Should An Intentional Discriminator Be Insured?

David A. Silverstone*
Should An Intentional Discriminator Be Insured?

David A. Silverstone

Abstract

Throughout history, public policy has placed limitations on insurance coverage because of the fear that insurance provides an incentive to engage in wrongful conduct.

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. Public policy once condemned fire insurance as encouraging arson, and life insurance as promoting murder and suicide. Liability insurance was viewed as encouraging the lowering of the standard of care toward the safety of others. To deter intentionally caused losses, it has long been the rule that such losses are excluded from insurance coverage because they violate public policy. 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. In Ranger Insurance Co. v. Bal Harbour Club, Inc., 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 Rena Skolnick purchased real property in the town of Bal Harbour, Florida. 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." The deed also provided that the property could be transferred only to members of Bal Harbour Club, Inc. (Club). 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.
4. R. Keeton, Basic Text on Insurance Law § 3.3(a) (1971).
5. Simon, supra note 3, at 37.
7. Ranger I, 509 So. 2d at 940.
8. Id. at 941.
9. Id.
quired immediate reversion of the property to the grantor.\textsuperscript{16} Therefore, membership in the Club was essential to gaining marketable title to the property. The Skolnick\textquotesingle s, 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.\textsuperscript{11} The Skolnick\textquotesingle s sued the Club, claiming the purpose of the Club was to exclude Jews and other minorities from the neighborhood.\textsuperscript{14} 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.\textsuperscript{12} The second count sought a declaratory judgment which would hold the Club had engaged in housing discrimination,\textsuperscript{13} in violation of Chapter 11A, Article I of the Code of Metropolitan Dade County,\textsuperscript{14} and in violation of the Florida Constitution.\textsuperscript{15}


11. Id.

12. Ranger I, 509 So. 2d at 943.

13. Id. The Skolnick\textquotesingle s 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 Skolnick\textquotesingle s 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\textquotesingle s refusal to approve their application. Brief for Appellant at 3.

14. Id.

15. Code of Metropolitan Dade County, Fla. ch. 11A, art. 1 § 11A-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:

(1) shall be unlawful . . . for a person, owner, financial institution, real estate broker or real estate salesman, or any representative of the above, to:

(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;

(2) discriminate against a person in the terms, conditions or privileges 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. 1 § 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\textquotesingle s fees. Id.

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

22. Id. The trial court found coverage under the policy\textquotesingle s personal liability provision and the “incidental” contractual liability provision. Id.


24. Id.


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

"Personal Injury" means injury arising out of one of more of the following
Silverstone: Should An Intentional Discriminator Be Insured?

Intentional Discriminator

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

Ranger brought the case before the Florida Third District Court of Appeal, still not raising the public policy issue. 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. However, of the sale, purchase, rental, or lease of any housing accommodation, or in the furnishing of facilities or services in connection therewith.

Ranger

Code of METROPOLITAN DADE COUNTY, FLA. ch. 11A, art. 1 § 11A-1 (1)

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. 1 § 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:

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

Published by NSUWorks, 1999
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.16

Ranger filed a motion for a rehearing en banc,17 raising the public policy issue.18 While the motion for rehearing was pending, the court requested supplemental briefs on this issue.19

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.20 The court noted, however, both the lack of Florida law on this precise issue,21 and that 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 defamation 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 Skolnick’s 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 was 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 943, 946.
30. Id.
31. Id.

http://nsuworks.nova.edu/nlr/vol13/iss2/18

1989] Intentional Discriminator 675

other jurisdictions where the issue was ripe for adjudication inevitably avoided wrestling with its complexities.22 Recognizing the great public importance of the issue, the third district certified the question to the Florida Supreme Court23.

In the third district’s decision, the majority cited two Florida cases, Hartford Fire Insurance Co. v. Spreen,24 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.,25 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.26 Since no Florida precedent dealing with the insurability of discrimination claims exists, the Ranger majority opinion cited discrimination cases from other jurisdictions.27 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.28 Recognizing this, the majority found only two
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. Ranger filed a motion for a rehearing en banc, raising the public policy issue. While the motion for rehearing was pending, the court requested supplemental briefs on this issue. 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. The court noted, however, both the lack of Florida law on this precise issue, and that 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 Skolnick's 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 11-A, 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 the Club 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. Recognizing the great public importance of the issue, the third district certified the question to the Florida Supreme Court.

