1-1-1990

The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification

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I. INTRODUCTION

As a general proposition, one who desires indemnification through insurance against a certain type of loss or injury cannot expect to recover the benefit of insurance when he intentionally causes the very loss or injury against which he sought protection. Losses that are consciously and deliberately brought about by the insured appear to be an inappropriate subject for indemnification through insurance. Even where the actual loss sustained exceeds the amount of insurance purchased, thus avoiding a claim of “net gain” to the insured through the intentional act, recovery for losses caused by intentional acts of the insured has traditionally been thought to be inconsistent with public policy. To allow recovery for such losses would encourage conduct which is socially undesirable because it is injurious to others, such as batteries, or simply economically wasteful, such as the destruction of property.
Yet, while the principle of not allowing recovery for losses intentionally caused by the insured is accepted by the courts as a basic principle, it is done so with difficulty and with occasional diffidence. This attitude by the courts seems ironic given the proclaimed strong public policies that gird the principle. As with many basic principles, it is easier to state the concept than apply it in practice or to reconcile the applications.

The first difficulty encountered in applying any insurance exclusion for losses caused by intentional acts of the insured is that we must first define how broad or narrow an exclusion we really desire. Most human conduct is volitional and therefore in the broad sense intentional; it is the consequences of that conduct that are unintended and unforeseen and the issue often is which viewpoint will encompass our inquiry. For example, assume an insured intentionally drives her automobile at 70 mph. Because of her excess speed, she is unable to stop before striking a pedestrian. Was the injury the result of intentional act of driving the automobile at an excessive speed? Probably so. Were the injuries intended? Probably not. This distinction illustrates a basic viewpoint found in insurance law; the emphasis is less on the intent to engage in the activity that creates the potential for injury and more on the intent to bring about the consequences of that activity. As a general rule, courts do not allow insurers to avoid coverage where the insured’s conduct, though intentional, was not intended to cause injury. The avoidance of coverage has been generally confined to situations where the insured acted with the actual intent to cause harm.

A second difficulty in assessing the scope of the intentional act exclusion is that a leading public policy justification for its adoption, deterrence of socially proscribed conduct, must now compete with a conflicting policy of compensating persons who have been injured by the insured. While under an ex ante approach the policies of deterrence and compensation do not conflict, ex post they do. Once the injury or loss has been sustained, the advancement of the deterrence interest undermines the compensation interest to the extent that insurance provides the sole or major fund available to secure compensation for the victim of the insured’s act. The goal of deterring the

$100,000, a transaction between a willing buyer and a willing seller serves the economic interests of both and society at large. Both receive fair value. In the arson situation, that is not the case. The insured forces the sale on the unwilling insurer. Indeed, the higher the transaction costs in the willing buyer-willing seller situation, the more desirable is the arson alternative. Thus, if intentional acts, here arson, do not vitiate coverage, the insured seller may realize a better deal for himself if he destroys the property than if he sells it.
insured, and those similarly situated, from engaging in willful misconduct is accomplished by taking away the one source of payment to which the victim can confidently look for payment of her claim. It would be surprising if, as the rule of responsibility for intentionally caused losses and injuries is broadened, the legal system’s attitude toward the availability of insurance were unaffected. Compensation of the insured or the victim of the insured’s misconduct is now frequently intoned as a basic policy of insurance law and this invariably raises conflicts with the competing policies of deterrence or punishment of the insured.

Related to the dominance of the compensatory goal, is the transformation of insurance disputes from primarily first party disputes, i.e., disputes between the insurer and insured over the terms of the insurance contract, to a significant increase of third party disputes involving a claim by the victim against the insurer directly in a direct action jurisdiction or indirectly in a suit against the insured. In these third party actions the court is directly confronted with the reality that a decision that coverage does not exist may leave the victim’s losses uncompensated. In such cases, the compensation policy has led to the denial of defenses the insurer would ordinarily have to a claim asserted against it by the insured. For example, in Barrera v. State Farm Mutual Automobile Ins. Co., the insured had made material misrepresentations on the insurance application which provided the insurer with the affirmative defense of fraud to any action for indemnity under the policy by the insured.

5. See Fageol Truck & Coach Co. v. Pacific Indem. Co., 18 Cal. 2d 748, 751, 117 P.2d 669, 671, (1941) (if semantically possible, the insurance contract will be construed so as to achieve its objective of securing indemnity to the insured for the losses to which the insurance relates).
8. In California, the standard “no action” provision in the insurance policy generally insulates the insurer from suit to enforce the indemnification obligations of the policy until the liability of the insured has been established. See, e.g., Clark v. Bellefonte Ins. Co., 113 Cal. App. 3d 326, 336, 169 Cal. Rptr. 832, 838 (1980). This rule is codified in cases involving liability policies. Cal. Ins. Code § 11580(b)(2) (West 1988).
sured subsequently was involved in an automobile accident with Barrera. Barrera sued the insured who notified State Farm. State Farm then conducted an investigation of its insured's insurability, discovered the misrepresentations, and denied coverage based on fraudulent procurement. Barrera obtained a judgment against the insured and sued State Farm to realize the indemnity obligation. The California Supreme Court held that State Farm's delay in investigating its insured's insurability had caused it to lose its misrepresentation defense. The Supreme Court noted that such a rule was required by the compensatory goal that underlies the Financial Responsibility Law, and outweighed competing public policies such as deterrence.

Conflicts between competing goals are hardly limited to this particular area of insurance law. Yet, the competing goals involve an issue that is of critical importance to claimants, insureds and insurers. Expansion of tort liability has operated to increase the number of occasions where the intentional act exclusion comes into play. Sexual misconduct torts, discrimination and civil rights actions, bad faith claims have all become more visible and, it appears, more

12. Barrera, 71 Cal. 2d 659, 669-70, 456 P.2d 674, 683, 79 Cal. Rptr. 106, 115 (1969) (citations and footnote omitted). Recently, the California Supreme Court upheld the Robbins-McAllister Financial Responsibility Act (CAL. VEH. CODE § 16028 (Supp. 1989)) which requires minimum levels of insurance as a condition to operating a motor vehicle on a public highway. See King v. Meese, 43 Cal. 3d 1217, 743 P.2d 889, 240 Cal. Rptr. 829 (1988). Some jurisdictions have read the compensatory goal behind mandatory insurance programs as being so strong as to negate contractual exclusions for losses caused by intentional acts. See, e.g., State Farm Fire & Casualty Co. v. Tringali, 686 F.2d 821 (9th Cir. 1982) (applying law of Hawaii); but see Allstate Ins. Co. v. Malec, 104 N.J. 1, 514 A.2d 832 (1985). Whether Tringali would be followed in California is unclear. As Malec evidences not all jurisdictions find its reasoning persuasive. Moreover, it should be noted that the goal of deterrence was not completely abrogated. As discussed at infra text and accompanying notes 58-61, the insurer may be subrogated to rights of the victims against the putative insureds, or the insurer may have direct actions against its putative insured for deceit or breach of the implied covenant of good faith and fair dealing. See Handel Co. v. United States Fidelity & Guar. Co., 192 Cal. App. 3d 684, 237 Cal. Rptr. 667 (1987).
13. See infra notes 148-66 and accompanying text.
frequent visitors to the landscape of litigation. The demise of common law immunities has further tended to increase the number of intentional tort claims. The increased frequency of the assertion of claims for intentionally brought about losses, coupled with the increased availability of insurance for misconduct by homeowners, municipalities, and businesses, has led to a significant increase in the importance of the intentional act exclusion of insurance coverage.

The central theme addressed in this article is that the application of the intentional act exclusion by lower courts has been divorced from the policy articulated by the California Supreme Court as underlying the exclusion. The need to reconcile the often competing goals of deterrence and compensation, both of which clearly underlie the proper application of the intentional act exclusion, are in many instances ignored by courts in favor of an ad hoc retributivist approach that is not in keeping with the rules and principles governing insurance contracts. The result has been the development of a patchwork of decisions that in many important areas are not helpful in predicting how the court will resolve the question of the application of an intentional act exclusion to a particular loss, and in those cases where guidance is provided, such as punitive damages awards against an insured, the guidance provided is flawed and incorrect.

The approach taken in this article is to discuss these issues in the context of specific aspects of the application of the intentional act exclusion. Because insurance law is an area of some uniqueness, Section II contains a brief overview of the general judicial approach toward resolving questions of insurance coverage. An understanding of this approach is necessary in order to better appreciate the context in which the intentional act exclusion is construed. Readers familiar with these principles may move directly to Section III.

Section III of this article examines both the California statutory intentional act exclusion and the contractual exclusion clauses found in many insurance policies. The California Supreme Court has articulated substantially similar legal definitions of the statutory exclusion and the standard policy exclusion. In each instance the court has


16. Spousal and family immunities had likely foreclosed many intentional tort claims. It seems there is much truth to the old adage "you only hurt the one you love." Common law immunities allowed the hurt to go uncompensated. Love truly meant never having to say you're sorry.
emphasized the need to show that the particular "loss" was deliberately intended or designed by the insured in order for the loss to be excluded from coverage. Unfortunately, lower courts, and on occasion the California Supreme Court, have failed to appreciate the full significance of that fact and thus have prevented the exclusion from receiving a principled, consistent application. Section IV addresses the issue of the "intent" necessary to invoke the intentional act exclusion. While the "deliberate intent or design" test would suggest a true intent, i.e., subjective intent requirement, California's courts have opted for ad hoc approaches that, as applied, often act to abrogate the role of the insured's actual intent in the determination of whether the insured intended to cause the loss. This result is again at odds with the articulated standard of "deliberate intent or design" adopted by the California Supreme Court.

Finally, in Section V, this article analyzes the special problem raised by the intentional act exclusion and the issue of coverage for punitive damages awards and penalties imposed against an insured. Here again, courts, including the California Supreme Court, have not been faithful to the "deliberateness" standard rather, they have adopted an expansive rule of no coverage even though the punitive damages and/or penalty may have been based on conduct that was merely negligent or reckless but not intentional in the sense of being deliberative.

II. The Judicial Approach Toward Construing Insurance Contracts

A. General Rules Governing the Construction of Insurance Contracts

Insurance companies do not deal with their clients and customers on the same footing as do many other business entities. The insurance business is judicially characterized as "quasi public" and the relationship between the insurer and the insured is deemed fiduciary in nature. This means that the rights and obligations of the insurer are not determined solely on the basis of rules applied to private contracts negotiated by individual parties of presumed relatively

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17. See infra notes 65-68, 97-99 and accompanying text.
equal bargaining strength.

This special position of insurance companies has led to the development of a laundry list of rules that, individually and collectively, tend to resolve doubts over the scope of coverage in favor of providing indemnification for losses.19 The insurance contract is frequently identified as a contract of adhesion.20 Courts are instructed to construe the insurance contract as a whole and attempt to give meaning and effect to all words and phrases of the contract but where two interpretations equally fair may be made, that which affords the greatest measure of protection to the insured should prevail.21 Any “ambiguity” or “uncertainty” in an insurance policy is to be resolved against the insurer.22 Insurance contract provisions providing coverage will be construed liberally whereas provisions restricting or limiting coverage will be construed narrowly.23 The common, popular and ordinary meaning of words is preferred24 and the terms of the insurance contract are to be construed in accordance with the reasonable understanding of a lay person.25 Finally, if se-

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22. Reserve Ins. Co. v. Pisciotta, 30 Cal. 3d 800, 807, 640 P.2d 764, 768, 180 Cal. Rptr. 628, 632 (1982). This is known as the doctrine of contra proferentum. Holtz Rubber Co. v. American Star Ins. Co., 14 Cal. 3d 45, 55, 533 P.2d 1055, 1060, 120 Cal. Rptr. 415, 420 (1975). “Ambiguity” is one of the slippery words in the law. Much like other loaded words, such as “due process,” “negligence,” “obscenity,” etc., the term has a core meaning that is generally understood. However, it is exceptionally difficult to state rules that control the correct application of the concept in particular cases. “Ambiguity” determinations appear to be a mechanism that allows courts to adjust the insurer-insured relationship based on the court’s sense of fairness. Cf. Garcia v. Trans Pac. Life Ins. Co., 156 Cal. App. 3d 900, 904, n.1, 203 Cal. Rptr. 325, 328, n.1 (1984) (the fact that the policy had a very low premium influenced the court to find for the insurer on the ground that the term was not ambiguous).


25. This is known as the doctrine of reasonable expectations. Many California cases apply some form of the doctrine of reasonable expectations. The most recent cases refer to the reasonable expectations of the insured. See White v. Western Title Ins. Co., 40 Cal. 3d 870, 881, 710 P.2d 309, 313-14, 221 Cal. Rptr. 509, 513-14 (1985) (title insurance); Garcia v.
mantly possible, the insurance contract will be construed so as to achieve its objective of securing indemnity to the insured for the losses to which the insurance relates. Although the above rules


It is unclear whether California recognizes the application of the doctrine of reasonable expectations to determine the meaning of a disputed contract term in the absence of a finding that the term is ambiguous. In one decision the California Supreme Court did expressly tie the doctrine of reasonable expectations to a finding of ambiguity:

It is a basic principle of insurance contract interpretation that doubts, uncertainties and ambiguities arising out of policy language ordinarily should be resolved in favor of the insured in order to protect his reasonable expectation of coverage.

Producers Dairy Delivery Co. v. Sentry Ins. Co., 41 Cal. 3d 903, 911, 718 P.2d 920, 924, 226 Cal. Rptr. 558, 562 (1986). As so defined and limited the doctrine of reasonable expectations is simply one additional rule for construing policy language to determine if it is susceptible to a pro-coverage construction that would favor the insured. On the other hand, the Supreme Court did suggest in Wint v. Fidelity & Casualty Co., 9 Cal. 3d 257, 507 P.2d 1383, 107 Cal. Rptr. 175 (1973), that the doctrine of reasonable expectations operates independently of a finding of ambiguity where there was affirmative misdirection of the insured by the insurer: "Under the circumstances, there being no ambiguity with respect to the exclusion of activities relating to farming, it remains only for us to determine if under the language of the policy the insurer has led the insured reasonably to believe that a defense would be provided." Id. at 264, 507 P.2d at 1388, 107 Cal. Rptr. at 180; see also Garcia, 36 Cal. 3d at 438, 682 P.2d at 1106, 204 Cal. Rptr. at 441. Several recent court of appeal decisions have, albeit against the general trend of decisions after Producers Dairy, applied the doctrine of reasonable expectations absent a finding of ambiguity. See Colokathis v. Hartford Accident & Indem. Co., 199 Cal. App. 3d 264, 244 Cal. Rptr. 779 (1988) (review denied but opinion ordered not to be officially published by Cal. Sup. Ct. on May 19, 1988 pursuant to Rule 976, Cal. R. of Ct.); Hurd v. Republic Ins., 113 Cal. App. 3d 250, 169 Cal. Rptr. 675 (1981). In Colokathis, the Court applied the doctrine for otherwise the insurance policy would have had no economic utility. In Hurd, the limitation was not conspicuous and thus was not allowed to defeat expectations of coverage otherwise created. Notwithstanding the language in Producers Dairy, the matter appears to be open.

The California Supreme Court's decertification policy has not helped to clarify the situation. Recently, the Ninth Circuit rejected the argument that the doctrine of reasonable expectations is necessarily limited to situations where there is an ambiguity. See Northern Assurance Co. of Am. v. Carr, 860 F.2d 934 (9th Cir. 1988) (Producers Dairy not applicable where exclusion was unambiguous but inconspicuous).

have analogies that are applied to contracts in general, and notwithstanding some conflicting rules, these pro-coverage rules are applied with special fervor and determination in the insurance context.

This pro-coverage bias is perhaps best evidenced by the judicial approach to construction of the “take away” provisions of the insurance policy. Insurance policies have a common structure. Insurance policies first define the scope of coverage. Thereafter, the insurance policy invariably contains the “take-aways.” These are commonly referred to as exclusions.

For an exclusion to be enforceable against the insured certain requirements must be met. Most importantly, an exclusion must be conspicuous, plain and clear. The insurer bears a heavy burden to draft exclusionary clauses in clear language comprehensible to lay persons.

661, 669 (1941).

27. Thus, the rule of construction against the policy drafter/insurer (contra proferendum) parallels the general rule that in “cases of uncertainty . . . the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.” CAL. CIV. CODE § 1654 (West 1985); 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, CONTRACTS §§ 698-704 (9th ed. 1987). Similarly, the doctrine of reasonable expectations parallels general rules of contract interpretation that: (1) look to the circumstances under which the contract was made (CAL. CIV. CODE § 1647 (West 1985); 1 B. WITKIN, supra § 688); (2) seek to give effect to the mutual intention of the parties (CAL. CIV. CODE § 1636 (West 1985), 1 B. WITKIN, supra § 684: “If it is shown that the words were used to conceal rather than to express the true intent of the parties, the court will look through the form to the substance’); and (3) endeavor to give the contract a reasonable construction (CAL. CIV. CODE §§ 1643, 3541 (West 1985)).

28. There are always counter-reformation rules. See, e.g., Reserve Ins. Co. v. Pisciotta, 30 Cal. 3d 800, 807, 640 P.2d 764, 768, 180 Cal. Rptr. 628, 632 (1982) (‘[T]he contract term is not ambiguous when its meaning is plain and susceptible of only one construction. In such circumstances the contract term must be construed consistent with that meaning unless some other rule requires otherwise’); Continental Casualty Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 432, 296 P.2d 801, 806 (1956) (except as otherwise required by statute, the insurer has the right to limit the coverage of a policy issued by it and, when it has done so, the plain language of the contract limitation must be respected).

29. The term “exclusion” is technically imprecise but courts generally do not examine the nuance of the distinction between conditions precedent to coverage and provisions taking away coverage.


31. Stewart v. Estate of Bohnert, 101 Cal. App. 3d 978, 162 Cal. Rptr. 126 (1980): The provisions and exceptions in an insurance policy must be strictly construed against the insurer, who is bound to use language clear to the ordinary mind. If the insurer would create an exception to the general import of the principal coverage clauses, the exception must be phrased in clear and unmistakable language. Where a policy contains a sea of print defining the promised benefits, an exclusionary clause incidentally inserted in the policy merely creates an ambigu-
These rules evidence a favoritism toward a particular class of litigants, here insureds, that is not seen on a sustained basis in most areas of the law. While the limits of these rules remain untested in California, there clearly exists a body of rules, biased in favor of insureds, which are consistently applied to sustain a finding that the loss is covered. Moreover, these "rules" are flexible enough to require, as a foundation for application, little more than an ability by the insured to make a plausible claim that the loss should be deemed covered by the insurance contract, regardless of whether the loss was deliberately or accidentally brought about.

Id. at 988, 162 Cal. Rptr. at 130 (citations omitted). See also Migliore v. Sheet Metal Workers' Welfare Plan, 18 Cal. App. 3d 201, 204, 95 Cal. Rptr. 669, 671 (1971).


We glean from Steven and its progeny (Steven v. Fidelity & Casualty Co., 58 Cal. 2d 862, 27 Cal. Rptr. 172 (1962); Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 54 Cal. Rptr. 104 (1966); Young v. Metropolitan Life Ins. Co., 272 Cal. App. 2d 453, 77 Cal. Rptr. 382 (1969)) a general principle of public policy as follows: In the case of standardized insurance contracts, exceptions and limitations on coverage that the insured could reasonably expect, must be called to his attention, clearly and plainly, before the exclusions will be interpreted to relieve the insurer of liability or performance.

Logan, 41 Cal. App. 3d at 995, 116 Cal. Rptr. at 532 (footnote omitted). Relying on Logan, the court in Underwriters Ins. Co. v. Purdie, 145 Cal. App. 3d 57, 193 Cal. Rptr. 248 (1983) stated that the traditional rule is suspect and not in harmony with today's law governing exclusions in insurance contracts. Id. at 65, 193 Cal. Rptr. at 252. The court held: "We conclude, therefore, the mere receipt of the insurance policy in this case, which is shown by substantial evidence, does not serve to charge the insured with constructive knowledge of the firearm exclusion." Id. at 65, 193 Cal. Rptr. at 252-53. However, in a recent case where the court refused to apply an exclusion from coverage that had not been pointed out to the insured, Aetna Casualty & Sur. Co. v. Velasco, 194 Cal. App. 3d 1441, 240 Cal. Rptr. 290 (1987), the Supreme Court ordered the opinion decertified. The difficulty here lies in the conflict between the "duty to point out" rule and the rule that neither the insurer nor its agents have a positive obligation to advise the insured regarding the "best" coverage the insured ought to obtain given the insured's needs and circumstances. Cf. Schultz Steel Co. v. Rowan-Wilson, Inc., 187 Cal. App. 3d 513, 231 Cal. Rptr. 715 (1986) (insurer has no duty to advise); Jones v. Grewe, 189 Cal. App. 3d 950, 234 Cal. Rptr. 717 (1987) (broker has no duty to advise). A fine line exists between advising the insured and pointing out what the policy does and does not cover. The California Supreme Court's decertification policy means that for now that fine line remains blurry.

33. The above is surely not exhaustive of pro-coverage rules applied by California courts. Indeed, almost every area of insurance law enjoys or suffers from, depending on your point of view, pro-coverage rules.
B. Coverage Clauses: Accidents, Occurrences and Intentional Acts

As the preceding section demonstrates, the legal system takes a rather expansive approach toward coverage issues and a rather narrow, at times almost hostile, approach to language in the insurance contract which takes away what an earlier part of the policy gave or seemed to give. This dichotomy is important to resolving coverage questions involving losses caused by intentional acts.

