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Business Risks and the Insurer's Duty to Defend

Millard Warehouse, Inc. v. Hartford Fire Insurance Co., 204 Neb. 518, 283 N.W.2d 56 (1979).

I. INTRODUCTION

Damage coverage under a general liability insurance policy depends on the existence of an "occurrence."¹ However, efforts of courts and commentators² have not yielded a generally accepted definition of occurrence despite the fact that the word has been standard in insurance policies since 1966. The lack of a definite understanding of the scope of coverage guaranteed by an occurrence basis policy has led to the application of the policy to circumstances more appropriately classified as business risks. While such coverage may often be within the insurance contract, using judicial interpretation to expand coverage beyond the intent of the contracting parties could destroy the cost prediction basis of insurance.

Central to a definition of occurrence is the concept of intent. The implementation of judicial standards for determining whether actions of both individuals and business entities are intentional

1. "'Occurrence' means 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." *Millard Warehouse, Inc. v. Hartford Fire Ins. Co.*, 204 Neb. 518, 525, 283 N.W.2d 56, 61 (1979) (quoting the general contract language in the insurance policies issued to Millard Warehouse).
2. "What is the meaning of the definition of 'occurrence'? No one knows." Even, *The Corporate Insurance Administrator-Problems with the 1966 Revised Liability Policy*, 3 THE FORUM 95, 105 (1968). See generally Bean, *The Accident Versus the Occurrence Concept*, 1959 INS. L.J. 550; Hall, *Contractors' Liability Insurance for Property Damage Incidental to Normal Operations—The Standard Coverage Problem*, 16 U. KAN. L. REV. 181 (1968); Rendall, *Drink, Drive and Die! Then Ask Us To Define "Accident"*, 9 MAN. L.J. 101 (1979); Snow, *Occurrence vs. Accident—Just What Is Covered?*, 21 INS. COUNSEL J. 30 (1954); Wheeler, *"Caused by Accident"*, 1956 INS. L.J. 87.

has proven difficult.³ Distinctions must be made between intending the acts and intending the results as well as between intended results and those results which are merely foreseeable. The Nebraska Supreme Court, in *Millard Warehouse, Inc. v. Hartford Fire Ins. Co.*,⁴ had an opportunity to articulate its appreciation of these distinctions. The court held that the insured was not to receive coverage for damages caused by a conscious business decision under an occurrence basis insurance policy. The court, however, failed to clearly articulate the judicial standards it applied to the facts. Neither insurers⁵ nor insureds will find guidelines in the decision sufficient to determine the limitations of insurance coverage. This note attempts to identify the standards used by the court. In this attempt, a review of previous rulings and an analysis of the dissent in *Millard Warehouse* is necessary.

II. THE DECISION

A. Facts

In response to an action⁶ filed against Millard Warehouse, Inc., by Ralph E. and Marilyn Tetrick, Millard Warehouse notified its three insurance companies⁷ and requested that they provide a legal defense according to the terms of their respective policies. The three insurance companies refused the request on the ground that their policies did not cover the action as brought. Millard Warehouse then filed an action against the three defendant-insurance companies ordering the defendants to satisfy their duty to defend

3. Pfennigstorf, *Environment, Damages, and Compensation*, 2 AM. BAR FOUND. RES. J. 347, 441 (1979).

4. 204 Neb. 518, 283 N.W.2d 56 (1979).

5. If coverage exists, the insurer has a duty to defend and wants to satisfy that duty to avoid the consequences of failing to provide full coverage. INSURER'S DUTY TO DEFEND (D. Hirsch & A. Karpowitz eds. 1978); R. KEETON, INSURANCE LAW 462-489 (1971); Roos, *The Obligation to Defend and Some Related Problems*, 13 HASTINGS L.J. 206 (1961); Comment, *The Insurer's Duty to Defend Under a Liability Insurance Policy*, 114 U. PA. L. REV. 734 (1966).

6. The Tetricks filed their action for "an order requiring Millard Warehouse to abate and remove the nuisance, or in the alternative, for a judgment against the Millard Warehouse for \$700,000 and general damages." 204 Neb. at 522-23, 283 N.W.2d at 60. It is not entirely clear how an insurance company would satisfy the judgment against its insured if the order obtained required Millard Warehouse to "abate and remove the nuisance."

7. Hartford Fire Insurance Company and Fireman's Fund Insurance Company policies, in addition to other coverages, insured Millard Warehouse by a comprehensive general liability clause with limits up to \$300,000 for personal injury or property damage. The Insurance Company of the State of Pennsylvania issued its "umbrella liability policy" which insured the plaintiff in the sum of \$3,000,000 against liability in excess of its underlying insurance coverages, but subject to a deduction, referred to as a "self-insured retention" in the amount of \$25,000. *Id.* at 524, 283 N.W.2d at 60.

and to pay any adverse judgment rendered within the companies' policy limits. The District Court for Douglas County found that Hartford and Fireman's Fund, according to the terms of their respective policies, were obligated to defend the plaintiff against the claims asserted by the Tetricks and to pay any judgment within the limits of their coverage rendered against Millard Warehouse.⁸ Pennsylvania was to satisfy any judgment in excess of the policy limits of the other two insurance companies subject to any limitations or conditions imposed in Pennsylvania's policy. The three defendants appealed to the Nebraska Supreme Court where the trial court's decision was reversed.⁹

Millard Warehouse purchased the land upon which it eventually built its warehouse at a time when the land was zoned for industrial use. After it filled in the land and built the pad for its building, the property along the creek was re-evaluated. Thereafter, Millard Warehouse's land was classified as floodplain for zoning purposes. The plaintiff was aware of the contentions by governmental agencies that its construction would obstruct the streamflow and so Millard Warehouse hired a hydrologist to assist in planning the construction and to meet the objections against such construction. Being assured by its expert that the construction would not obstruct the streamflow, the plaintiff applied for a zoning change which it received over the veto of the mayor.¹⁰

