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Liability Insurer's Duty to Defend Suits for Intentional Injury

CASE COMMENTS

LIABILITY INSURER'S DUTY TO DEFEND SUITS FOR INTENTIONAL INJURY

The typical liability insurance policy contains a clause by which the insurer agrees to defend any suit alleging bodily injury or property damage which is payable under the terms of the policy even though the suit is groundless, false, or fraudulent.[1] Another standard provision states that the policy does not apply to bodily injury or property damage caused intentionally by or at the direction of the insured.[2] With these provisions in the insured's policy, does the insurer have a duty to defend when a third person brings an action against the insured alleging that the insured wilfully, maliciously, brutally, and intentionally assaulted him?

In *Gray v. Zurich Ins. Co.*[3] the insured, Gray, was involved in a near accident with Jones. Jones got out of his car and approached Gray's automobile in a menacing manner jerking open the car door. Gray, apprehensive of harm to himself, thereupon struck Jones. Jones sued Gray alleging that Gray had wilfully, maliciously, brutally, and intentionally assaulted him. Gray's insurer, relying upon the intentional-injury exclusionary clause, refused to defend the suit. Gray unsuccessfully defended on the theory of self-defense and a judgment was awarded in Jones' favor. Gray then brought this action against the insurer for its refusal to defend.

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[1]See McDonald v. Great Am. Ins. Co., 224 F. Supp. 369, 371-72 (D.R.I. 1963). The inclusion of the duty to defend provision in the same sentence that contains the bodily injury and property damage coverages was a deliberate choice by the drafters of the policy. "This was done to ... reinforce the expression of intent ... that the obligation to defend suits against the insured is confined to those suits which allege facts which are within the policy coverage and on the basis of which the company will be obligated to pay damages if a judgment is recovered against the insured." Risjord & Austin, *Standard Automobile Policy*, 1957 INS. L.J. 199, 200.

[2]Harbin v. Assurance Co. of America, 308 F.2d 748 (10th Cir. 1962); Aetna Cas. & Sur. Co. v. Hanna, 224 F.2d 499 (5th Cir. 1955); McDonald v. Great Am. Ins. Co., 224 F. Supp. 369 (D.R.I. 1963); Abbott v. Western Nat'l Indem. Co., 165 Cal. App. 2d 302, 331 P.2d 997 (Dist. Ct. App. 1958); Blackwood v. Farley, 40 Misc. 2d 289, 243 N.Y.S.2d 138 (Sup. Ct. 1963); Joyce Apartments, Inc. v. Weinstock, 15 Misc. 2d 47, 181 N.Y.S.2d 430 (Sup. Ct. 1958); MacDonald v. United Pac. Ins. Co., 210 Ore. 395, 311 P.2d 425 (1957); Travelers Ins. Co. v. Newsom, 352 S.W.2d 888 (Tex. Civ. App. 1961); Wendall v. Union Mut. Fire Ins. Co., 123 Vt. 294, 187 A.2d 331 (1963); Alm v. Hartford Fire Ins. Co., 369 P.2d 216 (Wyo. 1962).

[3]54 Cal. Rptr. 104, 419 P.2d 168 (1966).

The lower court held that the insurer had no duty to defend stating that where the third-party complaint shows on its face that the injury is excluded from policy coverage no duty arises.[4] Furthermore, the court stated that where the third-party suit results in a judgment against the insured, the judgment operates as res judicata or collateral estoppel in the insured's action against the insurer. The Supreme Court of California reversed, holding that the insurer was obligated to defend and, having failed to do so, must pay the judgment rendered against the insured.

Zurich rejected two arguments of the insurer which are of particular interest. (1) The duty to defend is dependent upon the allegations of the complaint so that the duty arises only when the complaint discloses a cause of action which falls within coverage of the policy. The court replied that the insurer must defend any suit which *"potentially"* seeks damages within the coverage of the policy.[5] Since modern procedure allows pleadings to be amended liberally, the court concluded that the third-party suit presented the potentiality of a judgment based on negligence and that such liability was within coverage of the policy. (2) The insurer's participation in the suit would involve it in a conflict of interests. The insurer contended that if it had defended it would have attempted to establish either that the insured's liability rested on intentional conduct and, therefore, was not within the coverage of the policy, or that the insured was free from any liability. "Thus... an insurer, if obligated to defend in this situation, faces an insoluble ethical problem."[6] The court replied that the third-party suit does not involve the issue of coverage, the insured's *liability* being the only question litigated. Moreover, the injured party desires only a large judgment and is not concerned with the *theory* of liability. The court concluded that whether the insured actually engaged in intentional conduct is not an issue which is normally resolved in the third-party litigation. The rejection of the insurer's arguments by the Supreme Court of California represents a rejection of two established doctrines relating to the duty to defend.

Allegations of the Complaint

The rule is well established in most jurisdictions that the duty to defend is determined by the allegations of the complaint filed by the

[4]Gray v. Zurich Ins. Co., 49 Cal. Rptr. 271 (Dist. Ct. App. 1966).
[5]419 P.2d at 176.
[6]*Id.* at 178.

injured party.[7] Basically, there are four situations which have confronted the courts in attempting to apply this rule: (1) where the complaint states upon its face that the action is clearly within or outside the coverage of the policy; (2) where the complaint alleges two different causes of action, such as pleading negligence and intentional injury in the alternative; (3) where the complaint is ambiguous as to the grounds of recovery relied upon; (4) where there is a conflict between known facts and alleged facts.

A complaint that states clearly on its face that the action is outside the coverage of the policy is found in *Harbin v. Assurance Co. of America.*[8] The insurer brought a declaratory judgment action to determine if it had a duty to defend an action brought against the insured. The third-party complaint against the insured alleged that the insured did "wilfully, maliciously and wrongfully assault, strike and beat plaintiff with great force and violence."[9] The court held that the terms of the policy determine the rights of the insured and require defense of suits "alleging" an injury covered by the policy. Since the complaint alleged an injury not covered by the policy because of the intentional-injury exclusionary clause, there was no duty to defend. The court recognized that under the Federal Rules of Civil Procedure the outcome of a suit is not necessarily determined by the pleadings; hence, at trial a claim based on unintentional conduct which is within the policy coverage may be established.[10] If the

