

The Impaired Mental Capacity Defense to the Intentional Injury Exclusion

The impaired mental capacity defense to the intentional injury exclusion was further clarified last year in two Maryland appellate decisions. In *Pettit v. Erie Insurance Exchange*, 349 Md. 777, 709 A.2d 1287 (1998), the insured claimed he did not form the intent to harm the boys he molested because he was a pedophile. In *Lititz Mutual Insurance Company v. Bell*, 1999 WL 68913 (Md. Feb. 16, 1999), the insured claimed he did could not form the intent to harm because he was suffering from a psychiatric condition known as Intermittent Explosive Disorder. The Appellate Courts rejected both arguments and found that the intentional injury exclusion applied to preclude coverage.

In *Pettit v. Erie Insurance Exchange, supra*, the tort plaintiff filed suit alleging various counts of negligence against James Kowalski, the alleged molester of her two minor sons. Kowalski, an Erie policyholder under four separate homeowners' policies during the period of the molestation, demanded that Erie defend him in that action. Erie filed a declaratory judgment action seeking a judgment that Kowalski was not entitled to coverage or indemnification based upon the "intentional injury" exclusion found in each of those policies. The circuit court granted summary judgment in favor of Erie. The Court of Special Appeals of Maryland affirmed. *Pettit v. Erie Ins. Exch.*, 117 Md. App. 212, 699 A.2d 550 (1997).

The Court rejected attempts by the tort plaintiff to manipulate coverage by characterizing Kowalski's action as negligent in nature. *Pettit*, 349 Md. At 781, 709 A.2d 1287. The Court also rejected Kowalski's attempts to circumvent the operation of the intentional injury exclusion on the ground that the sexual relations between he and the

minor boys as consensual. The Court found that the minors, at age seven and nine, could not have legally consented to the activities. *Pettit*, 349 Md. at 783, 709 A.2d 1287.

The insured's primary contention was that the intentional injury exclusion was inapplicable due to Kowalski's pedophilia, which caused him to subjectively believe his acts caused no harm to the children. *Id.* The Court found Kowalski's subjective intent to be irrelevant. "[S]exual molestation is a tort which is only committed intentionally. There is no dichotomy between the 'damages' resulting from Kowalski's conduct and his intent to perform the acts of sexual child abuse." *Id.* at 786, 709 A.2d 1287. Thus, Kowalski's actions were excluded from coverage by the intentional injury exclusion contained in the Erie liability policies.

The Court was again called upon to consider the application of the intentional injury exclusion to a claim of mental incapacity in *Lititz Mutual Insurance Company v. Bell*, 1999 WL 68913 (Md. Feb. 16, 1999). The insured was receiving inpatient therapy for Intermittent Explosive Disorder ("IED") at the time of the incident that formed the basis of the underlying tort suit. IED is a condition that is characterized by the failure to resist aggressive impulses resulting in destructive and assaultive behavior. The plaintiff, a staff worker, filed suit for damages sustained when she was struck in the chest by the insured. Lititz filed a declaratory judgment action seeking a ruling from the court on whether the intentional injury exclusion contained in the applicable policy operated to preclude coverage in the underlying tort suit.

The insured admitted throughout the course of the litigation that he intended to strike the plaintiff. *Lititz*, 1999 WL 68913, *2. Nonetheless, he attempted to avoid application of the exclusion by arguing that his mental condition left him unable to form

an intent to injure the plaintiff. Relying on the reasoning in *Petitt*, the Court found that the intent to strike plaintiff was sufficient to trigger the intentional injury exclusion. *Id.*

The Court reasoned that:

[I]f [the insured] had not intended the contact itself due to a mental condition, then the act might be considered an 'accident' and not intentional because the contact (the harm) would have taken place without his foresight or expectation. However, where the actor intends to cause an offensive contact, the legally recognizable harm, ipso facto, cannot be said to have taken place without foresight or expectation.

Id. at *9. In so holding, the Court declined to adopt a rule which would prohibit the application of the intentional injury exclusion in cases where the insured lacks the mental capacity to intend not only the act, but also the resulting harm. *Id.* at *10. While other jurisdictions have adopted an "insanity" defense to the intentional injury exclusion, Maryland has declined to do so. *Id.*

While the standard for mental incapacity is unsettled, the *Petitt* and *Lititz* decisions demonstrate, that where the insured intended to commit the offensive acts the exclusion usually will apply. The subjective failure to recognize or appreciate the harm that may result from that offensive act will not save an insured from the operation of the intentional injury exclusion.