The action subsequently filed by the Tetricks alleged that Millard Warehouse had created a public nuisance. They specifically alleged that the building created an artificial obstruction that would "impair and impede the flow of the water in the west branch of the Papillion Creek and [would] considerably raise the level of the water during flood periods so as to flow onto the plaintiffs' (Tetricks') land."¹¹ Additionally, they alleged \$700,000 in damages for the deprivation of their use of the land. This amount was the estimated cost of raising the level of their land above the floodline.¹²

B. Holding

A primary rule of insurance law is that the obligation of the insurance company to defend its insured is determined by the nature of the claim brought against the insured.¹³ The Nebraska rule

8. *Id.* at 519-20, 283 N.W.2d at 58.

9. *Id.* The *per curiam* decision was rendered by a 3-2 panel with Judge Brodkey writing a strong dissent and District Judge Fahrnbruch joining the dissent.

10. *Id.* at 522, 283 N.W.2d at 59.

11. *Id.* at 523, 283 N.W.2d at 60.

12. *Id.*

13. R. KEETON, *supra* note 5, at 462. The clause in the general liability insurance policy setting out the insurer's duty to defend states:

is that the duty to defend is "measured by the allegations of the petition against the insured."¹⁴ In determining if an alleged public nuisance is within insurance coverage the court must determine whether the nuisance is an occurrence. In *Millard Warehouse*, the court used a brief semantical treatment of the words "accident" and "occurrence" to reach the conclusion that the Tetricks' petition, since it alleged a public nuisance, contained no allegations as to an accident or occurrence sufficient to require the insurance companies to provide a defense.¹⁵ Citing decisions from other jurisdictions for support,¹⁶ the court apparently concluded that an allegation of nuisance will never qualify for coverage under an occurrence basis liability policy.

The court confused and combined several concepts in its attempt to define occurrence in order to arrive at its conclusion that the facts of *Millard Warehouse* did not allege an act within that definition. However, these concepts must be analyzed separately in order to arrive at a coherent rule that insurance companies might use to decide whether to defend a particular lawsuit brought against their insured. The requirement that there be an occurrence effectively precludes the duty of an insurer to defend a lawsuit relating to acts determined to be intentional. The court, in

The company will pay on behalf of the insured all the sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, *caused by an occurrence*, and the company shall have the *right and duty to defend* any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Company's liability has been exhausted by payments of judgments or settlements.

204 Neb. at 525, 283 N.W.2d at 61 (quoting from the insurance policies issued to *Millard Warehouse*) (emphasis added). If the complaint alleges facts that if proven will require the insurer to indemnify the insured, the insurer has a duty to defend. Comment, *supra* note 5, at 8.

14. 204 Neb. at 527, 283 N.W.2d at 61; *Woodman of the World Life Ins. Soc. v. Peter Kiewit Sons' Co.*, 196 Neb. 158, 241 N.W.2d 674 (1976); *Hartford Acc. & Indem. Co. v. Olson Bros., Inc.*, 187 Neb. 179, 188 N.W.2d 699 (1971).

15. 204 Neb. at 528, 283 N.W.2d at 62.

16. *See American Cas. Co. of Reading, Pa. v. Minnesota Farm Bureau Serv. Co.*, 270 F.2d 686 (8th Cir. 1959); *Farmers Elevator Mut. Ins. Co. v. Burch*, 38 Ill. App. 2d 249, 187 N.E.2d 12 (1962); *Town of Tieton v. General Ins. Co. of America*, 61 Wash. 2d 716, 380 P.2d 127 (1963); *Clark v. London & Lancashire Indem. Co. of America*, 21 Wis. 2d 268, 124 N.W.2d 29 (1963). While the court cites these cases for the proposition that an allegation of nuisance can never be construed to be an allegation of an occurrence, that is not the holding of the cases. Each of these cases analyze the particular facts to determine if the nuisance was accidental.

determining what is an intentional act, discussed cases dealing with incidents causing damages as a result of mistakes,¹⁷ cases where the insured had prior knowledge of the possible consequences,¹⁸ and cases where the insured had been warned of the potential consequences of his act.¹⁹ In its conclusion the court relied on the fact that Millard Warehouse took a calculated business risk which was outside of its insurance coverage.²⁰

The dissent, on the other hand, advocated a rule whereby the insured must have "acted with the specific intent to cause harm to a third party."²¹ The dissent determined intent from a subjective test and attempted to determine the actual intent underlying the insured's decision.²² To support its conclusion of no intent, it pointed to the fact that Millard Warehouse had been assured by an expert that its location decision would not cause flooding.

In response to the initial portion of the majority's decision, the dissent rejected the ideas that an allegation of nuisance is always outside of policy coverage or that the duty to defend ought to be determined exclusively from the allegations in the petition.²³ In addition, both the majority and the dissenting judges recognized the unsettled condition of the law in this area.

III. ANALYSIS

A close consideration of the impact of *Millard Warehouse* reveals that premiums remain lower since coverage is not provided to those businesses which intentionally make business judgments irrespective of the potential consequences.²⁴ Business people should appreciate that premium costs are truly based on probability,²⁵ and these costs should not be prejudiced by the intentional acts of others attempting to transfer the costs of their own bad decisions to the insurance company and ultimately to the

17. See *Thomason v. United States Fid. & Guar. Co.*, 248 F.2d 417 (5th Cir. 1957); *Hardware Mut. Cas. Co. v. Gerrits*, 65 So. 2d 69 (Fla. 1953); *Foxley & Co. v. United States Fidelity & Guar. Co.*, 203 Neb. 165, 277 N.W.2d 686 (1979).

