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MAKING SENSE OF CALIFORNIA'S "ACCIDENT" REQUIREMENT IN LIABILITY INSURANCE POLICIES – PART II

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This two-part article assesses the accident or "occurrence" requirement that is typically found in liability insurance policies. This second part of the article suggests a means of making sense of the existing case law while simultaneously making the determination of whether a particular claim or suit involves an accident more consistent and predictable.

Developing a Comprehensive Accident Test

The vast variation, tremendous nuance, and extraordinary subtlety that attach to human interaction make it very challenging to describe the "accident" concept in simple terms that can be predictably applied to a wide array of different cases. But a unified "accident" definition that produces predictable and accurate results when applied to different types of cases would represent a major step forward in terms of properly framing an issue that has been a frequent source of disputes between policyholders and insurers, a struggle for courts, and a common cause of litigation.

So here goes—for purposes of liability insurance, whether or not conduct is accidental should generally be determined under the following test: *Did the actor physically achieve the objective he or she set out to achieve with respect to the injury producing event?*

If we can say the actors physically achieved their objective, there should be no accident, even if unexpected injury ensues. But when the actor does not achieve the desired objective (or achieves something more than the desired objective), and damage or injury ensues, there generally should be an accident.

Asking whether the defendant/insured achieved the objective he or she set out to achieve allows us to harmonize the large majority of cases and predict the outcome of future disputes. Or does it?

Let's first look at some of the recent cases. In *Lyons v. Fire Ins. Exch.*,[1] Steve Lyons, a former major league baseball player and broadcaster "met Stacey Roy while they were both vacationing with their families at a hotel in Hawaii. Following an afternoon of poolside conversation, Lyons followed Roy in the elevator to the floor of her hotel room and took her by the wrist to a hallway alcove, where he asked her to expose her breasts. She declined to do so. Roy later complained of an ensuing sexual attack, which Lyons denied."

According to Ms. Roy, "Lyons sexually attacked her in the alcove, shoved her against a vending machine, partially removed her clothes, exposed himself, and tried to force her to perform a sexual act." On the other hand, Mr. Lyons explained the encounter this way: "Roy said she was afraid of being observed in the hall. Lyons took her by the wrist and led her to an alcove near the elevator, where he repeated his request, stating, '[Y]ou know, you've been wanting to do this all day . . . so let's just move over here.' Roy declined because of concern that her husband might come by. According to Lyons, he then walked Roy to the door of her room and returned to the pool area. He denied any physical contact with Roy, other than having held her wrist when outside the elevator."

Did Lyons achieve the objective he set out to achieve? He may have wanted to achieve a lot more than he did achieve, but the sexual advance and the grabbing of Roy's wrist were purposeful actions. And in terms of actually causing an alleged injury, Lyons achieved his objective—restraining and propositioning Roy. The result should be no accident.

What did the court decide? The court held that there was no accident and no duty to defend. As the court explained, "although Lyons and Roy offer different versions of the events, their stories share key elements and establish that no covered accident occurred.

Both agree that Lyons grabbed Roy's wrist in the context of his sexual advances, that she did not consent to his actions, and that his conduct restrained her. Both recount an intentional and deliberate course of conduct."

While the court in *Lyons* struggled to distinguish "negligent" false imprisonment from the Lyons/ Roy encounter, it had no trouble determining that Lyons' grabbing of Roy's wrist was purposeful, and by momentarily restraining and propositioning Roy, Lyons had not acted accidentally.[2]

Another interesting case is *Food Pro Internat., Inc. v. Farmers Ins. Exch.*[3] Food Pro was a consulting company that offered engineering consulting for food processing operations. During a consulting job, a large extrusion machine was removed, leaving a hole in an upper level floor. The Food Pro representative spotted the danger and directed the customer's mechanics to address the situation, which they did by covering the hole with sheet metal and a plastic pallet, but they did not bolt it down. A week later, an electrical worker who had previously seen the hole, fell through it and was seriously injured.