In the third district's decision, the majority cited two Florida cases, Hartford Fire Insurance Co. v. Spreen, 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., 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. Since no Florida precedent dealing with the insurability of discrimination claims exists, the Ranger majority opinion cited discrimination cases from other jurisdictions. 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. Recognizing this, the majority found only two
cases from other jurisdictions which actually support its decision.39

The majority relied on these cases in advancing two main con-
cepts.40 The first concept was by allowing insurance coverage for inten-
tional acts of discrimination, the victims of such discrimination will be
assured compensation.41 However, as the dissent pointed out, in dis-
crimination cases the individual's interest in collecting damages is
small in comparison with society's interest in deterring discrimina-
tion.42 The majority based the second concept on the public policy
favoring freedom of contract and the enforcement of contracts accord-
ing 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-
tered into the insurance contract and because of other competing public poli-
cies,45 the majority did not see this as a clear case.46 However, in
Florida it is longstanding public policy that an insured who intention-
ally 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 ex-
cision of coverage.

COMPETING PUBLIC POLICIES

Liability insurance, by definition, covers wrongful acts of the ins-
ured.48 Insurance functions both to compensate the victims of wrong-
ful acts and to protect the insured from the consequences of his wrong-
ful 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:

40. Other arguments advanced by the majority are: a) there is no need to deter
discrimination by disallowing insurance coverage, because punitive damages are avail-
able 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; 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 ele-
ment (see note 68, supra); 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 Col-
law. 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 insurer's discriminatory practices. Willhite, In-
surance, Public Policy, and Employment Discrimination, 86 Mont. 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 Har-

41. Ranger II, 509 So. 2d at 946.
42. Id. at 951-52 (Ferguson, J., dissenting).
43. Id. at 947-48.


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).
(N.Y. 1921) where Judge Cardozo stated, "[t]o restrict insurance to cases where liabil-
ity is incurred without fault of the insured would reduce indemnity to a shadow."

49. Id. at 163, 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. Boult, 437 So. 2d 1061, 1064 (Fla. 1983) (Refer-
ing 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 miscon-
duct); Inshall 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 McNeesly, supra note 1 for the proposition that liability
is not incurred.

http://nsuworks.nova.edu/nlr/vol13/iss2/18
cases from other jurisdictions which actually support its decision.\textsuperscript{39}

The majority relied on these cases in advancing two main concepts.\textsuperscript{41} The first concept was by allowing insurance coverage for intentional acts of discrimination, the victims of such discrimination will be assured compensation.\textsuperscript{42} 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.\textsuperscript{43} The majority based the second concept on the public policy favoring freedom of contract and the enforcement of contracts according to its terms.\textsuperscript{44} The court asserted that freedom of contract is "not lightly to be interfered with," and that a contract will only be held void against public policy in a clear case.\textsuperscript{45} Because Ranger freely


\textsuperscript{41} 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, entitles 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 65, 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.44 (1980).

As to the second assertion, an insurer's interest in retaining a high paying insured may outweigh any concern over that insurer's discriminatory practices. Wilborn, Insurance, Public Policy, and Employment Discrimination, 66 Minn. L. Rev. 1001, 1025 n.127 (1982).

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

\textsuperscript{41} Ranger II, 509 So. 2d at 946.

\textsuperscript{42} Id. at 951-52 (Ferguson, J., dissenting).

\textsuperscript{43} Id. at 947-48.

\textsuperscript{44} Id. at 947 (quoting Union Camp Corp. v. Continental Casualty Co., 452 F. 77

COMPETING PUBLIC POLICIES

Liability insurance, by definition, covers wrongful acts of the insured.\textsuperscript{45} 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.\textsuperscript{46} Beyond this point, considerations of deterrence outweigh considerations of assuring compensation to victims. Basic hornbook law provides that

\textsuperscript{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.

\textsuperscript{46} Id. at 947.

\textsuperscript{47} Id. at 950 (Ferguson, J., dissenting).

\textsuperscript{48} See Mearessmith v. Am. Fidelity Co., 232 N.Y. 161, 163, 133 N.E. 432 (N.Y. 1921) where Judge Cardozo stated, "[t]he restriction is made on cases where liability is incurred without fault of the insured would reduce indemnity to a shadow."

