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Client Alert

What is an Occurrence

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What is an occurrence? In the context of liability insurance coverage, this is not always a simple question to answer.

We buy liability insurance coverage to protect us from the financial consequences of unforeseen accidents or unexpected liabilities. We face such exposures in our business lives and our personal lives and buy business policies and homeowners policies as protection. If we are involved in a profession or provide commercial services of any kind to customers or clients, we also buy “errors and omissions” or professional liability coverage.

The ordinary liability policy covers an “occurrence” which is usually defined in the policy as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” There is no policy definition of “accident,” and surprisingly, sometimes an “accident” or an unexpected liability is not a covered “occurrence.”

The word “accident” has a legal definition: “an accident means an unexpected happening without an intention or design[.]” *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1283-5 (Ind.2006). In *Harvey*, the “accident” involved a woman who was pushed into the Wabash River and drown. *Id.* The woman’s estate sued the man who pushed her, and he sought coverage under a homeowners policy. *Id.* The insurance company argued the woman’s death was not an “accident” because she was intentionally pushed into the river. *Id.* The Indiana Supreme Court disagreed: “it was clear that the drowning was unintended even if the push was an intentional act.” *Id.*

In Indiana, there are different rules which apply to an “occurrence” involving commercial service contracts or professional conduct:

Claims based on negligent performance of commercial or professional services are ordinarily insured under “errors and omissions” or malpractice policies. For this reason, CGL policies typically exclude claims arising out of professional or other business services.

Tri-Etch, Inc. v. Cincinnati Ins. Co., 909 N.E.2d 997, 1002 (Ind. 2009). In *Tri-Etch*, a night clerk at a liquor store died as a result of a beating he received during a late-night robbery. The clerk’s estate sued the alarm company claiming it had “breached a duty to notify the store’s manager within thirty minutes of closing if the night alarm had not been set.” If the alarm company had

notified the store manager, the night clerk may have survived the beating. *Id.* at 999. The alarm company sought coverage under its general liability policy.

The alarm company and the clerk's estate argued the clerk's death resulted from an "accident" – an "unexpected happening without intention." The alarm company's failure to call the store manager was unintentional. *Id.* at 1001. Observing that lack of intent does not transform a business error into an "accident," the Indiana Supreme Court held that the alarm company's mistake was not an "accident," but rather an "error or omission" arising from its failure to properly perform under its contract with the liquor store. *Id.* at 1001.

The lessons we take from these two Indiana Supreme Court cases are:

- the unintended consequence of an intentional act may can be an "accident" under liability coverage;
- the unintended failure to perform a contractual obligation may not be an "accident" under liability coverage; and
- if you provide commercial or professional services of any kind to customers or clients, you need to buy "errors and omissions" or professional liability coverage in addition to your general liability coverage.