the far side of the pool table, he fell to the floor. Barber subsequently died from the shotgun wounds.

When asked by the plaintiff's counsel whether he intended to hit Barber with the shot that he fired, Cook said, "I wanted to stop the man. The only way I had the power to stop him at that moment was by shooting that shotgun. I had no intention of killing the man, I just wanted to stop him from hurting me again." When asked whether he expected to injure Barber, Cook said "I certainly had knowledge that a shot with a shotgun would injure, yes. I expected it to injure him, I certainly did not expect to kill him . . . . I knew the shotgun would injure Mr. Barber because I had to stop him, but I did not anticipate it killing him."

Declaratory Judgment

In a declaratory judgment action to determine the issue of insurance coverage for Cook in relation to an action for wrongful death brought by the Estate of Barber, which contained allegations of negligence and intentional conduct, AICOH contended that it had no obligation to provide a defense or indemnification because the shooting death of Barber was not an "occurrence" within the meaning of the policy and because the injury to Barber was "intended or expected" by Cook and, therefore, specifically excluded from coverage. In support of its argument, AICOH focused on Cook's specific, incremental, intentional acts in the moments preceding the shooting: his apprehension of a problem; his acquisition of a handgun; his acquisition of a bigger, loaded gun; his warnings that he would shoot; his aiming at Barber's navel; his release of the safety; his pulling of the trigger; and his ultimate admission that he expected the shot to injure Barber.

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Cook, for his part, argued that his actions in shooting Barber were engaged in solely by reason of his instinct for self-preservation, and that his acting in self-defense, albeit intentionally, rendered his shooting "accidental" and, therefore, within the policy's definition of an "occurrence." He further argued that the intentionally inflicted injury did not fall within the policy's "intended or expected" exclusion because he did not have a "wrongful" intent.

In support of his self-defense argument, Cook focused upon the facts that: he was in his own home; he was one-third the size of Barber; he had asked or demanded Barber to leave; Barber had injured him in the past; he gave warning that if Barber did not stop, he would use the displayed weapon; Barber was in such close proximity that he could grab the barrel of Cook's gun if he did not act immediately; he was under no legal duty to suffer injury at Barber's hands; he placed himself in a position to give Barber and his companions a clear passageway to the door without confrontation and, Barber ignored at least two, and as many as five, warnings before Cook acted.

Supreme Court Decision

The Supreme Court (Albany County) ruled in favor of Cook, holding that "viewing the transaction as a whole, it cannot be said that the average person would conclude that Cook's shooting of Barber was not an accident." As the court further explained, "the incident as a whole, and the shooting in particular, were unexpected, unusual and unforeseen, from Cook's point of view, and, thus, the incident was an 'accident' within the meaning of the insurance policy."

Similarly, applying the "transaction as a whole" analysis, the court noted that "it is not disputed by [AICOH] that Cook was acting in self-defense when he shot Barber. Although each of Cook's specific actions may have been intentional when viewed in isolation, as a whole they do not constitute the type of 'intentional' behavior that has been held to be other than an accident within the meaning of an insurance policy" [citations omitted]. The court concluded that because Cook's overriding intention and expectation was to cause Barber and his companions to depart his home, not to assault, kill or otherwise harm Barber, the "expected or intended" exclusion did not apply. Moreover, under the facts of this case, the "expected or intended" exclusion was rendered ambiguous. "Although Cook's common sense and experience with firearms required him to admit that he 'expected' to injure Barber when he aimed the shotgun at Barber's abdomen and pulled the trigger, the policy exclusion does not unambiguously apply to this momentary and secondary 'expectation' in the self-defense context presented in this case."

Appellate Division

AICOH successfully appealed to the Third Department, which reversed the Order of the Supreme Court, and held that, as a matter of law, Cook's actions were not covered by AICOH's homeowner's policy and, indeed, were excluded by the "expected or intended" exclusion of the policy. In so holding, the court was influenced largely by Cook's admission at his deposition that he knew that the gunshot would injure Barber, thus concluding that "the result of Cook's intentional act cannot be characterized as accidental.... While he allegedly did not anticipate that the injury inflicted would result in death, the facts (and his admission) establish that he intended the result of a body injury." One Justice dissented, arguing that if the negligence claim were established, Cook's actions would be covered.

Court of Appeals

In their respective briefs to the Court of Appeals, both parties addressed the issue of the effects of the self-defense claim on the issue of coverage. For example, Cook, as well as Barber's estate, argued that decisions in other jurisdictions indicated a trend to adopt "a more sensible interpretation" of the definitions of "occurrence," and "intended or expected" and allow for self-defense when properly raised by the insured, such courts recognizing that "a properly raised defense of self-defense is proper, consistent with public policy and does not violate the underlying contract between the insurer and the insured." In support of this contention, they cited to and relied upon decisions from Nebraska,[2] California,[3] Pennsylvania,[4] Louisiana,[5] Alabama,[6] Arizona,[7] Hawaii,[8] Minnesota,[9] Texas,[10] Wyoming,[11] West Virginia,[12] South Dakota,[13] and Wisconsin.[14]

In reversing the order and finding in favor of coverage, the Court of Appeals focused upon the allegation of negligence in the underlying complaint. Noting that it had previously defined "accident" to include an intentional or expected event which unintentionally or unexpectedly results in death, the Court held that "if Cook accidentally or negligently caused Barber's death, such event may be considered an 'occurrence' within the meaning of the policy and coverage would apply."

They also argued that one New York Appellate Division decision, which addressed the issue in limited form, also supported their position. In *Michigan Millers Ins. Co. v. Christopher,* 66 AD2d 148 (4th Dept. 1979), the insured shot an intruder, allegedly in self-defense. The intruder sued the insured for negligence, and the insurer sought a declaration that coverage was barred by an "expected or intended" exclusion. The court denied the insurer's motion for summary judgment because it could not find, as a matter of law, that the shooting was something that the insured "expected or intended." Indeed, the majority found that even though the insured intended the act of shooting, the consequences were not intended.

