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I. INTRODUCTION

Individuals purchase liability insurance for one primary purpose: to shift liability to an insurer for injuries they may cause.[1] In order to protect themselves from liability for intentional injuries, insurance companies typically state in the policy agreement that coverage does not extend to "bodily injury . . . which is expected or intended by the insured . . . ."[2] A policy with such an exclusion clause clearly does not cover injuries wrongfully caused by the intentional torts of an insured person.[3] Over the past few decades, however, a more difficult issue has arisen: whether such a clause also excludes from coverage injuries caused by an insured person's intentional acts taken in self-defense.[4]

This Note examines a case that wrestles with this issue. In *Auto-Owners Insurance Co. v. Harrington*, decided July 29, 1997, the Supreme Court of Michigan held that, according to the plain language of the exclusion clause at issue, injuries caused by intentional self-defensive acts, even if legally justifiable, are excluded from coverage; thus, an insurer has no duty to defend or indemnify an insured under such circumstances.[5] Part II of this Note provides general background on how various state courts view the issue. Part III briefly outlines the

1. *See* Grange Ins. Co. v. Brosseau, 776 P.2d 123, 124 (Wash. 1989); *see also* Bryan P. Whitaker, *Empty Hands, Deep Pockets: Tort Liability and Potential for Recovery Against Individuals Applying Martial Arts Training in Self-Defense*, 31 GONZ. L. REV. 413, 415 (1996). For a discussion of an insurer's duty to defend or indemnify an insured when a claim is made, see *infra* note 80 and accompanying text.

2. North Carolina Farm Bureau Mut. Ins. Co. v. Stox, 412 S.E.2d 318, 321 (N.C. 1992).

3. *See infra* note 93 and accompanying text; *see also* Whitaker, *supra* note 1, at 416 ("Participating in an assault . . . is considered an intentional act . . . and would therefore fall outside the scope of coverage.").

4. *See generally* Whitaker, *supra* note 1 (providing overview of issues relevant to coverage determinations in martial arts self-defense situations).

5. 565 N.W.2d 839, 840 (Mich. 1997).

facts in the *Harrington* case and the court's holding. Part IV analyzes the court's reasoning in detail, as well as the reasoning of other courts on both sides of the issue. This Note concludes that the Michigan court's "freedom of contract" reasoning is sound; further, it offers additional support for the view that injuries caused by intentional acts taken in self-defense are indeed "intended or expected" from the standpoint of the insured, and are thus properly excluded from coverage.

II. BACKGROUND

In holding that injuries caused by intentional acts taken in self-defense are excluded from coverage under an "expected or intended injury" clause, the Michigan Supreme Court joined what the Florida Supreme Court called "the majority of jurisdictions."[6] While these courts recognize a legal right of individuals to defend themselves, they generally point to "the sanctity of the parties to freely contract"[7] and find that the language of the exclusion clause at issue unambiguously precludes coverage.[8] "Other jurisdictions," however, "do not find this mechanical interpretation appropriate";[9] these jurisdictions find that the language of such exclusion clauses is ambiguous and justify their holdings with various public policy arguments.[10]

The law on whether intentional acts taken in self-defense are properly excluded from liability coverage is, however, still in a state of flux. Many state courts have yet to address the issue, and at least one state supreme court has *changed its mind* as to how these clauses should be interpreted.[11] Therefore, although this Note specifically examines the decision of the Michigan Supreme Court, it has broad application; it is simply a matter of time before other state courts are forced to examine (or reexamine) this issue.

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6. State Farm Fire & Cas. Co. v. Marshall, 554 So. 2d 504, 505 (Fla. 1989). Whether this truly is a majority rule is somewhat disputed. *See infra* note 44.

7. *Marshall*, 554 So. 2d at 505.

8. *See infra* Section IV.A.

9. State Farm Fire & Cas. Co. v. Poomaihealani, 667 F. Supp. 705, 708 (D. Haw. 1987).

10. *See infra* Section IV.C.

11. *See* Transamerica Ins. Group v. Meere, 694 P.2d 181, 190 (Ariz. 1984) (Holohan, C.J., dissenting) ("Th[is] issue . . . was decided in *Lockhart v. Allstate Ins. Co.*, 119 Ariz. 150, 579 P.2d 1120 (App. 1978). Review was denied by this court.").

III. *AUTO-OWNERS INSURANCE CO. V. HARRINGTON*[12]

A. Facts

James Harrington (Harrington), defendant in this declaratory relief action, was the holder of a liability insurance policy issued by the plaintiff, Auto-Owners Insurance Company (Auto-Owners).[13] Under the terms of this policy, Auto-Owners had a duty to pay damages resulting from "covered" bodily injuries to third parties caused by the insured and to defend the insured in civil actions arising out of such injuries.[14] The policy specifically excluded from such coverage any "bodily injury . . . *expected or intended*" by the insured.[15]

During the afternoon of August 1, 1989, Brian Tew (Tew), who was living with Harrington's neighbor, became intoxicated and aggressive toward members of Harrington's family.[16] Tew's behavior became more erratic as the evening progressed; he threatened to kill Harrington's nephew and was later observed firing an automatic weapon into a nearby lake.[17] In response to these threats, Harrington prepared himself to protect his family by retrieving a shotgun from his garage.[18]

Later that night, Harrington's wife observed Tew climbing up the side of the garage toward an upstairs window where the Harrington children were located.[19] Assuming Tew still had a weapon and planned to harm the family, Harrington intentionally shot Tew with the shotgun, hitting him in the stomach.[20]

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12. 565 N.W.2d 839 (Mich. 1997).
13. *See id.*
14. *See id.* at 841. The "Personal Liability" section of the policy stated:

> *We will pay all sums which an insured person becomes legally obligated to pay as damages because of bodily injury . . . covered by this policy.*
>
> *If a claim is made or suit is brought against the insured person for liability under this coverage, we will defend the insured person at our expense . . . .*

Id.

