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Liability Insurers Get a Fair Deal

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Notes

Liability Insurers Get a Fair Deal

Easley v. American Family Mutual Insurance Co.[1]

I. INTRODUCTION

Public policy does not allow insurance against the results of intentional acts.[2] Thus, most liability insurance contracts contain a clause that excludes coverage for bodily injury or property damage intended or expected as a result of an insured's actions.[3] These clauses are generally referred to as "intentional acts exclusion clauses" or "intentional injury exclusion clauses."[4] Insurance companies invoke these clauses to deny coverage when they believe an intentional act of their insured has caused the damages giving rise to the claim. They cite them to justify declining to provide a defense or defending with a reservation of rights.[5] Difficulties arise in interpreting and applying these clauses. The real question in all cases is what the insurer must show to invoke the exclusion. There are two basic requirements: (1) The act done was intended; and (2) there was some intent for the act to cause injury. Most courts agree that the act must have been intentional from the standpoint of the insured. Courts are split, however, on the question of the level of intent that must be shown regarding the injury that results from the act.[6]

There are three general approaches to this issue. The majority rule requires a showing of specific intent to act and to cause harm. In certain cases, however, intent to harm can be inferred from the nature of the act itself.[7] Some states follow an objective rule that once intent to do the act is

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1. Easley v. American Family Mut. Ins. Co., 847 S.W.2d 811 (Mo. Ct. App. 1992).

2. *Easley*, 847 S.W.2d at 812; GEORGE COUCH 11 COUCH ON INSURANCE 2D § 44:285 (Rev. Ed. 1982); ROBERT E. KEETON, BASIC TEXT ON INSURANCE LAW, 286-87 (1971). This public policy is codified in section 533 of the California Insurance Code. CAL INS. CODE § 553 (West 1993).

3. KEETON, *supra* note 2, at 286, 288-89; COUCH, *supra* note 2, § 44:287.

4. James L. Rigelhaupt Jr., Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R. 4th 957, 969-70 (1984).

5. Nathan Z. Cyperstein, *Coverage for Intentionally Caused Unintended Consequences*, FOR THE DEFENSE, Feb. 1993 at 18, 19.

6. Rigelhaupt, *supra* note 4, at 973-74.

7. Constance M. Alvey, Note, *Intentional Injury Exclusion: American Family*

shown, all reasonably foreseeable results are deemed intended and thus excluded from policy coverage.[8] The most restrictive test is the subjective intent test,[9] under which an insurer must prove that the insured had the subjective intent to commit an act and had the subjective intent to cause the exact harm that results or a similar type of harm.[10] This standard is the most difficult to meet, and unless the insured admits that he intended the actual harm that resulted, the insurer is often stuck covering acts it believed it had excluded by the policy language.

Missouri was a specific intent state[11] until the decision in *American Family Mutual Insurance Co. v. Pacchetti*.[12] After this split opinion of the Missouri Supreme Court, it was thought Missouri had become a subjective intent state.[13] The first three decisions to try to follow *Pacchetti* had to strain to do so, however,[14] and arguably they demonstrated the difficulty in applying the subjective intent test. *Easley v. American Family Mutual Insurance Co.*[15] moves the law back to the center, where it was before *Pacchetti*, and provides a more reasonable and logical test for courts to use when dealing with these exclusionary clauses.

Mutual Insurance Co. v. Pacchetti, 60 UMKC L. REV. 559, 562 (1992). There is a particular subclass of inferred intent cases both in Missouri and nationwide dealing with injuries from the sexual abuse of children. In all of these cases, the courts have found that the sexual abuse of children is such a harmful act that injury is sure to result, and therefore intent is inferred as a matter of law. The insurer can successfully invoke the intentional acts exclusion clause in these cases. Mid-Century Ins. Co. v. L.D.G., 835 S.W.2d 436, 439-44 (Mo. Ct. App. 1992) (Hanna, J., concurring). This subclass of abuse cases illustrates the inferred intent concept, which will not be discussed in this Note because of the unique nature of the crime and its treatment by society.

8. Kristin Wilcox, Comment, *Intentional Injury Exclusion Clauses—What is Insurance Intent?*, 32 WAYNE L. REV. 1523, 1534 (1986).

9. This is the term used by this Note to describe the required level of intent. Several other terms are also used to describe this type of intent. *See* Alvey, *supra* note 7, at 561-62.

10. Alvey, *supra* note 7, at 561.

11. *See infra* notes 49-134 and accompanying text.

12. 808 S.W.2d 369 (Mo. 1991).

13. *See infra* notes 157-195 and accompanying text.

14. Mid-Century Ins. Co. v. L.D.G., 835 S.W.2d 436 (Mo. Ct. App. 1992); American Family Mut. Ins. Co. v. Lacy, 825 S.W.2d 306 (Mo. Ct. App. 1991); Economy Fire & Casualty Co. v. Haste, 824 S.W.2d 41 (Mo. Ct. App. 1991).

15. 847 S.W.2d 811 (Mo. Ct. App. 1992).

II. FACTS AND HOLDING

This case arose out of a simple schoolyard fight. On January 24, 1984, Shawn Easley and Douglas Willmeno had an argument during high school basketball practice at New Bloomfield High School.[16] After practice, Willmeno waited outside the school building for Easley.[17] When Easley left the building, Willmeno approached Easley and hit him on the chin with his fist.[18] Easley fell back against a wall of the building, bounced off at a 90 degree angle, and fell into a plate glass window.[19] His head went through the window; his neck was cut severely and his left ear was almost severed.[20]

Shawn Easley, through his next friend Charles Easley (his father), filed suit against Doug Willmeno on January 30, 1987.[21] American Family was notified of the suit because they had a valid mobile home owners insurance policy issued to Sandra Willmeno, Doug Willmeno's mother, which also covered her son.[22] This policy provided a fifty-thousand dollar liability coverage for personal injury and property damage.[23] However, it also had American Family's standard exclusion clause denying coverage for "bodily injury or property damage . . . which is expected or intended by any insured."[24] Based on this exclusion, American Family declined to provide a defense for Doug Willmeno.[25]

Easley obtained a judgment against Willmeno for $82,088.14.[26] He then instituted a garnishment proceeding[27] against American Family to recover the

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16. *Id.* at 811.

17. *Id.*

18. *Id.*

19. Findings of Fact and Conclusions of Law at 3, Easley v. American Family Mut. Ins. Co. v. Willmeno, Case No. CV589-493, Circuit Court of Callaway County, Missouri (Judgment entered Nov. 27, 1991).

20. *Id.*

21. *Id.* at 1. The case was Easley v. Willmeno, Case No. CV5-85-32, Circuit Court of Callaway County, Missouri.

22. *Easley*, 847 S.W.2d at 812; Findings of Fact and Conclusions of Law at 2, Easley v. American Family Mut. Ins. Co., Case No CV589-493, Circuit Court of Callaway County, Missouri.

23. Findings of Fact and Conclusions of Law at 2, Easley v. American Family Mut. Ins. Co., Case No. CV589-493, Circuit Court of Callaway County, Missouri.

24. *Easley*, 847 S.W.2d at 812.