18. See *Town of Tieton v. General Ins. Co. of America*, 61 Wash. 2d 716, 380 P.2d 127 (1963).

19. See *City of Kimball v. St. Paul Fire and Marine Ins. Co.*, 190 Neb. 152, 206 N.W.2d 632 (1973).

20. 204 Neb. at 530, 283 N.W.2d at 63.

21. *Id.* at 534, 283 N.W.2d at 65 (emphasis in original) (Brodkey, J., dissenting).

22. *Id.*

23. *Id.* at 535-37, 283 N.W.2d at 65-66.

24. Insurance premiums are determined from probabilities that an event will occur and are not meant to be sufficient to provide coverage for those events that are substantially certain to happen.

25. See generally J. LONG & D. GREGG, *PROPERTY AND LIABILITY INSURANCE HANDBOOK* (1965); E. PATTERSON, *ESSENTIALS OF INSURANCE LAW* (1935); C. WILLIAMS & R. HEINS, *RISK MANAGEMENT AND INSURANCE* (3d ed. 1976).

other insurers. Unfortunately, after reading the opinion neither insurers nor insureds will be able to predict with any degree of certainty the court's standard for determining the extent of liability coverage. This legal haze stems from the general uncertainty of the field, in addition to the court's inadequate articulation of the reasoning used to reach its decision.

A. Nuisance as an Occurrence

By not basing its decision on the proposition that an allegation of nuisance does not satisfy the requirement for an occurrence,²⁶ the court avoided adopting a rule that would preclude future courts from considering the nature of the insured's conduct in determining liability for nuisances. Decisions which assert that nuisance is a condition and not an actionable act present a clearer understanding of the concept of nuisance.²⁷ Before deciding the insurance company has a duty to defend, the better analysis is to first determine what kind of nuisance is being alleged: intentional, negligent, or accidental.²⁸ A flat statement that a nuisance is not an occurrence and therefore not within the policy coverage would mean cases of accidental pollution or other accidentally caused nuisances would be excluded from coverage where coverage could reasonably be expected by the insured parties. The accidental nuisance cases, where long-term damage rather than damage from a sudden, unexpected event occurred, were just the type of cases contemplated by the insurance companies when they substituted the word "occurrence" for "accident" in the general liability pol-

26. 204 Neb. at 527, 283 N.W.2d at 61.

27. See *White v. Smith*, 440 S.W.2d 497, 509 (Mo. Ct. App. 1969) ("[G]arnishee argues that plaintiff's suit was 'a nuisance case, not an accident case' Garnishee's apparent assumption that 'a nuisance case' cannot be 'an accident case' is untenable. Although . . . negligence is not a necessary ingredient of the wrong of maintaining a nuisance . . . negligence and nuisance may and frequently do coexist.")

28. A leading authority comments:

Nuisance is a field of tort liability . . . [and] has reference to the interests invaded, to the damage or harm inflicted, and not to any particular kind of act or omission which has led to the invasion. The attempt frequently made to distinguish between nuisance and negligence, for example, is based upon an entirely mistaken emphasis upon what the defendant has done rather than the result which has followed, and forgets completely the well established fact that negligence is merely one type of conduct which may give rise to a nuisance. . . . Today liability for nuisance may rest upon an intentional invasion of the plaintiff's interests, or a negligent one, or conduct which is abnormal and out of place in its surroundings, and so falls within the principle of strict liability.

W. PROSSER, *LAW OF TORTS* 573-74 (4th ed. 1971).

icy.²⁹ Accordingly, the court proceeded to discuss whether the actual act committed by Millard Warehouse was an occurrence.³⁰

B. Intentional Acts Exclusion

The exclusion of intentional acts from coverage under a liability policy is derived from an important theory of insurance law; the theory of risks assumed and losses apportioned among a pool of insureds. The insurer "is able to properly set premiums and supply coverage only if those losses are uncertain from the standpoint of any single policyholder. If the single insured is allowed through intentional or reckless acts to consciously control the risks covered by the policy, a central concept of insurance is violated."³¹ If the courts' treatment of claims under the liability policies do not cohere with the expectations of the insurers as to the limits of coverage, then the insurers will either have to redefine the extent of their coverage or raise their premiums.³²

The Wisconsin Supreme Court, as cited in the *Millard Warehouse* dissent, set out three general theories regarding the construction of the intentional tort exclusion in liability policies:

- (1) The minority view follows the classic tort doctrine of looking to the natural and probable consequences of the insured's act;
- (2) The majority view is that the insured must have intended the act and to cause some kind of bodily injury;
- (3) A third view is that the insured must have had the specific intent to cause the type of injury suffered.³³

It is asserted that Nebraska adopted the majority view in *State Farm Fire & Cas. Co. v. Muth*³⁴ and that contrary to the opinion of the dissent, the court's decision in *Millard Warehouse* is in conformance with the majority theory. In *Muth*, the court determined that the injuries from a personal injury accident were covered under a homeowner's liability policy. The insured fired a B-B gun from a slow-moving truck intending to scare the injured party but instead struck him in the eye causing a loss of sight. The court accepted the determination of the trial court which held that the insured did not intend the injury and further said that,

an injury is either expected or intended if the insured acted with the specific intent to cause harm to a third party. It seems to us to be immaterial whether the injury which results was specifically intended, i.e., the exclusion would apply even though the injury is different from that intended or anticipated.³⁵

29. Pfennigstorf, *supra* note 3, at 439.

30. 204 Neb. at 528, 283 N.W.2d at 62.