15. *Id.*
16. *See id.* at 840.
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.* at 842. Harrington admitted in deposition testimony that he "intentionally pointed his gun at Tew and intended to shoot him, hoping to stop Tew's advance toward the bedroom window." *Id.*

Tew died as result of the shooting. Although Tew had no weapon in his possession at the time of the shooting, criminal charges were not brought against Harrington.[21]

Tew's family brought suit against Harrington and Auto-Owners for wrongful death. Auto-Owners filed this action seeking a declaration that it had no duty to defend or indemnify.[22] The insurance company argued that because the plaintiff admittedly intended to shoot Tew, the injury was "expected or intended" within the meaning of the exclusion clause, and thus outside the coverage of the policy.[23] Harrington countered that because his actions were taken in self-defense, Auto-Owners should be required to defend him. He argued that his actions, while volitional, were not "'wrongful' or 'unjustified,'" and therefore could not result in an "intentional" injury.[24]

The trial court found that Auto-Owners owed Harrington a duty to defend. The Michigan Court of Appeals reversed, holding that Harrington's admittedly intentional act fell "squarely within the intentional-act exclusion."[25] The Michigan Supreme Court agreed, stating that "[t]o except injurious action taken in self-defense from the intentional-acts exclusion would impermissibly disregard the clear language of the . . . contract between insurer and insured."[26] The court further held that where injuries are "intentional, or at least expected," they are "excluded from indemnification coverage, even if taken in self-defense."[27]

B. The Court's Reasoning

The Michigan Supreme Court based its decision that injuries caused by an intentional act taken by an insured in

21. *See id.* at 840.

22. *See id.*

23. *Id.*

24. *Id.* at 842.

25. *Id.* at 840. For the Michigan Court of Appeals, the question of whether Tew's injuries were "intended or expected" hinged simply on whether Harrington "was capable of foreseeing the consequences" of his actions. Auto-Owners Ins. Co. v. Harrington, 538 N.W.2d 106, 109 (Mich. Ct. App. 1995), *aff'd*, 565 N.W.2d 839 (Mich. 1997). Thus where the injury is "subjectively . . . intended and expected," the fact that the insured has acted in "self-defense [does] not create an exception to the intentional acts exclusion . . . ." *Id.* at 110.

26. *Harrington*, 565 N.W.2d at 842.

27. *Id.* at 842S43.

self-defense fall within an "intended or expected" exclusion clause primarily on a strict analysis of what it called the "plain language of the policy exclusion."[28] The court initially noted that "[a]n insurance policy is an agreement between parties that a court interprets 'much the same as any other contract'"; as with other contracts, the aim is to "best effectuate the intent of the parties."[29] Thus, although a coverage exclusion clause is "to be strictly construed in favor of the insured,"[30] such a clause is valid "'as long as it is clear, unambiguous and not in contravention of public policy.'"[31] Although not expressly included in the Supreme Court's analysis, the Court of Appeals, whose decision the Supreme Court affirmed, also emphasized that "[a]n ambiguity will not be created where none exists."[32]

In light of these general principles of contract interpretation, the court held that the language of the exclusion clause was indeed "plain."[33] The court noted that the insurance policy "does not qualify the injuries excluded from coverage with terms such as 'wrongful' or 'unjustified,'" but rather "*only* distinguishes injuries that are either 'intended or expected' from those that are purely accidental."[34] The policy language, the court reasoned, calls for a "subjective inquiry into the intent *or expectation* of the insured,"[35] and requires nothing more than a finding that the "injuries are the 'natural, foreseeable, expected, and anticipated result of an intentional act.'"[36] Thus, where an insured "intend[s], or at least expect[s], that bodily

28. *Id.* at 842.

29. *Id.* at 841 (quoting Auto-Owners Ins. Co. v. Churchman, 489 N.W.2d 431 (Mich. 1992)).

30. *Id.*

31. *Id.* (quoting Raska v. Farm Bureau Mut. Ins. Co., 314 N.W.2d 440 (Mich. 1982)).

32. Auto-Owners Ins. Co. v. Harrington, 538 N.W.2d 106, 108 (Mich. Ct. App. 1995); *see also Churchman*, 489 N.W.2d at 431.

33. *Harrington*, 565 N.W.2d at 842.

34. *Id.* (emphasis added).

