




2012

# Debunking The Myth that Insurance Coverage is Not Available or Allowed for Intentional Torts or Damages

Christopher French  
*Penn State Law*

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# DEBUNKING THE MYTH THAT INSURANCE COVERAGE IS NOT AVAILABLE OR ALLOWED FOR INTENTIONAL TORTS OR DAMAGES

*Christopher C. French\**

## I. INTRODUCTION

What do unicorns, leprechauns, Santa Claus, and the Easter Bunny have in common with the proposition that insurance is not available for injuries or damage intentionally caused? They are all myths. It is a myth that insurance only covers unintentional injuries or damage.

This myth has its roots in what is known as the “fortuity” doctrine in the first party or property insurance context. Although the term “fortuity” does not appear in insurance policies, some courts have held that there is an implied exclusion of coverage for any loss that is not fortuitous.<sup>1</sup> A loss is fortuitous if it is not certain to occur.<sup>2</sup>

The fortuity doctrine was transferred to the third party or liability insurance context when it was incorporated into the definition of an “occurrence”<sup>3</sup> and subsequently as the “expected or intended” exclusion.<sup>4</sup>

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\* Christopher C. French is a partner at K&L Gates LLP in Pittsburgh, Pennsylvania, and an Adjunct Professor of Insurance Law at Duquesne Law School; J.D., Harvard Law School; B.A., Columbia University. The author gratefully acknowledges the legal research contributions of Robert Vernon to this article. The views expressed in this article are the author’s and not necessarily those of K&L Gates LLP or any of its clients.

1. See generally, Stephen A. Cozen & Richard C. Bennett, *Fortuity: The Unnamed Exclusion*, 20 FORUM 222 (1985).

2. *Avis v. Hartford Fire Ins. Co.*, 195 S.E.2d 545, 548 (N.C. 1973).

3. See, e.g., Donald S. Malecki and Arthur L. Flitner, *Commercial General Liability Insurance*, Appendix A (8th ed. 2005); *Bay Cities Paving & Grading v. Lawyers’ Mutual Ins. Co.*, 5 Cal.4th 854, 865 n. 4 (1993) (quoting *Mich. Chemical Corp. v. American Home Assurance Co.*, 728 F.2d 374, 378 (6th Cir. 1984).

4. The “expected or intended” exclusion, or a variation of it, is found in ISO’s 1986, 1990, 1993, 1996, and 2006 occurrence-based and claims-made CGL Coverage Forms. See Malecki, *supra* note 3, at Appendices B, C, E, and F. See also Kristin Wilcox, *Intentional Injury Exclusion Clauses – What is Insurance Intent?*, 32 WAYNE L. REV. 1523 (1986) (noting that many “homeowner’s insurance policies

Some states have even codified the fortuity doctrine. For example, section 533 of the California Insurance Code provides “An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured’s agents or others.”<sup>5</sup>

When claims arise, insurers attempt to further advance the myth by arguing that it would be against “public policy” to allow insurance to cover injuries or damage intentionally caused by the policyholder.<sup>6</sup> Without question, there are some decisions in which the courts have held that, as a matter of public policy, an insurance policy should not be permitted to provide coverage for injuries or damage intentionally caused by the policyholder.<sup>7</sup> Even some commentators agree:

[T]here is nothing contrary to public policy in making and enforcing a policy of liability insurance. But an agreement to indemnify for damages imposed by law for injuries willfully inflicted would be unenforceable since it is contrary to public policy to permit anyone to receive indemnity against the consequences of injuries willfully inflicted by him.<sup>8</sup>

Further, in some states, it is against public policy to allow insurance coverage for punitive damages, which often are awarded only for egregious or intentional misconduct.<sup>9</sup> The reasoning behind this public policy is that

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exclude coverage for injuries caused intentionally by the insured.”).

5. Cal. Ins. Code § 533 (West 1985). *See also* Russ-Field Corp. v. Underwriters at Lloyd’s, 164 Cal. App. 2d 83, 96–97 (1958) (“A ‘willful act’ as used in this statute connotes something more blameworthy than the sort of misconduct involved in ordinary negligence, and something more than the mere intentional doing of an act constituting such negligence.”); *accord* Cal. Civ. Code § 1668 (West 1985) (declaring that contracts that seek to exempt one of the parties from responsibility for willful injury are against public policy).

6. *See, e.g.*, Karen Cuttler, *Liability Insurance for Intentional Torts – Subrogation of the Insurer to the Victim’s Rights Against the Insured: Ambassador Insurance Co. v. Montes*, 32 RUTGERS. L. REV. 155, 157 (1979).

7. *See, e.g.*, *Hussar v. Girard Life Ins. Co.*, 252 So.2d 374, 374 (Fla. Dist. Ct. App. 1971) (public policy prohibits recovery from health insurer for self-inflicted injuries); *Commercial Travelers Mut. Accident Ass’n v. Witte*, 406 S.W.2d 145, 149 (Ky. Ct. App. 1966) (a beneficiary cannot recover life insurance proceeds if he murders the insured); *Checkley v. Ill. Cent. R.R. Co.*, 100 N.E. 942, 944 (Ill. 1913) (“A fire insurance policy issued to anyone, which purported to insure his property against his own willful and intentional burning of the same, would manifestly be condemned by all courts as contrary to a sound public policy . . .”).

8. 1 ROWLAND H. LONG, *THE LAW OF LIABILITY INSURANCE* § 1.02 (1996).

9. *See, e.g.*, *State Farm Fire & Cas. Co. v. Super. Ct.*, 191 Cal. App. 3d 74, 77–78 (1987); *Wausau Ins. Co. v. Valspar Corp.*, 594 F. Supp. 269, 273 (N.D. Ill. 1984); *Grant v. North River Ins. Co.*, 453 F. Supp. 1361, 1370 (N.D. Ind. 1978); *St. Paul Surplus Lines Ins. Co. v. Int’l Playtex, Inc.*, 777 P.2d 1259, 1269 (Kan. 1989), *cert. denied*, 493 U.S. 1036 (1990); *Santos v. Lumbermens Mut. Cas. Co.*, 556 N.E.2d 983, 990, 992 (Mass. 1990); *Heartland Stores, Inc. v. Royal Ins. Co.*, 815 S.W.2d 39, 43 (Mo. Ct. App. 1991); *Home Ins. Co. v. Am. Home Prods. Corp.*, 550 N.E.2d 930, 932 (N.Y. 1990); *Casey v. Calhoun*, 531 N.E.2d 1348, 1348 (Ohio Ct. App. 1987); *see also* John A. Appleman and Jean Appleman, *Insurance of Tortious Acts*, in 12f-256Af APPLEMAN ON INSURANCE LAW AND PRACTICE ARCHIVE § 7031 (1979); Steven Pitt et al., *Risks and Activities Covered by General Insurance Policy*, in 7 COUCH ON INSURANCE § 101:28 (3rd ed., 2007).

punitive damages are intended to punish the wrongdoer and deter others from such misconduct.<sup>10</sup> Thus, such goals allegedly would be thwarted if a policyholder were indemnified by its insurer for such damages.<sup>11</sup>

Similarly, some courts have held that a policyholder will not be covered by an insurance policy for criminal conduct because of the *scienter* requirement of criminal acts (i.e., the person who commits the crime intended to commit the crime).<sup>12</sup>

So, it looks like this “myth” that a policyholder cannot recover insurance for intentional injuries or damage is not a myth at all, but reality, right? Not so fast. As Cicero is often quoted as saying, the exception proves the rule.<sup>13</sup> In this instance, the exception swallows the rule.

There are an array of intentional torts for which insurance coverage is expressly provided under liability policies.<sup>14</sup> For example, insurance coverage is available for defamation,<sup>15</sup> disparagement,<sup>16</sup> trademark

10. See, e.g., *Nw. Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 434 (5th Cir. 1962) (disallowing insurance for punitive damages awarded on the theory that such coverage would thwart the purposes of punitive damage awards—to punish and to deter); *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1064 (Fla. 1983) (“The Florida policy of allowing punitive damages to punish and deter those guilty of aggravated misconduct would be frustrated if such damages were covered by liability insurance.”).

11. *U.S. Concrete Pipe Co.*, 437 So. 2d at 1064.

12. See, e.g., *Bohrer v. Church Mut. Ins. Co.*, 965 P.2d 1258, 1262 (Colo. 1998) (“[I]t is contrary to public policy to insure against liability arising directly against the insured from intentional or willful wrongs, including the results and penalties of the insured’s own criminal acts.”); *Everglades Marina, Inc. v. Am. E. Dev. Corp.*, 374 So. 2d 517, 519 (Fla. 1979) (“[P]ublic policy precludes recovery under an insurance policy when the insured has committed a criminal act with known and necessary consequences.”); *Goldsmith v. Green*, 47 So. 3d 637, 641 (La. Ct. App. 2010) (“[N]o reasonable policyholder would expect for his own intentional criminal acts to be insured . . .”); *Perreault v. Maine Bonding & Cas. Co.*, 568 A.2d 1100, 1102 (Me. 1990) (denial of coverage “in accord with the general rule that insurance to indemnify an insured against his or her own violation of criminal statutes is against public policy and, therefore, void.”).

13. M. Tullius Cicero, *For Cornelius Balbus*, available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.02.0020:text=Balb.:chapter=14>.

14. See *N. Bank v. Cincinnati Ins. Companies*, 125 F.3d 983, 986–87 (6th Cir. 1997) (rejecting insurers’ argument that an umbrella policy covered only unintentional torts where the policy defined “personal injury” to include “inherently intentional” torts such as false arrest, false imprisonment, detention, malicious prosecution, humiliation, libel, slander, defamation of character, assault and battery and discrimination); *Cincinnati Ins. Co. v. Zen Design Grp., Ltd.*, 329 F.3d 546, 546 (6th Cir. 2003) (duty to defend exists for underlying trademark and trade dress infringement claims); *Lime Tree Vill. Cmty. Club Ass’n v. State Farm Gen. Ins. Co.*, 980 F.2d 1402, 1404 (11th Cir. 1993) (duty to defend triggered by allegations in complaint that policyholder had falsely and maliciously slandered or disparaged homeowners’ titles); *Union Camp Corp. v. Cont’l Cas. Co.*, 452 F. Supp. 565, 565 (S.D. Ga. 1978) (coverage for employment discrimination liability does not violate public policy); *Imperial Cas. and Indem. Co. v. State of Conn.*, 714 A.2d 1230, 1237–39 (Conn. 1998) (policy targeted to law enforcement including coverage for intentional torts permissible); *Bailer v. Erie Ins. Exch.*, 687 A.2d 1375, 1376; 1384–85 (Md. 1997) (intentional tort of invasion of privacy covered despite “expected or intended” exclusion); *Fluke Corp. v. Hartford Accident & Indem. Co.*, 34 P.3d 809, 814 (Wash. 2001) (concluding that coverage for malicious prosecution does not violate public policy).

15. *Ind. Ins. Co. v. N. Vermillion Cmty. Sch. Corp.*, 665 N.E.2d 630, 635 (Ind. Ct. App. 1996) (duty to defend arose for claims alleging slander and libel); *Cmty. TV Corp v. Twin City Fire Ins. Co.*,

infringement,<sup>17</sup> misappropriation of style doing business,<sup>18</sup> unfair competition,<sup>19</sup> infringement of copyright, title or slogan,<sup>20</sup> false

15 Mass. Law Rptr. 435, 439 (Mass. Super. Ct. 2002) (although insured did not expressly allege defamation as a cause of action, duty to defend arose where alleged facts constituted defamatory act); McCormack Baron Mgmt. Serv. Inc. v. Am. Guar. & Liab. Ins. Co., 989 S.W.2d 168, 170 (Mo. 1999) (recognizing in defamation case that so long as “the complaint merely alleges facts that give rise to a claim potentially within the policy’s coverage, the insurer has a duty to defend.”); Town of Massena v. Healthcare Underwriters Mut. Ins. Co., 779 N.E.2d 167, 171–72 (N.Y. 2002) (finding insurer had duty to defend in defamation case); Butts v. Royal Vendors, Inc., 504 S.E. 2d 911, 916 (W. Va. 1998) (finding a duty to defend in a defamation case where elements in complaint “are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policies.”).

16. See, e.g., Microtec Research v. Nationwide Mut. Ins. Co., 40 F.3d 968, 972 (9th Cir. 1994) (holding insurance policy provided coverage for disparagement and comparing defamation to disparagement and noting that “[disparagement] is more akin to unfair competition than to true libel.”); Lime Tree Vill. Cmty. Club Ass’n, 980 F.2d 1402 (duty to defend triggered by allegations in complaint that policyholder had falsely and maliciously slandered or disparaged homeowners’ titles); Atl. Mut. Ins. Co. v. J. Lamb, Inc., 100 Cal. App. 4th 1017, 1035 (2002) (“Whether characterized as a trade libel or product disparagement, an injurious falsehood directed at the organization or products, goods, or services of another falls within the coverage of the . . . policy.”); Perkins Ins. Co. v. Phelan, 799 N.E.2d 523, 527 (Ill. App. Ct. 2003) (upholding insurance coverage where defendant’s statements were specific to plaintiff, they misled, and they tended to influence the consuming public not to buy plaintiffs’ services).

17. See, e.g., Cincinnati Ins. Co. v. Zen Design Group, Ltd., 329 F.3d 546, 546 (6th Cir. 2003); CAT Internet Svcs. v. Providence Wash. Ins. Co., 333 F.3d 138, 143 (3d Cir. 2002) (“[i]t makes sense that a trademark infringement action would be covered by an insurance policy that applies to ‘misappropriation of advertising ideas’ because a trademark is an advertising idea that may be created and ‘owned,’ and thus wrongfully taken or ‘stolen’”); American Emp’rs Ins. Co. v. Delorme Publ’g Co., 39 F. Supp. 2d 64, 77 (D. Me. 1999) (an action for trademark infringement can be described as an action for “infringement of a copyright, title, or slogan,” and is covered by the policy); Poof Toy Prod. v. U.S. Fid. & Guar. Co., 891 F. Supp. 1228, 1234 (E.D. Mich. 1995) (finding infringement of: trademark and trade dress, copyright, and title or slogan as defined in the insurance policy as advertising injuries, which brings the suit within the policy’s coverage); Kim Seng Co. v. Great Am. Ins. Co. of New York, 101 Cal. Rptr. 3d 537, 543 (Cal. Ct. App. 2009) (“advertising injury” coverage extends to the infringement of a trademark).

18. See, e.g., Cincinnati Ins. Co., 329 F.3d at 546 (duty to defend exists for underlying trademark and trade dress infringement claims); Hyman v. Nationwide Mut. Fire Ins. Co., 304 F.3d 1179, 1183 (11th Cir. 2002); Elcom Tech.s, Inc. v. Hartford Ins. Co., 991 F. Supp. 1294, 1297 (D. Utah 1997) (recognizing insurance coverage for misappropriation of style of doing business, but noting “whether or not particular acts constitute a company’s style of doing business varies with the facts of each case”); Australia Unlimited, Inc. v. Hartford Cas. Ins. Co., 198 P.3d 514, 519–20 (Wash. Ct. App. 2008) (applying misappropriation of style of doing business coverage to trade dress claim and noting that “numerous courts” have included trade dress as covered under policies as a part of misappropriation of advertising or style of doing business).