31. Bituminous Cas. Corp. v. Bartlett, 307 Minn. 72, 78, 240 N.W.2d 310, 313 (1976).

32. Pfennigstorf, *supra* note 3, at 434.

33. Pachucki v. Republic Ins. Co., 89 Wis. 2d 703, 708, 278 N.W.2d 898, 901 (1979).

34. 190 Neb. 248, 207 N.W.2d 364 (1973). This was an unanimous decision by the full court.

35. *Id.* at 252, 207 N.W.2d at 366.

Both the majority and the dissent in *Millard Warehouse* could have cited *Muth* in support of their decision. It will be argued that it is the definition of intent and its application, not the acceptance of the general theory, that divided the court.

The Wisconsin court added a further description of the majority position not cited by the dissent in *Millard Warehouse*:

(1) it is necessary that the insured intend both the act as well as intending to cause bodily injury in order for the exclusion to apply; (2) intent may be actual or may be inferred by the nature of the act and the accompanying reasonable foreseeability of harm; (3) once it is found that harm was intended, it is immaterial that the actual harm caused is of a different character or magnitude than that intended.³⁶

It is important to note that the *Millard Warehouse* court did not adequately address the three issues suggested by the majority position: (1) what must be intended; (2) how is intent to be determined; and (3) how the determination of the intent of a business entity differs from determining that of an individual.

In negligence cases, courts have distinguished between an intended act and an intended result.³⁷ Insurance coverage is generally accepted as applicable in the case of an intended act but unintended result. An insured may act to intentionally cause a certain injury in which case coverage will be denied, but it may also act intentionally with the resulting damage being unintentional and unexpected in which case coverage may be found.³⁸ In some cases negligence has been the cause of the injury or destruction of property and yet the courts have focused on what result was intended rather than on whether the act itself was intended.³⁹ Even the "unintentional or unforeseen consequences of reckless or negligent acts are within the definition of 'accident' if the acts were not undertaken with malice or intent to injure the person or

36. *Id.* at 709, 278 N.W.2d at 901.

37. See, e.g., *White v. Smith*, 440 S.W.2d 497, 507 (Mo. Ct. App. 1969). But cf. *Mofat v. Metropolitan Cas. Ins. Co. of New York*, 238 F. Supp. 165 (M.D. Pa. 1964) (even though the insured should have known consequences would occur, the court held that the insured did not intend trespass).

38. See, e.g., *The Travelers v. Humming Bird Coal Co.*, 371 S.W.2d 35 (Ky. 1963) (earth mass slipping and damaging water supply was an unforeseen and unexpected consequence of mining); *McGroarty v. Great Am. Ins. Co.*, 36 N.Y.2d 358, 329 N.E.2d 172, 368 N.Y.S.2d 485 (1975) (building garage so close was purposive, but the damage was unintended); *Gruol Constr. Co., Inc. v. Insurance Co. of North America*, 11 Wash. App. 632, 524 P.2d 427 (1974) (dry rot was a condition which unexpectedly and unintentionally caused injury). *Contra C. Y. Thomason v. Lumberman's Mut. Cas. Co.*, 183 F.2d 729 (4th Cir. 1950) (not an accident when construction company blocked ingress and egress of business).

39. *Northwestern Elect. Power Coop., Inc. v. American Motorists Ins. Co.*, 451 S.W.2d 356 (Mo. App. 1969); *Messersmith v. American Fid. Co.*, 232 N.Y. 161, 133 N.E. 432, (1921).

property hurt.”⁴⁰ A “transaction as a whole” test⁴¹ has been articulated to determine whether the term “accident” is applicable to a given situation, recognizing that “it is not legally impossible to find accidental results flowing from intentional causes, i.e., that the resulting damage was unintended although the original act or acts leading to the damage were intentional.”⁴²

The court has recognized coverage where the act was intentional and yet not intended to cause damage.⁴³ In *City of Kimball v. St. Paul Fire and Marine Ins. Co.*,⁴⁴ the Nebraska Supreme Court held that the pollution of an irrigation well of a judgment creditor was within the coverage of the city’s insurance policy protecting it against liability for accidents.⁴⁵ While the city intentionally built the irrigation well, the resulting damage was held to be accidental.⁴⁶ The decision left uncertainty as to why the results of the city’s act were held to be accidental. It is not clear whether it is the fact the city was reckless or negligent in not foreseeing possible seepage or whether the act was held to be unintentional because the city received no warning of the possible consequences.⁴⁷

40. *McGroarty v. Great Am. Ins. Co.*, 43 A.D.2d 368, 377, 351 N.Y.S.2d 428, 436 (1974), *aff’d*, 36 N.Y.2d 358, 329 N.E.2d 172, 368 N.Y.S.2d 485 (1975).

41. *McGroarty v. Great Am. Ins. Co.*, 36 N.Y.2d 358, 364, 329 N.E.2d 172, 175, 368 N.Y.S.2d 485, 490 (1975).

42. *Id.* According to the position taken by this note the decision in *McGroarty* cannot be supported. The calculated risk the contractor took in building in the manner he did caused the pressure against the plaintiff’s building and the resulting damage cannot be classified as an accident. The contractor made a business decision being fully aware of its possible consequences and should not be allowed to claim insurance coverage. Earlier in the opinion, the court gives as an example of a calculated risk the running of a red light and the resulting collision. The public has come to accept calculated risks taken with a car as qualifying as accidents under automobile liability insurance and in order to protect the injured, recovery should not be denied. *See Rendall, supra* note 2.

43. *Wolk v. Royal Indem. Co.*, 27 Misc. 2d 478, 485, 210 N.Y.S.2d 677, 683 (1961).

44. *City of Kimball v. St. Paul and Marine Ins. Co.*, 190 Neb. 152, 206 N.W.2d 632 (1973).