The trial court held that there was no accident because the Food Pro representative had directed the electrical worker to work in the area where the hole was located—"Food Pro learned about the dangerous condition left by the removal of the extruder and deliberately sent Pettigrew to the area of the hole without taking any precautions to alleviate the danger. These undisputed facts conclusively demonstrate that Pettigrew's accident does not qualify as an 'occurrence' under the CGL policy."

But did Food Pro physically accomplish what it set out to accomplish? It did not. Food Pro believed the hole had been secured. Its physical objective was to get the needed electrical work done—not to have a worker go through a hole in the floor. So if the rule is that an accident exists when the insured did not accomplish the desired physical objective and allegedly causes an injury in the process, the appellate court should reverse.

And in *Food Pro*, the appellate court did reverse, finding that the no accident decision "rests on [an] erroneous conclusion regarding the nature of Food Pro's conduct . . . ."

Stellar v. State Farm Gen. Ins. Co.[4] involved alleged defamation. The Stellars allegedly told third parties a relative had molested a child and was on drugs. The policy covered certain "occurrences," i.e., accidents that result in bodily injury or property damage. Nothing suggested that the Stellars had failed to accomplish their objective. They apparently wanted third parties to know they believed their relative was a child molester who was on drugs. This means there should be no accident and no duty to defend. After (perhaps needlessly) debating whether defamation can be "negligent," the court held that there was no accident and no duty to defend because "the underlying action specifically alleged that appellants' conduct was willful and intentional, and arose from an evil and improper motive. Appellants offered no extrinsic evidence to support their characterization of their conduct as negligent."

Can defamation occur by accident? At least for purposes of assessing insurance coverage, it can. For example, an insured writes a long letter to a co-worker saying the co-worker is on drugs and should seek help. The insured is also writing a memo on suggested cost-cutting measures the company can take next quarter. The insured mistakenly puts the drug letter in an inter-office envelope that goes to the boss and mails the costcutting memo to the co-worker's home.

Because the insured did not physically accomplish his objective—sending the drug letter to the co-worker's home—there was an accident for insurance purposes (even if tort law might allow a defense to defamation based on the argument that there was no intent to publish the statements to third parties).

What about the two early hypotheticals. First, boys are playing baseball at a schoolyard, and one hits a pitch so squarely it travels 440 feet and causes major damage to a parked Ferrari? There was an accident. The boy's physical objective was to hit a home run, not to hit the Ferrari.

But change the hypothetical slightly and the result differs. One of the other boys bets the batter $10 that he can't hit the ball all the way to the Ferrari. Even if the long hit was exceedingly rare, and the outcome unexpected, as long as the batter's physical objective was to cause the ball to hit the Ferrari, there is no accident.

Second, several friends like to amuse themselves with one quietly kneeling down behind another while a third approaches from the front and pushes the "victim," who is almost certain to fall backwards. The first 125 times they pull the stunt, it is good for a few laughs, the "victim" falls, but no one gets hurt. The 126th time, the *victim* falls awkwardly and breaks his neck. There was no accident because the friends accomplished their physical objective—to make the victim fall. Although the fall was not expected to cause injury, the accomplishment of the objective makes the resulting injury a non-accident for liability insurance purposes.

But a slight change to the hypothetical might change the result. The friends set up on a grassy strip between a curb and sidewalk. The friend that is kneeling sneezes and changes his positioning just as the front friend pushes the victim. As a result, the victim's head hits the curb rather than the soft strip of grass. Here, it looks as if the physical objective was not completely accomplished (they were trying to cause their friend to fall on to the grass), and the injury may be accidental for liability insurance purposes.

What if we apply the test by looking in the rear view mirror, back to a difficult case from prior decades? A particularly challenging case is *State Farm Fire & Cas. Co., v. Eddy*,[5] the 1990 decision where the court held that an accident existed where the insured had sex believing he had tested negative for herpes, and unfortunately, transmitted herpes in the process. In a sense, Eddy physically accomplished his objective of having sexual relations with a consenting woman. And in a sense, the sex caused the accident. But there is another way to look at it.

