Nova Law Review

Volume 13, *Issue* 2 1999 *Article* 18

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Abstract

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KEYWORDS: insured, discriminator, wrongful

SHOULD AN INTENTIONAL DISCRIMINATOR BE INSURED?

INTRODUCTION

Throughout history, public policy has placed limitations on insurance coverage because of the fear that insurance provides an incentive to engage in wrongful conduct.[1] Public policy once condemned fire insurance as encouraging arson, and life insurance as promoting murder and suicide.[2] Liability insurance was viewed as encouraging the lowering of the standard of care toward the safety of others.[3] To deter intentionally caused losses, it has long been the rule that such losses are precluded from insurance coverage because they violate public policy.[4] However, public policy changes, and now it is normal to insure against once uninsurable acts, such as negligence, gross negligence, some intentional torts, and some criminal acts.[5] In *Ranger Insurance Co. v. Bal Harbour Club, Inc.*,[6] the Florida Supreme Court must decide just how far public policy has come in allowing insurance for intentional misconduct. More specifically, the supreme court must determine whether public policy allows a deliberately racist and anti-semitic club to be insured against discrimination suits.

In February, 1981 Phil and Rona Skolnick purchased real property in the town of Bal Harbour, Florida.[7] The deed contained a restriction prohibiting use or occupancy of the property "by anyone not a member of the Caucasian race, [or] anyone having more than one-fourth Hebrew or Syrian Blood."[8] The deed also provided that the property could be transferred only to members of Bal Harbour Club, Inc (Club).[9] If this deed restriction was violated another provision re-

1. McNeely, *Illegality as a Factor in Liability Insurance*, 41 COLUM. L. REV. 26 (1941).
2. *Id.*
3. Simon, *Insurance Coverage for Illegal Acts*, 8 AMER. BUS. L.J. 37 (1970).
4. R. KEETON, BASIC TEXT ON INSURANCE LAW § 5.3(a) (1971).
5. Simon, *supra* note 3, at 37.
6. 509 So. 2d 940, 945 (Fla. 3d Dist. Ct. App. 1987)[hereinafter *Ranger I*].
7. *Ranger I*, 509 So. 2d at 940.
8. *Id.* at 941.
9. *Id.*

quired immediate reversion of the property to the grantor.[10] Therefore, membership in the Club was essential to gaining marketable title to the property. The Skolnicks, who are Jewish, applied for Club membership in March, 1981. A few months later the Club returned their application as being incomplete, even though the anti-Semitic deed restrictions lapsed in 1968.[11] The Skolnicks sued the Club, claiming the purpose of the Club was to exclude Jews and other minorities from the neighborhood.[12]

They sued the Club on two counts. The first claim was for ten million dollars in damages for tortious interference with their contract to purchase the property.[13] The second count sought a declaratory judgment which would hold the Club had engaged in housing discrimination,[14] in violation of Chapter 11A, Article I of the Code of Metropolitan Dade County,[15] and in violation of the Florida Constitution.[16]

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10. Brief for Appellant at 2, Ranger Ins. Co. v. Bal Harbour Club, Inc., 509 So. 2d 945 (Fla. 3d Dist. Ct. App. 1987) No. 70851 (Fla. filed Aug. 10, 1987) [hereinafter Brief for Appellant].

11. *Id.*

12. *Ranger I*, 509 So. 2d at 941.

13. *Id.* The Skolnicks alleged in their complaint that the failure of the Club to approve their application was wanton, willful, and reckless conduct which constituted a total disregard for their rights. *Id.* The Skolnicks alleged the following damages: a) inability to obtain marketable title to the property they purchased; b) they were barred from using or occupying the property; c) economic loss resulting from hiring an architect; and d) social and professional embarrassment resulting from the Club refusing their application. Brief for Appellant at 3.

14. *Id.*

15. CODE OF METROPOLITAN DADE COUNTY, FLA. ch. 11A, art. I § 11A-1 (1) (1981) states:

> It is hereby declared to be the policy of Dade County in the exercise of its police power for the public safety, public health, and general welfare to assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry, national origin, age, sex, physical handicap, marital status, or place of birth, and, to that end, to prohibit discrimination in housing by any person.

Section 11A-3 of the Code states:

> [I]t shall be unlawful . . . for a person, owner, financial institution, real estate broker or real estate salesman, or any representative of the above, to:
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> (1)Refuse to sell, purchase, rent or lease, or otherwise deny to or withhold any housing accommodation or to evict a person because of his race, color, religion, ancestry, national origin, age, sex, physical handicap, marital status, or place of birth; or
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> (2)To discriminate against a person in the terms, conditions or privileges

Ranger Insurance Company, Bal Harbour Club's insurer, undertook the defense of the Skolnicks' claim.[17] The Club, with Ranger's approval, negotiated a $25,000 settlement with the Skolnicks.[18] Ranger then sought a declaratory judgment holding that this loss was not covered by Club's insurance policy.[19] The Club counterclaimed, seeking a determination of coverage under the policy.[20] The trial court granted summary judgment[21] in favor of the Club, holding that coverage existed under the terms of the insurance policy.[22] However, the plaintiffs did not raise the issue of whether public policy prohibits insurance coverage of intentional discrimination.[23]

Ranger brought the case before the Florida Third District Court of Appeal, still not raising the public policy issue.[24] In affirming the trial court's ruling, the third district based its decision, as did the lower court, upon the interpretation of the insurance contract.[25] However,

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of the sale, purchase, rental, or lease of any housing accommodation, or in the furnishing of facilities or services in connection therewith.

CODE OF METROPOLITAN DADE COUNTY, FLA. ch. 11A, art. I § 11A-3 (1981).

16. *Ranger I*, 509 So. 2d at 941. *See* FLA. CONST. art. I, § 2, which reads:

All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and property, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property . . . No person shall be deprived of any right because of race, religion or physical handicap.

FLA. CONST. article I, § 9 states that "[n]o person shall be deprived of life, liberty or property without due process of law . . . . "

17. *Ranger I*, 509 So. 2d at 941.

18. *Id.*

19. *Id.*

20. *Id.* The Club also sought attorney's fees. *Id.*

21. *Id.* The parties stipulated that a summary judgment for either side was appropriate, based solely on the allegations in the complaint. *Id.*

22. *Id.* The trial court found coverage under the policy's personal liability provision and the "incidental" contractual liability provision. *Id.*

23. Ranger Ins. Co. v. Bal Harbour Club, Inc., 509 So. 2d 945, 946 (Fla. 3d Dist. Ct. App. 1987) [hereinafter referred to as *Ranger II*].

24. *Id.*

25. *Ranger I*, 509 So. 2d at 942. The policy contained a personal injury liability endorsement. Such a provision typically covers an insured for liability incurred by "personal injury" caused to others as the result of the commission by the insured of certain specified torts. Pratt & Baker, *The Status of Personal Liability and Comprehensive General Liability Insurance Coverage of Civil Rights Damages*, 48 INS. COUNS. J. 259, 260 (1981).

The policy of the Bal Harbour Club contained the following definition:

"Personal Injury" means injury arising out of one or more of the following

Judge Ferguson questioned the propriety of construing an insurance policy to cover acts of intentional discrimination which violate constitutional provisions and local ordinances, thereby running afoul of strong public policy.[26]

Ranger filed a motion for a rehearing en banc,[27] raising the public policy issue.[28] While the motion for rehearing was pending, the court requested supplemental briefs on this issue.[29]

The third district, sitting en banc, decided that it is not contrary to Florida's public policy to allow insurance coverage for losses resulting from an intentional act of religious discrimination.[30] The court noted, however, both the lack of Florida law on this precise issue,[31] and that

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offenses committed during the policy period:
1. false arrest, detention, imprisonment, or malicious prosecution;
2. wrongful entry or eviction or other *invasion of the right of private occupancy* (emphasis added)
3. a publication or utterance
(a) of a libel or slander or other defamatory or disparaging material, or
(b) in violation of an individual's right of privacy;
except publications or utterances in the course of or related to advertising, broadcasting, publishing or telecasting activities conducted by or on behalf of the named insured shall not be deemed personal injury.

Id. at 942 n.4.