19. See, e.g., Granite State Ins. Co. v. Aamco Transmissions, 57 F.3d 316, 320 (3d Cir. 1995) (a competitor of the insured, but not its customer, can assert a claim which may be covered under the “unfair competition” category of the “advertising injury” coverage); Liberty Life Ins. Co. v. Commercial Union Ins. Co., 857 F.2d 945, 950 (4th Cir. 1988); America Cynamid Co. v. Am. Home Assurance Co., 35 Cal. Rptr. 2d 920, 924 (Cal. Ct. App. 1994) (duty to defend triggered where element of competition or rivalry in marketplace between parties); Smartfoods, Inc. v. Northbrook Prop. & Cas. Co., 618 N.E.2d 1365, 1368–69 (Mass. App. Ct. 1993) (recognizing coverage for unfair competition, but limiting “unfair competition” to common law interpretation of “palming off”); Henderson v. United States Fid. & Guar. Co., 488 S.E.2d 234, 239–40 (N.C. 1997) (in addressing protection for unfair competition in insurance policy, noting that policy covers both common law and statutory interpretation of unfair competition).

imprisonment,<sup>21</sup> employment discrimination,<sup>22</sup> wrongful termination,<sup>23</sup> wrongful eviction,<sup>24</sup> malicious prosecution,<sup>25</sup> and invasion of privacy.<sup>26</sup>

20. *See, e.g.*, *Colony Ins. Co. v. Corrosion Control, Inc.*, 187 Fed. App'x 918, 919 (11th Cir. 2006) (policy provided coverage for, *inter alia*, infringement of copyright, title, or slogan); *Sport Supply Group, Inc. v. Columbia Cas. Co.*, 335 F.3d 453, 456 (5th Cir. 2003) (recognizing policy covered infringement of copyright, title, or slogan); *Maxconn, Inc. v. Truck Ins. Exch.*, 88 Cal. Rptr. 2d 750, 755–56 (Cal. Ct. App. 1999) (noting policy covered infringement of copyright, title, or slogan); *ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co.*, 731 A.2d 811, 814 (Del. 1999); *Myoda Computer Ctr., Inc. v. Am. Family Mut. Ins. Co.*, 909 N.E.2d 214, 216 (Ill. Ct. App. 2009) (policy covered “advertising injury” including the offense of infringement of copyright, title, or slogan).

21. *See, e.g.*, *First Specialty Ins. Corp. v. 633 Partners, Ltd.*, 300 Fed. App'x 777, 785 (11th Cir. 2008) (in the absence of clear evidence that exclusion applies, insurer had duty under policy to defend claim of false imprisonment); *Nat'l Fire & Cas. Co. v. West*, 107 F.3d 531, 533 (7th Cir. 1997) (employer's liability policy covered false imprisonment committed in the conduct of the named insured's operations); *Dixon Distrib. Co. v. Hanover Ins. Co.*, 641 N.E.2d 395, 398 (Ill. 1994) (umbrella policy covered false imprisonment); *Travelers Indem. Co. v. Thomas*, 315 So. 2d 111, 113–14 (Fla. Dist. Ct. App. 1975) (duty to defend insured in false imprisonment matter where the complaint contained allegations partially within the scope of the coverage); *Edquist v. Ins. Co. of N. Am.*, No. C6-95-1111, 1995 Minn. App. LEXIS 1350 (Minn. Ct. App. Oct. 31, 1995) (recognizing that “the tort of false imprisonment does not require the actor to intend the injury, but only requires the actor to intend to confine”).

22. *See, e.g.*, *Union Camp. Corp.*, 452 F. Supp. at 565 (coverage for employment discrimination liability does not violate public policy).

23. *See, e.g.*, *St. Paul Guardian Ins. Co. v. Centrum Gs Ltd.*, 283 F.3d 709, 713 (5th Cir. 2002) (wrongful termination claim covered under personal injury definition set forth in policy); *CIM Ins. Corp. v. Midpac Auto Ctr., Inc.*, 108 F. Supp. 2d 1092, 1100 (D. Haw. 2000) (coverage for wrongful termination, but not for damages arising out of breach of contract, such as employment contract); *Wells Fargo Bank v. California Ins. Guar. Assn.*, 45 Cal Rptr. 2d 537, 537 (Cal. Ct. App. 1995) (umbrella coverage for wrongful termination); *Smith v. Animal Urgent Care, Inc.*, 542 S.E.2d 827, 831, n.10 (W. Va. 2000) (noting availability of employment practices liability insurance covering wrongful termination).

24. *See, e.g.*, *Century Sur. Co. v. Seductions, LLC*, 349 Fed. App'x 455, 459 (11th Cir. 2009) (recognizing insurance coverage for wrongful eviction, but noting split in necessity of possessory interest to raise claim); *Nautilus Ins. Co. v. BSA Ltd. P'ship*, 602 F. Supp. 2d 641, 656 (D. Md. 2009) (coverage defining personal and advertising injury to include wrongful eviction); *Westfield Ins. Group v. J.P.'s Wharf, LTD*, 859 A.2d 74, 75 (Del. 2004) (recognizing insurance coverage for wrongful eviction, but not applying coverage as plaintiffs did not have a possessory interest); *Dixon Distrib. Co. v. Hanover Ins.Co.*, 641 N.E.2d 395, 398 (Ill. 1994); *Sallie v. Tax Sale Investors*, 814 A.2d. 572, 574 (Md. App. 2002) (“[C]overage for the wrongful eviction may exist if there is a sufficient connection between the wrongful eviction and ... the operation of, or operations incidental to, the designated premises.”).

25. *See, e.g.*, *Global NAPs, Inc. v. Fed. Ins. Co.*, 336 F.3d 59 (1st Cir. 2003) (recognized that policy covered malicious prosecution); *Atlantic Mut. Ins. Co. v. Atlanta Datacom*, 139 F.3d 1344, 1346 (11th Cir. 1998) (recognizing policy covered malicious prosecution, but noting that malicious prosecution under Georgia law is limited to the pursuit of criminal actions); *City of Erie v. Guaranty Nat'l Ins. Co.*, 935 F. Supp. 610, 615 (W.D. Pa. 1996) (duty to defend in malicious prosecution matter is triggered when first criminal charges were filed); *Lincoln Nat'l Health & Casualty Ins. Co. v. Brown*, 782 F. Supp. 110, 112–13 (M.D. Ga. 1992) (where policy specifically includes malicious prosecution as a covered action, provision limiting coverage to unintentional acts does not apply); *Fluke Corp. v. Hartford Accident & Indem. Co.*, 34 P.3d 809, 814 (Wash. 2000) (concluding that coverage for malicious prosecution does not violate public policy).

26. *See, e.g.*, *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 401 F.3d 876, 883 (8th Cir. 2005) (finding no support in policy for limiting the interpretation of the term “invasion of

Under well-established insurance policy interpretation principles such as *contra proferentum* and the “reasonable expectations” doctrine, insurers cannot escape their coverage obligations for these types of claims based upon the “expected or intended” exclusion or the fortuity doctrine even though these types of claims result in injuries or damages that typically are intentionally caused by the policyholder because the policyholder reasonably expects that the coverage the insurer expressly agreed to provide will, in fact, be provided.<sup>27</sup>

In addition, numerous courts have held that insurance coverage is available for injuries intentionally inflicted by the policyholder in, for example, self-defense, even though the policyholder “expected or intended” to injure his assailant.<sup>28</sup>

Further, although some courts have held that a policyholder cannot insure against punitive damages, the majority of courts have held just the opposite; namely, that a policyholder can obtain coverage for punitive damages unless such damages are expressly excluded under the policy at issue.<sup>29</sup> The Oregon Supreme Court’s discussion of the issue is emblematic

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privacy” and ordinary, lay definitions must be apply); *Lineberry v. State Farm Fire & Cas. Co.*, 885 F. Supp. 1095, 1099 (M.D. Tenn. 1995) (insurer cannot escape explicit coverage for invasion of privacy by reference to exclusion for injuries that were intended or expected); *Purrelli v. State Farm Fire & Cas. Co.*, 698 So. 2d 618, 619–620. (Fla. Dist. Ct. App. 1997); *Bailer v. Erie Ins. Exch.*, 687 A.2d 1375, 1376, 1384–85 (Md. 1997) (intentional tort of invasion of privacy covered despite “expected or intended” exclusion); *United States Fire Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 511 N.E.2d 127, 129 (Ohio Ct. App. 1986) (duty to defend claim which “potentially” or “arguably” would fall under coverage for invasion of privacy).

27. See *infra* notes 65 and 71.

28. See generally John D. Ingram, *The Expected or Intended Exclusion in Liability Insurance: What About Self-Defense?*, 42 CREIGHTON L. REV. 123 (2009). See also *State Farm Fire & Cas. Co. v. Poomaihealani*, 667 F. Supp. 705, 708 (Dist. Haw. 1987) (“when faced with a harm-threatening situation, the decision to defend one’s self is not a choice. It is an instinctive necessity.”); *Fire Ins. Exch. v. Berry*, 694 P.2d 191, 193 (Ariz. 1984) (“an act committed in self-defense should not be considered an ‘intentional act’ within the meaning of the [liability insurance policy’s] exclusion.”); *Transamerica Ins. Group v. Meere*, 694 P.2d 181, 188 (Ariz. 1984) (“when one acts in self-defense the actor is not generally acting for the purpose of intending any injury to another but, rather, is acting for the purpose of attempting to prevent injury to himself.”); *Preferred Mut. Ins. Co. v. Thompson*, 491 N.E.2d 688, 691 (Ohio 1986) (neither the deterrence factor nor any other interest of “public policy is served by application of the exclusion to an insured who claims to have acted in self-defense.”); *Stoebner v. S.D. Farm Bureau Mut. Ins. Co.*, 598 N.W.2d 557, 560 (S.D. 1999) (a person “acting in self-defense is . . . not acting unreasonably . . . [and] is not engaging in the type of conduct that intentional acts exclusions are intended to discourage.”); *Farmers & Mechanics Mut. Ins. Co. of W. Va. v. Cook*, 557 S.E.2d 801, 810 (W. Va. 2001) (“[A] loss which results from an act committed by a [liability insurance] policyholder in self-defense or in defense of another is not, as a matter of law, expected or intended by the policyholder.”); *Berg v. Fall*, 405 N.W.2d 701, 704 (Wis. Ct. App. 1987) (a liability insurance policy’s provision that excluded coverage for damage or injury intended or expected by the insured was “not clear as to whether it covers bodily injury caused by privileged acts of self-defense.”).

29. See generally Appleman and Appleman, *supra* note 9, § 7031; Steven Pitt et. al, *supra* note 9, § 101:29; Catherine M. Sharkey, *Calabresi’s The Costs of Accidents: A Generation of Impact on Law*

of the reasoning of such courts:

It has long been recognized that there is no empirical evidence that contracts of insurance to protect against liability for negligent conduct are invalid, as a matter of public policy, because of any ‘evil tendency’ to make negligent conduct ‘more probable’ or because there is any ‘substantial relationship’ between the fact of insurance and such negligent conduct . . . . Conversely, neither is there any such evidence that to invalidate insurance contract provisions to protect against liability for punitive damages on grounds of public policy would have any substantial ‘tendency’ to make such conduct ‘less probable,’ i.e., that to do so would have any ‘deterrent effect’ whatever upon such conduct.<sup>30</sup>

Similarly, the Wyoming Supreme Court has noted, “we know of no studies, statistics or proofs which indicate that contracts of insurance to protect against liability for punitive damages have a tendency to make willful or wanton misconduct more probable, nor do we know of any substantial relationship between the insurance coverage and such misconduct.”<sup>31</sup>

Other courts have reasoned that insurance does not alter the deterrent effects of punitive damages, because insurers can raise premiums after

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*and Scholarship: Revisiting the Non-Insurable Costs of Accidents*, 64 MD. L. REV. 409, 409 (2005); George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1031 (1989). See also *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, 910 (5th Cir. 1994) (Louisiana law), *cert. denied*, 115 S. Ct. 498 (1994); *Meijer, Inc. v. General Star Indem. Co.*, 826 F. Supp. 241, 246 (W.D. Mich. 1993) (Michigan law), *aff’d*, 61 F.3d 903 (6th Cir. 1995); *American Fidelity & Cas. v. Werfel*, 164 So. 383, 385 (Ala. 1935); *Aetna Cas. & Sur. Co. v. Marion Equip. Co.*, 894 P.2d 664, 671 (Alaska 1995); *Price v. Hartford Accident & Indem. Co.*, 502 P.2d 522, 525 (Ariz. 1972); *S. Farm Bureau Cas. Ins. Co. v. Daniel*, 440 S.W.2d 582, 584 (Ark. 1969) (punitive damages coverage available for accidents); *Greenwood Cemetery, Inc. v. Travelers Indem. Co.*, 232 S.E.2d 910, 915 (Ga. 1977); *Abbie Uriguen Oldsmobile Buick, Inc. v. United States Farm Ins. Co.*, 511 P.2d 783, 789 (Idaho 1973); *Skyline Harvestore Sys., Inc. v. Centennial Ins. Co.*, 331 N.W.2d 106, 109 (Iowa 1983); *Cont’l Ins. Co. v. Hancock*, 507 S.W.2d 146, 151 (Ky. 1973); *Sharp v. Daire*, 555 So.2d 1361, 1364 (La. 1990); *First Nat’l Bank v. Fidelity & Deposit Co.*, 389 A.2d 359, 360 (Md. 1978); *James W. Sessums Timber Co., Inc. v. McDaniel*, 635 So.2d 875, 884 (Miss. 1994); *Anthony v. Frith*, 394 So.2d 867, 868 (Miss. 1981); *First Bank (N.A.) – Billings v. Transamerica Inc. Co.*, 679 P.2d 1217, 1223 (Mont. 1984) (*but see* MONT. CODE ANN. § 33-15-317 (1989) (limiting coverage for punitive damages)); *Baker v. Armstrong*, 744 P.2d 170, 174 (N.M. 1987); *Mazza v. Medical Mut. Ins. Co.*, 319 S.E.2d 217, 219 (N.C. 1984); *Harrell v. Travelers Indem. Co.*, 567 P.2d 1013, 1017 (Or. 1977); *S.C. State Budget & Control Bd. v. Prince*, 403 S.E.2d 643, 644 (S.C. 1991); *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1, 5 (Tenn. 1964); *Dairyland County Mut. Ins. Co. v. Wallgren*, 477 S.W.2d 341, 342 (Tex. App. 1972); *American Protection Ins. Co. v. McMahan*, 562 A.2d 462, 466–67 (Vt. 1989); *Sinclair Oil Co. v. Columbia Cas. Co.*, 682 P.2d 975, 981 (Wyo. 1984); *Hensley v. Erie Ins. Co.*, 283 S.E.2d 227, 233 (W. Va. 1981).

30. *Harrell v. Travelers Indem. Co.*, 567 P.2d 1013, 1017 (Or. 1977).