A standard property or liability insurance policy will normally attempt in two ways to avoid coverage for losses caused by intentional acts. The coverage clause will be drafted so as to encompass only unintentional conduct. Thus, an insurance policy may limit coverage for intentional acts by adopting language from the Insurance Service Office's ISO Standard Form which, using “occurrence” as the insured event, defines “occurrence” as an accident which occurs during the policy period resulting in bodily injury or property damage “neither expected nor intended from the standpoint of the insured.” Alternatively, the effort to avoid coverage for losses caused by the insured's intentional acts is framed as an exclusion, excluding coverage for injury or loss “expected or intended from the standpoint of the insured.”

An initial question thus becomes whether placement of language seeking to avoid coverage for losses caused by the insured's intentional acts in a coverage clause or as an exclusion is legally significant. Although one California decision suggests that placement is legally irrelevant, case law suggests otherwise. For example, in Gray v. Zurich Insurance Co., the California Supreme Court subjected an exclusion for losses caused by the insured's intentional acts to the rigorous rules applicable to exclusions generally. The policy language in Gray excluded “injury or damage caused intentionally by or at the direction of the insured.” This was deemed to be ambiguous. The court held that the juxtapositioning of the terms “intentional” and “at the direction of” could cause the average insured to believe that the exclusion only applies to “collusive, willful or

34. The Insurance Service Office is a national organization which among other functions uses country-wide loss experience to determine “appropriate” risk classifications and proposes appropriate policy language to capture those desired risk classifications in insurance policies made available to insureds by insurers.


planned actions beyond the notion of intentional tort." Since it was arguable on the facts in Gray that the insured's conduct while intentional was not preconceived in the sense of being premeditated or designed, the exclusion did not apply.

On the other hand, where the insurer places the limitation in the coverage clause, some success in limiting coverage has been obtained. Thus, in St. Paul Fire & Marine Insurance Co. v. Superior Court, the court attached particular significance to the location of the restriction:

Here, the express terms of the policy extend coverage only for claims against the insured "resulting" from an accidental event." In its plain and ordinary sense, "accidental" means "arising from extrinsic causes [,] occurring unexpectedly or by chance [; or] happening without intent or through carelessness." (Webster's Ninth New Collegiate Dict. 49 (1983)). The policy itself states that "the accidental event . . . must be something [the insured] didn't expect or intend to happen.

By framing the issue as one of coverage rather than exclusion, the insurer may hope to avoid the hostile judicial reaction toward exclusions but whether this will succeed in fact or is worth the risk of the limitation on coverage being considered not sufficiently conspicuous is problematic.

37. Id. at 273, 419 P.2d at 174, 54 Cal. Rptr. at 110.
38. Gray is complicated for purposes here because it arose in the context of the defense of the insured, a contractual obligation of the standard liability insurance policy.
40. Id. at 1202, 208 Cal. Rptr. at 7.
41. Id. at 1203 n.1, 208 Cal. Rptr. at 7 n.1. See also Royal Globe Ins. Co. v. Whitaker, 181 Cal. App. 3d 532, 226 Cal. Rptr. 435 (1986);
[H]ere, the insurer only promises to indemnify or defend actions involving bodily injury caused by an accident resulting in bodily injury neither expected nor intended by the insured. It was therefore the appellants' burden to show they came within this definition. All the evidence they have adduced shows the act by their assignor, Knighten, was intentional. An intentional act is not an "accident" within the plain meaning of the word. Id. at 537, 226 Cal. Rptr. at 437-38. Where the exclusion explicitly defines the scope of coverage, there is authority for transferring the burden of disproving the application of the exclusion to the insured. See Zuckerman v. Underwriters at Lloyd's London, 42 Cal. 2d 460, 473, 267 P.2d 777, 784 (1954); but see Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 880, 587 P.2d 1098, 1106, 151 Cal. Rptr. 285, 293 (1978) (Zuckerman not applied where exclusion in question was present with other exclusions).
42. The nuance here is well illustrated by Coastal Plains Feeders, Inc. v. Hartford Fire Ins. Co., 545 F.2d 448 (5th Cir. 1977):
We recognize that there is some Alabama authority for the broad proposition that, where the general liability clause of an insurance policy itself contains an exclusion, the insured bears the burden of pleading and proving that he is not
By combining coverage and exclusion concepts into a unitary clause, the insurer runs the risk that the court may identify the restriction as an exclusion but refuse to enforce or apply it because it is not conspicuous. The argument that the exclusion within the coverage clause is inconspicuous is enhanced if the policy is sold with reference to other materials, such as brochures, which do not adequately disclose the limited coverage, or if the policy is sold in a manner, i.e., by vending machine or through the mail, such that opportunity to obtain the assistance of an agent or broker in explaining the scope and extent of coverage is negated. Moreover, the limitation may not be in the first coverage clause the insured encounters even if


Id. at 451 n.6.


The exclusionary clause in Elite’s policy appears in the second column of two columns of print, approximately one inch below other phrases. The paragraph on exceptions is in no way distinguished from any others in the document. The same type-face is used and the placement of the paragraph in the middle of the document is not likely to attract attention.

[The exclusion clause is open to more than one interpretation and is inconspicuously placed in a standardized contract.

Id. at 752, 161 Cal. Rptr. at 329. See also Northern Assurance Co. of Am. v. Carr, 860 F.2d 934 (9th Cir. 1988) (applying doctrine of reasonable expectations to unambiguous but inconspicuous language in exclusion clause in the insurance policy).

Courts have deemed exclusions to be inconspicuous where they were not in a section labeled exclusions and were placed on an overcrowded page (see Schmidt v. Pacific Mut. Life Ins. Co., 268 Cal. App. 2d 735, 740, 74 Cal. Rptr. 367 (1969) (“dense packing”)), or in a section titled “General Limitations” but again in a “dense pack” format. Ponder v. Blue Cross of S. Cal., 145 Cal. App. 3d 709, 722, 193 Cal. Rptr. 632, 639 (1983).
the insured reads the policy. As noted earlier, it is not uncommon for the insurance policy to use a bifurcated definition of coverage. The initial definition may use the concept of occurrence as the trigger for coverage. "Occurrence" in turn is then defined as an "accident neither expected nor intended from the standpoint of the insured." In such a setting the concept of occurrence may be treated as the coverage clause and the restrictive definition of occurrence as an exclusion.

Where the term "accident" or "occurrence" is treated as the trigger for coverage, courts have applied a most liberal standard. While the term "accident" is generally conceded not to be ambiguous, this is not to say that it has a settled or certain meaning. In Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co., the California Supreme Court acknowledged that "[n]o all-inclusive definition of the word 'accident' can be given." And while two California decisions hold that the term "accident" is ambiguous, that position has consistently been rejected by most California courts.

In California, the term "accident" has been deemed to be the antithesis of an intended act. In Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co., the court defined "accident" as follows:

It has been defined "as 'a casualty—something out of the usual course of events and which happens suddenly and unexpectedly and without design of the person injured.'" It "'includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event.'" "Accident, as a source and cause of damage to property, within the terms of an accident policy, is an unexpected, unforeseen, or undesigned happening or consequences from either a known or an unknown cause."

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44. 51 Cal. 2d 558, 563, 334 P.2d 881, 884 (1959).
49. Id. at 563-64, 334 P.2d at 884 (citation omitted). This is not to suggest that any unintended damage from an intentional act causes the insured's conduct to be deemed "accidental" for purposes of insurance law. Although the line of demarcation cannot be drawn with precision, courts tend to analyze the "act"-"effect" continuum not abstractly but functionally,
Thus, in California the legal definition of "accident" and the standard policy language defining an accident as an "occurrence neither expected nor intended" are synonymous.

Another factor which tends to distance the concept of accident from that of intentional conduct is the time of reference. An accident occurs when the actual injury occurs; not at the time the event which created the potential for future injury occurs. The decision to take certain action or engage in certain activity is ordinarily volitional, intentional conduct. One may intentionally act in a way that fails to evidence a proper appreciation of the risks involved to oneself or to others. If this was the central focus of inquiry it would be analytically more difficult to avoid characterizing such conduct as "intentional." By focusing on the injurious event, emphasis is placed on the foreseeability of the loss rather than the intent to do the act that creates the potential for loss. Consequently, an intentional act is conduct or activity in which one engages knowing or intending that an injury will occur.

A significant, albeit imprecise, divide separates accidents from intentional acts in the standard insurance policy. The coverage clause, subject to all the pro-coverage, pro-insured rules identified earlier, is framed by reference to the injurious event. The initial... particularly with respect to the nature of the "risk" assumed by the insurer. See Meyer v. Pacific Employers Ins. Co., 233 Cal. App. 2d 321, 327-28, 43 Cal. Rptr. 542, 547 (1965) in which the court stated:

A policy of insurance should not be so interpreted as to remove from the coverage a risk against which the circumstances under which and the purposes for which the policy was written indicate the insured intended to protect himself. . . . The insured knew and presumptively the insurer knew that in the drilling of water wells vibrations are set up in the surrounding soil and both parties knew that there was a risk that it was possible that such vibrations might cause damage to others. Certainly this risk was one clearly within the contemplation of the parties and the fact that the vibrations were intentionally caused and that they might possibly cause damage did not make the damage, if it occurred, intentional damage or an expected and therefore nonaccidental consequence of the insured's operation of its business.


51. If the coverage clause simply speaks to an "occurrence" as the insured event, then coverage may extend both to the event creating the potential for future injury and the injurious event. See Insurance Co. of N. Am. v. Sam Harris Constr. Co., 22 Cal. 3d 409, 413, 583 P.2d 1335, 1337, 149 Cal. Rptr. 292, 294 (1978).

52. The event may be defined by reference to its inherent characteristic (e.g., death), or as is most commonly the case in property and liability policies, by reference to how it came about (e.g., loss by fire but not by windstorm). Thus, in many cases, coverage claims are framed by causation rules, which also carry a pro-coverage orientation. See generally Brewer, Concurrent Causation in Insurance Contracts, 59 Mich. L. Rev. 1141 (1961); see Houser &...
focus is on whether the insured's loss is a covered event, as defined by the coverage clause. If it is a covered event, then the focus shifts to the "take-away" provisions, which are subject to the rules of restrictive application noted earlier. Moreover, in assessing the scope of the exclusion for intentional acts, emphasis is not on the intent to do the act that resulted in the loss but on the intent to realize the actual consequences of the act or knowledge that the activity engaged in will lead to the realization of the loss actually incurred. The different approaches to identifying the requisite degree and kind of intent or knowledge necessary to trigger the intentional act exclusion is the focus of this article.

III. THE EXCLUSION OF INTENTIONAL ACTS OF THE INSURED FROM COVERAGE

As a general rule insurance policies attempt to exclude coverage for losses caused by the intentional acts of the insured. In California the exclusion is accomplished either by language in the policy or by reliance on Insurance Code section 533 which exonerates insurers of losses caused by the willful act of the insured, or both. As a part of the Insurance Code, section 533 is incorporated into every insurance contract. Consequently, the resolution of the issue of the insurer's exoneration because the loss was allegedly due to the insured's intentional act requires the analysis of both Insurance Code section 533 and the insurance policy's express language limiting policy liability for intentional act.

A. The Statutory Exclusion

California Insurance Code section 533 states a general exclusion for losses caused by the willful acts of the insured. The statute is


53. See e.g., Cal. Ins. Code § 533 (West 1972): "An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." See also Cal. Civ. Code § 1668 (West 1972): "Certain contracts unlawful. All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his 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."

based on the stated public policy objectives of (1) prohibiting indemnification for intentional misconduct, and (2) preventing the encouragement of willful tortious acts. If the insured is able to shift the cost of his willful misconduct from himself to his insurer, the insured might be less inclined to avoid engaging in such undesirable conduct. Moreover, to the extent tort law retains vestiges of retribution or punishment of the tortfeasor as end purposes, indemnification is thought to interfere with the achievement of those goals. The "no indemnification" policy is predicated on the desire to deny any economic benefit to the insured whose intentional misconduct causes a loss.

In this context, however, the policy objective and the settings in which the exclusion for intentional acts arise do not coincide, resulting in a mismatch between objectives and result. To equate the intentional act exclusion with the purpose of denying "benefits" to wrongdoers is to render it essentially superfluous. The practice of denying wrongdoers the fruits of their wrongs is well-recognized in law. More importantly, the "no indemnification" policy rests on the erroneous assumption that payment in these cases benefits the insured. The reality is otherwise. An insurer who pays a claim brought about by the intentional misconduct of the insured should be subrogated to the rights of the claimant against the insured. Thus,


57. This is often referred to as "moral hazard," a problem endemic to insurance law. See generally KEETON & WIDISS, supra note 1, § 6.6(e)(3).

58. See generally A. DENNING, THE CHANGING LAW (1953): "Underlying all the law of restitution is the conception that no one should unjustly enrich himself at the expense of his neighbour." Id. at 53, quoted in G. PALMER, THE LAW OF RESTITUTION § 1.1, at 5 n.16 (1978).

59. Subrogation applies where one who is not a volunteer pays a debt for which another is primarily responsible and which in equity and good conscience should be borne by the debtor. See Offer v. Superior Court, 194 Cal. 114, 119-20, 228 P. 11, 13 (1924).

There is an often-applied rule that an insurer cannot be subrogated to a claim against its own insured as would be the case if the insurer is subrogated to the rights of the victim, a third-party claimant against the insured. See 16 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 61:133 (rev. 2d ed. 1983). Where, however, the payment is caused by the intentional misconduct of the insured, authority exists for allowing subrogation by the insurer against its insured. The theory here is that while subrogation normally only arises with respect to the rights of the insured against third persons to whom the insurer owes no duty, where the insured's conduct is such as to allow for rescission of the insurance contract, as between insurer and "putative" insured, no duty exists. See Frank Briscoe Co. v. Georgia Sprinklers Co., 713 F.2d 1500 (11th
a solvent insured could not “benefit” by the payment of the claim. Any payment under the policy would go to the victim with the insurer in turn subrogated to the victim’s claim against the insured to the amount of the payment. If the insured is insolvent the “benefit” argument becomes a makeweight.

There are, of course, limitations on the insurer’s right of subrogation and rules affecting the subrogated insurer’s priority vis-a-vis claims of other creditors of the insured, including the injured parties, to full payment of their claims against the insured. These variables will affect the benefit calculation. It is unnecessary to engage in a discussion of subrogation rules or to consider how these concepts would apply to the case of the insurer asserting a subrogated claim against its insured. It is sufficient to note that since the normal rule of no subrogation against the insured can be disregarded in this context, the essential premise that the intentional act exclusion must always be enforced to prevent the wrongful benefiting of the insured is erroneous.

Cir. 1983). Hence, when the insurer pays the claim of the victim of the “putative” insured’s misdeeds, the insurer is subrogated to that victim’s claim against the “putative” insured. See Ambassador Ins. Co. v. Montes, 76 N.J. 477, 388 A.2d 603 (1978) (deliberate arson fire resulting in unintended loss of life); see also Note, Conflicts Regarding the “No Subrogation Against The Insured” Rule, 29 Drake L. Rev. 811 (1979-80). Professor Kenneth York suggests that, as a consequence of this rule being adopted insurers ought to focus on the insured’s solvency as an underwriting consideration. Clearly, to the extent deterrence values do underlie the intentional act exclusion they would be enhanced if the fiscal impact of an insured’s intentional misconduct were actually visited on the insured.

60. The most prominent limitation is that the insurance contract may, by its terms, limit subrogation. See generally Kimball & Davis, The Extension of Insurance Subrogation, 60 Mich. L. Rev. 841 (1962). Subrogation may also be limited by equating it with an impermissible assignment of personal injury claims. Cf. Fifield Manor v. Finston, 54 Cal. 2d 632, 354 P.2d 1073, 7 Cal. Rptr. 377 (1960) (no subrogation to personal injury claim). Fifield obviously limits many subrogation actions that could be brought since many victims of intentional misconduct possess purely personal injury claims. In such cases, the insurer may eschew subrogation and rely on unjust enrichment of the insured. See, e.g., Kossian v. American Nat’l Ins. Co., 254 Cal. App. 2d 647, 62 Cal. Rptr. 225 (1967).


The assumption that the intentional act exclusion is needed to prevent all insureds from reaping windfalls from any insurer is incorrect. Application of the exclusion as a bar to coverage in many instances simply punishes the victim for the misconduct of the insured. The punishment rationale assumes too much. The primary objective that an intentional act exclusion can legitimately serve is one of deterrence and, perhaps incidentally, cost containment since it allows insurers to avoid those costs associated with subrogation actions that would be brought against solvent insureds. A punishment goal does underlie the intentional act exclusion but it is a more limited goal of placing ultimate responsibility for the loss with solvent insureds, rather than the broad "no benefit" rationale. The law's compensation goal is furthered by providing the victim of the insured's misconduct with the insurance proceeds. The punishment goal is vindicated by permitting the insurer to recover its outlay from its solvent insured. Since it is only in this latter setting that punishment has any real meaning, it should be confined to that situation.

Countermanding the policies of deterrence, punishment and cost-containment underlying Insurance Code section 533 is the general pro-coverage orientation of the courts and the desire that third party victims of the insured's misconduct be compensated for their losses. This has led to a restrictive gloss being placed on the statute in two recent decisions. In *Peterson v. Superior Court*, the California Supreme Court stated that Insurance Code section 533's concept of a willful act does not extend to an act "performed without intent to harm . . . [but which] nevertheless result[s] in injury and possible exposure to punitive damages because it was done with conscious disregard for the rights or safety of others." In *Clemmer v. Hartford Insurance Co.*, the California Supreme Court referred to and approved a "clear line of authority in [California] to the effect that even an act which is 'intentional' or 'willful within the meaning of traditional tort principles will not exonerate the insurer from liabil-

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63. There are, of course, situations where insureds seek to avail themselves or others of the benefits of insurance by intentionally seeking to bring about a "covered" loss. An arson fire or suicide are two obvious examples. These situations are invariably limited to first party transactions between insured and insurer. In such cases the compensation policy noted earlier may have less importance than in the third party transaction where the insured has inflicted injury on a third person and both the third person and the insured look to the insurer for compensation to cover the loss.

64. See *supra* notes 6-12 and accompanying text.

65. 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982).

66. *Id.* at 159, 642 P.2d at 1311, 181 Cal. Rptr. at 790.

ity under Insurance Code section 533 unless it is done with a 'preconceived design to inflict injury.'

The basis in precedent for this judicial gloss may be questioned. The "preconceived injury" language flows from a view of Insurance Code section 533 apparently first espoused in Nuffer v. Insurance Co. of North America. In Nuffer the court treated the statutory exclusion for willful acts as if it were a contractual exclusion and consequently applied the restrictive rules applicable to insurance policy exclusion, most importantly the rule of contra proferentum. Implicit in the Nuffer decision is the finding that the term "willful" as used in Insurance Code section 533 is ambiguous for there must be some flexibility in the language of the exclusion in order to give it a narrow construction. If the language is unambiguous and only one construction of the language is possible there is simply no role for the doctrine of contra proferentum. Ironically, the argument that Insurance Code section 533 is ambiguous was rejected when it was specifically presented in Evans v. Pacific Indemnity Co.

The Nuffer observation that the statutory exclusion (Insurance Code section 533) should be treated merely as a contractual exclusion was accepted without critical analysis by the California Supreme Court in Clemmer v. Hartford Insurance Co. The court's approval of Nuffer was so casual that it ignored the inherent inconsistency between Nuffer's implicit finding that Insurance Code section 533 is ambiguous and the rejection of that position in Evans.

That Insurance Code section 533 should be treated as merely the equivalent of a contractual exclusion and subjected to the same rules that govern the latter is questionable. The reason why contrac-

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68. Id. at 887, 587 P.2d at 1110, 151 Cal. Rptr. at 297.
69. Cf. Hale v. Morgan, 22 Cal. 3d 388, 584 P.2d 512, 149 Cal. Rptr. 375 (1978) ("[I]t is well settled that the terms 'willful' or 'willfully,' when applied in a penal statute, require only that the illegal act or omission occur 'intentionally,' without regard to motive or ignorance of the act's prohibited character.") But cf. text and note 202, infra, discussing "malice" element of Insurance code section 533.
70. 236 Cal. App. 2d 349, 45 Cal. Rptr. 918 (1965).
71. Id. at 356, 45 Cal. Rptr. at 923.
72. 49 Cal. App. 3d 537, 541, 122 Cal. Rptr. 680, 682 (1975) (Insurance Code section 533 is not ambiguous; "[S]ection 533 . . . reflects the very sound and long lasting policy . . . which disapproves of contracts which directly or indirectly exempt anyone from personal responsibility for his own willful injury to another").
74. The court in Clemmer cited both Nuffer and Evans in support of its treatment of Insurance Code section 533 as merely "the equivalent of an exclusionary or exculpatory clause." Id.
tual exclusions are subjected to rigorous scrutiny is due to the characterization of insurance contracts as being adhesive. The Insurance Code is not, however, a contract. The fact that the Code's provisions are deemed a part of the insurance contract by operation of law hardly supports treating them the same as contract provisions placed in the agreement by the party with superior bargaining power.

Whether a contract is deemed to be adhesive turns on the manner in which the contractual relationship was formed. In the insurance setting, the pro-insured, pro-coverage rules rest on the generally presumed unequal relationship between insurer and insured:

The principle that ambiguities in insurance policies must be strictly construed against the insurer stems primarily from a recognition of the typical relationship between the parties. Ordinarily, a court is faced with a conflict between the purchaser of an insurance contract and the insurance carrier. In such cases it is typically the carrier who drafts the insurance contract, unilaterally, and for policy reasons it is held responsible for any ambiguity in the language. And in the typical situation the policy represents a contract of adhesion entered into between the two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs and offered to the weaker party on a "take it or leave it" basis.