35. *Id.*

36. *Id.* (quoting Metropolitan Property & Liab. Ins. Co. v. DiCicco, 443 N.W.2d 734, 743 (Mich. 1989)). The court also noted that "'[t]here is a significant difference between insurance contracts that exclude both *intentional and expected* injuries and those that merely exclude intentional injuries.'" *Id.* at 842 n.6 (emphasis added) (quoting Frankenmuth Mut. Ins. Co. v. Piccard, 489 N.W.2d 422 (Mich. 1992) (plurality opinion)).

injury [will] result from"[37] an intentional act, the resulting injuries fall "squarely within the intentional-act exclusion."[38]

Applying these rules to the case, the court noted that the volitional nature of Harrington's act was not in dispute—although he argued that the shooting was "reactionary,"[39] Harrington admitted that he "intentionally pointed his gun at Tew and intended to shoot . . . hoping to stop [him]."[40] Additionally, the court noted that Harrington had "retrieved his . . . shotgun from his garage" earlier in the day with the expectation that he might need it to defend himself from Tew.[41] From the nature of the act the court concluded that "Harrington certainly was aware . . . 'that intentionally shooting at [Tew] would result in serious bodily harm or death.'"[42] Thus even if the shooting was, as Harrington claimed, a "justifiable response to unwarranted aggression," to except it from the exclusion clause would "impermissibly disregard the clear language of the . . . contract."[43]

While the court recognized that other jurisdictions have held "that an insured's intentional act taken in self-defense does not constitute intentional conduct," it noted that it viewed its holding as "consonant with the majority [of the] state[s]."[44] It also noted that its holding was consistent with the reasoning of its "prior determinations that injurious action by an insured who is ill or intoxicated, and subsequently absolved from civil

37. *Id.* at 842.
38. *Id.* at 840.
39. *Id.* at 842.
40. *Id.*
41. *Id.* at 840.
42. *Id.* at 842 (quoting Auto-Owners Ins. Co. v. Harrington, 538 N.W.2d 106 (Mich. Ct. App. 1995)).
43. *Id.*
44. *Id.* at 842 (citing Transamerica Ins. Group v. Meere, 694 P.2d 181 (Ariz. 1984); Allstate Ins. Co. v. Novak, 313 N.W.2d 636 (Neb. 1981)). It is debatable whether the Michigan rule truly represents a majority of courts that have decided this issue. *But see* State Farm Fire & Cas. Co. v. Marshall, 554 So. 2d 504, 505 (Fla. 1989) ("[T]he majority of jurisdictions . . . hold that self-defense is not an exception to the intentional acts exclusion . . . ."). *See generally* James L. Rigelhaupt, Jr., Annotation, *Acts in Self-Defense as Within Provision of Liability Insurance Policy Expressly Excluding Coverage for Damage or Injury Intended or Expected by Insured*, 34 A.L.R.4th 761 (1981 & Supp. 1996); Whitaker, *supra* note 1, at 418 (stating that "a minority of jurisdictions . . . exclude[] coverage in self-defense situations").

or criminal liability, is nonetheless excluded from coverage" under such a policy provision.[45]

IV. ANALYSIS

At first blush, the Michigan court's holding may give rise to some feelings of discomfort. That an insurance company should have no duty to defend a sympathetic policy holder who has simply attempted to protect himself or his family from an assault may seem to contradict basic sentimental notions of fairness; indeed, a good number of jurisdictions have decided this issue to the contrary. This Note argues, however, that the Michigan court was correct for three reasons.

First, the court's determination that injuries caused by intentional acts taken in self-defense are "intended or expected" and therefore excluded from coverage comports with traditional principles of contract interpretation. The language of these policy exclusions is clear and unambiguous;[46] courts that find that such an exclusion applies to acts taken in self-defense correctly apply the common meaning of these terms. On the other hand, jurisdictions which determine that coverage exists for such injuries seem to ignore the rights of parties to bargain for contractual benefits and burdens and to rely on the agreement's clear language. In short, requiring an insurer to defend under such circumstances would amount to the judicial revision of a clear contract.

Second, while an insurer's duty to defend may be broader than its duty to indemnify, there can be no duty to defend where there is no possibility that an injury is covered under the policy. In cases where the deliberate nature of the act is not disputed, regardless of whether the actions of the insured are justified by self-defense principles, there simply is no possibility that the resultant injury may be covered. On one hand, if the intentional act is not justified, it is simply an intentional tort, obviously outside the coverage of the policy.[47] On the other hand, if the acts are justified, there is no liability and thus no possibility for coverage under the policy. With no possibility of

45. *Harrington*, 565 N.W.2d at 842 n.8.

46. For an example of a typical exclusion clause, see *supra* note 14 and accompanying text.

47. For a discussion of how an insurer's duty to defend arises, see *infra* note 80 and accompanying text.

coverage regardless of the outcome, there can be no duty to defend or indemnify.

Finally, the arguments advanced by courts to justify judicial tinkering with the ability of insurers and insured persons to freely contract are unpersuasive. Such justifications ignore the clear language of these exclusion clauses and are simply a reflection of preconceived and unwise judicial policy "to distribute the consequences of [a] loss on an insurance company" rather than on an insured in all cases.[48]

A. Traditional Contract Analysis

Courts routinely recognize that insurance policy agreements are contracts and that policy terms are governed by traditional rules of contract interpretation.[49] Thus, policy terms are assigned their "'ordinary and popular'" definitions and are given the meaning "a layperson would ascribe to the language."[50] Although most courts recognize that "exclusionary provisions are not favored and . . . will be construed against the insurer," this presumption arises only where the language of the exclusion is "ambiguous."[51] Where the language of such an

48. Transamerica Ins. Group v. Meere, 694 P.2d 181, 190 (Ariz. 1984) (Holohan, C.J., dissenting).

49. *See, e.g.*, *Harrington*, 565 N.W.2d at 841 ("An insurance policy is an agreement between parties that a court interprets 'much the same as any other contract' to best effectuate the intent of the parties . . . ." (quoting Auto-Owners Ins. Co. v. Churchman, 489 N.W.2d 431, 433 (1992))). The Arizona Supreme Court ostensibly takes a different view of insurance policy interpretation; the court notes that

> [s]ome of the cases . . . resolve the issue [of whether self defense falls within the intended or expected injury exclusion] on the fictional basis of the "intent of the parties." . . . This is an approach which we have abandoned. . . . We believe the proper methodology is to determine the meaning of the clause . . . by examining the purpose of the exclusion . . . , the public policy considerations involved and the transaction as a whole.

