



**Lowenstein Sandler's Insurance Recovery Podcast:
Don't Take No For An Answer**

Episode 59

Debunking Insurance Myths About Coverage for Intentional Conduct

By [Lynda Bennett](#), [Eric Jesse](#)

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Lynda Bennett: Welcome back to Don't Take No for an Answer. I'm your host, Lynda Bennett, Chair of the Insurance Recovery Practice here at Lowenstein. And I'm joined once again by my partner, Eric Jesse, who's also a member of the group. Welcome back, Eric.

Eric Jesse: Hi, Lynda. Thanks for having me.

Lynda Bennett: So one of our favorite things to do here on Don't Take No for an Answer is to correct some of the most common myths in the insurance world. And today, we're going to discuss one of the biggest ones out there. When faced with a potential liability, many policyholders lose out on potential coverage because they assume that there's no coverage for "intentional conduct," and they either just accept an insurer's denial or sometimes they don't even submit the claim in the first instance because they figure there can't be coverage for intentional conduct. But on today's episode, we'll explain why it's a myth to assume that there's no coverage for intentional conduct, and we're going to address ways that policyholders may be able to get coverage for that alleged intentional conduct. So we often talk about the importance of language in insurance policies on this podcast, Eric. So let's start at the beginning. When we talk about intentional conduct, what policy language are we looking at?

Eric Jesse: Yeah. First and foremost, it's going to depend on the type of policy you're dealing with because the language will differ from policy to policy. So a D&O or an E&O policy, right? They're going to have exclusions that reference criminal, intentional, or fraudulent acts. Those are words that the policy will use. And they'll also use words like dishonesty, deliberate, maliciousness, and knowing violations of law, illegal profits or gains that are received. So when we're reviewing policies, D&O and E&O policies, what we're trying to do is really narrow that list. Or we're trying to include the word deliberate in front of fraudulent. Or in front of criminal, we're trying to take out the knowing

violation of law. But those are common terms that you'll see specific to a D&O or E&O policy.

Lynda Bennett: So Eric, I'm confused. You just listed off a pretty ominous list of types of conduct, intentional conduct. How are we still talking about potentially getting coverage when my policy says it doesn't cover fraud, it doesn't cover intentional conduct? Where's the coverage coming from?

Eric Jesse: Yeah. So this is where the myth is. So one thing that's important to understand is these exclusions will have an exception that will say, "This exclusion does not apply unless and until there is a final judgment establishing that the conduct occurs." And again, when we're reviewing that language, we're trying to make sure that exception is as strong as possible. So we're trying to, for example, say it's not just a final judgment, it's a final non-appealable judgment establishing that the conduct occurs. And the practical benefit of that exception is, one, it means this exclusion cannot apply to knock out defense cost coverage at the outset of the claim all the way through trial and appeal. And the other key benefit is it means most cases ultimately settle. And so that means the insurance company, if the claim is otherwise covered, they need to step up and provide settlement dollars because they cannot rely on that fraud exclusion or that conduct exclusion.

Lynda Bennett: Right. So you've been talking about the D&O, E&O cyber policies. Those conduct exclusions have that kind of language that you just talked about. But one of the biggest myths, and I always chuckle when people say, "Well, you can't get insurance for intentional conduct," it's that broad statement. It couldn't be more false with respect to CGL coverage. In fact, CGL coverage, that's comprehensive general liability policies that every business has, have multiple coverage grants. And one of the coverage grants, Coverage B, actually explicitly provides coverage for intentional conduct.

It provides coverage for defamation, libel, slander, false imprisonment, malicious prosecution, and a whole host of other intentional torts. So it's just flat-out not true to say that there's no coverage for intentional conduct under a CGL policy because there's an entire coverage grant that is based all around intentional torts. Now, Coverage A under that CGL policy also, you have the potential to get coverage for intentional conduct that includes unexpected, unintended consequences. So Eric, why don't you walk us through Coverage A? And what is the policy language that we're looking at there? And how do courts interpret it?