\textsuperscript{49} Id. at 163, 133 N.E. at 433. Public policy precludes insurance coverage for loss that is intentionally caused.

\textsuperscript{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. Boull, 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); Ibersart 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 McNellis, 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 now 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.

Published by NSUWorks, 1999
one may not insure against his own intentionally caused losses. Such coverage violates the public policy prohibiting one from profiting by his own wrongdoing and one of the fundamental precepts of insurance, that an insurable loss should be, at least to some extent, accidental. 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. This has both a punitive effect and serves as a deterrent to other acts of antisocial behavior. 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. Florida courts found acts of gross or culpable negligence such as intentionally shooting someone with a BB gun, driving a car into a crowd of people to disperse them, or shooting oneself in a game of "Russian Roulette" 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.

51. R. Kerton, supra note 4, at § 5.31(a).
53. R. Kerton, supra note 4, at § 5.31(a).
54. Couc'h on Insurance 2d, § 44.275 (rev. ed.); R. Kerton, supra note 4, at § 5.31(a).
56. McNelley, supra note 1, at 33; R. Kerton, supra note 4, at § 5.31(a).
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." 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. In adopting this specific intent standard, Florida courts rejected the "reasonably foreseeable" standard of intentional torts. 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. 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 insurer's? This depends on whose interest the policy is designed to protect. 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. 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-

50. R. Kerton, supra note 4, at § 5.4(a).
53. 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.
54. R. Kerton, supra note 4, at §§ 5.4(a), 5.4(b).
55. Id. at § 5.4(a).
one may not insure against his own intentionally caused losses. Such coverage violates the public policy prohibiting one from profiting by his own wrongdoing and one of the fundamental precepts of insurance, that an insurable loss should be, at least to some extent, accidental. 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. This has both a punitive effect and serves as a deterrent to other acts of antisocial behavior. 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. Florida courts found acts of gross or culpable negligence such as intentionally shooting someone with a BB gun, driving a car into a crowd of people to disperse them, or shooting oneself in a game of "Russian Roulette" covered by liability insurance. In these cases, the insured acted which caused the injury, but either did not intend the resulting injury, or did not intend injury to the party who was injured.

51. R. Kerton, supra note 4, at § 5.3(a).
53. R. Kerton, supra note 4, at § 5.3(a).
54. Couch on Insurance 2d, § 44.275 (rev. ed.); R. Kerton, supra note 4, at § 5.3(a).
56. McNelly, supra note 1, at 33; R. Kerton, supra note 4, at § 5.3(3).
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) (Bytander 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." 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. In adopting this specific intent standard, Florida courts rejected the "reasonably foreseeable" standard of intentional torts. 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. 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. 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. 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 of the beneficiary.
The primary purpose of liability insurance is to protect the insured against losses resulting from his legal liability, whether a loss is intentional or accidental is viewed from the insured's standpoint. 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. 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 insurers and worker's compensation insurers. Under these statutes, a victim recovers against the insurer even if the insured's conduct was intentional. 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

66. Id. Keston 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. Thus, as a punitive component even to compensatory judgments. See Jezholt v. Gen. Casualty Co., 233 Or. 49, 53, 377 P. 2d 26, 28 (1962), where the court held: [D]epartment 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.


upon whether the conduct of . . . the insured was intentional or negligent."

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. 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. These decisions show a concern for compensation but still refuse to allow an insured to profit by his own wrongdoing.

The holding in New Amsterdam Casualty Co. v. Jones is noteworthy because the insured, a gas station proprietor, shot a customer in an argument. 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." 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


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. Keston, however, points out that the insured may be granted a right of reimbursement from the insured. K. KESTON, supra note 4, at § 5.4(b).

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

76. Id.

77. Id. at 193.
point of the beneficiary. 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. 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. 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. Under these statutes, a victim recovers against the insurer even if the insured's conduct was intentional. 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

66. Id. Kenton 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 compulsory judgments. See Iserhart v. Gen. Casualty Co., 233 Or. 49, 53, 377 P. 2d 26, 28 (1962), where the court held: [D]epri ving 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.