Meere, 694 P.2d at 185 (citations omitted). However, even the Arizona court admits that this approach is only valid where the policy term "is susceptible to different constructions." *Id.*

50. Montrose Chem. Corp. v. Admiral Ins. Co., 913 P.2d 878, 888 (Cal. 1995) (quoting CAL. CIV. CODE §§ 1638, 1644); *see also* Espinet v. Horvath, 597 A.2d 307, 309 (Vt. 1991); GEORGE J. COUCH ET AL., COUCH CYCLOPEDIA OF INSURANCE LAW § 44:286 (2d ed. 1982).

51. North Carolina Farm Bureau Mut. Ins. Co. v. Stox, 412 S.E.2d 318, 321 (N.C. 1992).

exclusionary clause is "'clear, unambiguous and not in contravention of public policy,'" the clause will be found valid.[52]

Liability insurance policies such as the one at issue in *Harrington* typically limit coverage to injuries that arise by "accident."[53] In its ordinary sense, the word "accident" refers to "an event happening without any human agency,"[54] or an "unusual, unexpected, and unforeseen happening."[55] Because the language of these insurance policies makes clear that the accidental nature of the injury must be determined from the point of view of the insured (as opposed to the victim), the Washington Supreme Court has held that, in accordance with the common definition, "an accident is *never* present *when a deliberate act is performed* unless some additional unexpected, independent and unforeseen happening occurs which . . . brings about the result . . . ."[56]

Policies such as the one at issue also typically exclude from coverage injuries that are "intended" from the standpoint of the insured.[57] Although courts vary in their definition of what

52. *Harrington*, 565 N.W.2d at 841 (quoting Raska v. Farm Bureau Ins. Co., 314 N.W.2d 440 (Mich. 1982)).

53. *See* Grange Ins. Co. v. Brosseau, 776 P.2d 123, 124 (Wash. 1989).

54. BLACK'S LAW DICTIONARY 15 (6th ed. 1990). For an even more "ordinary" definition, see WEBSTER'S NEW WORLD DICTIONARY 4 (Pocket Books Paperback ed. 1995) (defining "accident" as "an unintended happening . . . a mishap . . . chance").

55. *Grange Ins. Co.*, 776 P.2d at 125 (citing Tieton v. General Ins. Co. of Am., 380 P.2d 127 (Wash. 1963)).

56. Unigard Mut. Ins. Co. v. Spokane Sch. Dist. 8, 579 P.2d 1015, 1018 (Wash. 1978) (emphasis added). The reasoning of the Supreme Court of Washington in *Grange Insurance Co. v. Brosseau*, 776 P.2d 123 (Wash. 1989), is instructive. There, the plaintiff insurance company sought a declaration that it had no duty to defend an insured that intentionally shot a third party in self-defense. The court first noted that the insurance policy in question, like the one at issue in *Harrington,* covered injuries occurring by "accident," but excluded injuries "expected or intended" by the insured. *Id.* at 124. In determining that the injuries were not "accidental," the court employed a two-step analysis. First, the court inquired whether the insured's acts giving rise to the injury were "deliberate." *Id.* at 125. Once the deliberate nature of the act was established, an injury could only be considered "accidental" if "'some additional unexpected, independent and unforeseen happening occurs which produces . . . injury or death.'" *Id.* (citing *Unigard*, 579 P.2d at 1018).

57. *Harrington,* 565 N.W.2d at 841; *see also* North Carolina Farm Bureau Mut. Ins. Co. v. Stox, 412 S.E.2d 318, 322 (N.C. 1994); Whitaker, *supra* note 1, at 415. Although the effects of such an exclusion clause are often analyzed separately from the analysis of the injury as an "accident," some courts have noted that the two issues are, in reality, two incarnations of the same question. *See Unigard*, 579 P.2d at 1018.

constitutes an "intended" injury,[58] the term is generally used in an insurance context "to denote that the actor desires to cause the consequences of his act or believe[s] that some consequences are substantially certain to result from his act."[59] The language of a typical intended injury exclusion clause does not add an additional requirement that the act producing the injury also be "'wrongful' or 'unjustified'" in order for the exclusion to apply.[60] Although some courts have judicially inferred such a requirement,[61] the Florida Supreme Court has noted that, based solely on the plain language of the clause,

> [t]he intent underlying an act of self-defense where the defender intends to harm the attacker is identical to that underlying an assault. In each, the actor intends to inflict harm on the other. Just as assault is often impulsive or reactive, so too is self-defense. The difference between the two lies in the motive or purpose governing the act . . . . Nevertheless, such acts of self-defense are undeniably intentional and have been held to be embraced within intentional act exclusions by a majority of courts.[62]

Even where the insured argues that he had no ill will or desire to hurt an attacker, but merely intended to protect himself,

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58. For a general discussion of how various courts define "intent to injure" in an insurance coverage context, see Whitaker, *supra* note 1, at 415–16. Whitaker notes:

> Whether a court will find coverage . . . depends largely on the jurisdictional interpretation of policy exclusions for injuries caused intentionally by . . . the insured. The three primary interpretations taken by courts are: (1) whether the insured intended to commit the act and intended it "to cause some kind of bodily injury;" (2) whether the insured had the "specific intent to cause the type of injury suffered;" or (3) whether the insured intended the "natural and probable consequences of the insured's act."

