The Ohio courts have long recognized that in certain situations, an insured’s intent to cause injury may be inferred from the course of conduct causing the injury. In such situations, an insurance carrier may disclaim coverage on the basis of a policy intentional act exclusion and/or the policy definition of an insurable “occurrence”. One of the first cases to discuss this principle was Wedge Products, Inc. v. Hartford Equity Sales Co. (1987), 31 Ohio St.3d 65. In Wedge Products, the court addressed the question of whether a CGL policy would provide coverage in response to an employee/employee intentional tort action. When comparing the policy intentional act exclusion as against a claim requiring proof of conduct causing the injury may be inferred from the course of conduct, the court concluded that “we are unable to see how Wedge could have committed any acts with the belief that [the employees]. . . were substantially certain to have been injured, yet not have “expected” such injuries to occur”. Id. at 67.

In Physicians Insurance Company of Ohio v. Swanson, (1991), 58 Ohio St.3d 189, the court reviewed a claim where the insured fired a BB gun at a distance of 70-100 feet to allegedly scare a group of kids, but ended up hitting the claimant in the eye. The court held that in order to exclude coverage on the basis that the injury was expected or intended, the insurer must demonstrate that the injury itself was expected or intended, not that the insured's act or conduct was intentional. In overturning the trial court’s coverage ruling in favor of the insurer, the Swanson court reasoned:

In this case, the exclusion is inapplicable because the trial court’s determination that Todd Baker’s injury was not intentionally inflicted or substantially certain to occur is supported by competent, credible evidence. (Emphasis added). Id. at 193-194.

In Gearing v. Nationwide (1996), 76 Ohio St.3d 34, the court held that an insured’s sexual molestation of a minor could not, as a matter of law, be deemed an insurable occurrence. In reaching this conclusion, the Gearing court reaffirmed the holding in Swanson that injuries resulting from a volitional act may be insurable if the insured did not specifically intend to cause the harm or was not substantially certain that such harm would result. The Gearing court went on to note that had the facts in Swanson been different (i.e., the shooting been at a closer range), the outcome may have changed.

The Ohio Supreme Court most recently revisited this issue in Penn Traffic Company v. AIU Ins. Co. (2003), 94 Ohio St.3d. 277, wherein the court majority cited approvingly to Justice Cook’s concurring statement in Buckeye Union. The Penn Traffic court reviewed a CGL policy which contained an enhancement endorsement providing coverage for bodily injury sustained by an employee arising out of or in the course of his or her employment with the insured, but excluding coverage for torts involving a deliberate intent to injure and/or for acts committed by or at the direction of an insured which was “substantially certain” to cause bodily injury. The Penn Traffic court held that these exclusions mirrored the legal definition of a substantial certainty tort and there could be no coverage for a substantial certainty based claim.

The majority of Ohio Appellate courts which have reviewed the Penn Traffic decision have cited the case for the proposition that an

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DOES DEFECTIVE CONSTRUCTION CONSTITUTE AN “OCURRENCE?”

By Michelle J. Sheehan

The Ohio Supreme Court has not addressed whether a claim for faulty workmanship constitutes an “occurrence” and triggers coverage under a CGL policy. At one time, a growing body of appellate case law held that faulty workmanship claims are not an “accident” and therefore not an “occurrence.” The courts reasoned that the fundamental purpose of CGL policies is to provide coverage for an “accident” and faulty or defective workmanship does not constitute an “accident.” See Royal Plastics, Inc. v. State Auto Mut. Ins. Co. (1994), 99 Ohio App. 3d 221 (8th Dist. Ct. of Appeals). This general proposition of law was eroded over the past ten to fifteen years. Multiple courts have held that claims for faulty construction reasonably fall within a CGL policy’s initial grant of coverage for an occurrence, especially if an insured seeks coverage for consequential damages. Recently courts have reconsidered this proposition and determined faulty construction claims do not constitute as “occurrence.”