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

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. 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. These decisions show a concern for compensation but still refuse to allow an insured to profit by his own wrongdoing.

The holding in New Amsterdam Casualty Co. v. Jones is noteworthy because the insured, a gas station proprietor, shot a customer in an argument. 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." The court interpreted this as a "accident" insurance policy and held that under such a policy the determination of whether an injury is accidental is to be made from the

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 noted that public policy would preclude recovery by the insured directly). Everglades Marine 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 Ins. 509 So. 2d at 946. Kenton, however, points out that the insured may be granted a right of reimbursement from the insured. Id. Kenton, supra note 4, at § 5.4(b).
75. 135 F.2d 191 (6th Cir. 1943).
76. Id.
77. Id. at 193.
victim's viewpoint. 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. 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. 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. 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. In addition, the policy did not specifically insure against wrongful acts and, therefore, did not encourage such acts. 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. 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, when the insured's intentional act was in self-defense, and when the insured was insane, or otherwise incompetent. 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.


89. Aliens, 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 303, 326-26 (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.
victim's viewpoint. 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. 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. 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. 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. In addition, the policy did not specifically insure against wrongful acts and, therefore, did not encourage such acts. 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. 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, when the insured's intentional act was in self-defense, and when the insured was insane, or otherwise incompetent. 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.

78. Id. True accident insurance is insurance against catastrophic injuries befalling the insured, not third parties. W. VANCE, HANDBOOK ON THE LAW OF INSURANCE 943-45 (3d ed. 1951).
79. R. KEETON, supra note 4, at § 5.4(a).
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.

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. The primary purpose of such legislation is to deter those who deprive others of guaranteed rights.

Title VII of the Civil Rights Act of 1964, concerning equal opportunity in employment, has been instrumental in bringing about employ...
ment discrimination actions. In Albermarle Paper Co. v. Moody, 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. Mere injunctive relief provides no incentive for employers to voluntarily eradicate discrimination in the workplace, which is the goal of Title VII. The back pay awards available under Title VII, although compensatory in nature, function as a penalty and a deterrent to discriminatory employment practices.

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

(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 reasonably certain prospect of a back pay award that "provides[] 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.


under Title VII may bring a cause of action either for "disparate treatment" or "disparate impact." Disparate treatment is employment discrimination where an employer intentionally treats certain individuals unfavorably, based on race, color, religion, sex or national origin. The plaintiff must prove discriminatory intent. Disparate impact is employment discrimination where a facially neutral employment practice has a discriminatory effect. 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.

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., a school district sued its insurer to recover money expended in settling a number of employment discrimination claims. The court allowed recovery on those claims alleging disparate impact, but not for disparate treatment claims. 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. In Solo Cup Co. v. Federal Insurance Co., 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 of insurance claims.

Intentional Discriminator

97. Id.
98. Id.
99. Id.
100. Id.
102. Id.
103. Id. at 1002-11, 650 P.2d at 936-41.
104. Solo Cup Co., 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.
ment discrimination actions. In Albermarle Paper Co. v. Moody, 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. Mere injunctive relief provides no incentive for employers to voluntarily eradicate discrimination in the workplace, which is the goal of Title VII. The back pay awards available under Title VII, although compensatory in nature, function as a penalty and a deterrent to discriminatory employment practices.

Actions under Title VII parallel common-law tort actions by not permitting insurance coverage for intentional misconduct. A plaintiff under Title VII may bring a cause of action either for "disparate treatment" or "disparate impact." Disparate treatment is employment discrimination where an employer intentionally treats certain individuals unfavorably, based on race, color, religion, sex or national origin. The plaintiff must prove discriminatory intent. Disparate impact is employment discrimination where a facially neutral employment practice has a discriminatory effect. 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. Although plaintiffs may recover under either theory, courts allow insurance to cover employers for disparate impact claims, but not disparate treatment claims.