31. *Sinclair Oil Corp.*, 682 P.2d at 981; see also *Skyline Harvestore Sys., Inc. v. Centennial Ins. Co.*, 331 N.W.2d 106, 109 (Iowa 1983) (“We doubt that ordinary potential tortfeasors make calculations to determine if the expected benefits of a harmful act are outweighed by the potential costs of punitive damages, insured or uninsured.”).



awards or generally build the expected cost of punitive damages into their premiums.<sup>32</sup>

Moreover, even in jurisdictions where courts generally have held that punitive damages are uninsurable, most of them still allow punitive damages to be covered by insurance if the award of the punitive damages is based upon vicarious liability.<sup>33</sup> In essence, the courts' reasoning is that a person or company that is held liable for the conduct of one of its agents did not intend the harm or damage, so why should it be required to forfeit its insurance coverage.<sup>34</sup>

In addition, arguments asserting that public policy allegedly disfavors allowing insurance for injuries or damages intentionally caused are not well founded. Other than in the context of committing insurance fraud there is little, if any, evidence that establishes that policyholders engage in reckless behavior or intentionally cause injuries or damages because they are insured. Indeed, there are many deterrents to bad behavior unrelated to insurance. For example, assault and battery are criminal offenses that can result in jail time. Thus, it seems unlikely that the loss of insurance to cover the injuries caused by a policyholder's assault/battery on a victim would be more of a deterrent than the prospect of prison. Similarly,

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32. See, e.g., *Price v. Hartford Accident & Indem. Co.*, 502 P.2d 522, 524 (Ariz. 1972) (reasoning that even with liability insurance a tortfeasor would still be subjected to considerable automobile insurance premiums, as well as facing possible criminal actions and loss of license); *First Nat'l Bank v. Fid. & Deposit Co.*, 389 A.2d 359, 366 (Md. 1978) ("Those who are demonstrated by experience to be poor risks encounter substantial difficulty in obtaining insurance, a fact such persons know."). See also 2 LEE R. RUSS & THOMAS F. SEGALIA, *COUCH ON INSURANCE* § 101:29 (3d ed. 1999) (noting that the deterrence argument "underestimates the impact that a large payment by an insurer would have on the insured's ability to obtain future insurance coverage, and the amount of premiums that would have to be paid"). Notably, Professor Calabresi, one of the founders of the law and economics movement, rejected this rationale on two grounds. First, he argued that "the manner in which insurance rates change as a result of accidents clearly is so haphazard and arbitrary under the fault system that the possibility of rate increases cannot conceivably be as good a collective deterrent as an intelligently fixed noninsurable fine." GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 271, n.6 (1970). Second, he noted that "even this risk of going into a higher risk actuarial subcategory by reason of accident involvement could conceivably be insured against." *Id.* at 125 n.23.

33. See ROBERT H. JERRY II, *UNDERSTANDING INSURANCE LAW* 352 (Barry R. Ostranger & Thomas R. Newman eds., 1st ed. 1987) (punitive damages are insurable in two-thirds of the states that have considered the issue); Michael A. Rosenshouse, *Liability Insurance Coverage as Extending for Punitive or Exemplary Damages*, 16 A.L.R. 4th 11 (1982) (listing the various approaches taken by different states); *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58 (8th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935); *U.S. Fid. & Guar. Co. v. Open Sesame Child Care Ctr.*, 819 F. Supp. 756 (N.D. Ill. 1993); *Norfolk & W. Ry. Co. v. Hartford Accident & Indem. Co.*, 420 F. Supp. 92 (N.D. Ind. 1976); *Highlands Ins. Co. v. McCutchen*, 486 So.2d 4 (Fla. Dist. Ct. App. 1986); *Scott v. Instant Parking, Inc.*, 245 N.E.2d 124 (Ill. App. 1969); *S. Am. Ins. Co. v. Gabbert-Jones, Inc.*, 769 P.2d 1194 (Kan. Ct. App. 1989); *Malanga v. Mfr. Cas. Ins. Co.*, 146 A.2d 105 (N.J. 1958); *Dayton Hudson Corp. v. Am. Mut. Liab. Ins. Co.*, 621 P.2d 1155 (Okla. 1980); *Butterfield v. Giuntoli*, 670 A.2d 646 (Pa. Super. Ct. 1996), *appeal denied*, 683 A.2d 875 (Pa. 1996).

34. See sources cited *supra* note 33.

because imprisonment is a meaningful punishment for a crime, it is not as though a policyholder that commits assault and battery will go unpunished if his insurer compensates the victim for his injuries.

On the other hand, there are sound public policy reasons that support allowing insurance for intentional injuries or damage. For example, public policy dictates that victims should be compensated for their injuries.<sup>35</sup> In many circumstances, the tortfeasor's insurance may be the only source of compensation for the injured person. In addition, public policy supports enforcing the terms of contracts, such as those found in insurance policies.<sup>36</sup> Thus, if insurers do not want to insure intentional injuries or damage, then, as the drafters of insurance policies, they should make it crystal clear in their policies that intentional injuries or damage are not covered.

In exposing the myth that insurance is not available to cover intentional injuries or damage, this article is divided into four parts. Part One discusses the fortuity doctrine and the "expected or intended" exclusion, which are the foundations of the myth that insurance is not available for intentional injuries or damages. Part Two discusses certain principles of insurance policy interpretation, such as *contra proferentum* and the "reasonable expectations" doctrine, and how such principles apply to insurance claims for intentional injuries or damage. Part Three discusses examples of the numerous types of intentional torts that are covered by insurance, as well as insurance coverage for punitive damages. Part Four discusses the public policy arguments in favor of and against insuring intentional injuries or damages and whether courts, as opposed to legislatures, should even be attempting to discern the controlling public policy in this area. Finally, the article concludes that public policy favors allowing insurance recoveries for intentional injuries or damage.

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35. See, e.g., Leland R. Gallaspy, Breland v. Schilling: *Louisiana's Approach to "Injuries Expected or Intended from the Standpoint of the Insured*, 52 LA. L. REV. 199, 200 (1991); Cuttler, *supra* note 6, at 158; Appleman and Appleman, *supra* note 9, § 4252.

36. See, e.g., Nw. Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 333 (5th Cir. 1962) (Gewin, J., Concurring) (noting the public policy for favoring the enforcement of contracts); Accord Sch. Dist. for the City of Royal Oak v. Cont'l Cas. Co., 912 F.2d 844, 848 (6th Cir. 1990), *reh'g denied*, 921 F.2d 625 (6th Cir. 1990) (public policy favors enforcing the terms of insurance policies and "common sense suggests that the prospect of escalating insurance costs and the trauma of litigation, to say nothing of the risk of uninsurable punitive damages, would normally neutralize any stimulative tendency that insurance might have."); *Continental Cas. Co.*, 912 F.2d at 849 ("Public policy normally favors enforcement of insurance contracts according to their terms.") (citing *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So.2d 1005, 1010 n.1 (Fla. 1989) (Ehrlich, C.J., dissenting)); *Union Camp Corp v. Cont'l Cas. Co.*, 452 F. Supp. 565, 568 (Ga. 1978) ("Exercise of the freedom of contract is not lightly to be interfered with. It is only in clear cases that contracts will be held void as against public policy."); *Creech v. Aetna Cas. & Sur. Co.*, 516 So.2d 1168, 1174 (La. Ct. App. 1987).

## II. THE FORTUITY DOCTRINE

The fortuity doctrine first appeared in the property insurance context and essentially provides that that insurance only covers “fortuitous” losses. Quoting *Webster’s Third New International Dictionary*, the Supreme Court of North Carolina has explained the meaning of fortuity as follows:

The word “fortuitous” means “occurring without evidential causal need or relation or without deliberate intention.”<sup>37</sup> The Supreme Court of North Carolina further explained that a fortuitous event is an event that is “not certain to occur.”<sup>38</sup> Other courts have described “fortuity” as “the loss of property or possession by some unexpected acts;”<sup>39</sup> “an event dependent on chance;”<sup>40</sup> a “happening by accident or chance; unplanned;”<sup>41</sup> and “a casualty.”<sup>42</sup>

The *Restatement (First) of Contracts* defines “fortuity” in the insurance context as follows:

A fortuitous event . . . is an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, such as the loss of a vessel, provided that the fact is unknown to the parties.<sup>43</sup>

The fortuity doctrine made its way into liability policies when it began being included in the definition of “occurrence.” “Occurrence” often is defined in liability policies as either “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage *neither expected nor intended from the standpoint of the insured;*”<sup>44</sup> or “an accident or happening or event or a continuous or repeated exposure to conditions which *unexpectedly and unintentionally results in . . . personal injury [or] property damage . . . during the policy period.*”<sup>45</sup>

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37. *Avis v. Hartford Fire Ins. Co.*, 195 S.E.2d 545, 548 (N.C. 1973).

38. *Id.*

39. *Klockner Ltd. v. Ins. Co. of the State of Pa.*, 760 F. Supp. 148, 157 (S.D.N.Y. 1991) (citing *London Provincial Processes, Ltd. v. Hudson*, 21 K.B. 724, 730 (1939)).

40. See *Formosa Plastics Corp. v. Sturge*, 684 F. Supp. 359, 367 (S.D.N.Y. 1987) *aff’d*, 848 F.2d 390 (2d Cir. 1988); *Intermetal Mexicana v. Ins. Co. of N. Am.*, 866 F.2d 71, 77 (3d Cir. 1989); *Ins. Co. of N. Am. v. U.S. Gypsum Co.*, 870 F.2d 148, 151 (4th Cir. 1989); *Standard Structural Steel Co. v. Bethlehem Steel Corp.*, 597 F. Supp. 164, 192 (D. Conn. 1984) (quoting *Compagnie des Bauxites de Guinee v. Ins. Co. of N. Am.*, 554 F. Supp. 1080 (W.D.Pa. 1983)).

41. *Nw. Mut. Life Ins. Co. v. Linard*, 498 F.2d 556, 563 n.11 (2d Cir. 1974).

42. *Buckeye Cellulose Corp. v. Atl. Mut. Ins. Co.*, 643 F. Supp. 1030, 1036, 1042 (S.D.N.Y. 1986).

43. RESTATEMENT (FIRST) OF CONTRACTS § 305 cmt. A (1932). See also *Compagnie des Bauxites de Guinee*, 724 F.2d at 372 (3d Cir. 1983); *Mattis v. State Farm Fire & Cas. Co.*, 454 N.E.2d 1156, 1164 (Ill. App. Ct. 1983).

44. See *Malecki*, *supra* note 3, at Appendix A (italics added).

45. See *Bay Cities Paving & Grading v. Lawyers’ Mut. Ins. Co.*, 855 P.2d 1263, 1269 n.4 (Cal. 1993) (quoting provision from *Mich. Chem. Corp. v. Am. Home Assurance Co.*, 728 F.2d 374, 378 (6th

As a belt and suspenders approach to the issue, many liability policies also include an express exclusion of coverage for injuries that are “expected or intended” by the policyholder. For example, “[t]his insurance does not apply to . . . ‘bodily injury’ or ‘property damage’ expected or intended from the standpoint of the insured.”<sup>46</sup> Thus, in some policies the “expected or intended” exclusion appears in both the exclusion section and in the definition of “occurrence.”

#### A. ISSUES RELATED TO THE APPLICATION OF THE “EXPECTED OR INTENDED” EXCLUSION

In analyzing whether there is coverage for injuries or damage the policyholder allegedly caused intentionally, the first thing one must keep in mind is that the “expected or intended” language contained in liability policies, whether located in the definition of “occurrence” or in the exclusions section of the policy, is an exclusion.<sup>47</sup> Thus, this language should be narrowly construed,<sup>48</sup> and all ambiguities regarding its interpretation and application should be resolved in favor of the policyholder.<sup>49</sup> Furthermore, assuming the exclusion has any applicability to the type of claim at issue, the insurer has the burden of proving the policyholder expected or intended the harm or damage at issue.<sup>50</sup>

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Cir. 1984)).

46. See sources cited *supra* note 4.

47. See, e.g., *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1205 (2d Cir. 1995) (insurer has burden of proof regarding exclusionary effect of policy language, regardless of where the exclusionary language is located in the policy); *Upjohn Co. v. Aetna Cas. & Sur. Co.*, No. 4:88-CV-124, at 29–30 (W.D. Mich. July 22, 1994) (although the “neither expected nor intended” language appears in the occurrence clause, it essentially operates as an exclusion); *Clemco Indus. v. Commercial Union Ins. Co.*, 665 F. Supp. 816, 820–21 (N.D. Cal. 1987) (coverage clauses are interpreted broadly to afford greatest possible protection, therefore the “expected or intended” clauses must be seen as an exclusion clause to be narrowly interpreted); *Nat’l Farmers Union Prop. & Cas. Ins. Co. v. Kovash*, 452 N.W.2d 307, 311 n.3 (N.D. 1990) (a determination of coverage under the “expected or intended” language in the definition of an occurrence generally involves the same determination as coverage under an exclusion for intentional acts).

48. See *infra* note 68.

49. See *infra* note 65.

50. See *infra* note 68. See also *United Equip. Co. v. Aetna Life & Cas. Ins. Co.*, 376 A.2d 1183, 1187 (N.J. 1977) (“When an insurance carrier puts in issue its coverage of a loss under a contract of insurance by relying on an exclusionary clause, it bears a substantial burden of demonstrating that the loss falls outside the scope of coverage.”); *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 313 (Minn. 1995) (insurer has burden to prove the applicability of an exclusion as an affirmative defense); *Continental Ins. Co. v. Louis Marx & Co.*, 415 N.E.2d 315, 317 (Ohio 1980) (insurer has burden of proving defense based upon exclusion); *Brown v. Snohomish Physicians Corp.*, 845 P.2d 334, 340 (Wash. 1993) (once insured has made a prima facie case that there is coverage, burden shifts to the insurer to prove an exclusionary provision applies). See also *Appleman & Appleman*, *supra* note 9, § 7405; *RUSS & SEGALLA*, *supra* note 32, § 22:31; 1 *BUSINESS INSURANCE LAW AND PRACTICE GUIDE* § 2.02[1] (1996).

### 1. *Objective versus Subjective Standard*

Whether based upon the fortuity doctrine, the definition of “occurrence,” or the “expected or intended” exclusion, when determining whether the policyholder intended the injury or damage at issue, one must examine the policyholder’s state of mind. Not all courts are in agreement regarding whether the test should be whether the policyholder subjectively expected the act at issue would cause the injury or damage, or whether the policyholder objectively expected to cause the injury or damage.<sup>51</sup> The majority of courts that have addressed this issue, however, have adopted a subjective standard.<sup>52</sup>

There are a number of variations of the objective standard. Under one variation, the question is whether the injury at issue would have been expected by a “reasonable” person.<sup>53</sup> Under another variation, the question

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51. *Compare* Royal Indem. Co. v. Soneco/Ne., Inc., 183 F. Supp. 2d 526, 533 (D. Conn. 2002) (determining intent for the intentionality exclusion “requires the Court to apply a subjective standard; Coregis Ins. Co. v. Elizabeth Twp., 2007 U.S. Dist. LEXIS 23574, at \*12 (W.D. Pa. Mar. 30, 2007) (“[T]o determine whether an insured intended the harm, courts apply a subjective standard.”); U.S. Fid. & Guar. Co. v. Armstrong, 479 So. 2d 1164, 1167 (Ala. 1985) (“[T]he legal standard to determine whether the injury was either expected or intended . . . is a purely subjective standard.”); Fire Ins. Exch. v. Berray, 694 P.2d 191, 194 (Ariz. 1984) (looks “from standpoint of the insured” at whether the insured expected or intended to cause injury); Shell Oil Co. v. Winterthur Swiss Ins. Co., 15 Cal. Rptr. 2d 815, 861 (Cal. App. 1993), (rejecting objective “should have known” meaning of expect and instead adopting its “plain meaning”); State Farm Mut. Auto Ins. Co. v. McMillan, 925 P.2d 785, 793 (Colo. 1996); Great Am. Ins. Co. v. Gaspard, 608 So. 2d 981, 985 (La. 1992) (“[T]he subjective intent of the insured is the key and not what the average or ordinary reasonable person would expect or intend.”); Williams v. City of Baton Rouge, 731 So. 2d 240, 253 (La. 1999) (The subjective intent of the insured will determine whether an act is intentional); Patrons-Oxford Mut. Ins. Co. v. Dodge, 426 A.2d 888, 892 (Me. 1981) (adopting subjective standard and recognizing it as the majority standard); Quincy Mut. Fire Ins. Co. v. Abernathy, 469 N.E.2d 797, 800 (Mass. 1984) (“Our cases have concluded that an injury is nonaccidental only where the result was actually, not constructively, intended.”); Arco Indus. Corp. v. Am. Motorists Ins. Co., 531 N.W.2d 168, 179 (Mich. 1995), overruled on other grounds by Frankenmuth Mut. Ins. Co. v. Masters, 595 N.W.2d 832 (Mich. 1999) (appellate court should have adopted a subjective standard); Espinet v. Horvath, 597 A.2d 307, 309 (Vt. 1991) (upholding subjective standard and rejecting use of objective standard with respect to “inherently dangerous activity” where such activity was not explicitly excluded by the insurance policy); Queen City Farms v. Cent. Nat’l. Ins. Co., 882 P.2d 703, 714 (Wash. 1994) (en banc), amended, 891 P.2d 718 (Wash. 1995) (holding that subjective standard applies where policy is silent and ambiguous on whether standard should be objective or subjective); *and* Farmers & Mechs. Mut. Ins. Co. v. Cook, 557 S.E.2d 801, 807 (W. Va. 2001) (“Courts must use a subjective rather than objective standard for determining the policyholder’s intent.”); *with* Auto-Owners Ins. Co. v. Jensen, 667 F.2d 714, 719 (8th Cir. 1981); Carter Lake v. Aetna Cas. & Sur. Co., 604 F.2d 1052, 1058–59 (8th Cir. 1979); *In re Texas E. Transmission Corp.*, 870 F. Supp. 1293, 1321 (E.D. Pa. 1992) (applying Texas law), *aff’d* without opp., 995 F.2d 219 (3d Cir. 1993); *and* Western Cas. and Surety Co. v. Waisanen, 653 F. Supp. 825, 830 (D.S.D. 1987). *See also* 1 BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 8.03(c) (14th ed. 2008).

