# CONSPIRACY THEORY: COVERAGE FOR CLAIMS INVOLVING ALLEGATIONS OF CONSPIRACY *

*By Robert E. Johnston*

Plaintiffs in mass tort cases always have had a knack for expanding the universe of potential defendants, seeking the maximal number of deep pockets in each case. Historically, doctrines such as market-share liability and concert of action have been relied upon by plaintiffs to access all the participants in an industry, based on the acts of only some of the participants therein. Recently, as those theories of broadened liability have begun to meet with judicial resistance, plaintiffs have turned to an ancient common-law doctrine through which to expand the number of available defendants in mass-tort suits: the conspiracy theory. The focus of this article is on the question whether industry participants accused of participating in such an alleged conspiracy can and should properly expect their liability insurers to defend such suits and indemnify any loss resulting therefrom. As shown below, there is no categorical bar to coverage for conspiracy liability in standard-form comprehensive general liability policies ("CGL"). Instead, coverage turns on the object of the alleged conspiracy and the injury suffered. Although many courts have shown great hostility to coverage for conspiracy-only claims, in many circumstances arising in the context of traditional mass tort suits insureds should be entitled to a defense (certainly) and indemnity (depending on the facts).

In the paradigmatic, mass-tort conspiracy claim the plaintiff alleges that all participants in an industry conspired to deprive the plaintiffs and other vital constituencies – such as the government – of critical information regarding the safety of their products. For example, in cases alleging injury from exposure to vinyl chloride monomer ("VCM"), plaintiffs claim that the industry as a whole conspired in the late 1960s and early 1970s to suppress information regarding the toxic properties of VCM. As a result, the plaintiffs contend that thousands of workers in a myriad of different fields (from workers at the factories producing products using VCM to beautyshop workers) were exposed to toxic levels of VCM over the next twenty years, resulting in alleged bodily injury ranging from disintegration of the bones in the fingers of workers to cancers. Based on this alleged conspiracy, plaintiffs have joined all of the participants in the industry (including industry trade associations in many instances) as defendants in suits seeking to recover from injuries allegedly caused by exposure to VCM, which may have resulted from interaction with the products of only one or a handful of the market participants.

Of course, the conspiracy-only defendants in these cases promptly turn to their insurers for a defense and indemnification of such claims. Seemingly more often than not, however, carriers deny coverage to insureds joined solely on the basis of an alleged conspiracy, even where the actual producer of the product at issue may be entitled to coverage based on separate specific allegations of negligence or recklessness, proclaiming that there is no coverage for conspiracy claims; usually, this denial of coverage is based on the misguided view that CGL policies do not cover injuries resulting from intentional acts. In fact, as discussed below, the inquiry is not so cut and dried and has less to do with the intentional nature of the *acts* of the insured and more to do with the insured's expectations or subjective intent *vis á vis* the *injuries* sustained.

CGL policies generally do not contain express exclusions barring coverage for injury arising out of conspiracies. Thus, where the underlying suit properly alleges bodily injury or property damage, insurers often turn to policy language stating that, to be covered, the bodily injury or property damage must have been "neither expected nor intended from the standpoint of the insured." This language can appear in one of several places in the policy, depending on vintage – or not at all. In occurrence-based policies issued prior to 1986, this language usually appears in the definition of "occurrence:"

> an accident, including continuous or repeated exposure to conditions which results in bodily injury or property damage *neither expected nor intended from the standpoint of the insured."*

16 Eric M. Holmes, Holmes' Appleman on Insurance 2d §118.1[A](3) at 412-13 (2000) (emphasis added). In policies issued after 1986, the language is likely to appear in an exclusion barring coverage for bodily injury or property damage "expected or intended from the standpoint of the insured." *Id.* at 415. In older, accident-based policies the language may appear in the definition of "accident" or may not appear in the policy at all, particularly where "accident" is not defined. The placement of this language is largely inconsequential for purposes of this article – though in some states it may affect the allocation of the burden of proof.

Insurers correctly argue that, because conspiracy claims are premised on the knowing and voluntary participation of the conspirators in a common scheme to commit an unlawful act or a lawful act by unlawful means, allegations of conspiracy necessarily involve intentional acts. From this premise, carriers then assert that the "expected or intended" language of the CGL policy precludes coverage for intentional acts, and argue, *a fortiari*, that claims of conspiracy are not covered under the policy. (They likewise argue they do not have a duty to defend, even though policies typically afford defense coverage against claims that are "groundless, false or fraudulent.") But intentional acts of conspiracy do not always result in expected or intended injury. It cannot be denied that, where the purpose of a conspiracy is to cause a particular injury, *e.g.,* to murder someone, the culmination of the properly executed conspiracy will result in the injury expected or intended by the conspirators – and coverage may correctly be precluded if the claim for such injury is not false or fraudulent. But it does not follow that all injuries

resulting from a conspiracy *necessarily* must be expected or intended by the conspirators. Assume, for example, that A and B conspire to burglarize a jewelry store. A, an employee of the jewelry store, provides B with alarm codes and safe combinations, but does not attend the heist. A and B enlist C, a well-known and respected wheelman, to drive the get-away car. After lifting the jewels, B and C make their escape – obeying all traffic laws so as to avoid arousing suspicion – but C negligently runs down a pedestrian. There is little doubt that, as a co-conspirator, A is liable for the injuries suffered by the pedestrian; but can those injuries fairly be seen as expected or intended by A, thereby precluding insurance coverage?