In Multinomah School District No. 1 v. Mission Insurance Co., a school district sued its insurer to recover money expended in settling a number of employment discrimination claims. The court allowed recovery on those claims alleging disparate impact, but not for disparate treatment claims. 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. In Slowo Cup Co. v. Federal Insurance Co., 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 under Title VII.
claims. 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. Each opinion implicitly acknowledged the principle that it is against public policy to insure against one's own intentional acts. 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. 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. The more recent cases addressed the public policy argument but generally found it to be without merit. 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., a man was killed by a police officer who was subsequently convicted of involuntary manslaughter. The decedent's estate prevailed in a section 1983 suit, and then brought action against the town's insurer to collect the damage award. 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. The insurer, however, claimed that this construction violated public policy, in that it allowed insured parties to be indemnified for criminal acts. The court acknowledged the public interest in deterring criminal acts but recognized the presence of competing public policies. A strongly influential factor in the decision was the city voluntarily waiving its tort immunity by purchasing liability insurance and therefore the sole purpose of the insurance was to compensate victims. This goal would be frustrated by not permitting insurance coverage for the criminal acts of police officers. 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.

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 Greenbush, 70 N.C.App. at 657, 321 S.E.2d at 236; Multnomah County Sch. Dist. No. 1, 58 Or. App. at 701 n.4, 650 P.2d at 976 n.4.
108. Solo Cup Co., 619 F.2d at 1187; Union Camp, 452 F. Supp. at 568; City of Greenbush, 70 N.C. App. at 657, 321 S.E.2d at 236; Sch. Dist. No. 1, Multnomah 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 Poria v. Underwriters at Lloyd's London, Union, 290 F. Supp. 890 (S.D. Ill. 1968); Caplin v. Johnson, 414 F.2d 615 (5th Cir. 1969); Colton v. Insurance Co. of North America, 140 F.2d 718 (2d Cir. 1944).
policy argument but generally found it to be without merit. 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., a man was killed by a police officer who was subsequently convicted of involuntary manslaughter. The decedent's estate prevailed in a section 1983 suit, and then brought action against the town's insurer to collect the damage award. 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. The insurer, however, claimed that this construction violated public policy, in that it allowed insured parties to be indemnified for their criminal acts. The court acknowledged the public interest in deterring criminal acts but recognized the presence of competing public policies. 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. This goal would be frustrated by not permitting insurance coverage for the criminal acts of police officers. 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.
In *Harris v. County of Racine*, 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." 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. 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. Public officials must act without fear of personal liability if they are to serve the public effectively. Such officials, like all others, occasionally exercise poor judgment. 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." 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. 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. 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. A formula for awarding damages under section 1983 where

---

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.
129. Id. at 324.
130. Id. at 325.
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 Albermarle Paper Co. v. Moody, 422 U.S. 405, 416-17 (1975).
137. Albermarle Paper Co., 422 U.S. at 416-17; Note supra note 89, at 324-26.
138. See supra notes 81-94 and accompanying text.

http://nsuworks.nova.edu/nlr/vol13/iss2/18
In Harris v. County of Racine, 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." 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. 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. Public officials must act without fear of personal liability if they are to serve the public effectively. Such officials, like all others, occasionally exercise poor judgment. 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." 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. 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. 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. A formula for awarding damages under section 1983 where

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 those acts to be racially motivated, and undertaken with malice. Id.
123. Id. at 1282.
124. Id.
125. Id.
126. Id.
127. Id. at 1283.
129. Id. at 324.
130. Id. at 325.
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 right." 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 deterrence 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 341.
133. Id.
134. See generally Albatrel Paper Co. v. Moody, 422 U.S. 405, 416-17 (1975); Note, supra note 88, at 324-26.
135. Albatrel Paper Co., 422 U.S. at 416-17; Note supra note 89, at 324-26.
136. Albatrel Paper Co., 422 U.S. at 416-17; Note supra note 89, at 324-26.
137. Albatrel Paper Co., 422 U.S. at 416-17; Note supra note 89, at 324-26.
138. See supra notes 81-94 and accompanying text.
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.140 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.141 However, intentionally caused losses, even when not expressly excluded from coverage, are impliedly excluded as a matter of public policy.142 Although most insurers protect themselves by expressly excluding coverage for intentional misconduct,143 problems arise where a broad reading of the policy terms covers the intentional misconduct of the insured.144


142. Id.

143. R. Keeton, supra note 4, at § 5.3(1).

144. Id. at § 5.2(b)(1); McIntyre, supra note 1, at 42-46.

145. Harris, 512 F. Supp. at 1273; New Amsterdam Casualty Co. v. Jones, 35 F.2d 191 (6th Cir. 1933); Newark, 134 N.J. Sup. 537, 542 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 Ins. Co., 334 So. 2d at 649.