45. *Id.* The city of Kimball had constructed a sewage lagoon on land adjacent to Strauch. In 1963, Strauch submitted a claim to the city alleging that seepage from the lagoon had polluted his irrigation water. When St. Paul refused to defend the action by Strauch against the city, the action proceeded to trial. At the trial it was determined that the city was negligent in not discovering and then filling the seismograph holes in the bottom of the lagoon which allowed sewage to flow and seep into the underground waters from which Strauch obtained his irrigation water. *Id.* at 154, 206 N.W.2d at 634.

46. Policy coverage was determined on whether the damage was expected or intended from the viewpoint of the injured party. Current policy language states that the damage be “neither expected nor intended from the standpoint of the insured.” *Id.* at 161, 206 N.W.2d at 637.

47. The dissent, quoting *Hayden v. Insurance Co. of North America*, 5 Wash. App. 710, 490 P.2d 454 (1971), states that an “[a]ccident within [the] terms of [an]

The *Millard Warehouse* court, in distinguishing *City of Kimball*, noted the reliance placed on the fact "there was no evidence that the city ever had any knowledge of the possibility of contamination of the well."⁴⁸ It was this lack of knowledge which supported a finding that it did not intend the harm.⁴⁹

Although damages caused by mistake or error have not received consistent treatment by the courts,⁵⁰ the Nebraska Supreme Court has denied coverage where the result is intended, even though the fact that it causes injury is the result of a mistake.⁵¹ In *Foxley & Co. v. United States Fidelity & Guar. Co.*,⁵² Foxley, believing it owned the property on which a water-line system and hydrants were located, caused several hydrants to be severed from the system resulting in damage. This was the result Foxley intended even though it did not intend that the system actually be owned by another party. When the other party brought suit for damages, Foxley requested its insurance company to defend. The company refused and the court found that insurance coverage did not exist. In support of its decision, the court said that the resulting damage, while caused by a mistake of law, was the intended result and therefore not an accident within coverage of the policy.⁵³

Like Foxley, Millard Warehouse acted intentionally in choosing

accident policy is never present when [a] deliberate act is performed, unless some additional, unexpected, independent and unforeseen happening occurs which produces or brings about the results of injury or death." 190 Neb. at 167, 206 N.W.2d at 640.

48. 204 Neb. at 530-31, 283 N.W.2d at 63. If the insured will be covered as long as it does not know that its actions might cause damage there is no incentive to do any preventive research.

49. See notes 54-56 & accompanying text *infra*.

50. See *Haynes v. American Cas. Co.*, 228 Md. 394, 179 A.2d 900 (1962) (employees mistakenly crossed boundary line and cut down trees, court held damage caused by accident); *York Indus. Center, Inc., v. Michigan Mut. Liab. Co.*, 271 N.C. 158, 155 S.E.2d 501 (1967) (due to error as to location of boundary line trees were cut down on neighboring property and court held for coverage). But see *Thomason v. United States Fidelity & Guar. Co.*, 248 F.2d 417 (5th Cir. 1957) (no coverage when employees bulldozed property up to wrong set of metal stakes causing damage to neighboring golf course: "Where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though the result may have been unexpected, unforeseen and unintended. There was no insurance against liability for damages caused by mistake or error." *Id.* at 419). See also *Hardware Mut. Cas. Co. v. Gerrits*, 65 So. 2d 69 (Fla. 1953) (not an accident when insured built on another's land in reliance on the boundary line located by a surveyor).

51. *Foxley & Co. v. United States Fidelity & Guar. Co.*, 203 Neb. 165, 277 N.W.2d 686 (1979).

52. *Id.* at 169, 277 N.W.2d at 688.

53. *Id.*

the location for its warehouse. Millard Warehouse argued that it relied on the assurance of its expert that the building would not be in the floodplain. The mistaken reliance on its expert does not support the argument that any alleged resulting damage was due to an occurrence.⁵⁴ The decision to build was made with the knowledge that governmental agencies were contending that the project would be an obstruction in the Papillion Creek.⁵⁵ The court correctly recognized the inequitable results possible if the insured who has been advised by an expert who is in error, is granted coverage under his liability policy when an insured who makes an error on his own is not.⁵⁶ A more equitable conclusion occurs when the insurer of the expert is held liable to cover the results of the expert's opinion as long as such coverage was within the understanding of the expert and his insurer in their contract.

In determining intent, the dominant factors should include both the conduct and the state of mind of the insured.⁵⁷ Intent may be of a subjective quality as was apparently required by the court in *Muth* and *City of Kimball*. On the other hand, the court in the past has recognized some acts are so certain to cause injury or harm that, from their very occurrence, the court will infer the insured's intent.⁵⁸ This recognition occurred in *Jones v. Norval*,⁵⁹ a personal injury case. The insured, Norval, hit Jones with sufficient force of his fist to knock Jones out. The court's discussion of intent noted Norval's testimony that he only intended to "sting" Jones.⁶⁰ The court mixed two concepts in determining coverage did not exist. First it appeared to adopt a classic tort theory under which the insured "must be said to expect or intend the natural, normal circumstances of his own intentional act."⁶¹ It then limited the "natural consequences of the act" rule and recognized "the correlation only where reason mandates that from the very nature of the act, harm to the injured party must have been intended."⁶²

54. The court's decision does not discuss whether the damages alleged were within the scope of the policy and that issue will not be discussed in this note.

55. 204 Neb. at 521, 283 N.W.2d at 59.

56. *Id.* at 531-32, 283 N.W.2d at 64. It is suggested a traditional tort standard of reasonably prudent behavior be applied. *City of Carter Lake v. The Aetna Cas. and Sur. Co.*, 604 F.2d 1052, 1059 n.4 (8th Cir. 1979).

