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Insuring Intentional Torts

Christopher French

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CHRISTOPHER C. FRENCH*

Conventional insurance law lore provides intentional torts are not, and should not be, covered by insurance. There are four primary justifications for this: (1) injuries or losses must be fortuitous (i.e., accidental) to be covered by insurance, (2) most insurance policies contain express intentionality exclusions that preclude coverage for injuries or losses expected or intended by the insured, (3) wrongdoers should not be permitted to benefit from their own intentional misconduct by allowing insurance to cover their liabilities for such misconduct, and (4) it is against public policy to allow insurance to cover injuries or losses caused intentionally because allowing such coverage would undermine society's interest in deterring and punishing intentional misconduct. On the other hand, there are other competing public policies that weigh in favor of allowing insurance to cover intentional torts: (1) the enforcement of contracts, and (2) the compensation of innocent victims.

This Article analyzes the competing public policies and arguments in favor of and against allowing insurance to cover intentional torts. In doing so, it discusses numerous lines of liability insurance that expressly cover various types of intentional torts. It then explores whether the theoretical foundation underlying the public policy against allowing liability insurance to cover intentional torts—that intentional misconduct is effectively deterred and punished by disallowing coverage—is supported by empirical evidence. Ultimately, the Article concludes that the compensation of innocent tort victims and the enforcement of contracts outweigh the limited deterrent impact of disallowing coverage. Consequently, the Article makes the novel proposal that, contrary to the conventional wisdom, the default rule should be that liability insurance can cover intentional torts unless there are compelling reasons why the specific type of intentional tort at issue should be deemed uninsurable. The Article further proposes that, contrary to the current law, insurers be granted subrogation rights against their insureds under certain lines of liability insurance for injuries intentionally and directly caused by their insureds.

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*Christopher C. French was the Director of Trial Advocacy Program and Professor of Practice at Penn State Law; J.D., Harvard Law School; B.A., Columbia University. The author gratefully acknowledges the legal research contributions of Garvey McKee to this Article. The author also thanks Tom Baker, Jay Feinman, Bob Jerry, Ben Johnson, Erik Knutsen, Dara Purvis, Steve Ross, Jake Schuman, Jeff Stempel, and Dan Walters for providing helpful comments on earlier drafts of the Article.

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I. INTRODUCTION

Imagine a woman's horror to learn that her landlord secretly installed a hidden camera in her bathroom and has been taping her while she showers. The invasion of the tenant's privacy is both intentional and outrageous. The aggrieved tenant sues her landlord for the intentional tort of invasion of privacy

and is awarded $200,000. Assuming the landlord has liability insurance, will the insurance cover the damages award? Should the landlord's liability insurance even be allowed to cover such an award? Does it, and should it, matter that the tenant will not be able to collect the judgment if the landlord's liability insurance is not allowed to cover the award?

The conventional wisdom is that liability insurance does not cover intentional torts, such as invasion of privacy, or other injuries intentionally caused by an insured.[1] This conventional wisdom is so imbedded in insurance law lore that it is basically considered a self-evident part of insurance law doctrine.[2] The justifications for this well-established "doctrine" are that: (1) insurance only covers fortuitous or accidental losses because the purpose of insurance is to transfer the *risk* of losses from an insured to an insurer, not to transfer liability for certain or intentional losses; (2) insurance policies contain intentionality exclusions that preclude coverage for losses that are expected or intended by the insured; (3) wrongdoers should not be permitted to benefit from their own intentional misconduct by allowing insurance to cover their liabilities for such misconduct; and (4) allowing insurance to cover intentionally caused injuries would undermine the public policy of deterring and punishing intentional misconduct.[3]

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[1] *See, e.g.*, 1 BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 8.02[a], at 581–82 (Elisa Alcabes & Karen Cestari eds., 20th ed. 2020) ("[T]here is an implicit requirement read into every liability insurance policy that coverage will be provided only for fortuitous losses . . . . The overwhelming majority of courts, including the Supreme Court of the United States, have adopted the fortuity doctrine and have limited insurance coverage, regardless of the language of a particular policy, to fortuitous or accidental events.").

[2] *See, e.g.*, Kenneth S. Abraham, *Peril and Fortuity in Property and Liability Insurance*, 36 TORT & INS. L.J. 777, 792 (2001) ("There can be little doubt that it is against current public policy to insure against liability for intentionally caused loss."); Alan I. Widiss, *Liability Insurance Coverage for Punitive Damages? Discerning Answers to the Conundrum Created by Disputes Involving Conflicting Public Policies, Pragmatic Considerations and Political Actions*, 39 VILL. L. REV. 455, 461 (1994) ("[I]n most circumstances it is contrary to public policy for a liability insurance contract to provide coverage when losses are not fortuitous.").

[3] *See, e.g.*, KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION: CASES AND MATERIALS 3 (7th ed. 2020) ("[T]he function of insurance is to . . . transfer[] risk from a generally risk-averse policyholder to an insurer."); ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 16, 459 (6th ed. 2018) ("A contract of insurance is an agreement in which one party (the insurer), in exchange for a consideration (usually called a 'premium') provided by the other party (the policyholder), assumes the other party's risk . . . . [D]amages are designed to deter parties from engaging in certain kinds of conduct, but this purpose will not be achieved if a party can insure against the consequences of that conduct and someone other than the tortfeasor pays the judgment."); Prudential Ins. Co. of Am. v. Athmer, 178 F.3d 473, 475 (7th Cir. 1999) ("[N]o person shall be permitted to benefit from the consequences of his or her wrongdoing."); U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983) ("The

This Article challenges, and rejects, that conventional wisdom by expanding upon and updating prior scholarship that has argued some types of injuries intentionally caused by an insured are, and should be, insurable.[4] In doing so, this Article analyzes and weighs the competing public policies when considering whether insurance should be permitted to cover injuries intentionally caused. It also contains a detailed discussion of the numerous types of injuries intentionally caused that currently are covered under many lines of insurance and explains why they are, and should be allowed to be, covered. The Article ultimately concludes that the conventional wisdom, and the theoretical justifications for it, are not supported by empirical evidence or intuition. The Article then argues that there are other, more important public policies that tip the scales in favor of allowing intentional torts to be covered by insurance. The Article then makes the novel proposal that the default rule should be that liabilities for intentional torts are insurable unless there are compelling reasons why the specific type of intentional tort at issue should be deemed uninsurable. The Article concludes by also proposing that, contrary to existing law, insurers be granted subrogation rights under certain lines of insurance for intentional tort liabilities for which their insureds are directly, as opposed to indirectly, responsible.

Although the desire to deter and punish entities that intentionally cause injuries is a strong, legitimate public policy that historically has weighed heavily against allowing insurance to cover intentionally caused injuries, there are other important public policies that weigh in favor of allowing insurance to cover such injuries.[5] Specifically, strong public policies support the enforcement of contracts and the compensation of innocent third-party tort victims.[6]

Freedom of contract and the enforcement of contracts are some of the foundational blocks upon which America's legal system is based.[7] People

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Florida policy . . . to punish and deter those guilty of aggravated misconduct would be frustrated if such damages were covered by liability insurance.").

[4] *See, e.g.*, Christopher C. French, *Debunking the Myth that Insurance Coverage Is Not Available or Allowed for Intentional Torts or Damages*, 8 HASTINGS BUS. L.J. 65, 73 (2012) [hereinafter French, *Debunking the Myth*]; *see also* RESTATEMENT OF THE L. OF LIAB. INS. § 45 reps.' notes g, h (AM. L. INST. 2019) (citing French, *Debunking the Myth*, *supra*); Julie Dahlstrom, *Trafficking to the Rescue?*, 54 U.C. DAVIS L. REV. 1, 68 (2020) (citing French, *Debunking the Myth*, *supra*); Merle H. Weiner, *Civil Recourse Insurance: Increasing Access to the Tort System for Survivors of Domestic and Sexual Violence*, 62 ARIZ. L. REV. 957, 1011 (2020) (citing French, *Debunking the Myth*, *supra*); J. Shahar Dillbary, *Causation Actually*, 51 GA. L. REV. 1, 67 (2016) (citing French, *Debunking the Myth*, *supra*); Peter Kochenburger, *Liability Insurance and Gun Violence*, 46 CONN. L. REV. 1265, 1292 (2014) (citing French, *Debunking the Myth*, *supra*).

[5] French, *Debunking the Myth*, *supra* note 4, at 93–101.

[6] *Id.* at 94–95.

[7] *See, e.g.*, JEFF FERRIELL, UNDERSTANDING CONTRACTS 1 (2d ed. 2009) ("Our freedom of contract, both the freedom to enter into legally binding agreements that advance our own purposes, and the freedom to avoid obligations unless we express our consent, is . . . a key aspect of a free society[;] it has also been the great engine of commerce in the

generally should be free to contractually agree to whatever they want if they are doing so voluntarily, and courts generally should enforce the contracts people enter when called upon to do so, unless another compelling public policy dictates otherwise.[8] People enter contracts to provide predictability regarding their rights and obligations, to memorialize those rights and obligations, and to ensure they will have a remedy if the other side fails to perform.[9] Insurance policies are contracts, and as such, insurers generally should be free to agree to cover whatever types of losses they want, with courts enforcing the terms of the insurance contracts when called upon to do so.[10] Consequently, if insureds have paid premiums for policies that expressly cover liabilities for injuries they

world."); P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 403 (1979) ("The agreement must be made 'freely' and without 'pressure' . . . ."); Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1247 (1998) ("Contract law proceeds from the premise that obligation is established by the existence of voluntary and informed choice to enter into a contract."); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 479 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960 (1986)) (claiming "classical theorists considered three principles to be central to a free contract system," one of which was the principle that a party may freely enter contracts).

[8] An example of a compelling public policy that prevents the enforcement of an otherwise valid contract is a contract for murder in exchange for the payment of money. *See, e.g.*, CHRISTINA L. KUNZ, CAROL L. CHOMSKY, JENNIFER S. MARTIN & ELIZABETH R. SCHILTZ, CONTRACTS: A CONTEMPORARY APPROACH 472 (3d ed. 2018) ("[T]he legislative purpose in forbidding the act of murder will be furthered by also denying enforceability to a contract to arrange for that act."). Public policy dictates that murder is such a heinous crime that contracts related to murdering someone are simply unenforceable. *Id.*

[9] *See, e.g.*, MICHAEL HUNTER SCHWARTZ & DENISE RIEBE, CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK 5 (2009) ("[P]redictability promotes our free market economy by providing certainty for those involved in exchanging goods and services. If a merchant knows the legal consequences of her negotiating efforts or of the language she selects for her contracts, she can act accordingly. This predictability encourages people to enter into contracts, secure in the knowledge that those contracts will be enforced."); KUNZ, CHOMSKY, MARTIN & SCHILTZ, *supra* note 8, at 1–2 (noting a contract is a "a promise or set of promises for which the law gives a remedy" (quoting RESTATEMENT (SECOND) OF CONTS. § 1 (AM. L. INST. 2013))); Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, 751 (2000) ("Long-term contracts raise a straightforward, but seemingly intractable problem: in the long term events are so hard to predict, that parties will not be able to allocate future obligations and payments in a way that maximizes the value of their contract.").

[10] Union Camp Corp. v. Cont'l Cas. Co., 452 F. Supp. 565, 568 (S.D. 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."); Sch. Dist. for Royal Oak v. Cont'l Cas. Co., 912 F.2d 844, 849 (6th Cir. 1990) ("Public policy normally favors enforcement of insurance contracts according to their terms."), *overruled on other grounds by* Salve Regina Coll. v. Russell, 499 U.S. 225 (1991); Indep. Sch. Dist. No. 697 v. St. Paul Fire & Marine Ins. Co., 495 N.W.2d 863, 868 (Minn. Ct. App. 1993) ("[P]ublic policies . . . favor freedom of contract and the enforcement of insurance contracts according to their terms."), *aff'd*, 515 N.W.2d 576 (Minn. 1994).

intentionally cause, then courts should enforce the terms of these insurance contracts instead of voiding, at the insurers' request, the very contracts the insurers themselves drafted, unless there is a compelling reason not to do so.

Similarly, compensating tort victims who have been wronged is a foundational block of the U.S. tort system.[11] People who are injured by another person's legally improper behavior should be compensated for their injuries. Because most people do not have adequate assets to cover the damages and injuries they cause, however, most tort victims are not compensated in the absence of insurance.[12] Consequently, the availability of insurance proceeds allows the U.S. tort system to function as intended.[13] Without insurance proceeds, many, if not most, tort claims would not even be worth pursuing because winning tort cases without recovering the money damages awarded is little more than a Pyrrhic Victory that few attorneys or claimants would be willing to pursue.[14]

Indeed, ensuring that tort victims will be compensated is the reason Auto Insurance, for example, is mandatory in every state.[15] Auto Insurance is not mandatory because legislatures are concerned about protecting the assets of the drivers who cause crashes. It is mandatory because public policy dictates that

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[11] *See, e.g.*, MEREDITH J. DUNCAN, RONALD TURNER & RORY D. BAHADUR, TORTS: A CONTEMPORARY APPROACH 6 (3d ed. 2018) ("When an innocent person is injured through no fault of her own, providing a system by which she can be compensated for her injuries is something our society values."); DAN D. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS 4 (2d ed. 2016) ("Tort law is primarily intended to redress legally recognized harms by rendering a money judgment against the wrongdoer, or 'tortfeasor.' This award . . . is usually intended as a kind of compensation for the harm suffered.").

[12] Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006) (explaining that a lack of liability insurance makes tort judgments generally uncollectible); Kyle D. Logue, *Solving the Judgment-Proof Problem*, 72 TEX. L. REV. 1375, 1375–76 (1994) (analyzing the role insurance plays in solving the judgment-proof problem); S. Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45, 47–52 (1986) (discussing the problems created by judgment-proof individuals).

[13] *See, e.g.*, Rick Swedloff, *Uncompensated Torts*, 28 GA. ST. U. L. REV. 721, 737 (2012) ("Liability insurance is typically the easiest and most available asset to satisfy a judgment.").