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.148 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.149

In the Intentional Discriminator Corp. v. Williams,146 the Florida Supreme Court stated that "[i]t is only in clear cases that contracts will be held void as contrary to public policy."147 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 contravenes[s] some established interest of society."148 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.149 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.150 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.140 Other courts, while acknowledging that an insurance contract is insured against intentional misconduct, allowed coverage nonetheless, claiming the facts did not present a "clear case" which justified setting

1989]

Intentional Discriminator

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.144

In Bituminous Casualty Corp. v. Williams,146 the Florida Supreme Court stated that "[i]t is only in clear cases that contracts will be held void as contrary to public policy."147 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 contravenes[s] some established interest of society."148 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.149 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.150 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.140 Other courts, while acknowledging that an insurance contract is insured against intentional misconduct, allowed coverage nonetheless, claiming the facts did not present a "clear case" which justified setting
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.139 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.140 However, intentionally caused losses, even when not expressly excluded from coverage, are impliedly excluded as a matter of public policy.141 Although most insurers protect themselves by expressly excluding coverage for intentional misconduct,142 problems arise where a broad reading of the policy terms covers the intentional misconduct of the insured.143 In

142. Id.
143. R. KETTON, 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 Ins. Co., 343 So. 2d at 649.

1989

Intentional Discriminator

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

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 contravenes[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

Int. 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).
149. Bituminous Casualty Corp., 17 So. 2d at 101. See also Shingreen v. Buss, 221 So. 2d 713, 717 (Fla. 1969); Title & Tr. Co. of Fla. v. Parker, 468 So. 2d 520, 532 (Fla. 1st Dist. Ct. App. 1985).
151. In the first Ranger decision, only contract issues were addressed, and only the insurer 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. Speen, 343 So. 2d 649 (Fla. 3d Dist. Ct. App. 1979).
Aside a contract on public policy grounds. 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. 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.

In *New Amsterdam Casualty Co. v. Jones*, 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 was the victim's, "it tended to encourage wrongful conduct." Then, looking at the facts and balancing various considerations, 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.

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


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


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 acting 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.

aside a contract on public policy grounds. 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. 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.

In New Amsterdam Casualty Co. v. Jones, 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 not be set aside depended on whether it tended to encourage wrongful conduct. Then, looking at the facts and balancing various considerations, 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.

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


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 acting was committed in the heat of the moment to a stranger, not 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.


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

162. Id. at 1282.


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 194 (Fla. 1943); Harris, 512 F. Supp. at 1273; Bituminous Casualty Co., 17 So. 2d at 194 (Fla. 1944); Horov v. Travelers Indem. Co., 279 Or. 199, 567 P.2d 1013 (1977); Union Camp Corp., 452 F. Supp. at 568; New Amsterdam Casualty Co., 343 F.2d 194; Harris, 512 F. Supp. at 1273; Bituminous Casualty Co., 17 So. 2d at 194 (Fla. 1943); Harris, 512 F. Supp. at 1273; Bituminous Casualty Co., 17 So. 2d at 194 (Fla. 1944); Horov v. Travelers Indem. Co., 279 Or. 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 individuals’ 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 bait 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 be balanced in determining whether to apply the public policy exclusion? If the court engaged in balancing, it should have stated the relative weight of the factors it considered, rather than mentioning many factors, but only discussing the innocence of the third party beneficiaries.

The certified question in Ranger offers the Florida Supreme Court an opportunity to specify standards by which courts determine when an intentional act precludes insurance coverage and when it does not. Florida courts need guidelines to determine when an exception to the public policy exclusion is warranted.

The trend is away from public policy automatically excluding coverage for all intentional misconduct and towards a balancing of factors.174 These factors allow compensation to more injured parties while still retaining the deterrent effect of the public policy exclusion.175 The general inquiry would be whether insurance coverage for the particular misconduct would injure the public interest by encouraging wrongdoing.