52. *See* sources cited *supra* note 51.

53. *See, e.g.,* *Jensen*, 667 F.2d at 717–20; *Carter Lake*, 604 F.2d at 1058–59; *In re Texas E.*

is whether the policyholder knew or should have known that there was a “substantial probability” its actions would result in the injury at issue.<sup>54</sup> “Substantial probability” has been defined as whether “a reasonably prudent man” would be aware that the adverse “results are highly likely to occur.”<sup>55</sup>

An obvious criticism of the objective standards is that they are not based upon the policy language, which speaks in terms of whether the policyholder “expected or intended” the injury or damage, not whether a “reasonable person” should have expected it.<sup>56</sup> Further, a “should have known” standard theoretically also could eliminate coverage for negligence claims because many accidents are reasonably foreseeable. Indeed, in the words of Judge Cardozo, “[t]o restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow.”<sup>57</sup> Or, in the words of the Second Circuit, “to exclude all losses or damages which might in some way have been expected by the insured, could expand the field of exclusion until virtually no recovery could be had on insurance.”<sup>58</sup> If one were jaded regarding insurance companies, one might think that avoiding the payment of claims is, in fact, their goal. In such a world, insurance companies essentially would be banks that accept deposits (i.e., premiums) but do not allow withdrawals (i.e., payment of claims).

Consequently, for reasons such as these, the majority view is that a

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*Transmission Corp.*, 870 F. Supp. at 1321; *Waisanen*, 653 F. Supp. at 830; see also OSTRAGER & NEWMAN, *supra* note 51, § 8.03(c).

54. See OSTRAGER & NEWMAN, *supra* note 51, § 8.03(c).

55. *Carter Lake*, 604 F.2d at 1059 n.4. See also *King v. Hartford Life & Accident Ins. Co.*, 414 F.3d 994, 1002 (8th Cir. 2005) (distinguishing between standards of “reasonably foreseeable” and “substantial probability,” and stating that the latter requires “not only that a reasonably prudent person would be alerted to the possibility of results occurring, but that such reasonable person would also be forewarned that the results are highly likely to occur.”).

56. See *Aetna Cas. And Surety Co. v. Dichtl*, 398 N.E.2d 582, 588 (Ill. App. 1980) (rejecting insurance company’s argument to read in a “reasonableness standard,” noting that if the insurer, who drafted the policy language, wanted an objective standard, “it could have drafted its policy accordingly”); *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 278–79 (Ky. 1991), *modified*, 1991 KY LEXIS 149 (Ky. Sept. 26, 1991) (policies do not define “expected” and “intended” but those are words that indicate subjective awareness); *United Servs. Auto Ass’n v. Elitzky*, 517 A.2d 982, 991 (Pa. Super. Ct. 1986), *appeal denied*, 528 A.2d 957 (Pa. 1987) (common meaning of “expected” connotes an element of conscious awareness by the insured).

57. *Messersmith v. American Fidelity Co.*, 133 N.E. 432, 432 (N.Y. 1921). Such a view would also violate the principle that an insured’s reasonable expectations should be protected. *Elitzky*, 517 A.2d at 991 (“We do not believe that a layman would reasonably expect that as a result of the inclusion of such a phrase [*i.e.*, “expected”] in his insurance contract he might not be insured for negligent acts. These are the very acts which insurance is purchased to protect against”).

58. *Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989). See also *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 735 n.6 (Minn. 1997) (rejecting a “purely objective test” as inconsistent with the policy language and as “undermin[ing] coverage for injuries caused by simple negligence, a result we sought to avoid in prior cases”).

subjective standard should be applied. Under this approach, the actual intent of the policyholder is examined rather than what some fictional “reasonable person” knew or should have foreseen.<sup>59</sup> Thus, assuming the exclusion has any applicability to the type of claim at issue, coverage is only precluded where the insurer can prove the policyholder actually expected or intended to cause the injury or damage at issue.<sup>60</sup>

## 2. *The Injury, Not the Act, Must be Expected or Intended*

In most instances, the policyholder intends to engage in the conduct that gives rise to the injury or damage. Thus, what exactly must the policyholder expect or intend before the claim is excluded from coverage? Most jurisdictions follow the rule that the injury or damage must be expected or intended, not merely the act itself, before coverage is lost for the claim.<sup>61</sup> With that said, some courts have interpreted this standard to mean that if some injury or damage is expected or intended, then coverage is precluded even if the injury or damage at issue is different than what the policyholder expected or intended.<sup>62</sup>

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59. When this standard is applied, the insurer typically needs a specific admission from the policyholder in order to successfully assert the defense. See Linda J. Kibler, *Intentional Injury Exclusion Clauses: The Question of Ambiguity*, 21 VAL. U. L. REV. 361, 371–75 (1987).

60. See sources cited *supra* note 51.

61. See, e.g., *Allstate Ins. Co. v. Sparks*, 493 A.2d 1110, 1112 (Md. App. 1985) (intentional injury exclusion applied only where the insured intended both an act causing damage and the results of that act); *Vt. Mut. Ins. Co. v. Singleton*, 446 S.E.2d 417, 420–21 (S.C. 1994) (intentional injury exclusion did not bar coverage where insured had not intended the injury resulting from his voluntary act); *Hanover Ins. Co. v. Talhouni*, 604 N.E.2d 689, 690–91 (Mass. 1992); *White v. Smith*, 440 S.W.2d 497, 508–09 (Mo. App. 1969) (though foreseeable, damages not intentionally inflicted but resulting from an insured’s negligence may be “caused by accident” and within the coverage afforded by a liability insurance policy); *Cont’l Cas. Co. v. Rapid-Am. Corp.*, 609 N.E.2d 506, 510 (N.Y. 1993) (“resulting damage can be unintended even though the act leading to the damage was intentional,” and further recognizing that “a person may engage in behavior that involves a calculated risk without expecting that an accident will occur”); *Grand River Lime Co. v. Ohio Cas. Ins. Co.*, 289 N.E.2d 360, 365 (Ohio App. 1972) (recognizing that the term “occurrence” is broader than the term “accident” and may encompass a fully intended action that resulted in unintended damage).

62. See LONG, *supra* note 8, § 1.08(2)(b)(ii); OSTRAGER & NEWMAN, *supra* note 51, § 8.03(d); *Lopez ex rel. Lopez v. Am. Family Mut. Ins. Co.*, 148 P.3d 438, 439 (Colo. App. 2006) (intentional act exclusion applies whenever *some* injury is intended, even though the injury that actually results differs in character or degree from the injury actually intended); *Farmers Mut. Ins. Co. v. Kment*, 658 N.W.2d 662, 668 (Neb. 2003) (in order for the intentionality exclusion in a liability insurance policy to apply, the insurer must show that the insured acted with the specific intent to cause harm to a third party, but does not have to show that the insured intended the specific injury that occurred); *Butler v. Behaeghe*, 548 P.2d 934, 934 (Colo. App. 1976) (holding in assault case that where insured intentionally struck the plaintiff, he was deemed to have intended the consequences of that action); *Ga. Farm Bureau Mut. Ins. Co. v. Purvis*, 444 S.E.2d 109, 109–10 (Ga. Ct. App. 1994) (intentional act exclusion applicable where the insured acts with the intent that any harm occur, even if actual injury is of a different kind or magnitude from that intended or expected); *State Farm Fire & Cas. Co. v. Johnson*, 466 N.W.2d 287, 289 (Mich. Ct. App. 1990) (“Once intended harm is established, the fact of an unintended injury is

Other courts have held, however, that coverage is not precluded if the policyholder expected an injury or damage that was different or significantly less severe than what actually occurred.<sup>63</sup> This is the sounder approach because a policyholder should not be required to forfeit coverage for a claim if the policyholder did not intend to cause a significant injury or damage but one occurs nonetheless.

In the context of corporate policyholders, determining who must expect or intend the injury or damage is a more complex issue. Corporations act through people. Thus, whose knowledge or expectation should dictate whether the corporation expected or intended the injury or harm? In many instances, some employee of the corporation may have expected or intended the injury or damage but the management or executives of the corporation had no knowledge of the employee's actions and therefore, they did not expect or intend any harm.

For example, in a situation where a low-level employee, unbeknownst to the corporation's management, dumps toxic chemicals into a waterway that results in contamination of the waterway and causes the corporation to incur millions of dollars in liabilities to remediate the damage, did the corporation expect or intend to cause the damage? Courts have answered questions like this one, "no," because the knowledge or intent of the corporation's management should be considered, not the low-level employee's.<sup>64</sup>

### III. PRINCIPLES OF INSURANCE POLICY INTERPRETATION RELEVANT TO INSURANCE COVERAGE FOR INTENTIONAL INJURIES OR DAMAGE

When courts are asked to interpret and apply policy language such as the "expected or intended" exclusion, three well-established rules of policy interpretation emerge as particularly relevant to the analysis: (1) *contra*

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irrelevant"); see also LONG, *supra* note 8, § 1.08(2)(b)(ii); James L. Rigelhaupt Jr., Annotation, *Construction and Application of Provision of Liability Insurance Policy*, 31 A.L.R. 4th 990-91 (1984).

63. See, e.g., *Yount v. Maisano*, 627 So. 2d 148, 151-2 (La. 1993) ("when minor injury is intended, and a substantially greater or more severe injury results, whether by choice, coincidence, accident, or whatever, coverage for the more severe injury is not barred"); *United Servs. Auto Ass'n v. Elitzky*, 517 A.2d 982, 988 (Pa. Super. Ct. 1986) ("Our interpretation affords maximum coverage to insured persons as coverage is precluded only for harm of the same general type as that which they set out to inflict."); see also Rigelhaupt, *supra* note 62, at 990-91.

64. See, e.g., *Olin Corp. v. Ins. Co. of N. Am.*, 762 F. Supp. 548, 564 (S.D.N.Y. 1991), *aff'd*, 966 F.2d 718 (2d Cir. 1992) (in determining whether the corporation expected or intended the harm, one should consider only "what [the policyholder's] executives knew, when they knew it, and what conclusion they drew from their knowledge."); *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 638 (Ky. 2007) (coverage analysis involves determining the intentions and expectations of corporate officers, not lower level employees).



*proferentem*, (2) the doctrine of “reasonable expectations,” and (3) construction of the policy as a whole.

A. UNDER THE DOCTRINE OF CONTRA PROFERENTEM, AMBIGUITIES SHOULD BE CONSTRUED AGAINST INSURERS AND IN FAVOR OF COVERAGE

It is Hornbook insurance law that because insurers are the drafters of policy language such as the “expected or intended” exclusion, the doctrine of *contra proferentem* applies, which means any ambiguities in the policy language should be construed against the insurers and in favor of coverage.<sup>65</sup> The test under many states’ laws for determining whether

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65. See, e.g., Appleman and Appleman, *supra* note 9, §§ 7401, 7481; RUSS & SEGALLA, *supra* note 32, § 22:14; LONG, *supra* note 8, §§ 16.04, 16.06 (1996); JEFFREY W. STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS, §§ 5.1, 5.2, 11.1 (1994); BUSINESS INSURANCE LAW AND PRACTICE GUIDE, *supra* note 50, § 2.02[1]; Ostrager & Newman, *supra* note 51, § 1.03[b][1]4 David B. Goodwin, *Disputing Insurance Coverage Disputes*, 43 STAN. L. REV. 779, 795 (1991); New Castle County, DE v. Nat’l Union Fire Ins. Co., 243 F.3d 744, 750–56 (3d Cir. 2001) (“When policy language is ambiguous . . . [the court] must apply the doctrine of *contra proferentem*. That is, ambiguous language must be construed against the drafter and in conformance with the reasonable expectations of the insured.”); Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 538–39 (9th Cir. 1990) (“According to the law of California and, indeed, every other state as well as the District of Columbia, ambiguities in insurance contracts must be construed against the insurer”), *cert. denied*, 498 U.S. 1013 (1990); Keller v. Safeco Ins. Co. of Am., 877 S.W.2d 90, 92 (Ark. 1994) (“If there is a reasonable construction that may be given to the contract that would justify recovery, it is the duty of the court to adopt it.”); Crane v. State Farm Fire and Cas. Co., 5 Cal. 3d 112, 115 (1971) (“Any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer.”); Hecla Mining Co. v. N.H. Ins. Co., 811 P.2d 1083, 1091 (Colo. 1991) (finding the term “sudden” to be ambiguous, and construing the phrase “sudden and accidental” against the insurer to mean unexpected and unintended); Ceci v. National Indem. Co., 622 A.2d 545, 548 (Conn. 1993) (finding “family member” ambiguous and defining it to favor the insured); Cody v. Remington Elec. Shavers, 427 A.2d 810, 812 (Conn. 1980) (ambiguities in contract documents are to be resolved against party responsible for its drafting); Phillips Home Builders, Inc. v. Travelers Ins. Co., 700 A.2d 127, 129–30 (Del. 1997) (“If there is an ambiguity, however, the contract language is construed most strongly against the insurance company that drafted it.”); Qwest Comm. Int’l v. Nat. Union Fire Ins. Co. 821 A.2d 323, 328 (Del. Ch. 2002) (“To the extent an ambiguity does exist, the doctrine of *contra proferentem* requires that the language be construed most strongly against the insurance company that drafted it.”); Crawford v. Prudential Ins. Co. of Am., 783 P.2d 900, 904 (Kan. 1989) (“Since an insurer prepares its own contracts, it has a duty to make the meaning clear, and if it fails to do so, the insurer, and not the insured, must suffer.”); RPM Pizza, Inc. v. Auto. Cas. Ins. Co., 601 So. 2d 1366, 1369 (La. 1992) (“any ambiguity must be construed against the insurance company and in favor of the reasonable construction that affords coverage”); Maine Drilling & Blasting, Inc. v. Ins. Co. of N. Am., 665 A.2d 671, 673 (Me. 1995) (liability insurance policy must be construed to resolve all ambiguities in favor of coverage); Am. Bumper and Mfg. Co. v. Hartford Fire Ins. Co., 550 N.W.2d 475, 480 (Mich. 1996) (“in construing insurance contracts, any ambiguities are strictly construed against the insurer to maximize coverage”); DeBerry v. Am. Motorists Ins. Co., 236 S.E.2d 380, 382 (N.C. Ct. App. 1977) (“any ambiguity or uncertainty as to the meaning of terms in a policy should be resolved against the insurer since it selected the language used”); Kief Farmers Co-op Elevator Co. v. Farmland Mut. Ins. Co., 534 N.W.2d 28, 32 (N.D. 1995) (in construing policies, “we balance the equities in favor of providing coverage to the insured”); Weaver v. Royal Ins. Co. of Am., 674 A.2d 975 (N.H. 1996) (if policy language is ambiguous or where conflicting interpretations exist,

policy language is ambiguous is whether the provisions at issue are reasonably or fairly susceptible to different interpretations or meanings.<sup>66</sup>