Eddy arguably resembles *Safeco Ins. Co. v. Robert S.*,[6] a case where a 16-year-old boy shot his friend in the head because he did not realize that his father's .22 caliber Beretta handgun was loaded. The insurance company and the California Supreme Court seemed to assume an accident was involved, and the *Robert S.* court addressed the "illegal act" exclusion. Did *Robert S.* involve an accident because the insured did not understand the gun to be capable of firing a bullet and therefore, the insured physically accomplished something he did not set out to accomplish—firing a bullet and killing his friend?

Just as the teenage shooter in *Robert S.* did not set out to fire a bullet at his friend, Eddy did not set out to expose his partner to herpes. Viewed from this perspective, *Robert S.* involved an accident because the actual firing of a dangerous bullet was not physically what the insured set out to accomplish. And viewed from this perspective, *Eddy* involved an accident because the dangerous exposure to the herpes virus was not what the insured physically set out to accomplish.

This is not entirely satisfying. Intuitively, we believe that sexual relations always entail a risk of spreading a sexually transmitted disease. But does that really matter? We know that every time we drive a car we could end up colliding with another car. But that hardly means every car collision is non-accidental.

Accident cases become harder for us to decide when we think the insured may be lying about his or her "real" objective." After analyzing numerous insurance decisions involving the accident issue, Professor James Fischer noted that courts tend "to exhibit caution when confronted with situations when subjective beliefs significantly influence the availability of legal rights."[7] Since only Mr. Eddy really knows whether he would have had sex with the plaintiff even if he had tested positive for herpes, there is a natural reluctance to deem his conduct accidental. And perhaps nothing demonstrates this dilemma better than the horseplay cases.

Is Horseplay an Accident?

A very interesting case is *State Farm Fire & Cas. Co. v. Superior Court*.[8] Two young men (Jeffrey Lint, 21 and Joshua Wright, 23 years old) were at a party. After an argument, Lint picked Wright up and threw him into the pool's shallow end. Unfortunately, Wright landed on the pool's concrete steps, breaking his clavicle. Lint said he did not mean to injure Wright ("If I wanted to hurt this guy . . . I would have just hit him."). Wright referred to the incident as "horse playing around."

Lint's insurer refused to defend Wright's lawsuit, concluding that Wright's injuries did not arise out of an "occurrence" or accident. Did the insurer correctly decide this very challenging issue? To an extent, Lint accomplished his physical objective. He wanted to throw Wright into the pool, get him wet, and have him make a big splash. But there was at least one way Lint did not accomplish his physical objective—he wanted to throw Wright far enough so that Wright landed in the water, not on the hard concrete steps. Or at least that's how Lint testified. Lint said he threw Wright in the pool just "to get him wet," as "a party joke," or "horseplaying," "something to laugh about."

The focus should be on the connection between the injury and the insured's action. If Wright had landed in the water and drowned, there would be no accident. Lint would have accomplished his exact physical objective—throwing Wright in the pool to get him wet. And the unexpected consequence, a drowning death, would not turn the purposeful act of throwing someone into the pool into an accident.

But Lint miscalculated the force needed to throw Wright beyond the steps. That miscalculation caused an accident—where Wright landed short and hit the concrete steps, resulting in a serious injury. The same thing would be true if Wright had landed on the concrete steps because he slipped out of Lint's grasp during the throw.