The analysis begins with a determination of whether the act in question is of the type which traditionally falls within the public policy exclusion. In Florida, if both act and injury are intentional the act is of the type traditionally uninsurable on public policy grounds.176 The Spreen and Everglades Marina decisions show an inclination in Florida towards allowing insurance coverage for a wider range of intentional acts.177 In light of these decisions, the fact that act and injury are intentional is no longer determinative of whether an act is uninsurable. The traditional standard of intentional act and injury is merely a starting place to ascertain whether an act included the specific intent to even qualify as intentional under Florida law.178 Courts need other criteria to determine whether certain misconduct may be covered in spite of the fact that act and injury are intentional.

New Amsterdam Casualty Co. v. Jones,179 discussed previously,180 sets forth criteria which the Florida Supreme Court should adopt in determining whether an act might be insurable despite its intentional

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.
174. See Farberstein & Stillman, supra note 60, at 1251-54.
175. Id.
176. See supra notes 57-63 and accompanying text.
177. See supra note 73.
178. See supra notes 56-63 and accompanying text.
179. 135 F.2d 191 (6th Cir. 1943).
180. See supra notes 75 and 155 and accompanying text.

http://nsuworks.nova.edu/nlr/vol13/iss2/18
nature. The criteria are whether the insured is seeking indemnity for his intentionally inflicted injury or whether the victim seeks compensation directly; whether the insurance contract specifically insures against intentional injury; whether the wrongful act was within the contemplation of the insured at the time he entered into the insurance contract; and whether the wrongful conduct is of a type which tends to be encouraged by insurance coverage. 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 Ringer, 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. The acts of the Club clearly constituted disparate treatment discrimination. The Skolnick's were the victims of an intentional scheme calculated to keep the neighborhood free of certain races and religions.

Applying the above analysis to the Ringer 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 Ringer, the Club intentionally discriminated against the Skolnicks for the intended result that the couple be denied good title to their property. 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. This action for indemnity by the Club weighs heavily against allowing coverage. The next question is:

182. Id.
183. Id.
184. Id.
185. Disparate treatment discrimination is intentional and disparate impact is unintentional. See supra notes 95-100 and accompanying text.
186. Ringer I, 509 So. 2d at 941.
187. Ringer 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. 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." The purpose of this type of provision is to cover an insured for injury arising from its torts. As the first Ringer decision observed, this coverage is not limited to injuries arising from an accident or occurrence. Therefore, the provision insures against intentional injury.

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. The Skolnick's 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. The coverage period for the insurance policy of the Club was from July 13th, 1980 through July 13th, 1983. 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...
nature. The criteria are whether the insured is seeking indemnity for his intentionally inflicted injury or whether the victim seeks compensation directly; whether the insurance contract specifically insures against intentional injury; whether the wrongful act was within the contemplation of the insured at the time he entered into the insurance contract; and whether the wrongful conduct is of a type which tends to be encouraged by insurance coverage. 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. 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.

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. 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. This action for indemnity by the Club weighs heavily against allowing coverage. The next question is:

whether the insurance contract specifically insures against intentional injury. 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." The purpose of this type of provision is to cover an insured for injury arising from its torts. As the first Ranger decision observed, this coverage is not limited to injuries arising from an accident or occurrence. Therefore, the provision insures against intentional injury.

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. 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. The coverage period for the insurance policy of the Club was from July 13th, 1980 through July 13th, 1983. 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:

182. Id.
183. Id. at 195.
184. Id.
185. Disparate treatment discrimination is intentional and disparate impact is unintentional. See supra note 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 wrongful conduct is encouraged by insurance coverage.\textsuperscript{186} One type of wrongful conduct which tends to be encouraged by insurance coverage is conduct designed to create a loss under the insurance contract.\textsuperscript{187} 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.\textsuperscript{188} Intentional discrimination clearly falls into the latter definition.\textsuperscript{189} 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.

\textsuperscript{198} New Amsterdam Casualty Co. 135 F.2d at 194-95.
\textsuperscript{199} R. Keeton, supra note 4, at § 5.3(f)(1971). See also Willborn, supra note 40, at 1014.
\textsuperscript{200} Willborn, supra note 40, at 1014-15.
whether the wrongful conduct is encouraged by insurance coverage. One type of wrongful conduct which tends to be encouraged by insurance coverage is conduct designed to create a loss under the insurance contract. 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. Intentional discrimination clearly falls into the latter definition. 286 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.

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.
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.

David A. Silverstone