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the court will construe insurance policy in favor of providing coverage to insured); *Allen v. Metro. Life Ins. Co.*, 208 A.2d 638, 644 (N.J. 1965) (“policies should be construed liberally in their favor to the end that coverage is afforded ‘to the full extent that any fair interpretation will allow’”); *Ohio Cas. Ins. Co. v. Flanagan*, 210 A.2d 221, 226 (N.J. 1965) (“If the controlling language will support two meanings, one favorable to the insurer, and the other favorable to the insured, the interpretation sustaining coverage must be applied.”); *N.Y. v. Home Indem. Co.*, 486 N.E.2d 827, 829 (N.Y. 1985) (“If, however, the language in the insurance contract is ambiguous and susceptible of two reasonable interpretations, the parties may submit extrinsic evidence as an aid in construction, and the resolution of the ambiguity is for the trier of fact.”); *Gomolka v. State Auto Mut. Ins. Co.*, 436 N.E.2d 1347, 1348–49 (Ohio 1982) (“Policies of insurance, which are in language selected by the insurer and which are reasonably open to different interpretations, will be construed most favorably for the insured.”); *Sec. Fin. Co. v. Aetna Ins. Co.*, 269 N.E.2d 592, 598 (Ohio 1971) (in construing provisions of insurance policies, a court must resolve any doubts arising from language used in favor of insured, and if words used in policy bear more than one reasonable meaning, they should be interpreted liberally in favor of insured); *Cohen v. Erie Indem. Co.*, 432 A.2d 596, 599 (Pa. Super. Ct. 1981) (“The very existence of two contrary schools of thought evidenced by the conflicting holdings in cases cited by both the Appellee and the Appellant is convincing in the conclusion that the clause in issue is ambiguous as to whether coverage is to be afforded under the fact situation presented. Such ambiguity, by itself, requires that we resolve the issue in favor of the Appellee, the insured driver.”); *Shelley v. Nationwide Mut. Ins. Co.*, 245 A.2d 674, 675 (Pa. Super. Ct. 1968) (“It is well established that an insurance policy will be construed most strongly against the insurer who has prepared it.”); *Nat’l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991) (if a contract of insurance is susceptible of more than one reasonable interpretation, we must resolve the uncertainty by adopting the construction that most favors the insured); *Garneau v. Curtis & Bedell, Inc.*, 610 A.2d 132, 134 (Vt. 1992) (“whether the insurer has a duty to indemnify, any ambiguity in the insurance contract will be resolved in favor of the insured”); *Peerless Ins. Co. v. Wells*, 580 A.2d 485, 487 (Vt. 1990) (noting any ambiguity in policy language should be resolved in favor of insured); *Murray v. W. Pac. Ins. Co.*, 472 P.2d 611, 615 (Wash. Ct. App. 1970) (noting the well recognized rule that exclusionary clauses in insurance policies are construed most strongly against the insurer).

66. See 13 Insurance Law & Practice, at § 7403 (insurer has burden of establishing that insurer’s interpretation is the only fair interpretation of contract); LONG, *supra* note 8, § 16.06. See also *Vargas v. Ins. Co. of N. Am.*, 651 F.2d 838, 840 (2d Cir. 1981) (under New York law, insurer bears heavy burden of proving policyholder’s interpretation is unreasonable, that the policy is susceptible to the insurer’s interpretation and the insurer’s interpretation is the only one that could fairly be placed on the policy); *New Castle County*, DE, 243 F.3d at 750 (3d Cir. 2001) (the settled test for ambiguity is whether the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings); *W. Heritage Ins. Co. v. Magic Years Learning Ctr. and Child Care, Inc.*, 45 F.3d 85, 88 (5th Cir. 1995) (applying Texas law, noting court must enforce policy as written if it can be given only one reasonable construction); *Desai v. Farmers Ins. Exch.*, 55 Cal. Rptr. 2d 276, 279 (Cal. Ct. App. 1996) (policy language is ambiguous if it is susceptible to two or more meanings); *Shepard v. Calfarm Life Ins. Co.*, 7 Cal. Rptr. 2d 428, 432–33 (Cal. Ct. App. 1992) (a policy provision is ambiguous when it is capable of two or more constructions, both of which are reasonable, and the burden of proving one reasonable construction falls to the insurer); *Phillips Home Builders, Inc.*, 700 A.2d at 129 (“Convoluting or confusing terms are the problem of the insurer . . . not the insured.”); *High Country Ass’n. V. N.H. Ins. Co.*, 648 A.2d 474, 476 (N.H. 1994) (“If the language of the policy reasonably may be interpreted more than one way and one interpretation favors coverage, an ambiguity exists in the policy that will be construed in favor of the insured and against the insurer.”); *Salem Group v. Oliver*, 607 A.2d 138, 139 (N.J. 1992) (when a policy fairly supports an interpretation favorable to both the insured and the insurer, the policy should be interpreted in favor of the insured); *Harris, Jolliff & Michel, Inc. v. Motorists Mut. Ins. Co.*, 255 N.E.2d 302, 307 (Ohio Ct. App. 1970) (where insurer and insured each presented reasonable interpretations of exclusion, exclusion is

Where the controversy involves a phrase that insurance companies have failed to define and has generated many lawsuits with varying results, common sense dictates that the policy language must be ambiguous.<sup>67</sup>

Further, because exclusions purport to limit coverage that otherwise is provided, they are to be narrowly construed and the insurer has the burden of proving they are applicable.<sup>68</sup> Indeed, numerous courts have held that exclusions will not be interpreted and applied in such a way as to swallow the basic coverages provided under a policy.<sup>69</sup>

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ambiguous and must be interpreted in favor of the insured); *Goldstein v. Occidental Life Ins. Co.*, 273 A.2d 318, 321 (R.I. 1971) (“Test to be applied by a court in determining the meaning of ambiguous terms in an insurance contract is not what the insurer intended by its words, but what the ordinary reader and purchaser applying for insurance would have understood them to mean.”); *Harris, Jolliff & Michel, Inc. v. Motorists Mut. Ins. Co.*, 593 A.2d 45, 47 (R.I. 1991) (noting ambiguity if clause has more than one reasonable meaning); *H.D. Bonner v. United Servs. Auto Ass’n*, 841 S.W.3d 504, 506 (Tex. Ct. App. 1992) (“court must adopt the construction of an exclusionary clause urged by the insured as long as the construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable, or a more accurate reflection of the parties’ intent”).

67. *See, e.g., New Castle County, DE*, 243 F.3d at 756 (finding ambiguity where the contested phrase was not defined and had been interpreted differently by various courts); *Sec. Ins. Co. v. Investors Diversified Ltd., Inc.*, 407 So. 2d 314, 316 (Fla. Dist. Ct. App. 1981) (“The insurance company contends that the language is not ambiguous, but we cannot agree and offer as proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of essentially the same language.”); *Crawford v. Prudential Ins. Co.*, 783 P.2d 900, 908 (Kan. 1989) (“[r]eported cases are in conflict, the trial judge and the Court of Appeals reached different conclusions and the justices of this court [disagree]. Under such circumstances, the clause is, by definition, ambiguous and must be interpreted in favor of the insured.”); *Allstate Ins. Co. v. Hartford Accident & Indem. Co.*, 311 S.W.2d 41, 46 (Mo. Ct. App. 1958) (“Since we assume that all courts adopt a reasonable construction, the conflict is of itself indicative that the word as so used is susceptible of at least two reasonable interpretations, one of which extends the coverage to the situation at hand”); *George H. Olmsted & Co. v. Metro. Life Ins. Co.*, 161 N.E. 276, 277 (Ohio 1928) (“Where the language of a clause used in an insurance contract is such that courts of numerous jurisdictions have found it necessary to construe it and in such construction have arrived at conflicting conclusions as to the correct meaning, intent and effect thereof, the question whether such clause is ambiguous ceases to be an open one.”); *Cohen*, 432 A.2d at 599 (“The mere fact that [courts differ on the construction of the provision] itself creates the inescapable conclusion that the provision in issue is susceptible to more than one interpretation.”). *See also* Charles C. Marvel, Annotation, *Division of Opinion Among Judges on Same Court or Among Other Courts or Jurisdictions Considering Same Question, as Evidence that Particular Clause of Insurance Policy is Ambiguous*, 4 A.L.R. 4th 1253 (1981); LONG, *supra* note 8, § 16.06; BUSINESS INSURANCE LAW AND PRACTICE GUIDE, *supra* note 50, § 2.02[1]; STEMPEL, *supra* note 65, § 5.8.

68. *See, e.g., SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 313 (Minn. 1995) (insurer has burden to prove the applicability of an exclusion as an affirmative defense); *Continental Ins. Co. v. Louis Marx & Co.*, 415 N.E.2d 315, 317 (Ohio 1980) (defense has burden of proving defense based upon exclusion); *Brown v. Snohomish Physicians Corp.*, 845 P.2d 334, 340 (Wash. 1993) (once insured has made a *prima facie* case that there is coverage, burden shifts to the insurer to prove an exclusionary provision applies). *See also* Appleman and Appleman, *supra* note 9, § 7405; RUSS & SEGALLA, *supra* note 32, § 22:31 (1995); BUSINESS INSURANCE LAW AND PRACTICE GUIDE, *supra* note 50, § 2.02[1].

69. *See, e.g., Tews Funeral Home v. Ohio Cas. Ins. Co.*, 832 F.2d 1037, 1045 (7th Cir. 1987) (policy excluding acts explicitly covered in prior section of policy construed against insurer); *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp.2d 376, 390 (D. Del. 2002) (ambiguities construed against insurer in order to reduce the insurer’s incentive to draft policy language where certain provisions

### 1. *Contra Proferentum Applied to the “Expected or Intended” Exclusion*

As discussed above, an ambiguous insurance policy provision is one that has more than one reasonable meaning. When one attempts to interpret and apply the “expected or intended” exclusion, as evidenced by the courts’ struggles with what the test even should be, it becomes apparent that the language is ambiguous when applied in many instances.<sup>70</sup>

### B. THE “REASONABLE EXPECTATIONS” DOCTRINE

Another staple of insurance policy interpretation law is that a policy should be interpreted in such a way as to fulfill the “reasonable expectations” of the policyholder.<sup>71</sup> A seminal article regarding the “reasonable expectations” doctrine was written by then Professor Robert Keeton more than forty years ago.<sup>72</sup> In his subsequent treatise, Judge Keeton summarized the doctrine as follows: “In general, courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by insurance contracts even

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purport to give coverage while other clauses take that very coverage away); *Titan Indem. Co. v. Newton*, 39 F. Supp. 2d 1336, 1348 (M.D. Ala. 1999) (finding coverage even though “the limitations of [the] policy completely swallow up the insuring provisions”); *Bailer v. Erie Ins. Exch.*, 687 A.2d 1375, 1380 (Md. 1997) (If the exclusion totally swallows the insuring provision, then such provisions create the greatest form of ambiguity, and insurer is obliged to defend and indemnify.).

70. See sources cited *supra* note 51.

71. OSTRAGER & NEWMAN, *supra* note 51, §1.03[b] (identifying courts in forty-two states that have expressed support for, or applied a form of, the reasonable expectations doctrine); RUSS & SEGALIA, *supra* note 32, § 22.11; LONG, *supra* note 8, § 16.07; BUSINESS INSURANCE LAW AND PRACTICE GUIDE, *supra* note 50, § 2.02[1]; ROBERT E. KEETON AND ALAN I. WIDISS, INSURANCE LAW, § 6.3 (1988); STEMPEL, *supra* note 65, at § 11.1. See also *AIU Ins. Co. v. Super. Ct.*, 799 P.2d 1253, 1264 (Cal. 1990) (ambiguous coverage clauses of insurance policies are to be interpreted broadly to protect the objectively reasonable expectations of the insured); *Roland v. Ga. Farm Bureau Mut. Ins. Co.*, 462 S.E.2d 623, 625 (Ga. 1995) (“[a] contract of insurance should be strictly construed against the insurer and read in favor of coverage in accordance with the reasonable expectations of the insured”); *Corgatelli v. Global Life & Accident Ins. Co.*, 533 P.2d 737, 740 (Idaho 1975) (applying reasonable expectations doctrine to “total pollution exclusion,” notwithstanding conclusion that the provision was unambiguous); *A.B.C. Builders, Inc. v. Am. Mut. Ins. Co.*, 661 A.2d 1187, 1190 (N.H. 1995) (“the policy language must be so clear as to create no ambiguity which might affect the insured’s reasonable expectations”); *Fed. Ins. Co. v. Century Fed. Sav. & Loan Ass’n*, 824 P.2d 302, 308 (N.M. 1992) (court will give effect to policyholder’s reasonable expectations in construing policy language); *Mills v. Agrichemical Aviation, Inc.*, 250 N.W.2d 663, 671–73 (N.D. 1977) (doctrine of reasonable expectations is properly invoked to discern intentions of parties and impose liability on insurer); *Nat’l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488, 495–96 (W. Va. 1987) (court will apply reasonable expectations doctrine to construe the policy in a manner that a reasonable person standing in the shoes of the insured would expect the language to mean, even though painstaking examination of the policy provisions would have negated those expectations).

72. Robert Keeton, *Insurance Law Rights at Variance With Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer.”<sup>73</sup>

As Professor Mootz more recently commented, “In other words, even when the policy language unambiguously precludes coverage, under certain circumstances, courts will hold that coverage exists.”<sup>74</sup>

Stated differently, the policyholder should receive in coverage what it objectively, can reasonably expect to receive even if the policy language does not expressly support coverage. Thus, for example, a policyholder that is in the business of selling products (e.g., widgets) reasonably can expect that it will receive coverage for products liability claims related to widgets when it buys commercial general liability insurance for purposes of insuring itself against product liability claims. So, in oversimplified terms, if an insurer sells insurance that covers products liability claims for which it accepted a premium, then courts generally should interpret the policy in such a way that coverage for product liability claims related to widgets will be provided regardless of what interpretation of the policy the

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73. KEETON & WIDISS, *supra* note 71, 6.3(a)3. For commentary regarding the reasonable expectations doctrine, see Robert H. Jerry II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 CONN. INS. L.J. 21 (1998) (discussing the doctrine as conceptualized by Keeton); Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823 (1990) (providing a detailed historical account of the doctrine and asserting that the doctrine is principled and can be applied within justiciable guidelines); William A. Mayhew, *Reasonable Expectations: Seeking a Principled Application*, 13 PEPP. L. REV. 267, 287–96 (1986) (formulating standards for applying the doctrine); Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 392 (1986) (arguing for refinements to the doctrine in response to the fading appeal that the doctrine holds for courts and commentators and contending that courts should “discard their unfortunate tendency to speak the platitudes of reasonable expectations without undertaking a careful and systematic analysis”); Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981). While there is relatively broad acceptance of the doctrine, judicial interpretation and application of the doctrine is variable. See Peter N. Swisher, *A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations*, 35 TORT & INS. L.J. 729 (2000) (exploring judicial responses and proposing a middle ground approach); Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181, 182–83, 191 (1998) (describing judicial approaches and noting both liberal and narrow approaches among the numerous states that have adopted the doctrine); Laurie K. Fett, *Note, The Reasonable Expectations Doctrine: An Alternative to Bending and Stretching Traditionally Tools of Contract Interpretation*, 18 WM. MITCHELL L. REV. 1113 (1992) (student note exploring the doctrine under Minnesota law); Stephen J. Ware, *Note, A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461 (1989) (student note providing a “law and economics” critique of the doctrine); Scott B. Krider, *Note, The Reconstruction of Insurance Contracts Under the Doctrine of Reasonable Expectations*, 18 J. MARSHALL L. REV. 155 (1984) (student note arguing that regulatory efforts address the underlying problems in the insurance industry in a manner superior to judicial use of reasonable expectations); William M. Lashner, *Note, A Common Law Alternative to the Doctrine of Reasonable Expectations in the Construction of Insurance Contracts*, 57 N.Y.U. L. REV. 1175, 1208 (1982) (student note arguing that “any provision which undercuts the bargained-for insurance coverage must . . . [be] specifically explained to the insured” to be enforceable).

74. Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 22 (1997).

insurer provides when a claim is presented (or exclusions in the policy that purportedly apply).

So what does this mean in the context of the “expected or intended” exclusion? As discussed below in Section III, a policyholder reasonably can expect to receive coverage for many intentional torts despite the presence of the “expected or intended” exclusion in the policy because the exclusion is inconsistent with the coverage grant in liability policies under which numerous types of intentional torts are expressly covered. Stated differently, insurers should not be permitted to agree in the insuring agreement portion of the policy to cover intentional torts such as trademark infringement, disparagement, malicious prosecution, invasion of privacy, and employment discrimination, but then, when claims are tendered, point to the “expected or intended” exclusion and argue that such claims are not covered because the policyholder expected or intended the injuries. To do so would render the coverage provided under the policy illusory, which is impermissible.<sup>75</sup>

### C. CONSTRUCTION OF THE POLICY AS A WHOLE

The third policy interpretation principle applicable to the “expected or intended” exclusion is similar to the “reasonable expectations” doctrine in that, if possible, the policy should be interpreted in a way that reconciles the various provisions of the policy and attempts to give effect to all of the policy’s provisions.<sup>76</sup> In essence, this principle means courts should give

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75. See sources cited *supra* note 69. See also *Bowersox Truck Sales & Serv., Inc. v. Harco Nat’l Ins. Co.*, 209 F.3d 273, 277–78 (3d Cir. 2000) (rejecting insurer’s interpretation of policy’s two-year limitation period where interpretation would have rendered coverage illusory); *Harris v. Gulf Ins. Co.*, 297 F. Supp. 2d 1220, 1226 (N.D. Cal. 2003) (rejecting insurer’s interpretation of insured v. insured exclusion in policy because it “would render the coverage provided by the policy illusory”); *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp.2d 376, 398 (D. Del. 2002) (rejecting a D&O insurer’s interpretation of the policy’s deliberate fraud exclusion where, if applied, “there would be little or nothing left to that coverage” because “[n]o insured would expect such limited coverage from a policy that purports to cover all types of securities fraud claims.”); *Atofina Petrochemicals, Inc. v. Cont’l Cas. Co.*, 185 S.W.3d 440, 444–45 (Tex. 2005) (rejecting insurer’s interpretation of additional insured endorsement because it “would render coverage under the endorsement largely illusory”).

76. See, e.g., GA. CODE ANN. § 13-2-2(4) (2010) (contracts should be interpreted as a whole); *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985) (applying New York Law, finding “an interpretation that gives a reasonable and effective meaning to all the terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect”); *Fireman’s Fund Ins. Co. v. Allstate Ins. Co.*, 286 Cal. Rptr. 146, 155–156 (Cal. 1991) (“In short, an insurance contract is to be construed in a manner which gives meaning to all its provisions in a natural, reasonable, and practical manner, having reference to the risk and subject matter and to the purposes of the entire contract.”); *Barrett v. Farmers Ins. Group*, 174 Cal. App. 3d 747, 750–51 (Cal. 1985) (construing insurance contract to give meaning to all its provisions); *State Farm Mut. Auto. Ins. Co. v. Crane*, 217 Cal.App.3d 1127, 1132 (Cal. 1990) (determining that contract is to be construed in a manner which gives meaning to all its provisions in a natural, reasonable, and practical manner); *Weiss v. Bituminous Cas. Corp.*, 319

effect to all of the policies' provisions if possible, and, do so in a way that is consistent with the general purpose of the policy as a whole. In the context of intentional injuries or damage, this doctrine's application is similar to the "reasonable expectations" doctrine, which means that the "expected or intended" exclusion should not be read by itself in isolation and then applied to a claim in determining whether the claim is covered. To the contrary, courts should first look to the insuring language in the policy to determine whether the policy is intended to cover the type of claim at issue. Then, if the claim is covered under the insuring language, as is the case with many intentional torts, then the "expected or intended" exclusion simply should not apply.

Stated differently, and as is discussed below in Section III, many types of insurance policies such as commercial general liability, employment practices liability, and homeowners policies expressly provide coverage for intentional torts in the insuring agreement sections of the policies. Thus, when analyzing whether there is coverage for a claim, courts should not analyze just a portion of the policy such as the "expected or intended" exclusion. Instead, the insurance policy should be read as a whole—keeping in mind that the basic purpose of insurance is to protect the policyholder from losses or liabilities in exchange for the payment of a premium. To do otherwise would make the insurance illusory.<sup>77</sup>

#### IV. INSURANCE COVERAGE FOR INTENTIONAL TORTS

The death knell for the myth that insurance does not cover intentional injuries or damage is the fact that many types of intentional torts are expressly covered under liability policies. Indeed, under the Personal and Advertising Injury Liability Section of standard form liability policies drafted by the Insurance Services Organization ("ISO"), which are used by most insurers, coverage for many intentional torts is expressly provided.

##### A. PERSONAL AND ADVERTISING INJURY COVERAGE

The Personal and Advertising Injury Liability Section of the 2006 ISO Commercial General Liability Coverage Form provides as follows:

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N.E.2d 491, 497 (Ill. 1974) (provisions in an insurance policy should be interpreted in context of entire policy); *Welborn v. Ill. Nat'l Cas. Co.*, 106 N.E.2d 142, 143 (Ill. App. 1952) (in construction of an insurance policy, the court should determine intention of the parties from the whole agreement, and endeavor to give a meaning to all provisions, if possible, which will render them consistent and operative).

<sup>77</sup>. See sources cited *supra* notes 69 and 75.

## COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

### 1. Insurance Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal and advertising injury” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “personal and advertising injury” to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or “suit” that may result . . . .<sup>78</sup>

“Personal and advertising injury” is defined in the 2006 ISO Commercial General Liability Coverage Form as follows:

14. “Personal and advertising injury” means injury, including consequential “bodily injury”, arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person of organization or disparages a person’s or organization’s goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person’s right of privacy;
- f. The use of another’s advertising idea in your “advertisement”; or
- g. Infringing upon another’s copyright, trade dress or slogan in your “advertisement.”<sup>79</sup>

Most, if not all, of these types of torts are committed intentionally by the policyholder. Indeed, how would one unintentionally prosecute someone maliciously? The “malicious” qualification in the phrase “malicious prosecution” by definition requires intent. Similarly, how would someone wrongfully evict someone unintentionally? Eviction has an intentional element to it. Is it possible to unintentionally disparage a person?

Yet, coverage for all of these torts and many more is expressly provided under the standard form language in commercial liability policies quoted above.

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78. ISO PROPERTIES, INC., FORM NO. CG 00 01 12 07, COMMERCIAL GENERAL LIABILITY COVERAGE FORM (2006).

79. COMMERCIAL GENERAL LIABILITY COVERAGE FORM, *supra* note 78.



### 1. *Trademark/Trade Dress Infringement*

In light of the standard form policy language quoted above, it should come as no surprise that numerous courts have held insurance coverage is available under commercial general liability policies for trademark/trade dress infringement.<sup>80</sup> Although a policyholder can negligently infringe a trademark or trade dress of another, in most situations the infringement is intentional because the policyholder is hoping to capitalize on the popularity of the trademark at issue.

### 2. *Defamation, Libel and Disparagement*

Courts also have held that insurance coverage is available for defamation,<sup>81</sup> libel,<sup>82</sup> and disparagement.<sup>83</sup> All of these types of claims have an intentional injury element to them.

### 3. *Malicious Prosecution*

Similarly, courts have held that malicious prosecution is covered.<sup>84</sup> The name itself—malicious prosecution—tells you that the conduct is intentional. It is covered nonetheless.

### 4. *Wrongful Imprisonment and Wrongful Eviction*

Wrongful eviction also has been held to be covered under commercial general liability policies.<sup>85</sup> It is hard to imagine someone imprisoning someone unintentionally, is it not?

### 5. *Invasion of Privacy*

Finally, commercial general liability policies also cover claims for invasion of privacy, which should have ever increasing importance in today's world of the Internet, Facebook, Twitter, and the paparazzi.<sup>86</sup>

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80. See sources cited *supra* notes 17–18.

81. See sources cited *supra* note 15.

82. See sources cited *supra* note 15.

83. See sources cited *supra* note 16.

84. See sources cited *supra* notes 21 and 25.

85. See sources cited *supra* note 24.

86. See sources cited *supra* note 26.

## B. IMPROPER EMPLOYMENT PRACTICES

Insurance is also available for improper employment practices. In addition to being able to recover under commercial general liability and directors' and officers' liability policies for certain types of improper employment practices claims, since the early 1990s employment practices liability insurance has been available.<sup>87</sup> Employment practices liability insurance provides coverage for many intentional employment practices that result in lawsuits against the policyholder such as racial discrimination, wrongful termination, sexual discrimination and retaliatory discharge.<sup>88</sup>

## C. VICARIOUS LIABILITY

Courts also have found coverage for a variety of claims in which the policyholder is responsible for intentional injuries or damage caused by someone else.<sup>89</sup>

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87. For various commentators' thoughts regarding issues related to insurance coverage for wrongful employment practices and a discussion of the case law in that area, see Richard A. Bales & Julie McGahy, *Insuring Title VII Violations*, 27 S. ILL. U.L.J. 71 (2002); Whitney L. Elzen, *Workplace Violence: Vicarious Liability and Negligence Theories as a Two-Fisted Approach to Employer Liability. Is Louisiana Clinging to an Outmoded Theory?*, 62 LA. L. REV. 897 (2002); Jeffrey W. Stempel, *Judge-Made Insurance That Was Not on the Menu: Schmidt v. Smith and the Confluence of Text, Expectation, and Public Policy in the Realm of Employment Practices Liability*, 21 W. NEW. ENG. L. REV. 283 (1999); Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1 (1997); Douglas R. Richmonds, *Insurance Coverage for Wrongful Employment Practices*, 48 OKLA. REV. 1 (1995).

88. Richmonds, *supra* note 87, at 2-7.

89. See KEETON & WIDISS, *supra* note 71, at 528 ("In most circumstances, courts hold both (1) that the express provisions commonly used in liability insurance policies do not preclude coverage for damages awarded for an intentional tort when the insured is held to be responsible on a theory of vicarious liability, and (2) that it would not be appropriate to imply a limitation that would restrict the coverage."). See also *Dart Indus., Inc. v. Liberty Mut. Ins. Co.*, 484 F.2d 1295, 1297 (9th Cir. 1973) (considering California's statutory bar against insuring willful wrongdoing and determining that California case law "clearly indicates the policy of the statutory exclusion as being limited to a situation where the insured is personally at fault"); *Chi. Bd. of Options Exch., Inc. v. Harbor Ins. Co.*, 738 F. Supp. 1184, 1187 (N.D. Ill. 1990) ("[The Exchange] did not insure itself . . . against its own intentional torts. Rather . . . [it] insured itself against the intentional torts of its officers and directors."); *Scott v. Instant Parking, Inc.*, 245 N.E.2d 124, 126 (Ill. App. 1969) ("This case . . . involves only the right of a corporation to insure against liability caused by its agents and servants. There is no reasonable basis to declare the latter type insurance is against public policy."); *Leon Lowe & Sons, Inc. v. Great Am. Surplus Lines Ins. Co.*, 572 So. 2d 206, 210 (La. Ct. App. 1990) ("Public policy forbids a person from insuring against his own intentional acts, but does not forbid him from insuring against the intentional acts of another for which he may be vicariously liable."); *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 216 (Minn. 1984) (permitting recovery under a professional liability policy by an attorney's law firm for the attorney's breach of fiduciary duty to a client); *Floralbell Amusement Corp. v. Standard Sur. & Cas. Co.*, 9 N.Y.S. 2d 959, 963 (N.Y. City Ct. 1937) (noting that it is "far fetched" to assume that coverage of one employer's liability incurred as the result of an unauthorized assault committed by one of its employees would be an inducement to the insured employer to encourage its employees to commit assaults because it can with equal force be said that liability insurance encourages

### *1. Imputed Liability – An Employer’s or Parent’s Liability for Its Employees’ or Children’s Conduct*

One of the most common situations in which courts have found coverage for vicarious liabilities is where an employer is held liable for the intentional injuries or damage(s) caused by one of its employees under the theory of respondeat superior.<sup>90</sup> In such situations, it is the employee’s, not the employer’s, intentional conduct that result in the injury or damage.

Courts have reached similar results in cases involving parents’ vicarious liability for their children’s conduct.<sup>91</sup> Thus, neither the “expected or intended” exclusion nor public policy concerns acted as a bar to coverage.<sup>92</sup>

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negligence); *Dayton Hudson Corp. v. Am. Mut. Liab. Ins. Co.*, 621 P.2d 1155, 1160 (Okla. 1980) (holding vicarious liability to be insurable “unless the employer’s volition was either directly or indirectly an element in the commission of the harm”); *McLeod v. Tecorp. Intl., Ltd.*, 844 P.2d 925, 927 n.3 (Or. Ct. App. 1992) (noting that the fact that an employee was acting within the scope of his employment is of little concern in determining whether an employer’s imputed liability should be insurable because it “is the insured’s actual conduct, not the imputed conduct of another” that matters), *modified*, 850 P.2d 1161 (Or. Ct. App.), *rev’d.*, 865 P.2d 1283 (Or. 1993).

90. *See, e.g., Dart Indus., Inc.*, 484 F.2d at 1297 (considering California’s statutory bar against insuring willful wrongdoing and determining that California case law “clearly indicates the policy of the statutory exclusion as being limited to a situation where the insured is personally at fault”); *Instant Parking, Inc.*, 245 N.E.2d at 126 (“This case . . . involves only the right of a corporation to insure against liability caused by its agents and servants. There is no reasonable basis to declare the latter type insurance is against public policy.”); *Leon Lowe & Sons, Inc.*, 572 So. 2d at 210 (“Public policy forbids a person from insuring against his own intentional acts, but does not forbid him from insuring against the intentional acts of another for which he may be vicariously liable.”); *Perl*, 345 N.W.2d at 216 (permitting recovery by attorney’s law firm under a professional liability policy for the attorney’s breach of his fiduciary duty to a client); *Floralbell Amusement Corp.*, 9 N.Y.S. 2d at 963 (noting that it is “far fetched” to assume that coverage of one employer’s liability incurred as the result of an unauthorized assault committed by one of its employees would be an inducement to the insured employer to encourage its employees to commit assaults because it can with equal force be said that liability insurance encourages negligence).

