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8 Intentional Act Exclusion

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I. [8.1] INTRODUCTION

Whether a claim is excluded by an "intentional act" exclusion in a general or professional liability policy can be a thorny issue for practitioners. The general principle underlying the exclusion is easily stated: insurance is a product designed to protect the insured from damages caused by a fortuitous event. Damage that is expected or intended from the standpoint of the insured is not fortuitous and, thereby, should not be covered. *State Farm Fire & Casualty Co. v. Watters,* 268 Ill.App.3d 501, 644 N.E.2d 492, 205 Ill.Dec. 936 (5th Dist. 1994). An agreement to indemnify a person for damages resulting from his or her own intentional conduct, as a general rule, would also be contrary to public policy. *Lincoln Logan Mutual Insurance Co. v. Fornshell,* 309 Ill.App.3d 479, 722 N.E.2d 239, 242, 242 Ill.Dec. 750 (4th Dist. 1999); *Dixon Distributing Co. v. Hanover Insurance Co.,* 161 Ill.2d 433, 641 N.E.2d 395, 401, 204 Ill.Dec. 171 (1994); *Solo Cup Co. v. Federal Insurance Co.,* 619 F.2d 1178, 1187 (7th Cir. 1980). As explained in *Lincoln Logan Mutual:* "If a single insured is allowed through intentional acts to consciously control risks covered by the policy, the central concept of insurance is violated." 722 N.E.2d at 242. Additionally, Illinois courts have noted that exclusions for intentional acts are necessary to help insurers set rates and supply coverage. *See, e.g., State Farm Fire & Casualty Co. v. Leverton,* 314 Ill.App.3d 1080, 732 N.E.2d 1094, 1097, 247 Ill.Dec. 762 (4th Dist. 2000).

The intentional act exclusion within a commercial general liability (CGL) policy typically states:

> **2. Exclusions**
>
> **This insurance does not apply to:**
>
> **a. Expected Or Intended Injury**
>
> **"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.** Insurance Service Office, Inc., Commercial General Liability Coverage Form CG 00 01 04 13, Section I, Coverage A, Paragraph 2.

When interpreting this exclusion, Illinois courts normally construe the words "intended" and "expected" as separate concepts. *See Bay State Insurance Co. v. Wilson,* 96 Ill.2d 487, 451 N.E.2d 880, 882, 71 Ill.Dec. 726 (1983); *Empire Indemnity Insurance Co. v. Chicago Province of Society of Jesus,* 2013 IL App (1st) 112346, 990 N.E.2d 845, 371 Ill.Dec. 657; *Affiliated FM Insurance Co. v. Beatrice Foods Co.,* 645 F.Supp. 298, 301 (N.D.Ill. 1985) (court noted that words "intended" and "expected" could not be treated as synonymous). "A greater degree of proof is required to establish intent than to establish expectation." *Bay State, supra,* 451 N.E.2d at 882. An "[i]njury is 'expected' where the damages are not accomplished by design or plan, *i.e.*, not 'intended,' but are 'of such a nature that they should have been reasonably anticipated (expected) by the insured." *Westfield National Insurance Co. v. Continental Community Bank & Trust Co.,* 346 Ill.App.3d 113, 804 N.E.2d 601, 608, 281 Ill.Dec. 636 (2d Dist. 2003), quoting *Aetna Casualty & Surety Co. v. Freyer,* 89 Ill.App.3d 617, 411 N.E.2d 1157, 1159, 44 Ill.Dec.

791 (1st Dist. 1980). Whether "an injury was 'expected' is a subjective question, but it can be inferred from objective evidence that the injury was the natural and probable result of the act." 804 N.E.2d at 608. *See also Aetna Casualty & Surety Co. v. Dichtl*, 78 Ill.App.3d 970, 398 N.E.2d 582, 34 Ill.Dec. 759 (2d Dist. 1979); *Westfield, supra.*

II. [8.2] APPLICATION OF INTENTIONAL ACT EXCLUSION

Sections 8.3 through 8.18 below discuss factual scenarios in which intentional act exclusions are commonly implicated.

A. [8.3] Assault and Battery

Perhaps the most common fact pattern implicating a policy's intentional act exclusion involves a claim in which an injured party seeks compensation for injuries suffered as a result of the insured's assault on that person. *See Lincoln Logan Mutual Insurance Co. v. Fornshell,* 309 Ill.App.3d 479, 722 N.E.2d 239, 242 Ill.Dec. 750 (4th Dist. 1999) (intentional act exclusion precluded coverage when insured stabbed man to death). While, on the surface, the application of the intentional act exclusion to an assault perpetrated by the insured may appear straightforward, these claims can implicate a variety of sub-issues that must be addressed.

1. [8.4] Effect of Underlying Criminal Prosecution Against the Insured

Often, when an insured has allegedly assaulted a claimant, there is a criminal assault and battery proceeding pending against the insured. Over time, Illinois courts have grappled with the effect of criminal proceedings against the insured on the application of an intentional act exclusion and whether a finding of guilt against the insured in a criminal proceeding estops the insured from claiming that the intentional act exclusion does not preclude coverage under the applicable policy.

In *Thornton v. Paul,* 74 Ill.2d 132, 384 N.E.2d 335, 23 Ill.Dec. 541 (1979), a complaint was filed against the insured, Paul, alleging willful and wanton conduct. The suit arose out of an altercation at the tavern owned by Paul. After asking some rowdy customers to leave the premises and being refused, Paul struck one of them over the head with a club. He was charged with aggravated battery and, after a criminal trial on stipulated facts, was convicted of the lesser offense of battery. Illinois Founders Insurance refused Paul's request to defend in the civil suit, claiming that the policy excluded incidents arising out of assault and battery and damages expected or intended by the insured. On appeal, the Supreme Court held that proof of Paul's conviction was not "conclusive proof of the facts on which it is based." 384 N.E.2d at 343. Instead, proof of the conviction was prima facie evidence that Paul's striking of the plaintiff constituted a battery. Nevertheless, in the coverage action, the insured still had the "opportunity to rebut the factual basis of the conviction insofar as those facts are applicable to the civil proceeding." *Id*.

In *American Family Mutual Insurance Co. v. Savickas,* 193 Ill.2d 378, 739 N.E.2d 445, 250 Ill.Dec. 682 (2000), the Supreme Court revisited its holding in *Thorton.* Savickas was sued by

Elizabeth Vinicky for wrongful death after shooting and killing Thomas Vinicky. Savickas' insurer filed a declaratory judgment action to determine whether it had a duty to defend and indemnify Savickas. The insurer contended that its policy did not cover Savickas' actions because the criminal prosecution established that the injury was intentional. Savickas and Vinicky argued that the insurer's interpretation was contrary to the Supreme Court's holding in *Thornton* that "a conviction constituted only *prima facie* evidence, which would 'preserve[] the opportunity to rebut the factual basis of the conviction insofar as those facts are applicable to the civil proceeding.' " 739 N.E.2d at 449.

On appeal, the Supreme Court cited a modern trend in favor of recognizing the estoppel effect of criminal convictions and noted that the differences in the safeguards inherent in "civil and criminal litigation all favor the criminal defendant." 739 N.E.2d at 450. Since there are greater safeguards against a mistaken verdict in a criminal trial, there is very little harm in allowing that verdict to estop claims in a civil trial. As such, the *Savickas* court found that "a criminal conviction now acts as a bar and collaterally estops the retrial of issues in a later civil trial that were actually litigated in the criminal trial." 739 N.E.2d at 449, quoting *Zinger v. Terrell*, 336 Ark. 423, 985 S.W.2d 737, 740 (1999). Nevertheless, the Supreme Court held that several factors must be met before a criminal verdict can be used to estop a civil claim. First, the previously decided issue must be identical to the current one. Second, the decision must have been final and on the merits. Finally, the party against whom estoppel is asserted must have been a party to the previous decision. 739 N.E.2d at 451.

In *Savickas,* the Supreme Court found that all of these factors were met. Therefore, Savickas could not argue that his acts were unintentional because that issue was decided against him in the criminal trial. *Id.* Furthermore, because Vinicky's rights against Savickas' insurer were derived from Savickas' relationship with his insurer, she could not have greater rights than he had against the insurer and, therefore, was also bound by the prior criminal action. In addition, Elizabeth Vinicky was estopped from arguing that Savickas negligently assessed the need for self-defense because Savickas made that argument during the criminal trial and the verdict resolved that issue. 739 N.E.2d at 453 – 454. *See also L.A. Connection v. Penn-America Insurance Co.*, 363 Ill.App.3d 259, 843 N.E.2d 427, 433 – 434, 300 Ill.Dec. 169 (3d Dist. 2006) (court was not limited to allegations in complaint, but could also consider extrinsic evidence gathered during discovery; relying on *Savickas,* court found intentional assault and battery exclusion clearly applied when deposition testimony established that bar patron intentionally shot victim and hit him on head with beer bottle and patron was arrested for and convicted of first-degree murder).

Since *Savickas,* Illinois courts have continued to wrestle with the effect of an underlying criminal complaint against the insured in a coverage action raising an intentional act exclusion. For instance, in *Metropolitan Property & Casualty Insurance Co. v. Pittington,* 362 Ill.App.3d 220, 841 N.E.2d 413, 299 Ill.Dec. 1 (3d Dist. 2005), the Third District refused to apply estoppel principles to preclude coverage. In *Pittington,* the insured was charged with attempted murder of a man named Harrison. During the criminal trial, an agreement was reached between Pittington and the state, whereby Pittington agreed to plead guilty to reckless conduct. During the course of the civil trial, the liability insurer brought an action against the insured and Harrison's estate for a declaratory judgment, holding that the policy excluded coverage because Pittington's acts were intentional.