The insurer who had refused to defend Lint took the big picture approach and disconnected the insured's objective from the resulting injury. The insurer argued that there was no accident because Lint intentionally threw Wright into the pool. But the court rejected that argument, holding:

> Taken to its logical conclusion, State Farm's argument that we should apply "fortuity" solely to the act causing the injury without reference to the injury, would result in no coverage at all. State Farm proffers an accident as one where Lint inadvertently bumps into Wright, knocking him into the pool. Yet, in State Farm's analysis, there could never be a covered event because all batters deliberately seek to hit baseballs and therefore engage in intentional acts, regardless of whether the property damage, namely, breaking windows, was intended. Likewise, there would never be a covered occurrence when an injury is occasioned by a negligent driver, who obeys the laws of the road, nevertheless miscalculates a lane change and hits another car.

The court's opinion highlights an important part of the rule.[9] We need to ask if the actor achieved the objective *with reference to the injury producing event*, not in the abstract.[10] If we view the question too abstractly, everyday situations we immediately recognize as accidents become non-accidents. For example, a driver does not see a fire hydrant and backs the car over it. Yes, in a general sense, the driver accomplished the objective of backing up. But the driver's actual physical objective was to back up in a clear path, where there was no object to destroy (much less an object that would damage the car and cause the unwanted release of thousands of gallons of water).

Or take another simple example. The insured intentionally places ice cubes in a small ice chest. The insured plans to add bottled water to the ice chest and take it to the baseball game that afternoon. But the ice chest has a crack in it. Ice melts. Water leaks out of the ice chest, onto the floor, and the insured's neighbor steps in the water, falls, and sustains a serious head injury. That was obviously an accident. Putting ice in the chest did not directly cause the injury. Slipping on a wet floor and falling caused the injury. The insured did not physically achieve the objective with respect to the injury causing event. The insured's physical objective was to put ice in the ice chest so that cold bottled water would be available at the baseball game. The insured did not set out to create a puddle of water on the floor next to the ice chest. If we look exclusively to the insured's act and sever it from the injury event, we erroneously turn accidents into non-accidents.

As the pool case shows, horseplay cases can make it tough to decide whether an accident was involved. *State Farm Gen. Ins. Co. v. Frake*[11] was another horseplay case, with some especially painful facts:

> After consuming several beers, respondent Patrick Frake struck his friend, respondent John King, in the groin, causing significant injuries. . . . Frake told State Farm he struck King as part of a consensual game and that he did not intend to injure King. Although State Farm did not believe Frake's conduct qualified as "an accident," it agreed to defend the action with a full reservation of its rights. The King case proceeded to trial and the jury awarded King over $400,000.

Did Frake achieve his objective? The court started the analysis with the injury causing event—the groin punch that caused "hematocele on the right scrotum . . . epididymal head cyst . . . chronic regional pain syndrome/reflex sympathetic dystrophe [and] nerve injury." During its investigation State Farm learned that Frake and his friends had developed an odd tradition—hitting each other in the groin. Frake explained it like this:

> When the State Farm investigator asked Frake whether he had intended to hit King directly in the groin, Frake stated, "no . . . not [on] this particular incident." Frake further explained that he was trying to strike King in the general area of the stomach or groin, but "just happened" to hit him directly in the groin. Frake also stated that he was "shocked" that King was hurt because he never intended to "inflict harm or pain purposefully." "[It] was never a closed [fist]. If it was a closed fist [the hit] was . . . on the arm or something like that. That was but never ever we knew I mean you don't punch someone in the . . . groin area. Obviously it's . . . painful regardless if you get hit in . . . the groin area so it was always with a backhand . . . never a closed fist, always with an open hand."

Frake admitted that he intended to hit King in the groin area. He accomplished that objective and the hit directly caused the injury. Not surprisingly, the court found that there was no accident and State Farm had no duty to defend. It emphasized that "this is not a case where some 'unexpected, independent, and unforeseen happening' in the causal chain produced the resulting harm." Or, to explain it another way, Frake achieved his physical objective of hitting King in the groin. The fact that Frake did not expect to cause serious injury, or even if he hoped the punch would not cause an injury, was not enough to make the purposeful punch in the groin an accident.