Ranger did not deny that the allegations in the Skolnicks' complaint fit this definition of "personal injury," since they constituted an "invasion of the right of private occupancy." *Id.* at 942. Ranger argued that coverage was precluded because of certain exclusions and restrictions in the policy. *Id.* Ranger pointed to one provision restricting coverage to "occurrences," defined as "accidents," and to a provision excluding personal injuries "arising out of the willful violation of a penal statute or ordinance." *Id.*

Since the allegations were of an act of *intentional* religious discrimination, Ranger argued, this was not an "occurrence," and coverage was precluded. *Id.* The court rejected this argument, because the requirement that an injury result from an occurrence appeared in the provision for bodily injury and property damage, but not in the provision for personal injury liability. *Id.*

Ranger claimed that since the Club violated Chapter 11A, Article I of the Code of Metropolitan Dade County (*see supra* note 15), coverage for its actions was excluded as a violation of a penal ordinance. *Id.* at 943. The court disagreed, holding that this Code provision is not penal in nature, and therefore the Club's actions were not excluded from coverage. *Id.*

26. *Id.* at 944-45 (Ferguson, J., dissenting).
27. Brief for Appellant at 6.
28. *Id.*
29. *Ranger II*, 509 So.2d at 945, 946.
30. *Id.*
31. *Id.*

other jurisdictions where the issue was ripe for adjudication inevitably avoided wrestling with its complexities.[32] Recognizing the great public importance of the issue, the third district certified the question to the Florida Supreme Court.[33]

In the third district's decision, the majority cited two Florida cases, *Hartford Fire Insurance Co. v. Spreen*,[34] where the Florida Supreme Court permitted an insured to be indemnified for an assault and battery claim, and *Everglades Marina Inc. v. American Eastern Development Co.*,[35] where the court held that an arsonist's insurer was liable in damages to arson victims. These two cases constitute rare exceptions to the dominant rule in Florida that public policy prohibits insurance coverage for acts in which the insured deliberately caused injury.[36] Since no Florida precedent dealing with the insurability of discrimination claims exists, the *Ranger* majority opinion cited discrimination cases from other jurisdictions.[37] However, most of these cases restricted their holdings exclusively to unintentional discrimination, and actually upheld the public policy prohibiting insurance coverage for intentional acts of discrimination.[38] Recognizing this, the majority found only two

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32. *Id.* at 946-47.

33. *Id.* at 948. At the time of this writing, oral arguments have been presented, however, the Florida Supreme Court has not yet rendered an opinion.

34. 343 So. 2d 649 (Fla. 3d Dist. Ct. App. 1977).

35. 374 So. 2d 517 (Fla. 1979). *See* notes 160-64, *infra*, and accompanying text for an analysis of *Everglades Marina*.

36. *See* notes 56-63, *infra*, and accompanying text.

37. *Ranger II*, 509 So. 2d at 946-48.

38. The *Ranger I* majority cited the following discrimination cases: Solo Cup v. Federal Ins. Co., 619 F. 2d 1178 (7th Cir.), *cert. denied*, 449 U.S. 1033 (1980) (Employer's insurance policy held to cover settlement of employment discrimination claim of "disparate impact," or unintentional discrimination); City of Greensboro v. Reserve Ins. Co., 70 N.C. App. 651, 321 S.E.2d 232 (1984) (In construing a municipality's insurance policy to cover losses resulting from discrimination suits, the court refused to reach the merits of the public policy issue because it was impossible to tell from the record whether the discrimination was disparate impact or disparate treatment); City Council of Elizabeth v. Fumero, 14 N.J. Super. 275, 362 A.2d 1279 (1976) (City's insurance policy held to cover punitive damages arising from civil rights suit against police officer, in light of statute obligating city to pay for damages in such suits) Multnomah School Dist. No. 1 v. Mission Ins. Co., 58 Or. App. 692, 650 P.2d 929 (1982), *review denied*, 294 Or. 692, 662 P.2d 725 (1983) (Insurer had obligation to defend claims of disparate impact discrimination, but not of disparate treatment [intentional] discrimination). *Id.* at 946-48. *See also* notes 88-140, *infra* and accompanying text for a discussion of insurance coverage of discrimination claims.

cases from other jurisdictions which actually support its decision.[39]

The majority relied on these cases in advancing two main concepts.[40] The first concept was by allowing insurance coverage for intentional acts of discrimination, the victims of such discrimination will be assured compensation.[41] However, as the dissent pointed out, in discrimination cases the individual's interest in collecting damages is small in comparison with society's interest in deterring discrimination.[42] The majority based the second concept on the public policy favoring freedom of contract and the enforcement of contracts according to its terms.[43] The court asserted that freedom of contract is "not lightly to be interfered with," and that a contract will only be held void as against public policy in a clear case.[44] Because Ranger freely en-

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39. The majority relied on: Harris v. City of Racine, 512 F. Supp. 1273 (E.D. Wis. 1981) (Public policy did not prohibit county's insurer from covering punitive damages for a judge's intentional racial discrimination); Union Camp Corp v. Continental Casualty Co., 452 F. Supp. 565 (S.D. Ga. 1978) (Employer permitted to recover from insurer loss resulting from employment discrimination suit). *Ranger II*, 509 So. 2d at 947-48.

40. Other arguments advanced by the majority are: a) there is no need to deter discrimination by disallowing insurance coverage, because punitive damages are available for this purpose *Ranger II*, 509 So. 2d at 948; b) the insurance industry itself will discourage acts of intentional discrimination, because insurance companies have a strong interest in avoiding claims, and, thus, entities which practice discrimination would be unable to procure insurance *Id.*; and c) discrimination will not be encouraged by allowing insurance coverage any more than other wrongful acts are encouraged by allowing coverage. *Id.*

As to the first assertion, a) even compensatory awards have a punitive element (*see* note 68, *infra*); b) punitive damages may not be awarded by a court sympathetic to the defendants; c) punitive damages are rarely granted under civil rights statutes. *See* Comment, *Insurance Against Civil Liability for Employment Discrimination*, 80 COLUM. L. REV. 192, 199 n.46 (1980);

As to the second assertion, an insurer's interest in retaining a high paying insured may outweigh any concern over that insured's discriminatory practices. Willborn, *Insurance, Public Policy, and Employment Discrimination*, 66 MINN. L. REV. 1003, 1025 n.127 (1982).

As to the third assertion, some wrongful acts will always exist, such as arson which is encouraged by the existence of insurance coverage. The question is where to draw the line between which intentionally caused harm is insurable, and which is not. *See* Farbstein & Stillman, *Insurance for the Commission of Intentional Torts*, 20 HASTINGS L.J. 1219, 1251 (1969).

41. *Ranger II*, 509 So. 2d at 946.

42. *Id.* at 951-52 (Ferguson, J., dissenting).

43. *Id.* at 947-48.

44. *Id.* at 947 (quoting Union Camp Corp. v. Continental Casualty Co., 452 F.

tered into the insurance contract and because of other competing public policies,[45] the majority did not see this as a clear case.[46] However, in Florida it is longstanding public policy that an insured who intentionally injures a third party is prohibited from recovering from his liability insurance policy.[47] Since the Club's discrimination was intentional, this case should have been clear enough to implement the public policy exclusion of coverage.

COMPETING PUBLIC POLICIES

Liability insurance, by definition, covers wrongful acts of the insured.[48] Insurance functions both to compensate the victims of wrongful acts and to protect the insured from the consequences of his wrongful acts. Public policy tolerates only a certain degree of misconduct.[49] Beyond this point, considerations of deterrence outweigh considerations of assuring compensation to victims.[50] Basic hornbook law provides that

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Supp. 565, 567-68 (S.D. Ga. 1978)).

45. The competing public policy of compensating victims of discrimination has been described above. Another competing public policy mentioned by the majority is that of allowing businesses and other entities to protect themselves from the potentially catastrophic economic consequences of discrimination suits. *Id.* at 948.

46. *Id.* at 947.

47. *Id.* at 950 (Ferguson, J., dissenting).

48. *See* Messersmith v. Am. Fidelity Co., 232 N.Y. 161, 163, 133 N.E. 432 (N.Y. 1921) where Judge Cardozo stated, "[t]o restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow."

49. *Id.* at 165, 133 N.E. at 433. Public policy precludes insurance coverage for loss that is intentionally caused.