The nexus between the identification of insurance contracts as contracts of adhesion and the creation of pro-insured, pro-coverage rules can be seen in those few cases where the facts do not plainly evidence that the case for a contract of adhesion exists. Thus, in Madden v. Kaiser Foundation Hospital, the California Supreme Court held that the special rules of construction applicable to contracts of adhesion did not apply to bar enforcement of an arbitration clause against an employee participant in a health care policy entered into between Kaiser and the Board of Administration of the Public Employees Retirement Plan. In Madden, the insurer succeeded in negating what now appears to be a legal presumption that

76. In many cases, the identity between insurance policies and adhesion contracts is simply stated by the court. See, e.g., Chodos v. Insurance Co. of N. Am., 126 Cal. App. 3d 86, 98, 178 Cal. Rptr. 831, 837-38 (1981) (automobile policy is a contract of adhesion).
78. 17 Cal. 3d 699, 711, 552 P.2d 1178, 1185, 131 Cal. Rptr. 882, 889 (1976).
insurance policies are contracts of adhesion by showing that the parties to the contract were of equal bargaining strength. In *Continental Insurance Co. v. Highland Insurance Co.*, where the dispute was between two insurance companies, the court found it was only just to construe the relevant contractual terms as written. A like result has been achieved in cases where the disputed policy term was drafted or proposed by the insured, thus evidencing that bargaining in fact did exist and undermining the case for the application of the pro-insured, pro-coverage rules. In a case where the insured was represented by a specialized risk manager who was in fact able to "bargain" with the insurer over the terms and conditions of the insurance contract, the pro-insured, pro-coverage rules were not applied.

The driving force between the recognition of pro-insured, pro-coverage rules is the identification of the insurance policy as a contract of adhesion. Should, therefore, the same rules be applied to contract provisions which are not a product of the insurer's advantageous relationship vis-a-vis the insured but rather are a result of the

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79. Conversely the absence of such equality requires the application of the special pro-insured, pro-coverage rules. See *Hannon Eng'g, Inc. v. Reim*, 126 Cal. App. 3d 415, 426, 179 Cal. Rptr. 78, 84 (1981) ("plan was not the product of a term-by-term negotiation between the parties herein. It was established by Hannon . . . for the benefit of the company's salaried employees"); *Beynon v. Garden Grove Medical Group*, 100 Cal. App. 3d 698, 705, 161 Cal. Rptr. 146, 150 (1980) ("no evidence that the agreement was negotiated by parties having a parity of bargaining strength or that plaintiff had a realistic opportunity to bargain"); *Jones v. Crown Life Ins. Co.*, 86 Cal. App. 3d 630, 637-38, 150 Cal. Rptr. 375, 378-79 (1978). In each of these cases the arbitration clause was not enforced.

80. 793 F.2d 225 (9th Cir. 1986).

81. *Id.* at 226 (applying California law).


Here the typical relationship (unequal bargaining strength, use of standardized language by more powerful insurer-draftsman) simply did not exist. Rather, two large corporate entities, each represented by specialized insurance brokers or risk managers, negotiated the terms of the insurance contracts. Neither Truck nor other respondents drafted or controlled the policy language: thus, the reasons for the general rule of construction—"to protect the insured's reasonable expectation of coverage in a situation in which the insurer-draftsman controls the language of the policy"—were non-existent. None of the authorities relied upon by Fibreboard reflects a comparable factual situation where the insured itself drafted or proposed the policy language. Moreover, to the extent that any ambiguity exists, ordinarily it would be interpreted against Fibreboard, the party who caused the uncertainty to exist.

*Id.* at 468, 227 Cal. Rptr. at 206-07 (citations and footnote omitted.)
acts of the legislature? Although one California court when specifically confronted with this issue decided that the pro-insured, pro-coverage rules should be applied, most courts do not, in this context, apply rules of contract interpretation to statutes.

The inappropriateness of applying rules developed to address problems encountered with adhesion contracts to statutes seems so evident that it is difficult to justify the California Supreme Court's implicit approval in Clemmer of that practice in connection with Insurance Code section 533. Of course, a literal application of section 533 would preempt most, if not all, the California Supreme Court had accomplished in whittling down contractual exclusions for losses caused by intentional acts. Any effort to go outside the literal language of section 533, which has existed in essentially the same form since 1872, through the traditional methods of negating literal construction of statutes, such as use of legislative history or committee reports, would be suspect given the absence of source material. Often, however, the absence of an historical record is ignored by courts in favor of contemporary notions of jurisprudence and social policy.

The narrowing down of Insurance Code section 533 must be seen as essentially a pragmatic decision resting on the court's decision to advance basic policies underlying insurance law, such as indemnification and fulfilling the reasonable expectations of the insured. The California Supreme Court's decisions equating "willfulness" with "intent to injure" must be based on Insurance


[A] statutory requirement can hardly be termed a "contract of adhesion," imposed unfairly by the stronger party upon the weaker. Rather, it represents a legislative determination of a reasonable period within which suits must be brought, a careful balancing of the interests of both insurers and insureds. The validity of this statutorily mandated limitation of suit provision has been consistently upheld.

Id. at 23, 444 A.2d at 649 (citations omitted).

87. CAL. INS. CODE § 533 (West 1972).

88. See Farbstein & Stillman, supra note 55.
Code section 533, not on the fiction that a statute is subject to contract rules of construction because it is deemed to be a part of every insurance contract. Unfortunately, the term "willfully" is not defined in the Insurance Code. Interestingly, where the term is defined in another Code\textsuperscript{90} the legislature was careful to note that "willfully" did not include a specific intent to injure.\textsuperscript{90} One can extrapolate from the legislature's actions two mutually exclusive views: (1) the term "willfully" should be consistently construed as not including a specific intent to injure; or (2) in the absence of a specific limitation, as found in Penal Code section 7, the legislature should be presumed to have intended that the term "willfully" include a specific intent to injure. Neither construction appears to have a better intrinsic claim to application than the other; the legislature has failed to point the way, and the court must adopt one construction over the other since both cannot be consistently applied.

In the end, the best claim for the adoption of the "specific intent to injure" requirement is that it is consistent with the general pro-coverage orientation of California Courts in cases involving insurance coverage questions.\textsuperscript{91} And rather than simply resting on rules of contract interpretation applied to adhesion contracts, the basis for the "intent to injure" requirement must rest on the quasi-public nature of the insurance business that demands greater policing of insured-insurer relationships to prevent overreaching and abuse and to insure fulfillment of the basic goal of compensation for losses. It is only when the loss is deliberately brought about by the insured that the compensation goal is overridden by the conflicting goals of punishment, deterrence and cost-containment. It is in this limited situation that the general exclusion found in Insurance Code section 533 should be applied. If the insurer seeks a broader exclusion for intentional, willful acts, it should do so by specific, express language in the insurance policy.\textsuperscript{92}

\textsuperscript{89} CAL. PENAL CODE § 7 (West 1985).
\textsuperscript{90} See infra note 154 and accompanying text; but see supra note 69.
\textsuperscript{91} See supra notes 20-33 and accompanying text. Although this pro-coverage orientation is of long duration, it has never been specifically approved by the Legislature. Interestingly, where the courts have considered this issue in the context of legislative intent, it has only been in the relatively limited context of financial responsibility laws. See, e.g., Barrera v. State Farm Mut. Auto. Ins. Co., 71 Cal. 2d 659, 456 P.2d 674, 79 Cal. Rptr. 106 (1969). Since no specific statute is implicated by the pro-coverage rule, the principle of legislative acquiescence to establish construction probably does not apply. See People v. Hallner, 43 Cal. 2d 715, 277 P.2d 393 (1954); Slocum v. Bear Valley Irrigation Co., 122 Cal. 555, 55 P. 403 (1898).
\textsuperscript{92} Cf. Barrera, 71 Cal. 2d at 668, 456 P.2d at 681-82, 79 Cal. Rptr. at 113-14. It should be noted that in Barrera, the Court relied on the quasi-public nature of the insurance business to justify the use of pro-coverage rules of construction.
B. The Insurance Policy's General Contractual Exclusion

The traditional formulation of the policy exclusion for intentional acts as "injury or damage caused intentionally by or at the direction of the insured" was held in Gray v. Zurich Insurance Co.,\(^9\) to be ambiguous. Relying on the standard rules used to construe exclusions, the court held that the juxtapositioning of the terms "intentional" and "at the direction of" would cause the average insured to believe that the exclusion only applies to "collusive, willful or planned actions beyond the notion of intentional tort."\(^9\)

Most policies today seek to limit coverage for intentional acts by adoption of language from the Insurance Service Office\(^5\) Standard Form which, using "occurrence" as the insured event, defines "occurrence" as an accident which occurs during the policy period resulting in bodily injury or property damage "neither expected nor intended from the standpoint of the insured." Since under the standard ISO language, the perspective from which "expectedness" or "intendedness" is viewed is from the standpoint of the insured, the fact that the resulting consequences were unexpected or unintended insofar as the victim is concerned is not controlling. This perspective constrains coverage significantly. Were the perspective that of the victim, many more acts would be deemed unintentional as few individuals consciously intend their own injury.\(^6\)

A significant limitation on the policy exclusion for intentional acts is the requirement that the insured must intentionally cause injury. Thus, in Meyer v. Pacific Employers Insurance Co.,\(^7\) the insurer was not relieved of its obligation to indemnify its insured for damages resulting from the insured's trespass. During drilling operations by the insured on its property, vibrations from the drilling damaged adjacent property. The insurer was held obligated to pay. Although the insured's act was "intentional" and even "wrongful" under trespass law, the insured did not intend to inflict any harm thereby.\(^8\) Thus, simply because the insured commits an intentional

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94. Id. at 273, 419 P.2d at 174, 54 Cal. Rptr. at 110 (footnote omitted).
95. See supra note 34.
96. Where such conduct is anticipated, as in life insurance contexts, it is addressed through suicide exclusions. In many instances a critical issue is the mental competence of the victim of the suicide. See infra notes 204-10 and accompanying text. The rigorous scrutiny courts give suicide clauses illustrates the difficulty an insurer faces in prevailing on the argument that the victim intended his own injury.
98. Id. at 327, 43 Cal. Rptr. at 547.
tort does not mean that his conduct falls within the intentional act exclusion. Where the injury was unforeseen or unintended, and within the risk assumed by the insurer, the exclusion does not apply.99

A related issue which has received no attention in California and little attention nationally, is whether the insured's negligence which allows the insured's agent to commit an act, which from the agent's standpoint falls within the intentional act exclusion, operates to deny the insured coverage for its liability.100 Where the insured's liability is strictly vicarious, the decided tendency is to find coverage for the insured's liability.101 The question arises whether the same should hold true if the insured is somewhat at fault. The Ninth Circuit has recently suggested that the negligence of the insured, which allowed the insured's agent to inflict a loss that from the agent's standpoint is within the exclusion, should not bar coverage for the insured. In American States Insurance Co. v. Borbor by Borbor,102 the insureds (husband and wife) were sued for injuries inflicted on children who attended a nursery school owned and operated by them. The complaints alleged that the children had been molested by one of the co-insureds, the husband, while at the school. The insured wife tendered the defense of the action to her insurer, American States Insurance Co. American subsequently sought a declaration that the policy did not afford coverage for the acts complained of in the actions brought against the insureds. Although the husband insured's conduct was within the exclusion for intentional acts,103 the critical issue was whether the exclusion extended to the co-insured wife. The court found that it did not.104

The court relied primarily on what it perceived to be the inconsistency between the purposes which underlie the exclusion and the consequences of denying a co-insured coverage due to her negligence.

99. See, e.g., Mullen v. Glens Falls Ins. Co., 73 Cal. App. 3d 163, 171, 140 Cal. Rptr. 605, 610 (1977) ("It is possible that an act of the insured may carry out his 'intention' and also cause unintended harm") (citations omitted).

100. See Terra Nova Ins. Co. v. Thee Kandy Store, Inc., 679 F. Supp. 476 (E.D. Pa. 1988) (allegation that insured was negligent in failing to prevent an employee from committing an assault and battery was insufficient to escape intentional act exclusion in policy).

101. The issues of pure vicarious liability and the exclusion for intentional acts are discussed at infra notes 222-32 and accompanying text.

102. 826 F.2d 888 (9th Cir. 1987) (applying California law).

103. The husband had been convicted of molesting children. Id. at 889.

104. Id.

105. Only the statutory exclusion (CAL. INS. CODE § 533 (West 1972)) was addressed in Borbor. Id. at 889. The court, however, followed the current practice of conflating the statutory and contractual exclusions. Id at 893.
The court identified the purpose of enforcing the exclusion as essentially following the equitable maxim that no wrongdoer should benefit from his wrong. The court then held without further discussion that the "innocent" co-insured was entitled to the benefit of insurance but the malevolent molester was not. The court unfortunately was not able to bridge the gap between its rationale and its application, because its rationale was flawed. As noted earlier, the nexus between the "no benefit" rationale and the intentional act exclusion is chimerical.

A flawed premise does not necessarily mean a flawed result. The critical issue remains whether the exclusion, as drafted, encompasses the act or conduct which fixes liability on the co-insured. Although an insurer can draft language that will, by its terms, deny coverage to a co-insured whose negligence allows another insured to engage in intentional misconduct to the detriment of others, that situation was not before the court in Borbor. Borbor's broad statements indicating that the negligence of the co-insured does not preclude coverage must be read in light of the court's focus on the statutory exclusion. Analysis of the question in the context of a contractual exclusion remains a matter of case by case construction of the policy language. Indeed, as noted in Borbor, the simple inclusion or omission of the word "any" may be determinative of the contract issue.

If the insurer uses the standard ISO language noted earlier, it is difficult to envision how the insurer could satisfactorily contend that the insured's negligence amounted to intentional or expected conduct from the standpoint of the insured. The logical and semantical

106. Id. at 893-94.
107. Id. at 894.
108. Id. at 894-95.
109. See supra notes 58-63 and accompanying text.
110. Particularly in connection with reliance on Insurance Code section 533, it is difficult to envision how "negligent" conduct could ever satisfy the "preconceived design" test that presently is used to apply the statute. If words have meaning, the insured would be required to affirmatively engage in some conduct evidencing or constituting a "preconceived design." Negligence is the antithesis of such a standard. Since the court in Borbor found that the wife was a separate insured (826 F.2d at 893), and since no facts indicated a "preconceived design" on her part to injure the children, the statutory exclusion did not apply.
111. Borbor, 826 F.2d at 894; cf. Sales v. State Farm Fire & Casualty Co., 849 F.2d 1383, 1385 (11th Cir. 1988) ("By stating that the entire policy is void when any insured intentionally conceals a material fact or circumstance, the contract clearly makes Mrs. Sales' recovery contingent upon Mr. Sales' conduct.")(emphasis in original); Allstate Ins. Co. v. Foster, 693 F. Supp. 886, 889 (D. Nev. 1988) (collecting cases). Such clauses have been held to be valid and not violative of public policy. Amick v. State Farm Fire & Casualty Co., 862 F.2d 704 (8th Cir. 1988). Whether such a provision would be enforced in California is beyond the scope of this paper. See infra note 231.
problems with such an approach suggest the likely judicial reaction to such a contention by an insured. Indeed, no doubt cognizant of the implausibility of the argument under the standard ISO language, in most cases insurers approach the problem by using attribution arguments by which the "innocent" insured is deemed to legally share in the animus possessed by the malevolent insured. These efforts are generally rejected today.\(^{112}\)

C. The Statutory Exclusion as Distinct From the Policy Exclusion

In *United States Fidelity & Guaranty Co. v. American Employer's Insurance Co.*,\(^{113}\) the court found a distinction between Insurance Code section 533's exclusion for willful acts and an express policy exclusion for intentionally caused injury. The court stated that Insurance Code section 533 focuses on the intention to do the act which causes the damage rather than on the resulting damage. Thus, injury different in kind from that intended when the act was committed would be, under this rationale, not excluded from coverage by the standard policy exclusion but would be excluded by operations of section 533. The distinction discussed in *United States Fidelity & Guaranty* case was noted but not commented on in *Allstate Insurance Co. v. Kim L.*\(^{114}\) Most California decisions, albeit by their silence, do not appear to recognize the distinction found in *United States Fidelity & Guaranty Co.* The consistent approach to resolving questions whether the intentional act exclusion applies has been to view the act, the consequences of the act, and the context in which both arose as determinative as to whether the loss is covered.\(^{115}\) This

\(^{112}\) Borbor, 826 F.2d at 892: We disagree with the court's conclusion that California Insurance Code § 533 bars coverage for Isabel. In reaching this conclusion, the district court appears to have collapsed two separate considerations into one. The first consideration is whether a partner may be liable for the wilful acts of a co-partner. The second, and critical issue here, is whether a partner who is liable for the wilful acts of a co-partner may be insured against that liability in light of California Insurance Code § 533. Isabel's liability for James' acts may be distinguished from her ability to insure against that liability. (footnote omitted). The issue of the attribution of intent between co-insureds is addressed at infra notes 221-32 and accompanying text.


tendency to conflate analysis under either the statutory or contract exclusions is abetted by the California Supreme Court’s construction of a contractual exclusion for intentional acts as requiring a “preconceived design,” a test that was subsequently incorporated into the statutory exclusion.

Notwithstanding this general tendency to conflate analysis of the statutory and contractual intentional act exclusion, one federal district court has recently picked up the distinction noted between intent and act. In American Guarantee & Liability Insurance Co. v. Vista Medical Supply, the court stated in dicta:

> A number of Court of Appeals cases have been decided since Clemmer, construing policy exclusions of coverage for non-accidental acts, and they focus not on the intent of the insured to cause harm, but upon the nature of the harmful act itself—whether it was an accident . . . [U]nder California law an insurer may place more restrictive limits on its liability for intentional acts than that limit provided by section 533.

The court is correct that there is language in California cases giving more significance to the nature of the act that occasioned the loss than the intent of the actor who committed the act. The difficulty is that if we are focusing on an intentional act exclusion, the only thing that can matter is intent. It is simply wordsmanship on the part of the court to suggest that an intentional act exclusion can be established merely by the act. The fact that previous courts have committed the error, does not justify continued perpetration of the mistake. It may, of course, be the case that losses resulting from certain types of acts may be excluded from coverage. Thus, a policy might exclude coverage for losses resulting from the act of operating a motor vehicle or practicing a profession or having sexual relations with a minor. Those exclusions would focus on the act that gave rise to the loss, and properly so. It is improper, however, to attempt to accomplish the same end by use of an intentional act exclusion and exclude all reference to intent.


117. See supra notes 65-68 and accompanying text.
119. Id. at 790 (citations omitted).
120. See supra notes 3-5, 43-50 and accompanying text.
The statutory and policy exclusions for intentional acts do differ generally, however, in two ways. First, the statutory exclusion only declares, as against public policy, indemnification for loss willfully caused; it does not, by its terms, preclude other forms of coverage, such as the right of the insurer to contract to provide a legal defense to civil and/or criminal charges for losses which could not be indemnified because of the statutory exclusion. A contractual exclusion, if enforced, results in the insurance becoming simply irrelevant because by its terms coverage does not exist and no obligations on the part of the insurer arise. Of course, if the statutory exclusion is treated as an implied term of the insurance contract, the court may, albeit incorrectly, extend the statutory exclusion beyond its stated objectives.

Second, the statutory and policy formulations of the intentional act exclusion do differ in that the standard ISO language uses the terminology “expected or intended.” The question is whether the terms “expected” and “intended” in the standard policy provision addressing coverage exclusion for intentional acts are synonymous. There is a dearth of authorities on this issue and what authorities exist are split. Several courts have held that the distinction between

121. Since the policy exclusion can be modified at the parties' discretion, the parties' can create specific differences through drafting of specialized terms. On the other hand, since the statutory exclusion embodies public policies that are deemed to transcend the interests of the individual parties to the contract, attempts to modify the statutory exclusion by contract are not allowed. But cf. Foremost Ins. Co. v. Wilks, 206 Cal. App. 3d 251, 258, 253 Cal. Rptr. 596, 600 (1988) (insurer waived contract exclusion for losses due to libel or slander resulting from willful misconduct or malice on the part of its insured to avoid a conflict of interest and having to pay for independent (Cumisi) counsel for its insured; the court did not raise or discuss the issue of Insurance Code section 533, even though the effect of the waiver was to commit the insurer to indemnify the insured for a loss willfully brought about).


123. See supra notes 69-72 and accompanying text.

124. See Maxon v. Security Ins. Co., 214 Cal. App. 2d 603, 615-17, 29 Cal. Rptr. 586, 593-94 (1963) (no coverage of defense costs where conduct of insured fell within the statutory exclusion for willful acts which is incorporated into every insurance contract). It is significant, however, that Maxon was decided prior to the California Supreme Court's expansion of the duty to defend in Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966). At the time Maxon was decided, the accepted rule in California was that the existence of a duty to defend depended on whether the complaint stated a claim within coverage. See also Remmer v. Glens Falls Indem. Co., 140 Cal. App. 2d 84, 295 P.2d 19 (1956). Hence, if the complaint stated a claim outside coverage (as was the case in Maxon), a court could uphold the insurer's refusal to accept the defense of the action. This approach was largely rejected by Gray. See Note, The Insurer's Duty to Defend Made Absolute: Gray v. Zurich, 14 UCLA L. REV. 1328 (1967).
“intended” and “expected” is unclear. Other jurisdictions which have considered the term “expected” have given the term constructions which run from “reasonably anticipated” to “substantially probable.” Several courts have treated the terms “intended” and “expected” as synonymous.