[14] Gilles, *supra* note 12, at 606. *See generally* Plutarch, *Life of Pyrrhus*, *in* 9 PLUTARCH'S LIVES 345, 395–401, 413–17 (Bernadotte Perrin trans., 1920). The phrase is named after King Pyrrhus of Epirus, whose army suffered irreplaceable casualties in defeating the Romans at Heraclea in 280 BC and Asculum in 279 BC during the Pyrrhic War. *See id.*

[15] *See, e.g.*, EMMETT J. VAUGHAN & THERESE VAUGHAN, FUNDAMENTALS OF RISK AND INSURANCE 539–41 (8th ed. 1999) (conducting a fifty-state survey of the compulsory Automobile Insurance laws); JERRY & RICHMOND, *supra* note 3, at 813 (stating that the obvious purpose of mandatory Auto Insurance is to provide victims of automobile accidents with access to funds to cover their losses); Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, 1497–98 (2010) (noting that every state effectively requires Auto Insurance).

the victims of car crashes should have an available source of funds from which to be compensated.[16]

Against this background of the public policies that favor enforcing contracts and compensating victims, insurers draft and sell liability insurance that specifically covers claims for many types of injuries intentionally caused by their insureds.[17] For example, Directors and Officers ("D&O") Insurance covers shareholder fraud claims,[18] Employment Practices Liability Insurance covers racial and sexual discrimination claims,[19] and Sexual Misconduct Insurance covers sexual assault and abuse claims.[20] The Personal and Advertising Liability coverage provided in Commercial General Liability ("CGL") Insurance and Personal Liability Insurance covers numerous intentional torts, including false imprisonment and invasion of privacy.[21] Punitive damages, which are awarded for egregious misconduct, are covered by CGL and other types of liability insurance.[22] Auto Insurance covers the injuries and damages caused by intentional crashes, as well as by criminally drunk drivers.[23] CGL and Homeowners Insurance cover injuries intentionally caused when acting in self-defense.[24]

Many courts are willing to enforce insurance contracts that provide coverage for these intentionally caused injuries despite the public policy, and conventional insurance law lore, against allowing insurance to cover such injuries.[25] Although the reasoning varies somewhat depending upon the line of insurance, courts typically enforce the insurance contracts at issue for one or more of these reasons: (1) the public policy that favors freedom of contract, (2) the public policy that favors the compensation of innocent tort victims, (3) the fact that the insured's tort liability was imposed vicariously so the insured was not considered a willful bad actor, and/or (4) the lack of empirical evidence to support the theory that disallowing insurance for intentionally caused injuries effectively deters and punishes intentional misconduct.[26]

In analyzing whether liability insurance should be allowed to cover claims for intentional torts, this Article proceeds in seven additional parts. Part II discusses the origins and purpose of the fortuity doctrine that underlies the conventional wisdom that intentional torts are uninsurable. Part III discusses the public policy against allowing insurance to cover claims for injuries intentionally caused. Part IV discusses the competing public policies that favor

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[16] Stempel, *supra* note 15, at 1498 n.18.
[17] *See infra* Part V.
[18] *See infra* Part V.A.
[19] *See infra* Part V.B.
[20] *See infra* Part V.C.
[21] *See infra* Part V.D.
[22] *See infra* Part V.E.
[23] *See infra* Part V.F.
[24] *See infra* Part V.G.
[25] *See infra* Part V.
[26] *See infra* Part V.

enforcing contracts and compensating victims. Part V discusses the various lines of insurance that currently cover claims for injuries intentionally caused, as well as the caselaw regarding such insurance. Part VI explores whether disallowing liability insurance for injuries intentionally caused is an effective punishment and deterrent for the misconduct giving rise to the injuries, as insurance law theory postulates. Part VI argues the conventional wisdom and public policy against allowing liability insurance to cover intentional torts are not well-founded. There are better ways to deter and punish intentional misconduct than by requiring insureds to forfeit liability coverage for the injuries they intentionally cause. Part VII then proposes that the default rule should be that intentional tort liabilities are insurable unless there are compelling reasons why the liabilities for the specific tort at issue should be deemed uninsurable.[27] The Article concludes by also proposing that the competing public policies for and against insuring intentional torts be reconciled by granting insurers subrogation rights against their insureds under certain lines of insurance for injuries their insureds intentionally and directly cause. Allowing subrogation rights by insurers against their insureds for intentional torts directly caused by their insureds would allow innocent victims to be compensated while also permitting insurers to seek to impose financial responsibility on the bad actors who are directly responsible for the victims' injuries. Part VIII concludes.

II. THE FORTUITY DOCTRINE

A. *The Origins and Purpose of the Fortuity Doctrine*

The fortuity doctrine posits that only fortuitous losses are insurable.[28] That means a loss cannot already have occurred, or be certain to occur, at the time insurance is purchased in order to be insurable.[29] It also means a policyholder

[27] It is important to note that this Article and its proposals address intentionally caused third-party injuries (injuries to other people or their property caused by an insured), as opposed to first-party injuries (losses the insured party itself suffers due to intentionally damaging its own property or intentionally causing the death of a person whose life it has insured). As discussed in Part VI, there are good reasons why intentionally caused first-party losses generally are not, and should not be, covered by insurance—namely, because allowing such insurance would create a financial incentive in certain circumstances to destroy insured property or kill people on whom life insurance has been obtained. *See infra* notes 161–66 and accompanying text.

[28] *See, e.g.*, Stephen A. Cozen & Richard C. Bennett, *Fortuity: The Unnamed Exclusion*, 20 FORUM 222, 222, 228 (1985) ("[A]n insurance carrier simply does not undertake to reimburse its insured for loss that is certain or expected to occur. The doctrine was first described at length by British and American courts shortly after World War I . . . . The fortuity doctrine had its genesis in maritime law . . . .").

[29] *See, e.g.*, 1 JEFFREY W. STEMPEL & ERIK S. KNUTSEN, STEMPEL AND KNUTSEN ON INSURANCE COVERAGE § 1.06[A][1] (4th ed. 2022) ("Fortuity for insurance purposes is evaluated not only by the means by which the loss takes place but also according to whether

cannot intentionally create a loss and then expect its insurer to cover the loss.[30] The fortuity doctrine was created because one of the underlying concepts of insurance is that one party transfers the risk of loss to another party in exchange for the payment of a premium.[31] If the loss already has occurred or is intentionally caused by the insured, then a risk of loss is not being transferred.[32] Instead, financial responsibility for a certain loss is being transferred, which is not the intended function of insurance.[33]

One court has described the fortuity doctrine as follows: "The word 'fortuitous' means 'occurring . . . without evident causal need or relation or without deliberate intention.' A fortuitous event may be said to be one not certain to occur."[34] Other courts have described fortuitous losses as losses caused "by some unexpected acts";[35] "an event dependent on chance";[36] "happening by accident or chance; unplanned";[37] or "a casualty."[38] The *Restatement (First) of Contracts* defines a fortuitous loss as one caused by "an event which so far as the parties to the contract are aware, is dependent on chance."[39]

In short, the fortuity doctrine encompasses both "known losses" and losses the policyholder intentionally causes. With respect to known losses, the classic example is a house that already is on fire—the homeowners cannot buy insurance for the house once it has caught fire or burned to the ground.[40] With respect to intentional losses, they are not covered because they are not accidental.[41] In the example of a house burning, that means a homeowner cannot

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insurance is in place (or at least sought) prior to the loss. For example, where a home is already burning . . . , it is generally considered too late to purchase insurance . . . .").

[30] *Id.* § 1.06[A][3] (noting "the loss must be accidental"); Widiss, *supra* note 2, at 461 ("[I]n most circumstances it is contrary to public policy for a liability insurance contract to provide coverage when losses are not fortuitous.").

[31] *See supra* note 3 and accompanying text.

[32] *See* Widiss, *supra* note 2, at 460 n.14.

[33] *Id.*

[34] Avis v. Hartford Fire Ins. Co., 195 S.E.2d 545, 548 (N.C. 1973) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 895 (1961)).

[35] Klockner Stadler Hurter Ltd. v. Ins. Co. of the State of Pa., 780 F. Supp. 148, 157 (S.D.N.Y. 1991) (quoting London Provincial Letter Processes, Ltd. v. Hudson, 21 K.B. 724, 730 (1939)).

[36] Formosa Plastics Corp. v. Sturge, 684 F. Supp. 359, 367 (S.D.N.Y. 1987), *aff'd*, 848 F.2d 390 (2d Cir. 1988); *see also* Intermetal Mexicana v. Ins. Co. of N. Am., 866 F.2d 71, 77 (3d Cir. 1989); Standard Structural Steel Co. v. Bethlehem Steel Corp., 597 F. Supp. 164, 193 (D. Conn. 1984) (quoting Compangnie des Bauxites de Guinee v. Ins. Co. of N. Am., 566 F. Supp. 258, 260–61 (W.D. Pa. 1983)).

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

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

[39] RESTATEMENT (FIRST) OF CONTS. § 291 cmt. a (AM. L. INST. 1932).

[40] *See supra* note 29.

[41] *See supra* note 30 and accompanying text.

buy insurance, intentionally burn the house down, and then ask the insurer to cover the loss.

Although the fortuity doctrine can trace its roots in the common law to first-party marine insurance, the first type of insurance sold in the modern world,[42] the doctrine also now manifests in intentionality exclusions contained in the express provisions of insurance policies and some states have even codified the doctrine.[43] For example, the intentionality exclusion contained in Insurance Services Office's ("ISO") 2012 CGL policy form is commonly referred to as the "expected or intended" exclusion, and it provides, "This insurance does not apply to: . . . 'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured."[44]

What exactly must be "expected or intended," and by whom, before coverage is forfeited under this exclusion? As discussed in the next Part, the short answer is that the insured must subjectively expect or intend to cause the injury.[45]

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[42] *See* Cozen & Bennett, *supra* note 28, at 228.

[43] The California Insurance Code, for example, provides, "[a]n 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." CAL. INS. CODE § 533 (West 2022); Russ-Field Corp. v. Underwriters at Lloyd's, 330 P.2d 432, 439–40 (Cal. Ct. 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."). Montana and North Dakota have identical statutes that preclude coverage for intentionally caused injuries. *See* MONT. CODE ANN. § 28-2-702 (2021); N.D. CENT. CODE ANN. § 9-08-02 (2021) ("All contracts which have for their object, directly or indirectly, the exempting of anyone from responsibility for that person's own fraud or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."). Massachusetts similarly precludes insurance from covering "any person against legal liability for causing injury, other than bodily injury, by his deliberate or intentional crime or wrongdoing." MASS. GEN. LAWS ANN. ch. 175, § 47 (West 2022).

[44] INS. SERVS. OFF., INC., COMMERCIAL GENERAL LIABILITY COVERAGE FORM (CG 00 01 04 13) § I.A.2.a (2012), *reprinted in* CHRISTOPHER C. FRENCH, INSURANCE LAW AND PRACTICE: CASES, MATERIALS, AND EXERCISES 206, 207 (2d ed. 2020).

[45] *Compare* 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) (concluding the expected or intended determination is made "from the standpoint of the insured"), 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."), 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."), *and* Farmers & Mechs. Mut. Ins. Co. v. Cook, 557 S.E.2d 801, 807 (W. Va. 2001) ("[C]ourts must use a subjective rather than objective standard for determining the policyholder's intent."), *with* Argonaut Sw. Ins. Co. v. Maupin, 500 S.W.2d 633, 635 (Tex. 1973) ("Where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen and unintended." (quoting Thomason v. U.S. Fid. &

B. *The Injury, Not the Action, Must Be Subjectively Expected or Intended by the Insured*

Although a minority of jurisdictions only require that the action leading to the injury be intentional for a forfeiture of coverage to occur, the vast majority of jurisdictions require that the insured must intend to cause an injury, not merely intend to do the act that causes the injury.[46] The reason for this is because many actions that lead to accidents are intentional.[47] That does not mean, however, that the actor intended to cause the accident or the resulting injuries and damage. For example, when a driver causes a car accident because the driver is distracted by texting, both the acts of driving and texting are intentional. The ensuing crash and resulting injuries and damage, however, are not intended by the driver even though they may be the foreseeable consequences of the negligent behavior.

Although some jurisdictions require only that a reasonable person would have expected an injury to result from the conduct in order for a forfeiture of coverage to occur, most courts apply intentionality exclusions only when the insured subjectively expects or intends to cause the injury.[48] Courts' holdings

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Guar. Co., 248 F.2d 417, 419 (5th Cir. 1957))). *See also* 1 OSTRAGER & NEWMAN, *supra* note 1, § 8.03[c].

[46] *See, e.g.*, *Quincy Mut. Fire Ins. Co.*, 469 N.E.2d at 800; *see also* RESTATEMENT OF THE L. OF LIAB. INS. § 32 cmt. d (AM. L. INST. 2019) (adopting a standard requiring that the insured intends the injury or "foresees that harm is practically certain to occur as the result of the insured's intentional act"); Abraham, *supra* note 2, at 781 ("[T]he dominant rule is that the test for whether a policyholder expected or intended harm is subjective. The question is not what the reasonable policyholder would have expected, but what the policyholder in question actually expected.").

[47] White v. Smith, 440 S.W.2d 497, 507–08 (Mo. Ct. App. 1969).

[48] *See, e.g.*, RESTATEMENT OF THE L. OF LIAB. INS. § 32 cmt. d (AM. L. INST. 2019) (adopting the subjective intent standard because it is "the majority rule"); Allstate Ins. Co. v. Sparks, 493 A.2d 1110, 1112 (Md. Ct. Spec. App. 1985) (holding the insured must intend both an act causing damage and the results of that act for intentionality exclusion to apply); Vt. Mut. Ins. Co. v. Singleton, 446 S.E.2d 417, 420–21 (S.C. 1994) (holding intentional injury exclusion did not bar coverage where insured had not intended the injury resulting from his voluntary act); White v. Smith, 440 S.W.2d 497, 508–09 (Mo. Ct. App. 1969) (finding "damages not intentionally inflicted but resulting from an insured's negligence . . . may be 'caused by accident'" even if foreseeable (citations omitted)); Cont'l Cas. Co. v. Rapid-Am. Corp., 609 N.E.2d 506, 510 (N.Y. 1993) (noting the "[r]esulting damage can be unintended even though the act leading to the damage was intentional"). A minority of courts, however, apply intentionality exclusions if the insured expected or intended to cause some injury, even if the injury expected or intended was a different type or less severe than the injury actually caused. *See, e.g.*, 1 OSTRAGER & NEWMAN, *supra* note 1, § 8.03[c] (discussing cases applying an objective standard, but then stating, "[t]here is substantial authority holding that expectation and intendment are to be judged by a subjective standard"); Farmers Mut. Ins. Co. v. Kment, 658 N.W.2d 662, 668 (Neb. 2003) ("[An] 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.");

in this regard are consistent with the actual language used in intentionality exclusions, which only apply if the "'bodily injury' or 'property damage' [was] expected or intended *from the standpoint of the insured*."[49] Applying an objective standard would override the express policy language and would effectively eliminate coverage not only for injuries intentionally caused, but also for most negligently caused injuries as well: a reasonable person can foresee that an accident might result from the conduct, which is the very reason the conduct is considered negligent.[50] Excluding coverage for negligence would defeat the very purpose of many types of liability insurance, which are intended to cover both unavoidable losses and losses a policyholder negligently causes.[51]

Ga. Farm Bureau Mut. Ins. Co. v. Purvis, 444 S.E.2d 109, 109–10 (Ga. Ct. App. 1994) ("The general rule is that such exclusions are applicable if and only if the insured acts without the intent or expectation of causing *any injury*, however slight.").

[49] INS. SERVS. OFF., INC., *supra* note 44, § I.A.2.a (emphasis added); *see also* Larry Spector, *Insurance Coverage for Business Tort Claims Alleging Intentional Wrongdoing*, 51 TORT TRIAL & INS. PRAC. L.J. 91, 99 (2015) ("Most intentional act exclusions in CGL insurance policies focus on whether the insured intended to cause harm by his conduct, not whether the insured intended to do the act that results in the harm.").

[50] *See, e.g.*, City of Johnstown v. Bankers Standard Ins. Co., 877 F.2d 1146, 1150 (2d Cir. 1989) ("[T]o 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."); Messersmith v. Am. Fid. Co., 133 N.E. 432, 432 (N.Y. 1921) ("To restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow.").

[51] *See, e.g.*, United Servs. Auto Ass'n v. Elitzky, 517 A.2d 982, 991 (Pa. Super. Ct. 1986) ("[Injuries caused by negligence] are the very acts which insurance is purchased to protect against."), *appeal denied*, 528 A.2d 957 (Pa. 1987); Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724, 735 n.6 (Minn. 1997) (applying an "objective test" to determine whether injuries should have been expected by the insured would "undermine coverage for injuries caused by simple negligence, a result we sought to avoid in prior cases").