Although Pittington had shot Harrison, the appellate court reversed and remanded the motion for summary judgment that the trial court had granted to the insurer. The court found that the principles set forth in *Savickas* did not preclude the insured from challenging the insurer's coverage position. The court reasoned that, under *Savickas,* "the party sought to be bound must actually have litigated the issue in the first suit and a decision on the issue must have been necessary to the judgment in the first litigation." 841 N.E.2d at 418, quoting *Savickas, supra,* 739 N.E.2d at 451. The Third District found Pittington's decision to plead guilty to reckless conduct in the middle of his attempted murder trial rendered the litigation a "side show" that would preclude any ruling or admissions therein from being used collaterally. 841 N.E.2d at 418. The court further noted that Pittington had little incentive to continue the litigation in a "struggle to the finish" when he was offered a chance to plea to reckless conduct. 841 N.E.2d at 419. Thus the outcome of the proceedings was not determinative. For this reason, Pittington's plea to reckless conduct did not meet the three estoppel requirements set forth in *Savickas.*

Similarly, in *Allstate Insurance Co. v. Kovar,* 363 Ill.App.3d 493, 842 N.E.2d 1268, 299 Ill.Dec. 916 (2d Dist. 2006), the court refused to apply estoppel principles based on Allstate's argument that *Savickas* mandated such a result. In *Kovar,* the underlying lawsuit by Estephan alleged that either (a) William Eckert, Daniel Kovar, or Christopher Kovar had negligently cut Estephan or (b) Eckert or Daniel negligently pushed Christopher into Estephan, causing him to be cut with an object. Daniel stated that he had pled guilty to battery because the conviction would be removed from his record if he complied with the terms of the plea agreement. Allstate filed a declaratory judgment action seeking relief from its obligation to defend or indemnify the Kovars based on the intentional or criminal acts exclusion in the policy.

In reaching its decision, the court determined whether *Savickas* estopped the parties from arguing the acts were not intentional. In considering the three threshold requirements set forth in *Savickas,* the court found that Allstate failed to satisfy the first requirement because Allstate presented no facts from which the court could determine that the issue decided in the criminal case was the same as the issue presented in the civil case. Allstate failed to produce the trial transcript or any other evidence to show the issue presented in the criminal case was identical to the issue in the civil case. 842 N.E.2d at 1276. Furthermore, the court found that even if Allstate could satisfy the threshold requirements from *Savickas,* summary judgment was still inappropriate because Daniel did not appear to have a strong incentive to litigate the battery conviction in the criminal case. The court recognized Daniel's deposition testimony — that he pleaded guilty in order to receive a light sentence and the opportunity to have the conviction removed from his record — as evidence of the lack of incentive. 842 N.E.2d at 1277 – 1278.

In *Grinnell Mutual Reinsurance Co. v. Jaegle,* No. 12 C 1542, 2014 WL 518089 at *2 (N.D.Ill. Feb. 10, 2014), the policy at issue did not cover acts by the insured person "a. in the course of or in furtherance of any: 1) crime; 2) offense of a violent nature; 3) physical abuse; or b. if a reasonable person would expect or intend 'bodily injury' or 'property damage' to result from the act." The insured was sued by an Illinois State Trooper for injuries sustained when the insured was resisting arrest, a crime to which the insured pleaded guilty, and the insurer argued that coverage was excluded under the policy provision above. The insured maintained that, under the language of the amended complaint, the plaintiff was not injured while the insured was resisting arrest, but rather "when [plaintiff] took [the insured] to the ground," at which time the insured

was no longer acting "in furtherance of" the crime in question (resisting a peace officer). 2014 WL 518089, at *4. The court agreed it was not clear that the criminal conduct to which the insured pleaded guilty was what caused the plaintiff's injury, and, finding no other exclusions clearly applicable, determined that there was a duty to defend.

2. [8.5] Negligent Supervision of a Tortfeasor Who Assaults the Claimant

On occasion, an insured may not be sued himself or herself for committing an assault but because he or she allegedly negligently supervised or negligently failed to control an individual who did commit the assault on the claimant. Often, in these cases, an intentional act exclusion within the policy will not alleviate an insurer's duty to defend. For instance, in *Illinois Farmers Insurance Co. v. Kure*, 364 Ill.App.3d 395, 846 N.E.2d 644, 301 Ill.Dec. 319 (3d Dist. 2006), the court considered whether the insurer had a duty to defend the insured parents in a complaint alleging that the parents acted negligently in providing their son with the vehicle that he used to travel to another child's home and failing to control their son. The insureds' son had driven to another child's home and initiated an altercation that rendered the other child paralyzed. The insurer filed a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify the insureds or their son because (a) the policy covered "occurrence[s]" that were defined as accidents, and the injury was not the result of an accident, and (b) the intentional act exclusion in the policy applied. 846 N.E.2d at 646. The trial court found the insurer had a duty to defend the parents but not the son. *Id.*

The appellate court first addressed whether the complaint's allegations described an "occurrence" under the parents' policy. The court stated that whether there was an occurrence is determined from the insured's standpoint. The court restated the rule from *United States Mutual Accident Ass'n v. Barry*, 131 U.S. 100, 33 L.Ed. 60, 9 S.Ct. 755 (1889), summarized by the Illinois Supreme Court as follows:

> **[I]f an act is performed with the intention of accomplishing a certain result, and if, in the attempt to accomplish that result, another result, unintended and unexpected, and not the rational and probable consequence of the intended act, in fact, occurs, such unintended result is deemed to be caused by accidental means.** 846 N.E.2d at 650, citing *Lyons v. State Farm Fire & Casualty Co.*, 349 Ill.App.3d 404, 811 N.E.2d 718, 723, 285 Ill.Dec. 231 (5th Dist. 2004).

The court found that from the parents' point of view, the complaint made factual allegations that were within the policy's coverage because the underlying complaint only alleged negligence by the parents. It did not allege they intended their negligent acts to result in their son injuring the other child. 846 N.E.2d at 650 – 651.

The court then considered whether the intentional act exclusion applied. The court stated that to determine whether an occurrence is an accident requires a determination of whether the injury was expected or intended, not whether the act itself was performed intentionally. 846 N.E.2d at 651, quoting *Lyons, supra*, 811 N.E.2d at 723. The court held that the intentional act exclusion did not apply because the underlying complaint did not allege that the parents intended or expected their negligence to result in their son injuring the other child, nor that the injury was reasonably foreseeable from their alleged negligence. 846 N.E.2d at 651 – 652.

Likewise, in *United States Fidelity & Guaranty Co. v. Open Sesame Child Care Center,* 819 F.Supp. 756 (N.D.Ill. 1993), a daycare and one of its employees were sued after the employee molested a minor. The daycare was sued for negligent hiring and under a respondeat superior theory. In the ensuing declaratory judgment action, the daycare argued that it was being sued under a theory of negligence and that the policy covered negligence. In deciding this matter, the district court distinguished between the negligent hiring and respondeat superior theories. When the employer was being sued under a theory of respondeat superior, the intent of the employee was imputed on the employer, and the intentional act exclusion would apply. However, the employee's intent was not imputed on the daycare for the purposes of the negligent hiring theory because the employer's negligence was separate and distinct from the employee's intentional act. 819 F.Supp. at 760 – 761. As a result, a duty to defend was triggered under the policy. *See also American Family Mutual Insurance Co. v. Enright,* 334 Ill.App.3d 1026, 781 N.E.2d 394, 269 Ill.Dec. 597 (2d Dist. 2002) (insurer had duty to defend insured sued under theory of negligent hiring when employee of insured sexually assaulted patient; citing *Open Sesame*, court reasoned that employer's negligence was separate and distinct from employee's intentional act, and sexual assault was not intended or expected from employer's perspective). *But see United National Insurance Co. v. Entertainment Group, Inc.*, 945 F.2d 210, 212 (7th Cir. 1991) (when exclusion precluded all claims "arising out of an assault and/or battery, whether caused by or at the instigation of, or at the direction of, or omission by, the Insured, and/or his employees," exclusion precluded coverage for negligent supervision because focus of exclusion was on injury caused, not on acts of insured); *Hermitage Insurance Co. v. Dahms,* 842 F.Supp. 319, 325 (N.D.Ill. 1994) (similarly applying assault and battery exclusion even though claims against insured sounded in negligence because underlying injury was caused by assault).

3. [8.6] Self-Defense Exception to the Intentional Act Exclusion

Illinois courts have scrutinized the applicability of self-defense exceptions to the intentional act exclusion. For instance, in *Pekin Insurance Co. v. Wilson,* 237 Ill.2d 446, 930 N.E.2d 1011, 1014, 341 Ill.Dec. 497 (2010), Pekin Insurance issued a policy with an intentional act exclusion stating that the policy did not provide coverage to " 'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured." The policy also provided that the intentional act exclusion did "not apply to 'bodily injury' resulting from the use of reasonable force to protect persons or property." *Id.* Wilson qualified as an insured under the Pekin policy.

Johnson filed a personal injury suit against Wilson. Among the various allegations, Johnson's complaint asserted that Wilson "scream[ed] expletives at [Johnson] and 'brandished' a steel pipe" and "struck [Johnson] with the pipe in the shoulder and lacerated Johnson's right hand with a knife." 930 N.E.2d at 1013 – 1014. In response to Johnson's complaint, Wilson filed a counterclaim, "alleging that, during the incident [in question] Johnson was the aggressor and Wilson was defending himself." 930 N.E.2d at 1014.

In the ensuing coverage litigation, the trial court found that Pekin Insurance did not have a duty to defend because Johnson's complaint fell within the scope of the policy's intentional act exclusion. On appeal, the appellate court reversed. *Pekin Insurance Co. v. Wilson,* 391 Ill.App.3d 505, 909 N.E.2d 379, 300 Ill.Dec. 666 (5th Dist. 2009). According to the appellate court, although Johnson's complaint alleged facts falling within the intentional act exclusion, the self-

defense exception created a duty to defend. 909 N.E.2d at 386 – 389. The appellate court also rejected Pekin's argument that the court could not look at Wilson's counterclaim to determine the applicability of the self-defense exception. The appellate court stated that the insurer "drafted and sold an insurance policy that excludes coverage for intentional conduct by the insured unless the insured used reasonable force to protect persons or property." 909 N.E.2d at 387. As such, the court needed to "consider the facts alleged in the underlying lawsuit as a whole, including the allegations in Wilson's counterclaim or any other defense he might plead; otherwise, the self-defense exception is largely a nullity and without any meaning." *Id.*

The Supreme Court affirmed the appellate court's reversal of the trial court, concurring with the appellate court's analysis and permitting the consideration of Wilson's counterclaim. Quoting *American Economy Insurance Co. v. Holabird & Root,* 382 Ill.App.3d 1017, 886 N.E.2d 1166, 1178 – 1179, 320 Ill.Dec. 97 (1st Dist. 2008), the Supreme Court stated:

> **[C]onsideration of a third-party complaint in determining a duty to defend is in line with the general rule that a trial court may consider evidence beyond the underlying complaint if in doing so the trial court does not determine an issue critical to the underlying action. . . . *The trial court should be able to consider all the relevant facts contained in the pleadings, including a third-party complaint, to determine whether there is a duty to defend.* [**Emphasis in original.**]** 930 N.E.2d at 1019 – 1020.