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[7]Harbin v. Assurance Co. of America, 308 F.2d 748 (10th Cir. 1962); Aetna Cas. & Sur. Co. v. Hanna, 224 F.2d 499 (5th Cir. 1955); Journal Publishing Co. v. General Cas. Co., 210 F.2d 202 (9th Cir. 1954); McDonald v. Great Am. Ins. Co., 224 F. Supp. 369 (D.R.I. 1963); Abbott v. Western Nat'l Indem. Co., 165 Cal. App. 2d 302, 331 P.2d 997 (Dist. Ct. App. 1958); Blackwood v. Farley, 40 Misc. 2d 289, 243 N.Y.S.2d 138 (Sup. Ct. 1963); MacDonald v. United Pac. Ins. Co., 210 Ore. 395, 311 P.2d 425 (1954); Travelers Ins. Co. v. Newsom, 352 S.W.2d 888 (Tex. Civ. App. 1961); Wendall v. Union Mut. Fire Ins. Co., 123 Vt. 294, 187 A.2d 331 (1963); Alm v. Hartford Fire Ins. Co., 369 P.2d 216 (Wyo. 1962). For cases standing for the general rule but involving a different exclusionary clause from that in *Zurich* see C. Y. Thomason Co. v. Lumbermens Mut. Cas. Co., 183 F.2d 729 (4th Cir. 1950); Travelers Ins. Co. v. Crane, 94 F. Supp. 44 (E.D. Mich. 1950); Maryland Cas. Co. v. Dalton Coal & Material Co., 81 F. Supp. 895 (W.D. Mo. 1949); American Fid. Co. v. Deerfield Valley Grain Co., 43 F. Supp. 841 (D. Vt. 1942).

[8]308 F.2d 748 (10th Cir. 1962).

[9]*Ibid.*

[10]*Ibid.* Rule 15 of the Federal Rules of Civil Procedure provides for amendment of the pleadings during trial. Professor James in his treatise on civil procedure in referring to the codes and the Federal Rules said:

> Both systems look to the complaint to give the defendant and the court accurate factual notice. Neither system seeks to tie the pleader down to a single legal theory. Under both systems a plaintiff is entitled to the benefit

insured is held liable and if liability is based on *grounds* within the policy coverage the insurer may be held liable for the judgment against the insured. But the ultimate grounds are not determinative of the duty to defend. Therefore, *Harbin* recognizes that even though the insurer has no duty to defend it is not necessarily absolved from indemnifying the insured.

Superior Ins. Co. v. Jenkins[11] is illustrative of a complaint which alleges both intentional and negligent conduct. The injured party pleaded in the alternative, alleging in the first paragraph that the insured intentionally inflicted an assault and battery and in the second paragraph that he negligently injured him. The court rejected the insurer's contention that there was no duty to defend because intentional injuries were excluded from coverage. Since pleading in the alternative is permitted, the court held that the portion of the complaint which alleges negligence sufficiently states a cause of action within the coverage of the policy.[12]

A situation involving an ambiguous complaint is illustrated in *Pow-Well Plumbing & Heating, Inc. v. Merchants Mut. Cas. Co.*[13] The policy insured against liability for injuries caused by accident arising out of the operations of the insured's business. The policy excluded coverage for accidents attributable to the insured's operations " 'if the accident occurred after such operations had been completed at the place of occurrence and away from . . . premises of the insured.' "[14] The complaint charged the insured with negligence in installing a gas burner which exploded causing injury. The complaint made no mention of whether the insured was still working on the premises at the time of the explosion, such allegation being determinative of whether the alleged negligent act is within the coverage of the policy. Holding that the duty to defend is to be determined by the allegations of the complaint, the court described the complaint as unclear and as presenting a question of doubt as to whether the accident was covered by the policy. The court concluded that in such a situation

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of any legal theory—the "whole law of the land"—applicable to the facts he has alleged.

JAMES, CIVIL PROCEDURE, § 2.11, 85-86 (1965).

[11]358 S.W.2d 243 (Tex. Civ. App. 1962).

[12]See MacDonald v. United Pac. Ins. Co., 210 Ore. 395, 311 P.2d 425, 430 (1957), where the court stated: "If in the pending case the injured parties had sued the plaintiff by a complaint asserting both negligent injury and assault and battery, a different problem would have been presented and it might have been the duty of the insurer to defend . . . ."

[13]195 Misc. 251, 89 N.Y.S.2d 469 (N.Y. City Ct. 1949).

[14]*Id.* at 471.

the insurer should defend if there is "potentially" a case within the coverage of the policy and that such potentiality existed, since proof could be offered that the insured was engaged on the premises at the time of the accident.[15]

Harbin v. Assurance Co. of America[16] illustrates that where there is a conflict between the facts as known or ascertainable by the insurer and the allegations of the complaint, the complaint determines the duty to defend.[17] In *Harbin,* the court rejected the insured's argument that had the insurer investigated it would have found that the conduct was not intentional and, therefore, was within the coverage of the policy. The court noted that whether the conduct was intentional depended upon the intent of the tortfeasor and that such intent was not to be determined by the insurer through investigation but by the trier of the fact.[18] However, other courts have held that facts known or ascertainable by the insurer prevail over the complaint in determining whether there is a duty to defend.[19] In *Stout v. Grain Dealers Mut.*

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[15]*Accord,* Boutwell v. Employers' Liab. Assur. Corp., 175 F.2d 597 (5th Cir. 1949).

[16]308 F.2d 748 (10th Cir. 1962).

[17]Significantly, there are decisions from the same circuit which decided *Harbin* that had held that the true facts prevail over the complaint in regard to determining the duty to defend. American Motorists Ins. Co. v. Southwestern Greyhound Lines, Inc., 283 F.2d 648 (10th Cir. 1960); Albuquerque Gravel Prods. Co. v. American Employers Ins. Co., 282 F.2d 218 (10th Cir. 1960); Hardware Mut. Cas. Co. v. Hilderbrant, 119 F.2d 291, 299 (10th Cir. 1941). *Harbin* distinguished these cases on the ground that they sought to establish the insurer's liability after the facts had been established while *Harbin,* being a declaratory judgment action, sought to establish liability before the facts were established.

[18]However, the court in *Harbin* recognized that under modern procedural rules the pleadings do not necessarily determine the issues and that recovery may be had on grounds not asserted in the complaint. The court further said: "Accordingly, paragraph 2 of the judgment of the court below is modified so as to declare that the plaintiff insurer is not obligated at this time to defend [the] action...." 308 F.2d at 750. Therefore, *Harbin* implies that if the third party's claim changed so as to come within the coverage of the policy a duty to defend would arise. See Comment, 114 PA. L. REV. 734 (1966).

