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News

TEXAS COURT RE-EXAMINES WHAT IS AN ACCIDENT UNDER CGL POLICIES

Newsbrief
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Recently, an Amarillo court of appeals revisited the meaning of an "accident" under a liability insurance policy and concluded that when the insured did exactly what he meant to do, there is no accident. *LaTray v. Colony Ins. Co.*, 07-19-00350-CV, 2021 WL 97204 (Tex. App.—Amarillo Jan. 11, 2021, no pet. h.) (slip op.) involved a reprise of the facts of a well-known Texas insurance case exploring the line between accidents and intentional acts, *Argonaut Sw. Ins. Co. v. Maupin*, 500 S.W.2d 633 (Tex. 1973). Both cases involved the intentional removal or placement of fill material from or to a piece of land, where the insured had obtained permission from a tenant rather than the true property owner. Here, the insured was induced to place 40 tons of construction debris and other fill material onto a piece of property for "erosion control." The insured learned too late that the occupant of the property, who had requested the fill material, was not actually the owner but only a long-term tenant, having leased the property for 20 years. When the property owner discovered the mountains of construction debris, a lawsuit against the insured ensued.

The court examined the two longstanding lines of "accident" cases growing out of *Maupin* and its sister case, *Mass. Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396 (Tex. 1967). The *Maupin* court in 1973 highlighted the fine distinction between a non-covered mistake (the insured's misunderstanding as to whether he had obtained permission from the correct person) and a covered accident (what would happen if the removal or placement of the fill created some additional damage outside the realm of the natural and probable). On the other hand, *Orkin* held that a deliberate act, performed negligently and which leads to an unexpected, unforeseen, or undesigned injury because of the negligence, is an accident.

Here, the court continued this distinction, and also noted that an allegation of negligence cannot create an accident out of an intentional act, because coverage depends on facts, not legal theories of recovery. The court concluded that, like *Maupin* and other cases where an intentional act led to an unexpected effect, the unexpected effect did not convert the intentional act into an accident. Because the insured clearly intended to move the debris and leave it where he left it, and the claimed injury was the natural and probable consequence of that action, the insured's bare mistake as to whether he had permission from the true owner of the property did not convert his intentional placement of the fill material into an accident.

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Editor's note: The court chose not to directly address *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), which famously renewed, in a construction defect context, *Orkin's* original holding that a deliberate act, performed negligently, can be an accident. *Lamar Homes* opened the door to a new era of insurance-funded construction defect litigation in Texas. This case thus could be said to stand for the proposition that *Lamar Homes* has not killed the *Maupin* line of cases, and there are still some acts that cannot be converted into covered accidents even when they are alleged to have been negligently performed.