Encroachment and Trespass Cases

An early (1973) Texas Supreme Court decision aptly analyzed whether a trespass was accidental. In *Argonaut Southwest Ins. Co. v. Maupin*,[12] the court concentrated on whether the trespassers "did what they intended to do," explaining:

> The plaintiff's act in trespassing upon the Meyers' property did not constitute an accident. They did what they intended to do by removing the borrow material from the property. The fact that they were unaware of the true owner of the property has no bearing upon whether the trespass was caused by accident. . . . The damage was not an accident . . . .

One rarely followed trespass/accident decision is *Allstate Ins. Co. v. Vavasour* (from the Northern District of California).[13] The next-door neighbors sued Vavasours for trespass, alleging routine use of a driveway with an eight-inch wide strip that encroached on the neighbor's property. The court found an accident, noting that "the only act the Vavasours intended may have been to drive in and out of their own driveway, not to drive on their neighbor's property." Because nothing demarcated the boundary, the court could have believed the Vavasours physically tried to stay on their own property, but did not accomplish their objective if they inadvertently strayed into the neighbors' eight inch strip. But the reality seemed to be that the Vavasours did accomplish their physical travel objective, they just did not realize the neighbors were asserting an ownership interest over the eight inch strip. If so, Judge Fern Smith decided *Vavasour* incorrectly.

Four months later Judge Smith got a chance to address the accident issue in *Bailey v. State Farm Ins. Co.*[14] The Baileys were sued for allegedly interfering with a right of way. The Baileys allegedly "installed a series of railroad ties and posts alongside, perpendicular to, and into the roadway . . . [and] altered the roadway by removing portions of a concrete edging."

Judge Smith then proceeded to show just how complicated and difficult the accident determination can be. Judge Smith distinguished *Vavasour* by noting that it expressly alleged trespass and that trespass can be "negligent." But knowing that something can be described as "negligent" tells us nothing about whether a particular incident involved an accident. Judge Smith also distinguished her earlier *Vavasour* decision by noting that "the Vavasours had a good faith belief that the driveway they were using was their sole and exclusive property." But that would be like saying that an alleged sexual assault was accidental if the assailant had a good faith belief that the victim was consenting.

In ruling that the Baileys' installation of railroad ties did not involve an accident, Judge Smith then said one more confounding thing: "Because the Baileys' conduct was intentional *and* deliberate, the Court grants defendant State Farm's motion for summary judgment." That italicized "and" is Judge Smith's emphasis. What conduct is intentional and not deliberate, or deliberate but not intentional? While the explanation's meaning is not exactly self-explanatory, we can safely say that Judge Smith is not the only judge to struggle with the accident requirement.

Building something near a boundary line often leads to a lawsuit. For example, in *Fire Ins. Exch. v. Superior Court*[15] the Bourguignons home was damaged due to earthquake. They negotiated a lot line adjustment with their neighbors and re-built the home. About seven years later, the Parsons bought the neighbors' home. Then the Parsons sued, disputing validity of the lot line adjustment. When the Bourguignons asked their insurer to defend, it declined, concluding "that any losses to the Parsonses resulted from the Bourguignons' intentional act of building over the lot line and, thus, was not the result of an 'accident.'"

The court described the issue as whether "building a structure at a specified location" is an accident. We know it is not an accident because if you build the house precisely where you set out to build the house, you achieved your physical objective, especially since the alleged damage flows entirely from the placement of the house. But what about the fact that the Bourguignons had negotiated a lot line adjustment and believed they had a legal right to build exactly where they built? The court rejected that argument, emphasizing that:

> the Bourguignons intended to build the house where they built it. Accepting their contention that they believed they owned the five-and-one-half-foot strip of land and had the legal right to build on it, the act of construction was intentional and not an accident even though they acted under a mistaken belief that they had the right to do so.

Can the placement of a house involve an accident for insurance purposes? Of course it could. For example, the contractors who built the home may have mis-measured and built five feet beyond the point where they actually wanted to build. Or measuring equipment could have malfunctioned, again causing the insureds to fail to achieve the physical objective they set out to achieve in terms of locating the house.