For case supporting the view that the duty to defend is determined by the complaint, rather than by actual facts as known or ascertainable by the insurer see Lamb v. Belt Cas. Co., 3 Cal. App. 2d 624, 40 P.2d 311 (Dist. Ct. App. 1935); Boyle v. National Cas. Co., 84 A.2d 614 (Mun. Ct. App. D.C. 1951); Fessenden School, Inc. v. American Mut. Liab. Ins. Co., 289 Mass. 124, 193 N.E. 558 (1935); Goldberg v. Lumber Mut. Cas. Ins. Co., 297 N.Y. 148, 77 N.E.2d 131 (1947) *but see* United Waste Mfg. Co. v. Maryland Cas. Co., 85 Misc. 539, 148 N.Y. Supp. 852 (Sup. Ct. 1914).

[19]Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521 (4th Cir. 1962); Marshall's U.S. Auto Supply, Inc. v. Maryland Cas. Co., 354 Mo. 455, 189 S.W.2d 529 (1945); United Waste Mfg. Co. v. Maryland Cas. Co., 85 Misc. 539, 148 N.Y. Supp. 852 (Sup. Ct. 1914); United States Fid. & Guar. Co. v. Briscoe, 205 Okla. 618, 239 P.2d 754 (1951).

Ins. Co.,[20] involving a comprehensive homeowner's liability policy containing an intentional-injury exclusionary clause, the United States Court of Appeals for the Fourth Circuit held that the insurer had no duty to defend a wrongful death action against the insured even though the complaint filed by the administrator alleged negligence.[21] In *Stout*, the insured shot and killed a "Peeping Tom" and later pleaded guilty to manslaughter. Voluntary manslaughter is an intentional killing without malice, thus the court found that the plea of guilty admitted that the death was intentionally caused. Since the insured offered no evidence to rebut the admission, the insured had placed himself outside the coverage of the policy and, therefore, there was no duty to defend.[22]

Conflict of Interests

A typical statement of the conflict of interests problem is made in *Harbin:*

> It [the insurer] cannot possibly defend the ... [third-party] action and protect both its own interests and the interests of its insureds. If it tries to exculpate itself by showing an intentional injury, it exposes the insured to a greater liability and a possible award of exemplary damages. If it urges an unintentional injury it foregoes the exclusionary provision on the policy.[23]

The leading authority on the conflict of interests doctrine is *Farm Bureau Auto Mut. Ins. Co. v. Hammer.*[24] In *Hammer*, the insurer sought a declaratory judgment that an automobile liability insurance policy did not cover the damages suffered by those killed in an automobile struck by the insured, because the insured's act was intentional. The complaint showed that the insured had been convicted of second degree murder for intentionally and maliciously causing the death of a passenger by driving his truck into the automobile in which the passenger was riding. The insured argued that criminal conviction was not binding as to the issue of noncoverage, that the civil suits were brought against the insured on the theory of negligence, and that judgments were recovered accordingly. The lower court held that

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[20]307 F.2d 521 (4th Cir. 1962).

[21]Stout v. Grain Dealers Mut. Ins. Co., 201 F. Supp. 647, 650-51 (M.D.N.C. 1962) (The complaint alleged both intentional and negligent conduct.)

[22]In *Stout* the insured asserted that he entered the plea to avoid the possibility of a prison sentence and not because of his guilt. The court stated that in view of the record such an assertion was insufficient to rebut the plea. Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521, 525 (4th Cir. 1962).

[23]Harbin v. Assurance Co. of America, 308 F.2d 748, 749 (10th Cir. 1962).

[24]177 F.2d 793 (4th Cir. 1949).

the insurer had a duty to defend the insured, which it had refused to do, and was bound by the findings in the civil suits that the deaths were due to the negligence of the insured.[25] The Court of Appeals for the Fourth Circuit reversed the district court decision and held that the insurer was not bound by the judgments in the civil suits. The reversal was based on the existence of a conflict between the interests of the insurer and the interests of the insured—that the insurer could not defend the insured and at the same time protect its own interest.

In holding that there was no duty to defend, the court in *Hammer* found it necessary to take exception to the estoppel-by-judgment rule that where an indemnitor has notice of and an opportunity to defend an action against his indemnitee, a judgment, if obtained without fraud or collusion, will be conclusive against him regardless of whether he appeared in defense of the action.[26] *Hammer* recognized that the purpose of the rule is to dispose of the necessity of two trials upon the same issue: one by the third party against the indemnitee, and the other by the indemnitee against the indemnitor. However, *Hammer* held that the estoppel-by-judgment rule is applicable only where the *interests* of the indemnitor and indemnitee are *identical* in opposing the injured party's claim.[27] Moreover, the purpose of the rule is accomplished by allowing the indemnitor to appear in the third-party suit "on behalf of the indemnitee so that everything that can be offered in exculpation of the indemnitee by either party to the indemnity contract may be presented."[28] The obvious implication is that at least where the interests of the indemnitor and indemnitee "conflict" the rule does not apply. Before examining *Hammer's* justification for the conflict of interests doctrine, a judicial application of the estoppel-by-judgment rule appears appropriate.

In *Aetna Life Ins. Co. v. Maxwell*[29] the Court of Appeals for the Fourth Circuit held that when an insurance company defends the insured[30] it is not bound by the judgment unless the ground upon which the insured bases his claim against the insurer was "necessarily

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[25]Farm Bureau Mut. Ins. Co. v. Hammer, 83 F. Supp. 383 (W.D. Va. 1949).

[26]See Washington Gas Light Co. v. District of Columbia, 161 U.S. 316 (1896); International Indem. Co. v. Steil, 30 F.2d 654 (8th Cir. 1929); Campbell v. American Fid. & Cas. Co., 212 N.C. 65, 192 S.E. 906 (1937); RESTATEMENT, JUDGMENTS § 107 (1942); 1 FREEMAN, JUDGMENTS § 448 (5th ed. 1925).

[27]177 F.2d at 799.

[28]*Ibid.*

[29]89 F.2d 988 (4th Cir. 1937).