Id. at 416 (footnotes omitted) (quoting Pachuki v. Republic Ins. Co., 278 N.W.2d 898, 901 (Wis. 1979)).

59. COUCH, *supra* note 50, § 44:289.

60. *Harrington*, 565 N.W.2d at 842.

61. See, for example, *State Farm Fire & Casualty Co. v. Poomaihealani*, 667 F. Supp. 705, 709 (D. Haw. 1987) (citing Transamerica Ins. Group v. Meere, 694 P.2d 181, 189 (Ariz. 1984), for the proposition that "'the proper interpretation of the clause in question is that it excludes . . . coverage when the insured intentionally acts *wrongfully* with a purpose to injure'"); Mullen v. Glens Falls Ins. Co., 140 Cal. Rptr. 605, 610 (Cal. Ct. App. 1977) ("[W]hen a . . . policy excludes . . . injuries . . . that are either 'intended' or 'excepted,' [sic] the policy is construed merely to exclude . . . injuries . . . resulting from acts involving an element of wrongfulness or misconduct . . . .").

62. State Farm Fire & Cas. Co. v. Marshall, 554 So. 2d 504, 505 (Fla. 1989).

courts applying the common definition of "intended" have recognized that the insured "must be taken to have intended an injury where the circumstances indicate that he knew his act would damage the injured party."[63]

Finally, policies such as the one at issue typically exclude from coverage injuries which are "expected" from the standpoint of the insured. As the Michigan Supreme Court noted in *Harrington,* "[t]he policy's use of the word 'expected' broadens the scope of the exclusion because 'expected' injuries are the 'natural, foreseeable, expected, and anticipated result of an intentional act.'"[64] Jurisdictions applying the "plain, ordinary, and popular sense"[65] of the word "expected" have readily determined that "[t]hough [legally] justified, an injury inflicted by an act taken in self-defense may be expected."[66] On the other hand, jurisdictions that require that the insured demonstrate something akin to specific intent to injure in order for the injury to be excluded seem to simply ignore the "expected" prong of the inquiry.[67]

Jurisdictions holding that an act taken in self-defense is not "expected" because it is merely an unplanned "*reaction* to [an] attacker,"[68] rely on faulty reasoning. First, taking this argument to its logical extreme, all acts are "unexpected" before they are planned; that an act taken in self-defense often entails

63. Espinet v. Horvath, 597 A.2d 307, 309 (Vt. 1991); *see also* Hartford Accident & Indem. Co. v. Krekeler, 363 F. Supp. 354, 358 (E.D. Mo. 1973) (holding that where an insured intended the movement of his own arm, the clenching of his own fist, and the forceful contact between his fist and another person, a finding that the injuries were "intended" was "inescapable"), *rev'd on other grounds*, 491 F.2d 884 (8th Cir. 1974).

64. *Harrington*, 565 N.W.2d at 842.

65. *Espinet*, 597 A.2d at 309 (quoting State v. Glens Falls Ins. Co., 404 A.2d 101 (Vt. 1979).

66. *Id.* at 310.

67. *See, e.g.*, North Carolina Farm Bureau Mut. Ins. Co. v. Stox, 412 S.E.2d 318 (N.C. 1992). Despite the presence of the word "expected" in the exclusion clause, this case rejects an appellate court's opinion that an injury fits under the exclusion dause even though "'there might well have been no specific intent to injure,'" and holds that "the resulting injury, not merely the volitional act, . . . must be intended for" the "expected or intended" exclusion to apply. *Id.* at 322 (quoting North Carolina Farm Bureau Mut. Ins. Co. v. Stox., 401 S.E.2d 82, 85 (N.C. Ct. App. 1991). Even the North Carolina Supreme Court recognized, however, that "[t]he character of the insured's act [could] rise to the level which would require that an intention to inflict an injury be inferred." *Id.* at 324.

68. Preferred Mut. Ins. Co. v. Thompson, 491 N.E.2d 688, 691 (Ohio 1986).

only a short planning period should not change the analysis. Second, because the language of these exclusion clauses refers to expected "*injuries*" rather than "acts," the focus of analysis should be on whether, given the volitional character of the act, the insured expected *the result*. The question is not whether the insured "expected" to shoot an attacker when he left his home in the morning; the question is, rather, given the fact that the act of shooting was deliberate, whether the insured "expected" the resultant injury.[69]

Thus, in light of the "plain, ordinary, and popular" definitions of the policy terms, an injury simply cannot be "accidental" where, as in *Harrington*, an insured admits that he deliberately "pointed his gun at [a victim] and intended to shoot him, hoping to stop [his] advance."[70] Similarly, given the deliberate character of the defensive shooting, a finding that the resultant injury is not expected or intended in the ordinary sense of those terms would, in the words of the Michigan Supreme Court, "'fl[y] in the face of all reason, common sense and experience.'"[71] Because the language of the policy mentions nothing about a "wrongfulness" qualification in order for the exclusion clause to apply, the fact that an insured is motivated to act out of a perceived need to defend himself "in no way negates the deliberate nature of his act."[72] The language of the exclusion clause at issue in *Harrington* simply states "we do not cover . . . bodily injury . . . *expected or intended by an insured person*";[73] thus, the Michigan Supreme Court was correct in its determination that, according to the "plain language of the policy,"[74] there was no coverage for injuries caused by the insured's intentional act taken in self-defense.