III. THE PUBLIC POLICY AGAINST ALLOWING INSURANCE TO COVER INTENTIONAL TORTS

In general, it is against public policy to allow insurance to indemnify a person for injuries willfully caused.[52] The reason is quite simple. The law seeks to discourage misconduct that is intended to result in injuries.[53]

Although allowing insurance for negligence theoretically increases the chances that people will take less care in their actions, it has long been accepted that the availability of liability insurance does not actually encourage negligent or reckless behavior to such an extent that insurance for injuries caused negligently should be prohibited.[54] According to some courts and commentators, allowing insurance to cover injuries intentionally caused, however, would implicitly encourage misconduct because the bad actors would be financially insulated from the consequences of their actions if their insurance covered the injuries.[55] If society, and the law, want to discourage and punish intentional bad behavior by imposing criminal penalties and/or awarding punitive damages against bad actors, then allowing insurance to cover the

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[52] *See, e.g.*, CAL. CIV. CODE § 1668 (West 2022) (declaring that contracts that seek to exempt one of the parties from responsibility for willful injury are against public policy); Bohrer v. Church Mut. Ins. Co., 965 P.2d 1258, 1262 (Colo. 1998) ("Historically, courts have held that it is 'contrary to public policy to insure against liability arising directly against the insured from intentional or willful wrongs . . . .'" (quoting 7 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 101:22 (3d ed. 1997))); 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."); Perreault v. Maine Bonding & Cas. Co., 568 A.2d 1100, 1102 (Me. 1990) (concluding that denial of coverage for sexual abuse claim was "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" (quoting Altena v. United Fire & Cas. Co., 422 N.W.2d 485, 490 (Iowa 1998))); *see also* Abraham, *supra* note 2, at 792 ("There can be little doubt that it is against current public policy to insure against liability for intentionally caused loss.").

[53] *See, e.g.*, 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."); JERRY & RICHMOND, *supra* note 3, at 459 ("Punitive damages are designed to deter parties from engaging in certain kinds of conduct, but this purpose will not be achieved if a party can insure against the consequences of that conduct and someone other than the tortfeasor pays the judgment.").

[54] *See* Harrell v. Travelers Indem. Co., 567 P.2d 1013, 1017 (Or. 1977) ("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.").

[55] *See, e.g.*, JERRY & RICHMOND, *supra* note 3, at 459; *U.S. Concrete Pipe Co.*, 437 So. 2d at 1064.

penalties and damages awards would undermine those objectives.[56] As explained by the Supreme Court of Oregon:

> [P]unishment . . . is the real basis upon which coverage should be excluded. A person should suffer the financial consequences flowing from his intentional conduct and should not be reimbursed for his loss, even though he bargains for it in the form of a contract of insurance. A similar idea is expressed in the cases which exclude coverage on the ground that "a person should not profit from his own wrong."[57]

Of course, the punishment and deterrence justifications for the public policy against allowing insurance to cover injuries intentionally caused presume that tortfeasors who commit intentional injuries possess sufficient assets to pay judgments entered against them. They also presume that insureds review their policies to determine what actions are covered versus not covered before acting. As discussed in Parts V.E and VI, neither of those assumptions is well-founded.

IV. THE PUBLIC POLICIES IN FAVOR OF ALLOWING INSURANCE TO COVER INTENTIONAL TORTS

There are competing public policies that favor allowing liability insurance policies to cover intentionally caused injuries and that conflict with the public policy against allowing insurance to cover such injuries.[58] Two of them are discussed in this Part of the Article.

A. *The Public Policy in Favor of Enforcing Contracts*

One competing public policy is that contracts should be enforced unless there is a compelling reason not to do so.[59] The freedom to enter contracts, and the right to have courts enforce them, are highly valued in America.[60] Indeed,

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[56] JERRY & RICHMOND, *supra* note 3, at 459.

[57] Isenhart v. Gen. Cas. Co. of Am., 377 P.2d 26, 28 (Or. 1962) (citing New Amsterdam Cas. Co. v. Jones, 135 F.2d 191, 193–94 (6th Cir. 1943), and Taylor v. John Hancock Mut. Life Ins. Co., 142 N.E.2d 5, 7 (Ill. 1957)).

[58] *See supra* Part III.

[59] *See, e.g.*, Sch. Dist. for Royal Oak v. Cont'l Cas. Co., 912 F.2d 844, 849 (6th Cir. 1990) ("Public policy normally favors enforcement of insurance contracts according to their terms."), *overruled on other grounds by* Salve Regina Coll. v. Russell, 499 U.S. 225 (1991); Creech v. Aetna Cas. & Sur. Co., 516 So. 2d 1168, 1174 (La. Ct. App. 1987) ("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.").

[60] *See, e.g.*, Indep. Sch. Dist. No. 697 v. St. Paul Fire & Marine Ins. Co., 495 N.W.2d 863, 868 (Minn. Ct. App. 1993) (noting that American jurisprudence recognizes the important public policy that "favor[s] freedom of contract and the 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))), *aff'd*, 515 N.W.2d 576 (Minn.

two of the central reasons for entering contracts, and contract law itself, are to provide predictability to parties' rights and obligations and to provide a remedy in the event a party fails to perform its agreed-upon obligations.[61] Consequently, one strong public policy provides that courts should not lightly set aside contracts because doing so undermines the highly valued freedom to enter contracts.[62]

The high value America places on freedom of contract dictates that if insurers are willing to sell insurance policies that cover intentionally caused injuries, then courts should be very reluctant to override the parties' contractual choices unless there is a compelling competing public policy reason to do so (e.g., contracts related to the procurement of murder are unenforceable due to the reprehensible nature of murder) or the creation of the contract somehow was defective (e.g., the contract was procured by fraud, there was a lack of capacity to contract by one of the parties, etc.).[63]

B. *The Public Policy in Favor of Compensating Tort Victims*

Another competing public policy strongly favors the compensation of innocent tort victims for their injuries.[64] The largest beneficiaries of liability insurance are the tortfeasor's victims.[65] In the absence of insurance, most

1994); Union Camp Corp. v. Cont'l Cas. Co., 452 F. Supp. 565, 568 (S.D. Ga. 1978) ("Exercise of the freedom of contract is not lightly to be interfered with.").

[61] *See* KUNZ, CHOMSKY, MARTIN & SCHILTZ, *supra* note 8, at 1–2.

[62] *See* cases cited *supra* note 60.

[63] *See, e.g.*, KUNZ, CHOMSKY, MARTIN & SCHILTZ, *supra* note 8, at 355, 471–73 (discussing defenses to contract enforcement and public policy reasons for not enforcing contracts).

[64] *See, e.g.*, Yousuf v. Cohlmia, 718 F. Supp. 2d 1279, 1288 (N.D. Okla. 2010) (noting that compensating a wrongdoer's innocent victims may "outweigh[]" the concern that the wrongdoer would be benefitting by allowing insurance to cover the claim (quoting 7 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 101:24 (3d ed. 2012))), *aff'd*, 741 F.3d 31 (10th Cir. 2014); St. Paul Fire & Marine Ins. Co. v. Jacobson, 826 F. Supp. 155, 163–64 (E.D. Va. 1993) (noting that public policy in favor of compensating innocent victims outweighs public policy against permitting insurance for intentional injuries), *aff'd*, 48 F.3d 778 (4th Cir. 1995); Grinnell Mut. Reinsurance Co. v. Jungling, 654 N.W.2d 530, 539, 541 (Iowa 2002) (finding coverage for a fraud claim because "compensating [the policyholders'] innocent victims . . . decidedly outweigh[s] the concern that [the policyholders] will unjustly benefit from . . . coverage" (quoting St. Paul Fire & Marine Ins. Co. v. Jacobson, 826 F. Supp. 155, 164–65 (E.D. Va. 1993))); Vigilant Ins. Co. v. Kambly, 319 N.W.2d 382, 385 (Mich. Ct. App. 1982) ("[T]here is great public interest in protecting the interests of the injured party.").

[65] *See, e.g.*, Erik S. Knutsen, *Fortuity Victims and the Compensation Gap: Re-Envisioning Liability Insurance Coverage for Intentional and Criminal Conduct*, 21 CONN. INS. L.J. 209, 230 (2014) ("Liability insurance is the backbone of the tort system. Tort suits would not be brought if not for available liability insurance."); Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 275 (2001) ("That personal injury litigation revolves around liability insurance has become

victims of tortfeasors would recover little or nothing because most tortfeasors are judgment-proof.[66] Most people, including tortfeasors, do not have adequate assets to satisfy judgments entered against them.[67] So, if insurance is not permitted to cover injuries intentionally caused, then most intentional tort victims will not receive any compensation for their injuries. Consequently, it is cold comfort for intentional tort victims to be told that the tortfeasor's insurance is not permitted to cover their injuries because the public has a strong interest in punishing and deterring the types of conduct that caused their injuries, goals which would be undermined if the victims were compensated for their injuries through the tortfeasor's liability insurance.

It is also noteworthy that if the express terms of insurance policies cover tort victims' injuries, but the policies nonetheless were not permitted to compensate the victims, then the insurers would be the big winners while both the insureds and tort victims would be the big losers. The tort victims would be losers because they would be left uncompensated for their injuries. The tortfeasors also would be losers because: (1) they still may be punished for their misconduct through the criminal justice system regardless of whether their liability insurance compensates their victims,[68] and (2) they have paid a premium in exchange for illusory insurance coverage. The insurers, on the other hand, would be the big winners because they would be able to collect insurance premiums for liabilities that they contractually agreed to cover but would not actually be required to cover if and when such liabilities occur.[69]

V. INTENTIONAL INJURIES COVERED BY LIABILITY INSURANCE

There currently are many types of liability insurance that are intended to, and do, expressly cover injuries generally understood to be caused intentionally. Several of the major ones are discussed in this Part of the Article. Courts enforce coverage under these various lines of insurance for many of the same reasons

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almost a truism among tort teachers, scholars, and practitioners alike . . . . [P]ersonal injury lawyers rarely bring a case unless there is an insured defendant . . . .").

[66] *See supra* note 12 and accompanying text; *see also* Knutsen, *supra* note 65, at 241 ("Most policyholders are unable to personally satisfy a tort judgment from their finances, so the ability to mete out punishment by denying liability insurance coverage would frequently be impossible.").

[67] *See supra* note 12 and accompanying text.

[68] *See infra* notes 175–79 and accompanying text.

[69] A compromise solution in this scenario would be for insurers to be required to refund the premiums they collected to disgorge the insurers of the unearned premiums, but many courts likely would view both the insurers and the insureds as blameworthy and, thus, the courts would decline to order a refund of the premiums. *See, e.g.*, CHRISTOPHER C. FRENCH & JOHN F. DOBBYN, INSURANCE LAW IN A NUTSHELL 121 (6th ed. 2021) ("While it might be argued that in such a case the risk never attached since the policy was unenforceable from inception, and therefore the premiums should be refundable, courts will frequently take the position that the insurer and policyholder are *in pari delicto*, and decline relief in any respect.").

discussed in this Article: (1) the lack of empirical evidence to support the argument that disallowing liability insurance for injuries caused intentionally serves to deter and punish intentional misconduct;[70] (2) the general policy in favor of enforcing contracts in the absence of a compelling reason not to do so, particularly where the party seeking to void the coverage (the insurer) was the party that drafted the contract;[71] (3) the fact that the insured was being held liable vicariously, as opposed to due to the insured's own malfeasance, so the insured did not directly cause the injuries;[72] and (4) the public policy that favors the compensation of innocent tortfeasor victims.[73]

A. *Shareholder Fraud Covered by D&O Insurance*

Under federal securities laws—the Securities Act of 1933[74] and the Securities Exchange Act of 1934[75]—corporate managers are liable for losses caused by misrepresentations, such as the provision of false or misleading information, made in connection with the offering or sale of securities.[76] Approximately eighty percent of shareholder claims litigated in federal court are federal securities class actions.[77] Most shareholder class actions are based on alleged misrepresentations contained in financial statements.[78] In order to recover, the plaintiffs must show, among other things, that the corporate managers intentionally made a material misstatement upon which the plaintiffs relied, and that the plaintiffs' reliance on the misstatement caused a loss.[79] According to the Supreme Court, the mental state required to satisfy the intent requirement is an "intent to deceive, manipulate, or defraud."[80] Thus,

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[70] *See infra* notes 136–37, 167–79 and accompanying text.

[71] *See infra* notes 125, 139–41 and accompanying text.

[72] *See infra* notes 104, 135, 181–84 and accompanying text.

[73] *See infra* notes 145–49 and accompanying text.

[74] 15 U.S.C. §§ 77a–77aa.

[75] *Id.* §§ 78a–78qq.

[76] *Id.* §§ 77e, 78j; 17 C.F.R. § 240.10b-5 (2022).

[77] TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION 30–31 (2010).

[78] *Id.* at 31 (illustrating that in 2008, for example, seventy-five percent of securities class actions alleged violations of Rule 10b-5's prohibition of misrepresenting any material fact in connection with the buying or selling of any security).

[79] *See id.* at 32–33 (illustrating the scienter requirement of such cases).

[80] Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 319 (2007) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976)). Lower courts have concluded, however, that the scienter requirement generally can be satisfied by a showing of recklessness by the defendant, which means it was foreseeable that the statement could be misleading. *See, e.g.*, AUSA Life Ins. Co. v. Ernst & Young, 206 F.3d 202, 221 (2d Cir. 2000) (explaining that the scienter requirement can be satisfied based on "what . . . the defendant [could] reasonably foresee as a potential result of his action" as opposed to an actual intention to cause injury (quoting RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (AM. L. INST. 1965))); BAKER &

shareholder fraud claims, by definition, are based upon corporate managers' intentionally misleading statements.

D&O policies are intended to cover the corporate managers of a company and the company itself against claims that may be asserted against them regarding their conduct in running the business.[81] More specifically, D&O policies are marketed as covering securities fraud claims, the most common type of shareholder claims brought.[82] Consequently, almost all public corporations purchase D&O Insurance to cover their corporate managers.[83]

D&O Insurance is allowed, and considered desirable, under the theory that companies would not be able to attract talented people to run companies if corporate managers had to risk their own personal assets in order to do so.[84] Consequently, many states, including Delaware where the majority of the Fortune 500 companies are incorporated,[85] have passed statutes that expressly allow companies to indemnify corporate managers for many types of misconduct and to purchase D&O Insurance to cover both indemnifiable losses and losses the companies are not allowed to indemnify.[86]

GRIFFITH, *supra* note 77, at 33 (explaining that the key issues are what the reasonable investor would consider significant and foreseeable).

[81] BAKER & GRIFFITH, *supra* note 77, at 44; Spector, *supra* note 49, at 94–95 ("D&O policies are expressly designed to respond to claims alleging that the insureds engaged in intentional acts, including . . . misleading statement[s], acts, or omissions, collectively described as 'Wrongful Acts.'").

[82] *See* BAKER & GRIFFITH, *supra* note 77, at 45; Alstrin v. St. Paul Mercury Ins. Co., 179 F. Supp. 2d 376, 396 (D. Del. 2002) (stating D&O "polic[ies] explicitly cover[] securities fraud claims").