[30]The insured defended under a nonwaiver agreement. See notes 77-87 *infra* and accompanying text.

adjudicated" in the prior action. In *Maxwell* a doctor was insured against liability for malpractice. The injured party brought an action for malpractice and negligence for failure to care properly for an injury which resulted in infection and subsequent amputation of his leg. Judgment was entered in favor of the injured party. Upon failure of the insured to satisfy the judgment, the injured party brought an action against the insurer claiming that the judgment based on negligence was binding on the insured.[31] The insurer's defense was that the negligent act occurred prior to the effective date of the policy and, therefore, was not covered by the policy. The court examined the complaint filed against the insured and pointed out that the alleged negligent acts constituted a course of conduct which began prior to the effective date of the policy but extended into a period after its effective date. Concerning the effect of the estoppel-by-judgment rule, the court said that the insurer was bound only by the issues *settled* in the third-party suit. The issue decided in the suit against the insured was not the same as the issue proposed against the insurer, for in the latter suit the insurance company was liable only for negligence that occurred between the effective date of the policy and the terminal date of the negligent conduct. The issue decided in the third-party suit was whether the insured had been negligent at any time during treatment of the injury.

The estoppel-by-judgment rule as qualified by the "adjudicated issues" requirement operates when the insurance company disclaims liability and refuses to defend, as well as when it defends but refuses to pay the judgment. In *B. Roth Tool Co. v. New Amsterdam Cas. Co.*[32] the tool company was insured against liability for bodily injuries sustained by its employees while on duty. An injured employee recovered a judgment against the insured. The insured then brought an action against the insurer to recover the money paid. The insurer answered that the insured had breached a stipulation in the policy against keeping explosives on the premises and that such breach was conclusively established by the judgment in the third-party suit. Upholding this contention the court said:

> Brushing aside unnecessary verbiage, the issue in this case is whether the tool company committed a breach... [of its promise] that it would not use explosives on the premises.

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[31]The insurance contract provided for an action by the injured party against the insurer if the judgment against the insured was returned unsatisfied. 89 F.2d at 989. The court held that the injured party stood in the place of the insured.

[32]161 Fed. 709 (8th Cir. 1908).

> Whether it was using such an explosive at the time Cameron was injured was the very issue tendered, met, and tried in the former suit.[33]

An exception to the estoppel-by-judgment rule was not made by the Supreme Judicial Court of Massachusetts in *Miller v. United States Fid. & Cas. Co.*[34] involving facts similar to *Hammer.* In *Miller* the insured was angry about the way in which Link passed him on the highway. The insured thereupon turned in front of Link's car causing him to lose control and run into an embankment. The insurance company refused to defend the action against the insured claiming that the injuries were caused by the intentional conduct of the insured. Link obtained a judgment against the insured who in turn brought suit against the insurer for indemnity. After making an independent finding of fact, the trial court held that the insured intentionally caused the accident and that such conduct was outside the coverage of the policy.[35] The Supreme Judicial Court of Massachusetts reversed, holding that the judgment in the third-party suit was based on negligence and that the insurer was bound by that finding of fact whether he defended or not. Moreover, to hold otherwise would require an insured to relitigate the same issues upon which he was found liable in the third-party suit, thus defeating the very purpose of the insurance policy, "protection against law suits and legal liability."[36]

The situation presented in *Miller* is identical to that presented in *Hammer:* (1) the insurer refused to defend and (2) the issue decided in the third-party suit was identical to the issue determinative of coverage or non-coverage.[37] *Miller* held that the insurer was bound by the determination in the third-party suit. However, *Hammer* reached the opposite result relying upon the conflict of interests doctrine. The primary justification for the conflict of interests doctrine is found in the exception to the estoppel-by-judgment rule stated in *Freeman on Judgments*[38] only where the contract or relation to the indemnitee imposes upon the indemnitor a *duty to defend* may the judgment be held conclusive on the indemnitor. Moreover, the duty to defend does not exist where the indemnitor would not be allowed to litigate matters which would determine his liability to the indemni-

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[33] *Id.* at 712.

[34] 291 Mass. 445, 197 N.E. 75 (1935).

[35] *Id.* at 76.

[36] *Id.* at 77.

[37] Farm Bureau Mut. Ins. Co. v. Hammer, 83 F. Supp. 383 (W.D. Va. 1949) (the issue in both cases was whether the insured was negligent).

[38] 1 FREEMAN, JUDGMENTS § 488 (5th ed. 1925).

tee. To the same effect the indemnitor has no duty to defend "where his showing himself not to be liable will not necessarily result in a judgment in favor of the party asking him to defend."[39]

This qualification of the duty to defend, which in turn prevents application of estoppel by judgment, is illustrated in *Raleigh & G.R.R. v. Western & A.R.R.*[40] In *Raleigh* the indemnitee was sued by the Pullman Company for damages to one of its cars while on the premises of the indemnitee. The suit was based on a contract under which the indemnitee was bound to make repairs on Pullman cars damaged while in the indemnitee's possession. The indemnitor was requested to defend on the ground that it had negligently allowed one of its cars to collide with the Pullman car and was therefore primarily liable. The indemnitor refused to defend, and the indemnitee alleged that the indemnitor was bound by the judgment. Holding that there was no duty to defend, the court noted that the purpose of the estoppel-by-judgment rule is to avoid a multiplicity of suits which can be effected by requiring the indemnitor to appear in the third-party suit and present any defense he might have. However, before the indemnitor can be called upon to defend, the third-party suit must be of such a nature that the indemnitor could present any defense "which he could set up if the suit was proceeding against him directly."[41] The court in *Raleigh* hypothesized that had the alleged indemnitor entered the third-party suit and presented the defense that it was without negligence such a defense could not be allowed to a suit based on a contract wherein the indemnitee had agreed to pay all damages irrespective of negligence. Moreover, if the indemnitee could have defeated the action by proving that the contract with the third party was void, the Pullman Company would not have been prevented from suing the alleged indemnitor in tort for negligence; therefore, the alleged indemnitor "would have gained nothing by appearing in the original suit and defending it."[42]

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[39]*Id.* at 982.

[40]6 Ga. App. 616, 65 S.E. 586 (1909).

[41]*Id.* at 588.

[42]*Ibid.* However, the court commented:

If in the present case the Raleigh & Gaston had contracted to pay all damages arising from negligence only, then it might be that Raleigh & Gaston could properly have vouched the Western & Atlantic into court, since it was the act of the latter which really caused the damage to the car. Or, if the Western & Atlantic [indemnitor] had by contract agreed to indemnify the Raleigh & Gaston for any liability which might arise by virtue of its contract with the Pullman Company, a simple case for vouching would be made out.