Because these "expected or intended injury" clauses are unambiguous, courts should not "rewrite [the] policy . . . to provide coverage where the clear language . . . does not."[75] As

69. *See* Grange Ins. Co. v. Brosseau, 776 P.2d 123, 126 (Wash. 1989) (recognizing that "[s]erious bodily injury, . . . was, from [the insured's] standpoint, obviously an expected result of his intentional act of shooting [the attacker]").

70. Auto-Owners Ins. Co. v. Harrington, 565 N.W.2d 839, 842 (Mich. 1997).

71. *Id.* (quoting Metropolitan Property & Liab. Ins. Co. v. DiCicco, 443 N.W.2d 734, 746 (Mich. 1989)).

72. *Grange Ins. Co.*, 776 P.2d at 126.

73. *Harrington*, 565 N.W.2d at 841.

74. *Id.* at 842.

75. State Farm Fire & Cas. Co. v. Marshall, 554 So. 2d 504, 506 (Fla. 1989);

the Supreme Court of Florida has noted, "the sanctity of the parties to freely contract prevails," even in a coverage exclusion context.[76] Because the right to freely contract and rely on the plain meaning of the terms in an agreement is so vital, even if a court could identify a valid public policy reason favoring coverage, courts should be reluctant to "invoke such public policy to override the provisions of these policies."[77] As a dissenting justice in *Fire Insurance Exchange v. Berray*[78] noted, such disrespect for parties' ability to contract could be applied to undermine any "attempt[] by [an] insurer to use simple, understandable language in the policy exclusion."[79]

B. No Possibility of Coverage

It is generally accepted that an insurer's duty to defend must be determined based on whether a claim against an insured person gives rise to a "potential of liability."[80] This potential in turn must be evaluated in light of the "allegations of the complaint" against the insured, as well as any "[f]acts extrinsic to the complaint . . . [which] reveal a possibility that the claim may be covered by the policy."[81] Thus, where facts suggest that the insured's conduct may have been merely negligent, the insurer retains a duty to defend even though the

see also Grange Ins. Co., 776 P.2d at 127 ("We . . . will not rewrite the policy here to provide for coverage when the plain language of the policy does not."); Home Ins. Co. v. Neilsen, 332 N.E.2d 240, 244 (Ind. Ct. App. 1975) (refusing to "rewrit[e] the contract agreed to by the parties to provide any additional coverage"); Espinet v. Horvath, 597 A.2d 307, 310 (Vt. 1991) ("We may not read [a wrongfulness] requirement into the contract.").

76. *Marshall*, 554 So. 2d at 505.

77. *Grange Ins. Co.*, 776 P.2d at 127.

78. 694 P.2d 191 (Ariz. 1984).

79. *Id.* at 195 (Holohan, C.J., dissenting).

80. Gray v. Zurich Ins. Co., 419 P.2d 168, 177 (Cal. 1966). It is often said that an insurer's "duty to defend is broader than the duty to indemnify." Horace Mann Ins. Co. v. Barbara B., 846 P.2d 792, 795 (Cal. 1993). This principle has been articulated to ensure that an insured will be protected even where a suit may be "groundless, false or fraudulent." Allstate Ins. Co. v. Novak, 313 N.W.2d 636, 638 (Neb. 1981). This oft-quoted language, however, does not suggest that an insurer has an absolute duty to defend even where there is no possibility that the injury could be covered under the terms of the policy; rather, the duty arises only "where facts . . . alleged . . . if proven, would render the insurer liable." *Grange Ins. Co.*, 776 P.2d at 124.

81. *Barbara B.*, 846 P.2d at 795.

complaint may only allege intentional torts.[82] However, as the Supreme Court of Michigan has pointed out, no duty to defend can be manufactured where the contention that the insured "did not intend or expect the injury 'flies in the face of all reason, common sense and experience.'"[83]

In cases such as the one under consideration in *Harrington,* where there is "no serious question"[84] regarding the deliberate character of the insured's act and the expected or intended nature of the resultant injury, there is simply no "possibility that the claim may be covered by the policy."[85] First, looking solely to the "allegations of the complaint,"[86] the plaintiff's "wrongful death action"[87] alleged intentional torts against the insured. Second, even if the allegations of complaint included a claim that Harrington negligently discharged his shotgun at Tew, the "[f]acts extrinsic to the complaint"[88] brought to light during discovery, particularly Harrington's admission during deposition testimony that he deliberately retrieved his shotgun and intentionally shot Tew with the purpose of stopping him,[89] independently showed that Tew's injuries were "intentional, or at least expected"[90] and therefore outside the possible realm of coverage under the "expected or intended" exclusion clause. A finding that Harrington's act could have been merely negligent under these circumstances indeed "'flies in the face of all reason, common sense and experience.'"[91] Thus, under prevailing notions of insurance coverage law, there can be no

82. *See* Zelda Inc. v. Northland Ins. Co., 66 Cal. Rptr. 2d 356, 361 (Cal. Ct. App. 1997) (citing Montrose Chem. Corp. v. Superior Court, 861 P.2d 1153 (Cal. 1993)) (recognizing that to determine a duty to defend, an insurer must take into account all available facts).

