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This Update is brought to you by the Insurance Committee of the Business Litigation Practice Group

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Missouri's Interpretation of "Occurrence"
as Defined in Commercial General Liability Insurance Policies

by Aaron French

When determining whether coverage exists under a Commercial General Liability (CGL) policy, one of the first things to consider is whether the underlying claim falls within the policy's definition of "occurrence." Missouri courts have provided guidance in determining whether certain acts or events are "occurrences." The purpose of this article is to briefly review how Missouri courts have interpreted the term "occurrence" through a survey of recent Missouri case law.

Definition of "Occurrence"

Although the exact wording may differ from policy to policy, "occurrence" in CGL policies is commonly defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Some CGL policies also state that the "occurrence" must result in personal injury or property damage that was neither "expected nor intended" by the insured.

The key word in the definition of "occurrence," and the word most often interpreted by courts, is "accident." Some CGL policies define "accident." Many CGL policies do not and in those cases, it is well-settled in Missouri that an accident is "[a]n event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event. Hence, often, an undesigned and unforeseen occurrence of an afflictive or unfortunate character; a mishap resulting in injury to a person or damage to a thing; a casualty; as, to die by an accident." *Columbia Mut. Ins. Co. v. Epstein*, 239 S.W.3d 667, 672 (Mo.App. 2007). However, an "accident" is "not necessarily a sudden event; it may be the result of a process." *Id.* The focus of the definition should be on the insured's foresight or expectation of the injury or damages. *Id.*

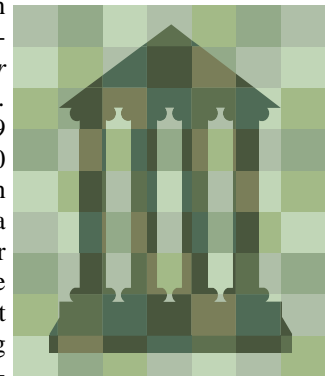
Missouri courts' interpretation of the terms "occurrence" and "accident" is consistent with Missouri courts' interpretation of CGL policies generally. The intent of CGL policies is to protect against the unpredictable and potentially

unlimited liability that can result from accidentally causing injury to other persons or their property. *American States Ins. Co. v. Mathis*, 974 S.W.2d 647, 649 (Mo.App. 1998).

Intentional Acts

A CGL policy is not intended to protect business owners against every risk of operating a business. *Id.* As such, intentional acts that cause damage or harm are not considered covered "occurrences" in

Missouri. For example, in *Shelter Mut. Ins. Co. v. Parrish*, 659 S.W.2d 315, 320 (Mo.App. 1993), an individual fired a pistol at another person at close range. The court held the shooting injury was ex-



pected. *Id.* Therefore, the shooting was not an "occurrence" under the policy, and no coverage existed. *Id.*

In *Hampton v. Carter Enterprises, Inc.*, 238 S.W.3d 170, 175-76 (Mo.App. 2007), judgment creditors filed a garnishment action against defendant's insurer to collect a judgment on their intentional infliction of emotional distress claim. However, a recovery for the intentional infliction of emotional distress requires a showing of intentional or reckless conduct. *Central Missouri Electric Cooperative v. Balke*, 119 S.W.3d 627, 636 (Mo.App. 2003). The court found intentional infliction of emotional distress was not an "occurrence" under the policy, based on the well-settled definition of "accident." In order to be an accident, the insured's actions had to take place without "foresight or expectation." Because intentional infliction of emotional distress requires foresight or expectation, the court found no coverage was provided for the claim.

Recent Illinois Insurance Cases of Note

27-month delay in providing written notice of suit violated policy's terms and precluded coverage, even if insurer received "actual notice" of the suit orally on six prior occasions.

In *West American Ins. Co. v. Yorkville Nat. Bank*, 2009 WL 537174 (Ill.App. 3 Dist. Feb. 27, 2009), the insurer sought a declaratory judgment against the insured bank and its vice president, who were sued in September 2001 for defamation. Written notice of the suit was not sent to the insurer until January 2004, about eight weeks before the underlying defamation case was set for a jury trial. The policy provided that if a suit was brought against any insured, the bank must see to it that the insurer receives written notice of the suit as soon as practicable.

Pointing to six alleged instances in which bank representatives told the bank's insurance broker about the lawsuit before January 2004, the bank argued "actual notice trumps technical policy language." The majority of the divided court of appeals disagreed, deeming the question of "actual notice" irrelevant, upholding the terms of the policy as written, and finding that written notice was not given as soon as practicable.

Policy exclusions for civil rights violations and zoning and land use determinations are trumped by separate coverage for injuries arising out of illegal discrimination.

In *City of Collinsville v. Illinois Mun. League Risk Management Ass'n*, 2008 WL 4879161 (Ill.App. 4 Dist. Aug. 27, 2008), developers had sued the City of Collinsville and one of its officials for alleged violations of the developers' constitutional rights in failing to act upon or approve a proposed subdivision plat. After the insurer denied any duty to defend or indemnify the city or its official, a declaratory judgment action was filed.