Putting the Test to the Test

In the vast majority of cases, policyholders and insurers should be able to tell whether a claim involves an accident by assessing whether the insured physically achieved the objective they set out to achieve, in relation to the injury causing event.

But will the test work to predict the outcome of more unusual cases? In *State Farm Gen. Ins. Co. v. JT's Frames, Inc.*,[16] the insured was sued for violating the Telephone Consumer Protection Act of 1991. The insured allegedly sent 74,000 unsolicited fax advertisements to class members. A $19.5 million settlement was negotiated, applicable to "all persons to whom Defendant sent advertising faxes

during the period of April 2, 2003 through January 30, 2007 without the recipients' prior express permission or invitation and with whom Defendant had not done business."

The insured did not believe its "blast fax" advertising would violate the law. But as we have seen time and again, since the insured physically accomplished the objective it set out to achieve—sending its fax ads to 74,000 people—there was no accident. As the court explained in holding that State Farm had no duty to defend, "[t]he focus is not on whether the transmitter intended to violate the TCPA or any recognized right of the recipient, but on whether the transmitter intentionally sent the fax."

Can a fax be sent by accident? Of course it can. The sender can have permission to fax person X but accidentally input the fax number for person Y. But where no evidence of such a physical mistake exists, and where the evidence reveals that the sender physically accomplished the goal the sender set out to accomplish, albeit under the mistaken belief that the conduct was lawful, there is no accident.

In an older but often cited case, *Meyer v. Pacific Employers Ins. Co.*,[17] the insured drilled a water well and the drill vibration allegedly damaged neighboring property. The trial court determined that there was no accident because a person intends the ordinary consequence of their voluntary act. Was that the correct result? No, it was not. The insured physically intended to drill a well, but not to create vibrations that were enough to cause nearby property to shake and sustain damage.

Predictably, the appellate court reversed the decision in *Meyer* and found an accident. While the court's reasoning appears outdated in that the court looked to whether the insured expected to cause injury, the result is predictable when the facts are viewed from the standpoint of whether the insured physically achieved its objective.

What about Self-Defense?

In 2009, the California Supreme Court tackled the accident issue in the context of alleged selfdefense. In *Delgado v. Interinsurance Exchange of Auto. Club of So. Cal.*,[18] the court was confronted with a complaint that alleged alternative liability theories—the insured either "in an unprovoked fashion and without any justification physically struck, battered and kicked" the plaintiff or the insured "negligently and unreasonably believed he was engaging in self-defense and unreasonably acted in self-defense when [he] negligently and unreasonably physically and violently struck and kicked [the plaintiff] . . . causing serious and permanent injuries."

The insured wanted Auto Club to defend under a policy that covered injury resulting from an "occurrence." "Occurrence" was defined as "an accident" that "results in bodily injury."

The California Supreme Court framed the issue as whether the insured's assault and battery could be an accident if it was motivated by an unreasonable belief in the need for self-defense. First, the court rejected the argument that an accident existed because the injured party may not have expected the assault. Instead, the court aptly guided attention back to where it belonged—to the insured's conduct that allegedly caused injury. The court emphasized that it is "the 'unexpected, undesigned, and unforeseen' nature of the injurycausing event that determines whether there is an 'accident' within the policy's coverage."

The court held that the accident requirement is assessed from the insured's perspective, not from the injured party's perspective. As the court explained:

> Were we to accept Delgado's argument that any interpretation of the policy term "accident" should be based solely on whether the injury-causing event was expected, foreseen, or designed by the injured party, then intentional acts that by no stretch could be considered accidental nevertheless would fall within the policy's coverage of an "accident." Under Delgado's reasoning, even child molestation could be considered an "accident" within the policy's coverage, because presumably the child neither expected nor intended the molestation to occur.