25. Findings of Fact and Conclusions of Law at 2, Easley v. American Family Mut. Ins. Co., Case No. CV589-493, Circuit Court of Callaway County, Missouri.

26. *Id.* Judgment was entered on September 11, 1989 in the underlying case of *Easley v. Willmeno*. See *supra* note 21 and accompanying text.

27. Pursuant to MO. REV. STAT. § 379.200 (1986).

amount of judgment against the Willmeno's insurance policy.[28] American Family impleaded Sandra and Doug Willmeno as third-party defendants.[29] Easley and American Family filed cross motions for summary judgment.[30] The trial court held that the American Family policy covered the injuries to Easley.[31] Based on the trial court's reading of *American Family Mutual Insurance Co. v. Pacchetti*,[32] it held that American Family had the burden of proving that Willmeno had intended the specific injury that resulted from his act.[33] The trial court found that Willmeno did not intend to knock Easley toward or through the window, or to cause the injuries that resulted.[34] It held that American Family had shown only that Willmeno intended to strike Easley and blacken his eye or give him a bloody nose, not that he intended the specific injuries that resulted.[35] Thus, the intentional acts exclusion clause was inapplicable and judgment was entered for Easley.[36]

American Family appealed, arguing that Willmeno could have reasonably predicted that striking Easley hard enough to give him a black eye or bloody lip could cause Easley to be knocked down or strike something causing further bodily injury.[37] Because Willmeno intended to strike Easley and intended to cause him harm, and reasonably foreseeable injuries resulted, American Family argued that the intentional act exclusion clause prohibited coverage.[38] Easley countered that under the rule of *Pacchetti* and *Economy Fire & Casualty Co. v. Haste*,[39] American Family had failed to show that Willmeno intended the specific result of his act, and thus the exclusionary clause did not bar coverage.[40] The Western District of the Missouri Court of Appeals, sitting en banc, reversed[41] and entered summary judgment for American

28. *Easley*, 847 S.W.2d at 812.

29. *Id.*

30. *Id.*

31. *Id.*

32. 808 S.W.2d 369 (Mo. 1991).

33. *Easley*, 847 S.W.2d at 812.

34. *Id.*

35. *Id.*

36. *Id.*; Findings of Fact and Conclusions of Law at 4, Easley v. American Family Mut. Ins. Co., Case No. cu5-85-32, Circuit Court of Callaway County Missouri. Judgment was in the amount of $50,000 plus interest of $16,478.20, and court costs were assessed to American Family. *Id.*

37. Appellant's Brief at 7, 10, Easley v. American Family Mut. Ins. Co., WD No. 45,688 (Mo. Ct. App. 1992).

38. *Id.* at 10-12.

39. 824 S.W.2d 41 (Mo. Ct. App. 1991).

40. *Easley*, 847 S.W.2d at 813.

41. *Id.* at 814. The Honorable Paul M. Spinden wrote the opinion in which all

Family.[42] The court held that the trial court had read *Pacchetti* too narrowly. According to the court of appeals, all that is required to invoke the exclusion is that an intent to injure be shown.[43] Because American Family had shown Willmeno's intent to strike and injure Easley, and because the public policy of Missouri prohibits insuring against the consequences of intentional acts, the Western District held that American Family could invoke the intentional acts exclusion clause in its policy to deny coverage to Doug Willmeno.[44]

III. LEGAL BACKGROUND

A. Missouri Cases Before Pacchetti

Missouri courts first tried to define the term "intentional" for purposes of these policy exclusions in *Crull v. Gleb*.[45] Gleb caught Crull dumping debris in a drainage ditch.[46] Gleb, in his pickup, chased Crull's car down the road, rammed him four times, and blocked him in a driveway.[47] Gleb claimed that the ramming was accidental in that his foot slipped off the clutch causing him to lose control of the truck.[48] The Eastern District Court of Appeals said that the only real issue for the jury in the subsequent jury action was whether Gleb's actions were "intentional." If so, the insurer was not liable.[49] The court defined "intentional" as "mean[ing] deliberately and consciously intending, or meaning, to do the acts themselves, knowing that they were wrong, and intending that harm result from said acts."[50] However, the case was submitted with jury instructions providing for "wanton and reckless" acts.[51] The court defined these terms to mean acts done deliberately but without regard for the consequences.[52] Since these acts could include negligent acts,[53] the insurer could not invoke the policy exclusion.[54]

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concurred. *Id.*

42. *Id.*
43. *Id.* at 812-13.
44. *Id.* at 814.
45. 382 S.W.2d 17 (Mo. Ct. App. 1964).
46. *Id.* at 19.
47. *Id.*
48. *Id.* at 21.
49. *Id.* at 21.
50. *Id.*
51. *Id.* at 20-21.
52. *Id.*
53. *Id.* at 22.
54. *Id.*

The next case looking at intentional acts exclusion clauses was in the Southern District—*Farmers Alliance Mutual Insurance Co. v. Reed*.[55] While driving drunk, Reed twice collided with the car of J.D. Hendrix, forcing him off the road.[56] The court first held that the trial court had jurisdiction to hear a declaratory judgment action by Farmers Alliance Mutual Insurance Company to construe the application of an intentional acts exclusion.[57] In deciding what must be shown to invoke an intentional acts exclusion, the court cited an annotation on the subject entitled *"Liability Insurance: Specific Exclusion of Liability for Injury Intentionally Caused by Insured."*[58] The court quoted a paragraph detailing what has come to be called the specific intent approach to construing these exclusions.[59] The quoted paragraph said that an insurer is not relieved of its obligations unless the insured acted with the specific intent to cause harm to the third party.[60] However, some acts are such that the intent to harm can be inferred from the character of the acts, thus relieving the insurer of liability.[61]

In 1977, the Eastern District tried to clearly define this area of law by adopting the specific intent test and rejecting the subjective intent approach. In *Subscribers at the Automobile Club Inter-Insurance Exchange v. Kennison*,[62] the Auto Club instituted a declaratory judgment action to deny coverage to its insured, Bobby Joe Brown.[63] Kennison blocked Brown's lane with his car in a parking lot.[64] When Brown told Kennison to move, Kennison responded "you make me move it."[65] Brown then backed up and rammed into Kennison's car.[66] The Eastern District cited *Crull*, *Reed*, and the annotation cited in *Reed*, in its discussion of the requirements for showing that an insured intended the results of his acts.[67] The court followed *Crull* in holding that there must be specific intent to cause harm or damage, and that "[i]ntended results are not only those results which are desired."[68] The court cited the Restatement (Second) of Torts for the proposition that intent can be

55. 530 S.W.2d 470 (Mo. Ct. App. 1975).
56. *Id.* at 477-78.
57. *Id.* at 477.
58. W.E. Merritt III, 2 A.L.R. 3d 1238 (1965).
59. *Reed*, 530 S.W.2d at 478.
60. *Id.*
61. *Id.*
62. 549 S.W.2d 587, 591 (Mo. Ct. App. 1977).
63. *Id.* at 589.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 590-91.
68. *Id.* at 590.

inferred if the nature of the act is such that the results are certain or substantially certain to occur.[69] The court also cited a Tenth Circuit case, *Rankin v. Farmers Elevator Mutual Insurance Co.*,[70] for the rule that if the results are the natural and probable consequences of an intentional act, then the results are deemed to be intentional.[71] The court concluded by stating that intent to harm can be inferred from the nature of the act.[72] The court said that "[t]o hold otherwise, would . . . establish a subjective standard of intent which would make intentional injury liability insurance exclusions inapplicable without an admission by the insured of specific intent to injure."[73] Thus, although *Kennison* adopted the specific intent test, the court's wording opened the door for insurers to argue for the use of the objective test to exclude "natural and probable" results of acts.