[83] *See, e.g.*, PETER J. KALIS, THOMAS M. REITER & JAMES R. SEGERDAHL, POLICYHOLDER'S GUIDE TO THE LAW OF INSURANCE COVERAGE § 11.01 (1997) ("[M]any [entities] now view directors and officers liability ('D&O') insurance coverage as a necessity."); Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors' & Officers' Liability Insurer*, 95 GEO. L.J. 1795, 1797 (2007) ("U.S. publicly traded corporations—virtually all of them—protect themselves against the costs associated with corporate and securities law liability by purchasing D&O insurance."); Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' & Officers' Liability Insurance Market*, 74 U. CHI. L. REV. 487, 487 (2007) ("Nearly all public corporations purchase D&O policies.").

[84] KALIS, REITER & SEGERDAHL, *supra* note 83, § 11.01.

[85] *About the Division of Corporations*, DEL. DIV. CORPS., https://corp.delaware.gov/aboutagency/#:~:text=More%20than%2066%25%20of%20the,formation%20statute%20in%20the%20nation [https://perma.cc/6F6P-LQ6J].

[86] *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2022) (allowing a corporation to eliminate or limit personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty, so long as it is not a breach of the director's duty of loyalty, was not done in bad faith, and did not involve intentional misconduct or a knowing violation of the law); BAKER & GRIFFITH, *supra* note 77, at 43–44 (discussing state statutes that allow corporations to purchase D&O Insurance to cover losses that the corporation cannot indemnify itself); *see also* KALIS, REITER & SEGERDAHL, *supra* note 83, § 11.01 (explaining further the purpose of D&O policies); John C. Kairis, *Disgorgement of*

To that end, D&O policies expressly cover shareholder claims premised upon an insured's alleged "wrongful acts," which commonly are defined in the policies as any "actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed or attempted."[87] D&O policies typically also expressly cover punitive damages imposed on insureds.[88] In short, despite the general public policy against allowing insurance to cover intentional misconduct, D&O policies expressly cover claims premised upon intentional misconduct, and many states have passed laws expressly allowing for such insurance.[89]

Further, although D&O policies also include exclusions for losses caused by deliberate criminal or fraudulent conduct,[90] many courts have declined to apply such exclusions because the exclusions would eviscerate the essence of the basic coverage being provided by the policies.[91] It is an insurance law maxim that insurance policies should not be interpreted in such a way that the

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Compensation Paid to Directors During the Time They Were Grossly Negligent: An Available but Seldom Used Remedy, 13 DEL. L. REV. 1, 4 (2011).

[87] TRAVELERS INDEM. CO., DIRECTORS, OFFICERS, AND ORGANIZATION LIABILITY COVERAGE (form PCDO-16001) § III (2017), *reprinted in* CHRISTOPHER C. FRENCH, INSURANCE LAW AND PRACTICE: CASES, MATERIALS, AND EXERCISES 384 (2d ed. 2020).

[88] *Id.* § III.

[89] *See supra* note 86 and accompanying text; RSUI Indem. Co. v. Murdock, 248 A.3d 887, 903 (Del. 2021) ("[D]oes our State have a public policy against the insurability of losses occasioned by fraud so strong as to vitiate the parties' freedom of contract? We hold that it does not. To the contrary, [Delaware statutory law] . . . authoriz[es] corporations to . . . purchase D&O insurance 'against *any* liability' asserted against their directors and officers . . . ." (emphasis in original) (quoting DEL. CODE ANN. tit. 8, § 145(g))); Soho Plaza Corp. v. Nationwide Mut. Ins. Co., 309 A.D.2d 504, 505 (N.Y. App. Div. 2003) (rejecting the insurer's argument that finding of coverage under a D&O policy violates public policy because it results in the unjust enrichment of the insured). *But see* Level 3 Commc'ns, Inc. v. Fed. Ins. Co., 272 F.3d 908, 910 (7th Cir. 2001) (concluding D&O policy not permitted to cover a securities fraud claim because it is against public policy to allow insurance to cover "a thief against the cost to him of disgorging the proceeds of the theft").

[90] *See, e.g.*, TRAVELERS INDEM. CO., *supra* note 87, § IV.B.1.

[91] *See, e.g.*, Fed. Ins. Co. v. Tyco Int'l, No. 600507/03, 2004 N.Y. Slip Op. 50160(U), at *7 (N.Y. Sup. Ct. Mar. 5, 2004) ("'Wrongful Acts' include any 'misstatement, misleading statement, act, omission, neglect, or breach of duty' by [the insured] in his capacity as an officer of [the firm]. This broad definition encompasses the claims by the Securities Action plaintiffs against [the insured]."); Alstrin v. St. Paul Mercury Ins. Co., 179 F. Supp. 2d 376, 396, 398 (D. Del. 2002) ("Given that the [D&O] policy explicitly covers securities fraud claims, . . . [if such claims are not actually covered], there would be little or nothing left to that coverage. Particularly, in a D&O insurance policy, where securities fraud claims are among the most common claims filed against directors and officers, the effect of [applying an intentional act] exclusion would be particularly devastating."). *But see* Cali. Amplifier, Inc. v. RLI Ins. Co., 113 Cal. Rptr. 2d 915, 918 (Cal. Ct. App. 2001) ("[L]iability under [the state securities statute] requires a 'wilful act' within the meaning of Insurance Code section 533, which precludes coverage under directors and officers liability insurance.").

coverage being provided is only illusory.[92] If D&O Insurance is sold to cover shareholder fraud suits, but exclusions in the policies were interpreted to preclude such coverage, then the policies impermissibly would be providing only illusory coverage.

B. *Racial and Sexual Discrimination Covered by Employment Practices Liability Insurance*

Since the 1990s, Employment Practices Liability ("EPL") Insurance is another type of liability insurance that has been sold that covers intentionally caused injuries.[93] It is sold by well-known global insurance companies, such as Travelers Insurance Company and Chubb Insurance Company.[94] EPL Insurance covers claims for, among others, racial and sexual discrimination, sexual

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[92] *See, e.g.*, Bailer v. Erie Ins. Exch., 687 A.2d 1375, 1380 (Md. 1997) ("If the exclusion totally swallows the insuring provision, the provisions are completely contradictory. That is the grossest form of ambiguity, and [the insurer], unquestionably, would be obliged to defend and indemnify."); Bowersox Truck Sales & Serv., Inc. v. Harco Nat'l Ins. Co., 209 F.3d 273, 278–79 (3d Cir. 2000) (rejecting the insurer's interpretation of the policy where that interpretation would have rendered coverage illusory); Harris v. Gulf Ins. Co., 297 F. Supp. 2d 1220, 1226 (N.D. Cal. 2003) (rejecting the insurer's interpretation of the policy exclusion as "unreasonable because it would render the coverage provided by the policy illusory"); Atofina Petrochemicals, Inc. v. Cont'l Cas. Co., 185 S.W.3d 440, 444 (Tex. 2005) (rejecting an insurer's interpretation of an endorsement in policy that "would render coverage under the endorsement largely illusory").

[93] *See* 2 STEMPEL & KNUTSEN, *supra* note 29, § 21.06[A]; Richard A. Bales & Julie McGhghy, *Insuring Title VII Violations*, 27 S. ILL. U. L.J. 71, 77 (2002) ("Several insurers voluntarily write coverage for an employer's violations of Title VII discrimination. A number of insurance carriers have developed Employment Practices Liability Insurance policies to respond to the employer's need to transfer the risk of large discrimination claims."); 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, 314 (1999) ("[D]iscrimination risks are better underwritten, priced, and administered through an Employment Practices Liability ('EPL') policy."); Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 13 (1997) ("[E]mployment-related acts, such as wrongful termination, discrimination, and sexual harassment . . . [are covered under] Employment-Related Practices Liability ('EPLI') policies.").

[94] *Employment Practices Liability Insurance (EPLI)*, TRAVELERS, https://www.travelers.com/professional-liability-insurance/employment-practices [https://perma.cc/D6ZH-3D7Y] ("Employment Practices Liability Insurance (EPLI) includes coverage for defense costs and damages related to various employment-related claims including allegations of Wrongful Termination, Discrimination, Workplace Harassment and Retaliation."); *Employment Practices Liability Insurance (EPLI)*, CHUBB, https://www.chubb.com/us-en/business-insurance/employment-practices-liability.html [https://perma.cc/6U4K-RLRG] ("Companies in every industry increasingly face potential litigation from employee-related claims such as perceived harassment, wrongful termination, breach of contract, discrimination or other work-related issues.").

harassment, and wrongful termination.[95] These are wrongs that typically are intentionally committed, yet insurers sell insurance specifically intended to cover such claims.[96] And, some courts allow EPL policies to cover the injuries resulting from the intentionally injurious conduct.[97]

C. *Sexual Assault and Abuse Covered by Sexual Misconduct Insurance*

One might be surprised to learn that insurers also sell insurance that covers companies that are sued for the intentional sexual misconduct of their employees.[98] The insurance is often sold as an endorsement to CGL or Professional Liability Insurance policies.[99] It covers companies that are sued for, among other things, the sexual assaults and sexual abuses inflicted by their employees on their victims.[100] The injuries caused by sexual assault and abuse are considered intentional acts of misconduct by many courts regardless of

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[95] *See, e.g.*, Douglas R. Richmond, *Insurance Coverage for Wrongful Employment Practices*, 48 OKLA. L. REV. 1, 2–7 (1995).

[96] Of course, disparate impact, as opposed to disparate treatment, discrimination claims may result from unintentional conduct. *See, e.g.*, Bales & McGhghy, *supra* note 93, at 74 ("A disparate impact case involves unintentional discrimination."). Insureds frequently pursue coverage for both types of discrimination claims. *Id.* at 86.

[97] *See, e.g.*, Manganella v. Evanston Ins. Co., 702 F.3d 68, 71–76 (1st Cir. 2012) (indicating that if the sexual harassment at issue began after the insured's EPLI policy took effect, the insurer would have a duty to defend and indemnify the insured, but remanding the case for a determination regarding when the sexual harassment began as a matter of fact); Lodgenet Ent. Corp. v. Am. Int'l Specialty Lines Ins. Co., 299 F. Supp. 2d 987, 993–97 (D.S.D. 2003) (holding that the insurer had a duty to indemnify the insured under its EPLI policy for defense costs associated with a sexual harassment claim against the insured); Mount Vernon Fire Ins. Co. v. Visionaid, Inc., 76 N.E.3d 204, 208 (Mass. 2017) (affirming that the insurer owed a duty to defend the insured under the EPLI policy in a wrongful termination suit but no obligation to cover the costs of prosecuting counterclaims). *But see* Bales & McGhghy, *supra* note 93, at 76, 86–87 (reporting a conflict among the courts on the coverage of intentional discrimination claims).

[98] *See, e.g.*, *Sexual Misconduct Liability Coverage*, UNDERWRITERS RATING BD. [hereinafter *Sexual Misconduct Liability Coverage*], https://urbratingboard.com/LS_d_pdf/LS-40_0714.pdf [https://perma.cc/48RW-KADD]; Allied World Surplus Lines Ins. Co. v. Day Surgery Ltd. Liab. Co., 451 F. Supp. 3d 577, 582 (S.D.W. Va. 2020) (addressing coverage provided by an insurer that "issued an endorsement to the policy that provides coverage for claims that allege 'sexual misconduct or sexual abuse'" (citation omitted)); Dobbs v. State Farm Fire & Cas. Co., 773 N.E.2d 1251, 1253 (Ill. App. Ct. 2002) (noting policy had an endorsement that covered "any actual, alleged[,] or threatened act of sexual molestation or sexual misconduct" (alteration in original)); Jane D. v. Ordinary Mut., 38 Cal. Rptr. 2d 131, 133 (Cal. Ct. App. 1995) (discussing policy that had an endorsement which covered "sexual misconduct, sexual abuse, sexual harassment or sexual molestation").

[99] Peter Nash Swisher & Richard C. Mason, *Liability Insurance Coverage for Clergy Sexual Abuse Claims*, 17 CONN. INS. L.J. 355, 358 (2011).

[100] *See, e.g.*, *Sexual Misconduct Liability Coverage*, *supra* note 98.

whether the perpetrators subjectively intended to cause any harm.[101] Because of the very nature of sexual assault or abuse, the law effectively finds that the perpetrators intended to cause harm when they sexually assault or abuse someone, so it does not matter what the perpetrator claims his or her intentions were.[102] Despite being viewed as intentionally harmful conduct, liability insurance is allowed to cover the injuries caused by sexual assault and abuse.[103]

Notably, however, Sexual Misconduct Insurance does not cover injuries directly caused by the insured. Rather, the insured (i.e., the employer) is only held liable for sexual misconduct claims vicariously or due to negligence in hiring or employing the perpetrator, as opposed to as a result of the insured's own intentional wrongdoing.[104] Nonetheless, Sexual Misconduct Insurance covers injuries intentionally caused even if the insured entity's own role in causing the injuries was indirect and unintentional.[105]

D. *Intentional Torts Covered by Personal and Advertising Liability Coverage Under CGL and Personal Liability Insurance*

Numerous intentional torts are covered under the Personal and Advertising Injury Liability section of the standard CGL policy form and under Personal Liability Insurance.[106] For example, the ISO 2012 CGL policy form provides: "We will pay those sums that the insured becomes legally obligated to pay as

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[101] *See, e.g.*, Landis v. Allstate Ins. Co., 546 So. 2d 1051, 1053 (Fla. 1989) (holding child molester's claim that no harm was intended by the abuse "defied logic"); Mut. of Enumclaw v. Merrill, 794 P.2d 818, 820 (Or. Ct. App. 1990) (holding sexual abuser's claim that no harm was intended by the abuse was "little short of absurd").

[102] *Cf.* Swisher & Mason, *supra* note 99, at 371 ("Although an insured seeking coverage for injuries arising out of sexual misconduct and sexual abuse may argue that he or she had no subjective intent to 'harm' the minor child, most courts have characterized these subjective assertions made by adult sexual molesters that they did not subjectively intend to harm their child sexual abuse victims as 'absurd' and 'irrational.'").

[103] *See, e.g.*, *Sexual Misconduct Liability Coverage*, *supra* note 98; *see also* TIG Ins. Co. v. Smart Sch., 401 F. Supp. 2d 1334, 1342–43, 1351 (S.D. Fla. 2005) (concluding that multiple acts of sexual abuse would constitute one occurrence under the sexual abuse endorsement in the insured's commercial general liability policy and thus the per-occurrence limit under the policy capped the amount of money the insurer was liable to indemnify for costs associated with defending the sexual abuse claims); NCMIC Ins. Co. v. Walcott, 46 F. Supp. 3d 584, 588–89 (E.D. Pa. 2014) (holding that the insurer had a duty to defend the insured under the professional liability policy's supplemental legal defense endorsement, which obligated the insurer to pay up to $25,000 in legal costs for "certain covered proceedings," including civil actions alleging "sexual misconduct in the course of providing professional services").

[104] *See, e.g.*, *Sexual Misconduct Liability Coverage*, *supra* note 98.