83. Auto Club Group Ins. Co. v. Marzonie, 527 N.W.2d 760, 768 (Mich. 1994) (plurality opinion) (quoting Metropolitan Property & Liab. Ins. Co. v. DiCicco, 443 N.W.2d 734, 746 (Mich. 1989)); *see also* Gunderson v. Fire Ins. Exch., 44 Cal. Rptr. 2d 272, 277 (Cal. Ct. App. 1995) ("An insured may not trigger the duty to defend by speculating about extraneous 'facts' regarding potential liability.").

84. *Grange Ins. Co.*, 776 P.2d at 127.

85. *Barbara B.*, 846 P.2d at 795.

86. *Id.*

87. Auto-Owners Ins. Co. v. Harrington, 565 N.W.2d 839, 840 (Mich. 1997).

88. *Barbara B.*, 846 P.2d at 795.

89. *See supra* note 20.

90. *Harrington*, 565 N.W.2d at 842.

91. *Id.* (quoting Metropolitan Property & Liab. Ins. Co. v. DiCicco, 443 N.W.2d 734, 746 (Mich. 1989)).

duty to defend where an insured's act is clearly intentional, regardless of whether it is justified.

Articulated in another way, there is no practical possibility, based on the nature of the victim's claim and the insured's proffer of self-defense, "that the claim may be covered by the policy,"[92] regardless of whether Harrington's actions were legally justified by self-defense principles. On one hand, if the trial court were to find that Harrington's use of force was not justifiable self-defense, his admittedly intentional act would be an intentional tort, clearly outside the coverage of the policy.[93] On the other hand, if the trial court were to find that Harrington's use of force was indeed reasonable self-defense, he would not be liable to Tew; the insurer would thus have no reason to indemnify the claim. Therefore, based on the generally accepted standard that an insurer only has a duty to defend where the damages sought are potentially within the coverage of the policy,[94] an insurer has no duty to defend where the liability of an insured depends on whether an admittedly intentional act either is, or is not, self-defense.

C. The Reasoning of Cases to the Contrary is Unpersuasive

Courts holding that injuries caused by the deliberate acts of an insured in self-defense are covered by liability insurance policies, despite the presence of an "expected or intended injury" exclusion clause, have articulated several policy considerations to justify their failure to give effect to the plain language of these policy terms. None of these policy arguments is persuasive.

In *Transamerica Insurance Group v. Meere*,[95] the Arizona Supreme Court held that injuries resulting from actions taken by an insured in self-defense were indeed covered under a

92. *Barbara B.*, 846 P.2d at 795.

93. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 19, at 109–10 (4th ed. 1971) ("The defendant is not privileged to inflict a beating which goes beyond the real or apparent necessities of his own defense. If he does, he is committing a tort as to the excessive force . . . ."). *But cf.* Transamerica Ins. Group v. Meere, 694 P.2d 181, 187 (Ariz. 1984) (opining that some courts "fix minimal blame on one who overreacts in self-defense because . . . the mental state induced in one repulsing an attack is different from that of the attacker (who commits an 'intentional tort')").

94. *See* Gray v. Zurich Ins. Co., 419 P.2d 168, 177 (Cal. 1966).

95. 694 P.2d 181 (Ariz. 1984).

liability policy, despite the presence of an "expected or intended" exclusion clause.[96] The court reasoned that although the self-defensive act of an insured may be undeniably volitional, her "primary intent" is to protect herself, not to injure her assailant.[97] The court therefore held that, in an "expected or intended injury" exclusion context, "the relevant intent" is "the purpose which underlies the insured's basic conduct," rather than the intent "that . . . accompanies the immediate act."[98] Thus an injury caused by the volitional act of an insured is only excluded from coverage if "the conduct which led to the [injury] was intentionally wrongful from the viewpoint of the law of torts."[99]

The Arizona Supreme Court expanded upon this "primary intent" theme in *Fire Insurance Exchange v. Berray*.[100] Here, the court explicitly recognized that in most intentional tort contexts, "intent" requires little more than that the act be volitional.[101] The court further noted that, in what it called "a narrow sense," "the act of shooting a person in self-defense *is intentional*."[102] Despite this recognition of the ordinary definition of intent, the court adopted a "broader"[103] definition of the word, holding that "in order to constitute 'intent' in an intentional acts exclusion . . . the insured *must desire to harm the plaintiff*."[104]

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96. *See id.* at 184.

97. *Id.* at 188; *see also, e.g.*, Allstate Ins. Co. v. Novak, 313 N.W.2d 636, 640–41 (Neb. 1981) ("[W]hen one acts in self-defense the actor is not generally acting for the purpose of intending any injury to another but, rather, is acting for the purpose of attempting to prevent injury to himself."); Farmers Ins. Exch. v. Sipple, 255 N.W.2d 373, 376–77 (Minn. 1977) (finding coverage where insured's act of striking an assailant in self-defense was "just a reflex action").

98. *Meere,* 694 P.2d at 186.