Jurisdictions which have identified a distinction have reasoned: “[T]hese two words “intended” and “expected” cannot be treated as synonymous . . . . Even where the damages are not accomplished by design or plan (not intended), they may be of such a nature that they should have been reasonably anticipated (expected) by the insured.” There is clearly linguistic merit to the view that when two terms are used in the disjunctive, they cannot be considered to be synonymous or complimentary. If this view were accepted here, California would recognize a significant distinction between the statutory and the contract exclusion for intentional acts and would give the contract exclusion a broader application than afforded by the statutory exclusion. Other jurisdictions have felt that such a distinction might operate to exclude not only intentional acts but those caused by negligence. It is the view of these courts that such a result would run counter to the insured’s reasonable expectation, for few insured’s would understand that the very purpose for which insurance was procured, protection from negligent acts, would be vitiated due to the “serious legal consequences emanat[ing] from the word ‘expected.’” To avoid that problem, the term “expected” is

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127. See, e.g., State Farm Fire & Casualty Co. v. Muth, 190 Neb. 248, 250, 207 N.W.2d 364, 366 (1973) (injury is either expected or intended only if the insured acted with the specific intent to cause harm to a third party).
128. Aetna Casualty & Sur. Co. v. Freyer, 89 Ill. App. 3d 617, 620, 411 N.E.2d 1157, 1159 (1980). See also Bay State Ins. Co. v. Wilson, 96 Ill. 2d 487, 494, 451 N.E.2d 880, 882-83 (1983) (injuries which should have been reasonably anticipated by the insured are “expected” within the meaning of insurance policy).
129. Grange Mut. Casualty Co. v. Thomas, 301 So. 2d 158 (Fla. Dist. Ct. App. 1974) provides:

If we were to give the exclusion before us the meaning argued by appellant, then, by a parity of reasoning, we would have to exclude an injury from an unintentional tort which a given jury might categorize as being “expected” depending upon the degree of likelihood thereof under the facts and circumstances of the case. Conceivably, indeed, this might include an injury resulting from simple negligence . . .

Id. at 159.
held to require an element of conscious awareness that for all intents and purposes renders it synonymous with the term "intended."

Which approach California courts will take to this problem is open. It is clear that the insurance industry did not intend the terms "expected" and "intended" to be viewed as interchangeable. It is just as clear, however, that jurisdictions have disagreed over what the two terms mean and this itself is often a prelude to a finding that the language used in the policy is ambiguous, and thus to be given a pro-coverage construction, if possible. This approach tends to conflate the two terms, resulting in the treatment of "expected" as synonymous with "intended."

The proper resolution of the question is difficult. It is clear that the term "expected" was not inserted into the insurance contract to provide insurers with an escape hatch in cases of losses caused by the insured's negligence. The term "expected" intuitively and grammatically suggests a level of awareness of the probable consequences of one's conduct which, while not rising to the level of premeditation or

131. Id. at 380, 517 A.2d at 991:

We hold that for purposes of an exclusionary clause in an insurance contract, expected injury means that the insured acted even though he was substantially certain that an injury generally similar to the harm which occurred would result. This interpretation affords insured persons the maximum legal protection they could reasonably expect under a contract excluding expected injuries.

132. Id.

133. See R. Keeton & A. Widiss, supra note 1, § 5.4(c)(4), at 538 (adoption of the term "expected" was designed to address problem of "recurrence" and "highly expectable losses" that were in the nature of inherent costs associated with the manufacturing of a product).

134. The fact that different courts have given similar language in the insurance contract disparate interpretations, has been relied on to support a finding of ambiguity. Annotation, Division of Opinion Among Judges As Evidence That Particular Clause of Insurance Policy is Ambiguous, 4 A.L.R. 4th 1253 (1981) (no reported California decisions in the annotation). Under this rationale, language is deemed to be clear until one court finds otherwise; when this occurs, all courts should find the language that was heretofore clear to now be unclear. Taken to its logical extreme, the fact that the parties are contesting the meaning of the contract language could be seen as evidence of "ambiguity." California courts have rejected this extension. See Delgado v. Heritage Life Ins. Co., 157 Cal. App. 3d 262, 271, 203 Cal. Rptr. 672, 677 (1984); but see Northwest Airlines, Inc. v. Globe Indem. Co., 303 Minn. 16, 225 N.W.2d 831, 837 (1975). ("The very fact that [the parties'] respective positions as to what the policy says are contrary compels one to conclude that the agreement is indeed ambiguous").

design, is much higher than mere foreseeability. The critical issue thus becomes what level of awareness by the insured that his or her conduct will result in injury or loss will be required of the insured before the injury or loss will be deemed “expected” on the part of the insured. This issue is addressed infra in connection with losses resulting from “high risk” activities where the insured has no actual intent to injure, although injury of some sort may be reasonably anticipated as following from the insured’s conduct.

IV. STATE OF MIND AND THE INTENTIONAL ACT EXCLUSION

A. Measuring Intent

In order to come within the intentional act exclusion, the insured must have the requisite intent. Surprisingly the appropriate standard to measure the insured’s “intent” has received little attention by California courts.

Jurisdictions which have considered the issue have recognized at least three separate tests. Many jurisdictions have adopted a policy-based approach whereby the insured’s intent is “inferred” from the nature and type of conduct that led to the loss. This approach is very common in sexual misconduct cases involving adults and minors. In such cases courts infer the requisite intent to harm based on the legislature’s decision to treat the underlying conduct (sexual acts by adult with child) as subject to criminal sanction.

Another approach adopted by several jurisdictions is a subjec-
tive standard. Under this approach, the exclusion only applies when the insured committed the act resulting in a loss with the specific, actual intent to bring about that loss. A few courts blend the subjective and policy-based approaches depending on the nature of the misconduct. Serious, reprehensible conduct, such as sexual abuse accompanied with violence or penetration, is reviewed against the per se standard for determining whether the insured possessed the requisite intent to injure; less reprehensible conduct, i.e., fondling as sexual abuse, is reviewed against a subjective intent standard.

Finally, a number of jurisdictions have adopted an objective standard for assessing whether the insured possessed the requisite intent. This objective standard relies on the act-result distinction noted earlier. The insured is presumed to intend the natural and probable consequences of his activity. Thus, the objective standard would apply to the determination of whether the insured intended to do the act from which the injury or loss resulted; whereas the subjective standard would focus on whether the insured had the conscious objective to bring about the injury or loss in fact resulting from his conduct. In California, this form of the objective test has been repudiated. Even when applied, however, there is little to distinguish it from the policy-based approach. Even under the objective standard, the consequence of the insured’s conduct must be deemed harmful or injurious in some way that distinguishes the process so that all purposive human conduct is not deemed to fall within the exclusion. In effect the objective test reasons backwards. The nature of the injury or loss is allowed to dictate the determination of the insured’s “intent” when committing the act that led to the loss. Such post hoc-propter hoc reasoning is fallacious. The true basis of the objective test must be seen as being policy based.

B. Measuring Intent in California

Since we are dealing with “intent”, it is perhaps appropriate to label the California approach to the issue of the requisite intent to

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145. See supra notes 47-51, 65-68, 93-99 and accompanying text.
invoke the intentional act exclusion as schizophrenic. This is highlighted by the fact that the decisions purport to apply the same statutory exclusion, Insurance Code section 533, yet reach conflicting results in terms of the actual standard used to measure intent.

The case for the use of a subjective standard follows from the recent decisions of the California Supreme Court which have grafted the “preconceived design to injure” language onto the “willfulness” term on the statutory exclusion. It is difficult to comprehend how one can have the requisite “preconceived design” unless one has the actual, conscious objective of bringing about the injury in fact.

Recent California decisions that have considered the issue have nonetheless adopted a policy-based approach. The foremost case is Allstate Insurance Co. v. Kim W. In Kim W. the insured was sued by Kim W., a minor, for sexual assault. The insurer, Allstate, brought a declaratory relief action seeking a declaration that the insurance policy provided no coverage to the insured for his sexual assaults on Kim W. The key to the case for the court was the fact that the sexual assault perpetrated on Kim W. was deemed to be a violation of California Penal Code section 288. The court held

146. See supra notes 65-68 and accompanying text.
147. These cases have all involved sexual misconduct/sexual molestation by adults on minors. Societal attitudes toward sex, particular sex between adults and minors may be a significant non-legal factor on the adoption of a policy-based approach. Contrast the sex-with-minors decisions that follow with State Farm Fire & Casualty Co. v. Irene S. (Anonymous), 138 A.D.2d 589, 526 N.Y.S.2d 171 (1988). In Irene S., the plaintiff in the underlying action alleged that the insured raped her with the intent of transmitting genital herpes. The court held that coverage was nonetheless available if the damage sustained by the plaintiff (infection with genital herpes) was unintended.
149. The insured had been criminally charged with sexual assault (CAL. PENAL CODE § 288 (West 1988)) on several children, including Kim W. He had pleaded guilty to a count of the criminal complaint involving another child and the remaining counts, including the count involving Kim W., had been dismissed. The insured had also admitted in his Answer to Allstate's Complaint for Declaratory Relief that he “participated in such acts which constituted a violation of Penal Code No. 288.” The court purported to give no weight to either fact, relying instead on the nature of the claim made by Kim W. against the insured in the civil action. Kim W., 160 Cal. App. 3d at 333, 206 Cal. Rptr. at 611-12. The admission only operated to preclude the insured from contesting that he had committed a sexual assault; the court independently determined that coverage for the sexual assault was barred by Insurance Code section 533.
150. CAL. PENAL CODE § 288 (West 1988) provides:
(a) Any person who shall willfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the state prison for a term of three,
that, because of the legislative policy of protecting children underly-
ing Penal Code section 288,\textsuperscript{151} a violation of section 288 was neces-
sarily injurious to children. Without further analysis, the court held
that a violation of section 288 was a "willful" act within the mean-
ing of Insurance Code section 533.\textsuperscript{152} The court's analysis did not
explain how an "injury to a minor" necessarily evidenced "intent to
injure" on the part of the adult.

The court's opinion may reflect the assumption that since one
intends the natural and probable consequences of one's acts and since
injury to minors is a necessary consequence of violating Penal Code
section 288, the link between intent and consequence was evident.
This approach, while customary in cases of fastening civil liability in
tort, has been repudiated in California. Alternatively, the court may
have been influenced by the requirement of section 288 that there be
proof of specific intent to arouse, appeal to, or gratify the lust or
passions or sexual desires of the perpetrator or the child.\textsuperscript{153} Since the
consequences of the insured's conduct were deemed to be necessarily
injurious to the child (Kim W.), the court could have assumed that
the "necessary" consequences must have been contemplated by one
who had the requisite specific intent required by section 288. The
weakness of this linking of the specific intent requirement of section
288 with the necessary injuries suffered by the child is that the spe-
cific intent requirement of section 288 is not focused solely on
arousal of the child. A violation of section 288 can occur where the
intent is to arouse the perpetrator of the sexual assault. Conse-
quently a nexus between the specific intent requirement of section
288 and the consequences of a violation of section 288 injury to a
child does not necessarily exist.

\textit{Allstate Insurance Co. v. Kim W.} is remarkable in that not-
withstanding the fact that section 288 is not an offense which re-
quires specific intent to injure,\textsuperscript{154} the court effectively created such

\textsuperscript{151} Kim W., 160 Cal. App. 3d at 332-33, 206 Cal. Rptr. at 611.
\textsuperscript{152} Id. at 333, 206 Cal. Rptr. at 611.
\textsuperscript{153} Id. at 332, 206 Cal. Rptr. at 611.
\textsuperscript{154} While section 288 does use the term "willfully", the Penal Code elsewhere states
that such usage does not envision the incorporation of a specific intent to bring about certain
consequences. \textit{See} CAL. PENAL CODE §7:

The word "willfully," when applied to the intent with which an act is done or
omitted, implies simply a purpose or willingness to commit the act, or make the
omission referred to. It does not require any intent to violate law, or to injure
another, or to acquire any advantage.

\textit{See also supra} note 69 and accompanying text and \textit{supra} note 90.
an intent out of whole cloth. Unfortunately the loose analysis of the intent issue has not prevented *Kim W.* from having significant influence in subsequent cases involving the intentional act exclusion.

*Kim W.*’s influence has not been without cost. That decision has tended to overshadow the better reasoned decision in *Allstate Insurance Co. v. Overton* which involved a misdemeanor battery charge to which the insured had pleaded guilty. The insured was named in a civil action arising out of the battery. The insurer sought a declaration of non-coverage. The court refused the insurer’s request and held that since the conviction required only a general intent to do the act that constituted the offense and the insured testified he intended no injury, the statutory exclusion for intentional acts did not, as a matter of law, apply.

It should be noted that insofar as intent to injure is concerned the offense involved in *Overton* (Penal Code section 242 (battery)) did not differ from the offense involved in *Kim W.* (Penal Code section 288 (sexual assault)). Neither required “intent to injure” as an element of the offense.

155. The court asserted that the “preconceived design to injure” standard did not apply because that test had been articulated in cases where the mental capacity of the insured was at issue. *Kim W.* 160 Cal. App. 3d at 333-34, 206 Cal. Rptr. at 612, citing *Clemmer* v. Hartford Ins. Co., 22 Cal. 3d 865, 587 P.2d 1098, 151 Cal. Rptr. 285 (1978) which is discussed at *supra* notes 67-68 and *Congregation of Rodef Sholom v. American Motorist Ins. Co.*, 91 Cal. App. 3d 690, 154 Cal. Rptr. 348 (1979) which is discussed at *infra* notes 192-202. Although the insured’s mental capacity was at issue in each case, neither decision suggests that the court’s use of the “preconceived design” test was necessarily tied or limited to the issue of mental capacity. And while the court in Peterson v. Superior Court, 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982) did not specifically adopt the “preconceived design” language, the court did emphasize the “intent to injure” requirement. *Id.* at 159, 642 P.2d at 1311, 181 Cal. Rptr. at 790. The linkage between *Clemmer* and *Peterson* has been noted by several California courts. See *Allstate Ins. Co. v. Overton*, 160 Cal. App. 3d 843, 849, 206 Cal. Rptr. 823, 827 (1984). Indeed, a number of courts which specifically recognize that the “preconceived design to injure” test is the basic focus of whether Insurance Code section 533 applies, nonetheless still apply *Kim W.* See, e.g., *Allstate Ins. Co. v. Gilbert*, 852 F.2d 449 (9th Cir. 1988). These courts justify the denial of coverage by finding that certain offenses create an irrebuttable presumption of intent to injure. *Id.* at 951 (“this intent can be inferred as a matter of law by the nature of some acts, such as sexual assault”).

156. See, e.g., *Gilbert*, 852 F.2d at 451-52; *State Farm Fire and Casualty Co. v. Bromke*, 849 F.2d 1218, 1219 (9th Cir. 1988).


158. *Id.* at 849-50, 206 Cal. Rptr. at 827-28. If it were established in the civil action that the insured did in fact intend to inflict the injury on the victim, the right of indemnification would be lost. Many of these cases involve a preliminary determination whether the insurer has the duty to defend the insured against the allegations made by the plaintiff. “Duty to defend” questions raise in themselves significant and substantial legal issues. It is not necessary to address those issues here except to note that both indemnification and the duty to defend have a common genesis in the issue whether the loss is covered. Hence, if a court finds that an insurer has a duty to defend, that determination constitutes a finding that the loss is potentially subject to indemnification under the insurance contract.
The motivating force underlying *Kim W.* and the decisions applying it is the policy determination that certain acts are inherently injurious by their very nature. The danger in this approach is that it tends to be *ad hoc* and reflective of the judge's personal attitudes toward the acts of the insured. For example, in *State Farm Fire & Casualty Insurance Co. v. Abraio* the relevant acts consisted of fondling of the genitals of an eight-year-old child. There was no indication in the opinion that the act was accompanied by any force or violence or penetration or threat of any of the above. The court appeared to be singularly impressed with the age differential between the participants to the sexual acts. This, of course, identifies the difficulty with all *ad hoc* approaches. The test looks fine in the cases in which it is first articulated. Those cases typically involve acts of great reprehensibleness. The rule, however, tends to find later application in cases that do not so nicely evidence a necessary intent to injure. The conduct of the adult in *Abraio* is offensive but that does not mean that it was necessarily undertaken with the intent to injure the minor. The converse of the above problem, the expansive definition of coverage, also needs to be based on principle not *ad hoc* determinations of sympathy for the victim. For example, in *State Farm Fire & Casualty Co. v. Irene S. (Anonymous)* the court held that there was the potential of coverage for the unintended consequence of transmission of genital herpes incident to the rape of the plaintiff by the insured. The critical fact is that the infectious disease damage was unintended. It would not be proper to read *Irene S.* as holding that all damages incident to a rape are covered.

159. See Gilbert, 852 F.2d at 451; *Bromke*, 849 F.2d at 1219 (intent to harm can be inferred as a matter of law by the nature of some acts, such as sexual assault, citing *Kim W.*, 160 Cal. App. 3d at 332, 206 Cal. Rptr. at 613); *State Farm Fire & Casualty Co. v. Huie*, 666 F. Supp. 1402, 1405 (N.D. Cal. 1987) provides: "Regardless of the language of individual criminal statutes, or the language used by the California courts in the individual cases before them, the legislative intent is clear. That is, that some acts are so extreme that public policy does not permit them to be insured." The source of the "legislative intent" was not disclosed in the opinion.


161. *Id.* at 222.

162. The court found that "the conclusion [is] inescapable that the initiation of sexual activity by a sixty-three year old man with an eight year old child is inherently harmful." *Id.*

163. Thus, in *Kim W.*, 160 Cal. App. 3d at 333 n.3, 206 Cal. Rptr. at 613 n.3, the insured had apparently engaged in the sexual abuse of several children; in *Bromke*, 849 F.2d at 1219, the insured had aided and abetted the kidnapping, rape and forced oral copulation of a 14 year old girl.


165. *Id.* at 591, 526 N.Y.S.2d 173.
course, this proper approach raises potentially difficult issues of apportionment and divisibility.

If the difficulties are perceived to be great, then the issue can always be addressed by clear and conspicuous policy language or by legislative fiat where the political costs and considerations can be properly brought to bear on the problem. A \textit{per se} test is simply inconsistent with the "preconceived design to injure" standard currently used to define the term "willfully" in Insurance Code section 533. The issue of intent to injure remains one of fact to be established in each case; it should not be preempted by judicial \textit{ad hoc} policy pronouncements that are inconsistent with the basic standard.

Abolishing artificial \textit{ad hoc} approaches does not open the flood gates insofar as insurer exposure for its insured's intentional misconduct is concerned. While the requisite "intent to injure" will invariably have to be inferred from the circumstances of the act, in some instances the inference will be so strong as to support a motion for summary judgment.\footnote{In any event, if the potential exposure of insurers is increased by use of an actual intent to injure test, the proper approach to resolving claims of insurer prejudice would be to give such a ruling only prospective application if insurers could show that they relied to their prejudice on a clearly established "per se" rule.\footnote{Although judicial decisions are normally retroactive in application, it is recognized that retroactive application may be denied where substantial prejudice would arise. Despite the presumption that new rules apply retroactively, California recognizes that the presumption will not be applied where to do so would be fundamentally unfair and contravene public policy. See generally 9 B. Witkin, \textit{California Procedure, Appeal} §§ 812-815 (1985) (collecting cases). Since the \textit{per se} rule has only been applied in sexual assault cases and has not found application in other "intentional" act contexts, insurers might have difficulty demonstrating that they have relied on such a rule in setting premiums such that retroactive change of the \textit{per se} rule would cause them prejudice in a way that is fundamentally unfair.}}

In any event, if the potential exposure of insurers is increased by use of an actual intent to injure test, the proper approach to resolving claims of insurer prejudice would be to give such a ruling only prospective application if insurers could show that they relied to their prejudice on a clearly established "per se" rule.\footnote{In some cases the failure of the insured or the victim to rebut the insurer's evidence of the requisite "intent to injure" has influenced the court to sustain the insurer's position. See State Farm Fire & Casualty Co. v. Abrasio, 874 F.2d 619, 623 (9th Cir. 1989); Allstate Ins. Co. v. Gilbert, 852 F.2d 449, 452-53 (9th Cir. 1988); Allstate Ins. Co. v. Overton, 160 Cal. App. 3d 843, 850-51, 206 Cal. Rptr. 823, 828-29 (1984). California decisions have split on this issue, although a clear majority appear to treat the issue of intent to injure as irrebuttable in sexual abuse cases. Compare Fire Ins. Exch. v. Abbott, 204 Cal. App. 3d 1012, 251 Cal. Rptr. 620 (1988) (presumption irrebuttable) with J.C. Penney Casualty Ins. Co. v. M. K., 209 Cal. App. 3d 1208, 257 Cal. Rptr. 801 (1989) (no general presumption should be adopted that person who commits sexual abuse intends to cause injury to victim), rev. granted by Cal. Sup. Ct. (S010524), 777 P.2d 83, 261 Cal. Rptr. 310 (July 26, 1989).}
the insured must have intended the specific injury that in fact occurred or whether it is sufficient if the insured possessed a general intent in that he only intended some injury. The general intent to injure requirement may be summarized as requiring: (1) that the insured intended both the act as well as the infliction of an injury; and (2) that once it is found that some harm was intended, it is immaterial that the actual harm caused is of a different character or magnitude than that intended.168

The distinction becomes important in cases involving “high risk” activities or injuries inflicted as a consequence of practical jokes or horseplay. The cases are split whether in such circumstances the insured’s “intent” voids coverage for resulting injuries.169

In United States Fidelity & Guaranty Co. v. American Employers Insurance Co.,170 the insured intentionally ignited a fire in trash behind a building. The fire spread, engulfing the building, a shed, as well as an adjoining structure. The insured disclaimed any


169. Pro-insured cases include Morrill v. Gallagher, 370 Mich. 578, 122 N.W.2d 687 (1963). In Morrill, the defendant, Gallagher, threw a cherry bomb into the plaintiff's office, attempting merely to scare. Instead, the plaintiff sustained a serious hearing impairment. The insurer, in its defense of the case, relied in part upon the intentional tort exclusion. The court rejected the defense position and stated: "There is nothing in this case to justify [the] conclusion that [the insured] intended to cause any physical harm to the plaintiff." Id. at 581, 122 N.W.2d at 691. Similarly, in Millers Mut. Ins. Co. v. Strainer, 663 P.2d 338 (Mont. 1983), the insured was a safety officer at a smelter. The employees of the smelter regularly tested breathing apparatuses for leaks by having harmful smoke blown in their faces while wearing the apparatus. The insured, as a practical joke, removed the filter from the apparatus of an unsuspecting employee and squirited him with smoke. The insured thought the employee would suffer only minor discomfort; in fact, he received significant injuries. The court held that the insured did not possess the requisite intent to injure. On the other hand, in Pachucki v. Republic Ins. Co., 89 Wis. 2d 703, 278 N.W.2d 898 (1979), the insured was engaged in a "greening pin war" with fellow employees which is the flinging of paper clips with a rubber band. One of the combatants became a war casualty when he was struck in the eye with a projectile flung by the insured. Although the insured disclaimed any intent to injure, the court found that his admitted intent to strike the person of another with a rubber band propelled paper clip was sufficient:

The trial court's finding that the intent to inflict injury could be inferred from the nature of the defendant's intentional acts is not contrary to the great weight and clear preponderance of the evidence in the record. There was testimony supporting the fact that each of the defendants had prior knowledge that being struck with a greening pin will result in injury. Boeschke stated on one occasion after being hit by a greening pin he suffered an injury and bled.