[105] *See, e.g.*, *id.*

[106] *See, e.g.*, INSURANCE LAW AND PRACTICE: CASES, MATERIALS, AND EXERCISES, *supra* note 44, at 345–46.

damages because of 'personal and advertising injury' to which this insurance applies . . . ."[107]

> "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 or 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."[108]

Despite expressly granting coverage for these intentional torts, the CGL policy form also contains the following exclusions:

> This insurance does not apply to:
>
> a. Knowing Violation of Rights of Another
> "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury."
>
> b. Material Published With Knowledge of Falsity
> "Personal and advertising injury" arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity . . . .
>
> . . . .
>
> d. Criminal Acts
> "Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.[109]

So, on the one hand, the policy covers numerous intentional torts, but on the other hand, the policy purports to exclude coverage for criminal acts or

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[107] INS. SERVS. OFF., INC., *supra* note 44, § I.B.1.a.
[108] *Id.* § V.14.
[109] *Id.* § I.B.2.

intentional torts done "with knowledge."[110] How are such seemingly inconsistent policy provisions reconcilable?

Generally, they are not.[111] Consequently, many courts have found coverage for each of the types of intentional torts listed in the Personal and Advertising coverage section of CGL policies, notwithstanding the inclusion of "intentionality exclusions" in CGL policies:

- False arrest, detention, or imprisonment;[112]
- Malicious prosecution;[113]
- Wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling, or premises that a person occupies;[114]

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[110] *Id.* § I.B.2.b.

[111] *See, e.g.*, RESTATEMENT OF THE L. OF LIAB. INS. § 45 cmt. h (AM. L. INST. 2019) ("The contemporary liability insurance market includes a variety of policy forms that cover intentional common-law or statutory torts . . . . Courts regularly enforce insurers' promises to provide these coverages, even in cases involving intentional injuries, typically without any mention of the tension between these coverages and the traditional public-policy-based concern about insurance for intentional harm.").

[112] INS. SERVS. OFF., INC., *supra* note 44, § I.B.1.a.; *see, e.g.*, Marculetiu v. Safety Ins. Co., 157 N.E.3d 644, 653 (Mass. App. Ct. 2020) (disagreeing with the lower court's reasoning that false imprisonment claim "did not trigger coverage [under the insured's CGL policy]" because the policy expressly provided coverage for false imprisonment and did not contain any explicit exclusions to that coverage); Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc., 420 F.3d 1317, 1332 (11th Cir. 2005) (holding that a policy's sexual misconduct exclusion did not bar the insured from receiving coverage for the victim's injuries resulting from false imprisonment because the sexual misconduct was a separate occurrence from the false imprisonment); First Specialty Ins. Corp. v. 633 Partners, Ltd., 300 F. App'x 777, 784–85 (11th Cir. 2008) (holding that the assault and battery exclusion did not apply to the false imprisonment claim because the complaint alleged that the false imprisonment preceded the assault and battery of the injured party).

[113] *See, e.g.*, Fluke Corp. v. Hartford Accident & Indem. Co., 34 P.3d 809, 814 (Wash. 2001) (A policy that provided insurance coverage for malicious prosecution liability "does not violate public policy in Washington. The insurance provision is clear and the type of coverage well established . . . . The paramount public policy here is the commitment to upholding the plain language of contracts."); Paterson Tallow Co. v. Royal Globe Ins. Co., 444 A.2d 579, 582–86 (N.J. 1982) (noting that the insurer has a duty to defend a malicious prosecution claim against the insured if the policy covering malicious prosecution liability is active at the time the malicious prosecution begins). *But see* Regent Ins. Co. v. Strausser Enters., Inc., 814 Fed. App'x 703, 706 (3d Cir. 2020) (concluding that insurance policy "covers claims for malicious prosecution based on a showing of gross negligence while excluding coverage for 'intentional' . . . claims of malicious prosecution"); *cf.* Downey Venture v. LMI Ins. Co., 78 Cal. Rptr. 2d 142, 166 (Cal. Ct. App. 1998) (holding that the California Insurance Code bars an insurer from indemnifying an insured found individually liable for malicious prosecution but does not bar indemnification when the insured is vicariously liable).

[114] *See, e.g.*, Hobbs Realty & Constr. Co. v. Scottsdale Ins. Co., 593 S.E.2d 103, 108–09 (N.C. Ct. App. 2004) (holding that claim for "invasion of the right of private occupation of a room, dwelling or premises that a person occupies" triggers insurer's duty to defend and

- Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services;[115]
- Oral or written publication of material that violates a person's right of privacy;[116]
- The use of another's advertising idea in an advertisement;[117] and

indemnify under a CGL policy); Great Am. Ins. Co. of N.Y. v. Helwig, 419 F. Supp. 2d 1017, 1026 (N.D. Ill. 2006) (insurer had a duty to defend the insured under Personal and Advertising Liability coverage for a class action suit against insured for water contamination because such claims could be viewed as potentially covered nuisance and trespass claims); Supreme Laundry Serv., L.L.C. v. Hartford Cas. Ins. Co., 521 F.3d 743, 748–49 (7th Cir. 2008) (holding an insurer's duty to defend an insured was triggered under a policy providing coverage for wrongful eviction or entry).

[115] *See, e.g.*, State Auto Prop. & Cas. Ins. Co. v. Ward Kraft, Inc., No. 18-2671-JWL, 2020 WL 377010, at *4–6 (D. Kan. Jan. 23, 2020) (finding insurer had a duty to defend the insured where the insured equated the quality of its products with the superior quality of a competitor's products because such claims were a type of potentially covered "disparagement"); Uretek (USA), Inc. v. Cont'l Cas. Co., 701 F. App'x 343, 347–48 (5th Cir. 2017) (finding exclusion barring coverage if the injury "is caused 'with the knowledge that [it] would . . . inflict personal and advertising injury'" did not prevent insurer from having a duty to defend the insured); Millennium Lab'ys, Inc. v. Darwin Select Ins. Co., 676 F. App'x 734, 736 (9th Cir. 2017) (holding that the insurer had a duty to defend insured under its disparagement liability coverage where the insured was sued due to its employees telling customers that the insured's competitors were engaged in illegal activities).

[116] *See, e.g.*, Hooters of Augusta, Inc. v. Am. Glob. Ins. Co., 272 F. Supp. 2d 1365, 1378 (S.D. Ga. 2003) (holding insurer was required to provide coverage for invasion of privacy claims despite an exclusion precluding coverage for injuries "arising out of the utterance or dissemination of matter . . . published . . . by or on behalf of the [i]nsured" because the exclusion would "completely nullif[y] the coverage provided" in the insuring agreement and thus impermissibly render the policy coverage "illusory"), *aff'd*, 157 Fed. App'x 201 (11th Cir. 2005); Columbia Cas. Co. v. HIAR Holding, L.L.C., 411 S.W.3d 258, 270 (Mo. 2013) (affirming coverage for invasion of privacy claims related to junk faxes sent to numerous recipients); Sawyer v. W. Bend Mut. Ins. Co., 821 N.W.2d 250, 254–59 (Wis. Ct. App. 2012) (holding that coverage was available for invasion of privacy claims related to junk faxes despite the presence of "knowing violation of rights" exclusion in policy). In a case with facts similar to the hypothetical set forth in the opening paragraph of this Article, the court found the aggrieved woman's invasion of privacy claim was covered by the tortfeasor's liability insurance. Bailer v. Erie Ins. Exch., 687 A.2d 1375, 1376, 1384–85 (Md. 1997).

[117] *See, e.g.*, Holyoke Mut. Ins. Co. in Salem v. Vibram USA, Inc., 106 N.E.3d 572, 580 (Mass. 2018) (finding that the insured's use of the claimant's family name while advertising a running shoe was a covered use of another's "advertising idea"); Amazon.com Int'l, Inc. v. Am. Dynasty Surplus Lines Ins. Co., 85 P.3d 974, 977–78 (Wash. Ct. App. 2004) (finding that complaint "conceivably alleged misappropriation of an idea concerning the solicitation of business and customers" and thus alleged an advertising injury under the policy); Westfield Ins. Co. v. Factfinder Mktg. Rsch., Inc., 860 N.E.2d 145, 152 (Ohio Ct. App. 2006) (holding that allegations of trade dress infringement and trademark infringement fell within the policy provisions covering "misappropriation of advertising ideas or style of doing business," but misappropriation of trade secrets did not).

- Infringing upon another's copyright, trade dress, or slogan in an advertisement.[118]

Courts have found coverage because intentional torts, by definition, are done intentionally.[119] Intentionality is an element of an intentional tort claim.[120] Consequently, in order to satisfy the elements of an intentional tort claim, the tortfeasor must know, or be substantially certain, that its conduct is unlawful or will cause injury.[121] Although some insurers have argued that intentionality exclusions, such as the "with knowledge" and "criminal acts" exclusions, mean the policies only cover negligent intentional torts, many courts have rejected such arguments.[122] Because intentionality is a required element of intentional

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[118] *See, e.g.*, Value Wholesale, Inc. v. KB Ins. Co. Ltd., 450 F. Supp. 3d 292, 306 (E.D.N.Y. 2020) (finding insurer had a duty to defend because "[t]he complaint plainly allege[d] that [the insured] engaged in the qualifying offense of '[i]nfringing upon [the claimant's] . . . trade dress . . . in its advertisement'" (fourth alteration in original)); Hershey Creamery Co. v. Liberty Mut. Fire Ins. Co., 386 F. Supp. 3d 447, 454 (M.D. Pa. 2019) ("The Complaint makes clear that [the claimant] believes [the insured] infringed on [their] advertising ideas and slogans . . . . Consequently, . . . [the insurer] has a duty to defend [the insured] in the . . . [a]ction."); Parker v. Farm Bureau Prop. & Cas. Ins. Co., 240 F. Supp. 3d 1140, 1147–50 (D. Kan. 2017) (finding a duty to defend because the claimants alleged that the insured infringed upon their copyright, title, or slogan).

[119] *See, e.g.*, *Bailer*, 687 A.2d at 1380–81 (stating a claim for invasion of privacy is an intentional tort because it is defined as "[o]ne who *intentionally* intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, . . . if the intrusion would be highly offensive to a reasonable person" (emphasis in original) (quoting RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1965))); Snakenberg v. Hartford Cas. Ins. Co., 383 S.E.2d 2, 7 (S.C. Ct. App. 1989) ("[W]rongful intrusion into private affairs always involves an intentional act . . . . Intentional conduct is a necessary element of the cause of action.").

[120] *See* cases cited *supra* note 119.

[121] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (AM. L. INST. 1965) ("Intent is not . . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."); Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y, 774 F.3d 935, 950 (9th Cir. 2014) ("If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." (quoting RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (AM. L. INST. 1965))); Burr v. Adam Eidemiller, Inc., 126 A.2d 403, 407 (Pa. 1956) ("Section 825 of the Restatement divides intentional . . . into two classes: (a) where the actor acts for the purpose of causing it; or (b) where the actor knows that it is resulting or is substantially certain to result from his conduct.").

[122] *See, e.g.*, *Bailer*, 687 A.2d at 1384–85 (rejecting insurer's argument that liability policy did not cover intentional tort claim for invasion of privacy due to the presence of an "expected or intended" exclusion because invasion of privacy claims were expressly covered under the policy); Purrelli v. State Farm Fire & Cas. Co., 698 So. 2d 618, 620 (Fla. Dist. Ct. App. 1997) ("Because invasion of privacy can only be actionable if done intentionally, State Farm's insurance contract providing coverage for invasion of privacy but excluding intentional acts is, at best, unclear and ambiguous."); Lineberry v. State Farm Fire & Cas.

tort claims, a negligently caused intentional tort is not a recognized cause of action, and thus, applying the exclusions as urged by insurers would impermissibly render the coverage provided for intentional torts in the insuring agreement language illusory.[123]

Courts also have rejected the public policy argument made by insurers that liability insurance simply should not be permitted to cover intentional torts.[124] In doing so, some courts have reasoned that these public policy arguments are unpersuasive when weighed against the competing public policy that favors enforcing contracts, particularly since insurers themselves drafted the very policy language they later sought to void.[125] Other courts have reasoned that if public policy concerns have not prevented courts from allowing coverage for

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Co., 885 F. Supp. 1095, 1099 (M.D. Tenn. 1995) ("In the instant case, the umbrella policy expressly covered injuries resulting from invasion of the right of privacy, an inherently intentional tort, but excluded injuries which were intended or expected. Therefore, the Court finds the coverage is illusory, and the policy is ambiguous and must be interpreted against the insurer and in favor of the insured.").

[123] *See* cases cited *supra* note 122.

[124] *See, e.g.*, *Bailer*, 687 A.2d at 1385 ("[W]e held that it was not contrary to public policy to insure against liability for punitive damages . . . even though the punitive damages in legal theory are predicated upon malice . . . . The instant case is an even weaker one for voiding the insuring agreement on public policy grounds . . . ." (citations omitted)); First Nat'l Bank of St. Mary's v. Fid. & Deposit Co., 389 A.2d 359, 366 (Md. 1978) ("It cannot properly be said that permitting payment of exemplary damages by an insurance company eliminates deterrence . . . ."); Yousuf v. Cohlmia, 741 F.3d 31, 40 (10th Cir. 2014) (rejecting insurers' argument that insurance for intentional conduct always violates public policy because sometimes "the court [may find] that the public interest in having victims compensated for their injuries, outweighs public interest in forcing the willful wrongdoer to pay the consequences of the misconduct" (quoting 6 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 101:24 (3d ed. 2012))); St. Paul Fire & Marine Ins. Co. v. F.H., 55 F.3d 1420, 1423 (9th Cir. 1995) ("[W]hen liability insurance is designed to compensate innocent third parties for injuries caused by the intentional misconduct of insureds, it may indemnify without violating public policy. This exception is particularly applicable where it is unlikely that insurance coverage induced the insured to engage in misconduct.").

[125] *See, e.g.*, *First Nat'l Bank of St. Mary's*, 389 A.2d at 367 ("Insurance companies have not shown a reluctance in the past to write into their policies such restrictions as they deem to be in their best interest, yet no restriction relative to the issue at bar appears in the policy issued . . . ."); Sch. Dist. for Royal Oak v. Cont'l Cas. Co., 912 F.2d 844, 849 (6th Cir. 1990) ("Had the company wished to exclude coverage for intentional religious discrimination in employment, it could and should have said so."), *overruled on other grounds by* Salve Regina Coll. v. Russell, 499 U.S. 225 (1991); Univ. of Ill. v. Cont'l Cas. Co., 599 N.E.2d 1338, 1350–51 (Ill. App. Ct. 1992) ("[T]he 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 the . . . policy to create an exclusion."); Indep. Sch. Dist. No. 697 v. St. Paul Fire & Marine Ins. Co., 495 N.W.2d 863, 868 (Minn. Ct. App. 1993) ("The carrier is, of course, free to expressly provide an exclusion for such conduct in the future."), *aff'd*, 515 N.W.2d 576 (Minn. 1994).

punitive damage awards that can be based on egregious misconduct, then public policy concerns similarly should not prevent coverage for intentional torts.[126]

E. *Punitive Damages for Egregious Misconduct Covered by CGL and Other Liability Insurance*

Many types of liability insurance policies cover punitive damages under the express wording of the policies.[127] For example, ISO's CGL policies cover all "sums that the insured becomes legally obligated to pay as damages."[128] The term "damages" is not defined, so there can be little dispute that *punitive damages* are a type of *damages* that insurers become legally obligated to pay when a judgment for such damages is entered against the insureds.[129]

Punitive damages typically are awarded to punish and deter parties from engaging in egregious misconduct.[130] Consequently, the argument against allowing insurance to cover punitive damages is that it would undermine the deterrence and punishment objectives of an award of punitive damages if the wrongdoer could simply pass along the award to its insurer for payment.[131]

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[126] Widiss, *supra* note 2, at 461, 469.

