AVOIDING EXCLUSIONS IN HOMEOWNERS' INSURANCE
— Four Experienced NCVBA Members Share Some Practical Insights
By Marnie Shiels, Esq.

Homeowners' insurance can be an important resource to help compensate victims of juvenile perpetrators. When a victim is injured by a juvenile, the juvenile usually lacks financial resources to pay damages. While the juvenile's parents may also have limited resources, the parents' insurance might help fund a recovery. However, homeowners' insurance policies often contain exclusions for things like intentional acts, sexual acts, or criminal acts. Recently, four National Crime Victim Bar Association (NCVBA) charter members shared their expertise on how to structure a civil lawsuit to avoid such exclusions. All of these attorneys cautioned that the law in this area differs from state to state and changes rapidly because the insurance companies modify the wording of their policies to avoid liability.

Language of the Policy

According to Robert Meyer, an NCVBA charter member from New Mexico, an attorney should attempt to obtain a copy of the insurance policy prior to drafting the complaint. It is important to know the terms of the policy so that the complaint can be crafted to fit within the coverage. It may be possible to get the policy from the attorney for the perpetrator's parents because it is in the parents' best interest to have coverage. If this route is not successful, an attorney should at least look to local case law because most policies issued in a state use the same language. (The NCVBA's Civil Justice Database—www.victimbar.org—is an excellent resource for researching such cases.) NCVBA charter member Jack Connelly of Washington State agrees that attorneys must think about the policy language when considering potential causes of action. Obtaining a copy of the policy is essential to see if the case theory fits within

the policy.

Who is Covered

A preliminary issue in considering the policy is whether the juvenile perpetrator is covered by it. The basic requirement is that the juvenile be a "resident relative" of the policyholder. NCVBA charter member Stan Marks of Arizona feels that it is generally easy to meet this requirement. For example, children living at school may be considered residents of their parents' household, and children of divorced parents may be considered residents of both parents' households. In *Mutual Service Casualty Ins. Co. v. Olson*, Greg Olson was spending the weekend at his mother's house when he shot his sister's friend with a rifle.[i] Olson's principle residence was his father's house, but he spent most weekends and some nights during the week at his mother's house. The Minnesota Court of Appeals held that Olson was a resident of his mother's house for purposes of coverage by her homeowners' insurance, and that a person can be a resident of more than one household for insurance purposes. In addition, the court provided the following three-factor test for determining whether a person is a resident of a named insured's household:

> (1) Living under the same roof; (2) in a close, intimate and informal relationship; and (3) where the intended duration is likely to be substantial, where it is consistent with the informality of the relationship, and from which it is reasonable to conclude that the parties would consider the relationship in contracting about such matters as insurance or in their conduct in reliance thereon.[ii]

Unfortunately, concluding that juveniles are covered by their parents' homeowners' insurance does not guarantee that the insurance policies cover the juveniles' harmful actions.

Intentional Acts Exclusions

Many policies contain an exclusion that bars coverage for bodily injury or property damage intended by, or which may reasonably be expected to result from, the intentional or criminal acts or omissions of any insured person. Meyer explains that the best way to avoid this exclusion is to draft the complaint broadly. NCVBA charter member Howard Schulman of Ohio recommends drafting a complaint in terms of negligence, rather than intentional acts. Marks suggests using terms such as "reckless misconduct" or "gross negligence."

Meyer further explains that if any part of the complaint fits within the insurance coverage, the insurer usually is required to defend the entire case. The question of defense is treated separately from the question of indemnification. According to Meyer, in many states, to determine whether the insurer is required to defend the insured, the court is only allowed to look at the complaint and may not do any fact finding.[iii] In some states where extrinsic facts may be considered, the court may consider such facts only when the complaint's allegations do not appear to be covered. The court may not do so when the allegations are clearly covered by the policy.[iv] Meyer points out that if the insurer can be made to defend the case, the plaintiff will have increased leverage toward settlement because of the cost of defending the suit and because of the uncertainty as to whether the insurer will ultimately have to provide coverage.