A number of cases considering the question of coverage for injuries allegedly sustained as a result of a conspiracy have held that the fact that conspiracy is an intentional act is not dispositive of the carrier's obligations. As the United States Court of Appeals for the Seventh Circuit recognized in *Argento v. Village of Melrose Park*, 838 F.2d 1483 (7th Cir. 1988), *overruled on other grounds*, *Peacock v. Thomas*, 516 U.S. 349 (1996), "[a] conspirator does not have to know specifically of, intend, or expect all the acts of the conspiracy nor all the injuries that will result" to be held liable for any resulting injury. *Id*. at 1497. "Thus, there can be an intentional act causing an unexpected or unintended result, and there will be coverage under the occurrence clause." *Id*. (quoting *Bay State Ins. Co. v. Wilson*, 96 Ill. 2d 437, 492-94, 451 N.E.2d 880, 882-883 (1983)). The coverage question, then, turns on whether the injuries suffered "are of such a nature that they should have been reasonably anticipated by the insured;" where the injuries could not have been reasonably anticipated they should not be found to be subjectively expected or intended, and coverage would not be precluded. *Id*. In *Argento*, the insureds were police officers who allegedly conspired to deprive a prisoner of his civil rights. The plaintiff sought to recover damages for bodily injuries sustained when he was beaten while in custody. The Court of Appeals found that the record was incomplete regarding whether the officers expected or intended the injuries the plaintiff suffered from the beating (apparently not at the insureds' hands), though there was no doubt, based on the complaint, that they intended to deprive him of his civil rights. The Court remanded for the trier of fact to "determine specifically whether either of the co-conspirators intended or expected" the injuries sustained. *Id*. at 1499. Thus, like the policy language itself, *Argento* makes it clear that, in order to find no coverage, the trier of fact must find that the conspirators expected or intended the particular injury alleged.

The United States Court of Appeals for the Second Circuit employed a similar analysis in *Brooklyn Law School v. Aetna Casualty & Surety Co.*, 849 F.2d 788 (2d Cir. 1988), when confronted with a carrier's argument that there was no coverage for claims of a conspiracy to deprive a teacher of his civil rights. Although the Court ultimately held that the complaint alleged that the insured specifically intended to cause the alleged injury to the underlying plaintiff, the Court recognized that there is a distinction between "damages which flow directly and immediately from an intended act, thereby precluding coverage, and damages which accidentally arise out of a chain of unintended though expected or foreseeable events that occurred after an intentional act." *Id*. at 789 (quoting *Continental Ins. Co. v. Colangione*, 484 N.Y.S.2d 929, 930-31 (App. Div. 1985)). Thus, although allegations that "the insured has conspired to commit certain acts necessarily charges intentional conduct" by the insured, that conduct "must be examined to determine whether the plaintiff alleges that the insured intended to cause damage or that the damage was 'unexpected, unusual, and unforeseen'." *Id*. (citations omitted). The *Brooklyn Law School* court also noted that the fact finder must find that the insured intended to cause the injury, and that neither ordinary negligence nor the taking of a calculated risk is sufficient to establish an expectation of injury. *Id*. at 789. Allegations that a conspiracy existed are not sufficient, alone, to preclude coverage; to bar coverage, there needs to be a close tie between the actual injury to the particular plaintiff and the object of the conspiracy.

The Illinois Court of Appeals has also recognized these principles, holding that the critical inquiry under CGL policies is not whether the conspiracy was an intentional act, but whether the injuries claimed were the foreseen "natural and probable result of the insured['s] … conduct." *Illinois Farmers Ins. Co. v. Preston*, 153 Ill. App. 3d 644, 649, 505 N.E.2d 1343, 1346 (Ill. App. Ct. 1987). In *Preston*, the court considered a claim seeking damages for emotional distress and elevated blood pressure allegedly resulting from a conspiracy to deprive a teacher of his civil rights. Although the policy did not contain the expected/intended language addressed above, the Court held that the word "accident" as used in the occurrence definition was properly construed as meaning an event giving rise to unexpected or unintended injury. The Court concluded that "it would have been possible for a fair-minded person to infer that [the] alleged injuries were not the natural and probable result of the insured['s] … conduct," and thus not expected or intended. *Id*. Although the Court went on to hold that there was no duty to defend the claim based on another exclusion barring coverage for bodily injury arising out of an "intentional act" – an exclusion that normally does not appear in CGL policies covering bodily injury and property damage – the reasoning of the court clearly supports coverage for claims of conspiracy where the injury suffered was not in fact expected or intended by the insured.