Furthermore, the court found that, "in light of the broad scope of [Pekin's] policy, and the clear language of the self-defense exception, the policy requires the defense of the insured where a genuine issue of material fact exists as to whether the intentional acts of the insured were committed in self-defense." 930 N.E.2d at 1023.

On the other hand, when no specific self-defense exception is at issue, a duty to defend is less likely to be recognized. Therefore, in *Farmers Automobile Insurance Ass'n v. Danner,* 2012 IL App (4th) 110461, 967 N.E.2d 836, 359 Ill.Dec. 806, the insured argued the insurer had a duty to defend a complaint against him for battery when he raised the affirmative defense of self-defense. The trial court determined that it was proper to examine the affirmative defenses to resolve a duty to defend and found the allegations could be construed as negligence insofar as unreasonable use of force was used and self-defense was alleged. 2012 IL App (4th) 110461 at ¶23. The appellate court disagreed. While it acknowledged that an affirmative defense of self-defense may be relevant when a policy includes a self-defense exception, there was no such exception in the policy at issue. As a result, a determination of whether the insured acted in self-defense was irrelevant in identifying a duty to defend, and the insurer had no duty to defend. 2012 IL App (4th) 110461 at ¶51.

Similarly, in *State Farm Fire & Casualty Co. v. Weber,* 2014 IL App (1st) 130156-U, the trial court determined that State Farm had no duty to defend or indemnify an insured in a suit brought by a fellow bar patron who he was alleged to have stabbed several times with a knife he purported to carry for the purpose of self-defense. The insured was acquitted in a criminal trial for misdemeanor battery after claiming self-defense. In the civil action, the complaint alleged a single negligence count and that the insured "exceeded the amount of force necessary to defend himself." 2014 IL App (1st) 130156-U at ¶10. State Farm sought, and was granted, a declaratory

judgment that it had no duty to defend or indemnify in the matter, while the insured claimed, before the trial court and on appeal, that the alleged misuse of self-defense created an issue of fact and that such a determination was premature. The appellate court observed that the complaint itself contained no allegations of accidental conduct, and found that it "strains credulity to conclude that stabbing an unarmed combatant several times with a knife, even in self-defense, constitutes behavior of the type that State Farm policy intended to insure against." 2014 IL App (1st) 130156-U at ¶22. As in *Danner*, there was no self-defense exception in the policy that might otherwise bring the allegations within the policy.

4. [8.7] Attempts To Plead Around an Intentional Act Exclusion

In an attempt to avoid the effect of an intentional act exclusion, a claimant may include a theory against the insured seeking to take the claim outside of the scope of the exclusion. This appears to occur with some frequency when the underlying claim against the insured is assault or battery. It is important to note, however, that "[t]he factual allegations of the complaint, rather than the legal theory under which the actions is brought, determine whether there is a duty to defend." *Pekin Insurance Co. v. Dial*, 355 Ill.App.3d 516, 823 N.E.2d 986, 990, 291 Ill.Dec. 400 (5th Dist. 2005). As a consequence, when the factual allegations of the complaint demonstrate that the intentional act exclusion precludes coverage, then the theory against the insured should have little bearing on the outcome. Indeed, as a general matter, "when the underlying complaint alleges facts within or potentially within the policy's coverage, the insurer's duty to defend arises even if the allegations are groundless, false or fraudulent." *Illinois State Bar Association Mutual Insurance Co. v. Cavenagh*, 2012 IL App (1st) 111810, ¶20, 983 N.E.2d 468, 368 Ill.Dec. 55, citing *General Agents Insurance Company of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill.2d 146, 828 N.E.2d 1092, 1098, 293 Ill.Dec. 594 (2005).

Moreover, Illinois courts are hesitant to find a duty to defend when the facts strongly suggest that an intentional or expected injury occurred merely because a plaintiff has included a theory of negligence within his or her complaint. For instance, in *State Farm Fire & Casualty Co. v. Young*, 2012 IL App (1st) 103736, 968 N.E.2d 759, 360 Ill.Dec. 266, a complaint for battery and negligent failure to procure medical assistance was brought against an insured alleging that he provided heroin to a young woman, subsequently beat her, and failed to seek medical help for her, resulting in her death. The insurer refused coverage citing the policy's intentional act exclusion. The circuit court ruled that the insured had no duty to defend, noting that the defendant pled guilty to criminal battery and that providing the victim with heroin and beating her were willful and malicious acts. 2012 IL App (1st) 103736 at ¶8. The insured asserted that counts IV through VI alleged negligence based on his failure to seek medical attention, which brought the claims potentially under those occurrences covered under his policy. 2012 IL App (1st) 103736 at ¶27.

While recognizing that the allegations in question were termed "negligence," the appellate court, in reviewing the complaint as a whole, concluded that even the "failure to seek medical attention" counts support the conclusion that the defendant affirmatively chose not to seek help, which constituted an intentional act. 2012 IL App (1st) 103736 at ¶29. It was, therefore, "free from doubt that his failure to act was intentional and the result from his failure to act was expected," and that the insurer had no duty to defend based on the exclusionary language of the policy. 2012 IL App (1st) 103736 at ¶41.

B. [8.8] Arson

An arson claim against an insured may also raise the possibility that a policy's intentional act exclusion applies. In *Farmers Automobile Insurance Ass'n v. Medina*, 29 Ill.App.3d 224, 329 N.E.2d 430 (2d Dist. 1975), a minor, covered by a homeowner's policy, lit gasoline on fire, which in turn ignited and burned a Cadillac. After the minor sought a defense under the homeowner's policy, the homeowner's carrier filed a declaratory judgment action to determine if it had a duty to defend the minor. The trial court found that "the intentional act of the minor defendant caused an unintended result." 329 N.E.2d at 432. The appellate court in *Farmers* announced that the proper test when considering an intentional act exclusion was "whether the injury was not caused intentionally but was, rather, an unintended result of an intentional act." 329 N.E.2d at 431. The court stated that "courts uniformly hold coverage under an exclusionary clause identical to or similar to the one before us is afforded where the injury was the unintended result of an intentional act." 329 N.E.2d at 433. However, the appellate court felt that the trial court's decision was contrary to the manifest weight of the evidence and reversed, finding that the burning of the car was the minor's intended result. Therefore, the exclusionary clause applied.

Likewise, *State Farm Fire & Casualty Co. v. Martin*, 186 Ill.2d 367, 710 N.E.2d 1228, 238 Ill.Dec. 126 (1999), involved an arrangement made between Martin and Gordon to destroy a building owned by Martin. Gordon was one of Martin's tenants and, in exchange for his participation, Martin offered him a reduced rental rate. Gordon ignited a fire by leaving an unattended candle in a hamper in the basement with accelerants. During the ensuing blaze, firefighters Tim Lewis and Gary Porter were killed. Thereafter, Martin was indicted by a federal grand jury for "maliciously damaging and destroying by means of fire, [his] building . . . and as a direct and proximate result of this conduct, death resulted to Gary Porter and Tim Lewis, both firemen in Alton, Illinois." 710 N.E.2d at 1230. Wrongful-death suits were subsequently filed by each of the deceased's estates against Martin. Martin tendered the defense of both complaints to State Farm under his rental insurance policy. Because of Martin's arson indictment, State Farm denied coverage under the policy and refused to defend Martin. State Farm then filed an action for a declaration that it owed no duty to defend or indemnify Martin.

After Martin was subsequently found guilty on the criminal charge, State Farm filed a motion for summary judgment in the declaratory judgment action. The trial court found that coverage existed and denied State Farm's motion, granting summary judgment in favor of the defendant and against State Farm. *Id.* In the meantime, the trial court in the wrongful-death case had already entered default judgments against Martin on both complaints. State Farm appealed. The appellate court opined that State Farm's policy substantively required it to indemnify Martin for his liability resulting from the deaths of the two firemen because there was no evidence that Martin had intended to kill the firemen who responded to the blaze. *Id.*

On appeal, the Supreme Court reversed, finding that State Farm had no duty to indemnify the insured. According to the Supreme Court, the language of State Farm's policy excluded coverage for injuries that were "expected or intended" *or* that were "the result of willful and malicious acts of an insured." 710 N.E.2d at 1233. By use of the conjunction "or," the policy unambiguously indicated that each of the two exclusionary clauses must be given its own meaning. Therefore, the Supreme Court found that the applicability of the willful and malicious exclusion could not be

made to depend on whether Martin subjectively expected or intended to injure the decedent firemen. The court held that Martin's act in hiring a tenant to set fire to Martin's building, which ultimately resulted in the deaths of two firemen, constituted a willful and malicious act as a matter of law and, therefore, fell within the exclusionary provisions of the policy at issue. *Id.* Therefore, State Farm was not required to indemnify Martin for the civil liability resulting from his actions.

In *American Family Mutual Insurance Co. v. Guzik*, 406 Ill.App.3d 245, 941 N.E.2d 936, 347 Ill.Dec. 67 (3d Dist. 2010), the court examined whether a homeowner's policy applied to an explosion and fire at the insured's house, which spread to neighborhood property. The policy covered:

> ***[B]odily injury* or *property damage* caused intentionally by or at the direction of any *insured* even if the actual *bodily injury* or *property damage* is different than that which was expected or intended from the standpoint of any *insured*. [**Emphasis in original.**]** 941 N.E.2d at 938.

The insurer filed for a declaratory judgment that it did not owe a duty to defend, as the damage resulted from the insured's intentional act of arson. The insured maintained that he did not intend to damage the surrounding homes and that his actions were, therefore, negligent and non-intentional. *Id.* The appellate court found that the policy language was unambiguous that coverage applied only to accidents, and that the insured intended to cause the fire to his home. The damage to the neighboring houses, even if it was not what the insured desired or expected, was a "rational and probable consequence of the explosion and fire" and fell within the parameters of the exclusionary clause. 941 N.E.2d at 939.

C. [8.9] Intoxication Negating Intent

On occasion, Illinois courts have also addressed whether the insured's intoxication can preclude the application of a policy's intentional act exclusion. In *Allstate Insurance Co. v. Carioto*, 194 Ill.App.3d 767, 551 N.E.2d 382, 141 Ill.Dec. 389 (1st Dist. 1990), Carioto, the insured, assaulted and repeatedly stabbed Evans during the course of an armed robbery. Carioto was later arrested and pleaded guilty to attempted murder; he was sentenced to 15 years' imprisonment. Evans subsequently filed a civil suit for tort damages, including charges against Carioto's mother for negligent supervision of Carioto. 551 N.E.2d at 384. Allstate, the homeowner's insurer of Carioto's mother, brought a declaratory judgment action seeking a determination that it was not obligated to indemnify or defend Carioto in the underlying tort action.