A similar illustration of the qualification of the duty to defend is *Pfarr v. Standard Oil Co.*[43] In *Pfarr* a judgment was recovered against a retailer of oil for injuries to the purchaser resulting from an explosion. The wholesaler refused to defend and the retailer alleged that the wholesaler was bound by the judgment. The wholesaler's liability turned on whether he could have appeared in the third-party suit and succeeded in defending it by establishing that he was not to blame. Holding the wholesaler, the court found that the wholesaler might have been free from fault and still the third-party could have recovered because of the negligence of the retailer. The court stated:

> [O]ne not a party to a suit, but notified to appear and defend, must do so, if the negligence charged is such that, if proved, would make it liable for the wrong done; but that it need not do so if the defendant in the suit would be liable for his own negligence, independent of any wrong on the part of the person so notified.... [T]he case must be such that his [wholesaler's] defense, if established, would be an end to the suit.... If, in response to the notice, the defendant had appeared and offered to defend it could not interpose any defense not personal to itself, and, by putting in such a defense, it might have tendered a false issue, in so far as the original case was concerned, thus complicating the issues and delaying the trial.[44]

Both *Pfarr* and *Raleigh* illustrate that the reason for the rule that one "cannot be called upon to defend an action where his showing himself not to be liable will not necessarily result in a judgment in favor of a party asking him to defend" is that such a situation will not satisfy the purpose of the estoppel-by-judgment rule: to avoid multiple litigation.

Hammer relied upon this exception to the duty to defend in stating its often cited rule that it was impossible for the insurer to defend and simultaneously protect its own interests.[45] In addition, "it could not exculpate itself by showing that the injurious acts of the insured were beyond the scope of the policy, for this showing would establish the liability of the insured...."[46] However, it does not seem to follow

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[43]165 Iowa 657, 146 N.W. 851 (1914). The court observed from the record of the third-party action that recovery was based on the negligence of the retailer's agents in not properly testing the oil after it received notice that some of it was dangerous.

[44]*Id.* at 856 (1914).

[45]177 F.2d at 800-01. See Stout v. Grain Dealers Mut. Ins. Co., 201 F. Supp. 647, 649 (M.D.N.C. 1962).

[46]177 F.2d at 801.

from *Pfarr* and *Raleigh* that the basis of the exception to the duty-to-defend rule is to avoid prejudice to the indemnitee which is implicit in *Hammer's* conflict of interests doctrine. *Hammer's* doctrine carries the exception one step further in that "exculpation" of the indemnitor would not only result in a judgment in favor of the insured but, in addition, would actually *establish* the liability of the insured. The indemnitor's assertion of non-liability would seemingly be prejudicial to the indemnitee—establish the indemnitee's liability—only where the issue which determines the liability of the indemnitee to the third party is identical to the issue which determines the liability of the indemnitor to the indemnitee. For example, in *Hammer* the issue of negligence was determinative of the insured's liability to the third party and the right of indemnity turned upon the same issue.[47] In such a situation a true conflict of interests exists, thus relieving the insurer of the duty to defend, which in turn avoids operation of the estoppel-by-judgment rule.

The conflict of interests doctrine should not be interpreted as assuming that the insurer's attorney could actually enter the suit and seek to establish that the insured acted intentionally, thereby placing him outside coverage of the policy. There are two objections to such a course of conduct. (1) Generally, an insurance company cannot litigate the issue of coverage in the third-party suit, for in most states it may not be joined as a defendant.[48] (2) An assertion of intentional conduct in the third-party suit would be a violation of the attorney's duty to his client.[49] The conflict of interests doctrine, read in light of the ethical objection, should be interpreted to mean only that when the attorney is faced with the temptation of promoting his employer's interest at the expense of the client-insured, he simply should not defend the third-party suit. As said by one court: "The lawyer may not, while bearing aloft the banner of his supposed client, at the same time carry on battle against him, and it is his duty to withdraw from the defense of . . . [the] action. . . ."[50]

Although conflict of interests has often been discussed solely in terms of the ethical problem confronting the attorney,[51] the underlying stimulus for the potentially unethical conduct, at least in intentional-unintentional liability insurance cases, is the estoppel-by-judgment rule. If the attorney could not rely on the results of his conduct there

[47]See JAMES, CIVIL PROCEDURE § 11.27 n.5 (1965).
[48]8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4861 (1962.)
[49]ABA CANONS OF PROFESSIONAL ETHICS No. 6.
[50]Schwartz v. Sar Corp., 19 Misc. 2d 660, 195 N.Y.S.2d 496, 503 (Sup. Ct. 1959).
[51]See, *e.g.*, Fidelity & Cas. Co. v. McConnaughy, 228 Md. 1, 179 A.2d 117 (1962).

would be no reason for him to assert a defense contrary to the interest of the insured. Moreover, even if the attorney defended the insured in a negligence action and complied with all the rules of ethical conduct but was unsuccesful in his defense, the estoppel-by-judgment rule would establish the issue of negligence as conclusive against the insurer, and it would therefore lose its policy defense. The conflict obviously still exists.

To resolve this conflict *Hammer* offers the insurer two courses of conduct: (1) refuse to defend and litigate the issue of coverage irrespective of the judgment in the third-party suit;[52] (2) defend but reserve its own defense under a nonwaiver agreement.[53]

However, *Zurich* rejected the conflict of interests doctrine offered in support of the argument that the insurer had no duty to defend. The third-party complaint alleged intentional conduct. The argument was to the effect that it would be in the best interests of the insurer, if it could not completely absolve the insured of liability, to have the judgment based on intentional conduct. The insured would desire a judgment based on unintentional conduct, thus bringing his liability within the coverage of the policy. In rejecting the doctrine the court commented:

> The only question there litigated [in the third-party suit] is the insured's *liability*. The alleged victim does not concern himself with the theory of liability; he desires only the largest possible judgment. Similarly, the insured and insurer seek only to avoid, or at least to minimize, the judgment. As we have noted, modern procedural rules focus on whether, on a given set of facts, the plaintiff, regardless of theory may recover. Thus the question of whether or not the insured engaged in intentional

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[52]177 F.2d at 800 (4th Cir. 1949). In Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521 (4th Cir. 1962), involving facts similar to *Hammer*, the court stated that where a conflict exists the insurer should be free to litigate coverage irrespective of the result of the third-party action. The court further stated:

> This does not mean that by a mere assertion of a conflict of interest the insurer may excuse itself from its contractual obligation to defend. It means only that, when there is an unresolved dispute as to the existence of this obgation the insurer is not required to participate in a tort proceeding where the insurer's interest would be to prove a state of facts which would establish or magnify the damaged party's claim against the insured. Simply, the law will recognize the practicalities of the situation. But, if it should be later determined that there is coverage, the insurer would be liable for the costs of the defense... as well as any judgment against him.