The Degree of Harm

According to Marks, the issue with an intentional acts exclusion is whether the juveniles intended the harm, not whether they intended their actions. Some courts conclusively presume that a child under a certain age cannot form intent. This is usually applied to children younger than eight.[v] In a similar vein, Schulman points out that in Ohio, a child under seven is too young

to be found negligent for purposes of comparative fault.

In some states, the insurer will be required to provide coverage if the degree of injury was much greater than expected, even if some injury was expected. In *Bilbo v. Shelter Ins. Co.*, fourteen-year-old V.K. punched fourteen-year-old J.B., breaking his nose.[vi] J.B.'s parents sued V.K.'s parents and their homeowner's insurer, Shelter Mutual Insurance Company. The trial court granted summary judgment to Shelter on the grounds that V.K. intended the bodily injury and damages suffered by J.B., so the policy did not cover those damages. The Court of Appeal of Louisiana, First Circuit, reversed the summary judgment, holding that when minor injury is intended and a substantially greater injury results, coverage for the more severe injury is not barred. Whether a particular injury was intended is a question of fact.[vii]

In the case of *Norris v. State Farm Fire & Casualty Co.,* fifteen-year-old Z.R. hit fifteen-year-old S.T. on his right jaw.[viii] S.T. fell face first onto the pavement and fractured the base of his skull and the bones around his left eye. The Supreme Court of Arkansas held that damage from an intentional act can be unintentional if the consequences of the act are unexpected. The policy in question did not exclude accidental or unintended results of wilful and malicious acts from coverage.[ix]

In some states, if any harm was intended, the court will deem the results to be intentional for purposes of the exclusion. For example, in *Easley v. American Family Mutual Ins. Co.*, D.W. hit S.E. in the face.[x] S.E. fell backward and his head went through a wall. S.E. sustained severe cuts and his ear was nearly severed from his face. The Court of Appeals of Missouri, Western District, held that an insurer can escape liability when it establishes that the insured intended his acts to injure rather than benefit the victim. The court held that the fact that D.W.

intended a much less severe injury was irrelevant because he did intend to injure S.E.[xi]

Marks also points out that if it can be shown that the juvenile was drunk or was trying to scare the victim rather than cause injury, it may be possible to negate intent. For example, in *Allstate Ins. Co. v. Justice*, K.J. and G.J., both minors, were at a party and became involved in a dispute.[xii] Both left the party and returned with firearms. When G.J. fired at K.J., K.J. returned fire, hitting Leonard Williams who was not involved in the incident and was parked across the street. K.J. testified that he did not intend to hurt G.J., but was shooting to protect himself and to frighten G.J. A jury found that Allstate, K.J.'s insurer, was obligated to defend and indemnify. The Georgia Court of Appeals affirmed, holding that because the evidence did not demand a finding that K.J. intended to harm G.J., a jury could find that the intentional injury exclusion did not apply.[xiii]

Inferred Intent to Harm

Marks observes that while intent is usually assumed as a matter of law for sexual assault by adults, it will not necessarily be assumed for sexual assault by minors. In *United Servs. Auto. Ass'n v. DeValencia*, Dennis and Debra Gerow provided day care in their home to the DeValencia children, Z.D., S.D., and J.D.[xiv] C.G., the Gerows' fourteen-year-old son, sexually molested the children. The DeValencias sued the Gerows, C.G., and United Services Automobile Association (USAA), the Gerows' homeowners' insurer. The trial court granted summary judgment to USAA on the grounds that C.G.'s intent could be presumed from the acts of sexual assault. The Court of Appeals of Arizona reversed, holding that whether a minor child molester intended to cause harm is a question of fact. Minors have less experience in sexual matters and are less able to "draw the inference that sexual contact with other minors is

inherently harmful."[xv]

In *Fire Ins. Exchange v. Diehl*, the Supreme Court of Michigan provided a test to determine whether a minor intended the injury.[xvi] The jury should determine whether the harm was reasonably foreseeable to "a child of like age, ability, intelligence, and experience . . . under like circumstances."[xvii]