On appeal, Evans argued that summary judgment was inappropriate because a material question of fact existed as to whether Carioto intended to injure Evans. Evans argued that it was undisputed that Carioto was intoxicated at the time of the occurrence and that whether Carioto's intoxication negated his intent was a question for the jury. Allstate conceded that Carioto was intoxicated but argued that Carioto's intoxication could not, as a matter of law, negate intent since intoxication is not a defense to a general intent crime and "general intent" was the level of intent that the policy exclusion contemplated. The court noted there was little support for Allstate's

argument that "intent" for purposes of an exclusionary clause in an insurance policy is identical to "general intent" as that term is understood in criminal cases. 551 N.E.2d at 388 – 389.

The court then found that the question of intoxication must be considered before it could decide whether Carioto's conduct fell within the scope of the insurance policy's exclusionary clause. The court held that intoxication might negate intent for purposes of an exclusionary clause, but only if the insured was so intoxicated that he or she was not able to realize the probable results of his or her actions. 551 N.E.2d at 389. Noting that this question is ordinarily one for the trier of fact, the court further held that it did not believe there was a material issue of fact regarding intoxication in this case, given Carioto's admissions that he had intended to harm Evans and the psychiatric evidence indicating that Carioto was able to appreciate the criminality of his actions. *Id.*

In *Mid America Fire & Marine Insurance Co. v. Smith*, 109 Ill.App.3d 1121, 441 N.E.2d 949, 65 Ill.Dec. 634 (4th Dist. 1982), the court addressed similar arguments regarding intoxication stemming from injuries sustained in a bar fight. The injured man, Smith, argued that the depositions and other matters before the court contained evidence creating a question of fact as to whether his assailant, Osborne, was so intoxicated at the time of the occurrence that he could not form the requisite intent to injure Smith. Smith relied on deposition testimony that Osborne had consumed very large quantities of intoxicants just prior to the episode and Osborne's deposition testimony that he was so intoxicated that later he could not recall some aspects of the episode. 441 N.E.2d at 951. The deposition evidence as to Osborne's intoxication, however, was negated by Osborne's testimony that he was not so intoxicated that he could not have driven himself home, by his testimony that he remembered substantial parts of the episode, and by his statement that he intended to kick Smith. Ultimately, the court found that Osborne intentionally struck Smith and must be deemed to have intended the natural consequences of his act. Because some injury was intended, it was immaterial that the particular injury that resulted was not specifically intended. Thus, the exclusionary clause of the liability policy was applicable, and the plaintiff, Mid America, owed no duty to defend or indemnify Osborne. *Id.*

In *Badger Mutual Insurance Co. v. Murry*, 54 Ill.App.3d 459, 370 N.E.2d 295, 12 Ill.Dec. 672 (3d Dist. 1977), the defendant, Murry, was placed under arrest by a police officer for driving under the influence of alcohol. While placing Murry in the back of the squad car, Murry repeatedly kicked the officer in the face, nose, and right thumb. The plaintiff, Badger Mutual Insurance, filed a declaratory judgment action, arguing that the homeowner's policy did not provide coverage for any of Murry's actions because the injuries were expected and intended and the policy excluded intentional acts from coverage. The trial court ruled in favor of Badger Mutual Insurance, holding that it was not obligated to defend Murry due to his intentional actions. 370 N.E.2d at 298. The trial court noted that Murry's intoxication was no excuse for the failure to act reasonably under the law and that intoxication could not excuse what would be a reasonable expectation of resulting injury. The appellate court affirmed the trial court's holding that Murry was not so intoxicated as to be unable to realize the probable results of his actions. The court found it significant that Murry went to the squad car unassisted and, after becoming engaged in an altercation with the police officer, voluntarily quit his attacks on the officer when another officer intervened, thereby acknowledging that he realized that further efforts on his part to injure a police officer would be useless. 370 N.E.2d at 300.

In *Prudential Property & Casualty Insurance Co. v. Kerwin*, 215 Ill.App.3d 1086, 576 N.E.2d 94, 159 Ill.Dec. 425 (1st Dist. 1991), Leno had a personal injury suit brought against him alleging that he negligently or intentionally shot Kerwin. The lawsuit arose when Leno, after drinking most of the night, encountered Kerwin and his wife in the parking lot of a tavern. After an exchange of words, Leno shot Kerwin in the chest. Prudential eventually filed a declaratory judgment action and moved for summary judgment in that action. The trial court granted summary judgment in favor of Prudential on the basis that the act was not covered by the policy because the act was intentional. 576 N.E.2d at 96 – 97.

On appeal, the Kerwins contended, among other things, that Leno's intoxication affected the application of the policy's intentional act exclusion. The court declared that it was a quantum leap from the proposition that extreme intoxication could be used as an affirmative defense in a criminal case to relieving citizens of the consequences of their actions in a civil case. The appellate court held that it was contrary to public policy to relieve citizens of the consequences of their actions because of voluntary drunkenness. 576 N.E.2d at 97. An insured cannot argue that an insurance policy should cover actions that were otherwise intentional just because he or she was intoxicated at the time. Furthermore, the court noted that it needed to give effect to the intention of the parties as expressed by the terms of the policy. 576 N.E.2d at 98. In its plain sense, a person "intends" the results of an act committed while voluntarily intoxicated. The shooting was otherwise intentional, and the trial court's decision, therefore, was affirmed.

D. [8.10] Insanity Negating Intent

In *Western States Insurance Co. v. Kelley-Williamson Co.*, 211 Ill.App.3d 7, 569 N.E.2d 1289, 155 Ill.Dec. 678 (2d Dist. 1991), *appeal denied*, 141 Ill.2d 562 (1991), the insured, Derwent, was sued after driving his automobile into a gas station owned by Kelley. Western States filed a declaratory judgment action against both Derwent and Kelley, alleging that it was not liable to defend Derwent under its insurance agreement because the policy excluded intentional acts and Derwent intentionally drove into the building. At trial, Derwent stated that he intended to commit suicide by driving into the gas station wall. He also admitted to knowing that he would damage the station by driving into it. At trial, the defendants presented expert evidence that Derwent was insane when the accident occurred and that his acts were not intentional. The trial court found Derwent was legally insane when the accident occurred and, therefore, could not form the necessary intent required under the policy. Thus, Western States was required to provide a defense and other benefits under the policy for Derwent. 569 N.E.2d at 1291. On appeal, the appellate court affirmed, finding, among other things, that when considering an exclusionary clause in a policy, the insured must have the mental capacity to form the requisite intent at the time the injury is inflicted. 569 N.E.2d at 1293.

In *State Farm Fire & Casualty Co. v. Watters*, 268 Ill.App.3d 501, 644 N.E.2d 492, 205 Ill.Dec. 936 (5th Dist. 1994), when the insured's specific intent to harm children sexually assaulted by him could be inferred as matter of law, coverage for sexual misconduct was precluded under the homeowner's policy despite evidence indicating that the insured had a diminished capacity and an inability to form the intent to harm children. The insured was found guilty of criminal charges despite his mental illness, and his conviction evidenced his capacity to form intent to commit acts, knowledge of acts, and the ability to distinguish right from wrong. 644 N.E.2d at 497.

E. [8.11] Sexual Abuse/Molestation — Presumed Intent

Illinois courts have held that sexual molestation is an intentionally caused injury as a matter of law. In *Pekin Insurance Co. v. Dial,* 355 Ill.App.3d 516, 823 N.E.2d 986, 291 Ill.Dec. 400 (5th Dist. 2005), the court held that an insurance company was under no duty to defend or indemnify an insured who sexually abused a minor because the nature of the conduct itself established, as a matter of law, that the insured expected or intended to injure the victim, even though the complaint alleged that the actions were a result of the insured's "misapprehension of [the minor's] desires and wishes." 823 N.E.2d at 992. The *Dial* court also held that coverage was not triggered because the insured's child sexual abuse fell outside the definition of "occurrence," and because, under the policy, abuse was excluded as an "expected or intended" act. *Id. See also State Farm Fire & Casualty Co. v. Watters,* 268 Ill.App.3d 501, 644 N.E.2d 492, 205 Ill.Dec. 936 (5th Dist. 1994) (finding no coverage for claims arising out of insured's sexual molestation of children).

In *Hartford Insurance Company of Illinois v. Kelly,* 309 Ill.App.3d 800, 723 N.E.2d 288, 243 Ill.Dec. 256 (1st Dist. 1999), suit was filed against Kelly alleging separate counts of negligence, intentional sexual battery, and sexual harassment against a minor. Kelly had a homeowner's policy from Hartford Insurance Company that provided coverage for damages because of bodily injury caused by an occurrence. However, the policy contained an exclusion for bodily injury or property damage that was "expected or intended" by the insured. After receiving the complaint, the insured tendered the matter to Hartford for defense under his policy. Hartford denied the request and filed a declaratory judgment action, arguing the complaint alleged "intentional behavior" that fell within the expected and intended exclusion of the policy. On appeal, comparing the complaint's allegations with the applicable provisions of the insurance policy, the appellate court stated that under Illinois law, when "an underlying complaint sets forth factual allegations of sexual misconduct, specific intent to harm is inferred as a matter of law, especially when the victims are minors." 723 N.E.2d at 292. Under this "inferred intent rule," the insurer has no duty to defend or provide coverage to the insured.

In *Westfield National Insurance Co. v. Continental Community Bank & Trust Co.,* 346 Ill.App.3d 113, 804 N.E.2d 601, 281 Ill.Dec. 636 (2d Dist. 2003), the court considered whether claims against a facilitator of sexual abuse would fall within the scope of an intentional act exclusion even when the facilitator did not participate in the abuse. In *Westfield,* the homeowner's insurer Westfield brought a declaratory judgment action seeking a determination that it was not obligated to defend its insured in a civil suit filed against her by victims of child molestation. *Westfield* involved an aunt who invited her minor nieces to occasionally stay at her house. During these visits, the aunt's husband would molest the girls. The husband later pleaded guilty and was criminally convicted for these incidents. The minors, in turn, sued the aunt, alleging she owed a duty to protect them from harm and danger that she knew or should have known existed. 804 N.E.2d at 603. Westfield argued that the underlying complaint alleged deliberate and intentional misconduct on the part of the aunt that enabled Valdez to molest the minors. Thus, there was no duty to defend or indemnify the aunt because this conduct was barred under the expected or intended exclusion of the policy. 804 N.E.2d at 603 – 604.