The next case in this line contained an explicit statement of the limits of exclusions used by American Family in its brief to the Court of Appeals in the *Easley* case.[74] *Hanover Insurance Co. v. Newcomer*[75] dealt with the injuries to a woman inflicted by a drunk friend, who was swinging a machete around when he hit her in the leg.[76] Hanover brought a declaratory judgment action claiming that the blow to the victim was intentional, and thus the injury was intentional.[77] Newcomer claimed that he had struck the victim by accident.[78] The court reviewed the decision in *Kennison*, and because the policy language in the two cases was different, it undertook a survey of the trends nationwide in this area of law.[79] The Western District adopted the rule of *State Farm Fire & Casualty Co. v. Muth*,[80] *Continental Western Insurance Co. v. Toal*,[81] and *Butler v. Behaege*.[82] The court rejected a distinction between the terms "expected" and "intended," saying that to do so would allow foreseeability to be injected into the test and thus allow

69. *Id.* (citing RESTATEMENT (SECOND) OF TORTS, § 8A).
70. 393 F.2d 718 (10th Cir. 1968).
71. *Kennison*, 549 S.W.2d at 590-91.
72. *Id.*
73. *Id.*
74. Appellant's Brief at 7, Easley v. American Family Mut. Ins. Co., WD No. 45,688 (Mo. Ct. App. 1992).
75. 585 S.W.2d 285 (Mo. Ct. App. 1979).
76. *Id.* at 285-86.
77. *Id.* at 286-87.
78. *Id.* at 287.
79. *Id.* at 287-89.
80. 207 N.W.2d 364 (Neb. 1973).
81. 244 N.W.2d 121 (Minn. 1976).
82. 548 P.2d 934 (Colo. Ct. App. 1976).

negligence to be excluded under the policy language.[83] Instead, the court adopted the rule that intent to injure can be inferred if the nature and character of the act is such that injury can be expected.[84] The court explicitly stated that "such exclusion is applicable if the insured acts with the intent or expectation that bodily injury will result even though the bodily injury that does result is different either in character or magnitude from the injury that was intended."[85]

Curtain v. Aldrich[86] was a case involving an assault based on mistaken identity.[87] Because it was a mistaken identity case, the legal analysis was a little different from the three previous intentional acts exclusion cases, but the court ultimately held that if Aldrich had assaulted Curtain with the intent to injure, knowing who Curtain was, the injuries were intentional and beyond the scope of policy coverage.[88] The court reaffirmed the rule that public policy denies indemnity insurance for intentional acts.[89]

In *Travelers Insurance Co. v. Cole*,[90] Travelers Insurance instituted a declaratory judgment action to determine whether it was liable for its insured's act of shooting a police officer.[91] The trial court found that the shooting was not an "occurrence" because the policy language prohibited intentional acts from being "occurrences," and the Eastern District affirmed.[92] The court said that language excluding injury or damage expected or intended from the standpoint of the insured necessarily excludes coverage for the insured's intentional acts.[93] The court defined an injury as intentional when "the insured acts with the specific intent to cause harm or if the insured's intent to harm is inferred as a matter of law from the nature or character of the act."[94] Intent is inferred if "the natural and probable consequences of an act are to produce harm."[95] The court then found that discharging a gun is a dangerous act from which harm is certain to result, and so it was proper to infer intent

83. *Hanover*, 585 S.W.2d at 288.
84. *Id.* at 289.
85. *Id.* at 288. (quoting Butler v. Behaege, 548 P.2d 934, 938 (Colo. Ct. App. 1976)); *also cited in* Appellant's Brief at 7.
86. 589 S.W.2d 61 (Mo. Ct. App. 1979).
87. *Id.* at 62-63.
88. *Id.* at 66.
89. *Id.* at 64.
90. 631 S.W.2d 661 (Mo. Ct. App. 1982).
91. *Id.* at 663.
92. *Id.* at 663-64.
93. *Id.* at 664.
94. *Id.*
95. *Id.*

to harm.[96] In this case, the plaintiff in the underlying suit had also pleaded one count alleging negligence.[97] The court said that wanton and reckless acts are those done intentionally but without regard for the consequences; thus, these acts may be negligent.[98] Insurers may not deny coverage for these acts.[99]

In 1982, the Western District again dealt with an exclusion clause in *Truck Insurance Exchange v. Pickering*.[100] In *Pickering*, the insured had tried to provoke a fight with the driver of a truck who had cut him off.[101] When he realized that he was outnumbered by men in the semi, Pickering got in his car as if he were leaving.[102] Instead of leaving, however, Pickering rammed the truck once, backed up, and drove towards the truck, killing one of the men standing in front of the truck.[103] The survivors of the man killed argued that the policy language required a subjective determination of intent before any exclusion could be invoked.[104] The court cited *Kennison*[105] for the rejection of the subjective state of mind standard to prove intent.[106] The court said that an admission of intent is not needed.[107] It held that it is possible to infer intent from the facts and circumstances surrounding an act, and a person is presumed to intend the natural and probable consequences of her actions.[108] Thus, "[w]hen an intentional act results in injuries which are the natural and probable consequences of the act, the injuries as well as the act are intentional."[109] The court explicitly rejected the subjective intent standard by saying that to adopt that standard would make it impossible to preclude coverage without an admission of intent by the insured.[110]

The Eastern District, in *Farm Bureau Town & Country Insurance Co. of Missouri v. Turnbo*,[111] became the first in Missouri to try to define a

96. *Id.*
97. *Id.* at 664-65.
98. *Id.*
99. *Id.*
100. 642 S.W.2d 113 (Mo. Ct. App. 1982).
101. *Id.* at 114.
102. *Id.* at 115.
103. *Id.*
104. *Id.* at 115-16.
105. 549 S.W.2d 587 (Mo. Ct. App. 1977).
106. *Pickering*, 642 S.W.2d at 116.
107. *Id.*
108. *Id.* (citing Camp v. John Hancock Mut. Life Ins. Co., 165 S.W.2d 277, 281 (Mo. Ct. App. 1942)).
109. *Pickering*, 642 S.W.2d at 116.
110. *Id.*
111. 740 S.W.2d 232, 234-36 (Mo. Ct. App. 1987).