For example, the Tenth Appellate District in particular appears to recognize that claims for faulty construction constitute an “occurrence” as defined in a standard CGL policy. Erie Ins. Exchange v. Colony Development Corp. (Ohio App. 10th Dist.), 2003-Ohio-7232; See also National Engineering & Contracting Co. v. U.S. Fidelity & Guaranty Co. (Ohio App. 10th Dist.), 2004-Ohio-2503 (negligent construction and design claims constitute an “occurrence” because the acts were not done with the intent or expectation of causing damage and were therefore an “accident” triggering a duty to defend). Even the Eighth Appellate District, which was at one time adamant that breach of contract and warranty claims did not constitute an occurrence, disregarded its own decision in Royal Plastics, supra, and subsequently held that faulty construction does constitute an occurrence. See Acme Constr. Co., Inc. v. Continental Nat’l Indem. Co. (Ohio App. 8th Dist.), 2003-Ohio-434, appeal not allowed, 99 Ohio St. 3d 1413, 2003-Ohio-2454 (“Ohio case law *** overwhelmingly indicates that allegations that a contractor failed to fulfill its duties in constructing or designing that which it had constructed, constitute an “occurrence” as *** most general commercial liability insurance policies uniformly define that term, i.e., as an “accident.”) The court noted in Acme Constr. Co. that work product cases typically hinge on applicable policy exclusions, not the definition of an occurrence. Acme Constr. Co., 2004-Ohio-434 at ¶14.

Thus, until very recently, the trend in Ohio was that allegations of defective construction and design can constitute an “accident” and thus an “occurrence.” Coverage for such claims was typically denied by the policy’s exclusions. However, recently, several appellate courts have resorted to prior opinions and concluded that claims for defective workmanship do not constitute an “occurrence” pursuant to CGL policy, especially if an insured does not allege any consequential damages. The Fifth District Court of Appeals in Auto Owners Mut. Ins. Co. v. Kendrick (Ohio App. 5th Dist.), 2009-Ohio-2169, ¶45 held that “we also agree with the Court in Heile . . . [CGL] policies do not insure an insured’s work itself; rather the policies generally insure consequential risks that stem from the insured’s work.” In Heile v. Herrmann (1999), 136 Ohio App.3d 351, the First Appellate District Court held that a homeowner’s claims for defective workmanship did not arise from an “occurrence” within the meaning of the contractor’s CGL insurance policy. See also Westfield v. R.I. Diiorio Custom Homes Inc. (Ohio App. 5 Dist.), 2010-Ohio-1007; Bogner v. Field & Assoc., (Ohio App. 5th Dist.), 2009-Ohio-116 (no CGL coverage for allegations of defective workmanship despite allegations of consequential damages); Indiana Ins. Co. v. Alloyed Insulation Co., (Ohio App. 2nd Dist.), 2002-Ohio-3916 at ¶12 (CGL policy “will not provide coverage if faulty workmanship is the accident, but will provide coverage if faulty workmanship causes the accident”); Paramount Parks v. Admiral Ins. Co. (Ohio App. 12th Dist.), 2008-Ohio-1351 (CGL policy does not provide coverage for defective or negligent workmanship).

However, recent federal case law exists for the proposition that property damage from defective workmanship does constitute an “occurrence.” In Fortney & Weygandt, Inc. v. American Mfgs. Mut. Ins. Co., (N.D. Ohio July 2005), 2005 WL 1566744, rev’d on other grounds, 595 F.3d 308 (6th Cir. 2010), the Trial Court held:

The counterclaim in arbitration and the third party complaint allege “property damage” caused by an “occurrence” as stated in the policies. The defective construction of the foundation system constitutes property damage. Further, that damage was caused by an “occurrence” because the damage was unintentional, and possibly the result of continuous exposure to a generally harmful condition – a defective foundation. Therefore, Frisch’s counterclaim and Lehmann’s third party complaint triggered the duty to defend Fortney unless an exclusion bars coverage.

On appeal, the parties did not dispute whether the damage constituted an “occurrence” and the Sixth Circuit Court of Appeals did not address the issue. Fortney, 595 F.3d at 310.