50. New Amsterdam Casualty Co. v. Jones, 135 F.2d 191, 194 (6th Cir. 1943) (Insurance coverage which tends to encourage illegal conduct is void as against public policy); U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983) (Referring to state policy prohibiting insurance coverage of punitive damages, court held that to allow such coverage would frustrate the goal of deterring acts of intentional misconduct); Isenhart v. Gen. Casualty Co. of Am., 233 Or. 49, 52-53, 377 P.2d 26, 28 (1962) (A wrongdoer should be personally liable for his intentional misconduct, as a punishment). *See generally* McNeely, *supra* note 1 for the proposition that liability insurance, distrusted at first as a license to do wrongful acts, became gradually more accepted, and expanded to where it now covers willful, reckless and even criminal acts once considered excluded by the public policy which seeks to deter those acts. The author claims that the role of liability insurance has changed from one of indemnifying the insured to compensating victims. Even within this expansive view, however, the author acknowledges that where the insured intentionally causes injury, it remains appropriate for public policy to exclude coverage in order to deter such conduct.

one may not insure against his own intentionally caused losses.[51] Such coverage violates the public policy prohibiting one from profiting by his own wrongdoing[52] and one of the fundamental precepts of insurance, that an insurable loss should be, at least to some extent, accidental.[53] Courts generally read into all insurance contracts an implied exclusion of coverage for intentionally caused injuries, even where the plain language of the contract indicated coverage.[54] This has both a punitive effect and serves as a deterrent to other acts of antisocial behavior.[55] The following section examines what types of conduct of the insured trigger the public policy exception; under what circumstances courts permitted insurance coverage in spite of intentionally caused injury; and whether intentional discrimination precipitates the public policy exclusion.

IN FLORIDA INTENTIONAL ACT AND INJURY TRIGGER PUBLIC POLICY EXCLUSION

At present liability insurance covers acts ranging from ordinary negligence to intentional torts, and even criminal acts of the insured.[56] Florida courts found acts of gross or culpable negligence such as intentionally shooting someone with a BB gun,[57] driving a car into a crowd of people to disperse them,[58] or shooting oneself in a game of "Russian Roulette"[59] covered by liability insurance. In these cases, the insured intended the act which caused the injury, but either did not intend the resulting injury, or did not intend injury to the party who was injured.

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51. R. KEETON, *supra* note 4, at § 5.3(a).

52. *New Amsterdam Casualty Co.*, 135 F.2d at 193; Hussar v. Girard Life Ins. Co. of Am., 252 So. 2d 374 (Fla. 2d Dist. Ct. App. 1971); Title & Tr. Co. of Fla. v. Parker, 468 So. 2d 520, 523 (Fla. 1st Dist. Ct. App. 1985); *Messersmith*, 232 N.Y. at 165, 133 N.E. at 432, 433.

53. R. KEETON, *supra* note 4, at § 5.3(a).

54. COUCH ON INSURANCE 2D, § 44:275 (rev. ed.); R. KEETON, *supra* note 4, at § 5.3(a).

55. *See* Isenhart v. Gen. Casualty Co. 233 Or. 49, 53, 377 P.2d 26, 28 (1962).

56. McNeely, *supra* note 1, at 33; R. KEETON, *supra* note 4, at § 5.3(a).

57. Allstate Ins. Co. v. Steinemer, 723 F.2d 873 (11th Cir. 1984) (interpreting Florida law).

58. Phoenix Ins. Co. v. Helton, 298 So. 2d 177 (Fla. 1st D.C.A. 1977).

59. Gulf Life Ins. Co. v. Nash, 97 So. 2d 4 (Fla. 1957). *See also* Grange Mut. Casualty Co. v. Thomas, 301 So. 2d 158, 159 (Fla. 2d Dist. Ct. App. 1974) (Bystander was accidentally shot by insured who was engaged in a family quarrel, and may have intended to shoot another).

Thus, each injury was, in Judge Keeton's words, "accidental in some sense."[60]

Florida follows the majority rule that injury is intentional, for the purpose of the public policy exclusion, when the insured acted with specific intent to harm a third party.[61] In adopting this specific intent standard, Florida courts rejected the "reasonably foreseeable" standard of intentional torts.[62] Thus, under Florida law, the insured specifically must intend to injure the party who is actually injured in order for public policy to exclude insurance coverage.[63] Under this rule it follows that when an insured injures an intended victim, the public policy exclusion should be triggered. At this point concerns of deterrence and punishment outweigh considerations of compensation to the victim.

COVERAGE OF AN INTENTIONAL ACT CAUSING AN INTENDED INJURY

Insurance covers only those losses that are to some extent accidental. However, an intentional act of the insured is an accident from the victim's viewpoint in that it is unexpected. From whose point of view is a policy of insurance to be observed, the victim's or the insured's? This depends on whose interest the policy is designed to protect.[64] If the purpose of an insurance policy is to protect parties injured by the insured, the compensation goal clearly outweighs the deterrence goal, and the injured party ought to be compensated for his loss despite the intentional conduct of the insured.[65] For example, a life insurance policy protects the economic interests of the named beneficiaries of the insured, not the interests of the insured himself. Thus, even if the insured died by wrongful means, it may still be an "accident" from the view-

60. R. KEETON, *supra* note 4, at § 5.4(a).

61. Cloud v. Shelby Mut. Ins. Co. 248 So. 2d 217, 218 (Fla. 3d Dist. Ct. App. 1971). *See generally* Note, *Intentional Tort Exclusions in Liability Insurance Policies: Confusion in Nebraska Law*, 14 CREIGHTON L. REV. 367 (1980).

62. *Allstate Ins. Co.*, 723 F.2d at 875; Gulf Life Ins. Co. v. Nash, 97 So. 2d 4 (Fla. 1957); *Cloud*, 248 So. 2d at 218; *Grange Mut. Casualty Co.*, 301 So. 2d at 159; Hartford Fire Ins. Co. v. Spreen, 343 So. 2d 649, 651 (Fla. 3d Dist. Ct. App. 1977); Harvey v. St. Paul W. Ins. Co., 166 So. 2d 822 (Fla. 3d Dist. Ct. App. 1964).

63. *Allstate Ins. Co.*, 723 F.2d at 875; *Cloud*, 248 So. 2d at 218; *Grange Mut. Casualty Co.*, 301 So. 2d at 159; *Hartford Fire Ins. Co.*, 343 So. 2d at 651; *Harvey*, 166 So. 2d at 822; *Gulf Life Ins. Co.*, 97 So. 2d at 4.

64. R. KEETON, *supra* note 4, at §§ 5.4(a), 5.4(b).

65. *Id.* at § 5.4(a).

point of the beneficiary.[66] The primary purpose of liability insurance is to protect the insured against losses resulting from his legal liability, so whether a loss is intentional or accidental is viewed from the insured's standpoint.[67] Thus, in the case of liability insurance, the public policy seeking to deter people from benefitting from their wrongdoing takes precedence over the public policy seeking to compensate third party beneficiaries of such insurance.[68] However, there are exceptions where the goal of compensation is more important.

Statutes may designate certain types of liability insurance for the purpose of compensating third parties, such as automobile insurance and worker's compensation insurance.[69] Under these statutes, a victim recovers against the insurer even if the insured's conduct was intentional.[70] As the North Carolina Supreme Court stated:

> The primary purpose of compulsory motor vehicle insurance is to compensate innocent victims who have been injured by . . . financially irresponsible motorists. Its purpose is not, like that of ordinary insurance, to save harmless the tortfeasor himself. Therefore, there is no reason why the victim's right to recover should depend

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66. *Id.* Keeton distinguishes between life insurance, where the designated beneficiaries are third party beneficiaries by virtue of being named in the contract, and liability insurance, where the victim is a third party beneficiary "merely as a practical incident of the protection of some other person." In the first instance, the beneficiary should not be precluded from coverage even in the event of the insured's suicide or execution because such acts were "fortuitous" from the point of view of the beneficiary, whose interest the policy was designed to protect. *Id.*

67. *Id.*

68. The purpose of the public policy exclusion is not only to deter intentionally caused injury, but also to punish those who do so, by placing the entire cost of the loss on them. There is a punitive component even to compensatory judgments. *See* Isenhart v. Gen. Casualty Co., 233 Or. 49, 53, 377 P. 2d 26, 28 (1962), where the court held:

> [D]epriving insured of coverage for intentionally inflicted injuries might have a deterring effect in some cases. However, punishment rather than deterrence is the real basis upon which coverage should be excluded. A person should suffer the financial consequences flowing from his intentional conduct and should not be reimbursed for his loss, even though he bargains for it in the form of a contract of insurance.