The *Westfield* court held that an insured's intent to cause injury in sexual abuse cases can be inferred as a matter of law because injury is an inevitable result in sexual abuse cases, especially when the victims are minors. 804 N.E.2d at 605 – 606. The *Westfield* court was not dealing with the party who actually perpetrated the abuse, however. As the wrongdoing of one insured could not be imputed to another insured absent an insurance provision to the contrary, the issue was whether a duty to defend or indemnify existed for the spouse of a perpetrator who committed the sexual abuse of minors. The court found the intentional act exclusion of the policy applied, and Westfield did not owe a duty to defend or indemnify the aunt. The court focused on the description of the aunt's conduct in relation to the abuse, which ranged from actively encouraging the girls to wear minimal and provocative clothing to passive acts, such as doing nothing when Valdez visited the girls' bedrooms at night. 804 N.E.2d at 609. Combined, the court found the record compelling that the aunt was aware of what was happening but did nothing to advise or report the abuse to the girls' parents. Ultimately, the court found the allegations raised against the aunt to be affirmative acts couched in terms of negligence, and the intentional act exclusion precluded coverage. 804 N.E.2d at 610.

Similar analysis was applied in *Empire Indemnity Insurance Co. v. Chicago Province of Society of Jesus*, 2013 IL App (1st) 112346, 990 N.E.2d 845, 371 Ill.Dec. 657. Various John Doe plaintiffs brought suit against the defendant for alleged molestation of minors by one of its priests. The complaints at issue alleged negligence, intentional infliction of emotional distress, and fraud against the organization and claimed that the organization knew or should have known of the abuse because they had knowledge of prior incidents of abuse by the same priest. 2013 IL App (1st) 112346 at ¶13. The defendant appealed summary judgment granted in favor of the insurers that had found, among other things, that the intentional act exclusion and actual knowledge exclusions of the operative policies applied and the insurers had no duty to defend.

The appellate court upheld the ruling as to the operation of the intentional act exclusion. Citing *Westfield*, the court noted that the complaints uniformly alleged that the organization was first appraised of allegations of abuse by the priest in question in 1969 and had subsequently received numerous other complaints prior to the abuse of the John Doe plaintiffs. The organization, therefore, should have reasonably anticipated further abuse, making the injuries to the John Doe plaintiffs an expected injury and barring coverage under the exclusion. 2013 IL App (1st) 112346 at ¶20.

Despite the application of the inferred intent rule when the perpetrator of the sexual molestation is an adult, when one minor has sexually abused another minor, Illinois courts have been reluctant to infer intent to injure as a matter of law. For instance, in *Country Mutual Insurance Co. v. Hagan*, 298 Ill.App.3d 495, 698 N.E.2d 271, 232 Ill.Dec. 433 (2d Dist. 1998), Hardwick alleged that Hagan invited her, when she was six years old, and her seven-year-old brother to his room to play. In his room, Hagan, who was fourteen years old at the time, performed certain sexual acts with Hardwick, such as forcing her to perform oral sex and attempting to rape her. Based on these allegations, Hardwick alleged that Hagan was liable for assault and battery, intentional infliction of emotional distress, negligence, and willful and wanton conduct. In the ensuing coverage action, the trial court granted summary judgment in favor of the insurer on the basis that sexual abuse is an intentionally caused injury as a matter of law. On appeal, the appellate court reversed. The appellate court noted that in cases involving an

adult insured's sexual abuse of a minor, Illinois courts have inferred, as a matter of law, that the insured intended to injure the minor. However, whether an intent to injure may be inferred when a minor insured sexually abuses another minor was an issue of first impression in Illinois. The appellate court noted that only a slight majority of courts have been willing to infer, as a matter of law, that a minor insured who sexually abuses another minor does so intentionally. 698 N.E.2d at 276.

The court held that the inferred intent standard should not apply when the insured is a minor and that such a determination should be made on a case-by-case basis. In such cases, a minor's intent is a question of fact based on the circumstances of the sexual conduct and the minor's individual characteristics and experience. 698 N.E.2d at 275. Therefore, the appellate court found it was error for the trial court in this case to decide, as a matter of law, that the exclusionary provision precluded coverage. In addition, according to the court, the allegations of Hardwick's complaint, which must be construed in the light most favorable to Hagan, did not permit a conclusion that he intended to injure her as a matter of law. Although there were allegations that he intended the sexual acts, there were no allegations that he intended to injure Hardwick by performing the acts. 698 N.E.2d at 277 – 278.

In certain circumstances, the coverage questions for complaints alleging sexual abuse may be complicated by the presence of a specific "sexual abuse" exclusion, which, depending on its language, may trigger a duty to defend for some parties and not for others. *National Casualty Co. v. Jewel's Bus Co.,* 880 F.Supp.2d 914, 916 (N.D.Ill. 2012), involved such a provision with the following language:

> **This policy does not apply to "bodily injury," "property damage" or "personal injury" sustained by any person arising out of or resulting from "sexual and/or physical abuse" by any person who actively participates in any act of "sexual and/or physical abuse."**

"Sexual and/or physical abuse" was defined elsewhere as "any sexual or physical injury or abuse action or behavior, including, but not limited to assault and battery, negligent or deliberate touching, corporal punishment and mental abuse." *Id.*

After a minor was sexually abused by a bus driver employed by Jewel's, the minor filed counts against the bus driver for assault, battery, and intentional infliction of emotional distress, against the Chicago Board of Education and Chicago Public Schools for negligent supervision, negligent hiring, negligent retention, and willful and wanton breach of duty, and against Jewel's for negligent supervision, negligent hiring, and willful and wanton breach of duty. The insurer claimed that the exclusion for sexual abuse applied and it had no duty to defend or indemnify Jewel's or the Chicago Board of Education, whereas a second insurer, seeking to have the other defend and indemnify, argued that even if coverage for the driver was excluded, the Chicago Board of Education and Jewel's were not "active participants" in the sexual abuse and a duty was triggered. *Id.*

The court found that the "active participant" language distinguished it from broader coverage provisions related to sexual abuse that had triggered exclusions in *United National Insurance Co.*

v. Entertainment Group, Inc., 945 F.2d 210 (7th Cir. 1991), and *Hermitage Insurance Co. v. Dahms*, 842 F.Supp. 319 (N.D.Ill. 1994). While it found the provision ambiguous, the court was compelled by its inclusion to construe it narrowly such that the "sexual abuse exclusion" excluded the conduct of the driver from coverage, but not that of the Chicago Board of Education or Jewel's.

F. [8.12] Products Liability

In *Affiliated FM Insurance Co. v. Beatrice Foods Co.*, 645 F.Supp. 298 (N.D.Ill. 1985), Affiliated issued to Beatrice Foods an excess liability insurance policy providing coverage for property damage liability assessed against Beatrice so long as such damages were sustained as a result of an "occurrence." An "occurrence" was defined as an "accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured." 645 F.Supp. at 299. Subsequent to the issuance of this policy, Beatrice was sued for defects in the manufacture or sale of a swimming pool coating known as Marbalon, which was marketed through the Beatrice Farboil division. These lawsuits were brought by a pool manufacturer and sought recovery for property damage to pools that used the defective swimming pool coating. In the property damage lawsuits against Beatrice, the court found that the swimming pool coating was defective and that Beatrice representatives had made misrepresentations about the testing and known efficacy of the product. There was no evidence in the property damage suits to suggest, however, that Beatrice knew that its product was defective.

After Beatrice sought indemnification for damages awarded in these lawsuits, Affiliated filed an action for declaratory judgment, arguing that the damages awarded in the underlying lawsuit were for injuries "expected [or] intended from the standpoint of the insured" within the meaning of the policy. *Id.* The district court, however, denied summary judgment for Affiliated. Although the court noted that the product ultimately proved defective and the insured's representatives deliberately withheld information, there was a lack of evidence that the insured knew that its pool coating was incurably defective. The court explained that the insured did not take a gamble that known defects in its product would go unnoticed, but instead took the gamble that an inadequately tested product would nonetheless prove marketable and that any defects manifested in practice could be easily remedied. 645 F.Supp. at 302. According to the court, this was insufficient evidence to prove that the damages were "expected" or "intended from the standpoint of the insured."

G. [8.13] Trespass

Trespass is one of those civil claims that may be based on either intentional or negligent conduct. As such, a determination of whether a CGL policy potentially provides coverage for damages resulting from a trespass requires an examination of the nature of the alleged trespass and the facts alleged against the insured and an evaluation of whether the damage caused (rather than the conduct of the insured) was intentional or expected. For instance, in *Lyons v. State Farm Fire & Casualty Co.*, 349 Ill.App.3d 404, 811 N.E.2d 718, 285 Ill.Dec. 231 (5th Dist. 2004), the insured brought an action against the homeowner's insurer for a declaratory judgment on a duty to defend and indemnify the insured in a neighbor's suit alleging trespass from the insured's

construction of levees. The *Lyons* court found that the trespass from the insured's construction of levees allegedly protruding onto adjacent property could be an "accident" and, thus, an "occurrence" within the meaning of the liability coverage of the homeowner's insurance policy, even though the insured intended to build the levees around the pond. 811 N.E.2d at 723 – 724. The insured argued that he did not intend to build part of the levees onto adjacent property and, thus, the resulting trespass could be said to be unintended or unexpected. Alternatively, if it was found that he intended the injury (*i.e.*, the trespass), the insurance policy would not provide coverage. The court emphasized that the focus of the inquiry in determining whether an occurrence was an accident was whether the injury was expected or intended by the insured, not whether the acts were performed intentionally. 811 N.E.2d at 724.

Similarly, in *Pekin Insurance Co. v. Miller*, 367 Ill.App.3d 263, 854 N.E.2d 693, 305 Ill.Dec. 101 (1st Dist. 2006), Pekin brought an action against the insured for a declaratory judgment on a duty to defend and indemnify the insured in the underlying suit alleging trespass when the insured, a tree clearing service, cleared trees on the wrong lots. The court followed *Lyons*, *supra*, in finding that clearing trees on the wrong lot was an "occurrence" potentially within the meaning of the liability coverage of the policy. Even though the insured intended to cut down the trees, there was no evidence the insured intended the injury that resulted. The court found it to be immaterial that the complaint alleged intentional torts because the property damage was not expected nor intended by the insured. 854 N.E.2d at 696 – 697. *See also West American Insurance Co. v. Kamadulski Excavating & Grading Co.*, No. 05-CV-206-DRH, 2006 WL 1235751 at **3 – 4 (S.D.Ill. May 4, 2006) (finding clearing of trees was intentional, but injury caused by clearing trees from wrong property was unintentional, rendering conduct accidental for purposes of insurance policy); *Dial v. City of O'Fallon*, 81 Ill.2d 548, 411 N.E.2d 217, 222, 44 Ill.Dec. 248 (1980) (explaining that one can be liable for trespass for causing thing or third person to enter land of another either through negligent or intentional act).