Thus, while recent state appellate courts appear to hold that a defective construction claim does not constitute an “occurrence” or “accident” even when certain consequential loss of business damages are alleged, recent federal district court decisions hold otherwise. Until additional case law develops, should this issue arise, make sure a thorough analysis of the current binding case law from the appellate jurisdiction where the issue is pending is completed to ensure a proper determination of whether a defective construction claim constitutes an “occurrence.”
IS THERE INSURANCE COVERAGE FOR CRIMINAL ACTS?

By Brian D. Sullivan

Does the intentional criminal conduct of an insured preclude coverage under an insurance policy for all claims? Many individuals assume that an insurance policy does not provide protection for claims arising out of criminal conduct. While this assumption is generally correct, the Ohio Supreme Court recently concluded that a homeowner’s insurance policy may be obligated to provide coverage when parents of a minor child are sued for negligent supervision after the child commits a brutal attack on a neighbor. 

Safeco Ins. Co. of America v. White, 2009-Ohio-3718.

In Safeco, a seventeen-year-old child attacked and repeatedly stabbed a neighbor. The seventeen-year-old lived with his parents at the time of the attack. The child ultimately pled guilty to attempted murder and felonious assault. After the conviction, the victim sued the seventeen-year-old on multiple claims including battery. The victim also sued the seventeen-year-old’s parents for negligent supervision, negligent entrustment, and negligent infliction of emotional distress. The seventeen-year-old’s parents demanded that their homeowner’s insurer provide them with a defense and agree to indemnify them for any liability arising out of the negligence claims.

The parent’s homeowner’s insurer disclaimed any obligation to provide coverage and filed a declaratory judgment seeking a determination that it had no obligation to defend or indemnify the parents in relation to the claims arising out of their son’s intentional criminal conduct. The victim’s tort claim proceeded against the seventeen-year-old and his parents. A jury determined that the seventeen-year-old and his parents owed the victim $6,500,000.00 in compensatory damages for their tortious conduct. The jury further determined that the seventeen-year-old was 30% responsible for the victim’s injuries while the seventeen-year-old’s parents were 70% responsible for the injuries.

The parents’ homeowner’s policy identified the parents as insureds. The definition of insured also contained language which included the seventeen-year-old himself. In claiming coverage, Safeco relied in part upon an exclusion which precluded coverage for bodily injury “expected or intended by an insured or which is the foreseeable result of an act or omission intended by an insured.” The policy also defined the word occurrence as “an accident.” The insurer argued that there was no coverage for the victim’s injuries because the attack was not an accident.

The Supreme Court concluded that Safeco was obligated to provide coverage to the seventeen-year-old’s parents for the negligence claims asserted against them. Specifically, the Court noted that whether an insured’s conduct may be viewed as expected or intended to cause injury is determined from the perspective of the person seeking coverage, not the person who may have committed the intentional act. The Court observed that there was no evidence demonstrating that the parents expected or intended to cause injury to the victim. Moreover, because the injury to the victim as a result of the parent’s negligence was accidental, the conduct qualified as an occurrence triggering coverage under the policy. 

Additionally, the Court determined that the expected or intended exclusion did not preclude coverage because the clear import of the exclusion was to preclude coverage for bodily injury arising from or caused by the intentional or illegal acts of any insured. While this exclusion “plainly” applied to the intentional acts of the seventeen-year-old, the Court noted that the exclusionary language would not apply to the claims of negligent supervision and negligent entrustment asserted against the parents. In so holding, the Supreme Court relied upon the underlying jury verdict which reflected that the victim had established a separate injury based upon the negligent failure to monitor the seventeen-year-old which did not arise from the intentional or illegal actions as contemplated by the policy’s exclusion.

The Safeco court’s resolution of the issue concerning whether a derivative claim such as negligent training, hiring, and supervision constituted an occurrence reaffirmed the Court’s prior decision in Doe v. Shaffer (2000), 90 Ohio St.3d 88. The Court’s holding relative to the application of a party’s intentional act exclusion, however, was less clear. While the Supreme Court’s decision renders the intentional act exclusion ineffective to bar coverage for such claims as negligent supervision, it is important to recognize that the Court heavily relied upon the specific factual findings made by the jury in the underlying case. It remains unclear if the majority of the Court would have reached the same conclusion if specific jury interrogatories had not separated out an award of damages between the claims asserted against the son and the claims asserted against his parents.