There are, of course, cases to the contrary. For the most part, these cases impose a strict prohibition on coverage for intentional acts that is not grounded in the insurance contract. For example, in *State Farm Fire & Casualty Co. v. Middleton*, 65 F. Supp. 2d 1240, 1246-47 (M.D. Ala. 1999), the Court correctly concluded that the expected/intended language did not bar coverage for claims of tortious interference with business relationship because the plaintiffs could recover without establishing a specific intent to cause mental anguish, but held there was no coverage for conspiracy

claims because the court believed that the plaintiff could not recover without establishing an intent to injure. Similarly, in *Atlantic Mutual Insurance Co. v. American Academy of Orthopaedic Surgeons*, 315 Ill. App. 3d 552, 734 N.E.2d 50 (App. Ct. 2000), the Court correctly recited the principles established in *Preston* and *Argento* – that "even an intentional act will be covered under the policy language at issue if it causes an unexpected or unintended result," *Id.* at 561, 58 – but then, relying on that portion of *Preston* addressing the applicability of the "intentional acts" exclusion, held there was no coverage for claims of conspiracy because conspiracy is an intentional act, even though it does not appear that the policies at issue in that case contained an "intentional acts" exclusion. Other cases find no coverage based on a minority view that, where undefined by the policy, the word "accident" means an "unforeseen and unplanned *event* or circumstance" (*i.e.* an unforeseen cause) rather than an event resulting in unexpected or unintended injury (*i.e.,* an unforeseen effect). *Compare Fibreboard Corp. v. Hartford Acc. & Indem. Co.*, 16 Cal. App. 4th 492, 510-11 (Cal. Ct. App. 1993) (emphasis added) and *Preston*, 505 N.E.2d at 1346. None of these contrary cases adequately address how the exception to coverage for expected-and-intended injuries is properly transformed into a prohibition against coverage for conspiracy claims and neither these cases, nor the cases discussed above, take into account the defense coverage under CGL policies for false or fraudulent claims.

As shown above, properly construed, policy language precluding coverage for expected or intended injuries does not *automatically* bar coverage for claims of bodily injury or property damage arising out of a conspiracy. In most instances, plaintiffs in mass-tort cases do not allege that the object of the purported conspiracy was to cause injury. Instead, plaintiffs usually allege that the industry engaged in a conspiracy to hide certain information that would adversely effect the sales of its products – such as information regarding the risks associated with the use of the product – and that the industry knew or should have known that the injuries complained of would result from the continued, uninformed use of the products. Thus, these cases do not usually present situations, like that in the *Brooklyn Law School* case, where the court can find allegations in the plaintiff's complaint that establish the insured's expectation of or intention to cause the injury complained of. Moreover, the further removed the injury is from the object of the conspiracy in both time – up to thirty years in the case of VCM, for example – and logic, the greater the likelihood that coverage exists. Thus, it is hardly a foregone conclusion that coverage is barred for these claims.

Absent allegations of intentional *injury*, courts recognize that the inquiry into whether a particular insured expected or intended the alleged injury becomes one of fact. In these situations, there should be, at the time the complaint is filed, a possibility that the injury can be found to be unexpected or unintended from the insured's standpoint, and insurers should have a duty to defend. As the case moves toward trial, facts may come to light that permit a carrier to establish that its particular insured co-conspirator expected or intended the injuries claimed to have resulted from the conspiracy. At that point, the carrier may be able to bring a declaratory judgment action to terminate the defense on that basis – although such an action generally will not be allowed where the litigation of the coverage defense would prejudice the insured in the underlying tort suit, as often will be the case. Accordingly, in many instances, carriers appropriately should be required to defend these cases to conclusion, and only thereafter permitted to seek a judgment regarding their duty to indemnify under the policy. *See generally* Marc S. Mayerson, *Insurance Recovery of Litigation Costs: A Primer for Policyholders and Their Counsel*, 30 Tort & Ins. L. J. 997 (1995).

Whether an insured will be required to indemnify an insured for a verdict based on conspiracy claims will, of course, depend on the particular facts. It is possible that some of the participants to an alleged conspiracy will be entitled to indemnification while others will not. This potential disparity in results is, of course, wholly consistent with the expected/intended provision of the contracts, which evaluates whether injury was expected or intended from the standpoint of the particular insured under the policy – not from the standpoint of alleged co-conspirators.

In short, insureds alleged to have conspired with other industry participants to suppress information regarding the risks posed by their products should turn to their CGL insurers when faced with claims that a purported conspiracy of which it is alleged to be a part caused bodily injury or property damage. In the absence of allegations of specific intent to injure, carriers should be obligated to provide a defense to such claims, at least until they can muster sufficient undisputed evidence to establish an expectation or intent that the particular injury claimed would result on the part of their insured. And where the ultimate facts do not establish that the insured meant to cause the injury or acted with knowledge that such injury was substantially certain to result from the conspiracy, insurers should be obligated to indemnify their insureds for amounts paid as damages in settlement of such claims or in satisfaction of any judgment.

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