69. Comment, *supra* note 40, at 196 n.29.

70. *Id. See* Carmack the Great v. Am. Indem. Co, 400 Ill. 93, 78 N.E.2d 507 (1948); Wheeler v. O'Connell, 297 Mass. 549, 9 N.E.2d 544 (1937); Stuart v. Spencer Coal Co., 307 Mich. 685, 12 N.W.2d 443 (1943) (workman's compensation); Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Hartford Accident & Indem. Co. v. Wolbarst, 95 N.H. 40, 57 A.2d 151 (1948) (compulsory auto insurance).

> upon whether the conduct of . . . [the] insured was intentional or negligent.[71]

Thus, when liability insurance is designated by statute to compensate injured parties, public policy will not preclude recovery for intentionally caused injury.

Some courts, in the interest of compensation to victims, allowed recovery for the victims of intentional misconduct of the insured, but granted the insurer a right of reimbursement from the insured.[72] The concern in these cases was for recovery by the victim, but the wrongdoer was also made to pay for his wrongs. Thus, the punitive and deterrent goals of the public policy doctrine were still served.

Other courts, also in the interest of compensation, allowed recovery directly by the victim but claimed they would not have allowed recovery by the insured directly.[73] These decisions show a concern for compensation but still refuse to allow an insured to profit by his own wrongdoing.[74]

The holding in *New Amsterdam Casualty Co. v. Jones*[75] is noteworthy because the insured, a gas station proprietor, shot a customer in an argument.[76] The insurance policy protected the insured against "liability for bodily injury suffered by any person not employed by him, as the result of any accident on his premises."[77] The court interpreted this as an "accident" insurance policy and held that under such a policy the determination of whether an injury is accidental is to be made from the

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71. *Nationwide Mut. Ins. Co.*, 261 N.C. at 290-91, 134 S.E.2d at 659.

72. Ambassador Ins. Co. v. Montes, 76 N.J. 477, 388 A.2d 603 (1978); Shew v. S. Fire & Casualty Co. 307 N.C. 438, 298 S.E.2d 380 (1983).

73. New Amsterdam Casualty Co. v. Jones, 135 F.2d 191, 194 (6th Cir. 1943) (although insured committed criminal battery, recovery was allowed to victim, but court stated that public policy would preclude recovery by the insured directly); Everglades Marina v. Am. E. Dev. Co., 374 So. 2d 517 (Fla. 1979) (public policy precluded recovery for insured who burned his own marina, but did not preclude boat owners from recovering).

74. The *Ranger* majority argues there is no real difference between a victim recovering directly against an insurer, and an insured being indemnified for a payment made to a victim. *Ranger I*, 509 So. 2d at 946. Keeton, however, points out that the insured may be granted a right of reimbursement from the insured. R. KEETON, *supra* note 4, at § 5.4(b).

75. 135 F.2d 191 (6th Cir. 1943).

76. *Id.*

77. *Id.* at 193.

victim's viewpoint.[78] This was a significant departure from the traditional rule; in liability insurance intent is to be determined from the viewpoint of the insured, and recovery is precluded when the insured injures intentionally.[79] The shooting was an accident from the victim's viewpoint, the court found that coverage under the contract did not violate public policy per se, but then switched to the insured's viewpoint in determining whether his misconduct still precluded recovery on public policy grounds.[80] In holding that public policy did not preclude recovery, the court noted this was not an action for indemnity by the insured, but a direct action by the victim.[81] The court found that since the shooting took place during a heated quarrel, the insured could not have intended this act when he purchased the insurance.[82] In addition, the policy did not specifically insure against wrongful acts and, therefore, did not encourage such acts.[83] In this unique case the Sixth Circuit Court of Appeals refused to blindly apply the public policy exclusion, but instead set forth criteria as to what types of misconduct precluded insurance coverage.[84] By sharpening the definition of what types of conduct public policy seeks to deter, this court extended insurance coverage to previously excluded areas, thereby furthering the goal of compensation.

Courts also permitted recovery to victims of intentional misconduct when the insured's liability was merely vicarious,[85] when the insured's intentional act was in self-defense,[86] and when the insured was insane, or otherwise incompetent.[87] In these cases, the balance between compensation for the victim and deterrence and punishment of wrongdoers swung in favor of compensation, because the actions of these types of insured are not deterred by the refusal of coverage.

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78. *Id.* True accident insurance is insurance against catastrophic injuries befalling the *insured*, not third parties. W. VANCE, HANDBOOK ON THE LAW OF INSURANCE 942-43 (3d ed. 1951).

79. R. KEETON, *supra* note 4, at § 5.4(a).

80. *New Amsterdam Casualty Co. v. Jones*, 135 F.2d 191, 193 (6th Cir. 1943).

81. *Id.* at 194.

82. *Id.* at 195.

83. *Id.*

84. *Id.* at 194-95.

85. *See* Simon, *supra* note 3, at 42 and cases cited therein.

86. Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R. 4th § 8(b) (1987).

87. *See* Rosa v. Liberty Mut. Ins. Co., 243 F. Supp. 807 (D. Conn. 1965); Ruvolo v. Am. Casualty Co., 39 N.J. 490, 189 A.2d 204 (1963).

In summary, the purpose of insurance is both to protect an insured against loss and to compensate injured parties. Deciding which is the dominant goal depends on whose interest the insurance is designed to protect. In liability insurance, the interest of the insured is protected and it is from his perspective that the intentional or accidental nature of an act is viewed. Normally the intentionally caused injury of the insured precludes coverage. However, courts in various jurisdictions carved out a number of exceptions to this rule. *New Amsterdam Casualty Co.* was a significant case; rather than a blanket application of the public policy exclusion, the *New Amsterdam Casualty Co.* court used a balancing approach, and allowed recovery, in spite of the insured's intentional behavior.

INTENTIONAL DISCRIMINATION, WHICH IS THE MORE IMPORTANT POLICY, DETERRENCE OR COMPENSATION?

Congress enacted various federal civil rights statutes for the purpose of enforcing those provisions of the Constitution which protect individual rights.[88] The primary purpose of such legislation is to deter those who deprive others of guaranteed rights.[89]

Title VII of the Civil Rights Act of 1964, concerning equal opportunity in employment, has been instrumental in bringing about employ-

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88. *E.g.*, 42 U.S.C. § 1983 (1982) specifically provides redress for any person deprived of "any rights, privileges, or immunities secured by the Constitution or laws," by another acting under "color of" law; 42 U.S.C. § 1982 (1982) prohibits discrimination in the sale, inheritance, leasing, holding or conveying of property was enacted pursuant to the thirteenth amendment's ban on slavery or involuntary servitude. *See, e.g.*, Dist. of Columbia v. Carter, 409 U.S. 418, *reh'g denied*, 410 U.S. 959 (1973); Jones v. Alfred H. Mayer Co. 392 U.S. 409 (1968). One of the stated purposes of the Civil Rights Act of 1964 was to "open additional avenues to deal with redress of denials of equal protection of the laws on account of race, color, religion, or national origin by State or local authorities." H.R. Rep. No. 914, 88th Cong., 1st Sess. 26 (1963).

89. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (primary purpose of Equal Employment Opportunity Act was to remove racial barriers); *See also* Note, *Limiting the Role of Insurance in Civil Rights Litigation: A Case for Re-Establishing 42 U.S.C. § 1983 As An Enforcement Mechanism*, 5 J. CORP. LAW 305, 325-26 (1980). The author argues that in enacting 42 U.S.C. § 1983 (1982), Congress' main concern was for the enforcement of constitutional rights, and that the cause of action available under that section is primarily a deterrent. This legislation enforces the public interest in preserving fundamental constitutional guarantees, and any individual's interest in being assured damages under 42 U.S.C. § 1983 (1982) is small in comparison.

ment discrimination actions.[90] In *Albemarle Paper Co. v. Moody*,[91] the Supreme Court, in reversing a lower court's decision denying back pay awards to successful Title VII plaintiffs, examined the purposes of Title VII. The Court stressed that the primary purpose of Title VII is to deter discriminatory employment practices, with the availability of back pay awards as a means of enforcing such deterrence.[92] Mere injunctive relief provides no incentive for employers to voluntarily eradicate discrimination in the workplace, which is the goal of Title VII.[93] The back pay awards available under Title VII, although compensatory in nature, function as a penalty and a deterrent to discriminatory employment practices.[94]

Actions under Title VII parallel common-law tort actions by not permitting insurance coverage for intentional misconduct.[95] A plaintiff

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90. Title VII, 42 U.S.C. § 2000e-2 (1982) provides:

> (a) It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The fact that Title VII is a major vehicle for employment discrimination actions is shown by the fact that in 1980, 29,000 claimants received $43,000,000 in back pay awards and other benefits under this title. Willborn, *supra* note 40, at 1003 n.3.