Eric Jesse: Yeah. So Coverage A under a CGL policy, this is going to provide coverage for claims of bodily injury and/or property damage. And here again, insurers will take the position that intentional conduct necessarily cannot qualify as an occurrence under a policy. An occurrence is defined as an accident. But this really brings into focus the difference or the distinction between whether an act was intended versus whether the ultimate harm or the ultimate consequence of that harm was intended. That's what we have to focus on. And so one example from way back is when a company is seeking coverage for an environmental contamination claim, right? Insurers were contending that the company was new and it was intentionally dumping chemicals into

the ground and into the water. That was an intentional act, and therefore could be an occurrence under a policy or an expected, intended exclusion might apply. And so what courts ultimately did not take the bait? They focused on the harm. And if there was no intentional harm, there was no intent to harm the environment, that then coverage could be established.

Lynda Bennett:

Yeah. We're seeing similar arguments being made today in the context of other types of mass tort claims. For example, sexual abuse claims under CGL policies. The insurers will try to dodge their coverage responsibilities by taking the position that, of course, sexual abuse is an intentional act that can never be covered. And so in this context, it brings up another concept that we've discussed many times on Don't Take No for an Answer, and that is severability and having to evaluate coverage through the lens of each and every insured that may be subject to that lawsuit or that claim. Because in the sexual abuse context, it is a true statement that the abuser intentionally engaged in acts to harm the survivor of sexual abuse.

But the claims are never limited to just the abuser. The claims will also be asserted against the organization that employed the abuser, for example. And those claims always are framed through a negligent supervision type of a claim. So that's another example of an intentional tort, an intentional act that doesn't necessarily knock out coverage for every insured. So Eric, what are some of the things that policyholders should consider if they've got an intentional act type of claim presented? Let's say a False Claims Act claim, for example. What are some of the things that policyholders need to think about in how to overcome the intentional allegation and ultimately get coverage for the claim?

Eric Jesse:

Yeah. So first and foremost, you laid it out in your introduction, right? Policyholders, they don't submit the claim, or they accept the denial. And so step one is submit the claim and question the denial and challenge the denial and see if there is a path forward. Don't accept the myth. And the other thing is there can be a value in getting that defense cost coverage at the outset. So that's really what I think the policyholder's first focus should be. Because as we've talked about, either there's going to be explicit coverage for intentional conduct under a CGL policy or there's exceptions to exclusions that allow that defense cost coverage. And if an insurance company is denying coverage at the outset, really focus on that duty to defend and trying to get the carrier to step up there, even potentially bringing in early lawsuit to get that defense cost coverage in place, which you can do with a duty to defend claim.

Lynda Bennett:

Another thing that I think our clients need to look at is, and we do this a lot, we're looking at, what is the nature of the claim that's being asserted? What is the legal standard that is going to have to be met to establish the liability that's been asserted? Because sometimes there's room there, right? So a lot of cases that evaluate intentional conduct exclusions and intentional acts, ironically enough, involve fact patterns like a bar fight or a shooting or something of that nature.

So I could punch Eric in the nose intending to want to break his nose, and I kill him instead. And there are cases, and there's a path forward to say, "Yes.

It was an intentional act that I punched him in the face, but the consequence of him dying as a result of that punch was not what my intention was." So there may actually still be coverage. So you've got to look at the liability that's being asserted, the legal standard that's going to apply to establishing that liability, and whether there is a negligence component or a subjective standard that can apply to establishing that liability that creates the light from which you can get coverage.

Eric Jesse:

And that's an interesting point. And there's actually a case that is currently pending before the Ohio Supreme Court, and it reinforces the importance of actually looking at the elements of the underlying claim. Because that case involved coverage for an adult care facility, and they had a policy that had an assault and battery exclusion. And so what happened was a resident at that facility attacked another resident, but the attacker was found not guilty by reason of insanity. And so the elements of assault under Ohio requires intent. But because the attacker was found not guilty by reason of insanity, the assault element isn't met. And so right now, the Ohio Supreme Court is going to decide if that assault exclusion can ultimately apply. The lower courts had found that that coverage was required and that the assault exclusion did not apply because assault under Ohio law had not been met.

Lynda Bennett:

That's a great example. That's going to wrap us up on today's episode, which is don't accept the myth that there's no coverage for intentional conduct. Understand that. As always, the words matter, the state law, applicable state law matters, and it matters that you've got experienced coverage counsel in your corner evaluating and disputing that claim denial from an insurer. So thanks for joining me today, Eric, to discuss this important topic. And we'll look forward to seeing you next time.

Eric Jesse:

All right, great. Thank you very much for having me.

Kevin Iredell:

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