57. Rendall, *supra* note 2.

58. *Cf.* *Continental Western Ins. Co. v. Toal*, 309 Minn. 169, 244 N.W.2d 121 (1976) (court inferred defendant's intent to injure when killing occurred during a robbery). *But cf.* *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966) (insurer obliged to defend assault action).

59. 203 Neb. 549, 279 N.W.2d 388 (1979).

60. *Id.* at 551, 279 N.W.2d at 390.

61. *Id.* at 552, 279 N.W.2d at 390.

62. 203 Neb. at 554, 279 N.W.2d at 391. The dissenting opinion, written by Judge Brodkey, must be noted since he was also the author of the dissent in *Millard*

In *City of Kimball* the court disagreed on whether the damage was so certain to occur as to deny coverage. The dissent, in arguing against coverage, stated: "[W]hen damage results from a willful and deliberate act and such damage is practically certain to occur under the immutable law of nature, it must be considered to have been intended or recklessly disregarded and it certainly is not 'caused by accident.'" ⁶³ It is asserted that adoption of this rule will effectuate the expectations of both the insureds and insurers.

The concept of expectability is basic to the determination that damage or injury is intended. ⁶⁴ Unfortunately the courts have attempted to equate the concept of expectability with foreseeability in determining whether an insured's acts were intentional. ⁶⁵ The *Millard Warehouse* court relied on the decision in *Town of Tieton v. General Ins. Co. of America*, ⁶⁶ to assert that the element of foreseeability must be considered in determining if Millard Warehouse was covered. ⁶⁷ In *Town of Tieton*, the town was aware of the potential hazard of pollution due to seepage from the sewage lagoon and thus was held to expect the resulting damage. Adoption of a foreseeability doctrine might lead to the inequitable consequences feared in *Hutchinson Water Co. v. United States Fidelity & Guar. Co.*, ⁶⁸ that insurance coverage would completely lose its effectiveness as a protection from fortuitous occurrences. Under such a rule "if the damage was foreseeable then the insured is liable, but there is no coverage, and if the damage is not foreseeable, there is coverage, but the insured is not liable." ⁶⁹ Thus, it is suggested that a foreseeability standard is contrary to the purpose of insurance. ⁷⁰

One court has observed that

The reasonable expectation of an insured in securing a comprehensive general liability policy is that it will cover some negligent acts. It does not follow, however, that because the policy covers some negligent acts it

Warehouse. In both cases he differs with the majority in the standard to be applied to intentional acts exclusions, advocating that the insured must intend to cause the physical harm that occurs.

63. *Id.* at 168, 206 N.W.2d at 641.

64. Damage or injury to be covered must be "neither *expected* nor intended from the standpoint of the insured." 204 Neb. at 525, 283 N.W.2d at 61 (emphasis added).

65. See *City of Aurora v. Trinity Universal Ins. Co.*, 326 F.2d 905 (10th Cir. 1964); *Gassaway v. Travelers Ins. Co.*, 222 Tenn. 649, 439 S.W.2d 605 (1969); *Town of Tieton v. General Ins. Co. of America*, 61 Wash. 2d 716, 380 P.2d 127 (1963).

66. 61 Wash. 2d 716, 380 P.2d 127 (1963).

67. 204 Neb. at 530, 283 N.W.2d at 63.

68. 250 F.2d 892 (10th Cir. 1957).

69. *City of Carter Lake v. The Aetna Cas. and Sur. Co.*, 604 F.2d 1052, 1058 (8th Cir. 1979). If the damage is not foreseeable then the insured is not negligent and there is no basis for a cause of action.

70. *Id.*

must cover all negligent acts. An insured need not know to a virtual certainty that a result will follow its acts or omissions for the result to be expected.⁷¹

The Nebraska Supreme Court is divided as to whether the insured must intend the actual result that occurs. In *Muth* it seems to find coverage because the insured was not certain the B-B would hit a person and therefore was covered by the insurance policy.⁷² In *Jones v. Norval*, the majority and the dissent split on this very issue with the dissent requiring an intent to cause the specific injury before excluding coverage.⁷³ The dissent in *Millard Warehouse* required this same specific intent before it would find no coverage noting that "Millard Warehouse did not build the pad or the warehouse with the specific intention of causing harm to the Tetricks or any other person."⁷⁴ Since insurance is to serve the reasonable expectations of the parties, the use of either a standard of reasonable foreseeability or requiring virtual certainty would fail to serve these expectations. Instead, a standard of expectability should be substituted with the intentional act exclusion clause applying if there is "a substantial probability that certain consequences will result from his actions."⁷⁵

Although Millard Warehouse was aware of the contentions by governmental agencies and others that the warehouse was being built within the floodplain and that it allegedly would act as an obstruction, it proceeded with the building plans. The suit by an upstream landowner alleging that its land was put in the floodplain was hardly an unexpected result. While Millard Warehouse may not have actually intended the harm, the result which occurred cannot be held to be unexpected and thus unintended. Admittedly it is difficult to define when the results of an insured's act are so certain to occur that the insured is held to intend the results⁷⁶ and the other situation where the resulting damage was unexpected.⁷⁷ The economics of business liability insurance would be severely threatened if acts such as those of Millard Warehouse building are considered accidents. Millard Warehouse was aware of the controversy surrounding its decision to build⁷⁸ and the possibility of

71. *Id.*

72. 190 Neb. 248, 207 N.W.2d 364.

73. 203 Neb. 549, 279 N.W.2d 388.

74. 204 Neb. at 534, 283 N.W.2d at 65.

75. 604 F.2d at 1058-59.

76. *Harleysville Mut. Cas. Co. v. Harris & Brooks, Inc.*, 248 Md. 148, 235 A.2d 556 (1967); *Town of Tieton v. General Ins. Co. of America*, 61 Wash. 2d 716, 380 P.2d 127 (1963).