difference between the terms "expected" and "intended." In *Turnbo*, Farm Bureau brought a declaratory judgment action to determine its duty to defend Turnbo for injuries William Humphry suffered in a simple fistfight with Turnbo.[112] Humphry sued Turnbo for his injuries on grounds that Turnbo had acted intentionally and had been reckless.[113] The Farm Bureau policy contained language excluding coverage for acts "intended or expected" to cause injury.[114] The Eastern District recognized that the Western District had indicated in *Hanover* that the two terms meant the same thing.[115] The court declined to follow the Western District, however, because it believed the two terms were not written to be synonymous.[116] It cited the industry-wide revision of these clauses in 1966 for the idea that the term "expected" was added specifically to force courts to view the injury from the standpoint of the insured.[117] The two terms were designed to require different levels of proof.[118] The court held that "'[i]ntend' means the insured desires to cause the consequences of his act or believes the consequences are substantially certain to result."[119] It held that "'[e]xpect' means the insured realized or should have realized there was a strong probability the consequences in question would result from his acts."[120] The court then equated "expect" with the legal definition of recklessness, and determined that in this case, the exclusion relieved Farm Bureau from having to cover Turnbo even if the plaintiff pleaded recklessness.[121]

After *Turnbo* was decided, the Southern District decided the final two cases before *Pacchetti*. In the first, *Western Indemnity Co. v. Alley*,[122] the court did not discuss *Turnbo* in stating that the rule is that "[i]njury is intentional if the insured acted with specific intent to cause harm. Intent to harm is usually inferred if the natural and probable consequences of an act produce harm."[123] However, in *Steelman v. Holford*,[124] the Southern District, without comment, followed the Eastern District's separate definitions

112. *Id.* at 233-34.
113. *Id.*
114. *Id.* at 234.
115. *Id.* at 235-36 (citing Hanover Ins. Co. v. Newcomer, 585 S.W.2d 285, 288 (Mo. Ct. App. 1979)).
116. *Id.* at 236.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. 740 S.W.2d 372 (Mo. Ct. App. 1987).
123. *Id.* at 374.
124. 765 S.W.2d 372 (Mo. Ct. App. 1989).

of "intended" and "expected."[125] In *Steelman*, Holford and a friend went on a drunken jeep ride from Jefferson City, Missouri, to Doniphan, Missouri.[126] During the drive, one of the two fired a .30 caliber rifle from the jeep.[127] Steelman, who was driving a truck, heard two pops, felt a sharp pain in his leg, and realized he had been shot.[128] Both Holford and his friend disclaimed any knowledge of shooting the truck or shooting Steelman, nor was there any evidence they had reason to shoot Steelman or that they had intentionally fired into the truck.[129] The Southern District cited *Turnbo* in holding that to avoid coverage, Home Mutual Insurance Company, Holford's insurer, had the burden of proving Steelman's injuries were intended or expected.[130] The court said that to prove Steelman's injuries were intended, Home Mutual would have to prove that "Holford either desired to cause Steelman's injury or believed that Steelman's injury was substantially certain to follow" from the gunshot.[131] To prove the injury was expected, Home Mutual would have to show "that Holford realized, or should have realized, that there was a strong probability Steelman would be shot as a consequence of his acts."[132] The court found that since there was no evidence of conscious intent to cause the harm that followed, there was no intentional act voiding coverage.[133] The court also said that wanton and reckless acts are not equivalent to intentional acts, and that an insurer cannot use an intentional acts clause to void coverage for reckless acts.[134]

B. American Family Mutual Insurance Co. v. Pacchetti

The first time the Missouri Supreme Court dealt with the issues involved in intentional acts exclusion clauses was in *American Family Mutual Insurance Co. v. Pacchetti*.[135] The Missouri Supreme Court granted transfer because of "the widespread use of an exclusion for injuries intended or expected in liability insurance policies."[136] *Pacchetti* was based on a unique factual

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125. *Id.* at 377.

126. *Id.* at 375-76.

127. *Id.* at 376. The testimony conflicts as to who was driving and who was shooting. *Id.*

128. *Id.* at 375.

129. *Id.* at 376.

130. *Id.* at 377.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. 808 S.W.2d 369 (Mo. 1991).

136. *Id.* at 370. The court immediately reaffirmed that the "burden is on the

situation. Sixteen year old Derek Anderson was visiting the defendant, Charles Pacchetti, when Pacchetti showed him a vial of nearly pure cocaine.[137] When he found out that Anderson had never tried cocaine before, Pacchetti either injected Anderson with cocaine or furnished the cocaine to Anderson to inject and/or helped him with the injection.[138] Anderson subsequently collapsed and died of an overdose.[139] American Family had an insurance policy on Pacchetti, insuring him for liability for personal injury and property damage, that contained American Family's standard exclusion clause barring coverage of bodily injury "'expected or intended by any insured.'"[140] The Missouri Supreme Court, by a four to three vote,[141] affirmed the trial court's finding that the exclusion was inapplicable as the injury was neither intended nor expected.[142] The court held that the insurer could not invoke the exclusion simply by showing that cocaine was harmful and inferring intent from that alone.[143] The court also rejected the idea that a showing of recklessness could satisfy the requirements of an intentional acts exclusion.[144]

The court defined the test to be that "[i]t must be shown not only that the insured intended the acts causing the injury, but that injury was intended or expected from these acts."[145] In another important passage the court said:

> It remains for the insurer to show that this particular insured expected or intended the result which occurred. The record does not compel a finding that he did. It is just as likely that Pacchetti, in his perverted way, might have thought that Derek would derive some transitory pleasure or benefit from what would be his initial experience with cocaine. What Pacchetti intended or expected is a question of fact for the trial court.[146]

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insurer to establish that an exclusion bars coverage." *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* Ulrich, Special Judge, dissented and was joined by Judges Robertson and Holstein. *Id.* at 372-74.

142. *Id.* at 371-72. Chief Judge Charles Blackmar wrote the opinion of the court. *Id.* at 370.

143. *Id.* at 371.

144. *Id.*

145. *Id.* (citing Steelman v. Holford, 765 S.W.2d 372, 377 (Mo. Ct. App. 1989)).

146. *Pacchetti*, 808 S.W.2d at 371.

The court concluded by saying that the trial court's findings of fact regarding Pacchetti's intent were supported by the evidence.[147]

Special Judge Ulrich, joined by Judges Robertson and Holstein, dissented.[148] Judge Ulrich argued that American Family had presented evidence that showed Pacchetti intended to cause Derek Anderson's death as a matter of law, causing the policy exclusion to apply.[149] He drew upon the traditional Missouri rules that the term "intentional" as "contemplat[ing] deliberately and consciously intending the acts themselves . . . [and] requir[ing] a showing that the actor intended that harm result from the acts."[150] He stated that "[a]n insured commits an intentional act when he acts with the specific intent to cause harm to a third person or when the insured's intent to harm is inferred as a matter of law from the nature or character of the act."[151] Judge Ulrich argued that the intent of Pacchetti to harm Anderson could be inferred from the dangerous nature of cocaine.[152] He believed the issue was whether Pacchetti intended some harm to result to Derek, not whether Pacchetti intended the actual harm that resulted.[153] He surveyed cases from many other states that dealt with the issue of whether intent to harm generally is sufficient, or whether intent to cause the actual resulting harm must be proven.[154] Judge Ulrich said he would adopt the rule from these other jurisdictions that "when the insured commits an intentional act intending to harm another person, the resulting harm to the person is intentional though more severe than that originally contemplated by the insured . . . [as long as] the resulting harm is the 'ordinary consequence[]' of

147. *Id.* at 371-72.

148. *Id.* at 372.