Id. at 523 n.1.

[53]177 F.2d at 800 (4th Cir. 1949). See notes 77-87 *infra* and accompanying text for discussion of nonwaiver agreement.

> conduct does not normally formulate an issue which is resolved in that litigation.[54]

Implicit in the court's language is that it rejected the conflict of interests doctrine primarily because California is a "fact pleading" jurisdiction.[55] In such a jurisdiction the theory of recovery as stated in the pleadings is not controlling if sufficient facts are alleged to constitute another ground for recovery.[56] Therefore, since only the *liability* of the insured is determined in the third-party suit and such liability could have been based upon either intentional or unintentional conduct, the *grounds* for liability cannot be determined from the judgment.[57] This being true it would follow necessarily that any conflict of interests is beyond identification. First, estoppel by judgment operates to make conclusive, in the suit between the indemnitor and indemnitee, any issue litigated in the third-party suit material to that judgment. Second, the conflict of interests arises when the right of indemnity turns upon the same issue as did the third party's action against the indemnitee. Thus, if the issue which determined liability is unidentifiable, the basis for the conflict of interests is lost.

However, it is submitted that the reasoning in *Zurich* is oversimplified. Professor James in his treatise on civil procedure points out that a general verdict rendered by a jury will often be "cryptic and ambiguous" and in such a situation collateral estoppel[58] would be of no

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[54]419 P.2d at 178.

[55]Buxbom v. Smith, 23 Cal. 2d 535, 145 P.2d 305 (1944); California W. States Life Ins. Co. v. Tucker, 15 Cal. 2d 69, 98 P.2d 511 (1940).

[56]Note 59 *supra.*

[57]*Zurich* qualified its rejection of the conflict of interests doctrine with the following statement:

> In rare cases the issue of punitive damages or a special verdict might present a potential conflict of interests, but such a possibility does not outweigh the advantages of the general rule. Even in such cases, however, the insurer will still be bound, ethically and legally, to litigate in the interests of the insured.

419 P.2d at 178 n.18 (1966). The obvious implication is that a special verdict would, by its very nature, reveal the grounds upon which recovery is based.

[58]It should be noted that the estoppel-by-judgment rule is often referred to as res judicata or collateral estoppel. In reading cases concerning the binding effect of a judgment on a later action between the indemnitor and indemnitee this overlap of terms should be taken into consideration. See Graves v. Associated Transp. Inc., 344 F.2d 894 (4th Cir. 1965) (res judicata); Travelers Indem. Co. v. State Farm Mut. Auto. Ins. Co., 330 F.2d 250 (9th Cir. 1964) (collateral estoppel by judgment); Jarvis v. Indemnity Ins. Co., 363 P.2d 740 (Ore. 1961) using terms res judicata and collateral estoppel interchangeably). The term res judicata is not completely accurate since the cause of action asserted in the third-party action is not the same as that involved between the insurer and insured. Travelers Indem. Co. v. State Farm Mut. Auto. Ins. Co., 330 F.2d 250 (9th Cir. 1964). Courts often use the term res judicata

benefit to the party claiming it.[59] A general verdict would probably not reveal upon which issue liability was decided.[60] However, the ambiguity may be resolved by admissible evidence, such as the pleadings and a transcript of the proceedings of the third-party suit.[61] In addition, answers to special interrogatories would be admissible.[62] Where a case is tried to the court, specific findings of fact are often made which frequently reveal the matters upon which the decision was based.[63] The Federal Rules of Civil Procedure require the court to make such findings.[64] Therefore, it is evident that the issues material to the judgment in the third-party action are not in all cases beyond identification.

Zurich apparently qualifies its rejection of the conflict of inter-

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as a generic term to include both the res judicata and collateral estoppel ideas. FIELD & KAPLAN, MATERIALS ON CIVIL PROCEDURE 936 (1953). As said by Professor James:

> A person not named as a party may in fact take over the control of an action, instead of or in co-operation with one of the parties. Where he does so to protect some financial or proprietary interest that he has in the judgment or in the transaction or occurrence giving rise to the action, he will be bound by the determinations of fact or law involved in the judgment according to the rules of *collateral estoppel.*

JAMES, CIVIL PROCEDURE § 11.27, at 590 (1965). (Emphasis added.)

The objection to collateral estoppel that the insurer and insured were not parties to the original suit is overcome because they are considered in "privy" with each other. Maryland Cas. Co. v. Sturgis, 198 Ark. 574, 129 S.W.2d 599 (1939); see *Development in the Law—Res Judicata,* 65 HARV. L. REV. 818, 855-56 (1952). However, there is some authority that upholds the objection. *E.g.,* State Farm Mut. Auto. Ins. Co. v. Wright, 173 Va. 261, 3 S.E.2d 187 (1939) (estoppel by judgment based on principle that a person should have only one opportunity to try his case); 114 U. PA. L. REV. 734, 740 (1966). *But see,* 4 OKLA. L. REV. 125 (1951).

[59]JAMES, CIVIL PROCEDURE § 11.20, at 580 (1965).

[60]See Northwestern Nat'l Cas. Co. v. Bettinger, 111 F. Supp. 511, 515 (D. Minn. 1953). The insurer brought a declaratory judgment action to declare an automobile liability policy void. The injured plaintiffs in the original suit were allowed to intervene, and they claimed that the issue of ownership was established in the suit against the insured. The court commented: "Examination of the record in the prior trials does not disclose the basis for the Court's granting the motion for a directed verdict. That being true, it cannot be said that it was sustained by the Court on any particular ground."

[61]JAMES, CIVIL PROCEDURE § 11.19, at 579 (1965); see Jarvis v. Indemnity Ins. Co. of No. America, 227 Ore. 508, 363 P.2d 740 (1961). It has been held that the oral testimony of a juror or judge can be used to show what was put in issue, Washington Steam Packet Co. v. Sickles, 72 U.S. (5 Wall.) 550 (1867), although they are not permitted to testify as to the grounds upon which the jury based its decision. JAMES, CIVIL PROCEDURE § 11.20, at 580, 1965).

[62]*Zurich* admitted that a special verdict might present a conflict of interests. 419 P.2d at 178 n.18.