DUTY TO DEFEND AND THE INTENTIONAL ACT EXCLUSION CONTINUED FROM PAGE 1

intent to harm will be inferred as a matter of law when an insured acts in a manner which, from an objective standpoint, is substantially certain to result in injury. See Simpson v. Internet Corp. (6th Cir. 2007) 213 Fed. Appx. 390 (Court, citing to Penn Traffic, held that inferred expectation of harm disqualifies the insured from coverage for the liability under the National Union policy); McGuffin v. Zaremba Contracting (2006), 166, Ohio App.3d 142, 146 (Court, relying on Penn Traffic, held that where substantial certainty exists, intent to harm will be inferred as a matter of law).

In conclusion, the courts of Ohio continue to recognize that the intent to cause harm may, under appropriate circumstances, be inferred from the conduct giving rise to the claim. When the insured’s conduct is, from an objective standpoint, substantially certain to result in injury, the insured’s intent to harm may be inferred as a matter of law.
INTENTIONAL ACTS IN SELF-DEFENSE

By Amy S. Thomas

The self-defense exception to the intentional act exclusion in a CGL policy typically provides that the “exclusion does not apply to ‘bodily injury’ resulting from the use of reasonable force to protect persons or property.” The Ohio Supreme Court first addressed the concept of “self-defense” in the context of an intentional act exclusion in Preferred Mutual Insurance Co. v. Thompson (1986), 23 Ohio St. 3d 78. Preferred Mutual filed its declaratory judgment action after Thompson sued Preferred Mutual’s insured, Sabo, for injuries sustained when Sabo shot Thompson. Sabo admitted that he intentionally shot Thompson, but claimed he acted in self-defense. Preferred Mutual disputed any duty to defend or indemnify Sabo for his shooting of Thompson.

Preferred Mutual argued that its policy exclusion for “expected or intended injury” obligated any duty to defend or indemnify Sabo for his intentional shooting of Thompson. Preferred Mutual further argued that the exclusion did not distinguish between “injuries caused by persons acting wrongfully and those acting under a claim of right (e.g., in self-defense).” Id. at 81. Notably, the Preferred Mutual policy’s intentional act exclusion did not expressly contain any self-defense exception. Nevertheless, the Ohio Supreme Court held that Preferred Mutual had a duty to defend its insured. In finding coverage, the Ohio Supreme Court initially agreed with Preferred Mutual’s argument that Sabo’s intentional shooting fit within the plain language of the “expected or intended injury” exclusion. However, the Ohio Supreme Court went on to conclude: “While a facial analysis of the exclusion in question may support Preferred’s contention, we find that neither the purpose behind the exclusion nor public policy is served by application of the exclusion to an insured who claims to have acted in self-defense.” Id. The Court distinguished intentional harm resulting from self-defense, noting:

“No purpose is served, however, by denying coverage to an insured who, while acting in self-defense, intentionally injures another. The insured who acts in self-defense does so only as a reaction to his attacker, and any injuries suffered by the attacker are not the result of the insured’s misconduct.”

The Court continued its analysis, focusing on the insurer’s risk:

Without [the “expected or intended injury”] exclusion, an insurance company’s risk would be incalculable. An act of self-defense, however, is neither anticipated nor wrongful from the standpoint of the insured. The risk that an insurance company bears in providing an intentional tort defense for an insured who claims to have acted in self-defense is calculable and, from a monetary standpoint, minimal. Id.

The Ohio Supreme Court reiterated that its conclusion only required Preferred Mutual to provide Sabo with a defense. The Court emphasized that “[i]f a finding is made in [the underlying case,] Thompson v. Sabo that Sabo did not act in self-defense, but committed an intentional tort against Thompson, Preferred will be relieved of its obligation to pay any judgment on Sabo’s behalf.” Id. at 82 n.4.

Under Thompson, an insurer may not rely on the “expected or intended injury” exclusion (even if it does not expressly contain an exception for self-defense) or refuse a defense to its insured when the insured committed the intentional conduct at issue in self-defense. However, Ohio law suggests that the self-defense exception will not require a defense in every case an insured raises self-defense. Moreover, Ohio law suggests that the insured will have the burden to demonstrate that the self-defense exception applies.