Id. at 708, 278 N.W.2d at 903.

intent to cause the subsequent conflagration. Although the court did give some weight to the strong evidence indicating that the insured had the specific intent to destroy the buildings by fire, the court adopted an approach which did not require it to weigh the facts regarding the actual intent possessed by the insured:

Smith [the insured] knew what he was doing was wrong. He intended to start a fire and he knew that damage was likely to result. Smith ignited several other damaging fires that same day. Smith pleaded guilty to arson, a crime in which one "willfully and maliciously sets fire to or burns or causes to be burned... any structure... or property." (CAL. PEN. CODE section 451.)

Clearly, Michael Smith's act in causing the fire was well beyond the sort of intentional misconduct involved in ordinary negligence and was willful within the meaning of Insurance Code Section 533.

Under this approach it was sufficient if the insured intended some injury. It is not necessary that the insured intend to cause the very injury actually sustained.

The issue was considered by the California Supreme Court in Clemmer v. Hartford Insurance Co. Clemmer involved an insured who had shot and killed his partner. The insured was convicted of second degree murder after he withdrew his plea of not guilty by reason of insanity. The victim's widow obtained a judg-

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171. The insured testified that he was "surprised and scared when he saw that the roof of the shed was on fire, and he called the fire department so that the building would not burn down." Id. at 281-82, 205 Cal. Rptr. at 463.

172. The court noted that the insured set several fires in addition to the one at issue and that after he phoned the fire department regarding the fire at issue, he then proceeded to set another fire. Id. at 281, 205 Cal. Rptr. at 463. Later in the opinion the court noted that the way in which the insured began the fire "indicated an intent to do more than merely start a trash fire." Id. at 287, 205 Cal. Rptr. at 466.

173. Id. In Allstate Ins. Co. v. Kim W., 160 Cal. App. 3d 326, 206 Cal. Rptr. 609 (1984), the court applied the same approach to the standard policy exclusion for intentional acts, although it did so in connection with whether a per se rule should be recognized for sexual misconduct losses. In State Farm Fire & Casualty Co. v. Bromke, 849 F.2d 1218, 1219 (9th Cir. 1988), Kim W. was applied in a statutory exclusion (Insurance Code section 533) case.

174. The court also stated, "[the insured] clearly acted with the wrongful intent to cause damage to the property against which he set the fire. It is immaterial that he subjectively did not expect or intend to cause the extent of damage which actually occurred." United States Fidelity & Guar. Co., 159 Cal. App. 3d at 291, 205 Cal. Rptr. at 469 (footnote omitted). Under this reasoning if an insured struck another in anger but because the other person's jaw was open when the blow was received grievous injury was sustained, the loss would not be covered even though the injury was neither intended nor foreseen! But see Brelan v. Schilling, 550 So.2d 609 (Ga. Sup. Ct. 1989) (injury under such circumstances was not intended).

ment against the insured which she sought to enforce against the insurer, Hartford. One of the objections raised by Hartford related to the instructions given the jury on the issue of willfulness. Hartford complained that the instruction given the jury had failed to define "willfulness" and that the trial judge had improperly allowed the jury to consider the insured's mental competency to form the requisite intent to injure. Hartford argued that the instruction actually given the jury "had the effect of requiring the jury to find the existence of what amounted to a specific intent to kill in order to find willfulness." Hartford contended that a specific intent to kill was not required but only the general intent to do an act more blameworthy than misconduct involved in ordinary negligence. In effect, Hartford wanted the issue of "willfulness" to turn on the gravity of the act resulting in the loss rather than on the actual state of mind of the person (insured) committing the act that resulted in the loss. The court rejected Hartford's arguments on this point:

It is clear, however, that [Hartford's] argument not only ignores the specific language of the instruction—which speaks in terms of intent to "shoot and harm," not in terms of intent to kill—but refuses to recognize the clear line of authority in this state to the effect that even an act which is "intentional" or "willful" within the meaning of traditional tort principles will not exonerate the insurer from liability under Insurance Code section 533 unless it is done with a "preconceived design to inflict injury." The instruction given by the trial court simply applied this principle to a situation in which the actor's capacity to harbor the requisite "design" was placed in issue through evidence bearing upon his mental state. There was no error in this respect.

176. Id. at 886-87, 587 P.2d at 1110, 151 Cal. Rptr. at 297.
178. Clemmer, 22 Cal. 3d at 886-87, 587 P.2d at 1110, 151 Cal. Rptr. at 297.
179. Brief for Appellant, at 48-49. Appellant's instruction would aid an insurer in that the offered instruction focused on the insured's act rather than the insured's intent in committing the act. The offered instructions provided in part:

An act is a "willful act" within the meaning of the question you are to decide, and within the meaning of my instructions, if the act is more blameworthy than the sort of misconduct involved in ordinary negligence, that is, if the act was performed with an improper motive or purpose . . .

Clemmer, 22 Cal. 3d at 887 n.13, 587 P.2d at 1110 n.13, 151 Cal. Rptr. at 297 n.13. The offered instructions also included a definition of "willful act": "[A] person willfully harms another when he knows and understands what he is doing and has the purpose of intending to harm him." Id.
180. Id. at 887, 587 P.2d at 1110, 151 Cal. Rptr. at 297.
The court's rejection of the "gravity of the offense argument undermines the approach undertaken in the sexual misconduct conduct cases which presume intent to injure from the nature of the act.

Reading Clemmer and United States Fidelity & Guaranty Co. together, a two pronged rule could be extracted which holds: first, that as long as the insured possessed the intent to inflict some injury, the intentional act exclusion applies; second, the insured's mental capacity is relevant to determining whether the insured possessed the requisite "intent to injure." It is nonetheless doubtful that this two-pronged rule is sound or can be consistently applied to achieve fair results. The problem lies with the implicit recognition in Clemmer and explicit recognition in United States Fidelity & Guaranty Co. that the insured's intent to inflict "some injury" justifies denial of coverage even as to actual, unforeseen injuries.

One inconsistency of the above approach is the suggestion that while the insured need not intend the specific injury sustained, the insured must intend to injure the specific person or property in fact injured. In effect there is no "transferred intent" rule. Thus, if an insured sets a fire intending to cause some loss to a structure and as a consequence of the fire a wind shift causes another structure to be consumed, the suggestion in United States Fidelity & Guaranty Co. is that the exclusion does not apply. Similarly, if the fire consumes the structure in which it was set and also results in the death of an inhabitant, the apparent result is that the exclusion applies to the property damage but not the personal injury claim!

Coupling the "some injury" rule with the refusal to apply the "transferred intent" rule is illogical. In effect if defendant intends to strike the decedent with his fist and the blow results in decedent's death because he has an "eggshell" head, coverage is avoided because "some injury" was the probable consequence of the blow. If, on the


182. Thus if D, intending to strike A, in fact, mistakenly or accidentally strikes B, the claim by B against D is excluded under the policy. The majority of jurisdictions that have considered the issue have not applied the "transferred intent" doctrine and have found B's injuries to be unintended. See American Ins. Co. v. Saulnier, 242 F. Supp. 257 (D. Conn. 1965); Smith v. Moran, 61 Ill. App. 2d 157, 209 N.E.2d 18 (1965); but see Kraus v. Allstate Ins. Co., 258 F. Supp. 407 (W.D. Pa. 1966), aff'd, 379 F.2d 443 (3d Cir. 1967).

183. See supra notes 174 and 181. The court clearly did not appreciate the consequences of its rationale for in the decision it upheld the denial of coverage for losses to adjoining structures.
other hand, defendant intends to strike the person next to the de
cedent but the intended victim ducks and the defendant strikes the de-
cedent with the same result as above, coverage exists. This distinc-
tion makes absolutely no sense.

An injury substantially different from that intended should be
covered whether or not the difference is due to the fortuitous pres-
ence of another person or thing. The presence of an intended victim
who escapes unscathed is a weak justification for treating the in-
sured’s actions as covered under the policy. In each case the compen-
sation goal is the same. The critical issue in either case is whether
the insured intended the injuries that in fact occurred. That basic
test should not be compromised by glosses on the rule that in effect
transform an intent test into a pure foreseeability test (the actual
injury should have been anticipated) or a penal test (coverage is de-
nied because “some injury” to someone or something was intended).

The “some injury” test also suffers in that it would sweep into
the exclusion for intentional acts many “high risk” activities where
some injury could be anticipated but the actual injury that occurred
was unforeseen and surely unintended. Outside the sexual abuse and
arson cases, California courts have taken a more pro-coverage ap-
proach than a “some injury” test would allow. For example, in
*Pilcher v. New York Life Insurance Co.*,\(^\text{184}\) the insured died of a
self-administered heroin overdose. The court held that where the
quantity of heroin injected was more than intended, the resulting
death was “unintended” and “unexpected.”\(^\text{185}\) Surely the self-admin-
istration of heroin involves the infliction of “some injury;” yet, in
*Pilcher* the court found the resulting death to be unintended, i.e.
apparently not the “same injury.” Nor does it seem that the likely
subjective intent of the insured not to injure himself controls and
distinguishes *Pilcher* from sexual abuse cases such as *Abraio.*\(^\text{186}\)
Heroin is heavily regulated by both the state and federal govern-
ments.\(^\text{187}\) Misuse generally subjects one to much heavier civil and
criminal penalties than does sexual misconduct. Surely use of heroin
gives rise to some “probability” of harm as does sexual misconduct

\(^{184}\) 25 Cal. App. 3d 717, 102 Cal. Rptr. 82 (1972).

\(^{185}\) *Id.* at 725, 102 Cal. Rptr. at 87. *Pilcher* involved the issue of whether death was
“accidental” within the contemplation of a “death-by-accidental-means” policy. Insurance
Code section 533 was not discussed by the court.

\(^{186}\) 683 F. Supp 220 (N.D. Cal. 1988), discussed at *supra* notes 160-61 and accompa-
nying text.

\(^{187}\) See CAL. HEALTH & SAFETY CODE §§ 11000-11058 (West 1981). Heroin is a
schedule 1 drug. *Id.* at § 11054(c)(11). See also 21 U.S.C. §§ 951-966 (West 1981). Heroin is
a schedule 1 drug. *Id.* at § 812.
and would suggest a similar *per se* rule. Yet, such is not the case either in California, as *Pilcher* evidences, or elsewhere.\textsuperscript{188} This is inconsistent with the general rule that injuries caused by sexual misconduct are intended.

One can, of course, provide flexibility by keeping the definition of "injury" open. Thus, the intent to frighten can be distinguished from the intent to injure; the intent to use drugs recreationally from the intent to harm oneself or another; the intent to set a fire in a trash can to warm oneself from the intent to burn a structure. This approach, which is used by many courts,\textsuperscript{189} simply accomplishes indirectly what should be done directly, which is to relate intent to the actual harm intended and limit the intentional act exclusion to the losses actually contemplated by the insured.

Differences between accidental death cases and sexual misconduct cases can also be explained by the inevitable differences in types of insurance involved (life or accident insurance versus liability insurance) or differences in the specific language of the insurance policy.\textsuperscript{190} Yet, this explanation is ultimately unsatisfactory. The basic issue is whether the loss, which the insured or his representative or his beneficiary contends is covered, was intended or unintended. Courts have developed a series of tests and rules that answer the question of the insured’s intent by reference to the type of loss in certain areas (e.g., sexual misconduct) yet by reference to the insured’s actual intent in others (e.g., high risk activities, heroin use, autoerotic asphyxiation, assault and battery). The development appears to be rather haphazard, with no perceivable difference between heroin use, death for sex, and sexual misconduct, save for the fact that the last, sexual misconduct, involves third parties as direct victims. Yet, all losses have their victims. In effect, the indirect victims of the loss of an insured by heroin overdose can receive the benefits of insurance but the direct victim of sexual abuse cannot. Similarly,

\textsuperscript{188} See Achampong, *Death from Autoerotic Asphyxiation and the Double Indemnity Clause in Life Insurance Policies: The Latest Round in Accidental Death Litigation*, 21 AKRON L. REV. 191-93 (1987) (Autoerotic asphyxiation involves a deliberate reduction of oxygen to the brain. In some people this apparently heightens sexual pleasure. The practice is often accomplished through use of a noose with a knot that gives way when the body goes limp. Death occurs when the knot fails).


\textsuperscript{190} For example, *Pilcher* involves slight changes in policy language that allowed the court to distinguish contrary precedents. *Pilcher*, 25 Cal. App. 3d at 717, 102 Cal. Rptr. at 82.
if the presence of third party victims is treated as legally significant, then death by self-administered heroin overdose is deemed unintended but if the insured “shoots up” a friend who dies, then death, at least for coverage purposes, is treated as intended.

The legislature could of course prescribe such discrete distinctions, if it wished. It is difficult, however, to reconcile the disparate approaches under a standard that uses a common term, be it “willfully” for purposes of Insurance Code section 533 or “intended” and “expected” for purposes of the standard policy exclusion. It would appear to more consistent with the language of Insurance Code section 533, a provision bereft of legislative history, and the standard pro-coverage orientation of California courts to answer the issue of the insured’s intent by using the insured’s actual intent rather than some substitute, such as the type of act. This, again, does not read the nature of the act out of the determination. Rather, it places it in its proper perspective as a factual aid to the determination whether the insured acted with the requisite intent to injure. Moreover, since the primary purpose of the intentional acts exclusion is to deter, the level of intent required would be an intent to cause some significant, socially disapproved injury. This would operate to retain insurance for practical jokers whose pranks go astray and preclude insurance for arsonists whose blazes exceed their unreasonable expectations.

D. Mental Capacity To Formulate Intent

The second prong of the Clemmer intent test is mental capacity. In order to come within the intentional act exclusion (policy and statutory), the insured must have had the requisite mental capacity to commit a “willful” act. The critical issue is what test is to be used to determine whether the insured had the requisite mental capacity and what are the burdens of proof with respect to the issue of mental capacity. While it is generally conceded that whether an act is intentional is a question different from whether the actor is responsible for his act, courts vary widely in their assessment of the proper test to be used to measure the actor’s (here the insured’s) capacity to be responsible for his act.191

1. Insanity

In Congregation of Rodef Sholom v. American Motorists Insur-
the insured was a 16 year old youth who set a fire in a wastepaper basket in a classroom at the plaintiff synagogue. The fire resulted in property damage of $48,770.01, a judgment for that amount was entered, and the plaintiff then commenced an action against the insurer, American Motorists Insurance (American), seeking a declaration that American was liable for the loss under a homeowner's policy under which the youth was an additional insured. American disclaimed responsibility relying on an exclusionary clause in the policy which provided: "Exclusions: (c) To injury, sickness, disease, death or destruction caused intentionally by or at the direction of the insured." The plaintiff contended that the exclusion should not be applied because the insured lacked the requisite mental capacity to "intentionally" cause property damage. There was testimony by a psychiatrist who was of the opinion that the insured set the fire as a result of an irresistible impulse. The trial court had applied the M'Naghton Test (could the insured distinguish between right and wrong) and refused to instruct the jury in conformity with the irresistible impulse test of insanity (does the insured suffer from a mental defect which deprives him of the capacity to govern his conduct in accordance with reason . . . when he was impelled by an impulse he did not have the power to resist). The Court of Appeals held that both tests set an erroneous standard: "neither criminal standard is appropriate for determining whether an insured has

193. The insurer had disclaimed coverage when the defense of the plaintiff's underlying lawsuit had been tendered to it by the insured. Id. at 693, 154 Cal. Rptr. at 349. Under Insurance Code section 11580 which relates to actions on insurance policies containing liability provisions, before the third party may bring an action on the policy against an insurer, that party must obtain a judgment against the insured. Muraoka v. Budget-Rent-A-Car, Inc., 160 Cal. App. 3d 107, 121, 206 Cal. Rptr. 476, 483 (1984).
195. [The psychiatrist] Lamers . . . testified that at the time of the fire Steven [the insured] could distinguish between right and wrong, and could form a rational intent to do the act of starting a fire. However, Lamers also testified that when Steven set the fire, he was "impelled by an impulse which he did not have the power to resist." Lamers was of the opinion that Steven exhibited paranoid tendencies of delusions and auditory hallucinations. He concluded that Steven had a schizoid personality caused by mental disease which existed on the date Steven started the synagogue fire. Congregation of Rodef Shalom, 91 Cal. App. 3d at 693-94, 154 Cal. Rptr. at 349-50.
196. Id. at 698, 154 Cal. Rptr. at 352.
sufficient mental capacity so as to invoke the exclusionary clause.\textsuperscript{197} The court stated that the M’Naghton test was too narrow and the “irresistible impulse” test was too broad.\textsuperscript{198} The court adopted the following:

If [the insured] was suffering from mental disease or defect which deprived him of capacity to intend to set the fire and cause the damage complained of, or which deprived him of the capacity to govern his conduct in accordance with reason, then he did not act intentionally \ldots \textsuperscript{199}

This test is a restatement of language in Clemmer v. Hartford Insurance Co.,\textsuperscript{200} finding no error in a jury instruction which focused on the insured’s ability to harbor the requisite “preconceived design to inflict injury” to come within the section 533 exclusion.\textsuperscript{201} The court in Clemmer did not consider what test of mental capability should be used; indeed the test adopted in Congregation of Rodef Sholom rejects any role for moral responsibility and is in this sense strikingly inconsistent with the “harbored a preconceived design to injure” test which has been grafted onto Insurance Code section 533. The “harbor a design to injure” language suggests that moral awareness and moral responsibility must be present on the part of the insured.\textsuperscript{202}

The test articulated in Congregation of Rodef Sholom is not a test that focuses the issue of mental capacity in the formats usually

\textsuperscript{197} Id. at 697, 154 Cal. Rptr. at 352.
\textsuperscript{198} Id. at 698, 154 Cal. Rptr. at 352.
\textsuperscript{199} Id. at 697, 154 Cal. Rptr. at 352 (emphasis added). The test adopted parallels superficially the ALI test (does the person suffering from a mental defect or disease possess the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law). The absence of a moral component in the court’s test distinguishes it from the ALI standard. Other jurisdictions have applied a similar test. See Johnson v. Ins. Co. of North America, 232 Va. 340, 350 S.E.2d 616 (1986) (no coverage where insured shot the victim although the insured was mentally ill and capable of differentiating between right and wrong. The insured knew of the nature and quality of his act and intended to do it).
\textsuperscript{200} 22 Cal. 3d 865, 587 P.2d 1098, 151 Cal. Rptr. 285 (1978).
\textsuperscript{201} Id. at 887, 587 P.2d at 1100, 151 Cal. Rptr. at 297.
encountered in the law. Since those tests are most commonly applied to determine criminal responsibility, the tests tend to reflect in whole or in part a concern for moral responsibility. The ability to distinguish "right" from "wrong," the ability to appreciate the "wrongfulness" of one's conduct, and the inability to withstand an "irresistible impulse" all bespeak of a moral sensibility of men and women as creatures free and able to consciously choose good from evil. The test espoused in *Congregation of Rodef Sholom* avoids any inclusion of moral sensibility into its test of mental capacity. It is, at root, a functional test: did the insured understand that striking a match and throwing it into a wastepaper basket would create a fire? If so, the insured possessed what might be called the requisite "arsonist's intent" so as to fall within the intentional act exclusion.\(^2\)03 If, on the other hand, the insured understood that striking a match and throwing it into a full wastepaper basket would not result in a fire because the match would burn out as it hit the basket, then the insured would not possess the requisite "arsonist's intent."