149. *Id.*

150. *Id.* (citing Crull v. Gleb, 382 S.W.2d 17, 21 (Mo. Ct. App. 1964)).

151. *Pacchetti*, 808 S.W.2d at 372 (citing Travelers Ins. Co. v. Cole, 631 S.W.2d 661, 664 (Mo. Ct. App. 1982), and Hanover Ins. Co. v. Newcomer, 585 S.W.2d 285, 289 (Mo. Ct. App. 1979)).

152. *Pacchetti*, 808 S.W.2d at 373.

153. *Id.*

154. *Id.* (citing Parkinson v. Farmers Ins. Co., 594 P.2d 1039 (Ariz. Ct. App. 1979); Butler v. Behaege, 548 P.2d 934 (Colo. Ct. App. 1976); Hartford Fire Ins. Co. v. Spreen, 343 So. 2d 649 (Fla. Dist. Ct. App. 1977); Antill v. State Farm Fire & Cas. Co., 344 S.E.2d 480 (Ga. Ct. App. 1986); Farmers Ins. Group v. Sessions, 607 P.2d 422 (Idaho 1980); Mid America Fire v. Smith, 441 N.E.2d 949 (Ill. Ct. App. 1982); Home Ins. Co. v. Neilsen, 332 N.E.2d 240 (Ind. Ct. App. 1975); Fireman's Fund Ins. Co. v. Hill, 314 N.W.2d 834 (Minn. 1982); State Farm Fire & Cas. Co. v. Muth, 207 N.W.2d 364 (Neb. 1973); Tal v. Franklin Mut. Ins. Co. 410 A.2d 1194 (N.J. Super. Ct. App. Div. 1980); Graves v. Liberty Mut. Fire Ins. Co., 745 S.W.2d 282 (Tenn. Ct. App. 1987); Pachucki v. Republic Ins. Co., 278 N.W.2d 898 (Wis. 1979)).

the insured's voluntary actions."[155] Under this rule, Judge Ulrich determined that because Pacchetti intended to puncture Derek's arm and put a toxic chemical into his blood, any harm that resulted was "intended" by Pacchetti, even if more severe than he contemplated.[156]

C. *Missouri Cases After* Pacchetti

The next three cases dealing with these exclusion clauses, *Economy Fire & Casualty Co. v. Haste*,[157] *American Family Mutual Insurance Co. v. Lacy*,[158] and *Mid-Century Insurance Co. v. L.D.G.*,[159] were all decided by the Western District. Using the narrow definition of "intentional act" in *Pacchetti*, the courts in *Haste* and *Lacy* found that the liability policies in question covered the acts.[160] However, in *L.D.G.*, coverage was denied because of slightly different wording in the exclusion clause.[161]

Economy Fire & Casualty Co. v. Haste[162] is better known as the Bob Berdella case.[163] Families of Berdella's victims brought a civil suit asking for damages for both wrongful death and for the pre-death injuries Berdella inflicted on his victims.[164] Berdella had a homeowners policy with Economy Fire that had standard personal injury and property damage liability coverage.[165] This policy contained an exclusion clause denying coverage for bodily injury expected or intended by Berdella.[166] The court followed *Pacchetti* by declaring the rule to be that the burden is on the insurer to show that the insured "expected or intended the result which occurred" in order to invoke the exclusion to deny coverage.[167] The court then applied the rule and declared that the record clearly showed that Berdella expected and intended to injure his victims with torture and abuse.[168] Therefore, the exclusion applied and there could be no recovery for the pre-death injuries the

155. *Pacchetti*, 808 S.W.2d at 374.
156. *Id.*
157. 824 S.W.2d 41 (Mo. Ct. App. 1991).
158. 825 S.W.2d 306 (Mo. Ct. App. 1991).
159. 835 S.W.2d 436 (Mo. Ct. App. 1992).
160. *Haste*, 824 S.W.2d at 45; *Lacy*, 825 S.W.2d at 314-15.
161. *L.D.G.*, 835 S.W.2d at 437-38.
162. 824 S.W.2d 41 (Mo. Ct. App. 1991).
163. *Id.* Berdella is a serial murderer who sexually tortured and killed his victims in his home in Kansas City, Missouri. *Id.* at 43-44.
164. *Id.* at 43.
165. *Id.* at 44.
166. *Id.*
167. *Id.* at 45.
168. *Id.*

victims sustained.[169] However, the court reversed the trial court's summary judgment for Economy Fire, saying there was a genuine issue of material fact regarding whether Berdella intended to kill any of his victims.[170] The Western District remanded the case for a determination of whether Berdella intended to cause his victim's deaths. If he did not intend to kill any of them, Economy Fire's policy would have to provide coverage.[171]

American Family Mutual Insurance Co. v. Lacy[172] was a declaratory judgment action arising out of a car chase and wreck.[173] American Family insured Timothy Stoffers,[174] who ran a stop sign and subsequently refused to pull over when the police gave chase.[175] At the end of the chase, Stoffers crested a hill, veered to the left, crossed the center line, and hit a car driven by John Turner.[176] Stoffers was killed.[177] The American Family policy contained an exclusion that denied coverage for "[b]odily injury or property damage caused by an intentional act of . . . an insured . . . even if the actual injury or damage is different than that which was expected or intended."[178] In defining the substantive law governing the interpretation of this exclusion clause, the court again looked to *Pacchetti* for the proper definitions.[179] The court interpreted *Pacchetti* as requiring that the insurer show the insured intended the acts causing the injury and that injury was intended or expected to result in order to invoke the exclusion.[180] If a question of fact arises as to what the insured intended or expected, it "remains for the insurer to show that this particular insured expected or intended the result which occurred."[181] Later in the opinion, the court summarized the rule governing intentional acts exclusions as being "that the insured intended the act that caused the injury, *and* intended or expected the injury from the act."[182] Despite the language of the policy extending the exclusion to cover injury not intended or expected by the insured, the court held that unintended harm from

169. *Id.*
170. *Id.*
171. *Id.* at 45-47.
172. 825 S.W.2d 306 (Mo. Ct. App. 1991).
173. *Id.* at 308.
174. *Id.*
175. *Id.* at 310.
176. *Id.*
177. *Id.* at 308.
178. *Id.*
179. *Id.* at 314.
180. *Id.*
181. *Id.* (quoting *Pacchetti*, 808 S.W.2d at 371).
182. *Lacy*, 825 S.W.2d at 315 (citing *Pacchetti*, 808 S.W.2d at 371) (emphasis in original).

an intentional act does not fall into the exclusion and is covered by the policy.[183] Because there was no evidence showing Stoffers could have intended the results of his acts, the court held summary judgment against the insurance company was appropriate.[184]