H. [8.14] Racketeering or Conspiracy

In *West Bend Mutual Insurance Co. v. Crichton*, 319 F.Supp.2d 887 (N.D.Ill. 2004), the court found the insurer did not have a duty to defend its insured in a complaint alleging the insured engaged in racketeering and conspiracy. The complaint alleged that Crichton was attempting to raise campaign funds for the incumbent sheriff by giving larger territory to towing companies who contributed larger amounts of money and reducing territory for towing companies that would not contribute funds. The court found the insurer had no duty to defend Crichton, stating, "[t]here is no such thing as accidental participation in a conspiracy." 319 F.Supp.2d at 889.

I. [8.15] Junk Faxes and Telemarketing

The Telephone Consumer Protection Act of 1991 (TCPA), Pub.L. No. 102-243, 105 Stat. 2394, prohibits businesses from making telemarketing calls and sending "junk" faxes:

> **It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States —**
>
> *** * ***

> **(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);**
>
> **(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement [**or**]**
>
> *** * ***
>
> **(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.** 47 U.S.C. §227(b)(1).

The TCPA has spawned countless lawsuits, and many of these lawsuits have resulted in coverage disputes between the insured and its insurer. Some of these coverage disputes involve a determination of whether a policy's intentional act exclusion precludes coverage of the claim. For example, in *Insurance Corporation of Hanover v. Shelborne Associates,* 389 Ill.App.3d 795, 905 N.E.2d 976, 329 Ill.Dec. 138 (1st Dist. 2009), Insurance Corporation of Hanover issued a CGL policy to Shelborne Associates. The policy contained an exclusion prohibiting coverage for injuries that were intended or expected by the insured. Shelborne Associates was subsequently sued for transmitting unsolicited faxes. Count II of the complaint alleged that Shelborne's distribution of unauthorized faxes constituted conversion, and count III alleged that this conduct amounted to trespass. Counts II and III alleged that Shelborne "[knew] or should have known" that its distribution of faxes was not authorized. 905 N.E.2d at 984.

After Shelborne submitted the claim to its insurer, Insurance Corporation of Hanover filed a complaint for declaratory judgment asserting, among other things, that the policy's intentional act exclusion precluded coverage for counts II and III. The appellate court disagreed, finding a duty to defend. The court noted that its primary inquiry was whether the injury was intentionally caused, not whether the insured acted intentionally. 905 N.E.2d at 983. Applying this principle to the underlying complaint against the insured, the court determined that "if [the] insured believed its fax was welcome, then any injury was not expected or intended." 905 N.E.2d at 984. Because counts II and III against Shelborne could include a situation in which Shelborne negligently believed that its unauthorized faxes were welcome, the insurer had a duty to defend. Moreover, when imposing a duty to defend, the court refused to adopt the insurer's position that the mere sending of a fax "correlates with an intent to cause property damage under the policy" because this would mean that "every fax communication equals intentional property damage by the sender, even if the fax was invited by the recipient." *Id.*

J. [8.16] Fraud and Misrepresentation

An underlying complaint alleging that an insured engaged in fraud, misrepresentation, or deceit may implicate a liability policy's intentional act exclusion. For example, in *West Bend Mutual Insurance Co. v. People,* 401 Ill.App.3d 857, 929 N.E.2d 606, 340 Ill.Dec. 955 (1st Dist. 2010), West Bend insured Father & Sons Contractors under a CGL policy. The CGL policy

contained an exclusion for "expected or intended injury." 929 N.E.2d at 609. Father & Sons was sued in four lawsuits asserting various causes of action, including violations of the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.*, common-law fraud, breach of contract, and unjust enrichment. The complaints alleged that Father & Sons "misrepresented the start and/or completion date of many projects"; "misrepresented that they had not had complaints about their construction work"; "misrepresented that certain work would be included in construction projects, which was not included"; "entered into contracts for certain work, and, after taking a deposit, refused to do the project unless money in excess of the contract price was paid"; "misrepresented the nature of documents"; "misrepresented the type and quality of materials that would be used on construction projects"; and "misrepresented to consumers that [it] would not use subcontractors . . . when, in fact, [it] used subcontractors to do the work." 929 N.E.2d at 610.

In the ensuing coverage litigation, the appellate court found that no duty to defend these complaints existed under the CGL policy for a number of reasons, including the implication of the policy's intentional act exclusion. According to the appellate court:

> **The four underlying complaints that are the subject of this declaratory judgment action similarly allege intentional misconduct designed to defraud customers of Father & Sons. The four underlying plaintiffs' complaints do not allege that Father & Sons acted negligently. Instead, the four plaintiffs' complaints allege that Father & Sons knowingly performed improper home repair and remodeling. Thus, the exclusion for expected or intended injury bars coverage for the acts alleged in all four of the underlying complaints.** 929 N.E.2d at 616.

Similarly, in *West American Insurance Co. v. Mund*, 500 F.Supp.2d 1071, 1074 (S.D.Ill. 2007), West American insured Mund under two CGL policies that contained the following intentional act exclusion:

> **This insurance does not apply to:**
>
> **a. Expected or Intended Injury**
>
> **"Bodily injury" or "property damage" expected or intended from the standpoint of the insured.**

Mund was named as a defendant in a lawsuit containing claims of intentional misrepresentation, unjust enrichment, and forcible entry and unlawful detainer. 500 F.Supp.2d at 1073.

In the ensuing coverage litigation, the district court found that West American had no duty to defend Mund because the claims fell within the scope of the intentional act exclusion. The court reasoned that

> **[**t**]he underlying complaint is replete with allegations that Mund's conduct was done to intentionally deceive [**the underlying plaintiffs**] and that Mund knew or should have known that his actions were false. The facts, as presented in the underlying**

> **complaint, are consistently couched in terms of intentional deception and fraud. . . . Thus, the exclusions of the insurance policies apply and the alleged intentional conduct is precluded from coverage. [**Citation omitted.**]** 500 F.Supp.2d at 1078.

See also United Fire & Casualty Co. v. Jim Maloof Realty, Inc., 105 Ill.App.3d 1048, 435 N.E.2d 496, 61 Ill.Dec. 799 (3d Dist. 1982) (in which alleged scheme predicated on intentional fraud did not fall within coverage of insurance policy and did not give rise to duty to defend); *Cambridge Mutual Fire Insurance Co. v. 1347-49 North Sedgwick Condominium Ass'n*, No. 12 C 878, 2013 WL 271222 (N.D.Ill. Jan. 23, 2013) (complaint regarding failure to fix plumbing defects in condominium building alleged knowledge of defect on part of condominium association and its managers and, therefore, insurer had no duty to defend).

However, in *USAA Casualty Insurance Co. v. McInerney*, 2011 IL App (2d) 100970, ¶6, 960 N.E.2d 655, 355 Ill.Dec. 773, sellers of real estate were insured under a homeowner's policy that provided coverage for suits against the sellers "because of bodily injury or property damage caused by an occurrence." The buyers of the property brought a breach of contract action against the sellers alleging fraudulent and negligent misrepresentation based on disclosures the sellers had made about leakage problems. The homeowner's insurer denied the claim on the basis that the complaint did not allege bodily injury or property damage caused by an occurrence.

Although the appellate court recognized that no other Illinois court has addressed whether a negligent misrepresentation could constitute an "occurrence," the court found that negligent misrepresentation can satisfy these conditions. It reasoned:

> **Illinois courts have held that claims based on negligence are not necessarily excluded from coverage of general liability policies as long as the insured did not expect or intend the injury. . . . There is no Illinois authority for the proposition that negligent misrepresentation cannot fall within the realm of coverage under a general liability policy. As such, we find no reason why we should treat a claim for negligent misrepresentation any differently than any other claim based on negligence. [**Citations omitted.**]** 2011 IL App (2d) 100970 at ¶18.

Under the facts and counts alleged, it was conceivable that the sellers were unaware of the defects and had never experienced any flooding, making their misrepresentations negligent rather than intentional in nature. 2011 IL App (2d) 100970 at ¶26. The court further found that the complaint also alleged that the negligent misrepresentations caused "property damage" and "bodily injury" because the complaint alleged that the misrepresentations caused injuries post-sale, namely that water infiltration damaged the buyers' personal belongings and caused the buyers to suffer bodily injury. 2011 IL App (2d) 100970 at ¶24.

K. [8.17] Criminal Act Exclusion

In addition to the traditional intentional act exclusion, liability policies may contain a criminal act exclusion that precludes coverage for bodily injuries or property damage reasonably expected to result from the criminal acts of the insured. Although this exclusion differs from an intentional act exclusion, it overlaps the intentional act exclusion in many situations, warranting a brief discussion of the exclusion in this chapter.

Unlike the intentional act exclusion, the criminal act exclusion focuses on whether the injury resulted from a criminal act, not whether the injury was intentionally caused. For instance, in *Allstate Insurance Co. v. Greer*, 396 Ill.App.3d 1037, 921 N.E.2d 793, 796, 336 Ill.Dec. 937 (3d Dist. 2009), the Leifheits were covered by an Allstate homeowner's policy that excluded coverage for "bodily injury or property damage intended by, or which may reasonably be expected to result from the *intentional or criminal acts* or omissions of, any insured person." [Emphasis in original.] This exclusion further stated that it "applies regardless of whether or not such insured person is actually charged with, or convicted of a crime." *Id.*

A suit was filed against the Leifheits. According to the suit, the Leifheits, who were over the age of 18, negligently and willfully supplied alcohol to a 17-year-old, "causing him to become intoxicated and impaired," and the teenager's intoxication lead to his death in a motor vehicle accident. 921 N.E.2d at 795. In Illinois, supplying alcohol to a minor is a crime. See 235 ILCS 5/6-16. After the insureds submitted a claim, Allstate denied that it had a duty to defend. According to the insurer, "(1) the statute creating liability in the lawsuit required a criminal act, (2) the insurance policy excluded coverage for conduct constituting a criminal act, and (3) the exclusion applied regardless of whether the insured was ever charged or convicted for the criminal act." 921 N.E.2d at 795.

During the declaratory judgment action, the appellate court concurred with Allstate and found that

> **a comparison of the allegations in the underlying complaint to the provisions of the insurance policy shows that [**the insurer**] does not have a duty to defend. In the underlying complaint, the decedent's parents alleged that the [**insureds**] were liable for damages because they supplied alcoholic beverages to the decedent, causing him to become intoxicated and impaired, which caused him to die while driving a motor vehicle. These allegations describe criminal conduct. . . . By its plain language, the insurance policy excludes coverage for criminal acts.** 921 N.E.2d at 796.