*Congregation of Rodef Sholom* was actually a harbinger of a similar result that the California Supreme Court would reach in a case involving a standard suicide clause which sought to exclude coverage where death was brought about by "suicide, sane or insane." In *Searle v. Allstate Insurance Co.*,\(^2\)04 the court found that the clause, while unambiguous, did not abrogate all requirements that the insured have some mental capacity to intentionally cause a loss. Paralleling *Congregation of Rodef Sholom*, the court adopted a test of mental capacity that avoided any inclusion of moral sensibility on the part of the insured to the consequences of his act:

> [I]nsanity or other mental derangement does not negate suicidal intent if the decedent is shown to have performed the self-destructive act with an understanding of its physical nature and consequences. Proof that the act was impelled by an irresistible

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203. Although *Congregation of Rodef Sholom* involved specifically a contractual exclusion for losses intentionally brought about, the court's reference to the statutory exclusion (Insurance Code section 533) strongly suggest that a similar test of mental capacity would be used for the statutory exclusion. See Escobedo v. Travelers Ins. Co., 227 Cal. App. 2d 353, 38 Cal. Rptr. '645 (1964): "The type of willfulness which exempts an insurance carrier from liability is that which is exemplified by a driver willfully running down a pedestrian in the street for whatever reason. If he negligently runs him down but not willfully, then the insurance is applicable." Id. at 360, 38 Cal. Rptr. at 649.

204. 38 Cal. 3d 425, 696 P.2d 1308, 212 Cal. Rptr. 466 (1985). *Searle* does not involve the intentional act exclusion. But as the latest pronouncement by the California Supreme Court on the issue of mental capacity in the context of insurance, it will, no doubt, be examined by lower courts on the issue presented here.
impulse would merely establish that "self-destruction was the very result intended, albeit by a deranged mind."\textsuperscript{205}

Under \textit{Searle}, if the insured puts a loaded gun to his head and pulls the trigger knowing that a bullet will be propelled into his head and cause his death, the insured possesses the requisite suicidal intent; it matter's not that he cannot appreciate the wrongfulness of the taking of his own life or that he cannot resist the impulse to take his own life. If, on the other hand, the insured due to his derangement, believes the loaded gun is really the "hand of God" which will impart to him everlasting life, he probably lacks the requisite suicidal intent.\textsuperscript{206}

Both \textit{Congregation of Rodef Sholom} and \textit{Searle} articulate a "mental capacity" test that has not been used in California for many years.\textsuperscript{207} In effect the two decisions adopt the "wild beast" theory that was rejected in \textit{M'Naghton}. There is little to differentiate the "arsonist intent/suicidal intent" tests from the "wild beast" test which holds that a person lacks mental capacity to form a specific intent only when he is totally deprived of his understanding and memory and does not know what he is doing.\textsuperscript{208}

\textsuperscript{205} Id. at 441, 696 P.2d at 1408, 212 Cal. Rptr. at 476.

\textsuperscript{206} Searle was decided solely on the basis of the policy language and a minority line of decisions that read a "minimal" intent requirement into the standard suicide exclusion. Id. at 440, 696 P.2d at 1407, 212 Cal. Rptr. at 475. The court did not mention either Insurance Code section 533 or \textit{Congregation of Rodef Shalom}.

\textsuperscript{207} M'Naghton} has a long usage in California. Although the \textit{M'Naghton} Rule was replaced by the ALI standard in People v. Drew, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978), \textit{M'Naghton} was reestablished in California in 1982 as a result of the adoption of Proposition 8 (Constitutional Ballot Initiative). See People v. Skinner, 39 Cal. 3d 765, 704 P.2d 752, 217 Cal. Rptr. 685 (1985) (discussing history of \textit{M'Naghton} in California and the affect of adoption of Proposition 8).

\textsuperscript{208} See generally \textsc{R. Perkins & R. Boyce, Criminal Law} 450-51 (3d ed. 1982). Suicide clauses, such as raised in \textit{Searle}, do not really raise the issue of "intent"; rather, the critical issue is whether self-destruction was a sufficiently real probability of the insured's act as to warrant denial of insurance benefits. The use of the language "sane or insane" represents an effort by insurers to remove the issue of the insured's mental capacity ("sanity") from the dispute. Even where they are successful, there still remains the issue whether the insured committed suicide. For example, assume the insured points a loaded gun to his head knowing that a bullet propelled into his brain will result in his death. If he pulls the trigger, he has the requisite "suicidal intent" required by \textit{Searle}. But what if the insured only knew those facts in the abstract; in the actual case let us hypothesize that the insured believed he was pointing a realistic toy replica at his head. Or assume the insured thought there was no bullet in the firing chamber. In both cases, the resulting death is an accident not suicide even in a jurisdiction that does not follow \textit{Searle}. Both examples lack the element of intended self-destruction that is the essential element of suicide.

The difficulty with \textit{Searle} does not appear to be that it creates an "intent" test where the policy exclusion specifically negates coverage in absolutist terms. \textit{Searle} does not do more than create a test for recognizing the occurrence of suicide, as opposed to accidental death. The
Legal tests for gauging mental capacity which have been developed for use in the field of criminal law, where assessing moral responsibility is a major objective in many cases, should not be unthinkingly applied to the civil side of the law. However, it is also inappropriate to apply a test of mental capacity that does not take into account the goals and purposes that underlay the intentional act exclusion. Mental capacity does not exist in a vacuum. Its determination can only be made against a backdrop of advancing the goals and policies that underlie the intentional act exclusion. The appropriate test for measuring the mental capacity of the insured to form the requisite "intent to injure" must be consistent with the understood goals and purposes of the exclusion. In this respect the basic test articulated in Congregation of Rodef Sholom is inadequate.

The true goal of the intentional act exclusion is deterrence although courts continue to view punishment as a major purpose of the exclusion.209 Even if the goal of punishment is accepted it argues for a stricter not a looser mental capacity requirement. To vindicate a goal of punishment the person to be punished, who has caused the loss, must deserve the punishment inflicted and be able to appreciate the fact that because of his misconduct he is being denied indemnification. If the above is not met, the infliction of punishment is wholly divorced of its retributivist and educational function. Indeed, given the stated goals underlying the intentional act exclusion, a strong case can be made that a rigorous standard for mental capacity, consistent with the ALI test, ought to be used that would make certain that the insured would understand why he was being punished and why and how he should conform his conduct to that which is socially desirable. As so formulated, this would also suggest that the appropriate point in time to measure "mental capacity" would depend on the goal and purpose being advanced. The deterrence goal would suggest that the appropriate point in time for determination is the time the conduct giving rise to the loss occurred; the punishment goal would suggest that the appropriate point in time is when the punishment is inflicted.210

209. See supra notes 55-59 and accompanying text and infra notes 263-70, 273. Punishment is a goal in the sense that the insured would stand ultimately responsible for the loss inflicted. If the insured is judgment-proof, then punishment is illusory.

210. Cf. Ford v. Wainwright, 477 U.S. 399 (1986) (unconstitutional to execute someone when he is insane, in large part because retributivist value of punishment is so low). Since the
2. Voluntary Intoxication As Affecting Intent to Injure

It has not been decided in California whether alcohol or substance abuse can negate the requisite intent the insured must possess to allow an insurer to invoke the intentional act exclusion. While Clemmer and Congregation of Rodef Sholom state that the criminal test of insanity does not determine the insured’s mental capacity to form the requisite intent to defeat insurance coverage, the decisions are not clear as to the test to be applied if the criminal tests for mental capacity are not used. Jurisdictions have split on the issue whether intoxication can impair the mental capacity needed to form the intent to injure. Most jurisdictions do allow, however, evidence on the issue whether intoxication impaired the insured’s mental capacity to form the requisite “intent.” The rationale for the majority approach is set forth in Burd v. Sussex Mutual Insurance Co.:

With respect to voluntary intoxication, the public policy considerations applicable to a criminal prosecution are not decisive as to liability insurance coverage. In criminal matters there is reason to deal cautiously with a plea of intoxication, and this to protect the innocent from attack by drunken men . . . But other values are involved in the insurance controversy. The exclusion of intentional injury from coverage stems from a fear that an individual might be encouraged to inflict injury intentionally if he was assured against the dollar consequences. Pulling the other way is the public interest that the victim be compensated, and the victim’s rights being derivative from the insured’s, the victim is aided by the narrowest view of the policy exclusion consistent with the purpose of not encouraging an intentional attack.

If the “preconceived design to injure” test is to be consistently applied, it would seem that intoxication could take the case out of

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211. See Annotation, Liability Insurance: Intoxication or Other Mental Incapacity Avoiding Application of Clause in Liability Policy Specifically Exempting Coverage of Injury or Damage Caused Intentionally by or at Direction of Insured, 33 A.L.R. 4th 983 (1984) (collecting cases).
213. Id. at 390, 267 A.2d at 15.
the intentional injury exclusion,\textsuperscript{214} unless it could be said that the insured intentional and voluntarily intoxicated himself to fortify his resolve to inflict injury on another.

In this regard Taylor v. Superior Court\textsuperscript{216} is significant. There the court held that punitive damages could be recovered from intoxicated drivers. The court did not accept the position of former Associate Justice Clark who, in dissent, contended that recognition of punitive damages for injuries caused by intoxicated drivers would allow insurers to avoid coverage by invoking Insurance Code section 533.\textsuperscript{216} Denying the insured the right to present evidence that her intoxication negated her mental capacity to harbor the required "preconceived design to injure" would likewise run counter to the broad pro-coverage policy articulated in numerous California decisions construing insurance contracts. It was surely contemplated under Taylor that the fact of intoxication did not avoid insurance coverage as to non-punitive, compensatory damage claims.

Taylor also illustrates that a distinction should be invoked between (1) cases which seek to assess whether the requisite intent in fact exists from (2) cases where public policy may preclude introduction of an intent-negating defense such as diminished capacity.\textsuperscript{217}

\begin{itemize}
  \item \textsuperscript{214} In general, cases dealing with a substance abuse/diminished capacity defense to the insurer's claim of "no coverage," involve contract exclusions.
  \item \textsuperscript{215} 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979).
  \item \textsuperscript{216} Id. at 903, 598 P.2d at 862, 157 Cal. Rptr. at 701. (Clark, J., dissenting).
  \item \textsuperscript{217} For example, in 1982 the people passed Proposition 8, a ballot constitutional initiative. One of the provisions of the Proposition, subsequently codified at California Penal Code section 25 restricted the diminished capacity defense, a defense which had been substantially expanded by California courts in the 1970's. The Proposition, as codified, provides:
  \begin{description}
    \item [(a)] The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.
  \end{description}
  \textbf{CAL. PENAL CODE} \textsection 25(a) (West 1988) (emphasis added). Although prior to the adoption of Proposition 8, California Penal Code section 22 had precluded use of intoxication as a defense to a criminal offense, the courts allowed intoxication to negate the specific intent element when that element was part of the offense. \textit{See, e.g.,} People v. Foster, 19 Cal. App. 3d 649, 97 Cal. Rptr. 94 (1971) (voluntary intoxication may not be considered when offense charged is general intent offense (offense requiring nothing more than intent to do proscribed act), but voluntary intoxication may be considered in determining whether particular purpose, motive or intent actuated the defendant; where specific intent is a necessary element of the offense, the trier-of-fact may consider the fact of the defendant's voluntary intoxication as a defense to the specific intent offense). This entire area is complicated by the fact that prior to the adoption of Proposition 8, the legislature substantially restricted the defense of diminished capacity (\textbf{CAL. PENAL CODE} \textsections 22, 28, 29) (West 1988), and thus there are overlapping statutory provisions. \textit{See generally} People v. Whitler, 171 Cal. App. 3d 337, 214 Cal. Rptr. 610 (1985). This
Diminished capacity may be eliminated or restricted as a defense for reasons of reliability or public policy, yet, such a course is normally not presumed. Thus, in People v. Westmore the California Supreme Court stated that “any proof tending to show that a certain mental condition could not exist is relevant and should be admissible to show that it did not exist.” Since the application of the intentional act exclusion should turn on the assessment of the insured's moral responsibility for the loss, it is appropriate that the Westmore test, likewise developed in the context of assessing moral responsibility, should be used.

E. Vicarious Liability

A person may be legally responsible in damages because of the misconduct of another. For example, under California law the principal is liable for intentional torts of the agent committed within the course and scope of the latter’s agency or employment. The question arises whether the principal may secure insurance for liability imposed on it as a result of the deliberate misconduct of its agents. In this regard, indemnification for losses caused by willful acts is not contrary to public policy where the liability of the insured is vicarious. Thus, the benefits to the insurer of the intentional acts exclusion are often effectively negated whenever the liability of one of several co-insureds is vicarious, unless the animus of the active wrongdoer is attributed to the passive wrongdoers.

Courts frequently reject attribution of the “intent to injure” possessed by one insured to other co-insureds. For example, where adverse reaction to the diminished capacity defense was not limited to California. See Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (1982 & Supp. IV 1986); see generally United States v. Pohlot, 827 F.2d 889, 903 (3d Cir. 1987), cert. denied, 108 S. Ct. 710 (1988).


220. Id. at 324, 583 P.2d at 1312, 149 Cal. Rptr. at 269.

221. See generally 2 B. Witkin, SUMMARY OF CALIFORNIA LAW, AGENCY AND EMPLOYMENT § 135 (9th ed. 1987) (“Liability under the doctrine of respondeat superior extends to malicious acts and other intentional torts of an employee committed within the scope of his employment.”) (collecting cases).

family members are co-insureds and the liability of one insured for her deliberate misconduct is direct and primary and the liability of the other insured(s) is derivative and secondary, indemnification is common. In this context California courts have held that the intentional act exclusion does not bar indemnification of the insured(s) whose liability is secondary and derivative.\textsuperscript{223} In \textit{American States Insurance Co. v. Borbor by Borbor},\textsuperscript{224} a husband and wife operated a nursery school. The husband sexually molested a number of the children during the period the American States policy was in force. The husband was convicted of child molestation; thereupon, a number of the children and their parents sued the husband and wife for infliction of emotional distress, assault and battery and fraud. The court found that the wife was a separate insured under the policy and that the husband’s willful acts would not be attributed to her for purposes of Insurance Code section 533:

\begin{quote}
[That the wife] may be indemnified under the American States policy does no violence to this public policy. She did not encourage, aid, or abet her husband’s willful, tortious activities. She did not ratify his acts. [The wife] may be liable for what the district court suggested might have been “negligent . . . supervision,” or for a negligent failure to investigate facts which existed but to which the district court stated she may have “closed her eyes to . . . deliberately avoid learning the whole truth.” But neither [the wife’s] negligence, if any, nor her vicarious liability for [the husband’s] willful acts, precludes insurance coverage under California Insurance Code § 533.\textsuperscript{225}
\end{quote}

Similarly, in \textit{Safeco Insurance Co. of America v. Kartsone}\textsuperscript{226} the arsonist-husband died as a result of injuries sustained in the arson fire he started. The court held that his wife, an innocent co-insured, was not barred by Insurance Code section 533 to the extent of her interest—which was the entire estate because of her husband’s death.

As \textit{Kartsone} implies, the result may be different if the wrong-doing insured stands to benefit directly from the insurance proceeds. Thus, in \textit{Norman v. State Farm Fire & Casualty Co.},\textsuperscript{227} the court denied recovery to the innocent co-insured where the insured prem-

\begin{flushleft}
\textsuperscript{223} See Arenson v. National Auto. & Casualty, Inc., 45 Cal. 2d 81, 84, 84 P.2d 816, 818 (1955) (Insurance Code section 533 has no application to a situation where the insured is not personally at fault; indemnification allowed for parent whose liability was based on an arson fire started by his child at school).
\textsuperscript{224} 826 F.2d 888 (9th Cir. 1987).
\textsuperscript{225} \textit{Id.} at 894 (footnote omitted).
\textsuperscript{227} 804 F.2d 1365 (5th Cir. 1986) (applying Texas law).
\end{flushleft}
ises were community property of the innocent insured and her co-insured arsonist husband and the husband was still alive and thus could benefit from the insurance proceeds.228 Thus, we might expect courts to be less willing to attribute the wrongdoer's intent to innocent insureds in liability insurance contexts since the benefits of insurance coverage will usually go to the third party victims of the wrongdoer's conduct.

A problem over the proper scope of attribution also exists when a business is owned by several persons, e.g., through the form of a corporation or partnership, and one of the owners intentionally causes a loss. Although the case law is not entirely consistent, a developing theme appears to limit imputation of wrongdoing to the other "innocent" owners of the business to situations where the wrongdoer(s) constitute a majority ownership interest229 or possess effective management and control of the entity.230

There is an inherent conflict between the social policies of (1) providing indemnification for insureds who have contracted for such protection and (2) deterring socially undesirable conduct as evidenced by intentionally induced losses. Allowing innocent insureds to recover the full value of indemnification clearly lessens the deterrence value associated with intentional act exclusions; however, freely imputing "intent" to innocent insureds denies them the benefits of the indemnification they have purchased. The approach adopted by a number of courts of limiting imputation to all insureds to situations where the wrongdoing insured(s) constitute the majority

228. Ironically, the federal court felt that alternatives other than outright denial of all benefits under the policy existed, but did not feel that a federal court sitting in diversity should implement those possible solutions. There is dicta in Erlin-Lawler Enters., Inc. v. Fire Ins. Exch., 267 Cal. App. 2d 381, 73 Cal. Rptr. 182 (1968) that supports the same result under California law. See infra note 230.

229. See generally Witten, "Barn Burning" and What Can Be Done to Prevent It, 22 TORT & INS. L.J. 511 (1986). In Federal Deposit Ins. Corp. v. Lott, 460 F.2d 82 (5th Cir. 1972), the wrongdoing insured was a majority owner but the court did not impute wrongdoing to the other insureds since the wrongdoer had been frozen out of any recovery of insurance proceeds. Thus, imputation would simply prejudice the interests of innocent co-insureds and creditors.

230. See Vicksburg Furniture Mfg., Ltd. v. Aetna Casualty & Sur. Co., 625 F.2d 1167 (5th Cir. 1980) (wrongdoers owned only 25% of company but possessed effective management control). But see Fidelity Phenix Fire Ins. Co. v. Queen City Bus & Transfer Co., 3 F.2d 784 (4th Cir. 1925) (arson fire instigated by 25% owner not imputed to others where wrongdoer frozen out of insurance proceeds). There is dicta in Erlin-Lawler which states that a corporation could not recover under an insurance policy for its fire loss if the loss were the result of arson perpetrated by the beneficial owner of practically all of the stock of the corporation and who had absolute control and management of the corporation. 267 Cal. App. 2d at 385-86, 73 Cal. Rptr. at 185.
owners of the insured business or have effective management control has substantial merit. Minority owners and passive investors must assume some responsibility for losses incurred by majority owners and controlling persons, at least to the extent the issue is whether they must bear the loss or some third party (here the insurer) must indemnify them for a loss intentionally caused by the majority owners or controlling persons. Unlike the third party victim cases, the involvement of the minority owners in the situation is voluntary, not involuntary. Moreover the insurer must be able to deal with some person or persons who represent all the insureds and whose actions and conduct will be imputed to all insureds. Absent such a relationship, the insurer simply cannot determine the relative risks assumed under the insurance contract. In this context, limiting attribution to situations where controlling persons have procured the insurance and intentionally brought about the loss provides a “bright line” test that enhances risk assessment and encourages the marketing and purchase of insurance.

The alternative approach used by some courts of denying coverage only to the wrongdoing insured must be used cautiously. The approach is surely sensible when applied in those contexts where indemnification will otherwise be made available, as where the innocent insureds constitute a majority interest or possess effective control. It is questionable whether the approach should be applied where the loss is caused by insureds who constitute majority owners or possess control. First, such an approach ignores the fact that the persons representing the entity have breached the insurance contract and public policy as espoused in Insurance Code section 533. Someone must speak and stand for the entity and those who have voluntarily elected to stand behind that “someone” must accept the costs as readily as they accept the benefits. Second, if the search for indemnification is carried so far as to permit full recovery under the policy whenever a single innocent insured can be found, the insurer is compelled to write a much broader exclusion that nullifies coverage whenever the loss is intentionally brought about by any insured rather than an insured.231 Rather than such an all or nothing approach, the use of the majority owner/controlling person test as a

231. The use of the term “any” rather than “an” may preclude recovery for all co-insureds whenever the loss was intentionally brought about by any one of the insureds. See supra note 111. The above recalls, to paraphrase Mark Twain, that the difference between the right word and the almost-right word is the difference between “electric” and “electric chair.” This opportunity does not exist where the parties are not co-insureds but have each obtained their separate insurance.
line of demarcation represents an appropriate compromise point, which will, in many if not most instances, effectuate both indemnification and deterrence goals.\textsuperscript{232}

V. THE SPECIAL PROBLEM OF THE APPLICATION OF INTENTIONAL ACT EXCLUSIONS TO PUNITIVE DAMAGE AWARDS

The determination whether an insurer must indemnify its insured for a punitive damages award entered against the insured raises three critical issues: first, is a punitive damage award within the coverage provision(s) of the policy; second, does the policy's intentional act exclusion effectively negate or withdraw coverage for punitive damage awards; and, third, does the statutory exclusion for losses willfully brought about negate coverage for punitive damage awards. To the extent that resolution of the above issues results in the denial of indemnification for the punitive damage award, a related issue arises whether the no indemnification policy extends to parallel awards, such as treble damage awards, civil penalties, liquidated damages, and the like. Because California courts have broadly, albeit wrongly, applied the statutory exclusion for intentional acts to negate insurability for punitive damages, there are no California decisions which address the first and second considerations.

A. Punitive Damages and Basic Coverage Clauses

The standard coverage clause in many liability policies provides coverage “[i]f a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies . . . .”\textsuperscript{233} The terms “property damage” and “bodily injury” are also defined in the standard policy.\textsuperscript{234} The initial inquiry is thus whether the punitive damages constitute a type of loss to the insured that is covered under the standard policy language.