The insurer relied upon multiple policy exclusions regarding actions arising out of condemnation, zoning, and land use determinations, as well as alleged violations of civil or constitutional rights. The court of appeals held that what controlled was a separate coverage extension for injuries arising out of discrimination prohibited by Illinois or federal law. This coverage extension, which appeared in a separate form, was not affected by the cited exclusions, which appeared in other coverage forms.

The lesson for underwriters is to make sure their exclusions are written to apply to all coverage.

No duty to settle in good faith owed to policy-holding but non-insured medical clinic hit with \$2.5 million excess verdict, even if such a duty was owed to clinic's insured doctor.

In *Iowa Physicians' Clinic Medical Foundation v. Physicians Ins. Co. of Wisconsin*, 547 F.3d 810 (7th Cir. 2008), a patient's widow sued her late husband's family doctor and the clinic where he worked for providing ineffective anti-malarial therapy. The clinic had purchased a policy that expressly stated the clinic was a non-insured, but that covered its doctors' liability up to \$1 million and provided for the defense of claims made against them.

When the widow offered to settle for \$900,000, the doctor and clinic unsuccessfully urged the insurer to settle, but the insurer ignored the demand. Later, after a defense expert admitted in a deposition that the doctor violated the standard of care, the widow increased her demand to \$1.5 million. The insurer countered with \$200,000, which the widow ignored. The case went to trial and a jury found the doctor and clinic liable, awarding \$3.5 million. The insurer paid the \$1 million policy limit and the clinic agreed to pay the excess on behalf of both defendants. Thereafter they both sued the insurer for failing to settle the claim in good faith.

The insurer sought judgment on the pleadings, arguing the duty to settle in good faith extended only to the doctor, who suffered no damages because the clinic paid the excess verdict. The trial judge agreed the duty only applied to the doctor, not the clinic, but held the doctor's claim could proceed because he sought damages for injury to his reputation and for emotional distress.

The Seventh Circuit affirmed, explaining the duty to settle is designed to protect the bargain embodied in an insurance contract, not to extend coverage or to simply honor the relationship between contracting parties. Here, the intent of the contracting parties was clear: the clinic was to be excluded from coverage. The clinic could have paid a higher premium to receive coverage but chose not to. Furthermore, because the clinic controlled its own defense, there was no conflict of interest and, in fact, the clinic could have settled if it chose to do so.

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Recent Missouri Insurance Cases of Note

Property owner could pursue contract claim against insurer, not fraud and negligent misrepresentation claims; similar claims against broker also unavailable.

In *Ryann Spencer Group, Inc. v. Assurance Co. of America*, 275 S.W.3d 284 (Mo.App. E.D. 2008), after a fire loss, the insured commercial property owner sued its broker for negligence, its insurer for breach of contract and vexatious refusal to pay, and both for fraud and negligent misrepresentation.

The court dismissed the fraud and negligent misrepresentation claims against the broker and insurer. On the claims against the insurer, the court reaffirmed Missouri law that an insured with a dispute against its insurance company cannot substitute a tort claim when a contract remedy is available, even if the tort claim is not *per se* preempted by the vexatious refusal to pay statute and otherwise alleged the facts required to state a tort claim. On the claims against the broker, the court held the property owner had no right to rely on the broker's representation of what the insurer, a third party, would or would not do in the future.

\$1 million bad faith judgment against insurer refusing to settle within \$50,000 policy limits upheld due to multiple improper claims practices.

In *Shobe v. Kelly*, 2009 WL 230230 (Mo.App. W.D. Feb. 3, 2009), an insured sued her automobile insurer and its claims adjuster for bad faith in failing to settle a third-party claim against the insured within her policy limits of \$50,000. A jury awarded the insured \$500,000 in actual damages and \$500,000 in punitive damages. The Court of Appeals reversed the judgment against the claims adjuster, holding she was functioning solely as an agent of her employer, but affirmed the judgment against the insurer.

The court rejected the insurer's argument it lacked control of the proceedings and thus could not be responsible for failing to settle, because its lack of control was due to its own wrongful denial of coverage. The court disagreed that the insurer acted in

good faith by performing an investigation and seeking an outside legal opinion, because the adjuster started with a presumption of no coverage, denied coverage before a full investigation, accepted legal conclusions from outside counsel lacking legal citation or reference, ignored the insured's financial interests and made no inquiry regarding the third party injuries, and rejected a settlement offer within policy limits while considering defending under a reservation of rights, thus implying coverage was in doubt.

The court also upheld the award of actual damages, explaining there were "intangibles" not easily calculated, including ten years of litigation faced by the insured, her fears of bankruptcy, and her economic losses in credit, interest rates, and insurance. Additionally, the court upheld the award of punitive damages, holding the jury had a basis to find that the insurer acted with reckless indifference to its insured's interests.

Summary judgment upheld for insurer whose policy did not define "driver," because the purported insured was listed as a driver only for another vehicle not in the accident.

