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FEDERAL DISTRICT COURT IN NEW JERSEY FINDS A MURDER-SUICIDE DOES NOT CONSTITUTE AN "ACCIDENT" UNDER A LIABILITY POLICY

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On December 22, 2010, the U.S. District Court for the District of New Jersey ruled in *Electric Ins. Co. v. Estate of Marcantonis*, Civ. No. 09-5076 (D.N.J. Dec. 22, 2010), that, without further evidence of a psychiatric disorder, an insured who commits a "particularly reprehensible act" such as murder-suicide intended to cause an injury. Thus, no accident and no coverage.

The facts related to this decision are troubling. On December 8, 2008, Theodore Marcantonis went to the Home Depot in Vineland, N.J. and purchased some long matches, a flexible lighter, a five-gallon blue kerosene can, a five-gallon red gasoline can, and a crow bar. Later on that day, he put a sledgehammer in the trunk of his car and went to Rich's Gun Shop to buy ammunition for his handgun and shotgun. He then filled up the kerosene and gas cans at a local gas station. That evening, Marcantonis, as was his routine, spent time with his friends and his daughter, Theodora, at the Neptune Diner in Vineland. By every account, Marcantonis was his usual self. Early morning the next day, Marcantonis drove his car to the Capricorn Farm on 256 Rosenhayn Avenue, in Bridgeton, N.J., and parked his vehicle at a location where it could not be seen from the residence, took out the sledgehammer from the trunk of his car and used it to break down the door to the house at the farm where his ex-girlfriend, Lisa Gabriel, was asleep with her boyfriend, Joseph Martorana. When Martorana heard Marcantonis entering the house, he ran downstairs where Marcantonis shot him. Martorana sustained seven gunshot wounds including three perforating gunshot wounds in the torso, three perforating gunshot wounds to the bilateral arms, one penetrating gunshot wound to the upper right arm, and one perforating shot gun wound to the chest. Marcantonis then returned to his car, set himself on fire, and died. The state police recovered the body of Marcantonis from his parked vehicle at the Capricorn Farm. The autopsy report showed that Marcantonis died as a result of inhalation of the products of combustion as well as thermal injuries, with the manner of death being suicide. Tests showed that his urine and blood were negative for drugs and alcohol.

On July 28, 2009, the Estate of Joseph Martorana filed suit against the Estate of Marcantonis in the Superior Court of New Jersey, Cumberland County. The Marcantonis Estate tendered the defense of the *Martorana* complaint to Marcantonis' homeowner's carrier, Electric Insurance Company. Under the policy, Electric had a duty to defend the Marcantonis Estate for losses during the policy period caused by "occurrences" not *otherwise excluded as an expected or intended injury*. Marcantonis also had personal umbrella excess liability coverage for $1,000,000 over and above the primary liability insurance policy under a policy issued by United States Liability Insurance Company. Under that policy, USLI would pay damages for a "loss."

Electric reserved its rights under the Electric policy. Immediately thereafter, Electric commenced a declaratory judgment action. On March 9, 2010, USLI filed an intervenor complaint seeking a declaration that it had no duty to defend or indemnify the Marcantonis Estate and that the Marcantonis Estate had no entitlement to the excess liability coverage in the USLI policy.

In construing insurance policies that limit coverage to accidents, New Jersey courts look to whether the "alleged wrongdoer intended or expected to cause an injury. If not, then the resulting injury is 'accidental,' even if the act that caused the injury was intentional." *Voorhees v. Preferred Mutual Ins. Co.*, 128 N.J. 165, 183 (1992). The court acknowledged that this analysis often requires an inquiry into the actor's subjective intent, but pointed out

that "[w]hen the actions are particularly reprehensible, the intent to injure can be presumed from the act without an inquiry into the actor's subjective intent to injury." *Id.* At 184. This "objective approach focuses on the likelihood that an injury will result from an actor's behavior rather than on the wrongdoer's subjective state of mind." *Id.* The court noted that the Electric policy covering "occurrences" and the USLI policy covering "losses" both defined those terms as "accidents resulting in bodily harm." And, based on Marcantonis' "particularly reprehensible actions," the court presumed that Marcantonis intended to kill Martorana and held that there was no coverage under the respective policies. This begs the question: how does an insured overcome the presumption that a "particularly reprehensible act" constitutes intent to injure?

The defendant argued that its expert report, which included a "psychological autopsy," created a genuine issue of material fact regarding whether Marcantonis' acts were intentional. The court, however, found the expert report insufficient to create a genuine issue of material fact, "as it [was] conclusory and unsupported by the record." The expert pointed to no facts other than the murder itself to support her conclusion that Marcantonis suffered from a derangement of his intellect.

It appears that the court agreed with Electric's argument that the "net opinion rule" applied.[1] This rule states that, "an expert's bare conclusions are not admissible under Rule 702 of the Federal Rules of Evidence." *Holman Enters. v. Fidelity & Guar. Ins. Co.*, 563 F. Supp. 2d 467, fn. 12 (D.N.J. 2008). Under this analysis, the court "examine[s] the expert's conclusions in order to determine whether they could reliably flow from the facts known to the expert and the methodology used" mindful that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert" or where "there is simply too great an analytical gap between the data and the opinion proffered." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Here, the court pointed out that the expert herself acknowledged that Marcantonis' medical records evidenced no history or symptoms of a serious psychiatric disorder. Thus, the court explained, "the fact that Marcantonis committed murder and suicide alone is insufficient to support a conclusion that he had a serious psychiatric disorder that deprived him of the capacity to govern his conduct in accordance with reason." *See Cumberland Mutual Fire Ins. Co. v. Dahl*, 362 N.J. Super. 91, 101 (App. Div. 2003). Based on this lack of evidence, the Court ruled that neither Electric nor USLI had an obligation to defend or indemnify the Marcantonis Estate in the *Martorana* Litigation.

We still are left wondering, however, how much and what kind of evidence is needed to overcome the presumption of intent to injure when the insured's actions are "particularly reprehensible?"

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Philip Kouyoumdjian (pkouyoumdjian@cozen.com or 212-908-1289).

1 Although the court never mentions the "net opinion rule" in its holding, it applied the rule's standards.

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