91. 422 U.S. 405 (1975).

92. *Id.* at 417. In support of its holding that Title VII back pay awards are essential to deterring discrimination, the Court stated:

> It is the reasonably certain prospect of a back pay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as is possible, the last vestiges of an unfortunate and ignominious page in this country's history."

Id. at 417-18 (quoting U.S. v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

93. *Id.*

94. The Court noted that Title VII has a secondary purpose of compensation, "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.* at 418.

95. Solo Cup Co. v. Fed. Ins. Co. 619 F.2d 1178 (7th Cir.), *cert denied* 449 U.S. 1033 (1980); Union Camp Corp. v. Continental Casualty Co. 452 F. Supp. 565 (S.D. Ga. 1978); Multnomah Sch. Dist. No. 1 v. Mission Ins. Co., 58 Or. App. 692, 650 P.2d 929 (1982), *rev. denied* 294 Or. 382, 662 P.2d 725 (1983); E-Z Loader Boat Trailers,

under Title VII may bring a cause of action either for "disparate treatment" or "disparate impact."[96] Disparate treatment is employment discrimination where an employer intentionally treats certain individuals unfavorably, based on race, color, religion, sex or national origin.[97] The plaintiff must prove discriminatory intent.[98] Disparate impact is employment discrimination where a facially neutral employment practice has a discriminatory effect.[99] The plaintiff does not need to establish specific intent to discriminate in a disparate impact action. Merely the intention to do the *act* without an intent to injure is sufficient.[100]

Although plaintiffs may recover under either theory, courts allow insurance to cover employers for disparate impact claims, but not disparate treatment claims. In *Multnomah School District No. 1 v. Mission Insurance Co.*,[101] a school district sued its insurer to recover money expended in settling a number of employment discrimination claims.[102] The court allowed recovery on those claims alleging disparate impact, but not for disparate treatment claims.[103] Not only have courts generally allowed insurance coverage of disparate impact claims, but some courts maintain that such coverage actually helps both the deterrent and compensation goals of Title VII.[104] In *Solo Cup Co. v. Federal Insurance Co.*,[105] for example, where recovery was allowed for a disparate impact claim, the court stated insurance coverage may help remedy employment discrimination by making claims prevention services available. Interestingly, none of the courts deciding employment discrimination cases directly confronted the issue of whether it is against public policy for insurance to cover disparate treatment

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Inc. v. Travelers Indem. Co., 106 Wash. 2d 901, 726 P.2d 439 (1986).

96. *See* Int'l Brotherhood of Teamsters v. U.S., 431 U.S. 324, 335-36 n.15 (1977).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. 58 Or. App. 692, 650 P.2d 929 (1982).

102. *Id.*

103. *Id.* at 702-11, 650 P.2d at 936-41.

104. *Solo Cup Company*, 619 F.2d at 1188. *See also* Comment, *supra* note 40, at 199-201 (Several reasons are stated why insurance coverage of disparate impact claims would not tend to defeat the deterrence goal of Title VII. The author lists as reasons the employer's interest in keeping insurance premiums from rising and the insurer's interest in avoiding claims through loss prevention assistance).

105. *Solo Cup Co.*, 619 F.2d at 1188.

claims.[106] Since all of these courts interpreted the terms of the insurance policies to cover disparate impact, but not disparate treatment, these courts avoided dealing with whether a contract covering disparate treatment violates public policy.[107] Each opinion implicitly acknowledged the principle that it is against public policy to insure against one's own intentional acts.[108] However, because the courts decided these cases on contract grounds alone, the decisions shed no light on whether the primary purpose of Title VII is to compensate or deter, and thus, whether coverage should be permitted in spite of intentional discrimination.

42 U.S.C. section 1983 is the federal statute providing a cause of action to individuals deprived of a constitutional right by an official acting under color of law.[109] Plaintiffs commonly utilize this statute to bring suit against state and local government officials for false arrest, malicious prosecution and other civil rights violations.

It is common for government entities to carry insurance coverage for section 1983 claims. The early cases concerning insurance coverage of section 1983 claims were limited to contract construction and did not address public policy.[110] The more recent cases addressed the public

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106. *Id.* at 1178; Union Camp Corp. v. Continental Casualty Co., 452 F. Supp. 565 (S.D. Ga. 1978); City of Greensboro v. Reserve Ins. Co., 70 N.C. App. 651, 321 S.E.2d 232 (1984); Multinomah County Sch. Dist. No. 1 v. Mission Ins. Co., 58 Or. App. 692, 650 P.2d 929 (1982), *review denied* 294 Or. 682, 662 P.2d 725 (1983); E-Z Loader Boat Trailers v. Travelers Indem. Co., 106 Wash. 2d 901, 726 P.2d 439 (1986).

107. *See, e.g., Solo Cup Co.*, 619 F.2d at 1187 (Court interpreted terms of insurance policy to exclude disparate treatment coverage, they specifically declined to consider whether such coverage would be void as against public policy). *See also Union Camp*, 452 F. Supp. at 568; *City of Greensboro*, 70 N.C.App. at 657, 321 S.E.2d at 236; *Multinomah County Sch. Dist. No. 1*, 58 Or. App. at 701 n.4, 650 P.2d at 936 n.4.

108. *Solo Cup Co.*, 619 F.2d at 1187; *Union Camp*, 452 F. Supp. at 568; *City of Greensboro*, 70 N.C. App. at 657, 321 S.E.2d at 236; *Sch. Dist. No. 1, Multimomah County*, 58 Or. App. at 699 n.3, 650 P.2d at 934 n.3.

109. 42 U.S.C. § 1983 (1982) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or another person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

110. *See, e.g.*, City of Peoria v. Underwriters at Lloyds' London, Uninc., 290 F. Supp. 890 (S.D. Ill. 1968); Caplan v. Johnson, 414 F.2d 615 (5th Cir. 1969); Colton v. Swain, 527 F.2d 296 (7th Cir. 1975)

policy argument but generally found it to be without merit.[111] In rejecting public policy grounds of denying coverage, courts stressed both the compensatory purpose of the section 1983 cause of action and the potential "chilling effect" on government officials who may be hindered in the exercise of their duties by the threat of personal liability.

In *Graham v. James F. Jackson Associates, Inc.*,[112] a man was killed by a police officer who was subsequently convicted of involuntary manslaughter.[113] The decedent's estate prevailed in a section 1983 suit, and then brought action against the town's insurer to collect the damage award.[114] Because the insurance contract was ambiguous as to whether it covered criminal acts of police officers, the court followed the canons of construction and held that coverage existed.[115] The insurer, however, claimed that this construction violated public policy, in that it allowed insured parties to be indemnified for their criminal acts.[116] The court acknowledged the public interest in deterring criminal acts but recognized the presence of competing public policies.[117] A strongly influential factor in the decision was the city voluntarily waived its tort immunity by purchasing liability insurance and therefore the sole purpose of the insurance was to compensate victims.[118] This goal would be frustrated by not permitting insurance coverage for the criminal acts of police officers.[119] The court employed a balancing process, weighing the above factors, and concluded that under the circumstances compensation to victims was clearly the stronger public policy and that the greater public good would be achieved by allowing coverage.[120]

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111. *See, e.g.*, Fagot v. Ciravola, 445 F. Supp. 342 (E.D. La. 1978); Harris v. Racine, 512 F. Supp. 1273 (E.D. Wis. 1981); Graham v. James F. Jackson Assoc., Inc., 84 N.C. App. 427, 352 S.E.2d 878 (1987); Newark v. Hartford Accident & Indem. Co., 134 N.J. Super 537, 342 A.2d 513 (1975). *See generally* Note, *supra* note 89.

112. 84 N.C. App. 427, 352 S.E.2d 878 (1987).

113. *Id.*

114. *Id.*

115. *Id.* at 430-31, 352 S.E.2d at 880-81. The court followed the well-known rule of insurance policy construction that any ambiguities must be resolved in favor of the insured. *Id.* at 430, 352 S.E.2d at 880.

116. *Id.* at 430-43, 352 S.E.2d at 880-81.

117. *Id.*

118. *Id.* at 432, 352 S.E.2d at 881-82.

119. *Id.* at 432, 352 S.E.2d at 882.