First, both Thompson and subsequent case law suggests that the self-defense exception will not automatically require the insurer to defend just because the insured argues he or she acted in self-defense. Rather, the surrounding circumstances must indicate the insured acted in self-defense. Indeed, the Ohio Supreme Court incorporated into the Thompson syllabus law the necessity of more than just the insured’s argument:

“When an insured admits that he intentionally injured a third party and the surrounding circumstances indicate that he acted in self-defense in causing the injury, the insured’s insurance company may not refuse to defend the insured from the third party’s intentional tort claim on the grounds that the third party’s injuries fall within an exclusion from coverage for ‘bodily injury … which is either expected or intended from the standpoint of the [i]nsured.”

Id. at syllabus. Thus, the Thompson holding incorporates some objective standard regarding the self-defense exception by requiring proof via “the surrounding circumstances.”

This conclusion is reaffirmed in State Farm Fire and Casualty Co. v. Totarella, 2003-Ohio-5229, where the Ohio Court of Appeals for the Eleventh District specifically cited to the Ohio Supreme Court’s holding in Thompson that the surrounding circumstances must indicate the insured acted in self-defense for the exception to the intended injury exclusion to apply. In Totarella, a young prankster, Brian Keeney, knocked on Totarella’s door bell around 8 p.m. one evening. Keeney jumped off the porch and began running after ringing the bell. Totarella gave chase, caught Kenney, and grabbed him, threw him in a ditch, and punched him in the face about twenty times. After Kenney and his parents sued Totarella, State Farm, Totarella’s insurer refused to defend. Totarella argued, based on Thompson, that State Farm had a duty to defend because Totarella acted in self-defense. Both the trial court and Court of Appeals rejected Totarella’s argument. In rejecting Totarella’s reliance on Thompson, the Court of Appeals held:

However, Thompson requires that the “surrounding circumstances” justify the use of force. Here, [Totarella’s] affidavit, and the unrebutted assertions in [State Farm’s] summary judgment submissions do not present “surrounding circumstances” that demonstrate any of the
NO CONTEST PLEA CANNOT BE USED TO DENY COVERAGE

By Joseph Borchelt

When an insured pleads no contest to intentionally committing a criminal act, can the insured still seek insurance coverage for his/her actions? Approximately two weeks ago, the Ohio Supreme Court begrudgingly held “yes.”

In Elevators Mut. Ins. Co. v. J. Patrick O’Flaherty’s, Inc., 2010-Ohio-1043, Richard Heyman (“Heyman”), the owner of a restaurant named O’Flaherty’s, pled no contest to criminal charges for intentionally burning down the restaurant. Heyman also filed an insurance claim for the fire damage. When the insurer denied coverage and filed a declaratory judgment action, Heyman filed a counterclaim for breach of contract, bad faith and spoliation of evidence.

The Trial Court ultimately considered Heyman’s no contest plea to arson and held coverage was excluded under the policy for “dishonest or criminal acts” by Heyman. The Court of Appeals reversed the Trial Court and held Heyman’s no contest plea was inadmissible.

The Ohio Supreme Court affirmed the Court of Appeals’ decision. The Ohio Supreme Court analyzed Criminal Rule 11 and Evidence Rule 410(A). Crim. R. 11(A) provides that a plea of no contest to criminal charges “is not an admission of Defendant’s guilt, but an admission of the truth of the facts alleged in the indictment.” Crim. R. 11(B)(2). Evid. R. 410(A)(2) similarly provides that a no contest plea “is not admissible in any civil or criminal proceeding against the Defendant who made the plea.”

The reason for the rules is to encourage Defendants to plea bargain and avoid admitting guilt if a victim later sues the Defendant.

Based on the foregoing, the Ohio Supreme Court held neither the plea nor the resulting conviction was admissible in the subsequently filed coverage litigation. The Ohio Supreme Court recognized and struggled with the fact that as a result of its ruling, insurers may financially benefit from criminal actions. However, the Court noted: 1) the facts surrounding the criminal activity is still admissible, and 2) the Ohio Rules of Evidence should be changed so that a no contest plea can be used as a defense to a claim asserted by a Defendant.