However, some states do assume intent to injure from an act of sexual assault, even when the perpetrator is a minor. In *Belsom v. Bravo*, S.B. went over to E.B.'s house when her parents were away.[xviii] He carried her to her parents' bedroom and forced her to perform oral sex. E.B. sued S.B. and his parents' homeowners' insurer, State Farm. The Court of Appeal of Louisiana, Fifth Circuit, held that the inferred intent rule applies regardless of age. Sexual assault is a crime regardless of the perpetrator's age. It is not the age of the offender that results in the mandatory inference of intent, but "the character of the nonconsensual sexual act."[xix]

Negligent Supervision or Failure to Warn

An additional way to avoid an intentional acts exclusion is to sue the juvenile's parents for negligent supervision or failure to warn. The attorneys consulted for this article agree that it may be possible to get coverage by claiming that the parents knew or should have known of the juvenile's dangerousness, and negligently failed to warn the victim or supervise the perpetrator. Connelly suggests that in bringing this type of case, it is important to make sure that the claim is a direct cause of action against the parents, not one that is derivative of the case against the juvenile. Some states limit the amount of parents' liability for their children's acts. For example, in Washington, parental liability is capped at $5,000.[xx] However, these limits do not apply to recoveries against parents for their own negligence. (For more information about

statutes which impose vicarious liability on parents for the crimes of their children, see the box *"Statutory Parental Liability for Juvenile Crime."*)

The basic elements of a negligence case against a juvenile's parents are that the parents had notice of the juvenile's dangerousness, but failed to act in a reasonable manner. The more the parents knew and failed to act, the more likely the case will be successful. According to Connelly, this type of case is similar to that discussed in § 319 of the **Restatement (Second) of Torts,** which provides that "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." The key is to show that the parents knew of the danger and had control of the juvenile, yet did not reasonably exercise such control to prevent the crime.

An example of a successful case of this type is *Prudential Property & Casualty Ins. Co. v. Boylan*.[xxi] Fifteen-year-old R.B. sexually assaulted five-year-old M.H. when he was babysitting her. R.B.'s parents were insured by Prudential Property & Casualty Insurance Company. The trial court granted summary judgment to Prudential. The Superior Court of New Jersey, Appellate Division, held that there was no coverage for R.B. because his acts were intentional. However, the court also held that the intentional acts exclusion did not apply to claims against R.B.'s parents because these claims were "essentially negligence based, including negligent supervision."[xxii]

On the other hand, in *Hewitt v. Allstate Ins. Co.*, a case involving one minor shooting another, the Court of Appeal of Louisiana, Fourth Circuit, held that the policy in question was drafted broadly enough to exclude any bodily injury "arising out of an intentional act."[xxiii] This

meant that all claims based on that act, even those which were negligence-based, were excluded.[xxiv] In *Allstate Ins. Co. v Jordan*, the Court of Appeals of Tennessee held that under the terms of the policy, the intentional act of one insured, the juvenile, would be imputed to all insureds, including his parents.[xxv]

Sexual Acts Exclusions

Many homeowners' insurance policies also include an exclusion for "bodily injury or property damage . . . arising out of any sexual act, including but not limited to molestation, incest or rape."[xxvi] Connelly states that because these exclusions are drafted so broadly, it is difficult to find coverage for a sexual-assault-related injury when the policy contains this type of exclusion. He recommends that attorneys look at the policy language to see if there is another claim which is covered by the policy or if there is any ambiguity in the policy. According to Meyer, because of the broadness of the policy language, even if the suit is against the parents for negligence, courts will often look at the conduct of the juvenile in determining whether the exclusion applies. However, in *St. Paul Fire & Marine Ins. Co. v. Schrum*, J.L.Z. and S.J.Z. were minors who went to the Schrums' home.[xxvii] An adult named Backes was also at the home and sexually molested the two children. The Schrums were insured by St. Paul Fire & Marine Insurance Company, and the policy contained a sexual acts exclusion. The children's parents sued the Schrums for negligent supervision of the children. The United States Court of Appeals for the Eighth Circuit held that the allegations of negligence "contain[ed] separate and non-excluded causes of the children's injuries, apart from the accompanying sexual act."[xxviii]