This approach is consistent with assessing accident by determining whether the actor physically achieved the objective he or she set out to achieve with respect to the injury producing event. Citing *Quan* and *Collin*, the California Supreme Court emphasized that under "California law, the word 'accident' in the coverage clause of a liability policy refers to the conduct of the insured for which liability is sought to be imposed on the insured."

Then the California Supreme Court soundly rejected the argument that an insured's subjective belief in the need for self-defense can convert purposeful physical action into an accident. The court distinguished *Gary v. Zurich Ins. Co.*, just as so many previous cases had done, cautioning that "*Gray* . . . stated that an unreasonable belief in the need for self-defense could remove the resulting act from the reach of the policy's exclusion clause for intentional acts (that is, makes the act 'nonintentional'). *Gray* did not say, however, that such a belief would convert an intentional act into an unintentional act . . . ."

Then came the most difficult and most debatable issue facing the court. Can "a provocative act by the injured party turn[] the insured's physical response into an accidental act"?[19] As the court explained, under "this view, the injured party's provocative acts are unforeseen and unexpected from the perspective of the insured, making the insured's responsive acts unplanned and therefore accidental, triggering the policy's coverage for 'an accident.'"

Turning back to *Quan* for its explanation, the court held that in order "to determine whether an injury resulted from an accident . . . one needs to consider the nature of the insured's act." The court could have held that an accident exists when people suddenly perceive a need to defend themselves against an imminent attack. The logic would be that the insured did not really set out to achieve any particular objective, and merely reacted to another person's conduct. But that approach would be forced and strained. In many situations where unreasonable force is used in "self-defense," the insured affirmatively and purposefully assesses the situation and decides to take the specific actions that injure the "assailant." So rather than carve out a broad exception to the general rule—did the insured achieve the physical objective the insured set out to achieve with respect to the injury causing event?—the Supreme Court applied the rule.

The *Delgado* opinion does, however, leave a little room for accidental injuries in self-defense contexts. The opinion notes that "Reid's assault and battery on Delgado were acts done with the intent to cause injury; there is no allegation in the complaint that the acts themselves were merely shielding or the result of a reflex action." So after Delgado, we can envision self-defense scenarios that involve accidents.

Let's use the shielding example first. If an insured is at a dinner party arguing politics and another guest grabs an empty wine bottle and swings it at the insured's head, but the insured raises has hand (which happens to be holding a steak knife) to try to block the wine bottle, and the steak knife stabs the bottle swinging person's arm, there was an accident. Why? Because the insured's physical objective was blocking the wine bottle; not stabbing the other person's arm. The insured did not achieve the physical objective he set out to achieve (and caused an injury in the process).

Secondarily, let's look at a reflex reaction scenario. A group of teenage boys gathers on New Year's Eve and they stay up late. One of them (we can call him Mr. Sleepy") falls asleep before the others. The troublemaker in the group grabs a red Sharpie and sets out to write the word "LOSER" on Mr. Sleepy's forehead. But just as the writing is about to start, Mr. Sleepy is startled to a semi-awake state. In a blur, he sees something red coming down toward his eye and he reacts instinctively, even involuntarily, striking out with a closed fist, and breaking the troublemaker's jaw in the process.

In the "LOSER" scenario, we could probably get to an accident in two different ways. First, we could decide that the reactive, essentially involuntary reaction to coming out of a sound sleep and seeing something heading toward your face means that Mr. Sleepy did not really set out to achieve any physical objective. He just reacted to something he did not fully understand without forming any goal whatsoever.

Alternatively, if we decided Mr. Sleepy had time to decide he wanted to block the red object that was moving toward his face, then he still did not physically accomplish the objective he set out to accomplish. He physically did a lot more than block the red Sharpie—he also hit the troublemaker in the face and broke his jaw.