The final post-*Pacchetti* case before *Easley* was *Mid-Century Insurance Co. v. L.D.G.*[185] This case involved the sexual abuse of a two year old girl.[186] She was raped by Robert McKinney, the husband of her babysitter, and she contracted chlamydia as a result.[187] McKinney claimed he was unaware that he was a chlamydia carrier.[188] His insurance policy, issued by Mid-Century, contained an exclusion clause for bodily injury either caused intentionally or that is the reasonably foreseeable result of an intentional act.[189] The court followed the definition in *Pacchetti* that "[i]t remains for the insurer to show that this particular insured expected or intended the result which occurred."[190] Under this test, the court held that there was no showing on the record that McKinney intended to give L.D.G. chlamydia as a result of the rape.[191] Therefore, the policy exclusion could not be invoked on the grounds that McKinney's acts and the result were intentional.[192] However, the exclusion clause also contained language barring coverage for reasonably foreseeable results of an intentional act.[193] The court held that the transmission of a venereal disease as the result of a rape could be considered reasonably foreseeable as a matter of law, and thus this provision of the Mid-Century clause excluded coverage of McKinney.[194] Judge Hanna concurred in a lengthy and thorough opinion, arguing that the majority should have adopted a rule that under *Pacchetti*, the sexual abuse of children was so

183. *Lacy*, 825 S.W.2d at 315 n.7. The court engaged in an analysis of what "intentional" meant. *Id.* at 314-15. The court seemed to decide that despite the policy language, an injury that was not intended or substantially certain to result from the insured's acts was not "intentional," and thus was covered by the policy. *Id.*

184. *Id.* at 315.

185. 835 S.W.2d 436 (Mo. Ct. App. 1992).

186. *Id.* at 436.

187. *Id.*

188. *Id.*

189. *Id.* at 436-37.

190. *Id.* at 437 (citing *Pacchetti*, 808 S.W.2d at 371). Interestingly, Judge Ulrich wrote for the majority in this case, after writing the dissent in *Pacchetti* objecting to this subjective intent standard.

191. *L.D.G.*, 835 S.W.2d at 437.

192. *Id.*

193. *Id.* at 437-38.

194. *Id.* at 438.

harmful that any injury resulting would be inferred to be intentional, and thus excludable from policy coverage.[195]

Thus, based on the Western District's interpretation of *Pacchetti* in these three cases, the subjective intent standard was the law in Missouri. Because of the language in *Pacchetti* the panels had cited, an insurer had to show that their insured intended his act and intended the precise result that had occurred, in order to invoke an intentional acts exclusion clause.

IV. INSTANT DECISION

In *Easley v. American Family Mutual Insurance Co.*[196] the Western District of the Missouri Court of Appeals, sitting en banc, reversed the trial court's declaration that Willmeno's policy covered Easley's injuries.[197] The court began its analysis by noting that Missouri courts have consistently held that the intentional infliction of damage cannot be covered by liability insurance.[198] Allowing insurance to cover these intentional acts would be against Missouri's public policy and would prevent an insured from bearing the responsibility for his acts.[199]

The court summarized the trial court's finding that Willmeno did not intend to knock Easley towards the window or cause the injuries Easley sustained.[200] The trial court held, based on *Pacchetti*, that an insurer can only be relieved of liability when it shows that the insured intended the specific injury that resulted.[201] Because American Family had shown only that Willmeno wanted to give Easley a black eye or a bloody nose and not knock him through the window and cause the specific injuries that resulted, according to the trial court, the exclusion clause did not apply.[202]

The en banc court concluded that the trial court had read *Pacchetti* too narrowly.[203] The court said:

> We read it [*Pacchetti*] as instructing that an insurer can escape liability for intentional acts when it establishes not only that the

195. *Id.* at 438-44.

196. 847 S.W.2d 811 (Mo. Ct. App. 1992).

197. *Id.* at 812.

198. *Id.*

199. *Id.* (citing Keeler v. Farmers & Merchants Ins. Co., 724 S.W.2d 307, 309 (Mo. Ct. App. 1987); Fidelity & Casualty Co. of New York v. Wrather, 652 S.W.2d 245 (Mo. Ct. App. 1983); White v. Smith, 440 S.W.2d 497 (Mo. Ct. App. 1969)).

200. *Id.* at 812.

201. *Id.*

202. *Id.*

203. *Id.*

> insured acted intentionally, but that the insured intended his acts to injure—not benefit—the victim. The insurer must establish that the insured acted volitionally and with a motive to harm or injure. The *Pacchetti* court was not requiring a showing that the insured intended the specific injury which resulted.[204]

The source of confusion in how to read *Pacchetti* comes from two passages on page 371 of the opinion.[205] The first relevant passage states:

> The insurer . . . does not automatically bring the exclusion into play simply by showing that cocaine is harmful, or that the insured's acts in providing it . . . were intentional. Many intentional acts are within the coverage of liability insurance policies, even with this standard exclusion. It must be shown not only that the insured intended the acts causing the injury, but that injury was intended or expected from these acts.[206]

The second relevant passage the Western District quoted states:

> It remains for the insurer to show that this particular insured expected or intended the result which occurred. The record does not compel a finding that he did. It is just as likely that [the insured], in his perverted way, might have thought that [the victim] would derive some transitory pleasure or benefit from what apparently would be his initial experience with cocaine.[207]

The Western District determined that the trial court had read the words "the result" in the above passage as requiring a showing that the insured intended the precise result that occurred before the insurer could escape liability.[208] However, the court of appeals read this passage as meaning that "the result" was not a reference to the actual result only.[209] Instead, the key is that the court in *Pacchetti* was trying to determine if the insured intended to benefit or harm his victim.[210] If the insured was intending to benefit his victim, there was no way any resulting harm could be intentional, whether it was

204. *Id.* at 812-13.
205. *Pacchetti*, 808 S.W.2d at 371.
206. *Id. quoted in Easley*, 847 S.W.2d at 813 (emphasis omitted).
207. *Pacchetti*, 808 S.W.2d at 371, *quoted in Easley*, 847 S.W.2d at 813.
208. *Easley*, 847 S.W.2d at 813.
209. *Id.*
210. *Id.*

death or severe brain damage.[211] Thus, the Western District read *Pacchetti* as requiring a harm/benefit analysis in terms of determining what "the result" was.[212] Therefore, the proper rule of law was not the subjective intent approach from the second quoted paragraph.[213] That statement applied to the particular facts of the *Pacchetti* case.[214] The rule of *Pacchetti* to use in other cases is the one from the first quoted paragraph, the specific intent rule requiring only a showing of intent to act and cause some harm.[215]

Easley argued that the Western District's decisions in *Lacy*[216] and *Haste*[217] were consistent with *Pacchetti*, and thus the trial court was correct in following them. The court rejected this argument, stating that *Lacy* was of no help because it reached the same result as in this case. The court clarified *Haste* to make it consistent with this case.[218] The court pointed to language in *Lacy* which indicated that the court believed the analysis was that an insured needed to show "not only that the insured intended the *acts* causing the injury, but also that *injury* was intended or expected from these acts."[219] Thus, in *Lacy*, the court found no material issue of fact that the insured intended his acts cause any harm, and therefore the policy exclusion was inapplicable.[220]

Easley had pointed to dicta in the *Haste* decision which indicated that it must be shown that an insured intended the precise results of his acts. However, the Western District noted that the result in *Haste* was consistent with the analysis and the rule adopted in the present case.[221] The *Haste* court had drawn a distinction between the intent the insured had to cause pre-death injuries and the lack of intent to cause death.[222] Because Bob Berdella intended that pre-death injuries occur to his victims, the families could not recover damages for those intended injuries from Economy Fire.[223] With respect to the deaths caused by Berdella, the issue was unresolved; the *Haste*