Until the Ohio Rules of Evidence are changed, however, insurers will be forced to invest more time and money to prove coverage is excluded for an insured’s intentional acts. An insurer will not be able to rely upon an insured’s no contest plea in a criminal proceeding to prove the insured acted intentionally.

INTENTIONAL ACTS IN SELF-DEFENSE CONTINUED FROM PAGE 4

vaguely offered affirmative defenses; i.e., self-defense, ejectment of a trespasser, or citizen’s arrest.

… [Totarella] claims that he feared for his and his family’s safety because he believed that Brain was an intruder responsible for “break-ins and vandalism that had been occurring on [his] street.” However, there is absolutely nothing in the record that could logically lead a person to conclude that the simple act of knocking on a front door at 8:00 p.m. constituted a sufficient threat of great bodily harm justifying the use of self-defense. And even if it did, appellant clearly violated his duty to retreat when he became the aggressor and chased Brain off his property and restrained him once the pursuit ended.

Id. at ¶¶ 24-25.

The Totarella Court focused on the tort elements for a self-defense claim under Ohio law. The Court of Appeals noted that a party asserting a self-defense claim must “allege facts demonstrating the following elements: (1) that he was not at fault in creating the situation giving rise to the affray; (2) that he had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that he did not violate any duty to retreat or avoid the danger.” Id. at ¶ 25 (citing State v. Robbins (1979), 58 Ohio St.2d 74, syllabus ¶ 2).

Thus, even if the policy at issue does not contain an express self-defense exception to the “expected or intended injury” exclusion, Ohio law may still require the insurer to defend an insured for his or her intentional conduct in causing harm if the surrounding circumstances demonstrate that the insured acted in self-defense. In addressing such an argument by an insured, an insurer should consider the pertinent elements of the self-defense claim. First, the insurer will consider the insured’s role in creating the situation. Second, the insurer will examine the insured’s beliefs regarding the harm perceived. The insured must have a bona fide (and, as the Totarella decision suggests, objectively reasonable) belief that the insured was in imminent danger and could only escape by use of force. Finally, the insurer will examine whether the insured acted excessively. The insured must act to retreat or avoid the danger. Finally, it is important to bear in mind that self-defense in an intentional-tort action is an affirmative defense that a defendant must plead and prove by a preponderance of the evidence. Snowden v. Hastings Mut. Ins. Co., 2008-Ohio-1540, ¶ 14 n.1.

Finally, Ohio law addressing the self-defense exception suggests that the insured will have the burden to prove application of the exception to the exclusion. Ohio law is well-settled that an insurer has the duty to demonstrate that an exclusion to coverage applies. However, because the underlying lawsuit (in which the third party asserts the intentional tort against the insured) will result in resolution of the self-defense issue, the insured will ultimately bear the burden to demonstrate the elements of the self-defense exception. Although the insured may have the ultimate burden to prove the elements of the self-defense claim, the insurer may have a duty to provide a defense before the underlying lawsuit ultimately establishes the issue. Again, careful scrutiny of the surrounding circumstances must dictate whether the insurer provides a defense.
In Ohio, courts determine whether a duty to defend is owed the insured by following what is often referred to as the “scope of the allegations” test. While the concept sounds simplistic, it is not. This test was initially set out by the Ohio Supreme Court in *Socony-Vacuum Oil Co. v. Continental Casualty Co.* (1945), 144 Ohio St. 382, 59 N.E.2d 199, and later clarified in *Motorists Mut. Ins. Co. v. Trainor* (1973), 33 Ohio St. 2d 41, 294 N.E.2d 874. Under the “scope of the allegations” test, where the allegations of the complaint obviously bring the action within the policy coverage or where the allegations on their face disclose that the action is covered, the insurer has a duty to defend. This same result occurs where the complaint contains multiple allegations, but only a single one of them gives rise to the duty to defend. Under these facts, the insurer still has a duty to defend the entire action, not just the singular covered allegation. *Preferred Mut. Ins. Co. v. Thompson* (1986), 23 Ohio St. 3d 78, 491 N.E.2d 688.