Furthermore, it was irrelevant to the court that the allegations of the complaint did not assert that the insureds intended to injure the teenager because the policy contained "a criminal-act exclusion under which coverage would be barred irrespective of its intentional-act exclusion." *Id.* Finally, the court could not find any public policy that would prohibit the inclusion of this type of exclusion within a homeowner's policy. 921 N.E.2d at 796 – 797.

L. [8.18] Malicious Prosecution

Illinois Farmers Insurance Co. v. Keyser, 2011 IL App (3d) 090484, 956 N.E.2d 575, 353 Ill.Dec. 713, examined whether an intentional act exclusion extends to coverage for malicious prosecution when the policy granted coverage for malicious prosecution in the insuring agreement but excluded intended or expected injuries. The insured's homeowner's policy specifically included "malicious prosecution" within its coverage for personal injury and excluded coverage for injury intentionally caused by the insured. The insurer claimed that the malicious prosecution claim alleged intentional acts that were excluded under the policy. The court found that the express provision covering malicious prosecution in the policy generated a

duty for the insurer to defend the claim. 2011 IL App (3d) 090484 at ¶13. While it agreed that a contract indemnifying an insured for its intentional acts is against public policy, the degree to which it violates public policy is relative to "the nature of the risk against which insurance is sought." 2011 IL App (3d) 090484 at ¶18. Here, any indemnity would provide a benefit to the victim of the intentional conduct and would not result in compensation to the insured for her wrongdoing. Accordingly, the insurer was compelled to fulfill its contractual obligation and defend and indemnify.

III. [8.19] PROFESSIONAL SERVICES

Policies offering coverage for professional services can add an additional wrinkle to claims that involve conduct that often falls within the confines of an intentional act exclusion — such as fraud and deceit. Professional services policies frequently cover certain enumerated professional services relevant to the profession at issue and possibly "other professional services" rendered in "other professional capacity." Such "non-medical" professional liability policies are frequently called "errors-and-omissions policies" and are designed to insure members of a particular professional group or occupation from special risks (including negligence, omissions, and mistakes) inherent in the practice of that profession. *Management Support Associates v. Union Indemnity Insurance Company of New York*, 129 Ill.App.3d 1089, 473 N.E.2d 405, 409, 85 Ill.Dec. 37 (1st Dist. 1984), citing 7A Appleman, INSURANCE LAW AND PRACTICE (Berdal ed.), §4504.1, p. 310. When a claimant sues an insured under one of these policies for conduct that often implicates an intentional act exclusion, the scope of the policy's definition of "professional services" is often an important threshold issue to consider because it will usually impact whether coverage exists under the policy.

Sections 8.20 and 8.21 below consider cases in which the wrongful act or complained of conduct was argued to have occurred during the rendering of professional services.

A. [8.20] Scope of Professional Activity

In *Mendelsohn v. CNA Insurance Co.*, 115 Ill.App.3d 964, 451 N.E.2d 919, 71 Ill.Dec. 765 (5th Dist. 1983), Mendelsohn filed a declaratory judgment action seeking a declaration that coverage was available to him under his professional liability insurance in an action brought against him by his former wife. Mendelsohn was sued by his wife for intentionally committing certain acts during the course of their divorce proceedings that he knew would upset her in her fragile mental state. Mendelsohn claimed to have represented himself in the divorce even though court documents showed a different attorney of record. CNA filed a motion to dismiss the complaint, which was granted by the trial court.

Mendelsohn appealed, claiming that the lawsuit arose "out of an alleged personal injury caused by an occurrence and arising out of [his] professional and business activity." 451 N.E.2d at 921. He claimed that it was obvious that he was "being sued as an attorney." 451 N.E.2d at 922. The appellate court held that "the phrase 'professional and business activities' refers to the practice of law" and not "being sued as an attorney." *Id.* Practicing law necessarily implies being

in the service of another person, a client. Defending oneself in an action is not conducting a professional or business activity. Therefore, CNA owed no duty to defend since the complaint was not within coverage of the professional liability insurance.

In *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill.2d 384, 620 N.E.2d 1073, 1076, 189 Ill.Dec. 756 (1993), Mid-State Realty was sued by Dependable Realty under several theories, including tortious interference with a contract, unfair competition, and fraud. Mid-State Realty had "Real Estate Agents and Brokers Professional Liability Insurance Polic[ies]" through Crum. Crum filed a declaratory judgment action to determine if they had a duty to defend and indemnify Mid-State. The trial court held that Crum did have a duty to defend Mid-State, but the court stated that any determination concerning the indemnity issue would be premature. The appellate court affirmed both rulings.

The Supreme Court stated that professional liability policies provide

> **a specialized and limited type of coverage as compared to comprehensive insurance; it is designed to insure members of a particular professional group from the liability arising out of a special risk such as negligence, omissions, mistakes and errors *inherent in the practice of the profession.* [**Emphasis added by court.**]** 620 N.E.2d at 1078, quoting 7A John Allan Appleman and Jean Appleman, INSURANCE LAW & PRACTICE §4504.01, p. 310 (rev. ed. 1979).

In this case, the risks undertaken by the insurance company were those inherent to the practice of real estate. In order to be covered by the policy, "the claims made against the insureds by the underlying plaintiff must be made *because of* an act, error, or omission in the insured's performance or rendering of" professional services, demonstrating "a direct, causal relationship between the insured's performance of real estate services and the underlying claims made against the insured." [Emphasis in original.] 620 N.E.2d at 1079. Dependable Realty's claims were the result of tortious conduct on the part of Mid-State, not because of an error in professional service. The risk inherent in conducting business in an unfair and tortuous manner was "certainly not one inherent in the practice of the real estate profession." *Id.* Therefore, the court held Crum had no duty to defend. The court further found that the determination of the duty to indemnify is not premature when the insurance company has been found to have no duty to defend. Since the duty to defend is broader than the duty to indemnify, there will never be a situation in which the insurance company does not have to defend but must indemnify. *But see Keystone Consolidated Industries, Inc. v. Employers Insurance Company of Wausau*, 456 F.3d 758 (7th Cir. 2006), and *Sokol & Co. v. Atlantic Mutual Insurance Co.*, 430 F.3d 417 (7th Cir. 2005), which both state that *Crum & Forster* does not stand for the proposition that absence of a lawsuit relieves an insurer of the duty to indemnify in every context.

In *Continental Casualty Co. v. McDowell & Colantoni, Ltd.*, 282 Ill.App.3d 236, 668 N.E.2d 59, 217 Ill.Dec. 874 (1st Dist.), *appeal denied*, 168 Ill.2d 585 (1996), McDowell & Colantoni, a law firm, was sued after it was discovered that one of the partners, Colantoni, was transferring money out of clients' trusts and into the firm's general accounts. The complaint contained many allegations, including, on the part of the law firm, breach of contract, breach of fiduciary duties, and negligent supervision of trust accounts. A Florida court found that the firm was liable for

negligently supervising its accounts. The firm had a professional liability insurance policy through Continental. Continental denied coverage and filed a declaratory judgment action to determine if it had a duty to defend. The trial court ruled in favor of Continental, finding no duty to defend.

On appeal, the law firm argued that negligent supervision of accounts fell within the rendering of professional services covered by the policy because the supervision of accounts was "an integral part of an attorney's professional services." 668 N.E.2d at 63. The firm further argued that the plaintiff in the Florida case would not have been able to recover had she not proved that the loss of money was the result of a negligent performance on the part of the law firm. Continental argued that coverage in this matter was excluded under the policy's dishonesty exclusion that stated the policy did not cover claims arising out of "any dishonest, fraudulent, criminal or malicious act or omission." *Id.* It claimed that the negligence was the result of Colantoni's theft and, therefore, the dishonesty exclusion applied. Had the dishonest event never occurred, there would not have been a loss.

However, the appellate court noted that the facts alleged against Colantoni were different than those alleged against the firm as a whole. The complaint alleged negligence on the part of the law firm and the judgment was based on negligence. Continental's claim that the negligence was the result of Colantoni's theft was actually backwards. Had the accounts been properly supervised and maintained, Colantoni would not have had the opportunity to transfer the money. The court held that the firm's negligence was independent of Colantoni's misappropriation of funds. Therefore, the trial court was incorrect in ruling for Continental because Continental had a duty to defend the firm against allegations of professional negligence, such as those presented in the case. 668 N.E.2d at 65.

In *Rossoff v. Cincinnati Insurance Co.,* 26 F.Supp.2d 1095 (C.D.Ill. 1998), Rossoff had an insurance policy that included coverage for veterinarian's professional liability. A complaint was filed against Rossoff seeking damages for alleged sales and distribution of gentamicin sulfate, in violation of a previous judicial order. He was found guilty of violating the consent order and in a settlement agreed to pay $850,000. He then sought to have Cincinnati pay the penalty, claiming that it was covered as part of his insurance policy.

Rossoff claimed that his conduct did not invalidate the coverage and that coverage for the contempt judgment was provided by the policy. Rossoff's professional liability policy provided coverage for "any claim or suit for damages, at any time filed, based on professional services rendered or which should have been rendered, by the insured or any other person, in the practice of the insured's profession, during the term of this endorsement." 26 F.Supp.2d at 1099. The court found that the decision to violate the consent order was not a professional one, stating that there was no "direct, causal relationship between the violation of the consent order and Plaintiff's professional responsibilities as a veterinarian." 26 F.Supp.2d at 1100. Rossoff argued that since he was the president of a company that sold antibiotics, the risk of illegally selling them was a foreseeable risk for Cincinnati to be insuring. The court held that the violation of a federal consent order could not have been contemplated by Cincinnati and, therefore, Rossoff's actions were not covered by the insurance policy.