In *Eldridge v. Columbia Mut. Ins. Co.*, 270 S.W.3d 423 (Mo.App. W.D. 2008), the court upheld summary judgment in favor of an automobile insurer whose policy did not define the word "driver." The declarations page identified the named insured and listed him as "Driver 001," listed his daughter as "Driver 002," identified a Chevy Malibu under a "Vehicle(s) Summary," and showed "Driver 002" as the driver of the Malibu. The policy provided coverage to the named insured for any auto, to resident family members under certain circumstances, and to any person using a covered auto. While driving a Ford Tempo and no longer living with her father, the daughter was involved in an accident that killed her stepson.

The court held that the word "driver" was unambiguous. Accordingly, there was no coverage for the daughter under the policy, because it was clear she was listed as a driver only for the Malibu, which was not involved in the accident, and she was no longer living with her father at the time of the accident.

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Missouri's Interpretation of "Occurrence"

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The Eighth Circuit, applying Missouri law, found that the injury suffered from sexual abuse of a minor does not constitute an "occurrence" covered by insurance policies. *B.B. v. Continental Ins. Co.*, 8 F.3d 1288, 1296 (8th Cir. 1993). In *B.B.*, the minor plaintiff sued the individual who abused him (P.F., also a minor) and argued the abuse was covered under P.F.'s parents' homeowner's policy. *Id.* at 1289. The court concluded that P.F. intended to cause harm to B.B. as a matter of law. *Id.* at 1296. Because the injury was expected and intended, it was not an "occurrence" under the policy and was not covered by the parents' policy. *Id.*

Negligence Claims

When a CGL policy defines "occurrence" as meaning "accident," Missouri courts consider this definition to mean injury caused by the negligence of the insured. *Wood v. Safeco Ins. Co. of America*, 980 S.W.2d 43, 49 (Mo.App. 1998). The term "accident" does not exclude human fault or negligence, but is recognized as an occurrence arising from the carelessness of persons. When used without restriction in liability policies, "accident" has been held not to exclude injuries resulting from ordinary or even gross negligence. *Id.*

Missouri views negligent conduct to be covered under a CGL policy providing coverage for an "occurrence" defined as an "accident." This view comports with a reasonable person's expectation of liability coverage, because a "liability policy is designed to protect the insured from fortuitous injury caused by his actions. If the injury occurs because of carelessness of the insured, he reasonably expects the injury to be covered." *Id.* (quoting *Farm Bureau Town & Country Ins. Co. v. Turnbo*, 740 S.W.2d 232, 236 (Mo.App. 1987).

Claims for negligent misrepresentation by the insured also qualify as an "occurrence." In *Stark Liquidation Co. v. Florists' Mut. Ins. Co.*, 243 S.W.3d 385, 393 (Mo.App. 2007), plaintiff asserted the insured orchard negligently misrepresented the quality of its trees, negligently sold the trees without testing them, or negligently allowed the defective trees to infect the remainder of the orchard. In addition, there was no evidence the

insured either intended or expected the crop loss and attendant economic damages that occurred. Thus, the plaintiff's claims were found to be an "occurrence" within the meaning of the CGL policies. *Id.*; see also *Wood*, 980 S.W.2d at 53.

Breach of Contract

Breaches of contract are generally found not to be "accidents" or "occurrences." *Mathis*, 974 S.W.2d at 650. In *Mathis*, the court found the cause of plaintiff's loss was defendant's failure to adhere to construction contract specifications. The court held a breach of a defined contractual duty was not an "accident." Performance of the contract according to its terms was within defendant's control and management, and its failure to perform was not an undesigned or unexpected event. *Id.* Furthermore, the court found the breach did not cause an unintended accident to other property.

Although breach of contract claims generally do not involve an "occurrence" for which coverage is provided, extra attention should be paid when analyzing them, especially when claims for breach of express or implied warranty are also alleged. See *Amerisure Mutual Ins. Co. v. Paric Corp.*, 2005 WL 2708873 (E.D. Mo. 2005). Any analysis must be done on a case-by-case basis and will depend on the underlying allegations. Courts will look to a number of factors including, but not limited to, the following: (1) whether the insured intended, expected, or desired the results; (2) whether the alleged occurrence was a business risk not covered by the general liability policy; and (3) whether excluding the alleged occurrence from coverage essentially leaves the insured without any coverage. *Id.*

Conclusion

Although Missouri courts will review policies and facts case-by-case to determine if a claim constitutes an "occurrence," the above cases provide helpful guidance. Whether the claim alleges facts constituting an "occurrence" is an important issue to consider when making a coverage analysis. Fortunately, Missouri courts have provided case law that assists in predicting how "occurrence" will be interpreted in most cases.

Although Missouri courts will review policies and facts case-by-case to determine if a claim constitutes an "occurrence," the cases discussed here provide helpful guidance. Whether the claim alleges facts constituting an "occurrence" is an important issue to consider when making a coverage analysis. Fortunately, Missouri courts have provided case law that assists in predicting how "occurrence" will be interpreted in most cases.

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