[127] *See, e.g.*, Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 115 ("[T]here is little dispute that, on their face, most primary general and automobile policies provide coverage for punitive damages."); George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1010 (1989) (noting that "the insurer for some reason has failed to incorporate a more specific exclusion of punitive coverage into the basic policy itself"); Widiss, *supra* note 2, at 469 ("Millions of liability insurance policies do not explicitly specify whether coverage 'is' *or* 'is not' provided for punitive damages. Consequently, . . . courts usually resolve the coverage dispute by deciding whether to imply an exception to coverage on the basis of public policy." (emphasis in original)); *see also* TRAVELERS INDEM. CO., *supra* note 87, § III (discussing D&O policies that expressly cover punitive damages).

[128] INS. SERVS. OFF., INC., *supra* note 44, § I.A.1.a.

[129] Baker, *supra* note 127, at 115.

[130] *See, e.g.*, BMW of N. Am. v. Gore, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further [the] legitimate interests in punishing unlawful conduct and deterring its repetition."); *see also* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 356–57 (2003) (noting that "courts and academic commentators on the whole do agree that there are two prevailing justifications for punitive damages: punishment (or retribution) and deterrence"); 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, 161–68 (1990) (discussing public policy arguments regarding, among other things, insurance for punitive damages).

[131] Nw. Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 440 (5th Cir. 1962) ("The policy considerations in a state where . . . punitive damages are awarded for punishment and deterrence, would seem to require that the damages rest ultimately as well [as] nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose."). The parties raising the issue of whether punitive damages should be allowed to be covered by insurance policies, such as CGL policies, are again the very parties who draft and sell the policies—

Insurers' litigation position that CGL policies should not be allowed to cover punitive damages, despite policy language that expressly covers such damages, is somewhat surprising when one considers that the insurance industry actually drafted a CGL policy form in 1977 that expressly excluded coverage for punitive damages but then decided not to include the exclusion in the policy form after insurance salespeople raised concerns about the negative impact such an exclusion could have on policy sales.[132] So, the inclusion of coverage for punitive damages under CGL policies was not a drafting oversight or mistake. It was a deliberate decision. Consequently, it seems hypocritical for insurers to draft, sell, and collect premiums for policies that expressly cover punitive damages but then seek to disclaim coverage for such damages on public policy grounds when punitive damages claims are presented for payment.[133]

Despite the public policy arguments against allowing insurance to cover punitive damages, a majority of jurisdictions actually allow insurance policies to cover punitive damages if the policies do not expressly exclude such coverage.[134] In addition, even in jurisdictions where courts have held that allowing insurance to cover punitive damages is against public policy, most of

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insurers. *See* Fairfield Ins. Co. v. Stephens Martin Paving, LP, 246 S.W.3d 653, 670 (Tex. 2008) ("[W]e decline to invalidate the parties' workers' compensation contract to enforce a public policy urged by [the insurer] but not adopted by the Legislature."); Harrell v. Travelers Indem. Co., 567 P.2d 1013, 1015 (Or. 1977) ("[The insurer] . . . contends that if even the provisions of its policy be construed so as to impose liability for punitive damages, such provisions would then be invalid as contrary to the public policy of Oregon . . . ."); Mazza v. Med. Mut. Ins. Co., 319 S.E.2d 217, 220 (N.C. 1984) ("The main thrust of [the insurer's] argument concerning punitive damages is that allowing insurance coverage for punitive damages is contrary to public policy.").

[132] Widiss, *supra* note 2, at 488.

[133] Insurers' requests that courts void their policies on public policy grounds also could be viewed as somewhat hypocritical because insurers typically argue that judges should not ignore or rewrite the terms of policies when they interpret policy language or decide cases. Baker, *supra* note 127, at 123–24, 124 n.78.

[134] *See, e.g.*, KALIS, REITER & SEGERDAHL, *supra* note 83, § 5.04; Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 5 (Tenn. 1964) (allowing coverage for punitive damages imposed on insured for intoxicated driving); Dayton Hudson Corp. v. Am. Mut. Liab. Ins. Co., 621 P.2d 1155, 1160 (Okla. 1980) ("We . . . hold that public policy against insurance protection for punitive damages does not preclude recovery of indemnity from the insurer by an employer to whom either willfulness or gross negligence of his harm-dealing employee became imputable for imposition of liability under the Oklahoma application of the *respondeat superior* doctrine."); Boyd v. Nationwide Mut. Ins. Co., 424 S.E.2d 168, 172 (N.C. Ct. App. 1993) (finding coverage for punitive damages in a commercial umbrella liability policy even though policy did not explicitly provide coverage for punitive damages because the policy contained broad, ambiguous language and such coverage was not expressly excluded). *But see* Ace Am. Ins. Co. v. Dish Network, LLC, 883 F.3d 881, 889 (10th Cir. 2018) (refusing to require an insurer to indemnify the insured for punitive damages because Colorado public policy "prohibits an insurance carrier from providing insurance coverage for punitive damages" (quoting Lira v. Shelter Ins. Co., 913 P.2d 514, 517 (Colo. 1996))).

them will still allow insurance to cover punitive damage awards if the insured is only vicariously liable for the awards.[135]

Courts have reached such results for several reasons. First, there is no empirical evidence to support the argument that policyholders review their policies to determine whether the policies will cover their liabilities before engaging in the improper behavior for which punitive damages are awarded.[136] Second, for many types of egregious misconduct for which punitive damages may be awarded, criminal liability also may be imposed.[137] One would expect that being imprisoned would be a stronger deterrent to misbehavior than the prospect that the insured tortfeasor's policy may not cover the damages award. So, the goal of deterring misconduct is more effectively advanced through criminal laws than under the theory that bad actors will alter their behavior if they lose liability insurance to cover their malfeasance. Consequently, disallowing coverage effectively only results in victims losing insurance recoveries for their damage awards.[138] Third, there is the competing public policy that favors the enforcement of contracts as written.[139] Insurers, as the exclusive drafters of insurance policies, should expressly exclude coverage for punitive damages if they do not want their policies to cover punitive damages.[140]

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[135] *See, e.g.*, KALIS, REITER & SEGERDAHL, *supra* note 83, § 5.04.

[136] *See* Sinclair Oil Corp. v. Columbia Cas. Co., 682 P.2d 975, 981 (Wyo. 1984) ("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.").

[137] *See, e.g.*, *Lazenby*, 383 S.W.2d at 5 ("This State . . . has a great many detailed criminal sanctions, which apparently have not deterred this slaughter on our highways and streets. Then to say the closing of the insurance market, in the payment of punitive damages, would act to deter guilty drivers would in our opinion contain some element of speculation.").

[138] Baker, *supra* note 127, at 113; *see also* Cynthia A. Muse, Note, *Homeowners Insurance: A Way to Pay for Children's Intentional—and Often Violent—Acts?*, 33 IND. L. REV. 665, 669 (2000) ("By denying insurance coverage for intentional acts, innocent victims may not be compensated, especially if the insured lacks personal financial resources.").

[139] *See, e.g.*, Missouri, K. & T. Ry. Co. of Texas v. Carter, 68 S.W. 159, 164 (Tex. 1902) ("'[C]ontracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice . . . .' The power to make contracts is too valuable a right to be lightly swept away under the general declaration that such contracts are contrary to public policy . . . ." (quoting Printing & Numerical Registering Co. v. Sampson (1875) 19 Eq. 462, 465 (Ct. App.))); *Lazenby*, 383 S.W.2d at 5 ("The insurance contract in the case at bar is a private contract between defendant and their assured . . . which when construed as written would be held to protect him against claims for both compensatory and punitive damages. Then to hold assured, as a matter of public policy, is not protected by the policy on a claim for punitive damages would have the effect to partially void the contract.").

[140] Christopher C. French, *Understanding Insurance Policies as Noncontracts: An Alternative Approach to Drafting and Construing These Unique Financial Instruments*, 89 TEMP. L. REV. 535, 546–53 (2017); *see, e.g.*, Collins & Aikman Corp. v. Hartford Accident & Indem. Co., 416 S.E.2d 591, 595 (N.C. Ct. App. 1992) ("If [the insurer] 'intended to

And, in fact, insurers have done exactly that for some lines of insurance.[141] In short, courts should not sanction insurers' requests to ignore or override policy provisions that the insurers themselves deliberately have included in their policies.

F. *Criminal Conduct and Intentional Crashes Covered by Auto Insurance*

Another area of insurance law where intentional injuries are permitted to be covered, even if the policy at issue contains an intentionality exclusion, is Auto Insurance.[142] Despite continued safety improvements in vehicles, a lot of people are injured or killed in the United States every year in vehicle crashes—approximately 40,000 people are killed, and more than three million people are injured.[143] In 2010, for example, the total economic cost of vehicle crashes was approximately $242 billion.[144]

In light of these staggering figures, one of the overriding public policies underlying the laws that make Auto Insurance mandatory is victim compensation.[145] Indeed, many courts have held that the public policy favoring victim compensation overrides the public policy against allowing insurance to cover intentionally caused injuries.[146] The interest in victim compensation is so

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eliminate coverage for punitive damages it could and should have inserted a single provision stating this policy does not include recovery for punitive damages.'" (quoting Mazza v. Med. Mut. Ins. Co. of N.C., 319 S.E.2d 217, 223 (N.C. 1984))), *aff'd*, 436 S.E.2d 243 (N.C. 1993).

[141] *See, e.g.*, Rummel v. St. Paul Surplus Lines Ins. Co., 945 P.2d 985, 987 (N.M. 1997) (noting that the policy contained "an express exclusion of coverage for punitive damages"); Cassel v. Schacht, 683 P.2d 294, 295 (Ariz. 1984) ("[T]he insurer has explicitly excluded coverage for punitive damages.").

[142] French, *Debunking the Myth*, *supra* note 4, at 94.

[143] *See* INSURANCE LAW AND PRACTICE: CASES, MATERIALS, AND EXERCISES, *supra* note 44, at 479; NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS 1 (Dec. 2020), https://crashstats.nhtsa.dot.gov/Api/Public/Publication/813060 [https://perma.cc/JF87-XBNK] ("There were 36,096 fatalities in motor vehicle traffic crashes in 2019.").

[144] NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., THE ECONOMIC AND SOCIETAL IMPACT OF MOTOR VEHICLE CRASHES, 2010 (REVISED) 1 (May 2015), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812013 [https://perma.cc/2KBS-X393].

[145] *See, e.g.*, JERRY & RICHMOND, *supra* note 3, at 837 ("In automobile insurance . . . the public policy favoring victim compensation sometimes trumps the public policy in favor of requiring willful perpetrators of injury to compensate their victims out of their own resources."); ABRAHAM & SCHWARCZ, *supra* note 3, at 714 ("[T]he principal function of compulsory insurance requirements is not to protect negligent drivers against the risk of financially disastrous liability, but to protect victims against the cost of suffering otherwise uncompensated injury.").

[146] *See, e.g.*, Wheeler v. O'Connell, 9 N.E.2d 544, 546 (Mass. 1937) (allowing coverage for injuries caused by a driver who drove vehicle in a "wilful, wanton and reckless" manner because "[t]he purpose of the compulsory motor vehicle insurance law is not . . . to protect the owner or operator alone from loss, but rather is to provide compensation to persons

strong in the area of Auto Insurance that some courts have held that victims can recover under auto policies even when the insured driver deliberately runs into the victim.[147]

The public policy favoring the compensation of auto crash victims also allows for insurance to cover the injuries of the victims of drunk drivers even though driving while intoxicated is a crime that society seeks to deter and to punish when it does occur.[148] The reason is simple—if Auto Insurance were not allowed to cover injuries caused by drunk drivers, then most victims of drunk drivers would not be compensated for their injuries.[149]

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injured through the operation of the automobile insured by the owner"); Travelers Indem. Co. v. Hood, 140 S.E.2d 68, 70 (Ga. Ct. App. 1964) ("We hold that it is not against public policy for a contract for automobile liability insurance to cover liability of the insured arising out of wilful and wanton misconduct in unlawfully racing automobiles on a public highway."); Harris v. Nationwide Mut. Ins. Co., 699 A.2d 447, 453 (Md. Ct. Spec. App. 1997) ("[W]e hold that 'accident,' as that term is used in [the Maryland underinsured motorist statute], encompasses both intentional and unintentional incidents. This holding is based on the clear and unambiguous language of the definition of 'accident' in [the statute] . . . and the overriding statutory goal of assuring recovery for innocent victims of automobile-related mishaps."). *But see* State Farm Mut. Auto. Ins. Co. v. Wertz, 540 N.W.2d 636, 641 (S.D. 1995) (holding that "the public policy against insuring intentional wrongdoers predominates" over "'the public policy of providing compensation to victims injured by motor vehicles'" (quoting Williams v. Diggs, 593 So. 2d 385, 387 (La. Ct. App. 1991))).

[147] *See, e.g.*, State Farm Fire & Cas. Co. v. Tringali, 686 F.2d 821, 824 (9th Cir. 1982) (Injuries caused by an intentional crash are covered because "a compulsory scheme of automobile liability insurance very strongly suggests a legislative intent that there be no exclusion of intentional acts of the insured. Compulsory automobile insurance is adopted for the protection of the victims."); Jernigan v. Allstate Ins. Co., 269 F.2d 353, 357 (5th Cir. 1959) (holding that "accident" under an automobile liability insurance policy could be interpreted from the perspective of the injured party, thereby allowing coverage in a case where a driver deliberately ran a person over with their car); State Farm Mut. Auto. Ins. Co. v. Langan, 947 N.E.2d 124, 128–29 (N.Y. 2011) (finding coverage for decedent insured's death under his underinsured motorist coverage because it was "in keeping with the national trend toward allowing innocent insureds to recover uninsured motorist benefits under their own policies when they have been injured through the intentional conduct of another").

[148] *See, e.g.*, Tom Baker, *Liability Insurance at the Tort-Crime Boundary*, *in* FAULT LINES: TORT LAW AS CULTURAL PRACTICE 66, 74 n.10 (David M. Engel & Michael McCann eds., 2009) ("[T]he overwhelmingly compensatory purpose of compulsory automobile liability insurance has prevented automobile insurance companies from putting drunk driving exclusions in their policies."); Avi Perry, *Restructuring Insurance Coverage for Drunk Drivers*, 4 HARV. L. & POL'Y REV. 427, 431 (2010) ("[N]o Connecticut automobile insurance policy reviewed . . . contained an exclusion for injuries or damage arising as a result of drunk driving."); Kochenburger, *supra* note 4, at 1288 ("Personal lines automobile policies do not exclude bodily injury or property damage when the policyholder is driving under the influence of alcohol or drugs in violation of law.").

[149] *See, e.g.*, Perry, *supra* note 148, at 432 ("If a drunk driving exclusion were permitted, many tort victims would be either undercompensated or wholly uncompensated for their injuries since drivers typically have shallower pockets than do insurers."); Kochenburger, *supra* note 4, at 1289 ("Exclusions for intoxicated driving would eliminate a major source

Thus, Auto Insurance is another example of liability insurance being allowed to cover intentionally caused injuries. Indeed, it is even more than allowed—in some states it is mandated by public policy regardless of whether the insurance policies contain intentionality exclusions.[150]

G. *Injuries Intentionally Caused in Self-Defense Covered by CGL and Homeowners Insurance*

Injuries intentionally caused when defending oneself are also often covered by liability insurance notwithstanding the presence of an intentionality exclusion in the policy at issue.[151] When one defends oneself, one intends to stop the other person's attack. That often requires intentionally injuring the other person, at least temporarily. Yet, one should not have to forfeit insurance coverage when one asserts the right to defend oneself. Many courts agree.[152]

Notably, coverage for injuries caused while acting in self-defense typically only applies to the insured's defense costs.[153] That is because an insured who is defending, for example, a battery claim asserted against him based on self-defense will not be held liable for the other party's injuries if the defense is

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of financial contribution to victims harmed by this behavior, thus defeating a primary purpose of liability insurance.").