[63]JAMES, CIVIL PROCEDURE § 11.20, at 580 (1965).

[64]FED. R. CIV. P. 52(a).

ests doctrine in stating that "in any event, if the insurer adequately reserves its right to assert the noncoverage defense later, it will not be bound by the judgment."[65] This reservation of right is often referred to as a nonwaiver agreement whereby the insurer in defending the third-party suit avoids operation of an estoppel or waiver[66] which would preclude it from later setting up its defense of noncoverage. The estoppel referred to here is based upon the equitable doctrine that one "whose conduct has led another to act or not to act in reliance upon a belief as to a fact or expectation as to future performance ought not to be allowed to act in a way contrary to the belief or expectation so created."[67] However, the nonwaiver agreement is subject to various limitations: for example, normally consent of the insured is required to make the agreement legally valid;[68] the insurer must give prompt notice to the insured after obtaining knowledge of the possible defense;[69] and any defense known at the time of the agreement and not stipulated by the insurer is waived.[70] Thus, if these requirements are not met any benefit of a nonwaiver is sacrificed.[71]

Irrespective of these restrictions, there still appears some doubt as

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[65]419 P.2d at 178.

[66]Courts often use the terms "waiver" and "estoppel" interchangeably. 23 MD. L. REV. 252, 256-57 (1963). However, the two terms are distinguishable.

> The term 'waiver' is used sometimes broadly to indicate *merely the legal consequence* that a particular defense by the insurer is not available because of some conduct of it or its agents, and sometimes more narrowly to mean 'an intentional relinquishment of a known right.' Even the latter formula leaves the *operative facts* ('intention relinquishment') somewhat nebulous. The term 'estoppel' always involves the notion of reliance by one party (insured) upon the conduct of the other (insurer), and varies in meaning with the kind of conduct of the latter, which may be either a representation of fact (estoppel by misrepresentation), a promise (promissory estoppel) or merely 'taking a position', a manifestation of election.

PATTERSON AND YOUNG, CASES MATERIALS ON THE LAW OF INSURANCE 531 (4th ed. 1961).

[67]PATTERSON, ESSENTIALS OF INSURANCE LAW § 96, at 493-94 (2d ed. 1957). "[W]here an insurance company defends an action and keeps control... over it... without notice to the insured that it does not consider itself liable under the policy it is estopped to deny its liability... but no estoppel arises where... it insists on its nonliability under the policy...." State Farm Mut. Auto. Ins. Co. v. Phillips, 210 Ind. 561, 2 N.E.2d 989, 992 1936).

[68]*E.g.*, Merchants Indem. Corp. v. Eggleston, 37 N.J. 114, 179 A.2d 505 (1962).

[69]*E.g.*, Farrell v. Merchants' Mut. Auto. Liab. Ins. Co., 203 App. Div. 118, 196 N.Y. Supp. 383, 385 (1922).

[70]*E.g.*, John Alt Furniture Co. v. Maryland Cas. Co., 88 F.2d 36 (8th Cir. 1937).

[71]"[I]he limited effect of a nonwaiver agreement appears in cases holding that if the insurer's representative induces the insured to make any statement or do any other act which he could not be required to do except on the assumption that the insurer is to be liable to him, then the insurer is estopped to deny its liability." PATTERSON, ESSENTIALS OF INSURANCE LAW § 106, at 535 (2d ed. 1957).

to whether a nonwaiver agreement will cure any conflict of interests problem. The question is whether a nonwaiver agreement will prevent application of the doctrine of estoppel-by-judgment or collateral estoppel where the issue of liability in the third-party suit is *identical* to the issue of coverage in the action against the insured. If the nonwaiver does not prevent application of the doctrine, the conflict of interests would not necessarily be avoided, for the insurer by defending might still forego his defense of noncoverage. In *Maxwell*[72] the court took the unequivocal position that if an issue is necessarily adjudicated in the third-party suit and defended under a nonwaiver it is conclusive upon the parties in the suit against the insurer.[73]

The Minnesota decision of *Newcomb v. Meiss*,[74] involving facts similar to those in *Zurich*, clearly illustrates that the conflict of interests problem is not cured by a nonwaiver. In *Meiss* the insured stopped at a traffic light behind the automobile driven by third-party plaintiff. The insured thereupon permitted his car to strike the rear of plaintiff's car. The plaintiff got out of his car and, while inspecting the damage, the insured hit him with a tire iron. While the insured was leaving the scene of the accident his automoble struck the plaintiff who was still standing in the road. The insured was convicted of assault. The complaint filed in the civil action alleged negligence and the plaintiff recovered on this theory. On appeal the insurer's attorney, who defended under a nonwaiver, urged that the judgment against the insured should be reversed because the trial court refused to instruct on the issue of intentional tort. In the lower court action the attorney moved for a directed verdict claiming that any liability should be based on intentional conduct. In refusing the instruction the trial court judge commented:

> I do not believe [defense counsel] is in a position now to insist upon a finding of willful or intentional tort. If the jury held it was an intentional tort, and this was an issue in the case, [and] if the defendant sued the insurance company it could be set up as an *estoppel by verdict*. Counsel would thus be appearing in the interest of the insurance company, and not that of defendant.[75]

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[72]Aetna Life Ins. Co. v. Maxwell, 89 F.2d 988, 991 (4th Cir. 1937).

[73]It is to be noted that *Maxwell* was decided prior to *Hammer*, the latter case suggesting a nonwaiver as one method of avoiding a conflict of interests by allowing the insurer to present his defense in a subsequent proceeding. However, the authority relied upon by *Hammer* was a case where the issue which would establish coverage was not litigated in the third-party suit, State Farm Mut. Auto. Ins. Co. v. Coughran, 303 U.S. 485, 492 (1938).

[74]116 N.W.2d 593 (Minn. 1962).

[75]*Id.* at 597. (Emphasis added.)