Meyer represented a victim in a similar case.[xxix] Freddie Montoya sexually assaulted

C.R., who was then a minor. Freddie was an adult who was living with his parents as part of a sentence for criminal sexual penetration of a minor, a case involving a different victim. C.R. sued Freddie and his parents, the Montoyas. The Montoyas were insured by Millers Mutual Fire Insurance Company and the policy contained an exclusion for "bodily injury or property damage arising out of any sexual act, including, but not limited to molestation, incest or rape." The United States District Court for the District of New Mexico ruled that Millers had a duty to defend the Montoyas in C.R.'s underlying case because in looking at whether coverage is blocked by the exclusion, "this court must look to the acts allegedly committed by the Montoyas, not Freddie." The allegations against the Montoyas were ones of negligence, not sexual acts, so the exclusion did not apply.

A contrary result occurred in *Caroff v. Farmers Ins. Co.,* a case in which K.T., a teenager, sexually molested three-year-old A.C.[xxx] A.C.'s parents brought a negligence suit against K.T.'s parents, who were insured by Farmers Insurance Company. The policy contained an exclusion for child molestation by any insured. The policy also contained a severability clause, providing that "[t]his insurance applies separately to each insured." The Court of Appeals of Washington, Division One, held that the molestation exclusion blocked coverage for the negligence claim because the molestation was by an insured. According to the court, the existence of the severability clause did not require the court to consider the parents' actions separately and did not create any ambiguity in the policy.[xxxi]

If the crime in question is statutory rape, the court may decide that it does not meet the definition of "molestation" in the policy. In *Newby v. Jefferson Parish School Board*, W.A. and J.N. were teenagers who had a consensual sexual relationship.[xxxii] J.N.'s parents sued W.A.'s

parents, who were insured by Audubon Insurance Company. The policy contained an exclusion for injury "arising out of sexual molestation." The trial court granted summary judgment to Audubon. The Court of Appeal of Louisiana, Fifth Circuit, reversed. The court looked to definitions of "molest" in the dictionary and the state code in determining that the sexual acts involved were not "molestation" because they were not committed by force, violence, duress, menace, intimidation, or threats.[xxxiii]

Criminal Acts Exclusions

Some policies also contain exclusions for personal injury resulting from criminal acts. Although a juvenile may be found "delinquent," rather than "convicted," the exclusion may still apply. In *Allstate Ins. Co. v. Burrough*, fourteen-year-old M.B. stole his grandfather's handgun.[xxxiv] M.B. gave the gun to a friend who gave it to another friend who accidentally shot K.W. K.W.'s estate sued M.B. M.B. was insured by Allstate Insurance Company and the policy contained a criminal acts exclusion. The United States Court of Appeals for the Eighth Circuit held that even though M.B. could not be charged with or convicted of the offense of "furnishing a deadly weapon to a minor," the exclusion applied because M.B.'s actions satisfied all the elements of the offense. The court held that it did not matter whether M.B. was adjudged a juvenile delinquent or not, as long as he met the elements of the offense.[xxxv]

Connelly again recommends that attorneys look at the policy language and structure their cases around the parents' negligence, rather than the minor's criminal acts. For example, in *C.P. v. Allstate Ins. Co.*, C.P. was a minor who spent the night with a friend in the home of Dolan and Eleanor Lancaster.[xxxvi] The Lancasters' adult son, Harold, also lived in the home. On the night

C.P. stayed over, Dolan and Eleanor were away, so Harold was the only adult present. Harold sexually assaulted C.P. C.P.'s parents sued the Lancasters for negligence. The Lancasters were insured by Allstate Insurance Company. The policy contained a criminal acts exclusion. The Supreme Court of Alaska held that the Lancasters' conduct was negligent and not criminal, so the exclusion did not apply to them.[xxxvii]

Conclusion

Homeowners' insurance can be a source of remuneration for victims of juvenile perpetrators. Although these policies often have exclusions designed to prevent coverage for injury resulting from crimes, it is possible for a skillful attorney to avoid these exclusions. The focus in many of these cases is on interpreting the policy language as it applies to the phrasing of the victim's case.