[150] *See* cases cited *supra* notes 146–47.

[151] *See, e.g.*, Farmers & Mechs. Mut. Ins. Co. v. Cook, 557 S.E.2d 801, 809–10 (W. Va. 2001) (holding that acts in self-defense are not committed with the intent to injure the victim but with the intent to prevent injury to the actor); Stoebner v. S.D. Farm Bureau Mut. Ins. Co., 598 N.W.2d 557, 559 (S.D. 1999) (finding that, in order to void coverage for injuries caused while an insured acted in self-defense, the insurer must prove that "the insured acted for the purpose of causing the loss," not just that the insured intended to commit the act that caused the loss; noting that "[m]ost, if not all, negligently inflicted injuries . . . result from intentional acts of some kind, but coverage still exists under normal [insurance] policy provisions" (second alteration in original) (quoting State Farm Mut. Auto. Ins. Co. v. Wertz, 540 N.W.2d 636, 642, 639 (S.D. 1995) (internal quotation marks omitted))); Vt. Mut. Ins. Co. v. Walukiewicz, 966 A.2d 672, 679–80 (Conn. 2009) (reasoning that self-defense can be considered an "accident" under an insurance policy either because acts of self-defense are "by their very nature, instinctive or reactive and, accordingly, unplanned and unintentional" or because "'the third party's actions provoking the self-defense response [are] the unforeseen and unexpected element in the causal chain of events making the insured's acts in self-defense unplanned and involuntary'" (citation omitted)). *But see* Grange Ins. Co. v. Brosseau, 776 P.2d 123, 127 (Wash. 1989) (arguing that a court should not "rewrite the policy . . . to provide for coverage [of intentional injuries caused while acting in self-defense] when the plain language of the policy does not").

[152] *See, e.g.*, *Cook*, 557 S.E.2d at 809–10; *see also* RESTATEMENT OF THE L. OF LIAB. INS. § 45 reps.' note g (AM. L. INST. 2019) ("[A]ctions taken in self-defense, which are intentional but are not taken for the purpose of injuring another, are often covered by insurance policies.").

[153] State Farm Fire & Cas. Co. v. Poomaihealani, 667 F. Supp. 705, 708–09 (D. Haw. 1987) ("It would be ironic to exonerate an individual on the basis of self-defense but deny him insurance coverage of the costs of defense . . . .").

successful. Consequently, there should not be any judgments against the insured for the insurer to indemnify in cases where self-defense is successfully asserted. Nonetheless, defense costs can be significant, so being able to recover them is meaningful for many insureds.[154]

Rather than simply acquiesce to courts' creation of an implicit self-defense exception to intentionality exclusions, insurers have added express self-defense exceptions to the intentionality exclusions contained in their policies.[155] For example, the intentionality exclusion in ISO's 2012 CGL policy form provides: "This insurance does not apply to: 'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured. This exclusion does not apply to 'bodily injury' resulting from the use of reasonable force to protect persons or property."[156]

Similarly, the intentionality exclusion in the liability coverage section of ISO's 2010 H-3 homeowners policy form provides:

> Coverage[] . . . do[es] not apply to . . . "bodily injury" or "property damage" which is expected or intended by an "insured" . . . . However, this Exclusion . . . does not apply to "bodily injury" or "property damage" resulting from the use of reasonable force by an "insured" to protect persons or property.[157]

The addition of a self-defense exception to intentionality exclusions is a recognition that the underlying reasons for the public policy against allowing insurance to cover injuries intentionally caused are not really implicated in self-defense situations because the person is not acting improperly when acting in self-defense, so there is no need to deter or punish the conduct.[158] Further, the self-defense exception to intentionality exclusions is only implicated when there is an unproven allegation that the insured intentionally caused bodily injury or property damage without justification.[159] If the underlying claimant successfully overcomes the insured's claim of self-defense, then the self-defense exception to the intentionality exclusion would no longer be implicated

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[154] *The Cost of Taking Your Personal Injury Case to Court*, ALLLAW, https://www.alllaw.com/articles/nolo/personal-injury/cost-case-court.html [https://perma.cc/C4RK-SFWL] (noting that between attorney's fees, expert witness fees, administrative fees, and filing fees, it is not uncommon for defense costs to exceed $100,000).

[155] INS. SERVS. OFF., INC., *supra* note 44, § I.A.2.a.

[156] *Id.*

[157] INS. SERVS. OFF., INC., H-3 HOMEOWNERS POLICY FORM § II.E.1 (2010), *reprinted in* CHRISTOPHER C. FRENCH, INSURANCE LAW AND PRACTICE: CASES, MATERIALS, AND EXERCISES 609 (2d ed. 2020) (alterations in the original).

[158] Preferred Mut. Ins. Co. v. Thompson, 491 N.E.2d 688, 691 (Ohio 1986) ("The insured who acts in self-defense does so only as a *reaction* to his attacker, and any injuries suffered by the attacker are not the result of the insured's misconduct." (emphasis in original)).

[159] *Id.*

and the intentionality exclusion would apply to defeat coverage for the insured's indemnity claim in most cases.[160]

VI. THEORETICAL VERSUS REAL WAYS TO DETER INTENTIONALLY CAUSED INJURIES

Is the premise underlying the public policy against allowing insurance to cover injuries intentionally caused—that allowing coverage would defeat the goals of deterring and punishing intentional misconduct or even incentivize such misconduct—merely theoretical or grounded in reality? It depends upon the type of conduct at issue and whether the insurance is first-party insurance or third-party (i.e., liability) insurance.[161]

The concern that wrongdoers may be incentivized to engage in misconduct if they are rewarded for doing so is legitimate and provable. In the first-party insurance context where the wrongdoer is insuring its own property, it seems obvious that a person who, for example, has Homeowners Insurance in the amount of $350,000 on a house worth only $300,000 would be benefitted financially if the house were destroyed because the homeowner would net $50,000.

Why would an insurer insure a house for $50,000 more than it is worth? It typically would not do so intentionally because of the moral hazard risk that would be created.[162] This scenario could occur, however, if there were a dramatic downturn in the real estate market, such as what occurred in 2008–2009,[163] or the insured property's value went down for some other reason after

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[160] State Farm Fire & Cas. Co. v. Poomaihealani, 667 F. Supp. 705, 709 (D. Haw. 1987).

[161] Loudin v. Nat'l Liab. & Fire Ins. Co., 716 S.E.2d 696, 700 (W. Va. 2011) (explaining the difference between first-party and third-party insurance).

[162] Moral hazard has two aspects to it: (1) a person who has insurance may be incentivized to destroy the insured property to collect the insurance proceeds, and (2) a person will take less care to avoid losses if the losses are insured. W. Cas. & Sur. Co. v. W. World Ins. Co., 769 F.2d 381, 385 (7th Cir. 1985) ("Once a person has insurance, he will take more risks than before because he bears less of the cost of his conduct."); MARK S. DORFMAN, INTRODUCTION TO RISK MANAGEMENT AND INSURANCE 480 (8th ed. 2005) (explaining that the term "moral hazard" also generally encompasses situations where "[a] person . . . deliberately causes a loss . . . [or] exaggerates the size of a claim to defraud an insurer"); Adam F. Scales, *The Chicken and the Egg: Kenneth S. Abraham's "The Liability Century,"* 94 VA. L. REV. 1259, 1263 (2008) (book review) (describing moral hazard as the phenomenon where a person will have a "tendency to take fewer precautions in the presence of insurance"); Gary T. Schwartz, *The Ethics and the 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.").

[163] Mark Landler, *U.S. Housing Collapse Spreads Overseas*, N.Y. TIMES (Apr. 13, 2008), https://www.nytimes.com/2008/04/13/business/worldbusiness/13iht-housing.1.11931770.html [https://perma.cc/V4PP-PKZJ]; Jack Healy, *More Homeowners Facing Foreclosure*, N.Y.

the insurance was issued. And, in fact, homeowner insurance fraud did rise after the real estate downturn of 2008–2009.[164] So, this is not just a theoretical problem. Insurance fraud is real. Some people who own property and stand to financially benefit through insurance when the property is destroyed actually destroy the property in order to collect the insurance proceeds.[165] So, the public policy against allowing people to collect insurance proceeds if they deliberately destroy their own insured property is well-founded.

"Slayer" statutes are predicated on similar concerns in the life insurance or inheritance context. Slayer statutes provide that a person is not allowed to inherit from a deceased person or collect life insurance proceeds if the person played a role in intentionally and unlawfully causing the deceased person's death.[166] Allowing people to inherit or collect life insurance proceeds when they are involved in wrongfully causing the person's death invites murder. Thus, having a public policy against allowing financial incentives to kill people makes sense.

In the context of third-party liability insurance, however, are insureds motivated to intentionally injure people or cause property damage if they have liability insurance that will compensate the victims? Neither common sense nor empirical evidence supports such a conclusion.

In the liability context, the insured party typically does not financially benefit by hurting someone else after purchasing liability insurance.[167] So, there is no financial benefit to the insured that arises due to the availability of liability

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TIMES (May 28, 2009), https://www.nytimes.com/2009/05/29/business/economy/29 home.html [https://perma.cc/4E3V-R4LA].

[164] *See, e.g.*, *Insurance Fraud in America: Current Issues Facing Industry and Consumers: Hearing Before the S. Comm. on Com., Sci., and Transp.*, 115th Cong. 5–6 (2017) (statement by Dennis Jay, Executive Director, Coalition Against Insurance Fraud), https://www.commerce.senate.gov/index.php/services/files/ECCB5179-8ACF-4C2D-9958-6D8498BB175F [https://perma.cc/7TF8-T8Z6]; Tony Pugh, *Recession Is Fueling a Boom in Insurance Fraud*, MCCLATCHY DC BUREAU (Mar. 11, 2010), https://bit.ly/3wj9pGJ (on file with the *Ohio State Law Journal*); Patricia-Anne Tom, *Recession Increasing Insurance Fraud*, INS. J. (Apr. 14, 2009), https://bit.ly/3xjKF1w [https://perma.cc/RU7X-L5JY].

[165] *See, e.g.*, Pugh, *supra* note 164 (describing how homeowners simulated hail damage to their roofs by "striking the roofs with ball-peen hammers or golf balls inside socks or even by twisting quarters into asphalt shingles"); Katherine Doyle, *Rise in Searches for 'How to Set Fire' a Sign that Insurance Fraud Beckons as Economy Crashes*, WASH. EXAM'R (Apr. 7, 2020), https://www.washingtonexaminer.com/news/rise-in-searches-for-how-to-set-fire-a-sign-insurance-fraud-beckons-as-economy-crashes [https://perma.cc/K4JN-4KVX].

[166] *See, e.g.*, UNIF. PROB. CODE § 2–803(b) (amended 2019) ("An individual who feloniously and intentionally kills the decedent forfeits all benefits under this [article] with respect to the decedent's estate . . . ." (alteration in original)); GA. CODE ANN. § 33-25-13 (2022) ("No person who commits murder or voluntary manslaughter or who conspires with another to commit murder shall receive any benefits from any insurance policy on the life of the deceased, even though the person so killing or conspiring be named beneficiary in the insurance policy.").

[167] *See, e.g.*, Level 3 Commc'ns, Inc. v. Fed. Ins. Co., 272 F.3d 908, 910 (7th Cir. 2001).

insurance such that it creates an incentive to commit intentional torts.[168] On the other hand, there is a financial detriment to the innocent victims of intentional tortfeasors if an insured tortfeasor does not have assets sufficient to compensate the victim for the injuries inflicted and the insured tortfeasor's liability insurance is not allowed to cover the injuries.

Is an insured nonetheless emboldened to intentionally cause injuries because the insured has liability insurance to protect it in the event of litigation? Again, there is no empirical evidence to support such a conclusion.[169] There also is no empirical evidence that insureds review their liability policies to see if their actions would be covered before engaging in unlawful activity.[170] To the contrary, most people do not even have copies of their policies and very few people ever review their policies.[171]

Even if they did review their policies, however, doing so would be fruitless for most insureds because policies are so long, complex, and confusing that most insureds cannot even understand what is covered versus not covered under the

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[168] One could argue, however, that this proposition is untrue with respect to injuries caused by fraud or misrepresentations if the injuries would be covered by insurance because the bad actor gets to keep the benefits improperly procured by the fraudulent conduct if insurance will cover the injuries. Consequently, for this reason, some courts do not allow insurance to cover fraud claims seeking restitutionary relief. *See, e.g.*, *Level 3 Commc'ns, Inc.*, 272 F.3d at 910–11 (holding restitutionary relief provided under settlement agreement in a securities fraud case was not covered under a D&O policy due to public policy); O'Neill Investigations, Inc. v. Ill. Emps. Ins. of Wausau, 636 P.2d 1170, 1175, 1179 (Alaska 1981) (holding claims seeking the restoration of monies wrongfully acquired were not covered under liability policy); Bank of the W. v. Superior Ct., 833 P.2d 545, 553–55 (Cal. 1992) (holding it was against public policy to allow insurance to cover the return of monies wrongfully obtained); *see also* Christopher C. French, *The Insurability of Claims for Restitution*, 18 U. PA. J. BUS. L. 599, 628–33 (2016) (discussing the public policy arguments and caselaw against allowing insurance to cover claims for restitution).

[169] *See* Erik S. Knutsen, *Fortuity Clauses in Liability Insurance: Solving Coverage Dilemmas for Intentional and Criminal Conduct*, 37 QUEEN'S L.J. 73, 109 (2011) ("Most insureds do not consider loss of insurance coverage while acting in a manner that could be deemed to be intentional or criminal."); Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223, 1245–50 (2004) (concluding that the empirical evidence does not support the theory of "adverse selection"—that insureds understand their risks better than insurers, so high risk insureds who expect to have significant losses purchase insurance while low risk people forgo insurance).

[170] *See* Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 660 (2013); Michelle E. Boardman, Contra Proferentem*: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1120 (2006); Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 107 (2008).