Concluding Thoughts

Determining whether specific conduct involved an accident has challenged courts, insurers, and policyholders for nearly 50 years. No single verbalized test can remove all uncertainty or eliminate the need to apply common sense and careful reasoning to the particulars of each individual claim or situation. However, policyholders, insurers, insurance coverage attorneys, and courts may find it easier to reach the correct result in disputes over whether an accident was involved by asking the following question: *Did the actor physically achieve the objective he or she set out to achieve with respect to the injury producing event?*

If the actor achieved, physically, precisely what he or she set out to achieve, and injury ensues, no accident was involved. Conversely, if the actor fails to achieve what he or she physically set out to achieve and causes injury in the process (or if the actor causes injury by accomplishing something more or different than what he or she physically set out to achieve), it was an accident.

Endnotes

1. 161 Cal. App. 4th 880 (2008).
2. In an unfortunate passage the Lyons court explained: Two situations aptly illustrate negligent false imprisonment . . . . In the first example, a shopkeeper at closing time intentionally locks his storage vault but forgets he had sent an employee inside to take inventory . . . . In the second example, a store employee honestly but mistakenly detains a customer the employee believes is a shoplifter. Negligent wrongful detention could be found if the store employee detains the customer without reasonable cause . . . . Hence, even though conduct is intentional and results in the

restraint and control of the movements of another person, false imprisonment can be in some circumstances accidental.
The court's discussion is unfortunate because it equates negligence with accidental. For purposes of assessing the accident requirement, the two hypothetical false imprisonments are not at all the same. In the first situation, the shopkeeper did not accomplish his physical objective, letting the employees go and then locking the vault—a classic accident.
In the second scenario, the shopkeeper thinks the customer might be stealing and the shopkeeper sets out to detain and question the customer. There was no accident, even if there was negligence, because the shopkeeper achieved the physical objective—detaining the customer until it could be determined that the customer was not stealing.

3. 169 Cal. App. 4th 976 (2008).
4. 157 Cal. App. 4th 1498 (2007).
5. 218 Cal. App. 3d 958 (1990).
6. 26 Cal. 4th 758 (2001).
7. James M. Fischer, *Accidental or Willful?*: *The California Insurance Law Conundrum*, 54 Santa Clara L. Rev. 69, 111 (2014).
8. 164 Cal. App. 4th 317 (2008).
9. On June 6, 2014, the Fourth Appellate District decide *Upasani v. State Farm Gen. Ins. Co.*, 227 Cal. App. 4th 509 (2014). Unremarkably, the *Upasani* court held that allegations of conspiracy to kidnap a child did not involve an accident, even if the jury found for the insured defendants and there was no actual conspiracy. That holding was consistent with *Quan v. Truck Ins. Exch.*, 67 Cal. App. 4th 583, 599-600 (1998) ("The 'groundless or false' clause does not change the fundamental principle that there is no defense obligation absent potential liability *under the policy*. The 'groundless, false, or fraudulent' clause . . . does not extend the obligation to defend without limits; it includes only defense to those actions of the nature and kind covered by the policy.'"). But the *Upasani* court went further, questioning some of the pool case's reasoning (*State Farm Fire & Cas. Co. v. Superior Court*, 164 Cal. App.4th 317 (2008). After noting that the pool case "is factually distinguishable," the *Upasani* court questioned whether "[the insured]'s mistake regarding the amount of 'force necessary to throw Wright far enough out into the pool' was sufficient to transform his behavior into an accident." *Upasani*, 227 Cal. App. 4th at 520-521.
10. *See also* Michael R. Sohigian, *By Accident*, 31 Los Angeles Lawyer 20, 23-24 (2008).
11. 197 Cal. App. 4th 568 (2011).
12. 500 S. W. 2d 633 (Tex. 1973).
13. 797 F. Supp. 785 (N.D. Cal. 1992).
14. 810 F. Supp. 267 (N. D. Cal. 1992).
15. 181 Cal. App. 4th 388 (2010).
16. 181 Cal. App. 4th 429 (2010).
17. 233 Cal. App. 2d 321 (1965).
18. 47 Cal. 4th 302 (2009).

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