120. *Id.*

In *Harris v. County of Racine*,[121] a federal district court employed the "chilling effect" rationale in finding a county's insurance policy covered money awarded in a section 1983 action to a police officer who was the victim of a judge's racially motivated "campaign of vilification."[122] The Wisconsin federal court held that insurance coverage was not against public policy, and furthermore that the rationale for the public policy exclusion was invalid for section 1983 actions.[123] The court explained that while the purpose of the exclusion in deterring and punishing intentional misconduct is beneficial in common-law torts, it has a detrimental effect in section 1983 actions.[124] Public officials must act without fear of personal liability if they are to serve the public effectively.[125] Such officials, like all others, occasionally exercise poor judgment.[126] Disallowing insurance protection has a "chilling effect" on the effective performance of public officials, because it tends to have a "substantially inhibiting effect on the exercise of reasonable discretion."[127] This rationale takes into account not only deterrence and compensation as factors, but also the public interest in the efficiency of public officials.

One author argues that because of the fundamental nature of the constitutional rights protected by section 1983, there is a strong deterrent purpose to the statute which insurance coverage tends to defeat.[128] The history of the statute reveals this deterrent purpose. Section 1983 was enacted at the end of the Civil War to provide a weapon against the Ku Klux Klan, which carried on its racist atrocities largely with the cooperation of public officials.[129] An individual's interest in compensation, while important, pales beside society's interest in ensuring that public officials do not violate the very rights they are sworn to uphold.[130] A formula for awarding damages under section 1983 where

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121. 512 F. Supp. 1273 (E.D. Wis. 1981).

122. *Id.* at 1275. The judge's acts against the police officer included a John Doe criminal investigation which resulted in charges against him, and a consequent effort to destroy the officer's reputation through the media and contacts with city officials. At trial the jury found these acts to be racially motivated, and undertaken with malice. *Id.*

123. *Id.* at 1282.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 1283.

128. Note, *supra* note 89, at 324-26.

129. *Id.* at 324.

130. *Id.* at 325.

compensatory, punitive and "constitutional" damages would be awarded to the victim is preferable.[131] Insurance would cover compensatory damages but not punitive and "constitutional" damages.[132] This process is favored to total insurance coverage of section 1983 claims because the proposed system maintains the deterrent function of the statute, while still effecting compensation to victims.[133]

Federal civil rights legislation serves both a compensatory and deterrent purpose.[134] The primary reason such legislation exists is to eradicate discrimination throughout society and to enforce constitutional provisions by creating a deterrent to those who would obstruct those constitutional and legislative purposes.[135] However, damages also are available under these statutes which provide both penalties for wrongdoers and a means of making the victims whole.[136] Thus, compensation is an important secondary goal because it remedies past discrimination.[137] No court has ever had to decide whether public policy allows insurance coverage for disparate treatment employment discrimination. However, those courts finding coverage of disparate impact discrimination acknowledge that public policy precludes coverage for intentional acts.[138] This indicates that some degree of wrongfulness exists which would prompt the courts to exclude coverage. Perhaps the reason these courts have not taken a firm stand on whether insurance covers disparate treatment is that they observed what was happening in cases based

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131. *Id.* at 346-48. The compensatory award would cover out-of-pocket injury. The punitive award would be for "malicious interference with an individual's constitutional rights." The "constitutional" damage award would be to compensate an individual for the deprivation of the constitutional right itself, beyond out-of-pocket expenses. This award would serve both a deterrent and punitive function where a) the deprivation of the right is substantial, but the out-of-pocket injury is small and b) the deprivation did not amount to the "malicious interference" required for punitive damages. *Id.*

132. *Id.* The cost of punitive damages must be borne personally by the official who committed the wrongful act. However, the official may be indemnified for the cost of "constitutional" damages, provided the employer does not pay such funds from an insurance policy. In this way, the deterrence goal of U.S.C. § 1983 (1982) is shifted to the government entity, which will hopefully take action to avoid further claims. *Id.* at 348.

133. *Id.*

134. *See generally* Albemarle Paper Co. v. Moody, 422 U.S. 405, 416-17 (1975); Note, *supra* note 88, at 324-26.

135. *Albemarle Paper Co.*, 422 U.S. at 416-17; Note *supra* note 89, at 324-26.

136. *Albemarle Paper Co.*, 422 U.S. at 416-17; Note *supra* note 89, at 324-26.

137. *Albemarle Paper Co.*, 422 U.S. at 416-17; Note *supra* note 89, at 324-26.

138. *See supra* notes 81-94 and accompanying text.

on section 1983 claims. Courts in those cases allowed coverage in spite of the fact that the terms of insurance contracts violated public policy, finding that other public policies outweighed the intentional act exclusion.[139] These cases show a trend away from a blanket application of the public policy exclusion, and towards a balancing process. However, such a balancing process must be used with care, so as not to defeat the deterrent effect of the statute.[140]

PUBLIC POLICY FAVORING FREEDOM OF CONTRACT

Insurers write insurance policies. Because they draft policies and thus exercise control over the terms of the policy, the general rule is that insurance policies are construed liberally in favor of the insured and strictly against the insurer.[141] When the terms are unclear as to inclusion of a certain type of coverage, coverage is deemed included if a liberal reading of the terms would include such coverage.[142] However, intentionally caused losses, even when not expressly excluded from coverage, are impliedly excluded as a matter of public policy.[143] Although most insurers protect themselves by expressly excluding coverage for intentional misconduct,[144] problems arise where a broad reading of the policy terms covers the intentional misconduct of the insured.[145] In

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139. *See* Fagot v. Ciravola, 445 F. Supp. 342, 344-45 (E.D. La. 1978); Harris v. City of Racine, 512 F. Supp. 1273, 1282-84 (E.D. Wis. 1981); Graham v. James F. Jackson Assoc., Inc., 84 N.C. App. 427, 432, 352 S.E.2d 878, 881-82 (1987); City of Newark v. Hartford Accident & Indem. Co., 134 N.J. Super. 537, 545-48, 342 A.2d 513, 517-18 (1975). *See also* Note, *supra* note 89, at 308-14.

140. *See* Fagot v. Ciravola, 445 F. Supp. 342, 344-45 (E.D. La. 1978); Harris v. City of Racine, 512 F. Supp. 1273, 1282-84 (E.D. Wis. 1981); Graham v. James F. Jackson Assoc., Inc., 84 N.C. App. 427, 432, 352 S.E.2d 878, 881-82 (1987); Newark v. Hartford Accident & Indem. Co., 134 N.J. Super. 537, 545-48, 342 A.2d 513, 517-18 (1975). *See also* Note, *supra* note 89, at 308-14; Comment, *supra* note 103, at 198-201.

141. Poole v. Travelers Ins. Co., 130 Fla. 806, 179 So. 138 (1937); Hartford Fire Ins. Co. v. Spreen, 343 So. 2d 649, 652 (Fla. 3d Dist. Ct. App. 1977); Oliver v. U.S. Fidelity & Guaranty Co., 309 So. 2d 237 (Fla. 2d Dist. Ct. App. 1975); Moore v. Conn. Life Ins. Co., 277 So. 2d 839, 842 (Fla. 3d Dist. Ct. App. 1973), *cert. denied*, 291 So. 2d 204 (Fla. 1974); *Ranger I*, 509 So. 2d at 942 n.4.

142. *Id.*

143. R. KEETON, *supra* note 4, at § 5.3(f).

144. *Id.* at § 5.2(a); McNeely, *supra* note 1, at 43-46.

145. *Harris*, 512 F. Supp. at 1273; New Amsterdam Casualty Co. v. Jones, 135 F.2d 191 (6th Cir. 1943); *Newark*, 134 N.J. Super at 537, 342 A.2d at 513; *Fagot*, 445 F. Supp. at 342; *Graham*, 84 N.C. App. at 427, 352 S.E.2d at 878; *Hartford Fire*

those cases the public policy favoring freedom of contract and the enforcement of contracts is in conflict with the policy prohibiting insurance for intentional wrongdoing.[146]

In *Bituminous Casualty Corp. v. Williams*,[147] the Florida Supreme Court stated that "[i]t is only in clear cases that contracts will be held void as contrary to public policy."[148] The court went on to list such "clear cases" as when a contract is prohibited by legislative act, prior judicial decision, or is "clearly injurious to the public good or contravene[s] some established interest of society."[149] Other jurisdictions echo this view that freedom of contract is an essential right, not lightly to be interfered with and that a contract will be set aside on public policy grounds only if it clearly violates a statute or some interest of profound public significance.[150]

Some courts, when faced with an insurance contract clearly covering acts of intentional wrongdoing, permitted insurance coverage based on freedom of contract without even addressing the public policy issue.[151] This seems indefensible at first, but courts are extremely cautious about setting aside contracts on public policy grounds. If the plaintiff does not specifically allege public policy violations, most courts would rather not tangle with this difficult issue *sua sponte*.