91. *See, e.g., Arenson v. Nat’l Auto. & Cas. Ins. Co.*, 286 P.2d 816, 818 (Cal. 1955) (enforcing coverage under a homeowner’s policy for liability parents incurred as a result of the intentional wrongdoing of their son). For a discussion regarding the availability of homeowners insurance to cover intentional injuries caused by children, *see* Cynthia A. Muse, Note, *Homeowners Insurance: A Way to Pay for Children’s Intentional and Violent Acts?*, 33 IND. L. REV. 665, 666 (2000); Hazel Glenn Beh, *Tort Liability for Intentional Acts of Family Members: Will Your Insurer Stand by You?*, 68 TENN. L. REV. 1, 2 (2000).

92. *See, e.g., Chi. Bd. of Options Exch., Inc. v. Harbor Ins. Co.*, 738 F. Supp. 1184, 1187 (N.D. Ill. 1990) (“The Exchange did not insure itself . . . against its own intentional torts. Rather . . . it insured itself against the intentional torts of its officers and directors.”); *Dayton Hudson Corp.*, 621 P.2d at 1160.

## 2. *Negligent Supervision*

Another situation in which courts have rejected arguments that coverage is precluded for intentional injuries or damage is where an employer's or a parent's liability for its employee's or child's intentional conduct is based upon the theory that the employer or parent negligently supervised the employee<sup>93</sup> or the child.<sup>94</sup> Again, the employer's or parent's liability was not premised upon its own intentional conduct; thus, the "expected or intended" exclusion was not applicable and no public policy issues were implicated.

## 3. *Innocent Co-Insureds*

Some courts have also recognized an exception to the "rule" that first-party insurance policies do not cover the deliberate destruction of property. As one commentator noted, "in recent years, a number of courts have moved away from the rule barring recovery for intentionally incurred losses to property to a rule that permits recovery by an innocent co-insured of a loss intentionally caused by . . . another co-insured."<sup>95</sup> This innocent co-insured exception often arises in the context of joint ownership of property, particularly marital property.<sup>96</sup> Thus, for example, a husband can recover under a homeowner's policy for the deliberate destruction of his house by his estranged wife.<sup>97</sup> The rationale for the exception, at least in part, is that "it is one individual who is responsible for the wrongdoing, not all the co-insureds."<sup>98</sup>

## D. INSURANCE COVERAGE FOR PUNITIVE DAMAGES

Courts in some jurisdictions have held that public policy precludes a policyholder from receiving insurance proceeds to cover an award of punitive damages against the policyholder.<sup>99</sup> These courts have reasoned

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93. See, e.g., *Chi. Bd. of Options Exch., Inc.*, 738 F. Supp. at 1187–88 (retaliatory discharge is uninsurable, but the corporation's vicarious liability would be insurable); *Seminole Point Hosp. Corp. v. Aetna Cas. & Sur. Co.*, 675 F. Supp. 44, 47 (D.N.H. 1987) (an employer may insure against harm resulting from "negligent supervision," including harm caused by the intentional acts of its employees).

94. See e.g., *Arenson*, 286 P.2d at 818; *Muse*, *supra* note 91; *Beh*, *supra* note 91.

95. *JERRY*, *supra* note 33, at 303.

96. *Id.*

97. *Id.*

98. *Id.* at 304.

99. See e.g., *Nw. Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 432; *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1064 (Fla. 1983). See also James A. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95, 161 (1990) (focusing on California law and discussing public policy

that the purposes of punitive damages—to deter misconduct and punish the wrongdoer—would allegedly be thwarted if insurance covered punitive damages.<sup>100</sup>

Yet, in making such pronouncements, the courts do not cite any empirical evidence to support such conclusions. Further, the reasoning is flawed. The premise of such decisions is that the policyholder thinks, “I have insurance to cover me if punitive damages are awarded so I should go ahead and engage in criminal, egregious or reckless behavior.” Other than in the context of first party insurance fraud (e.g., burning down a house to collect under an insurance policy because the homeowner cannot sell the house in today’s housing market and cannot afford to pay the mortgage), does anyone really believe that a policyholder reviews its insurance to see if he or she will be covered before deciding whether to commit a crime or tort?

In addition, if an insurer agrees to cover punitive damages, and many insurers do,<sup>101</sup> why should the insurer be permitted to avoid paying after the fact based upon public policy grounds? Insurers should not be permitted to draft policies that cover punitive damages, collect premiums for such policies from policyholders, and then be permitted to argue such coverage is against public policy when a claim arises. Indeed, once the policyholder pays the premium for a policy that does not exclude coverage for punitive damages, the policyholder can reasonably expect punitive damages will be covered.

For these reasons, the majority of courts have held that policyholders can recover from their insurers for punitive damage awards against them unless such damages are expressly excluded from coverage.<sup>102</sup> Moreover, even in jurisdictions where courts have held insurance for punitive damages is against public policy, most of them allow for recovery of punitive damages if they are awarded on the basis of vicarious liability.<sup>103</sup>

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arguments for, among other things, insurance for punitive damages).

100. *U.S. Concrete Pipe Co.*, 437 So. 2d at 1064; Fischer, *supra* note 99, at 161.

101. Standard form commercial general liability policies state that the insurer agrees to pay “all sums” the policyholder is “legally obligated to pay as damages” without limiting the covered damages to only compensatory damages. See COMMERCIAL GENERAL LIABILITY COVERAGE FORM, *supra* note 78.

102. See sources cited *supra* note 29.

103. See sources cited *supra* note 33.

## V. PUBLIC POLICY CONSIDERATIONS

### A. PUBLIC POLICY ARGUMENTS IN FAVOR OF AND AGAINST INSURANCE FOR INTENTIONAL INJURIES OR DAMAGE

Proponents of the myth that insurance is not available for intentional injuries or damages primarily rely upon public policy as its basis. The basic theory, known as the “moral hazard” problem, posits that the policyholder is encouraged to engage in bad behavior because the policyholder would either be rewarded for bad behavior by being able to recover under insurance policies for the damage he causes to his own property, or he would have little or no incentive not to engage in bad behavior if he will be covered for the injuries or damages he causes.<sup>104</sup>

Examples of courts applying this logic are most commonly found in the first party insurance context, such as in situations where the court rejects a beneficiary’s attempt to recover under a life insurance policy where the beneficiary murdered the named insured.<sup>105</sup> Similarly, courts often enforce an insurer’s decision not to cover the amount of a property loss where the policyholder intentionally destroyed the property by, for example, arson.<sup>106</sup> The reasoning of such decisions is understandable in the

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104. Judge Easterbrook has described the moral hazard problem by stating that “once a person has insurance, he will take more risks than before because he bears less of the cost of his conduct.” *W. Cas. & Sur. Co. v. W. World Ins. Co.*, 769 F.2d 381, 385 (7th Cir. 1985). Numerous other commentators also have addressed the moral hazard problem. *See, e.g.*, Gary T. Schwartz, *The Ethics and Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 338 n.117 (1990) (“‘Moral hazard’ is sometimes distinguished from ‘morale hazard’, the former referring to deliberate acts like arson, the latter to the mere relaxation of the defendant’s discipline of carefulness.” (citing C. ARTHUR WILLIAMS, JR. & RICHARD M. HEINS, *RISK MANAGEMENT AND INSURANCE* 217 (4th ed. 1981))); Scott E. Harrington, *Prices and Profits in the Liability Insurance Market*, in 42 *LIABILITY: PERSPECTIVES AND POLICY*, 47 (Robert E. Litan & Clifford Winston eds., 1988) (“Moral hazard is the tendency for the presence and characteristics of insurance coverage to product inefficient changes in buyers’ loss prevention activities, including carelessness and fraud . . . .”); JERRY, *supra* note 33, at 13 (“The existence of insurance could have the perverse effect of increasing the probability of loss . . . . This phenomenon is called moral hazard.”); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L.J.* 1521, 1547 (1987) (“Moral hazard refers to the effect of the existence of insurance itself on the level of insurance claims made by the insured . . . . Ex ante moral hazard is the reduction in precautions taken by the insured to prevent the loss, because of the existence of insurance.”).

105. *See, e.g.*, *New Eng. Mut. Life Ins. Co. v. Null*, 605 F.2d 421, 424 (8th Cir. 1979) (referencing “the accepted rule that a life insurance policy is void AB initio when it is shown that the beneficiary thereof procured the policy with a present intention to murder the insured.”); *Witte*, 406 S.W.2d at 149 (explaining that a beneficiary cannot recover life insurance proceeds if he murders the insured); *Appleman and Appleman*, *supra* note 9, at 481 (“It has uniformly been held that a beneficiary under a contract of personal insurance who murders the insured cannot recover the policy benefits.”).

106. *See, e.g.*, 12 *Appleman and Appleman*, *supra* note 9, at 7031 (“Arson by the insured will prevent him from recovering.”); JERRY, *supra* note 33, at 302. *See also* *U.S. Fire Ins. Co. v. Beltmann N. Am. Co.*, 695 F. Supp. 941, 948 (N.D. Ill. 1988) (“A fire insurance policy issued to anyone, which purported to insure his property against his own willful and intentional burning of the same, would

first party context because the policyholder's conduct is tantamount to insurance fraud and is often criminal.

Yet, when examined, the suggestion that the policyholder would be deterred from engaging in criminal conduct if insurance were not available is suspect even in the first party insurance context. In fact, little, if any, evidence has been offered to support the argument that the primary deterrent to criminal conduct such as arson or murder is the unavailability of insurance for the injuries or damage caused by such conduct. Indeed, in many instances, there are substantial deterrents to convince the policyholder not to engage in criminal behavior unrelated to insurance. For example, arson is a felony. Murder is also a felony. One would expect that imprisonment or the death penalty would be better deterrents to such crimes than the forfeiture of insurance proceeds.

The same logic applies to auto accidents. One would expect that the risk of grievous bodily harm to the policyholder himself or jail time for manslaughter or assault would be a better deterrent to a deliberate accident than the risk that insurance proceeds would be forfeited if it were discovered the accident was deliberately caused by the policyholder. Moreover, the insurer always has fraud as a defense to coverage in situations where the policyholder deliberately purchases insurance immediately before committing an intentional act that results in injury or damage in order to recover under the policy.<sup>107</sup>

In addition, what empirical evidence can the proponents of the myth present that a policyholder reviews his or her insurance policy to determine whether it will cover an injury or damage to a third party before causing the injury or damage? In short, such arguments are based upon theory, not evidence.

On the other hand, particularly in the third party insurance or liability context, there are other competing public policies that favor allowing insurance recoveries for intentional injuries or damage. For example, public policy favors compensating innocent victims.<sup>108</sup> Thus, in situations

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manifestly be condemned by all courts as contrary to a sound public policy . . ." (quoting *Checkley v. Ill. Cent. R.R. Co.*, 100 N.E 942, 944 (Ill. 1913)). One commentator refers to this as the "barn burning defense," stating, "the insured who intentionally burns his own barn is not entitled to collect the insurance on it!" 1 WARREN FREEDMAN, *RICHARDS ON THE LAW OF INSURANCE*, § 1:13 (6th Ed. 1990).

107. See, e.g., sources cited *supra* notes 105 and 106.

108. See, e.g., *Yousuf v. Cohlma*, 718 F. Supp. 2d 1279, 1288 (N.D. Okla. 2010) (stating that compensating a wrongdoer's innocent victims would outweigh the concern that the wrongdoer would unjustly benefit); *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 826 F. Supp. 155, 163-64 (E.D.Va. 1993) (where insurance policy does not explicitly exclude coverage of intentional acts, public policy of compensating innocent victims outweighs public policy of not permitting coverage of intentional action); *Grinnell Mut. Reinsurance Co. v. Jungling*, 654 N.W.2d 530, 539 (Iowa 2002); *Vigilant Ins. Co. v. Kambly*, 319 N.W.2d 382, 385 (Mich. Ct. App. 1982) ("[T]here is great public interest in

where the victim would go uncompensated in the absence of the tortfeasor's insurance, public policy favors the victim recovering insurance proceeds even if the policyholder intentionally harmed the victim.

Another competing public policy is the enforcement of contracts, such as insurance policies, in accordance with their terms. Indeed, as one court correctly has noted, "There is more than one public policy. One such policy is that an insurance company which accepts a premium for covering all liability for damages should honor its obligation."<sup>109</sup> Insurers draft the language contained in their policies so they do not need courts to create "public policy" to help them avoid coverage for the types of claims the insurers do not want to insure. The insurers can simply state, in clear terms, in the policy the specific types of claims that are not covered.<sup>110</sup> If the insurer fails to do that, then public policy favors enforcing the terms of the policy in favor of coverage.

#### B. COURTS' REJECTION OF PUBLIC POLICY ARGUMENTS AGAINST ALLOWING INSURANCE FOR INTENTIONAL INJURIES OR DAMAGE

For the reasons discussed above, an increasing number of courts have rejected the argument that public policy precludes coverage for intentional injuries or damage.<sup>111</sup>

The Sixth Circuit's consideration of insurance for intentional employment discrimination in *School District for Royal Oak v. Continental Casualty Co.*<sup>112</sup> is instructive in this regard. In *Royal Oak*, the insured school board settled an intentional religious discrimination suit brought by an aggrieved teacher and then sought indemnification for that settlement

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protecting the interests of the injured party.").

109. *Creech*, 516 So. 2d at 1174. *Accord* *Sch. Dist. for Royal Oak v. Cont'l Cas. Co.*, 912 F.2d 844, 848 (6th Cir. 1990), *reh'g denied*, 921 F.2d 625 (6th Cir. 1990) (public policy favors enforcing the terms of insurance policies and "common sense suggests that the prospect of escalating insurance costs and the trauma of litigation, to say nothing of the risk of uninsurable punitive damages, would normally neutralize any stimulative tendency that insurance might have"); *Sch. Dist. for Royal Oak*, 912 F.2d at 849 ("Public policy normally favors enforcement of insurance contracts according to their terms.") (citing *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005, 1010 n.1 (Fla. 1989) (Ehrlich, C.J., dissenting)); *Nw. Natl. Cas. Co.*, 307 F.2d at 444 (Gewin, J., concurring) (noting the public policy favoring the enforcement of contracts); *Union Camp Corp. v. Cont'l Cas. Co.*, 452 F. Supp. 565, 568 ("Exercise of the freedom of contract is not lightly to be interfered with. It is only in clear cases that contracts will be held void as against public policy.").

110. See sources cited *supra* note 109.

111. See, e.g., *School Dist. for Royal Oak*, 912 F.2d at 848 (applying Michigan law); *Ranger Ins. Co.*, 509 So. 2d at 946 (en banc), *rev'd.*, 549 So. 2d 1005 (Fla. 1989); and *Indep. Sch. Dist. No. 697 v. St. Paul Fire & Marine Ins. Co.*, 495 N.W.2d 863, 867 (Minn. Ct. App.), *review granted*, No. 92-1625, 1993 Minn. LEXIS 225 (1993) (where policy provides coverage for intentional injuries, public policy will not create absolute rule of insurability).