77. *City of Kimball v. St. Paul Fire and Marine Ins. Co.*, 190 Neb. 152, 206 N.W.2d 632 (1973); *Massachusetts Bonding and Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396 (Tex. 1967).

78. Millard Warehouse was completely aware of the controversy surrounding its decision and the very fact it had to secure new zoning for the area under heavy challenge from other entities put it on notice that its building was ar-

damage, therefore the three insurance companies and their pools of insureds should not have to compensate for the resulting damage.

C. Business Judgment Decision

A basic corollary to denying liability insurance coverage for damages which are expected or foreseeable consequences of an intentional or negligent act is the denial of coverage for damages resulting from business judgment decisions. The costs of these decisions when they cause damages or injuries to others as a regular and expected consequence of the operation of the business are no longer insurance risks, but should be figured into the cost of operating the business.⁷⁹

Both his know-how and his ethics should remain the enterpriser's risk. The insurer should permit the enterpriser to sink or swim on the basis of his ability to compete in his own field. It has no business guaranteeing in any way the success of the enterprise. That is the function of management. Some of us have come to call this the 'business risk', and we are concerned because some current interpretations of 'caused by accident' are making the insurer assume the risk.⁸⁰

In order for the insurer to determine the premium costs for his insurance policies it must be clearly understood exactly what eventualities are covered.⁸¹ If the courts re-interpret the contract provisions between the insureds and insurers then the insurer must either adjust the scope of his coverage or increase the premiums.⁸² Certain contingencies derived from the operation of a business, such as employee injury, are appropriate risks for liability coverage. Acts committed by the insured which were purposely designed to cause harm or injury as well as acts exclusively intended to further the insured's business are not appropriate risks for coverage by liability insurance.⁸³

Businesspersons who knowingly maintain dangerous conditions are often not covered by their general liability insurance policies. This has been true whether the condition was the emission of

guably in the floodplain. An upstream landowner claiming loss of use of his land because of the raising of the flood level was not unforeseeable. 204 Neb. at 520-23, 283 N.W.2d at 59-60.

79. R. KEETON, *supra* note 5, at 297.

80. Bean, *supra* note 2, at 556.

81. J. LONG & D. GREGG, *supra* note 25. If an insured is operating his plant in such a manner that foreign substances are emitted into the atmosphere and wants coverage as to any lawsuits filed against him for this act, coverage must be specifically allowed by his insurer with the resulting premium costs to cover this risk.

82. *Id.*

83. Pfennigstorf, *supra* note 3, at 434.

foreign substances in the air,⁸⁴ the possibility of water contamination,⁸⁵ or the possibility of sewage backup⁸⁶ or flooding⁸⁷ caused by the manner in which construction was performed or where it was located. Also not covered are situations where the insured either breached his contract⁸⁸ or performed inadequately⁸⁹ or in an unworkmanlike manner⁹⁰ resulting in damages, unless it was shown that he took reasonable precautions that should have prevented the harm⁹¹ or some unexpected and unprecedented event inter-

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84. *See, e.g., American Cas. Co. of Reading, Pa. v. Minnesota Farm Bureau Serv. Co.*, 270 F.2d 686 (8th Cir. 1959) (blasting noise and vibrations); *Farmers Elev. Mut. Ins. Co. v. Burch*, 38 Ill. App. 2d 249, 187 N.E.2d 12 (1962) (dust from grain elevator); *Harleysville Mut. Cas. Co. v. Harris & Brooks, Inc.*, 248 Md. 148, 235 A.2d 556 (1967) (smoke and soot from burning tires); *United States Fid. & Guar. Co. v. Briscoe*, 205 Okla. 618, 239 P.2d 754 (1952) (cement dust); *Clark v. London & Lancashire Indem. Co. of America*, 21 Wis. 2d 268, 124 N.W.2d 29 (1963) (smells and rodents from open gravel pit). *Contra Grand River Lime Co. v. Ohio Cas. Ins. Co.*, 32 Ohio App. 2d 178, 289 N.E.2d 360 (1972) (seven years emission of air pollutants).
 85. *See, e.g., Town of Tieton v. General Ins. Co. of America*, 61 Wash. 2d 716, 380 P.2d 127 (1963) (had warnings of possible contamination). *Contra City of Kimball v. St. Paul Fire and Marine Ins. Co.*, 190 Neb. 152, 206 N.W.2d 632 (1973) (no warnings of possible contamination).
 86. *See, e.g., City of Carter Lake v. The Aetna Cas. and Sur. Co.*, 604 F.2d 1052 (8th Cir. 1979) (continuing damages from flooding after city learned of damage held not accidental); *City of Aurora v. Trinity Universal Ins. Co.*, 326 F.2d 905 (10th Cir. 1964) (unprecedented rainfall causing sewage backup not accidental).
 87. *See, e.g., Albuquerque Gravel Prod. Co. v. American Employers Ins. Co.*, 282 F.2d 218 (10th Cir. 1960) (ramp built in arroyo causing damage from not unprecedented floods not accident); *Ladner & Co., Inc. v. Southern Guaranty Ins.*, 347 S. 2d 100 (Ala. 1977) (suits filed alleging intentional acts of insured caused damage by flooding); *Gassaway v. Travelers Ins. Co.*, 222 Tenn. 649, 439 S.W.2d 605 (1969) (seller-insured knew of drainage facilities whose flooding caused damage and did not disclose, held not accident). *Contra Wolk v. Royal Indem. Co.*, 27 Misc. 2d 478, 210 N.Y.S.2d 677 (1961) (held an accident when insured altered contours of golf course which led to flooding on neighboring land).
 88. *See, e.g., Neale Constr. Co. v. United States Fid. & Guar. Co.*, 199 F.2d 591 (10th Cir. 1952) (damage caused by negligent performance of work).
 89. *See, e.g., Hutchinson Water Co. v. United States Fidelity & Guar. Co.*, 250 F.2d 892 (10th Cir. 1957) (insured's negligent failure to provide sufficient water pressure to put out fire held not accident); *Midland Const. Co. v. United States Cas. Co.*, 214 F.2d 665 (10th Cir. 1954) (insured's failure to cover roof from afternoon shower not an accident).
 90. *See, e.g., Bituminous Cas. Corp. v. Bartlett*, 307 Minn. 78, 240 N.W.2d 310 (1976) (held no coverage when person intentionally constructed masonry wall in unworkmanlike manner).
 91. *See, e.g., Cross v. Zurich Gen. Acc. & Liab. Ins. Co.*, 184 F.2d 609 (7th Cir. 1950) (sprayed windows with water to prevent damage from acid used to clean building); *Ohio Cas. Ins. Co. v. Terrace Enterprises, Inc.*, — Minn. —, 260 N.W.2d 450 (1977) (settling damage to building caused by negligent backfilling).