Other courts, while acknowledging that an insurance contract insured against intentional misconduct, allowed coverage nonetheless, claiming the facts did not present a "clear case" which justified setting

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Ins. Co., 343 So. 2d at 649.

146. *Harris*, 512 F. Supp. at 1273; *New Amsterdam Casualty Co.*, 135 F.2d at 191; *Fagot*, 445 F. Supp. at 342; *Graham*, 84 N.C. App. at 427, 352 S.E.2d at 878; *Hartford Fire Ins. Co.*, 343 So. 2d at 649; *Newark*, 134 N.J. Super at 537, 342 A.2d at 513.

147. 17 So. 2d 98, 101 (Fla. 1944).

148. *Id. See also New Amsterdam Casualty Co.*, 135 F.2d at 191, 194; Union Camp Corp. v. Continental Casualty Co., 452 F. Supp. 565, 568 (S.D. Ga. 1978); Harrell v. Travelers Indem. Co., 279 Or. 199, 567 P.2d 1013, 1014 (1977).

149. *Bituminous Casualty Corp.*, 17 So. 2d at 101. *See also* Shingleton v. Bussey, 223 So. 2d 713, 717 (Fla. 1969); Title & Tr. Co. of Fla. v. Parker, 468 So. 2d 520, 523 (Fla. 1st Dist. Ct. App. 1985).

150. *Union Camp Corp.*, 452 F. Supp. at 568; *New Amsterdam Casualty Co.*, 135 F.2d at 194; Harris v. City of Racine, 512 F. Supp. 1273, 1281 (E.D. Wis. 1981); *Harrell*, 279 Or. at 199, 567 P.2d at 1013.

151. In the first *Ranger* decision, only contract issues were addressed, and only the dissent addressed the question of whether insuring against intentional discrimination was against public policy. *Ranger I*, 509 So. 2d at 940. *See also* Hartford Fire Ins. Co. v. Spreen, 343 So. 2d 649 (Fla. 3d Dist. Ct. App. 1979).

aside a contract on public policy grounds.[152] These courts viewed the "big picture," weighing various factors, and then decided whether the "general tendency" of the contract was harmful to the public good.[153] The inquiry is whether such a contract tends to encourage wrongful behavior, or whether by enforcing one public policy, the decision may abrogate another more important one.[154]

In *New Amsterdam Casualty Co. v. Jones*,[155] the Sixth Circuit held an assault and battery claim to be covered by a liability insurance policy. The court stated it would only set aside a contract in "clear cases" and whether a contract could be set aside depended on whether it tended to encourage wrongful conduct.[156] Then, looking at the facts and balancing various considerations,[157] the court decided that this contract was not definite enough to invoke the public policy exclusion. Furthermore, the court stated that allowing insurance under the facts would not tend to encourage wrongful behavior.[158]

Courts deciding section 1983 cases employed a similar weighing of the insurance contract's "general tendency" as in *Harris v. City of Racine*.[159] In *Harris*, such factors as compensation to victims and the "chilling effect" on law enforcement persuaded the court to allow cov-

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152. *Harris*, 512 F. Supp. at 1273; *New Amsterdam Casualty Co.*, 135 F.2d at 191; Fagot v. Ciravola, 445 F. Supp. 342 (E.D. La. 1978); Graham v. James F. Jackson Assoc., Inc., 84 N.C. App. 427, 352 S.E.2d 878 (1987); *Hartford Fire Ins. Co.*, 343 So. 2d at 652; *Newark*, 134 N.J. Super at 537, 342 A.2d at 513.

153. *Harris*, 512 F. Supp. at 1273; *New Amsterdam Casualty Co.*, 135 F.2d at 191; *Fagot*, 445 F. Supp. at 342; *Graham*, 84 N.C. App. at 427, 352 S.E.2d at 878; *Hartford Fire Ins. Co.*, 343 So. 2d at 652; *Newark*, 134 N.J. Super at 537, 342 A.2d at 513.

154. *Harris*, 512 F. Supp. at 1273; *New Amsterdam Casualty Co.*, 135 F.2d at 191; *Fagot*, 445 F. Supp. at 342; *Graham*, 84 N.C. App. at 427, 352 S.E.2d at 878; *Hartford Fire Ins. Co.*, 343 So. 2d at 652; *Newark*, 134 N.J. Super at 537, 342 A.2d at 513.

155. 135 F.2d 191 (6th Cir. 1943). *See* notes 75-84, *supra*, and accompanying text.

156. New Amsterdam Casualty Co. v. Jones, 135 F.2d 191, 194 (6th Cir. 1943).

157. The court observed that it was the victim, not the insured himself who sought recovery, that the insurance policy did not specifically cover intentional misconduct, that the insurance contract was not entered into in contemplation of the wrongful act, and that the shooting was committed in the heat of the moment to a stranger, and so a) collecting insurance could not have been the motivation and b) this is not the type of act which insurance coverage tends to encourage. *Id.* at 194-95.

158. *Id.*

159. 512 F. Supp. 1273 (E.D. Wis. 1981).

erage for intentional misconduct.[160] In rejecting the public policy argument, the *Harris* court stated, that "it would amount to an excessive judicial interference with the right to freedom of contract and with the prerogative of the legislature to declare such contracts illegal because they do not accord with what a judge might prefer as the better of competing public policies."[161]

Equitable considerations enter into the freedom of contract argument to some extent. The *Harris* court stated that "considering what [the insurance company] contracted for and the ease with which it could have restricted the coverage provided, there are no equitable considerations which favor its release from liability."[162] In *Union Camp Corp. v. Continental Casualty Co.*,[163] the court allowed an employer insurance coverage under a Title VII disparate impact claim, stressing that an insurer, who freely enters into a contract, should not later claim it violated public policy.[164] The court intimated the insurance company's main goal was to avoid responsibility under its contract, and no clear public policy goal was being served.[165]

Freedom of contract is a highly protected public policy. Courts will neither casually set aside a validly executed contract nor change its terms, when the contract is clear and unambiguous.[166] However, when a contract clearly violates a constitutional, legislative or judicial mandate, or is highly detrimental to the public good, courts will set it aside.[167] Although courts generally recognize the public policy prohibiting insurance coverage of intentional injuries, problems arise in cases where there is a question as to how "clearly" public policy is violated. There seems to be a trend toward a factoring process and away from courts automatically invoking the public policy exclusion in marginal

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160. Harris v. City of Racine, 512 F. Supp. 1273 (E.D. Wis. 1981); *Fagot*, 445 F. Supp. at 342; *Graham*, 84 N.C. App. at 427, 352 S.E.2d at 878; Newark v. Hartford Accident & Indem. Co., 134 N.J. Super 537, 342 A.2d 513 (1975).

161. *Harris*, 512 F. Supp. at 1283.

162. *Id.* at 1282.

163. 452 F. Supp. 565 (S.D. Ga. 1978).

164. *Id.* at 568.

165. *Id.*

166. *Id.* at 568; New Amsterdam Casualty Co. v. Jones, 135 F.2d 191, 194 (6th Cir. 1943); *Harris*, 512 F. Supp. at 1273; Bituminous Casualty Co. v. Williams, 17 So. 2d 98, 101 (Fla. 1944); Horol v. Travelers Indem. Co., 279 Or. 199, 567 P.2d 1013 (1977).

167. *Union Camp Corp.*, 452 F. Supp. at 568; *New Amsterdam Casualty Co.*, 135 F.2d at 194; *Harris*, 512 F. Supp. at 1273; *Bituminous Casualty Co.*, 17 So. 2d at 101; *Harrell*, 279 Or. at 199, 567 P.2d at 1013.

cases.