Punitive damages are, in theory, not intended to compensate the injured party but rather are intended to punish the wrongdoer and

\textsuperscript{232} Minority owners and non-controlling persons will be deterred since they will not share in the indemnification and will be subject to subrogation claims asserted by the insurer. \textit{See supra} notes 59-62 and accompanying text.

\textsuperscript{233} This language is drawn from the standard ISO Homeowners 4 Special Form (ed. 4-89). It is essentially repeated in other standard ISO Forms, such as the Commercial General Liability Coverage Form (eds. 11-85).

\textsuperscript{234} “Bodily injury” is defined as “bodily harm, sickness or disease, including required care, loss of services and death resulting therefrom.” “Property damage” means “physical injury to or destruction of tangible property, including loss of use of [the] property.” \textit{Id.}
thereby deter her and others from engaging in conduct deemed socially reprehensible. 235 While punitive damages clearly constitute "damages" in contexts other than insurance, 236 it is unclear whether they do so within the purview of the standard ISO language noted above. The problem is whether to read the term "damages" as limited to "bodily injury damages" and/or "property damages" or whether to read the term as sufficiently broad to encompass punitive damages even with the "bodily injury"/"property damage" qualifiers.

Courts taking the first approach treat the qualifying language as controlling. 237 Under this approach, the terms "bodily injury" and "property damage" 238 tie the range of damages subject to indemnification to the coverage clause and define the types of damages that are covered. For courts adopting this approach, punitive damages, given their non-compensatory orientation, simply do not fit within the

235. See Cal. Civ. Code § 3294(a) (West 1970 & Supp. 1989); Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 928 n.13, 582 P.2d 980, 990 n.13, 143 Cal. Rptr. 389, 399 n.13 (1978). Professor Ellis has identified three circumstances where punitive damages are compensatory or compensation enhancing: (1) where there is a strong likelihood that normal damages do not measure the loss accurately; (2) where there is substantial difficulty in detecting the existence of the injury; and (3) where incentives are needed to stimulate litigation because losses relative to costs of litigation discourage redress. See Ellis, Fairness & Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1 (1982).

236. Thus Webster's Third New International Dictionary defines "damages" as "the estimated reparation in money for detriment or injury sustained; compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 571 (3d ed. 1967).


238. Bodily injury even in the broadest sense possibly requires some injury to bodily integrity. For example, courts disagree whether the term "bodily injury" encompasses "non physical, emotional harm." Compare American & Foreign Ins. Co. v. Church Schools, 645 F. Supp. 628, 632 (E.D. Va. 1986) (bodily injury coverage does not cover claims for purely emotional distress) with Levy v. Duc laux, 324 So. 2d 1, 9-10 (La. Ct. App. 1975), cert. denied, 328 So. 2d 887-88 (La. 1976); County of Chemung v. Hartford Casualty Ins. Co., 130 Misc. 2d 648, 650-51, 496 N.Y.S.2d 933, 935-36 (1985) (term "bodily injury in an insurance policy does not avoid coverage for emotional distress); cf. Interstate Fire & Casualty Co. v. Stuntman, Inc., 861 F.2d 203, 204-05 (9th Cir. 1988) (emotional or mental injuries are not inextricably linked to bodily injury under California law). The disagreement is, however, over whether physical harm to the body is required. It is difficult to equate punitive damages with "bodily injury" under either view. Similarly, while courts disagree over the scope of "property damage" compare Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1352-55 (4th Cir. 1987), cert. denied, 484 U.S. 1008 (1988) (under Maryland law environmental clean-up costs are not covered) with New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1365-67 (D. Del. 1987) (under Delaware law, environmental "clean-up costs" are covered), the nature of the loss is inherently tied to the property and its restoration, repair or valuation. See, e.g., Gulf Ins. Co. v. The L.A. Effects Group, Inc., 827 F.2d 574, 577 (9th Cir. 1987).
range of meanings that can reasonably and legitimately be given to the terms "bodily injury" or "property damage."

Most courts however do not follow the above approach. Rather they treat the term "damages" as definitive. The terms "bodily injury" and "property damage" rather than limiting the term "damages," appear merely to identify a trigger necessary to initiate coverage but do not limit the scope of coverage. Thus, as long as the punitive damages are based on a covered event, here "bodily injury" or "property damage," the punitive damages award falls within the coverage clause. This results even where the reason for the award is not to compensate because of the existence of a covered event but to deter the insured and others from allowing a similar event to occur again.

An insurance policy may provide an unqualified definition of "damages" and this, of course, simplifies the analysis. Thus, an insured may seek and obtain coverage for "economic losses he may be liable for," rather than coverage based on the standard ISO language which uses the "bodily injury"/"property damage" terminology. In such situations, the insurer's use of the broader coverage language, which references the insured's potential legal obligation as the means for defining the scope of coverage, negates the insurer's claim that punitive damages are not contractually covered. In such cases, if the insurer wishes to avoid indemnification it must rest its case on a specific policy exclusion or public policy.

B. Punitive Damages and Policy Exclusions

If an insurance policy specifically excludes coverage for punitive damages, and assuming the exclusion is not inconspicuous or defective in some way that allows the court to ignore exclusions, the
exclusion will be enforced. There is no requirement that insurers write coverage for punitive damages.\textsuperscript{243}

Although many insurance policies contain a specific punitive damages exclusion, many more do not. On the surface this may appear surprising but it can be explained by several factors. First, the majority of states do not as a matter of public policy prohibit insurance for punitive damages.\textsuperscript{243} In these jurisdictions insurers may offer coverage for punitive damages awards entered against their insureds. Second, punitive damages cannot be treated as a unitary concept. In many jurisdictions a principal’s vicarious liability for the misconduct of its agent may be sufficient to allow for the imposition of a punitive damage award against the principal.\textsuperscript{244} Consequently, a blanket exclusion for punitive damages may not serve the insurance needs of the insured-principal. In such circumstances, either to meet market need or competition for the insured’s business, the insurer may be willing to provide coverage for some punitive damages awards, at least up to policy limits. Thus, a blanket exclusion will be avoided and specific exclusions will be used in order to control the types of punitive damage awards for which the insurer will provide coverage.

The standard policy exclusion for intentional acts suggested by the ISO does not \textit{per se} exclude coverage for punitive damages.\textsuperscript{245} To avoid indemnification, the insurer must establish that coverage is negated by reference to the nature and consequences of the insured’s conduct that resulted in the loss rather than by reference to the legal remedy made available to redress that misconduct.\textsuperscript{246}

Because policy exclusions operate under judicial suspicion, the situation confronting insurers is not comforting to them. The market

\textsuperscript{242} It is frequently stated that an insurer has the right to limit coverage as long as the restriction is not contrary to public policy. \textit{See}, e.g., Public Employees Ins. Co. v. Mitchell, 173 Cal. App. 3d 814, 817, 219 Cal. Rptr. 129, 130 (1985).

\textsuperscript{243} This is said to be the majority rule in Prell Hotel Corp. v. Antonacci, 86 Nev. 390, 469 P.2d 399 (1970) and Stroud v. Denny’s Restaurant, Inc., 271 Or. 430, 532 P.2d 790 (1975).

\textsuperscript{244} There is a state-by-state compilation in J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE, Table 5-1 (1981), which identifies those states which hold the principal liable for a punitive damage award based on the agent’s misconduct. The jurisdictions do divide on the issue whether pure vicarious liability will be applied or whether some complicity will be required of the principal which contributed to the injury. \textit{Id. See Restatement (Second) of Torts} § 909 (1965) which argues for the more restricted approach.

\textsuperscript{245} \textit{See}, e.g., Caspersen v. Webber, 298 Minn. 93, 213 N.W.2d 327 (1973).

\textsuperscript{246} \textit{See}, e.g., Shapiro v. Glens Falls Ins. Co., 39 N.Y.2d 204, 347 N.E.2d 624, 383 N.Y.S.2d 263 (1976) (policy exclusion for loss “caused intentionally by or at the direction of the insured” negated coverage for claim based on alleged defamation published “falsely, wilfully and maliciously with intent to injure”).
requires that some coverage for punitive damages be available to the insured. Yet efforts by insurers to cabin the risk assumed is most difficult. Under such circumstances insurers would prefer a legal determination that would fix the scope of liability insurers can assume for a punitive damages award sustained against their insured. A legal determination avoids the problems inherent in attempting to establish limitations by contract drafting. No court has yet held a judicial determination to be subject to the same rules of construction as applied to terms found in insurance policies. In California, insurers have received a series of favorable judicial decisions that have largely removed punitive damages from insurability even if both insurer and insured wish initially to insure the risk.

247. The use of conduct-based exclusions rather than remedy-based exclusions also means that policy obligations other than indemnification, such as the duty to defend the insured, must invariably be assumed by the insurer. Litigation costs being high, the obligation to provide the insured with a defense can be a significant expense to the insured, often exceeding the amount of any possible indemnity. That this is the case can be inferred from the number of instances insurers are reported to have attempted to pay policy limits to secure a discharge of their duty to defend. Compare Denham v. LaSalle-Madison Hotel Co., 168 F.2d 576 (7th Cir. 1948), cert. denied, 335 U.S. 871 (1948) (insurer may terminate defense obligation by tender of policy limits) with Conway v. Country Casualty Ins. Co., 92 Ill. 2d 388, 442 N.E.2d 245 (1982) (contra). This problem has received sustained attention in the asbestos cases. See, e.g., Commercial Union Ins. Co. v. Pittsburg Corning Corp., 553 F. Supp. 425 (E.D. Pa. 1981); St. Paul Fire & Marine Ins. Co. v. Thompson, 150 Mont. 182, 433 P.2d 795 (1967). The issue is complicated by changes in the standard policy language adopted by the ISO in 1966 (see Van Vugt, Termination of the Insurer's Duty to Defend by Exhaustion of Policy Limits, 44 Ins. COUNSEL J. 254 (1977)) and the growth of the doctrine of conforming policy language to the reasonable expectations of the insured. See supra note 25 and accompanying text; see Gross v. Lloyds of London Ins. Co., 121 Wis. 2d 78, 358 N.W.2d 266 (1984) (insurer not allowed to invoke policy provision allowing it to terminate defense on tender of policy limits where provision was not accompanied with sufficient notice to apprise insured that insured's reasonable expectation that prior policy controlled insurer's duty to defend was no longer valid). In Ohio Casualty Ins. Co. v. Hubbard, 162 Cal. App. 3d 939, 208 Cal. Rptr. 806 (1984), the court compelled the insurer to continue with the defense of its insured even though policy limits had been paid and the only claim remaining against the insured was for punitive damages. The court held that the fact that the insurer was required to undertake the defense because part of the claim was covered created the reasonable expectation on the part of the insured that the insurer would see the case through to its conclusion even as to non-covered claims. Id. at 947-48, 208 Cal. Rptr. at 811-12.

248. For example, in Ambassador Ins. Co. v. Montes, 76 N.J. 477, 388 A.2d 603 (1978), the insurer sought a declaration that the insured's setting of an arson fire which resulted in the death of a resident of the insured premises was not covered by the insurance policy. Although the policy apparently did contain an intentional act exclusion, the insurer purposefully resisted raising any policy defense and relied instead on a public policy argument. Id. at 479, 388 A.2d at 605.

249. An insurer may write coverage for punitive damages yet still contend that the coverage is unenforceable due to public policy considerations. In Public Serv. Mut. Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 425 N.E.2d 810, 442 N.Y.S.2d 422 (1981), a health care provider was held, on public policy grounds, not entitled to indemnification for punitive damages flow-
C. California's Broad Public Policy Negation of Insurability For Punitive Damages

Although other jurisdictions have split on the issue whether insurance may cover liability for punitive damages, California has adopted the rule that they are not insurable. Two reasons for non-insurability have been advanced in California: first that Insurance Code section 533 precludes insurers from indemnifying insured for punitive damages; and, second, that public policy precludes shifting the responsibility for satisfying a punitive damages award from insured to insurer. Neither reason supports a blanket refusal to allow indemnification for punitive damage awards.

1. The Statutory Exclusion

The argument in favor of deeming punitive damages to be within the statutory exclusion recognized by Insurance Code section 533 flows from the treatment of section 533's "willfulness" element and the "malice" element of the punitive damages statute as representing identical states of mind. While there is equivalency be-
between "malice" and "willfulness" in some cases, it cannot be generalized to exist in all cases. California courts have recognized that the "malice" requirement for a punitive damages award can be satisfied where the tortfeasor exhibits "conscious disregard" for the rights of the victim. Where punitive damages are sustained on the basis of "conscious disregard," there is no equivalency with the willfulness element of section 533 since "conscious disregard" bespeaks "recklessness," whereas intent connotes "willfulness." In addition, the term "willfulness" found in section 533 has been given a narrow construction in recent decisions as meaning a "preconceived design to

The tort of malicious prosecution connotes something more blameworthy than an act of negligence. The chief element of a cause of action for malicious prosecution is malice. To constitute malice there must be a motive or purpose, and it must be an improper one. The requirement in a malicious prosecution case is evidence which establishes bad faith, or the absence of an honest and sincere belief that the prosecution was justified by the existent facts and circumstances. . . . 'The element of malice necessarily involves the process of the mind and its thinking.' Malice imports willfulness; and, accordingly, in our opinion, is a 'willful act' within the meaning of section 533.

Id. at 36-37, 151 Cal. Rptr. at 497-98 (citations omitted). But see supra note 69.

255. Malicious prosecution cases, such as presented in City Products, are examples of situations where convergence usually exists. See, e.g., Alberston v. Raboff, 46 Cal. 2d 375, 295 P.2d 405 (1956), in which the court noted that improper purposes sufficient to establish malice exist in those proceedings in which:

(1) the person initiating them does not believe that his claim may be held valid;
(2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.

Id. at 383, 295 P.2d at 411.

256. The California Supreme Court has recognized that, in certain circumstances, negligent conduct may rise to the level of outrageous conduct and, at that higher level, support an award of punitive damages. See Peterson v. Superior Court, 31 Cal. 3d 147, 158-59, 642 P.2d 1305, 1311, 181 Cal. Rptr. 784, 790 (1982) ("[n]on-intentional torts may also form the basis for punitive damages when the conduct constitutes conscious disregard of the rights or safety of others"); Hasson v. Ford Motor Co., 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982). In order to justify punitive damages in such cases the evidence must show that the defendant (1) knew of the (2) probable injurious consequences of his conduct and (3) deliberately failed to avoid them. Woolstrum v. Mailloux, 141 Cal. App. 3d Supp. 1, 5, 190 Cal. Rptr. 727, 732 (1983).

Examples of cases which have sustained awards of punitive damages for outrageous conduct include: Nolin v. National Convenience Stores, Inc., 95 Cal. App. 3d 279, 283-84, 288, 157 Cal. Rptr. 32, 34-35, 37 (1979) (Defendant, operator of a self service gasoline station, was repeatedly advised by his employees of nozzle malfunction which caused gasoline to overflow when the pump was used. Defendant was actually advised of people slipping and falling in the pump area where the spillage occurred. Defendant ordered the station manager to remove warning signs and to stop advising patrons of the hazards in the pump area). See also Woolstrum, 141 Cal. App. 3d Supp. 1, at 5-6, 190 Cal. Rptr. at 731-32 (collecting cases).
The court in *City Products* stated that "malice in fact" and a "preconceived design to inflict injury" are synonymous. In this the court was mistaken. While there is some definitional similarity between the two terms, the "preconceived design" test suggests a higher level of moral culpability and intent than is communicated by the standard definition of "malice in fact," which is the "wish to vex, annoy or injure another person." A practical joker may wish to vex or annoy the victim of the prank but that hardly suggests equivalency with a "preconceived design to injure." Likewise a wish to injure does not suggest equivalency with a "preconceived design" to injure. The latter test suggests a necessary element of premeditation which is absent from the former. Unfortunately, without the gloss the normal construction would be just the opposite; "malice" would be considered the more restrictive term over "willfulness." This need to recognize the role reversal that has occurred in this area by reason of the restrictive gloss given the term "willfulness" in *Peterson* and *Clemmer* and the expansive construction given "malice" has escaped California courts resulting in the mismatch of result and legal principles. The very words chosen by the court to describe the proper limits of the terms "malice" and "willfulness" suggest that the latter has a much more restrictive meaning and role than the former.

That the terms should have distinct meanings is supported by the role each term plays in the statute within which it is found. The punitive damages statute and the statutory exclusion for losses willfully brought about do not share equal, identical goals. The purposes of the punitive damages statute are essentially deterrent and retributive; the goals of the statutory exclusion, while sharing those goals in part, must also balance the goal of indemnification. This balancing requirement is largely absent from punitive damage calculations. Given the distinct role each statute plays, there is little merit

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258. *City Prods.*, 88 Cal. App. 3d at 36 n.3, 151 Cal. Rptr. at 497 n.3.
259. This is the standard California jury instruction definition of "malice in fact." See BAJI No. 6.94 (6th ed. 1977). Interestingly, the court in *City Products* cited BAJI No. 6.94 but ignored the definition of "malice" contained in the standard punitive damages instruction, BAJI No. 14.72 which is, at least in part, closer to Insurance Code section 533. BAJI No. 14.72 also recognizes that "conscious disregard" may amount to "malice" for purposes of punitive damages.
261. The calculation of punitive damages is not determined by a fixed mathematical formula. In determining the proper amount to be awarded, the trier-of-fact is to consider:
in drawing correlations between language used in the two statutes simply because of the presence of terminology that has received parallel constructions in different contexts. The critical issue must be whether the public policy goals that underlie both the punitive damage statute and the statutory exclusion warrant the non-indemnification of all punitive damages awards.

The problems with justifying the refusal to allow indemnifica-

1. the reprehensibility of the defendant's conduct;
2. the amount of damages necessary to have the desired deterrent effect given the defendant's financial condition; and
3. the relationship between the award and the amount of actual damages sustained.

Id. at 928, 582 P.2d at 990, 148 Cal. Rptr. at 399.

The disconnection between punitive damages and compensatory goals is also evidenced by the lack of success litigants have had in attempting to connect the two. Efforts by defendants in mass tort cases to create plaintiff classes based on the impact of punitive damages awards on the ability of the defendant to provide compensation for other injured victims have been unsuccessful. See, e.g., In re "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188 (N.D. Cal. 1981), rev'd sub nom. Abed v. A.H. Robbins Co., 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983) (reversing trial court's certification of plaintiff's class at defendant's request because of multiple punitive damages claims); but cf. In re Benediction Prods. Liab. Litig., 749 F.2d 300, 306 (6th Cir. 1984) (while acknowledging that district court was not "clearly erroneous" in holding that "limited fund" may justify mandatory plaintiffs' class action, reversed because of failure to conduct a fact-finding inquiry whether "limited fund" did or did not exist).


The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against. We find examples of it wherever we turn. Contract and tort; contract and quasi-contract; action *in rem*, *in personam*, and *quasi in rem*; title; general and special property—all these and a hundred others furnish examples of words which more often than not are supposed to have some one meaning, good for all purposes, when even a small amount of observation and analysis of the phenomena of legal decision as they occur will show the falsity of the assumption.

Id. at 159.

263. This is confirmed, at least inferentially, by the California Supreme Court's citation in Peterson only to the "public policy" arguments raised in City Prods. Corp. v. Globe Indem. Co., 88 Cal. App. 3d 31, 151 Cal. Rptr. 494 (1979); the Peterson court's citation did not include those pages of the City Products opinion where the semantic similarities between "malice-in-fact" and "willfulness" were addressed. Peterson v. Superior Court, 31 Cal. 3d 147, 157 n.4, 642 P.2d 1305, 1310 n.4, 181 Cal. Rptr. 784, 789 n.4 (1982). See Foremost Ins. Co. v. Wilks, 206 Cal. App. 3d 251, 253 Cal. Rptr. 596 (1988) (court stated that proscription on indemnification for punitive damages awards followed from Ins. Code section 533 and Civil Code section 1668). Ironically, while the court stated that the insurer could be held to have waived the right not to indemnify for compensatory damages awarded against the insured as a result of intentional misconduct, the court impliedly suggested that waiver would not apply to a punitive damages award. The Court, in effect, acknowledged that a punitive damages award stands on a different footing than other awards for purposes of indemnification.
tion of punitive damages as required by Insurance Code section 533 may thus be summarized as follows:

1. The intentional act exclusion precludes indemnity for losses resulting from a preconceived design to inflict injury; moreover a number of California decisions equate "intent" with malice, i.e., a wish to vex or annoy, thus, in effect collapsing Civil Code § 3294 and Insurance Code § 533. But

2. Conduct may be unintentional yet still give rise to punitive damages if the conduct is carried out by the insured "with a conscious disregard of the rights or safety of others." But

3. All punitive damages awards fall within the ambit of Insurance Code § 533.

The punitive damage exclusion thus extends the sweep of section 533 to unintentional conduct whenever the resulting loss is labeled a punitive damage award. However, the exclusion for non-intentional punitive damages cannot rest on section 533 unless "conscious disregard" can be transmuted into "preconceived design," which clearly it cannot. Indeed "recklessness," the verbal equivalent of "conscious disregard," implies other than an intentional act. The decision to deny coverage to punitive damage awards cannot be justified by reliance on Insurance Code section 533; justification must rest on other grounds.