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i. *Mutual Service Casualty Ins. Co. v. Olson*, 402 N.W.2d 621 (Minn. Ct. App. 1987).

ii. *Id.* at 624-625.

iii. *See* Gregor J. Schwinghammer, Jr., *Insurance Litigation in Florida: Declaratory Judgments*

and the Duty to Defend, 50 U. MIAMI L. REV. 945, 946 (1996).

iv. *Id.*

v. Cynthia A. Muse, Note, *Homeowners Insurance: A Way to Pay for Children's Intentional and Violent Acts?*, 33 IND. L. REV. 665, 669-670 (2000).

vi. *Bilbo v. Shelter Ins. Co.*, 698 So.2d 691 (La. Ct. App. 1997).

vii. *Id* at 695.

viii. *Norris v. State Farm Fire & Casualty Co.*, 16 S.W.3d 242 (Ark. 2000).

ix. *Id.* at 245-246.

x. *Easley v. American Family Mutual Ins. Co.*, 847 S.W.2d 811 (Mo. Ct. App. 1992).

xi. *Id*. at 812-814.

xii. *Allstate Ins. Co. v. Justice*, 493 S.E.2d 532 (Ga. Ct. App. 1997), *cert. denied*, 1998 Ga. Lexis 358 (Ga. 1998).

xiii. *Id.* at 535.

xiv. *United Servs. Auto. Ass'n v. DeValencia*, 949 P.2d 525 (Ariz. Ct. App. 1997).

xv. *Id*. at 529.

xvi. *Fire Ins. Exchange v. Diehl*, 545 N.W.2d 602 (Mich. 1996).

xvii. *Id*. at 607.

xviii. *Belsom v. Bravo*, 658 So.2d 1304 (La. Ct. App. 1995), *cert. denied*, 659 So.2d 737 (La. 1995).

xix. *Id*. at 1306-1308.

xx. WASH. REV. CODE ANN. § 4.24.190 (West 1988 & Supp. 2001).

xxi. *Prudential Property & Casualty Ins. Co. v. Boylan*, 704 A.2d 597 (N.J. Super. Ct. App. Div. 1998), *cert. denied*, 713 A.2d 499 (N.J. 1998).

xxii. *Id*. at 169-170.

xxiii. *Hewitt v. Allstate Ins. Co.*, 726 So.2d 1120 (La. Ct. App. 1999).

xxiv. *Id*. at 1124.

xxv. *Allstate Ins. Co. v Jordan*, 16 S.W.3d 777 (Tenn. Ct. App. 1999).

xxvi. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Schrum*, 149 F.3d 878 (8th Cir. 1998).

xxvii. *Id*. at 881.

xxviii. *Id.*

xxix. *Millers Mutual Fire Ins. Co. v. Montoya*, No. CIV 99-1325 MV (D.N.M. 2000).

xxx. *Caroff v. Farmers Ins. Co.*, 989 P.2d 1233 (Wash. Ct. App. 1999), *review denied*, 10 P.3d 1073 (Wash. 2000).

xxxi. *Id*. at 1236.

xxxii. *Newby v. Jefferson Parish School Board*, 738 So.2d 93 (La. Ct. App. 1999).

xxxiii. *Id*. at 97.

xxxiv. *Allstate Ins. Co. v. Burrough*, 120 F.3d 834 (8th Cir. 1997).

xxxv. *Id*. at 839-840.

xxxvi. *C.P. v. Allstate Ins. Co.*, 996 P.2d 1216 (Alaska 2000).

xxxvii. *Id*. at 1226.