The supreme court on appeal noted that counsel for the defendant had insisted throughout the trial that the action was one for assault and battery. Therefore, the defendant should prevail. The argument of counsel was that there was a distinction between intentional and negligent conduct and that although the insured was liable he should be held so upon the correct theory. Counsel further argued that if he were successful in establishing intentional injury the insured would not be liable because the statute of limitations had run.[76] The court did not question counsel's good faith in asserting the defense but noted that counsel apparently had assumed that the court would not amend the complaint to allow recovery upon the ground of intentional conduct.[77] However, the court was of the opinion that had counsel succeeded in establishing intentional conduct, the trial court, in the interest of justice would have amended the complaint and thus deprived the insured of the right to indemnity.[78] The court said:

> This case points up the danger which defense counsel may encounter by defending under a reservation of rights under circumstances where the defense may not be consistent with the interests of both the insurer and the insured.... The misunderstanding between counsel and the court... might well have been avoided if the liability of the insurance company had been properly determined in separate proceedings.[79]

The bizarre situation in *Meiss* certainly illustrates that the estoppel-by-judgment rule may cause a conflict of interests regardless of the existence of a nonwaiver or reservation of rights.

On the other hand, the recent decision of *Great Am. Ins. Co. v. Ratliff*[80] lends some support to the *Zurich* position concerning nonwaiver and the conflict of interests doctrine. In *Ratliff* the insured ran his car into plaintiff's car one or more times causing it to overturn thus injuring plaintiff. The insurer unsuccessfully defended the negligence action under a nonwaiver agreement relying on the policy

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[76]The court pointed out, however, that the statute of limitations factor was not discussed at the trial level. *Ibid.*

[77]Apparently the attorney's argument was that since the complaint alleged negligence, a finding of intentional conduct, which constitutes a different theory of recovery, would impose no liability on the insured. The trial court judge had indicated to counsel for the insured that no amendment would be allowed. *Id.* 596-97 n.1.

[78]The court noted that the statute of limitations for intentional tort had not run as of the time the action began and that any amendment would date back to the time the negligence action was instituted. *Id.* at 598 n.3.

[79]*Id.* at 598.

[80]242 F. Supp. 983 (E.D. Ark. 1965).

clause which excluded intentional injury caused by the insured.[81] In the declaratory judgment action brought by the insurance company the court pointed out that a judgment operates as res judicata or collateral estoppel as between all parties and their privies as to issues adjudicated in the third-party action. Furthermore, the very nature of the insured's conduct was put in issue because the judge refused plaintiff's request to have the issue of punitive damages submitted to the jury.[82] However, the court relied upon the conflict of interests argument in holding that the insurer could litigate the question of coverage irrespective of the judgment in the third-party suit. The court said that the insurer probably had an affirmative obligation to defend and in so doing could not assume a position adverse to the insured. *Ratliff* lends support to the contention of *Zurich* as to the effect of nonwaiver in the sense that the insurer may defend under a nonwaiver and not be bound by the judgment. On the other hand, *Ratliff* emphasizes that the reason that the judgment is not binding is *because* of the conflict of interests, and not because of the nonwaiver. *Ratliff* and *Meiss* clearly illustrate that a nonwaiver agreement will not cure a conflict of interests problem unless such an agreement precludes operation of estoppel by judgment or collateral estoppel, and not merely equitable estoppel.

Conclusion

Zurich rejected two defenses of the insurer relative to the duty to defend primarily because of the flexibility of modern rules of pleading. According to *Zurich* the insurer can no longer rely on the allegations in the complaint to determine whether it has a duty to defend, at least in intentional-unintentional tort cases, nor may it rely on the conflict of interests argument. Thus, *Zurich* has a profound effect on the intentional-injury exclusionary clause when read in connection with the provision wherein the insurer agrees to defend any suit "alleg-

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[81]Following the accident the injured party caused a warrant to be issued for the arrest of the insured charging him with assault with intent to kill. However the civil proceeding took place before the accused was brought to trial. Three days after the incident the plaintiff filed a complaint alleging intentional injury. Seven months later the plaintiff filed an amended complaint alleging negligence. The court inferred that the plaintiff became aware of the exclusionary clause and may have amended so as to bring the judgment within the coverage of the policy. *Id.* at 985-86.

[82]The court in *Ratliff* commented:

> The action of the Circuit Judge in refusing to submit the issue of punitive damages is somewhat puzzling in view of the testimony of Ratliff in the State Court that Holland deliberated and repeatedly drove his pickup truck into the rear of the Ratliff vehicle and bumped and pushed that vehicle for about two miles down the highway.

Id. at 989 n.4.

ing" injury payable under the policy. The insurer can no longer rely on the exclusionary clause to be relieved of its duty to defend the insured. The insurer must defend; however, if the insurer can obtain a valid nonwaiver agreement it may still litigate the issue of coverage in a subsequent suit. Therefore, the exclusionary clause is still effective as to the ultimate liability of the insurer. Yet, it is submitted that the insurer's dilemma is not cured even under a nonwaiver unless the latter precludes operation of estoppel by judgment.

The *Zurich* holding, requiring the insurer to defend even where the injury was intentionally inflicted, may be justifiable since it gives primary consideration to the interest of the insured for whose benefit the contract was entered into. Yet this "guaranteed legal services view" has one weakness. The insurer may be able to obtain a declaratory judgment[83] determining the issue of policy coverage prior to the rendition of the judgment in the third-party action. In such actions some courts have considered only the question of the duty to defend stating that the insurer may still be ultimately liable under the policy,[84] but others have adjudicated the issue of coverage—whether the insured acted intentionally.[85] The Supreme Court of the United States held that the injured third-party is a proper defendant in a declaratory judgment action brought by the insurer.[86] Seemingly, if coverage is adjudicated in an intentional-unintentional injury situation, a verdict in favor of the insurer might, on principles of collateral estoppel, operate to hold the insured liable to the injured third-party. This possibility has led one court to comment that the declaratory judgment action should be allowed only after the third-party suit has proceeded to judgment.[87] Assuming that a declaratory judgment action is available, the insured cannot always rely upon the insurer coming to his defense.

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[83]See 3 VAND. L. REV. 798, 801-02 (1950).

[84]*E.g.*, Harbin v. Assurance Co. of America, 308 F.2d 748 (10th Cir. 1962).

[85]*E.g.*, Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521 (4th Cir. 1962).

[86]Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941).

[87]Great Am. Ins. Co. v. Ratliff, 242 F. Supp. 983, 990 (E.D. Ark. 1965). The court stated:

> In many instances it is ... in the best interests of all parties concerned to have the question of coverage litigated in advance of the trial ... between the insured and the injured party. However ... advance determination of the matter of coverage is not desirable where ... that question is closely and directly connected with the issue of the insured's personal liability to the injured party.
>
> If this case had been tried first, and if the Court had found that ... [insured] intentionally injured ... [third party] that decision, on settled principles of res judicata and collateral estoppel, might have established ... [insured's] substantive liability to ... [third party]."