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Insurance Law Update

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The Concurrent Proximate Cause Test for Coverage in Illinois: A Look at *Allstate Indemnity Company v. Contreras*

A version of the "expected or intended injury" exclusion can be found in nearly every liability insurance policy. The message is simple: the insurance company is not paying for certain damages intentionally caused by the insured. While the message may be simple, the application of these exclusions may not.

The Illinois Court of Appeals, Second District's, recent opinion in *Allstate Indemnity Co. v. Contreras*, 2018 IL App (2d) 170964, should give insurers relying on expected or intended injury exclusions pause. *Contreras*, handed down on July 20, 2018, applied a narrow interpretation of an expected or intended exclusion to liability coverage in the insureds' homeowner's policy.

Contreras concerned liability coverage for Alejandra Contreras and Jasmine's Day Care, the home day care that Alejandra owned and operated out of the home she shared with her husband Adan Contreras. *Contreras*, 2018 IL App (2d) 170964, ¶¶ 1-3. The claimant filed the underlying lawsuit against Alejandra and Jasmine's Day Care seeking damages for alleged sexual abuse the claimant's two minor daughters sustained while attending Jasmine's Day Care. *Id.* ¶¶ 3-4. The underlying lawsuit alleged that Adan perpetrated the purported abuse and sought to hold Alejandra and Jasmine's Day Care liable for negligence. *Id.* ¶ 4. Specifically, the claimant alleged that Alejandra and Jasmine's Day Care were negligent in failing to provide adequate supervision for the children, allowing Adan to be alone with the children, and failing to adequately protect the children "from exploitation, neglect and abuse" while at the day care. *Id.*

Alejandra and Jasmine's Day Care sought liability coverage under the homeowner's policy issued to Alejandra and her husband. The insurer argued that the policy's expected or intended injury exclusion barred coverage. *Id.* ¶¶ 5-6. The exclusion removed liability coverage for certain injury "intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person …" *Id.* ¶ 5. Finding that the insurer had a duty to defend Alejandra and Jasmine's Day Care against the underlying lawsuit, however, the second district disagreed that this exclusion applied.

Initially, the second district agreed with the insurer that the sexual abuse allegations supported a presumption as a matter of law that Adan himself intended to injure the children. *Id.* ¶ 15. Yet, the court found that presumption did not necessarily extend to his co-insureds Alejandra and Jasmine's Day Care's alleged negligence in failing to prevent the abuse. *Id.* ¶ 16.

In reaching this determination, the second district relied largely on its prior decision in *Westfield National Insurance Co. v. Continental Community Bank and Trust Co.*, 346 Ill. App. 3d 113 (2d Dist. 2003). *Westfield* concerned liability coverage for the insured under her homeowner's insurance policy arising out of her husband's alleged sexual abuse of

their minor nieces. *Westfield*, 346 Ill. App. 3d at 115. The *Westfield* policy contained a similar exclusion removing liability coverage for certain "expected or intended" injuries. *Id.* at 116. Focusing largely on the "innocent-insured doctrine," pursuant to which courts decline to impute the intent of one insured to another, the second district in *Westfield* declined to impute the insured's husband's intent to the insured herself. *Id.* at 120-21. Instead, the court examined the allegations asserted against the insured and the policy language to determine whether the exclusion applied. *Id.* at 122. The court ultimately concluded that the allegations showed that the insured reasonably should have anticipated or expected the injuries to her nieces, bringing the suit against her within the scope of the exclusion, as well. *Id.* at 123.

Under *Westfield*, the *Contreras* court declined to impute Adan's intent to Alejandra or Jasmine's Day Care, focusing instead on the policy language and the allegations against Alejandra and Jasmine's Day Care. *Contreras*, 2018 IL App (2d) 170964, ¶ 24. Turning to the exclusionary language, the insurer argued that the exclusion's use of the phrase "any insured person" barred coverage for the claims against Alejandra and Jasmine's Day Care based on Adan's intent alone. *Id.* ¶ 26. The exclusion removed coverage for certain injuries reasonably expected from the intentional acts of "*any insured person*." *Id.* ¶ 25 (emphasis added). The insurer argued that the use of this phrase rendered the exclusion broad enough to bar coverage for all insured persons based on the intent or expectation of *any* insured person. *Id.* ¶ 26.

The court disagreed. *Id.* ¶¶ 29-32. Relying on prior cases discussing the "innocent-insured doctrine," the court declined to hold that the exclusion categorically removed coverage for Alejandra and Jasmine's Day Care based on Adan's intent. *Id.* ¶ 32. The court reiterated that it "must look to the specific factual allegations asserted against Jasmine's Day Care and Alejandra in the underlying action to determine whether the 'expected injury' exclusion applies to their particular conduct." *Id.*

The court then examined the allegations against Alejandra and Jasmine's Day Care. *Id.* ¶¶ 34-38. Distinguishing *Westfield*, the court found that the allegations of the complaint did not allege that Alejandra or Jasmine's Day Care engaged in participatory conduct or knew or should have known that Adan had abused the children. *Id.* ¶ 35. Further, the court declined to examine the sufficiency of the complaint to determine whether additional knowledge allegations were required to support the claims against Alejandra and Jasmine's Day Care, focusing solely on the allegations in the complaint to determine the insurer's duty to defend. *Id.* ¶ 37. Ultimately, the court found that the insurer had not shown it had no duty to defend Alejandra or Jasmine's Day Care. *Id.* ¶ 38.

The second district's opinion should serve as a cautionary tale to Illinois coverage attorneys. The *Contreras* decision could be read to apply a concurrent proximate cause test to evaluate liability coverage, holding that coverage may be afforded when an exclusion removes coverage for one cause of the claimant's purported injuries but not another concurrent, proximate cause. In fact, the court found potential coverage for Alejandra and Jasmine's Day Care despite the broad language of the exclusion, which on its face purported to remove coverage based on *any* insured person's expectation or intent. Yet, because the exclusion did not expressly state that it would apply to *all* insured persons based on the intent of *any* insured person, the court declined to apply the seemingly broad exclusionary language to the claims against Alejandra and Jasmine's Day Care.

Coverage attorneys should keep the *Contreras* decision in mind when reviewing coverage for claims involving multiple insureds or derivative theories of negligence. An example would be cases arising out of an employee's alleged conduct and also involving allegations of negligent supervision, hiring or training against the employer, or, cases arising out of a child's conduct and also involving allegations of negligent supervision against the parent. While these derivative negligence theories may seem to arise out of conduct excluded from coverage, these theories may actually involve separate and independent conduct that does not quite fit within the exclusion, even if that exclusion appears fairly broad.

Pay close attention to the policy provisions and allegations asserted against *all* insureds to determine whether any potentially covered claims are presented.

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