99. *Id.* at 189; *see also* Fire Ins. Exch. v. Altieri, 1 Cal. Rptr. 2d 360, 364 (Cal. Ct. App. 1992) (recognizing that California courts infer an "element of wrongfulness" in a coverage exclusion).

100. 694 P.2d 191 (Ariz. 1984).

101. *See id.* at 194 (citing W. PROSSER, THE LAW OF TORTS § 8 at 31 (3d ed. 1964)).

102. *Id.* at 193 (emphasis added) (quoting Fire Ins. Exch. v. Berray, 694 P.2d 259, 261 (Ariz. Ct. App. 1983), *modified,* 694 P.2d 191 (Ariz. 1984)).

103. *Berray*, 694 P.2d at 193 (quoting Fire Ins. Exchange v. Berray, 694 P.2d 259, 261 (Ariz. Ct. App. 1983)). In contrast, the California Supreme Court recognized a "common and ordinary" definition of "intent." Montrose Chem. Corp. v. Admiral Ins. Co., 913 P.2d 878, 888 (Cal. 1995).

104. *Id.* at 194 (emphasis added) (quoting Patron-Oxford Mut. Ins. Co. v. Dodge, 426 A.2d 888, 891–92 (Me. 1981)).

This reasoning utterly fails to take into consideration the language of "expected or intended injury" exclusion clauses. The fact that an insured may prefer not to have ever been involved in a situation where self-defense becomes necessary does not make her actions any less "intentional" or the resulting injuries any less "expected." The language of these exclusion clauses simply "does not qualify the injuries excluded from coverage with terms such as 'wrongful' or 'unjustified.'"[105] Additionally, as has been previously discussed, such reasoning also fails to recognize that the use of the word "expected" in the exclusion clause "broadens the scope of the exclusion."[106] Even if the reasoning of the Arizona court could validly be applied to determine whether injuries caused by an insured were "intentional," it cannot be said that an insured who acts intentionally with force sufficient to defend herself from attack does not "expect" her action to cause some injury. The inclusion of the word "expected" in the language of the clause manifests a clear intent on the part of the drafters of the contract that exclusion of injuries not be determined based solely on the wrongfulness of the acts which caused them.

Other courts holding that actions taken in self-defense do not fall under such an exclusion clause reason that "the rationale for . . . intentional injury exclusion [clauses] . . . [is to] 'prevent[] individuals from purchasing insurance as a shield for their *anticipated intentional misconduct*'" thus allowing an insurance company to accurately calculate its risk of liability.[107] Therefore, because "[a]n act of self-defense . . . is neither anticipated nor wrongful,"[108] the rationale does not apply, and coverage should be found. These courts ignore, however, that the language of these policies mentions nothing about whether an injury is "anticipated" or "wrongful." Further, this argument's "conclusion . . . does not follow from the premise";[109] as the Supreme Court of Washington has noted, the fact that the "law actually prohibits the purchase of insurance covering

105. Auto-Owners Ins. Co. v. Harrington, 565 N.W.2d 839, 842 (Mich. 1997).

106. *Id.*

107. State Farm Fire & Cas. Co. v. Poomaihealani, 667 F. Supp. 705, 709 (D. Haw. 1987) (quoting Preferred Mut. Ins. Co. v. Thompson, 491 N.E.2d 688, 691 (Ohio 1986)).

108. *Thompson*, 491 N.E.2d at 691.

109. Chisom v. Roemer, 501 U.S. 380, 403 (1991).

[wrongful] acts" does not necessarily mean that "acts of self-defense which are lawful are therefore covered. That which public policy prohibits does not determine that which must be considered covered."[110]

Still another argument has been advanced that, even if the language of "expected or intended injury" exclusion clauses is indeed clear and unambiguous, consumers in the market for liability insurance have little opportunity to bargain for the omission of such a clause. This argument ignores the fact that insurers offer liability policies which do not contain the standard "expected or intended injury" clause. In *Cochran v. Aetna Casualty & Surety Co.*,[111] for example, the Maryland Court of Appeals dealt with an "expected or intended" exclusion clause that explicitly did not apply to injuries "resulting from the use of reasonable force to protect persons or property."[112] Thus, although a consumer may not be able to bargain for the deletion or addition of terms in any given policy, she does have the option to "shop around" for the type of liability coverage for which she is willing to pay.

V. CONCLUSION

Courts addressing the issue of whether injuries resulting from an intentional act taken in self-defense are covered under a standard "expected or intended injury" exclusion clause should restrain themselves from yielding to the temptation of rewriting insurance policies to accomplish results which, although sentimentally more appealing, are not justified by the policies' clear terms. "Freedom of contract" reasoning is sound and courts should enforce the plain language of these types of contracts. The language of such exclusion clauses clearly manifests the parties' intent to exempt such results from coverage. Therefore, insurance companies must have the right to bargain for and rely on favorable terms in liability policies which they issue.

D. Heath Bailey

110. Grange Ins. Co. v. Brosseau, 776 P.2d 123, 126 (Wash. 1989).

111. 637 A.2d 509 (Md. Ct. Spec. App. 1994), *aff'd*, 651 A.2d 859 (Md. 1995).

112. *Id.* at 510; *cf.* Zelda Inc. v. Northland Ins. Co., 66 Cal. Rptr. 2d 356, 361 (Cal. Ct. App. 1997) (interpreting a policy excluding from coverage injuries "arising out of assault or battery, or out of any act or omission in connection with the prevention or suppression of an assault or battery").