112. 912 F.2d 844 (6th Cir. 1990).



under a commercial general liability insurance policy.<sup>113</sup> The policy covered “‘all loss’ that the school district or its employees become legally obligated to pay . . . provided that the subject of the loss does not include ‘matters which shall be deemed uninsurable under state law.’”<sup>114</sup>

The district court in *Royal Oak* held that the policy covered the school district’s liability for its intentional discrimination.<sup>115</sup> The insurer invoked both the contractual exclusion for “matters that are uninsurable under state law” and the argument that Michigan public policy allegedly precluded enforcement of the coverage.<sup>116</sup> Citing cases in which Michigan courts found coverage for a psychiatrist’s liability for “felonious sexual activity,” the district court had held that, “Michigan does not as a general rule bar recovery under public liability policies simply because some illegal act was involved in the damage.”<sup>117</sup>

The Sixth Circuit affirmed. As an initial matter, the court questioned the assumption that insurance for intentional discrimination promotes wrongdoing: “Perhaps the existence of liability insurance might occasionally ‘stimulate’ discrimination, but common sense suggests that the prospect of escalating insurance costs and the trauma of litigation . . . would normally neutralize any stimulative tendency the insurance might have.”<sup>118</sup>

The Sixth Circuit then noted “public policy normally favors enforcement of insurance contracts according to their terms.”<sup>119</sup> The court further reasoned that the insurer is responsible for drafting the policy, not the policyholder or the court. Thus, the insurer is in the best position to eliminate coverage for claims it does not want to insure.<sup>120</sup> On this point, the Sixth Circuit quoted the district court which noted that, “insurers can always exclude or limit coverage” for discrimination.<sup>121</sup> Finally, the Sixth

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113. 912 F.2d 844, 845–46 (6th Cir. 1990).

114. *Id.* at 846.

115. *See Royal Oak*, 912 F.2d at 849–50.

116. *Id.* at 847–48.

117. *Royal Oak*, 912 F.2d at 849 (quoting *Bowman v. Preferred Risk Mut. Ins. Co.*, 83 N.W.2d 434, 436 (Mich. 1957)).

118. *Id.* at 848. *See also Ranger Ins. Co.*, 509 So. 2d at 948 (“Wrongdoers can be adequately punished under present law by the imposition of punitive damages, where appropriate, since it is against the public policy of this state to insure against such damages.”), *rev’d*, 549 So.2d 1005 (Fla. 1989); *Id.* at 947 (“The proposition that insurance taken out by an employer to protect against liability under Title VII will encourage violations of the Act is . . . speculative and erroneous.” (quoting *Union Camp Corp. v. Cont’l Cas. Co.*, 452 F. Supp. 565, 567 (S.D. Ga. 1978))); *Indep. Sch. Dist. No. 697 v. St. Paul & Marine Ins. Co.*, 495 N.W.2d 863, 867 (Minn. Ct. App.) (quoting *Royal Oak*, 912 F.2d at 848), *review granted*, No. 92-1625, 1993 Minn. LEXIS 225 (Mar. 30, 1993).

119. *Royal Oak*, 912 F.2d at 849 (citing *Ranger Ins. Co.*, 549 So. 2d at 1010 n.1 (Ehrlich, C.J., dissenting)).

120. *Id.*

121. *Id.* (quoting the transcript of the proceedings in the district court).

Circuit stated, “had the company wished to exclude coverage for intentional . . . discrimination in employment, it could and should have said so.”<sup>122</sup>

Other courts that have rejected insurers’ public policy arguments have analyzed the issue similarly. For example, some have questioned whether the inference that insurance stimulates wrongdoing can overcome the “competing public policies . . . that favor freedom of contract and the enforcement of insurance contracts according to their terms.”<sup>123</sup> Other courts have pointed to the insurance industry’s ability to discourage undesirable behavior.<sup>124</sup> Such courts have noted that insurance companies are capable of policing their own policyholders and that insurance companies have ample motivation to prevent policyholders from recovering for intentionally incurred losses if they so desire.<sup>125</sup>

In sum, the courts that have rejected public policy based arguments that insurance should not be available for intentional injuries or damage have done so for three primary reasons. First, they have noted the lack of empirical evidence to support the assumption that insurance promotes intentional wrongdoing.<sup>126</sup> Second, they have noted the competing public policies that favor the enforcement of an insurer’s agreement to provide coverage under its policies and the need to compensate the victims.<sup>127</sup>

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122. *Royal Oak*, 912 F.2d at 849.

123. *See, e.g., Independent Sch. Dist. No. 697*, 495 N.W.2d at 868; *see also Royal Oak*, 912 F.2d at 849.

124. *See, e.g., Ranger Ins. Co.*, 509 So. 2d at 948 (“The marketplace itself will discourage wrongful acts of discrimination.”); *Indep. Sch. Dist. No. 697*, 495 N.W.2d at 867 (quoting *Royal Oak*, 912 F.2d at 848).

125. *See, e.g., Royal Oak*, 912 F.2d at 849 (“Had the company wished to exclude coverage for intentional religious discrimination in employment, it could and should have said so.”); *Union Camp Corp. v. Continental Cas. Co.*, 452 F. Supp. 565, 568 (S.D. Ga. 1978) (“Continental and other insurers which have issued policies containing such clauses have not up to now conceived that they were violating public policy by writing insurance policies insuring against losses resulting from discriminatory employment practices.”); *Ranger Ins. Co.*, 509 So. 2d at 947 (citing *Union Camp*, 452 F. Supp. At 567–68); *University of Ill. V. Cont’l Cas. Co.*, 599 N.E.2d 1338, 1350–51 (Ill. App. Ct.) (“The insurer is an informed contracting party with no inferiority in bargaining position and should not be allowed to escape from the contract it freely entered into . . . This court will not rewrite . . . policy to create an exclusion.”), *appeal denied*, 606 N.E.2d 1235 (Ill. 1992); *Independent Sch. Dist. No. 697*, 495 N.W.2d at 868 (“The carrier is, of course, free to expressly provide an exclusion for such conduct in the future.”).

126. *See, e.g., Ranger Ins. Co.*, 509 So. 2d at 947 (“The proposition that insurance taken out by an employer to protect against liability under Title VII will encourage violations of the Act is . . . speculative and erroneous.”).

127. *See St. Paul Fire & Marine Ins. Co. v. Jacobson*, 826 F. Supp. 155, 164–65 (E.D. Va. 1993) (public policy does not forbid patients from being compensated by doctor’s professional liability policy for doctor’s intentional insemination of them with his own sperm), *aff’d*, 48 F.3d 778 (4th Cir. 1995); *St. Paul Fire & Marine Ins. Co. v. Shernow*, 610 A.2d 1281, 1285–86 (Conn. 1992) (public policy does not prohibit indemnity for compensatory damages flowing from dentist’s intentional sexual assault of patient); *St. Paul Fire & Marine Ins. Co. v. Asbury*, 720 P.2d 540, 542 (Ariz. Ct. App. 1986) (because

Third, they have emphasized that insurers can themselves exclude coverage for specific types of intentional wrongdoing when drafting the policies so insurers should not attempt to avoid their contractual obligations when claims are presented by appealing to vague public policy concerns with the expectation that the courts will do for the insurers what the insurers themselves failed to do when they drafted the policies.<sup>128</sup>

### C. SHOULD PUBLIC POLICY EVEN BE PART OF THE ANALYSIS?

When analyzing courts' efforts to determine the prevailing "public policy" in the context of whether insurance should be allowed to cover intentional injuries or damage, one question comes to mind: what is the basis for courts' authority to be the arbiter of public policy? The short answer is the Restatement (Second) of Contracts. Under the Restatement, a contract or term is unenforceable when public policy considerations clearly outweigh the interest of enforcement.<sup>129</sup> By not explicitly limiting how courts should discern the controlling public policy, the Restatement arguably implicitly provides courts the authority to decide what is needed to protect public welfare without giving the courts a specific list of sources to consult in their efforts to discern public policy.<sup>130</sup>

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Arizona public policy favors compensating injured persons) victims of doctor's sexual abuse can be compensated through his professional liability policy); *Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1170–71 (Del. 1990) (refusing to void coverage for intentional wrongdoing under an automobile policy, despite the public policy exclusion because of the competing public policy behind the state motor vehicle financial responsibility law); *Vigilant Ins. Co. v. Kambly*, 319 N.W.2d 382, 385 (Mich. Ct. App. 1982) (allowing insurance recovery for a physician's sexual assault of his patient because "it is not the insured who will benefit, but the innocent victim who will be provided compensation for her injuries"); *Independent Sch. Dist. No.*, 495, N.W.2d at 868; *S.S. v. State Farm Fire & Cas. Co.*, 808 S.W.2d 668, 671 (Tex. Ct. App. 1991) (concluding that a homeowner's insurance policy provides coverage for the transmission of a sexually transmitted disease by relying on the analogous context of automobile insurance in which public policy favors the compensation of tort victims).

128. See, e.g., *Royal Oak*, 912 F.2d at 849 ("Had the company wished to exclude coverage for intentional religious discrimination in employment, it could and should have said so."); *Union Camp Corp.*, 452 F. Supp. at 568 ("Continental and other insurers which have issued policies containing such clauses have not up to now conceived that they were violating public policy by writing insurance policies insuring against losses resulting from discriminatory employment practices."); *Ranger Ins. Co.*, 509 So. 2d at 947; *Univ. of Ill. V. Cont'l Cas. Co.*, 599 N.E.2d 1338, 1350–51 (Ill. App. Ct.) ("The insurer is an informed contracting party with no inferiority in bargaining position and should not be allowed to escape from the contract it freely entered into . . . This court will not rewrite . . . policy to create an exclusion."), *appeal denied*, 606 N.E.2d 1235 (Ill. 1992); *Independent Sch. Dist. No. 697*, 495 N.W.2d at 868 ("The carrier is, of course, free to expressly provide an exclusion for such conduct in the future.").

129. See RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

130. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 129, § 179, cmt. a (the rule allowing for the deriving of public policy is "an open-ended one that does not purport to exhaust the categories of recognized public policies.").

The Restatement does, however, provide the courts with some guidance. Section 178 of the Restatement (Second) of Contracts provides that a contract term is unenforceable “if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”<sup>131</sup> In other words, courts should first look to legislation to determine whether the public’s duly elected legislature has spoken on the issue.

It is only when the legislature has not spoken that courts should attempt to discern the controlling public policy themselves, which is what opens the door for courts to go awry. Courts are not well equipped to discern public policy. Federal judges, for example, are appointed, not elected, so they do not even purport to be representatives of the people.<sup>132</sup> Nor is that their job. Judges are intended to apply the law, not create the law in accordance with their views of what the public wants. Nonetheless, because the Restatement does not give the courts any guidance aside from legislation, courts have turned to case law and their own perceptions of what would best serve the public welfare.<sup>133</sup>

An old English decision vividly describes the unbridled nature of courts’ attempts to engage in public policy analysis, as “a very unruly horse, and when once you get astride it you never know where it will carry you.”<sup>134</sup> In fact, not only are they unbridled and unruly, but courts’ public policy pronouncements can lead to very different conclusions over time.<sup>135</sup>

One problem with courts creating public policy and then refusing to enforce contracts such as insurance policies is that it frustrates the reasonable expectations of one of the parties—the policyholder. Indeed, if an insurance policy is not enforced after one side has performed (e.g., the policyholder paid a premium and acted in accordance with the reasonable expectation that he had insurance), then the other party (e.g., the insurer) has been unjustly enriched in violation of one of the key purposes contracts. For these reasons, Professor Corbin once described the supporters of cavalier decisions by courts not to enforce contracts based upon public policy grounds as follows: “The loudest and most confident

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131. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 129, at 178(1).

132. See U.S. Const. art. III, § 2.

133. See generally JOHN D. CALAMARI AND JOSEPH M. PERILLO, THE LAW OF CONTRACTS, 22–1 (3d ed. 1987) (noting that contracts can be set aside by vague notions of public policy); 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS, 1374 (1962) (noting that contracts can be declared unenforceable not just due to legislative decrees, but also based upon courts’ reference to public policy based upon the courts’ perception of “prevailing mores of the community (contra bonos mores)”).

134. Richardson v. Mellish, 130 Eng. Rep. 394, 303 (C.P. 1824).

135. See, e.g., E. ALLEN FARNSWORTH, CONTRACTS § 5.2 (1982) (“As the interests of society change, courts are called upon to recognize new policies, while established policies become obsolete or are comprehensively dealt with by legislation.”).

assertions as to what makes for the general welfare and happiness of mankind are made by the demagogue and the ignoramus.”<sup>136</sup>

#### D. HOW COURTS SHOULD BE ADDRESSING PUBLIC POLICY ISSUES

With this background in mind, how should courts determine whether public policy favors or disfavors enforcing insurance policies that provide coverage for intentional injuries or damages? The answer is multilayered and is different in the first party (e.g., life insurance and property insurance) versus third party (e.g., liability) insurance context.

One, in a democratic political system, because legislatures represent the public, not courts, legislatures should establish public policy just as California, for example, has done in establishing the parameters of when insurance can cover intentional injuries or damage.<sup>137</sup> In the absence of legislation relating to insurance coverage for intentional torts, courts should enforce the coverage obligations of the insurers in accordance with the terms of the policy and the rules of insurance policy interpretation such as *contra proferentum* and the “reasonable expectations” doctrine.

Two, if courts nonetheless feel compelled to create public policy where the relevant legislature has not spoken, then the answer depends upon whether first party or third party insurance is at issue. In the first party context, the policyholder should not be able to recover if the act creating the damages is criminal (e.g., the policyholder murders someone in order to recover life insurance) or fraudulent (e.g., the policyholder purchases insurance with the intent of destroying the property in order to recover insurance proceeds) because the policyholder, for his own personal financial gain, has engaged in criminal or fraudulent misconduct.

In the liability context, the analysis is different because it cannot credibly be argued that an insurance recovery is the incentive to engage in the misconduct. Consequently, whether the misconduct is criminal or intentional is not important to the insurance analysis because the policyholder is acting for some reason other than to recover insurance proceeds for its own financial gain. Consequently, public policies such as compensating victims and enforcing contracts outweigh the notion that it would be unseemly to allow insurance recoveries for such conduct. Thus,

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136. Corbin, *supra* note 133, at 1375.

137. See Cal. Civ. Code § 533 (West 1985). See also *Russ-Field Corp. v. Underwriters at Lloyd's*, 330 P.2d 432, 439–40 (Cal. App. 1958) (“A ‘willful act’ as used in this statute connotes something more blameworthy than the sort of misconduct involved in ordinary negligence, and something more than the mere intentional doing of an act constituting such negligence”); accord Cal. Civ. Code § 1668 (West 1985) (declaring that contracts that seek to exempt one of the parties from responsibility for willful injury are against public policy).

if courts feel compelled to weigh competing public policies, the balance in favor of allowing insurance for intentional injuries or damages in the liability context far outweighs the unidentified and untenable public policy arguments against it.

## VI. CONCLUSION

It is a myth that insurance is not available for injuries or damages intentionally caused. Although it is true some claims may be barred by the fortuity doctrine or the “expected or intended” exclusion, there are numerous examples of intentional torts that are expressly covered by insurance such as defamation, disparagement, trademark infringement, copyright infringement, employment discrimination, wrongful termination, and invasion of privacy. Insurance is also available for punitive damages in many jurisdictions regardless of whether the policyholder is directly or indirectly liable for such damages. Insurers should not be permitted to agree to insure such claims, collect a premium for such coverage, and then, when claims arise, attempt to rely upon the “expected or intended” exclusion or ask courts to deny coverage due to public policy concerns.

Courts should defer to the applicable legislatures to determine whether public policy should permit insurance to cover intentional losses. If courts nonetheless decide to engage in a public policy analysis, then the balance of the competing public policies weighs in favor of allowing insurance to cover intentional injuries or damage in the liability context. On the one hand, little, if any, empirical evidence has been offered to support a public policy argument that the availability of insurance to cover intentional injuries or damage actually encourages the bad behavior that results in the injuries or damage. On the other hand, by allowing insurance recoveries for intentional injuries or damage in accordance with the terms of insurance policies, the public policy interests of compensating injured victims and enforcing the terms of contracts can be fulfilled.

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