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211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. American Family Mut. Ins. Co. v. Lacy, 825 S.W.2d 306 (Mo. Ct. App. 1991).
217. Economy Fire and Casualty Co. v. Haste, 824 S.W.2d 41 (Mo. Ct. App. 1991).
218. *Easley*, 847 S.W.2d at 813. *See infra* notes 221-24 and accompanying text.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 813-14.
223. *Id.* at 814.

court reversed and remanded the issue because the trial court had granted summary judgment.[224] The Western District said that this analysis and result were consistent with the rule of intent to harm adopted in *Easley*, and so *Haste* was of no help.[225]

The court concluded by finding that Willmeno deliberately acted by striking Easley and wanted to hurt him.[226] The court said, "That he wanted to limit the injury to a bloody nose or blackened eye is of no consequence; all that is required is that he intended to injure Easley."[227] American Family successfully showed that Willmeno acted volitionally and with intent to injure.[228] The court declared that American Family's policy did not cover Willmeno's conduct because of the policy exclusion and because public policy prevents "an insured from insuring against the consequences of his intentional acts."[229] The court concluded by reversing the trial court and entering judgment for American Family.[230]

V. COMMENT

The Western District's en banc opinion in *Easley* is a welcomed result. The test of *Pacchetti* was applied much too narrowly in *Lacy*, *Haste*, and *L.D.G.* With their erroneous focus on the sentence "it remains for the insurer to show that this particular insured expected or intended the result which occurred,"[231] the three cases subsequent to *Pacchetti* effectively moved Missouri into the subjective intent category by requiring proof of intent to cause the actual resulting harm.[232] The Western District demonstrated why focusing on this test was wrong. Because of that sentence's fact-specific context in *Pacchetti*, the need arose to do a harm/benefit analysis to determine Pacchetti's intent towards Derek Anderson.[233]

The Western District ably showed that *Pacchetti* really did not digress from the rule of law of all preceding Missouri cases. As quoted by the Western District in *Easley*, *Pacchetti* still used the specific intent rule that "[i]t must be shown not only that the insured intended the acts causing the injury,

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224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Pacchetti*, 808 S.W.2d at 371.
232. *L.D.G.*, 835 S.W.2d at 437; *Lacy*, 825 S.W.2d at 314; *Haste*, 824 S.W.2d at 45.
233. *Easley*, 847 S.W.2d at 813.

but that injury was intended or expected from these acts."[234] Furthermore, as the court pointed out, the wording in *Pacchetti* may have been subjective intent language, but the analysis the *Pacchetti* court carried out was a specific intent analysis: did Mr. Pacchetti intend to harm or to benefit his victim?[235] If he intended to benefit Anderson, there was no intent to harm and there would be insurance coverage. If he intended to harm Anderson, however, this would provide the intent necessary to allow invocation of the exclusion clause. Thus, the *Pacchetti* majority, in its outcome, in essence followed and approved the specific intent rule.[236] As interpreted and used by the *Easley* court, the traditional Missouri rule continues to be valid: an insurer must show only that the insured intended his act and intended that some harm result in order to decline coverage under the exclusion clause.[237]

Two courts applying Missouri law have followed this rule in post-*Easley* cases. In *B.B. v. Continental Insurance Co.*,[238] the Eighth Circuit United States Court of Appeals, in a case involving the sexual molestation of a minor, upheld the district court's ruling that the insurance policy denied coverage for the perpetrator's acts. In interpreting the standard "intended or expected" language to deny coverage, the court decided that Missouri would adopt an inferred intent standard when the sexual abuse of children was involved.[239] The Eighth Circuit also noted that the *Easley* court had rejected the *L.D.G.* panel's requirement that the insurer show that the specific result had been intended by the insured.[240] And in *Monsanto Company v. Aetna Casualty & Surety Co.*,[241] the Superior Court of Delaware noted that *Easley* made it clear that the Missouri Supreme Court, in *Pacchetti*, was requiring that if intent to cause harm was shown, even if the harm was of a different type from what was intended, coverage could be denied under an "intended or expected" clause.[242]

The simple facts in *Easley* are excellent for a look at the issues surrounding the definition of an intent to harm for purposes of an intentional acts exclusion clause. It would seem that many of the difficulties presented by *Pacchetti* and the succeeding cases arose from their unusual fact pat-

234. *Id.* (quoting *Pacchetti*, 808 S.W.2d at 371).

235. *Pacchetti*, 808 S.W.2d at 371; *Easley*, 847 S.W.2d at 813.

236. *See supra* notes 203-215 and accompanying text.

237. *Easley*, 847 S.W.2d at 812-13. This rule would, of course, have to include the ability for a court to infer intent from the nature of the act if appropriate, as was allowed in pre-*Pacchetti* cases.

238. 8 F.3d 1288 (8th Cir. 1993).

239. *Id.* at 1294.

240. *Id.* at 1294-95.

241. No. 88C-JA-118, 1993 WL 542431 (Del. Super. Ct., Dec. 9, 1993).

242. *Id.* at *7, *9.

terns.[243] An even starker hypothetical than the facts in *Easley* can be useful in discussing the appropriate limits of "intent to harm."

For example, J, unprovoked, shoots several people. Some die, some are only injured. What should the insurer of J have to show to invoke the exclusionary language in its policy so that it won't be liable for any of J's acts?[244] Should insurer have to show only that J intended to shoot the victims and cause them injury? Or should insurer have to show J intended to kill those who died and only wound those who were wounded? The early interpretations of *Pacchetti* would indicate that the subjective intent of J to do what she did to each victim would have to be proven.[245] However, the test of *Easley* only requires Insurer to show that J intended to shoot her victims and intended to cause them harm.[246] Insurer would not have to differentiate between J's subjective intent regarding the specific result to each victim. In fact, *Travelers Insurance Co. v. Cole*,[247] would suggest that firing a gun is such a dangerous act that intent to harm can be inferred from the nature of the act.[248] In such a case, J would be liable and not insured for all "natural and probable consequences of J's dangerous acts."[249]

Easley's return to the specific intent test returns Missouri to the national majority in how to interpret these clauses.[250] Use of the specific intent test is probably fairest to all persons involved. Insurer's favor an objective test,

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243. The old adage "hard cases make bad law" certainly applies here, when dealing with a cocaine injection, serial murderer, high speed car chase, and sexual abuse.

244. Provided that J is sane.

245. *E.g.*, *Lacy*, 825 S.W.2d at 314 (focusing on the test from *Pacchetti*: "It remains for the insurer to show that this particular insured expected or intended the result which occurred."); *Haste*, 824 S.W.2d at 45 (utilizing the same language from *Pacchetti* in defining the requirement "the insurer must show that the insured expected or intended the result which occurred"); *L.D.G.*, 835 S.W.2d at 437 (citing the same *Pacchetti* language requiring intent as to exact result).

246. *Easley*, 847 S.W.2d at 812-13.

247. 631 S.W.2d 661 (Mo. Ct. App. 1982).