However, even in instances where no allegation plainly brings the action within coverage, an insurer may yet have a duty to defend. This concept was first discussed by the Ohio Supreme Court in *Willoughby Hills v. Cincinnati Insurance Company* (1984), 9 Ohio St. 3d 177, 459 N.E.2d 555. In *Willoughby Hills*, the Ohio Supreme Court addressed the effect of Ohio’s adoption of notice pleading upon the rule that an insurer’s duty to defend arose solely from the pleadings and concluded that, under notice pleading standards, the duty to defend could arise at some point after the complaint was filed. *Willoughby Hills*, 9 Ohio St. 3d at 179, 459 N.E.2d 555. The rationale of *Willoughby Hills* is clear; that is, under notice pleading, the scope of the allegations may expand through discovery such that, while not apparent initially, the claims may become covered by the insurance. *Ferro Corp. v. Cookson Group*, PLC, 585 F.3d 946 (C.A.6, 2009).

Accordingly, the Ohio Supreme Court reformulated the “scope of the pleadings” test, amending it to provide that when the pleadings “state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim.” *Willoughby Hills* at 180, 459 N.E.2d 555.

This does not mean that coverage may arise after the filing of a complaint when the pleadings do not create even an arguable basis for coverage. Ohio courts of appeals have made this distinction clear, holding that the inquiry into the insurer’s duty to defend must naturally begin with a close scrutinization of the allegations of the disputed complaint. For example, in *Motorists Mutual Insurance Co. v. National Dairy Herd Improvement Ass’n*, Inc. (2001), 141 Ohio App.3d 269, 750 N.E.2d 1169, the complaint in the underlying case stated causes of action for violations of antitrust and monopoly. The insured argued that it was covered because the complaint also impliedly alleged disparagement and defamation, stating that “it only made sense” that these torts occurred, given the other allegations in the complaint. The appellate court rejected this argument, stating that the complaint must state the causes of action which fall within the scope of coverage, not merely imply those causes of action.

Similarly, in *City of Sharonville v. American Employer’s Insurance Company* (2004), 158 Ohio App. 3d 576, 583, 818 N.E.2d 295, judgment aff’d, (2006), 109 Ohio St. 3d 186, 846 N.E.2d 833, the court observed:

But the general rule—that the duty to defend is determined from the allegations in the Complaint—remains. This makes sense because, unless a plaintiff amends his Complaint, the plaintiff is allowed to prove no set of facts outside the Complaint’s ambit.

As such, there is no duty to defend “if there is no set of facts alleged in the underlying complaint against the insured that, if proven true, would invoke coverage.” *Cincinnati Indem. Co. v. Martin* (1999), 85 Ohio St.3d 604, 605, 710 N.E.2d 677. This means that courts will not imply that a cause of action has been pled in a complaint merely because the allegations in the complaint indicate that another cause of action might have happened. *Erie Ins. Exch. v. Landsbery*, 7th Dist. No. 07 CO 6, 2008-Ohio-1553, at ¶ 42.

Based upon this law, it is important to recognize that while the “scope of the allegations” test may have been broadened; determining whether or not the duty to defend has been triggered in Ohio still begins and ends with a careful examination of the factual allegations in the complaint.
An insurer’s duty to defend is triggered even if the allegations in the complaint only “state a claim which is potentially or arguably within the policy coverage.” Willoughby Hills v. Cincinnati Ins. Co. 6 (1984), 9 Ohio St. 3d 177, 180. In other words, if the mere allegations of the complaint assert a claim for which coverage applies, the duty to defend will attach regardless of the veracity of the allegations. In Willoughby Hills, the Court imposed upon the insurer the duty to defend the insured when the duty to defend is not apparent from the pleadings but the allegations “state a claim which is potentially or arguably within the policy coverage.” Id. (emphasis added). In reaching this conclusion, the Court cited to the fact that the policy language obligated the carrier to defend “groundless, false or fraudulent claims.” Three years later, the Supreme Court of Ohio again addressed the issue of when the duty to defend is imposed upon the insurer when the policy lacked the language requiring a defense for “groundless, false or fraudulent claims.” The insurer in Preferred Risk Ins. Co. v. Gill (1987), 30 Ohio St. 3d 108, 507 N.E.2d 1118, filed an action for declaratory judgment seeking a declaration that the insured’s conduct was not covered because of the intentional nature of the conduct regardless of the fact that the underlying lawsuit asserted a negligence claim in addition to an intentional tort claim. In that case, the insured had murdered a boy and pled guilty to aggravated murder.