vened leading to the resulting damage.⁹²

The denial of coverage in these situations makes it clear that insurance companies can no longer be used "to act as subcontractors of *every* business risk."⁹³ The information available to businesspersons makes it possible for them to weigh the impact of their decisions and then make their choices.

[M]anagement decisions setting up and directing the operation of a business, *choosing plant location*, establishing production methods, and selecting equipment are expected to be made on the basis of a careful analysis of all cost and risk factors including the risk that third persons will be harmed by unavoidable though unwanted side effects. Third party claims that were foreseeable at the time of management decision making and that like other cost figures should have been included in the calculations then made are not intended to be covered by a liability insurance policy.⁹⁴

Millard Warehouse had fully apprised itself of the cost and risk factors associated with building its warehouse in a location determined by governmental entities and experts in the field to be within the floodplain. Although Millard's privately hired expert supported the location decision, the surrounding controversy was sufficient to put the prudent and responsible businessperson on notice that the risk of being sued for obstructing the streamflow must be considered as a cost of his decision.⁹⁵ The court correctly recognized that in following the advice of his own expert in locating the warehouse "he [president of Millard Warehouse] took a calculated risk . . . after being advised of the possibility of flood damage."⁹⁶

Insured companies are in business to make profits and therefore will make decisions that provide them with economic benefits. It is assumed that Millard Warehouse's location decision was based on the fact that the location beside the Papillion Creek was the most economical. It received economic benefits from its decision and therefore should not be allowed to demand indemnification for the costs of its decision from the insurance company and the rest of the pool of insureds. Businesses seeking liability insurance do not want to be categorized in actuarial tables with businesses which intentionally choose to act in a manner which expose them to foreseeable liability. Generally insurance is purchased to protect against "pure risks,"⁹⁷ risks "when there is a chance of loss

92. See, e.g., *Chapman Constr. Co. v. Glen Falls Ins. Co.*, 297 Minn. 406, 211 N.W.2d 871 (1973) (insured was sued for obstructing businesses with construction delay caused by unprecedented rainfall).

93. Even, *supra* note 2, at 95.

94. Pfennigstorf, *supra* note 3, at 436 (emphasis added).

95. *Id.*

96. 204 Neb. at 532, 283 N.W.2d at 64.

97. C. WILLIAMS & R. HEINS, *supra* note 25, at 208.

but no chance of gain,"⁹⁸ and a basic condition is that the loss be accidental from the viewpoint of the insured. The public policy behind liability insurance, is as much concerned with assuring that costs are internalized to the wrongdoer as with protecting the injured.⁹⁹

IV. CONCLUSION

While the court may not agree that it has accepted the majority view of the intentional act exclusion, the preceding discussion has shown that this is the case. It is upon the definition of intent which the court is not in agreement. Part of the divisiveness is due to the problems inherent in distinguishing between an individual's intent and the intent manifested by a business entity. The cause and effect of an individual's action is more readily ascertainable which aids in the determination whether the individual possessed the subjective intent to cause the harm or if the action was of such a nature that harm was substantially certain to result.

More difficult is the problem of determining the intent of a business entity. The business entity should rely on a more structured decision-making process and therefore be credited with more knowledge of the consequences of its actions. Hence, actions which cause results that were or should have been within the contemplation of the insured are held to be intentional. This ascription of superior knowledge could also be applicable to the individual with expert knowledge who could readily anticipate the probable results and thus is held to intend the resulting harm.¹⁰⁰ In order to apply the exclusion, an insured need not know with certainty that a result will occur, but merely that a substantial probability exists. The knowledge ascribed to the insured should be considered in deciding if the insured felt there was a substantial probability of harm.

The policy behind the interpretation of the intentional act exclusion is to promote the reasonable expectations of both the insured and the insurer. The differentiation of occurrence and mere business risks fulfills this policy. By recognizing that general liability insurance policies are not to be construed to cover business risks not clearly contemplated by both the insurer and the insured, the court preserves a basic tenet of insurance: only risks are to be

98. *Id.* at 10.

99. Pfennigstorf, *supra* note 3, at 432.

100. *Kraus v. Allstate*, 379 F.2d 443 (3d Cir. 1967). Insured was a professional demolitions expert and aware of the destructive range of dynamite. Following an explosion which killed the insured and his wife and injured a bystander, the court held the injury to the bystander intentional and thus not within coverage of the deceased's insurance policy. *Id.*

insured. Businesspersons cannot transfer the risks of their business judgments to the insurance company and other insureds without specific contract provision and adjustments in premiums. The burden is on the insurance companies to write contracts that make clear the limits of coverage, the courts cannot be used to expand coverage beyond the policy contract.

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