[171] *See, e.g.*, Abraham, *supra* note 170, at 660 ("For virtually all individuals, insurance policies are complex documents with terms they neither read nor understand."); Boardman, *supra* note 170, at 1120 (explaining that "the policyholder could not, or does not, understand the [policy] language in those rare cases where it is read"); Randall, *supra* note 170, at 107 ("Insurance policies are complex and technical documents that very few policyholders can read or understand.").

policies.[172] Indeed, the Supreme Court of New Hampshire has described insurance policies as "inexplicable riddle[s]":

> [I]nsurance policies are weighted with such a prolixity of complex verbiage that "they would not be understood by men in general, even if [the policies were] subjected to a careful and laborious study. . . . The [policy], if read by him, would, unless he were an extraordinary man, be an inexplicable riddle, a mere flood of darkness and confusion. Some of the most material stipulations were concealed in a mass of rubbish on the back side of the policy and the following page . . . where scarcely any one would think of looking for information so important. . . . As if it were feared that, notwithstanding these discouraging circumstances, some extremely eccentric person might attempt to examine and understand the meaning of the involved and intricate net in which he was to be entangled, it was printed in such small type, and in lines so long and crowded, that the perusal of it was made physically difficult, painful, and injurious."[173]

In short, because liability policies generally are "a mere flood of darkness and confusion" to most people, in the unlikely event an insured were to review a liability policy as part of a deliberative process to weigh the pros and cons of anticipated misconduct before acting, doing so would be a wasted effort for most insureds.[174]

There are also, of course, other legal disincentives to intentionally causing harm to other people. Criminal liability immediately comes to mind.[175] Many intentional torts are also crimes.[176] For example, false imprisonment, an intentional tort covered under the Personal and Advertising Liability coverage section of CGL policies, is a felony punishable by up to ten years in prison in some states.[177] Securities fraud, which is covered by D&O policies, is a felony

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[172] *See* Randall, *supra* note 170, at 107.

[173] Storms v. U.S. Fid. & Guar. Co., 388 A.2d 578, 580 (N.H. 1978) (alterations in original) (quoting DeLancy v. Ins. Co., 52 N.H. 581, 587–88 (1873)).

[174] *Id.* (quoting *DeLancy*, 52 N.H. at 588).

[175] *See, e.g.*, Swedloff, *supra* note 13, at 764 ("[L]iability insurance will not remove the most significant deterrence signal—the threat of criminal sanctions."); Knutsen, *supra* note 65, at 241 ("[T]he threat of losing liability insurance protection pales in comparison to the threats possible under civil or criminal law for the same conduct. For example, few criminals would say they were deterred from the crime due to fears of losing liability insurance coverage. If fears of going to jail or of harming others do not deter the conduct, how can liability coverage concerns do the same?").

[176] *See, e.g.*, Swedloff, *supra* note 13, at 764 ("Most intentional torts are also criminal acts, with corresponding criminal punishments . . . ."); MISSISSIPPI LAW OF TORTS § 2:25 (2d ed. 2022), Westlaw ("Acts which constitute crimes against the person or property of another person may also constitute intentional torts against that person.").

[177] *See* GA. CODE ANN. § 16-5-41 (2022) (one to ten years); N.Y. PENAL LAW §§ 70.00(2)(e), 135.10 (McKinney 2022) (designating first degree unlawful imprisonment as a Class E felony with the prison sentence not to "exceed four years"); COLO. REV. STAT.

punishable by up to twenty-five years in prison.[178] Sexual assault, which is covered by Sexual Misconduct Insurance policies or endorsements, is a felony punishable by up to ten years in prison in some states.[179]

So, there are ample criminal liability deterrents to disincentivize people from intentionally harming other people. If ten to twenty-five years in prison will not deter someone from harming other people, is it reasonable to believe that the risk of losing liability insurance coverage for the parallel civil liabilities associated with the injuries will deter the person? What good would the avoidance of financial liability for the misconduct do an insured if the insured will be in jail for decades?

In addition, the misconduct giving rise to the injuries to the innocent victims also creates a risk of physical harm to the insured as well in many situations, so self-preservation is also a deterrent to the misconduct. For example, driving drunk creates a risk of injury not only to the public, but also to the insured drunk driver. So too does intentionally causing a car crash while driving when sober. Consequently, one would expect that self-preservation and the avoidance of suffering severe bodily injuries with the accompanying pain and suffering, or potentially even death, would serve as ample deterrents to intentionally crashing. Certainly, avoiding death or self-inflicted harm is a better deterrent to intentionally crashing than is losing one's liability insurance to cover the victim's injuries.

VII. SHIFTING THE PARADIGM TO A DEFAULT RULE THAT PRESUMES INTENTIONAL TORTS ARE INSURABLE AND GRANTS INSURERS LIMITED SUBROGATION RIGHTS AGAINST THEIR INSUREDS

If the conventional wisdom that liabilities for intentional torts are not allowed to be insured is not well-founded and should be rejected, what should the rule be regarding the insurability of intentional tort liabilities? The default rule should be that injuries to third parties intentionally caused by insureds that are expressly covered by liability insurance presumptively are covered unless there is a compelling reason why the type of intentional tort at issue should be deemed uninsurable.

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§§ 18-1.3-401, 18-3-303 (2022) (designating certain false imprisonments as Class 5 felonies with a prison term of one to three years).

[178] *See* 18 U.S.C. § 1348(2) (allowing up to twenty-five years' imprisonment); 70 PA. STAT. AND CONS. STAT. ANN. § 1-511 (West 2022) (allowing up to twenty years' imprisonment); CAL. CORP. CODE § 25540(b) (West 2022) (allowing two to five years' imprisonment).

[179] *See* 18 PA. STAT. AND CONS. STAT. ANN. § 3124.1 (West 2022) (noting that sexual assault is a felony of the second degree); Commonwealth v. Smith, 863 A.2d 1172, 1174 (Pa. Super. Ct. 2004) (holding a sentence of up to ten years for sexual assault is appropriate under Pennsylvania sentencing guidelines); CAL. PENAL CODE § 243.4 (West 2022) (allowing up to four years' imprisonment).

Freedom of contract and the compensation of innocent tort victims simply outweigh the theoretical, but empirically unsupported, premise that disallowing liability insurance for intentional torts effectively deters and punishes intentional tortfeasors. Leaving innocent tort victims uncompensated for their injuries and allowing insurers to retain unearned premiums for policies that provide illusory coverage is not appropriate in the absence of empirical evidence to support such a rule. Further, the theoretical justification for the rule is actually counterintuitive when scrutinized. Consequently, the default rule should be that liability insurance that expressly covers intentional torts is presumed to be valid unless there is a compelling reason why the specific type of intentional tort at issue should be deemed uninsurable.

The determination of which types of intentional torts can overcome the rebuttable presumption of insurability would need to be made on a tort-by-tort basis. Challenges to the insurability of many, if not most, intentional torts, however, should be rejected. Indeed, although liability for some intentional torts, such as intentionally killing someone, might appear to cross the reprehensibility line so far that one would think the presumption in favor of insurability would be overcome, such an outcome may not be so clear when the scenario is actually scrutinized.[180]

Even in the case of murder, one still must consider what the consequences would be for the victim and the victim's family if a liability insurance recovery were disallowed. Assuming the killer is judgment-proof, is the desire to ensure that absolutely no benefit inures to the killer so great that it is better that the innocent victim and the victim's family should suffer the loss of life and income with no compensation for their losses? Such a result would only compound the victim's and the victim's family's loss—a loved one would be forever lost and the family also would suffer, without compensation, the financial loss of services and income that would have been provided by the murdered victim if the person had not been killed. How is that a just result?

Stated differently, it seems incongruous that a family can recover insurance proceeds from an insured's liability insurer when an insured accidentally crashes a car and kills someone, but the family of an intentional vehicular homicide victim would receive nothing. Both families suffered the same losses. Indeed, one could argue the family of the murder victim is even more deserving of compensation because the murderer is much more culpable than a negligent person who accidentally kills someone in a car accident.

One way to reconcile the competing public policies and to avoid the unfair outcome where the victims of intentional torts and their families recover nothing

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[180] Of course, insurers are not required to sell liability policies that cover the liabilities of their insureds for intentionally killing people. Indeed, the author is unaware of any liability policies that expressly cover liability for intentionally killing someone. Considering such an extreme scenario helps illustrate, however, the difficulty in weighing the competing public policies to determine where the line should be drawn between insurable and uninsurable liabilities.

while the victims of accidental torts and their families are compensated with insurance proceeds for their losses would be to allow liability insurance to cover the losses but create subrogation rights for insurers against their insureds for the amounts the insurers pay for intentional tort injuries caused directly, as opposed to indirectly, by their insureds. Under this approach, an insurer would not have a subrogation right against its insured where the insured is only liable for an intentional tortfeasor's conduct because the insured negligently hired or employed the intentional tortfeasor or because the insured is vicariously liable for the intentional tort claim.[181]

The intentional tort victim and the victim's family could recover from the insured's liability insurer and the insurer could then pursue subrogation from the intentional tortfeasor to the extent the intentional tortfeasor has any assets to pursue.[182] The net result would be that the intentional tort victim and the victim's family would be compensated for their losses and the intentional tortfeasor ultimately would be financially responsible to the extent of his assets for the injuries he causes.[183] This proposed subrogation right would not apply to liabilities imposed vicariously on insureds or where an insured indirectly caused the injury (e.g., due to the negligent hiring or supervision of an employee who commits an intentional tort) because the culpability of the insured in such circumstances does not rise to a level that warrants insurance forfeiture in the same way that willful, intentional misconduct does.[184]

Normally, insurers do not have subrogation rights against their own insureds because subrogation would defeat the indemnity purpose of insurance—transferring financial responsibility for losses from insureds to insurers.[185]

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[181] *See, e.g.*, Ambassador Ins. Co. v. Montes, 388 A.2d 603, 606 (N.J. 1978) (allowing insurance to cover deaths caused by arson but granting insurer subrogation rights against the insured, and reasoning that, "[i]n subrogating the insurer to the injured person's rights so that the insurer may be reimbursed for its payment of the insured's debt to the injured person, the public policy principle to which we adhere, that the assured may not be relieved of financial responsibility arising out of his criminal act, is honored"); TOM BAKER & KYLE D. LOGUE, INSURANCE LAW AND POLICY: CASES AND MATERIALS 389 (3d ed. 2013) (discussing *Ambassador* and stating that "when the victim, not the insured, benefits, and the insurance company is permitted to subrogate against the insured, it is difficult to see how a moral hazard is created"); H. 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, 155–57 (1979) (discussing the *Ambassador* case); Swedloff, *supra* note 13, at 765 ("[A]llowing an insurer to subrogate the claim of the third party against its own insured would provide necessary compensation to the victim and deterrence signals to the insured (when possible).").

[182] Swedloff, *supra* note 13, at 765–66.

[183] *Id.* at 765.

[184] *See, e.g.*, City of Johnstown v. Bankers Standard Ins. Co., 877 F.2d 1146, 1150 (2d Cir. 1989); U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983).

[185] *See, e.g.*, JERRY & RICHMOND, *supra* note 3, at 574 ("[A]llowing the insurer subrogation against its own insured would allow the insurer to pass the loss from itself to its own insured, thereby avoiding the coverage that the insured purchased."). To address potential arguments by policyholders that granting subrogation rights to insurers against their

There already are exceptions, however, to this general rule, so this proposal would simply be an additional exception. For example, Homeowners Insurance typically requires the insurer to pay off the mortgage if a house covered by insurance is destroyed even if the insured deliberately burned the house down.[186] After paying the mortgage, however, the insurer has a subrogation right against the insured for the payment of the mortgage.[187]

Allowing liability insurance to cover intentional torts but giving the insurer subrogation rights against its insureds for injuries directly caused by the insureds would advance the goal of compensating victims while also acknowledging the goals of punishing and deterring intentional misconduct that underlie the fortuity doctrine and conventional wisdom. Further, granting subrogation rights to insurers for intentional tort liabilities might actually increase the number of intentional tortfeasors who are held financially accountable for their misconduct. This is because plaintiffs' attorneys generally do not pursue tort claims for which no monetary award will be recoverable.[188] Consequently, if liability insurance is not allowed to cover intentional torts, then plaintiffs' attorneys generally will not pursue intentional tort claims against judgment-proof tortfeasors.[189] Thus, where the public policy against allowing insurance to cover intentional torts is embraced, then many, if not most, intentional tortfeasors are not even sued for their misconduct.

If, however, liability insurance can cover intentional torts and insurers were granted subrogation rights against their insureds for intentional tort liabilities the insureds directly cause, then plaintiffs' attorneys would be more interested in pursuing intentional tort claims and insurers similarly would be financially incentivized to attempt to recoup from their intentional tortfeasor insureds the settlement and judgment amounts the insurers pay. Consequently, the number of intentional tortfeasors who actually are held financially accountable for their misconduct should be greater under the default rule proposed in this Article

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insureds for intentional torts that otherwise are covered by the terms of the policies would be inconsistent with the insureds' reasonable expectations of coverage for such claims, the subrogation rights should be explicitly provided in the policy language.

[186] *See, e.g.*, INSURANCE LAW AND PRACTICE: CASES, MATERIALS, AND EXERCISES, *supra* note 44, at 680–83.

[187] *See, e.g.*, Nw. Farm Bureau Ins. Co. v. Althauser, 750 P.2d 1166, 1168 (Or. Ct. App. 1988) (holding the insurer had a subrogation right against its insured after it paid the mortgage on a house destroyed by fire where policy was void due to misrepresentations by insured).

[188] *See, e.g.*, Knutsen, *supra* note 65, at 230 ("Tort suits would not be brought if not for available liability insurance."); Baker, *supra* note 65, at 275 ("[P]ersonal injury lawyers rarely bring a case unless there is an insured defendant . . . ."); Swedloff, *supra* note 13, at 739 ("When tortfeasors lack . . . insurance . . . , the predicted profitability and expected value of a suit go down. This makes it difficult, if not impossible, for lawyers and victims to bring suit and seek financial (or other) remedies through litigation.").

[189] Swedloff, *supra* note 13, at 739.

when accompanied by insurer subrogation rights than in a legal regime where liability insurance is simply not permitted to cover intentional torts.[190]

VIII. CONCLUSION

The public policy against allowing insurance to cover intentional losses covered by first-party insurance (e.g., life insurance and property insurance) makes sense because an insured may be incentivized to cause damage, or even death, due to the prospect of receiving insurance proceeds. There is little empirical or intuitive support, however, for the idea that people are deterred from causing intentional injuries to third parties by not allowing the intentional tortfeasor's liability insurance to cover the injuries caused by the intentional tortfeasor. The more powerful deterrents for preventing people from intentionally causing injuries to third parties are criminal penalties and the risk of injuries or death to the intentional tortfeasors themselves that could result from the misconduct.

On the other hand, allowing liability insurance to cover injuries intentionally caused advances the public policies in favor of enforcing contracts and compensating victims. If a policy's express provisions regarding coverage for intentional torts are not enforced, then insurers receive premium windfalls at the expense of their insureds and the insureds' victims. Insurers charge and accept premiums to cover losses intentionally caused by their insureds. So, if courts refuse to allow the insurance to cover intentional injuries, then insurers are being paid to provide only illusory coverage while most intentional tort victims are left uncompensated for their injuries.

Thus, liability insurance should be allowed to cover injuries intentionally caused by insureds in most circumstances. Victims of intentionally caused injuries should not be left uncompensated when liability insurance has been purchased to cover such injuries and there are other, better ways of deterring the misconduct that leads to injuries. Consequently, contrary to the conventional wisdom, the default rule should be that intentional tort claims that are expressly covered by liability insurance presumptively are covered in the absence of compelling reasons why the specific type of intentional tort at issue should be deemed uninsurable. In addition, under many lines of liability insurance, insurers should be granted subrogation rights against their insureds for liability payments that insurers make due to their insureds' own intentional misconduct that directly causes a victim's injuries.

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[190] Of course, as discussed in Part V, for certain lines of insurance, such as D&O Insurance that is sold specifically because the law recognizes that individual insureds are not expected to financially be able to individually pay for the potential losses they cause, subrogation against the insureds would not be viable because it would defeat the very purpose of the line of insurance.