After the boy was discovered and after the insured pled guilty, the family of the boy sued the insured asserting claims for wrongful death and negligent infliction of emotional distress. Preferred Risk, 30 Ohio St. 3d at 109, 507 N.E.2d at 1120. Thereafter, the insurer sought a declaratory judgment arguing that the insured’s conduct was outside the scope of coverage because the policy did not cover intentional acts. Although a claim of negligence had been asserted in the lawsuit, the trial court found that the insured had acted intentionally in all respects. Thus, the trial court found that the insurer did not possess a duty to defend the insured.

...the Supreme Court of Ohio held “the duty to defend does not depend solely on the allegations of the underlying tort complaint.”

The court of appeals reversed. Based upon the holding in Willoughby Hills, the appellate court held that the mere assertion of the negligence claim brought the claim within the policy coverage despite the insured’s intentional act of killing the boy. In reviewing the appellate court’s decision, the Supreme Court of Ohio held that “the duty to defend does not depend solely on the allegations of the underlying tort complaint.” Preferred Risk, 30 Ohio St.3d 108, 507 N.E.2d 1118, at paragraph two of the syllabus (emphasis added). The Court reasoned that when the language of the policy does not include coverage for “groundless, false or fraudulent claims,” courts can look beyond the four corners of the complaint to determine whether the act of the insured was intentional and, thus, outside the policy coverage. The Court’s holding allows insurers to file a declaratory judgment action and present evidence that regardless of the nature of the claims in the complaint, the insured’s acts were committed intentionally thereby negating coverage under the policy as well as the duty to defend.

After Preferred Risk, in cases where the policy did not expand coverage to groundless, false or fraudulent claims, courts were required to review the “true facts” of the underlying case to determine whether the insured’s conduct was covered under the policy. Id. at 114. However, if the policy does not exclude coverage for “groundless, false or fraudulent claims,” coverage may be triggered.

On appeal to the Supreme Court of Ohio, the Court, in a one paragraph opinion, reversed relying on Willoughby Hills. Cincinnati Ins. Co. v. Colelli & Assocs., Inc., 93 Ohio St.3d 325, 2002-Ohio-2214, 767 N.E.2d 717, ¶1. The Court further limited the holding in Preferred Risk to its facts. Id. Because of the Court’s brief opinion, the full extent of the limitation of Preferred Risk is unclear. Although the limitation arguably could be restricted to the egregious and sensational facts provided by the “true facts” of the Preferred Risk case, i.e. the insured’s act of murder, the Seventh District Court of Appeals has held that Preferred Risk is applicable and no duty to defend attaches when the acts of the insured that form the basis of the underlying claims result in a criminal conviction. Westfield Ins. v. Barnett, 7th Dist. No. 306, 2003-Ohio-6278, ¶25.

As it currently stands, the duty to defend clearly arises when the insured is not convicted of a criminal offense stemming from the conduct that forms the basis of the underlying claims. Because of the Supreme Court of Ohio’s holding in Cincinnati Insurance, however, an insurer must proceed with caution when refusing to provide a defense if the “true facts” of the case do not rise to the extreme level of the facts presented by Preferred Risk, even in the event the insured’s conduct results in a criminal conviction.
The complexity and potential long term ramifications arising from insurance coverage litigation not only requires a global understanding of insurance law, but often demands a creative and innovative problem solving approach. At Reminger Co., L.P.A., our members of the insurance coverage group offer a variety of services to our clients when confronted with insurance coverage issues. We offer advice in drafting policy language to effectively address some of the unique nuances of Ohio and Kentucky law and aid in the evaluation of coverage issues. We provide representation in all types of insurance coverage litigation and the defense of bad faith and other extra contractual claims arising from insurance coverage issues.