In *Continental Casualty Co. v. Donald T. Bertucci, Ltd.,* 399 Ill.App.3d 775, 926 N.E.2d 833, 339 Ill.Dec. 358 (1st Dist. 2010), a lawyer was an insured under a professional liability policy that provided coverage under its insuring agreement for "all sums in excess of the . . . deductible that the Insured shall become legally obligated to pay as damages and claim expenses because of a claim . . . by reason of any act or omission in the performance of legal services by the Insured." 926 N.E.2d at 836. According to the policy, "legal services" were defined as "those services performed by an Insured for others as a lawyer, arbitrator, mediator, title agent or as a notary public," and "damages" were defined as "judgments, awards and settlements" and did not include "legal fees, costs and expenses . . . charged by the Insured . . . and injuries that are a consequence of any of the foregoing." *Id.*

A former client filed a lawsuit against the lawyer. The lawyer had represented the client during a malpractice case that was settled for $2.25 million, and the lawyer retained $750,000 of the settlement as his fee. According to the lawsuit, the lawyer's retention of $750,000 as a fee violated an Illinois statute governing fees in medical malpractice cases and the fee agreement with the lawyer. 926 N.E.2d at 837 – 838. The former client sued the lawyer for breach of contract, unjust enrichment, conversion, breach of fiduciary duty, fraud, and violation of the medical malpractice fee statute. The lawyer submitted the claim to his legal malpractice insurer, and the malpractice insurer denied the claim.

In the ensuing action for declaratory judgment, the appellate court found that no coverage existed under the policy. First, the court found that the suit against the lawyer did not allege "damages" as defined by the policy because the suit sought the recovery of excessive legal fees charged by the lawyer and consequential damages suffered as a result of those excessive fees. 926 N.E.2d at 840 – 841. The court also found that the suit did not allege "an act or omission in the performance of legal services by the Insured" within the meaning of the insuring agreement. 926 N.E.2d at 844. In doing so, the court recognized a dichotomy between billing and professional services performed by a lawyer by stating:

> **[Professional acts or services require] specialized knowledge and skill that is acquired through rigorous intellectual training. . . . The setting for the intellectual training is often an academic one, as in architectural school, engineering school, law school, or medical school.**
>
> **Against those criteria we decide that the billing function of a lawyer is not a professional service. Billing for legal services does not draw on special learning acquired through rigorous intellectual training. We are not aware that courses in billing clients appear in law school curricula. The billing function is largely ministerial. There are elements of experience and judgment in billing for legal services, but the same goes for pricing shoes. As billing is not a professional service, it does not come with[**in**] the coverage of a professional liability insurance policy.** *Id.,* quoting *Reliance National Insurance Co. v. Sears, Roebuck & Co.,* 58 Mass.App.Ct. 645, 792 N.E.2d 145, 148 (2003).

In *Landmark American Insurance Co. v. NIP Group, Inc.,* 2011 IL App (1st) 101155, ¶6, 962 N.E.2d 562, 356 Ill.Dec. 877, an insurance broker was insured under a professional liability

policy that provided coverage for "all sums that the Insured becomes legally obligated to pay as *Damages* and associated *Claim Expenses* arising out of a negligent act, error or omission, *Advertising Liability* or *Personal Injury* . . . in the rendering or failure to render professional services as described in the Declarations." [Emphasis in original.] The policy's definition of "*Advertising Liability*" included "[o]ral or written publication of material that violates a person's right of privacy." [Empasis in original.] *Id*. The policy listed the covered "professional services" of the insured, including the insured in its role as "an insurance wholesaler, insurance managing general agent, insurance general agent, insurance underwriting manager, insurance program administrator, insurance agent, insurance broker, surplus lines insurance broker, insurance consultant, insurance claims administrator, insurance appraiser, and insurance premium financier." 2011 IL App (1st) 101155 at ¶7. The policy also contained an exclusion for "[f]alse advertising or misrepresentation in advertising, but only regarding intentionally false, misleading, deceptive, fraudulent, or misrepresenting statements in advertising the insured's own product or service." 2011 IL App (1st) 101155 at ¶6.

The insured was sued in a complaint under a number of theories, including an alleged violation of the Telephone Consumer Protection Act for sending unsolicited facsimiles. The insured submitted this complaint under its professional liability policy for a defense. The insurer denied the claim on the basis that the sending of unsolicited facsimiles did not constitute the "rendering or failure to render professional services." 2011 IL App (1st) 101155 at ¶8. Focusing on the exclusion for intentionally deceptive advertisements, the court found that the policy at issue was sufficiently broad to include claims for the distribution of unsolicited facsimiles. According to the court:

> **If the exclusionary language of NIP's policy is to have any meaning at all, the language of the policy's initial insuring agreement *must* include NIP's advertising for its various insurance-related functions within the scope of coverage for liability incurred in the rendering or failure to render one of its host of listed professional services. Because the language of the policy excludes coverage for only specific types of advertising, but does not exclude the types of advertising alleged in the underlying complaint, we must find that NIP's insuring agreement at least potentially covers the allegations contained in [**the**] underlying complaint. [**Emphasis in original.**]** 2011 IL App (1st) 101155 at ¶44.

See also Standard Mutual Insurance Co. v. Lay, 2014 IL App (4th) 110527-B, ¶¶27 – 28, 2 N.E.3d 1253, 377 Ill.Dec. 972 (finding that "professional services" exclusion was not applicable to complaint under TCPA, as advertisements in question only provided information regarding commercial properties for sale and were, therefore, "ancillary to the performance of real estate services").

B. [8.21] Fiduciary Duty

In *Twin City Fire Insurance Co. v. Somer*, 342 Ill.App.3d 424, 794 N.E.2d 958, 276 Ill.Dec. 708 (1st Dist. 2003), the insurer sought a declaratory judgment that, under a public officials' errors and omissions liability insurance policy, it had no duty to defend or indemnify township supervisors and a township attorney in an action alleging inter alia a breach of fiduciary duty.

Specifically, the suit involved taxpayers' allegations that the township supervisors and attorney used fraudulent, sham transactions to waive the township's tax liens on properties acquired by the supervisors at tax scavenger sales. The *Somer* court held that the underlying action essentially stated causes of action for breach of fiduciary duty and intentional fraud and, as there were specific exclusions in the insurance policy for breach of fiduciary duty and fraud, the insurer was relieved of the duty to defend the supervisors and attorney. 794 N.E.2d at 964 – 965.

In *National Union Fire Insurance Company of Pittsburgh v. Associates in Adolescent Psychiatry*, No. 86 C 4959, 1987 WL 12661 (N.D.Ill. June 18, 1987), Pension Actuaries provided professional services for Associates in Adolescent Psychiatry (AAP). AAP filed a complaint against Actuaries alleging fraud, misrepresentation, and negligent rendering of professional services. The complaint had one federal claim, a breach of fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. No. 93-406, 88 Stat. 829, as well as state claims of negligence and fraud. The state claims were dismissed because they were preempted by ERISA. AAP filed an amended complaint, but the state law claims were again dismissed as being preempted by ERISA. The third amended complaint did not contain any state law claims. 1987 WL 12661 at *1.

National Union Fire Insurance filed a declaratory judgment action to determine whether it had a duty to defend or indemnify its insured, Actuaries. National argued that only the state law claims in the underlying case arose out of negligence and that the other claims were for fraud, deceit, and conspiracy, all of which fell within the policy exclusions of intentional acts. However, the court held the complaint alleged a violation of fiduciary duties under ERISA, which did "not require that the defendants acted with the intent to defraud," and that by holding that the state claims were preempted by ERISA, the judge ruled that the state claims were encompassed by the ERISA claim. 1987 WL 12661 at *3. Therefore, the ERISA claim could have been potentially within the policy and had to be defended by National. Thus, with one claim within the policy, National had a duty to defend Actuaries on all claims.

In *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill.App.3d 749, 835 N.E.2d 890, 296 Ill.Dec. 537 (1st Dist. 2005), a claim was brought against Caremark Rx, Inc. alleging that it used pricing spreads to divert a portion of its discounted retail and mail drug prices from a Georgia Pacific Corporation Life Health and Accident Plan for its own use and benefit in breach of its fiduciary duty under ERISA. The policy at issue covered "wrongful acts," defined as any "alleged or actual negligent act, error, or omission in the rendering or failure to render 'Professional Services' by any 'Insured.' " 835 N.E.2d at 897. The insurer maintained that the complaint failed to allege wrongful acts as covered under the applicable insurance policy, as its factual allegations concerned intentional, dishonest, and knowingly wrongful conduct that were specifically excluded from coverage, and that it therefore did not have a duty to defend. *Id.* The court agreed, finding that the policy was explicit in limiting its coverage to negligent acts, while a complaint that utilized such phrases as "mislead and conceal," "scheme or device" and "intentionally and willfully" demonstrates the "paradigm of intentional conduct and the antithesis of negligent actions." 835 N.E.2d at 899, quoting *Connecticut Indemnity Co. v. DER Travel Service, Inc.*, 328 F.3d 347, 351 (7th Cir. 2003).

In *Illinois State Bar Association Mutual Insurance Co. v. Mondo*, 392 Ill.App.3d 1032, 911 N.E.2d 1144, 331 Ill.Dec. 914 (1st Dist. 2009), an attorney was insured under a professional

liability policy that provided insurance only for claims arising out of a wrongful act. The policy defined "WRONGFUL ACT" as "any actual or alleged negligent act, error, or omission in the rendering of or failure to render PROFESSIONAL SERVICES." 911 N.E.2d at 1150. The policy defined "PROFESSIONAL SERVICES" as "services rendered by YOU as a lawyer." *Id.* Furthermore, among the policy's various exclusions, the policy specifically excluded any claim "arising out of any criminal, dishonest, fraudulent or intentional act or omission committed by any of YOU" or "arising out of YOUR capacity as: . . . a fiduciary under" ERISA. *Id.* The attorney operated a consulting firm that provided advice concerning the design and operation of insurance plans. One of the consulting business' clients sued the lawyer and the consulting business. According to the client, the lawyer convinced the client to become self-insured for the provision of medical benefits to its employees and hire an administrator to manage the self-insurance program. The lawyer failed to disclose, however, that he had a business interest in the recommended administrator. The complaint alleged various theories of relief, including counts for breach of fiduciary duty under ERISA, fraud, breach of contract, and malpractice. The lawyer submitted the claim to his malpractice insurer, and the malpractice insurer denied the claim.

In the ensuing declaratory judgment action, the appellate court agreed with the insurer that no coverage under the policy existed. The court found that, despite the inclusion of counts that alleged negligence and malpractice in the insured's capacity as an attorney, "the true nature of the complaint" was "related to [the attorney's] capacity as an insurance expert and not in any capacity related to his status as an attorney." 911 N.E.2d at 1151. Furthermore, the appellate court found that "the factual allegations . . . make clear that [the attorney's] failure to disclose information was allegedly part of his overall scheme to mislead and defraud the Insurance Trust and not based upon any negligent or potentially negligent conduct." *Id.* Finally, the court noted that exclusions within the professional liability policy applied to bar the claim, including the exclusion for fraud and the exclusion for "any action related to the insured's capacity as a fiduciary under ERISA." *Id.*