[J-157-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MINNESOTA FIRE AND CASUALTY COMPANY,	:	No. 68 MAP 2003
Appellee	:	Appeal from the Order of the Superior Court entered on 8/9/02 at No. 651 MDA 2001 which reversed and remanded the
v.	:	Judgment of Cumberland County, Civil Division entered 3/14/01 at No. 00-3886-EQUITY
MICHAEL J. GREENFIELD, SHARON SMITH AND ARLIN C. SMITH, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF ANGELA C. SMITH,	:	
Appellants	:	ARGUED: December 2, 2003

CONCURRING OPINION

MR. JUSTICE SAYLOR **Decided: August 19, 2004**

I join the lead opinion's disposition and the core of its analysis, namely, that on the facts of this particular case, public policy may be invoked to deny a defense and indemnification under a homeowner's insurance policy for liability resulting from the criminal delivery and ingestion of a powerful narcotic substance such as heroin. This conclusion does not, in my view, improperly or unfairly rewrite the policy to correct the absence of an appropriate exclusion, particularly since it cannot be reasonably maintained that the parties to the insurance contract anticipated that the homeowner's involvement in the drug overdose death of another would give rise to a covered risk. See generally RESTATEMENT (SECOND) OF CONTRACTS §178(2)(a) (providing that, in

weighing the enforcement of a contractual provision in connection with public policy grounds, the parties' justifiable expectations must be considered). Like the lead, I strongly prefer this rationale to support the result in this case over the attribution of "inferred intent" to Greenfield. Indeed, in effect, the inferred intent approach seems to me merely to represent an unnecessarily indirect and somewhat strained route to the implementation of a judicial, public policy exclusion.

Regarding the contractual coverage aspect of the case, my position most closely aligns with that of the common pleas court and Judge Olszewski of the Superior Court. I believe that these jurists were correct in apprehending that, although Appellee's complaint alleged an intentional act by Greenfield (providing heroin to Smith), in the absence of averments alleging or reasonably implying that Greenfield expected or intended to cause her death, this result should be deemed an accidental occurrence rather than one caused with intention. In my view, this approach best comports with the line of decisions establishing that an insured's acts are to be deemed intentional only when he aims to cause the resultant damage or harm of the same general type, see United Serv. Auto. Assoc. v. Elitzky, 358 Pa. Super. 362, 371-73, 517 A.2d 982, 987-88 (1986) (citing Mohn v. Am. Cas. Co. of Reading, 458 Pa. 576, 326 A.2d 346 (1974); Eisenman v. Hornberger, 438 Pa. 46, 264 A.2d 673 (1970)), and constraining the role of reasonable foreseeability (as opposed to substantial certainty of result) in terms of the accidental versus intentional occurrence assessment. See id. at 371-73, 517 A.2d at 987.[1]

[1] I recognize that Elitzky facially concerns only an "expected or intended" exclusion, and not also the occurrence-as-an-accident aspect of an insurance policy. In my view, however, the reasoning of Elitzky -- i.e., that the terms "expected" and "intended" are ambiguous and, therefore, must be construed against the insurer, see Elitzky, 358 Pa. Super. at 371, 517 A.2d at 987 -- applies equally to an insurer's undefined use of the terms "accident" and "accidental" in defining occurrence-based coverage. Under (continued . . .)

Centrally, prevailing Pennsylvania law establishes that "[a]n insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result." Id. at 374-75, 517 A.2d at 989; accord Aetna Life and Cas. Co. v. Barthelemy, 33 F.3d 189, 191 (3d Cir. 1994). Appellee's concession that "the prospect of a fatal overdose may be statistically remote as a function of the number of regular heroin users on a national basis," Brief of Appellee at 10; see also Minnesota Fire and Cas. Co. v. Greenfield, 805 A.2d 622, 631 (Pa. Super. 2002) (Olszewski, J., dissenting) (observing that a lower percentage of heroin addicts die from heroin-related causes than smokers who die from tobacco-related causes), thus answers the contractual coverage question under the law as it presently stands.

Finally, I would not undertake to consider altering these fundamental, guiding principles on the strength of the present submissions, which, as the lead opinion notes, are focused on the discrete inferred intent and public policy doctrines as they relate to unique circumstances. Accord id. at 630-31 (observing that the charged circumstances presented in this case create the potential for undue distortion of the essential contract analysis).

(...continued)
prevailing principles, then, I believe that the common pleas court was wholly justified in treating the terms "accident" as subsuming the unintended result of an intentional act, where the result was one that was not substantially likely to occur. Accord id. at 374-75, 517 A.2d at 989.