Intentional Act Without Intent to Harm May Not Be an Occurrence

An intentional act may not be an "occurrence" even when there is no intent to cause harm, according to a California appellate court's recent ruling in *Ghukasian v. Aegis Security Insurance Co.*[1] *Ghukasian* involved an insured who hired contractors to level land and clear trees on land she understood to be a part of her property. However, the land cleared and leveled by the insured's contractor was not owned by the insured but by her neighbors.

The neighbors sued the insured and her contractor in the underlying action, alleging trespass and negligence. The underlying complaint alleged that the insured and her contractor entered upon the neighbors' property without their consent, made deep cuts into a natural hill on the property, caused a natural swale located on the property to be filled with dirt, and removed, cut down, and carried off timber, trees, and underwood from the property.

The insured tendered the underlying action to her insurer. The policy at issue provided coverage if a "suit is brought against [the insured] for damages because of ... property damage caused by an occurrence to which this coverage applies." An "occurrence" was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results during the policy period in ... [p]roperty damage." The insurer denied coverage for the underlying action on the grounds that it owed no duty to defend because the complaint alleged intentional, not accidental, conduct.

The insured proceeded to sue her insurer for breach of contract, declaratory relief, and insurance bad faith. The trial court granted the insurer's motion for summary judgment, explaining that the insured's mistaken belief as to the boundaries of the property did not transform her intentional act of hiring contractors to clear and level the land into an accident for the purposes of qualifying as an occurrence under the policy.

On appeal, the *Ghukasian* court affirmed the trial court's grant of summary judgment to the insurer. The court explained that the underlying complaint alleged harm from the insured's intentional conduct. The court noted that the leveling of land and cutting of trees were not unexpected or unforeseen events. On the contrary, the insured specifically instructed her contractor to level certain land and cut trees, which is exactly what was done. The court held that the insured's mistaken belief about the boundaries of her property was irrelevant to determining whether the conduct itself – leveling land and cutting trees – was intentional.

In reaching its conclusion, the *Ghukasian* court relied on two California Court of Appeal decisions: *Albert v. Mid-Century Ins. Co.*[2] and *Fire Ins. Exchange v. Superior Court.*[3]

In *Albert,* similarly to *Ghukasian,* a neighbor sued the insured for building an encroaching fence and pruning the neighbor's trees. The trial court, as in *Ghukasian,* granted summary judgment to the insurer on the basis that no occurrence was stated. The *Albert* court held it was irrelevant to the occurrence analysis that Albert did not mean to harm the trees she pruned because she intended the pruning in the first instance. Significant to the *Albert* court was that the complaint was entirely absent of any allegation that any unforeseen accidental conduct (a slip of the saw, for example) resulted in damage to the trees.

Fire Exchange concerned the construction of a building that encroached on a neighboring property by about five and a half feet. The court found that the insured's mistaken belief that the building could be constructed where it was did not cure the fact that the construction itself was constituted entirely of intentional acts: the insureds intended to build a building precisely where they built it.

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The insured contended that the California Supreme Court implicitly held otherwise in *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co.*[4] In that case, a third-party claim against an employer for the negligent hiring, retention, and supervision of an employee who intentionally injured that third party potentially stated an occurrence under the employer's commercial general liability policy because the employee's conduct may be deemed an unexpected consequence of the employer's negligence. The *Liberty Surplus* court broadly indicated that an accident or occurrence is subsumed in the broader category of negligence. It was this holding that Ghukasian argued required a finding of a potential occurrence.

The *Ghukasian* court, however, was unpersuaded by this argument. The court distinguished *Liberty Surplus* by pointing out that the injury involved there was caused by the employee's independent tortious conduct. By contrast, in *Ghukasian*, the insured's intentional conduct of leveling land and cutting trees was the immediate cause of the injury. There was no additional, independent act that produced the damage. Rather, the work done on the property was, according to the underlying complaint, precisely what was intended. Moreover, the court noted that the *Liberty Surplus* decision contained no language indicating it intended to overrule prior California case law holding intentional acts are not accidents merely because the insured did not intend to cause injury.

The court likewise rejected the insured's contention that the complaint alleged an occurrence because the underlying action alleged a cause of action for negligence. The court pointed out that, under California law, the scope of the duty to defend does not depend on the labels given to the causes of action. Instead, it rests on whether the alleged facts or known extrinsic facts reveal a possibility that the claim may be covered by the policy. Noting that the underlying complaint alleged that the insured and her contractor entered the neighbors' property without consent, made deep cuts into the hill, and removed timber, trees, and underwood from the property, the court observed that there were no allegations or evidence that the neighbors' property was damaged by an accident, such as by inadvertently dropping equipment on the neighbors' property. Thus, although the underlying action alleged a cause of action for negligence, the factual allegations reflected intentional acts.

Concluding that the acts for which the neighbors sought to impose liability on the insured were not accidental, the court held that the underlying lawsuit against the insured did not trigger coverage under the policy. Because the insured's claims for breach of contract and declaratory relief failed as a matter of law, the court held her bad faith claim necessarily failed as well. Accordingly, the court affirmed the trial court's grant of summary judgment to the insurer.

Until *Ghukasian*, some insureds had attempted to use *Liberty Surplus* to impose a formulaic construction of occurrence without regard to the nature of the acts underlying a "negligence" cause of action, despite the fact that *Liberty Surplus* did not explicitly indicate it was overruling the several California Court of Appeal decisions finding that the mere presence of a cause of action for negligence does not, without more, trigger coverage and did not specifically overrule those cases finding that certain negligence claims necessarily involving intentional conduct — like negligent misrepresentation — do not state an occurrence. Furthermore, *Liberty Surplus* did not overrule a prior occurrence decision, which reinforced the oft-repeated canon that "an injury-producing event is not an 'accident' within the policy's coverage language when all of the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor." *See Delgado v. Interinsurance Exch. of Auto. Club of S. California*, 47 Cal. 4th 302, 311–12 (2009).

The holding in *Ghukasian* clarifies that, under California law, an underlying action based on an insured's allegedly intentional act may not qualify as an occurrence even if it is based on a misunderstanding of the factual circumstances (such as the boundaries of the insured's property) and is not intended to cause any harm. With the Court of Appeal's May 5, 2022, order to publish the *Ghukasian* decision, *Ghukasian* may now be cited as binding precedent in California's lower courts.

[1] *Ghukasian v. Aegis Security Insurance Co.*, Case No. B311310 (Cal. App. 2d Dist. May 5, 2022.

[2] *Albert v. Mid-Century Ins. Co.* (2015) 236 Cal.App.4th 1281, 1289.

[3] *Fire Ins. Exchange v. Superior Court* (2010) 181 Cal.App.4th 388.