2. The Public Policy Argument Against Indemnification For Punitive Damages

As noted previously, jurisdictions are divided on the issue whether it is against public policy to allow indemnification for punitive damages. Jurisdictions which refuse indemnification accept one or more of the following arguments: (1) indemnification defeats the purpose of punitive damages which is to make an example of defendant and thereby deter him and others from engaging in socially reprehensible conduct; (2) indemnification serves no useful purpose because punitive damages are a windfall for the plaintiff; or (3) indemnification would allow the burden of the penalty to fall on the innocent insurer, its shareholders and policyholders through increased premiums. Jurisdictions which permit indemnification reason: (1) courts should generally not interfere with private contracts unless manifestly necessary; (2) the insured has paid and the

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264. See supra notes 241-44 and accompanying text and infra notes 279-82.
insurer has received payment for the coverage; (3) the reasonable expectations of the policyholder are that she is covered for all damages awarded up to policy limits; (4) punitive damages do not really deter and compensatory damages do not really compensate; and (5) increased premium costs that would accompany indemnification for punitive damages are an equivalent deterrent to the punitive damages award itself. 266

The arguments against indemnification of punitive damages are similar in many respects to those made against punitive damages in general. 267 Since California allows punitive damages to be assessed but not indemnified, the distinction must be based on reasons that are not common to the two situations or which, if common, demand different resolutions.

One argument that is not common to both situations is based on the nature of insurance. An insurer must be able to calculate within reasonable bounds the expected loss in order to arrive at an appropriate premium that will cover the insurer's costs (losses plus expenses, such as underwriting, claim adjustment, etc.) and provide the insurer with a reasonable profit. Thus, it might be argued that indemnification for punitive damages should not be permitted because it jeopardizes the fiscal integrity and solvency of insurers. 268 The insurer may not be able to calculate the risk because punitive damage awards are assessed with reference to such inconstant variables as wealth and the culpability of the defendant. Calculating punitive damages is a fluid process not subject to rigid guidelines. 269 Yet, the same arguments could be made for a number of damage awards for which insurance is available, such as, lost profits, pain and suffering. While the observation is correct that indemnification for punitive


268. See Kimball, The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law, 45 MINN. L. REV. 471 (1961) (insurance provides security for policyholders; regulation of insurers is designed to ensure continued security). Insuring insurer solvency has been a major if not primary reason for regulation of insurers in California. See 1 CALIFORNIA INSURANCE LAW & PRACTICE § 1.02[4][a], at 1-18 (1986).

damages complicates the ability of insurers to calculate risk, there is no objective proof, that, for purposes of risk calculation, punitive damages are different in kind from other types of difficult to quantify damage or that allowing indemnification of punitive damages would threaten the fiscal integrity of insurers. Insurers who did not want to assume such an indemnity obligation could do so by a plain and conspicuous exclusion of punitive damages, rather than relying on a public policy known to all insurers but only a few insureds. The very fact that many insurance policies provide coverage for punitive damages, even if only where imposed on a theory of vicarious liability, undermines the fiscal solvency argument.

A second argument is that since punitive damages are designed to deter and punish, allowing indemnification would be at cross purposes to those goals. This argument appears to be the principal one relied upon by California courts. Although the argument has some appeal, it is ultimately an unsatisfactory justification for the broad punitive damages exclusion recognized by California courts. The statutory exclusions (Insurance Code section 533 and Civil Code section 1688) speak to deterring willful acts. While it cannot be gainsaid whether denying indemnification really deters, it is clear that the purpose of the exclusion is to deter willful acts not non-intentional conduct. The mere fact that conduct poses a high risk to human safety has not been deemed by the majority of courts to preclude insurability, even when the risk is to third parties.

It is paradoxical to proscribe insurance on a deterrence rationale for one type of conduct simply because the resulting damages are labeled punitive rather than compensatory. Perhaps, if there was a strong sense in the legal community that punitive damages only punished and properly discriminated between the careless and the heartless, then a case for distinguishing, for insurability purposes, between compensatory and punitive damages might be made. If the decision to deny insurability for punitive damages awarded in the context of non-intentional, conscious disregard conduct is in fact based on the purpose of the penal remedy, this suggests that all non-compensatory remedies ought to be uninsurable, such as treble damage awards, “presumed” damages, civil sanctions, etc. Courts have,


272. See supra note 169 and accompanying text and supra notes 184-89.
however, treated these types of damages as insurable. The rationale of these decisions is that mandatory enhanced damages are primarily compensatory. Yet, in analogous settings courts have recognized that mandatory enhanced damages serve a penal function. It appears that treble damages can be either penal or compensatory depending on the immediate wishes of the court. The punishment and deterrence rationales prove too much. Punishment and deterrence remain theoretical goals of the whole of law. Classification of losses as insurable or not based on whether there was a related goal of punishment or deterrence would sweep many losses into this exclusionary “black hole.”

Since the legislature has addressed the public policy issues of indemnification for willful acts in Insurance Code section 533 and Civil Code section 1688, judicial intrusion into the area ought to be circumspect. Deterrence is but one of the many purposes that lie at the heart of law. Whether the theoretical deterrent effect of punitive damages would be undermined by allowing indemnification is a matter better left to legislative determination than judicial specula-


274. Id. at 34, 221 Cal. Rptr. at 187. See also Cieslewicz v. Mutual Servs. Casualty Co., 84 Wis. 2d 91, 104, 267 N.W.2d 595, 601 (1978) (Insurance coverage for statutory treble damages not violative of public policy. Statutory and common law punitive damages differ in that statutory punitive damages (1) do not require a particular state of mind, (2) are automatically imposed, and (3) are fixed in amount without regard to wealth of the defendant.); Miller v. Continental Ins. Co., 40 N.Y.2d 675, 358 N.E.2d 484, 389 N.Y.S.2d 565 (1976); cf In re National Mortgage Equity Corp. Mortgage Pool, 636 F. Supp. 1138, 1152-55 (C.D. Cal. 1986) (review of the case law indicated that there is no clear-cut distinction in the cases as to whether antitrust and RICO treble damages are penal or remedial). On the compensatory aspects of common law punitive damages, see Fagot v. Ciravola, 445 F. Supp. 342, 344-45 (E.D. La. 1978).


276. While the regulation of insurance falls to both the legislature and judicial branches of government, it is generally conceded that the identification and establishment of “public policy” most properly belongs to the legislative branch. See Farmers Ins. Exch. v. Cocking, 29 Cal. 3d 383, 628 P.2d 1, 173 Cal. Rptr. 846 (1981). See also K. ABRAHAM, DISTRIBUTING RISK 126-29 (1986) (noting that judicial action should be circumspect of legislative and regulatory primacy except in situations where the insurer’s action misleads the insured as to the scope of coverage). The legislature is capable of acting in this area as evidenced by its adoption of California Insurance Code section 533.5 which prohibits insurance coverage for the payment of any fine, penalty or restitution in any civil or criminal action or proceeding brought by specified law enforcement entities. CAL. INS. CODE § 533.5 (West Supp. 1988). The statute by its terms does not apply to private disputes.
At present, the only legislative declaration in this area regarding “intentional acts” is that contained in Insurance Code section 533. No provision in the Insurance Code suggests that the public interest would be harmed if punitive damages, based on non-intentional conduct, were insurable. Nor should insurers, who purport to write coverage for such damages, be allowed to escape from the bargain with impunity because of a public policy argument which by its very terms is inapplicable to non-intentional conduct, but is applied to such conduct nonetheless. While it may be conceded that judicial delineation of public policy may permissibly expand on legislative pronouncements, that expansion should be consistent with the legislative scheme and in furtherance of the basic legislative policy. California courts have yet to demonstrate that the blanket prohibition on indemnification for punitive damages awards is consistent with the public policies underlying either Insurance Code section 533 or Civil Code section 3294, much less both. Rather, as demonstrated above, the blanket prohibition does not vindicate the legitimate goals that underlie the awarding of punitive damages; however, it does subject insureds to the full cost of imperfect verdicts and insured misjudgments that lead to penal awards in private disputes.

When the punitive damages exclusion was first developed, there was a strong correlation between the “willful act” requirement of Insurance Code section 533 and the “malice” concept in Civil Code section 3294. Every California court that has purported to exclude punitive damages from coverage has relied on this one-to-one correlation. No California court has purported to exclude punitive damages solely on the basis of public policy apart from Insurance Code section 533. Subsequent judicial decisions extended the “malice” concept of punitive damages to include “conscious disregard for the health and safety of another.” Since, from a remedial perspective, the tort system undercompensates many individuals injured by the misconduct of others, it is not difficult to treat the “conscious disregard” standard as substantially compensatory, and as a way of providing, more complete compensation to those who were injured by conduct highly likely to injure. Conduct undertaken in conscious disregard}

277. See Keeton & Widiss, supra note 1, § 6.4(a), at 646 stating: More often and more explicitly than was common [in] earlier times, courts . . . may look to the state’s legislation not only with the purpose of faithfully applying the specific statutory mandates, but also as sources of establishment of policy [that] carries significance beyond the particular scope of each of the statutes involved. (citation omitted).

of the health and safety of others is inherently more likely to result in injury to others. Looking at damages awarded for injury resulting from conscious disregard conduct as substantially compensatory means that the public policy exclusion does not have a strong claim for application.

The answer to the question whether punitive damages should be insurable is neither clear-cut nor easy. There is strong appeal to the basic proposition that punitive damages should punish and thereby deter and that the effect of both punishment and deterrence will be softened if the insured can obtain indemnification of the award. Yet, that argument also requires acceptance of the assumption that triers-of-fact are infallible, that punitive damages are never awarded in contexts where the real delict is that the principal failed to supervise an employee or exercised poor judgment, or lack of judgment, in approving the employee’s conduct, or the defendant was extremely careless in his regard for the safety of others. Moreover, the punishment and deterrence argument assumes that a state has only one public policy. “Public policy” is not a talisman or magic touchstone. Unfortunately, California courts have not evidenced a willingness to analyze the issue of the insurability of punitive damage awards in terms of the multiple “public policies” that are involved here, most importantly the basic pro-coverage policy based on the fact that the insurer has accepted a premium and implicitly represented to the insured that damages are covered.

Few observers of the legal system should be so sanguine of the perfectibility of the adjudicative process as to assume that errors in awarding punitive damages do not occur and that the errors are greatest in the cases involving non-malevolent conduct. The efforts ("[exemplary damages are those] recoverable for injury to feelings and for the sense of indignity and humiliation resulting from injury maliciously and wantonly inflicted"). Other reasons have been advanced for allowing punitive damages that are quasi-compensatory: (1) encouraging plaintiffs to bring actions that might otherwise be discouraged due to cost and inconvenience of proceedings; and (2) providing a substitute for personal revenge. See Hensley v. Erie Ins. Co., 283 S.E.2d 227, 233 n.15 (1981) (collecting cases); see also, Ellis, supra note 235. Even if it is assumed that tort remedies in theory fully compensated a victim, the general requirement that the victim bear the costs of securing his or her compensation means that, in actuality, full compensation is not achieved.

279. All judgments are in fact statements about the probability that certain events occurred. See Ball, The Moment of Truth: Probability Theory and Standards of Proof, 14 Vand. L. Rev. 807 (1961); Kaye, The Laws of Probability and the Law of the Land, 47 U. Chi. L. Rev. 34 (1979); McBaine, Burden of Proof: Degrees of Belief, 32 Calif. L. Rev. 242 (1944); Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329 (1971). Because the probability is always less than one, inevitably an incorrect decision may be reached. The incorrect decision may, of course, favor the insured, but the basic point is that the insured should be entitled to protect itself against the possibility of an errone-
on the part of the California Supreme Court to tighten the willfulness standard of Insurance Code section 533 so that it only excludes losses brought about through the insured's "preconceived design to inflict injury" can be explained, in large part, as an effort to give insureds the benefit of the doubt in the very fluid area where coverage turns on ascertaining "intent."

In considering whether coverage for punitive damages ought to be allowed, courts should avoid giving the term "punitive damages" undue symbolic significance. Punitive damages are available in a wide variety of contexts, many of which do not involve conduct that could be said to amount to a "preconceived design to inflict injury." Inasmuch as neither the California courts nor the California legislature have seen fit to limit punitive damage awards to "preconceived design to injure" cases, there is clearly a discontinuity in treating such awards as violative of a public policy against insurability. The net effect of discarding the blanket prohibition on coverage for punitive damages would be to return insurance law to the position that existed before the expansion of liability for punitive damages by the adoption of the "conscious disregard" standard. Coverage would turn on the insured's intent in committing the act that led to the loss, not on the remedial theory used to compensate or encourage the plaintiff to initiate litigation. This distinction is generally recognized in the case law acknowledging the insurability of punitive damages. While a few decisions broadly hold that punitive damages for intentional torts are insurable, the vast majority of courts have announced their relaxation of the public policy bar in cases factually


280. This discontinuity has been recognized as calling for the insurability of punitive damage awards that are not based on intentional acts of misconduct. See Public Serv. Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 400, 425 N.E.2d 810, 815, 442 N.Y.S.2d 422, 427 (1981) (punitive damages are insurable if awarded for any reason other than "intent to injure," such as for gross negligence, recklessness, or wantonness); Mazza v. Medical Mutual Ins. Co., 311 N.C. 621, 319 S.E.2d 217 (1984) (the North Carolina Supreme Court reserved judgment whether punitive damages could be covered, consistent with public policy, where they were related to the insured's intentional misconduct).

involving conduct not specifically found to have been intended to injure.\textsuperscript{282} There is much to commend in an approach that would permit coverage of punitive damages awarded where the insured engaged in conduct deemed to be recklessness or amounting to conscious disregard; yet, preserve the bar where the loss was inflicted as a result of a deliberate design to injure.

D. Punitive Damages and Vicarious Liability

In \textit{City Products Corp. v. Globe Indemnity Co.},\textsuperscript{283} the court suggested that the public policy against allowing indemnification for punitive damages awards would not apply when liability for punitive damages was vicarious.\textsuperscript{284} California's punitive damages statute does not purport to permit attribution of punitive damages based on the doctrine of \textit{respondeat superior}.\textsuperscript{285} Under California law the principal may be made to pay punitive damages based on the act of the agent where the principal (1) authorized the acts, (2) ratified the acts, (3) knowingly or recklessly employed an unfit agent, or (4) employed the agent, who did the wrongful act, in a managerial capac-

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\item \textsuperscript{283} 88 Cal. App. 3d 31, 151 Cal. Rptr. 494 (1979).
\item \textsuperscript{284} \textit{Id.} at 35-36, 151 Cal. Rptr. at 496-97. The court did not apply the rule because it found that the punitive damages were based on the corporation's own willful act.
\item \textsuperscript{285} It is apparent from the foregoing that under California law the imposition of punitive damages upon a corporation is based upon its own fault. It is not imposed vicariously by virtue of the fault of others. The "malice in fact," which was the foundation of the punitive award against plaintiff, was malice of plaintiff acting through its corporate official "having the power to bind the corporation" who, in contemplation of the law, constituted plaintiff itself.
\item \textit{Id.} at 36, 151 Cal. Rptr. at 497.
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ity. Where punitive damages are awarded against the principal based on his authorizing the agent to commit the wrongful act, there is little question but that the principal’s conduct was willful within the purview of Insurance Code section 533. Here authorization is legally analogous to that where the insured commits a willful injury himself. Much more difficult are the situations where punitive damages may be assessed against the principal because of ratification, knowing employment of unfit agent or commission of wrongful conduct by a managerial employee.

In California, punitive damages have been upheld on the mere retention of the agent by the principal after the principal knew or had the opportunity to know of the agent’s misconduct. Attribution of liability on such grounds falls far short of the “preconceived design to injure” test that is the basis of Insurance Code section 533. Similarly, what constitutes “knowing employment of an unfit agent” can run the gamut from positive misconduct (i.e., hiring the known vicious thug to repossess cars) to negligence (i.e., failing to appreciate the agent’s erratic behavior). A per se rule excluding indemnification amounts to overkill. Likewise the managerial test imposes liability on another (the entity or its owners) based on the acts of a particular class of agents. Confusion results because the determination of who is a manager is fluid. Whether an agent acts in a managerial capacity depends on “the degree of discretion the employee possess[es] in making decisions that will ultimately determine corporate policy.”

In an analogous setting the Alaska Supreme Court recognized the propriety of allowing indemnification:

The purpose of punitive damages is twofold: to punish the wrongdoer and to deter the wrongdoer and others like him from repeating the offensive act. Assuming, without deciding, that public policy in Alaska would prohibit liability insurance coverage for punitive damages, we hold that such a policy would not

286. CAL. CIV. CODE § 3294(b) (West Supp. 1988).
289. See Egan, 24 Cal. 3d at 822-23, 620 P.2d at 148, 169 Cal. Rptr. at 698.
prohibit municipal corporations from insuring against punitive damage awards. Such awards are incurred in the performance of public functions and, if uninsured, would fall on the innocent taxpayers. Further, where the liability is vicarious, or the defendant is a governmental entity, there exists a considerable body of decisional authority to the effect that liability insurance coverage of punitive damage awards is allowed. We view this exception to the general prohibition against insurance coverage of punitive damages as a sound one and find the rule an appropriate basis for the disposition of this issue on appeal.290

The fact that punitive damages may be assessed against one whose liability is secondary and whose culpability often falls far short of any specific intent to injure suggests that the public policy against indemnification is not the same as is the case with the actual wrongdoer. In situations where punitive damages are the consequence of some neglect other than commission or authorization of the wrongful act, the policies in favor of indemnification and the speculative deterrent value of punitive damages favor allowing indemnification. Providence Washington Insurance Co. and the general policies underlying vicarious liability support the use of insurance to protect the interests of innocent shareholders and innocent insureds against imprudent actions by others. The fluidity and flexibility which accompany the determination of the liability of principals for punitive damages for acts committed by their agents prevent any meaningful claim that such damages are always and necessarily awarded because the insured principal harbored a preconceived design to injure. Denial of indemnification in such cases simply amounts to the giving of an allegiance to the deterrence and punishment goals that is neither warranted in theory nor consistent with what lawyers and judges know juries do, and don’t do, in actual practice. Insurance should be allowed to protect insureds from the adversities visited on them in the real world—a world of imperfection and error.291 The protection insureds pay for should not be de-


291. For example, as noted previously at supra note 287, a principal has a duty to repudiate unauthorized acts of the agent and failure to do so may evidence approval or ratification. On the other hand, where the agent’s special skills and experience are necessary to the employer’s business, retention may not amount to ratification. See Sullivan v. Matt, 130 Cal. App. 2d 134, 144, 278 P.2d 499, 506 (1955). The employer is clearly put in a difficult position where exposure to punitive damages may turn on an erroneous decision regarding the skill and experience of the agent as it relates to the employer’s business. It seems that this is just the type of decision that should be insurable.
nied based on artifice and unnecessary fictions.

VI. Conclusion

Surveying the California decisions addressing the intentional act exclusion reminds one of the old legal aphorism: “The rule has been consistently followed and the only difficulty has been in applying it.” The determination to exclude from insurability losses intentionally brought about or inflicted has manifested itself in many ways. With the core concept, there is little disagreement. An insured who, harboring the actual intent to injure or create a loss, follows through and causes that loss to arise should not be able to negate statutory and policy exclusions that deny coverage for such losses. The critical issue, however, is how far from the core concept courts should go in allowing the intentional act exclusion to perform the task that could be accomplished by a specific exclusion. One theme that emerges in the decisional law applying the intentional act exclusion is that once outside the core concept, the decisions become inconsistent both in their results and reasoning. To some extent this must be expected. Decisions in the penumbra cannot be expected to have the internal consistency and closeness to the reasons for creating the doctrine as do cases in the core. A certain amount of inconsistency is a tolerable price in situations where the decision to go outside the core is itself, in general, reasonable and warranted. The difficulty here, however, is that the principled decision to leave the core, and the terms and conditions under which the journey will be made has not been made by decision makers in this area. Rather, the intentional act exclusion has evolved spontaneously and without plan or design. Nor can we now look at the results of fifty years of unplanned development and say that, serendipitously, all came out all right in the end. The intentional act exclusion has evolved into a misshapen doctrine that like a “banjo” hitter at the plate, sometimes hits, usually misses, and rarely accomplishes anything significant except to make an out.

Fortunately, a little pruning can restore consistency, logicality, and purpose to this area of the law. The basic test of Clemmer that the exclusion is only activated when the insured “harbors a preconceived design to injure” states a workable, fair test. It certainly serves any legitimate underwriting interest that insurers possess. To the extent successful underwriting depends on the convenient certainty that arises when fortuity is spread across a large number of similar risks, excluding losses caused by “preconceived design” preserves fortuity.

What is important is that the related issues of “intent,” mental capacity, and the issue of coverage for punitive and penal awards be
tied to the test in actuality rather than in pretense. Use of the “preconceived design” test would certainly force insurers to rethink and, most likely, rewrite several clauses in the insurance contract. If insurers wanted broad or blanket exceptions for punitive damages awards, sexual assault injuries, etc. the insurance policy would have to expressly so provide. Explicit disclosure of the limitations on insurance coverage is much the preferable approach over the current system that allows the generic concept of intentional act exclusion to dictate whether certain losses are insured or not. The consequence of this ambiguous system of coverage is that much turns on largely fortuitous events, such as the presence of an innocent co-insured the existence of a large pain and suffering award rather than a punitive damages award, as the determinants of coverage.

The legitimate purposes of an intentional act exclusion are punishment and, more importantly, deterrence. The first purpose requires that the insured’s conduct be sufficiently blameworthy in a legal and moral sense to warrant the imposition of punishment and that the fact of punishment have economic reality. The second purpose suggests that coverage only be negated where the consequence of denying the applicability of the intentional act exclusion (loss indemnity) is outweighed by the conviction that the conduct sought to be deterred is controllable by the insured and sufficiently socially undesirable to justify placing the full cost of the decision (no indemnity) on the insured and the victim. It is suggested that the Clemmer test appropriately identifies the few situations where the values of “punishment” and “deterrence” are sufficiently real to justify the negation of indemnity.