248. *Id.* at 664-65. This would be consistent with past cases involving dangerous acts, especially the line of cases dealing with the sexual abuse of children. *See* B.B. v. Continental Ins. Co., 8 F.3d 1288 (8th Cir. 1993); *supra* note 7.

249. *Cole*, 631 S.W.2d at 664; Subscribers at the Auto. Club Inter-Ins. Exchange v. Kennison, 549 S.W.2d 587, 590-91 (Mo. Ct. App. 1977). *See also* Hanover Ins. Co. v. Newcomer, 585 S.W.2d 285, 288-89 (Mo. Ct. App. 1979) (citing cases with "substantial certainty" as test for inferring intent for result of act). Using the "natural and probable consequences" language opens up possibilities for excluding negligence or recklessness, but this test could be limited only to dangerous acts, as in the *Cole* case.

250. *See* Wilcox, *supra* note 8, at 1538; Rigelhaupt, *supra* note 4, at 973.

as it lets them deny coverage for any result of an intentional act.[251] The objective test is measured by what reasonable persons would foresee as the results of their acts, and could be used to preclude coverage for negligent acts.[252] Victims favor a purely subjective test, which allows coverage unless the defendant admits intent to cause the actual results of her act.[253] The specific intent test is the closest thing to a middle ground and is the fairest to both parties.

Liability insurance provides a fund a wrongdoer may use to pay her just obligations and serves as a pool of resources to provide compensation to a victim.[254] As discussed above, however, public policy cannot allow insurance to pay for the results of a wrongdoer's intentional acts, as it would allow wrongdoers to avoid taking responsibility for their acts.[255] The criminal justice system may make some wrongdoers take some responsibility, but it does very little to compensate the victims. The specific intent test is the fairest way to determine when coverage is due because it serves several policy goals.

First, the specific intent test serves the goals of deterrence and punishment for many situations, as it would put the burden of a wrongdoer's acts on the wrongdoer, and not force the insurer to pay for the intentionally wrongful acts of its insured.

Second, the specific intent test lets insurers know that when they put an exclusion clause into a policy, they can readily predict what types of acts and results will be considered intentional. By looking at a state's case law, and using common sense, an insurance company can form a reasonable basis of expectation for what it will have to cover. Thus, it will have the financial stability it needs to write policies to cover only what it wants to cover and be able to set an appropriate premium.[256] The specific intent test eliminates the situation many insurance companies found themselves in after *Pacchetti*: practically requiring defendants to admit on the stand that they intended the exact results of their actions. This is ridiculously unfair for an insurer, as very few policyholders will cut their own throats and lose their coverage. It leaves insurers in the position of either risking huge bad-faith judgments if they deny coverage, or paying their policy limits in many more cases than they had intended.

Third, the specific intent test is also fair to victims and serves the policy goals of providing compensation to them. Strategically, it is not as good for

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251. *See* Wilcox, *supra* note 8, at 1538.
252. *Id.* at 1538-39.
253. *See id.*
254. Cyperstein, *supra* note 5, at 23.
255. *Id.*
256. *Id.* at 24. *See also infra* text accompanying notes 259-260.

plaintiffs as the subjective intent test because it denies coverage for more claims. It does leave many victims uncompensated because the insurer must only prove an intent to harm.[257] However, it is much better than the objective test the insurers prefer, which would eliminate most claims based on intentional or reckless acts, and even some acts of negligence.[258] The specific intent standard is a test plaintiffs can readily use to analyze and plan their cases, because it provides a relatively clear way to predict whether an insurance company will be successful in denying coverage to the defendant. Because the specific intent test provides a known standard for insurers to apply in writing their policies, it helps victims by ensuring that liability insurance will still be available.[259] The subjective intent test would actually hurt all insurance consumers, not just victims, because of its financial ramifications on insurers. To cover claims which could not be excluded because of a subjective intent standard, insurers would have to either raise everyone's premium, or lower the coverage amounts in most policies. Victims would also be hurt by the subjective intent test they crave, because insurers might begin writing policies that deny coverage for all "reasonably foreseeable" consequences or some other low standard, thus eliminating insurance coverage now available for plaintiffs to count on.[260] The specific intent test is one that plaintiffs can count on to ensure that insurance coverage will be available for them to make claims against.

Part of the problem with these exclusion clauses was created by the insurance industry itself because companies want to use one standard, nationwide contract. Now that the case law interpreting these clauses in Missouri has been cleaned up, insurers who don't like the rule have several choices to make. First, because Missouri has reaffirmed that it stands with the majority of states in interpreting these clauses, the insurance companies are safe in assuming that the rule will not change in the near future. They can accept this interpretation, and base their projections about costs, payouts, and premiums on this standard. Second, they could begin to write custom

257. Wilcox, *supra* note 8, at 1528.

258. Missouri case law helps victims by its requirement that intent to harm be proven in some subjective way. *Monsanto*, 1993 WL 542431 at *7.

259. If the subjective intent test was the rule, insurance companies would have to write very restrictive policies to deny coverage when they did not want to provide it. They would probably do this either by using very narrow definitions of what a policy covers, thus eliminating coverage for many acts now insured, or by adopting new standards for denying coverage.

260. *See, e.g.*, the cited policy language using the "reasonably foreseeable" test in Mid-Century Ins. Co. v. L.D.G., 835 S.W.2d 436, 437 (Mo. Ct. App. 1992). Using a reasonable person standard in the language adopts the objective test; which converts negligent acts to intentional acts and precludes coverage. Wilcox, *supra* note 8, at 1539.

insurance policies for each state to reflect whatever standard they want, probably a reasonably foreseeable standard. They run the risk, however, of the courts ignoring these new clauses as part of a contract of adhesion.[261] Finally, because most courts now treat "expect" and "intend" as part of the same clause, changing policy language may not be the best course for insurance companies. Their best choice may be to lobby for statutory relief in the form of a statute denying insurance coverage for intended harm.[262]

VI. CONCLUSION

The result in *Easley* is a fair one. The law has gone back to giving insurers a clear, fair test for determining when they aren't liable for acts they never intended for their policies to cover. It is fair to plaintiffs, because it does not create a broad test eliminating coverage for all foreseeable results of intentional acts, thus eliminating many viable claims. Although some plaintiffs will get stuck trying to collect from insolvent defendants because the deep pocket of the insurance company has been eliminated, the need for predictability for the insurance industry outweighs this problem. Some victims of intentional torts will be left worse off than victims of negligent acts by the specific intent rule. But the insurance company is not the wrongdoer, and it should not have to pay in every case. The company is a third party that has agreed to pay for the acts of its insured in certain circumstances, and it has the right to define what those circumstances will be. To get around the specific intent rule, many plaintiffs will try to plead recklessness or negligence to render the intentional acts exclusion inapplicable.[263] This is a potential problem, and courts will need to look to the substance of a plaintiff's claim over its form to see if intentional acts are really involved. If they are, Missouri courts have a clear and fair test for determining if the intentional acts exclusion clause will apply.

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261. *See* Wilcox, *supra* note 8, at 1529, 1538 n.92. *Cf. L.D.G.*, 835 S.W.2d at 439 (Hanna, J., concurring).

262. *See* Alvey, *supra* note 7, at 574.

263. Cyperstein, *supra* note 5, at 18-19.