AICOH, by contrast, argued that Cook's self-defense argument must be rejected in the absence of a definition of "occurrence" that includes or references the intentional infliction of harm in the course of self-defense or other "justifiable" conduct as being an "accident," and in the absence of an exception to the "expected or intended" exclusion pertaining to an insured's infliction of expected or intended injuries in the course of self-defense or some other "justification." While some policies do, in fact, contain language embracing coverage with respect to self-defense or an insured's use of force to protect persons or property,[15] such language was absent from the policy at issue.

Notably, AICOH also pointed to one New York appellate precedent, which it claimed supported its position. In *Peters v. State Farm Fire & Cas. Co.*, 306 AD2d 817 (4th Dept. 2003), affd. as modified, 100 NY2d 634 (2003), the insured repeatedly swung a baseball bat, knowing that he was striking a person. He claimed that he did so in order to extricate his brother from a fight. The Fourth Department concluded that such conduct "can only be described as intentionally caused" as a matter of law, and, therefore, any coverage under his policy was excluded by the policy's intentional harm exclusion, and the Court of Appeals affirmed. According to AICOH, this affirmance strongly suggested that a justification claim cannot create coverage for an insured's intentional act causing expected harm.

Finally, AICOH also pointed to substantial precedent from other jurisdictions to the effect that intentionally inflicted injuries are not removed from the exclusion merely because of an insured's claim of self-defense. This included citations and references to decisions from Michigan,[16] Washington,[17] Vermont,[18] Florida,[19] North Carolina,[20] Indiana,[21] Missouri,[22] Oregon,[23] Iowa,[24] and Maine.[25]

Court of Appeals

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Although the Court of Appeals was apparently not ready to settle the law of New York on this particular issue because it was not necessary to do so in the case before it, it is likely that this issue will be presented again. At that time, the Court will determine which of the opposing views presented above should prevail.

1. Dachs, N. and Dachs, J., "Court of Appeals: Deciding and Deciding Not to Decide," NYLJ, July 7, 2006, p. 3, col. 1.
2. *Allstate Ins. Co. v. Novak*, 210 Neb. 184 (1981).
3. *Walters v. American Ins. Co.*, 185 Cal. App. 2d 776 (1st Dist. 1960); *Mullen v. Glens Falls Ins.* Co., 73 Cal. App. 3d 163, 170 (1977).
4. *State Farm v. Dunleavy*, 197 F.Supp.2d 183 (2001).
5. *Johnson v. Hitchens*, 518 So.2d 1154 (La. 1987).
6. *Allstate Ins. Co. v. Portis*, 472 So.2d 997 (Al. 1985).
7. *Fire Ins. Exchange v. Berray*, 43 Ariz. 361 (1984).
8. *Allstate Ins. Co. v. Takeda*, 243 F.Supp.2d 1100.
9. *Tower Ins. Co. v. Judge*, 840 F.Supp. 679, 684 (Minn. 1993).
10. *Seaboard Life Ins. Co. v. Murphy*, 134 Tex. 165 (1939).
11. *Smith v. Equitable*, 614 F.2d 72 (10th Cir. 1980).
12. *Farmers & Mechanics Mut. Ins. Co. of W.VA v. Cook*, 557 SE2d 801, 809 (W.Va. 2001).
13. *Stoebner v. South Dakota Farm Bureau Mut. Ins. Co.*, 598 NW2d 557, 559-60 (SD 1999).
14. *Berg v. State Farm Ins. Co.*, 405 NW2d 701, 704 (Wis. Ct. App. 1987).
15. See *Aromin v. State Farm Fire & Cas. Co.*, 908 F.2d 812 (11th Cir. 1990); Miller & LeFebvre, Miller's Standard Insurance Policies Annotated, Vol. 1, Form CGGL1 (1993); *Handlebar, Inc. v. Utica First Ins. Co.*, 290 AD2d 633, 634 (3d Dept. 2002), lv. denied, 98 NY2d 601 (2002); Standard Commercial General Form, CG0001, reprinted in 3 Long, Law of Liability, Insurance, §I.IA.100[3] at I.IA.-47 (2000).
16. See *Auto-Owners Ins. Co. v. Harrington*, 45 Mich. 377 (Sup. Ct. 1997).
17. See *Grange Ins. Co. v. Brosseau*, 113 Wash.2d 91 (Sup. Ct. 1989).
18. See *Espinet v. Horvath*, 157 Vt. 257 (1991).
19. See *State Farm Fire & Cas. Co. v. Marshall*, 554 So.2d 504 (Fla. Sup. Ct. 1989).
20. *Erie Ins. Group v. Buckner*, 389 SE2d 901, 904 (N.C. App. 1997).
21. *State Farm Fire & Cas. Co. v. Sanders*, 805 F.Supp. 1453, 1463 (S.D. Ind. 1992); *Home Ins. Co. v. Nielsen*, 165 Ind. App. 445 (1975).
22. *American Family Mut. Ins. Co. v. Nickerson*, 657 F.Supp. 2, 6 (E.D. Mo. 1986).
23. *Allstate Ins. Co. v. Simms*, 597 F.Supp. 64, 67-68 (D. Oregon 1984).
24. *McAndrews v. Farm Bureau Mutual Ins. Co.*, 349 NW2d 117, 120 (Iowa 1984).
25. *Royal Ins. Co. v. Pinette*, 756 A2d 520, 524 (Maine 2000).
26. See *Miller v. Continental Ins. Co.*, 40 NY2d 675, 678 (1976).