THE RANGER INSURANCE CASE: A SUGGESTED APPROACH TOWARDS DECIDING THE PUBLIC POLICY ISSUE

The certified question of the *Ranger* court underscored the uncertainty of the current status of the public policy exclusion in Florida.[168] The Florida Supreme Court sent conflicting signals to the lower courts in *Everglades Marina*.[169] In *Everglades Marina*, a marina owner intentionally set fire to his marina, damaging the boats of marina patrons who were third-party beneficiaries under the insurance policy of the marina.[170] The supreme court recognized the public policy prohibiting coverage for intentional acts, but refused to extend the public policy exclusion to third-party beneficiaries.[171] The decision noted a number of factors; this was not an action for indemnity by the arsonist, the marina owner did not intend to damage other individual's boats, and law enforcement authorities apprehended him for his act of arson.[172] However, the only factor discussed in depth was the innocence of the injured parties and deserved compensation on that basis.[173]

The Florida Supreme Court in *Everglades Marina* specifically narrowed its holding to third-party beneficiaries. However, the court could have been more specific in explaining its rationale. If taken to mean that a victim's innocence is all that is required to allow insurance coverage for intentional injury, this holding largely does away with the public policy exclusion in Florida. Individuals would be able to batter their neighbors, burn their houses, and pursue discriminatory employment and housing practices without fear of personal liability. Insurance coverage would permit people to engage in wrongful conduct with impunity. Obviously the court did not mean to do away with the intentional act exclusion completely. The question remains how far did *Everglades Marina* go in relaxing the application of the exclusion? Does *Everglades Marina* stand for the proposition that compensating innocent parties outweighs deterrence in all cases, or that factors must

168. *Ranger II*, 509 So. 2d at 948.
169. 374 So. 2d 517 (Fla. 1979).
170. *Id.*
171. *Id.* at 519.
172. *Id.* at 518.
173. *Id.* at 519.

nature. The criteria are whether the insured is seeking indemnity for his intentionally inflicted injury or whether the victim seeks compensation directly;[181] whether the insurance contract specifically insures against intentional injury;[182] whether the wrongful act was within the contemplation of the insured at the time he entered into the insurance contract;[183] and whether the wrongful conduct is of a type which tends to be encouraged by insurance coverage.[184] By using these factors Florida courts will be able to compensate victims in circumstances where the deterrent goal of the public policy exclusion previously prevented recovery. In cases where the intentional act is discrimination, such as *Ranger*, courts should utilize the same factors. The disparate impact/disparate treatment dichotomy utilized in Title VII claims is analogous to the unintentional/intentional act distinction.[185] The acts of the Club clearly constituted disparate treatment discrimination. The Skolnicks were the victims of an intentional scheme calculated to keep the neighborhood free of certain races and religions.[186]

Applying the above analysis to the *Ranger* case, the Florida Supreme Court must reverse the decision of the Third District Court of Appeal and find that insurance coverage for intentional discrimination violates public policy. Florida common law recognizes that when both act and injury of an insured are intentional, insurance coverage is void as against public policy. In *Ranger*, the Club intentionally discriminated against the Skolnicks for the intended result that the couple be denied good title to their property.[187] Since the Club intended the act and injury, the Club should be precluded from insurance coverage under Florida common law.

Under the *New Amsterdam Casualty Co.* factors, the first inquiry is whether the wrongdoer is seeking indemnity or whether the victims are bringing action directly.[188] This action for indemnity by the Club weighs heavily against allowing coverage.[189] The next question is;

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181. New Amsterdam Casualty Co. v. Jones, 135 F.2d 191, 194 (6th Cir. 1943).
182. *Id.*
183. *Id.* at 195.
184. *Id.*
185. Disparate treatment discrimination is intentional and disparate impact is unintentional. *See supra* notes 95-100 and accompanying text.
186. *Ranger I*, 509 So. 2d at 941.
187. *Ranger II*, 509 So. 2d at 945.
188. *New Amsterdam Casualty Co.*, 135 F.2d at 194.
189. The *New Amsterdam* decision states that if the insured were seeking indemnity for his own wrongdoing, this would constitute a complete defense against recovery.

whether the insurance contract specifically insures against intentional injury?[190] The personal injury endorsement of the Club's insurance policy covered liability arising from the "wrongful entry, eviction, or other invasion of the right of private occupancy."[191] The purpose of this type of provision is to cover an insured for injury arising from its torts.[192] As the first *Ranger* decision observed, this coverage is not limited to injuries arising from an accident or occurrence.[193] Therefore, the provision insures against intentional injury.[194]

The next criterion under the *New Amsterdam Casualty Co.* factors is whether the wrongful act was within the contemplation of the insured at the time it entered into the insurance contract.[195] The Skolnicks' suit was based on the allegation that the purpose of the Club was to carry out the racist and anti-semitic policies of the deed restrictions which lapsed in 1968.[196] The coverage period for the insurance policy of the Club was from July 13th, 1980 through July 13th, 1983.[197] At the time the Club entered into the insurance contract it had been functioning to exclude certain ethnic groups since 1968 when the discriminatory deed restrictions expired. Intentional discrimination was therefore "within the contemplation" of the Club upon entering into the insurance contract.

The final inquiry of the *New Amsterdam Casualty Co.* factors is

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Id.

190. *Id.*

191. *See supra* note 25 for the entire text of the personal injury endorsement.

192. The typical personal injury provision covers certain enumerated torts. *See* Farbstein & Stillman, *supra* note 175, at 1239, for the standard personal injury endorsement drafted by the National Bureau of Casualty Underwriters. Bal Harbour Club's insurance policy contained identical coverage. *See supra* note 25.

193. *Ranger I*, 509 So.2d at 941.

194. The personal injury endorsement is a relatively recent development in insurance coverage. It clearly covers certain intentional torts such as libel, slander, false imprisonment and malicious prosecution. The fact that insurance companies regularly contract for this type of coverage shows that they no longer fully accept the public policy exclusion of coverage for all intentional acts. However, most insurance contracts do contain an exclusion for intentionally caused losses. Farbstein & Stillman, *supra* note 40, at 1238-51. *Ranger* is unique because the contract contained no intentional act exclusion. Therefore, the contract insured against *all* wrongful acts under the personal injury endorsement, including intentional discrimination.

195. New Amsterdam Casualty Co. v. Jones, 135 F.2d 191, 195 (6th Cir. 1943).

196. *Ranger I*, 509 So. 2d at 941.

197. Respondent's brief at 4, Ranger Ins. Co. v. Bal Harbour Club, Inc., 509 So. 2d 940 (Fla. 3d Dist. Ct. App. 1987) (No. 70,851).

whether the wrongful conduct is encouraged by insurance coverage.[198] One type of wrongful conduct which tends to be encouraged by insurance coverage is conduct designed to create a loss under the insurance contract.[199] Another type of misconduct which insurance tends to encourage is where the insured engages in wrongful acts which he would not engage in without the protection from liability offered by insurance.[200] Intentional discrimination clearly falls into the latter definition.[201] Bal Harbour Club's insurance policy enabled it to carry on its intentionally discriminatory policies without risk of liability, whereas the threat of liability would tend to deter the discriminatory policy. The wrongful conduct of the Club was of a type which tends to be encouraged by insurance coverage.

Thus, Bal Harbour Club committed wrongful acts of the type excluded from insurance coverage by Florida common law because act and injury were intentional, is seeking indemnification for its own intentional wrongdoing, entered into a contract which specifically insured against intentional wrongdoing, contemplated the wrongful conduct at the time it entered into the insurance contract, and insured against conduct which tends to be encouraged by insurance coverage. Under the factors Bal Harbour Club's acts of intentional discrimination were uninsurable.

CONCLUSION

Traditionally Florida law excludes all coverage where act and injury were intentional. However, in light of *Spreen* and *Everglades Marina*, as well as the widespread use of personal injury endorsements, the law is out of date. Public policy has changed and now allows insurance coverage for certain types of intentional acts once uninsurable. The first two *Ranger* decisions as well as *Spreen* and *Everglades Marina* show that Florida courts are no longer willing to employ a blanket application of the public policy exclusion. In deciding the *Ranger* case, the Florida Supreme Court must update Florida law by setting forth a standard which comports with current public policy and modern insurance practice.

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198. *New Amsterdam Casualty Co.*, 135 F.2d at 194-95.

199. R. KEETON, *supra* note 4, at § 5.3(f)(1971). *See also* Willborn, *supra* note 40, at 1014.

200. Willborn, *supra* note 40, at 1014-15.

201. *Id.*

The factors described above present an effective standard. The factors allow courts to examine the circumstances of each case and make a decision based upon whether the insurance coverage tended to encourage wrongful conduct. If an insured's conduct passes the factor test, a court may allow coverage in spite of the intentional nature of the conduct. In this way Florida law acknowledges the growth of insurance coverage for intentional torts, yet still protects the public interest from those who wish to profit by their own wrongdoing.

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