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James M. Fischer

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ACCIDENTAL OR WILLFUL?: THE CALIFORNIA INSURANCE LAW CONUNDRUM

James M. Fischer*

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INTRODUCTION

Legal claims often arise out of deliberate conduct with alleged unintended or unanticipated harmful consequences, such as claims based on faulty workmanship, horseplay, or practical jokes. While these legal claims, if proved, will generate legal liability, often the more immediate concern for the defendant is whether these legal claims trigger the defendant’s liability insurance, with its concomitant duties of defense and indemnity.

Liability insurance in the United States, at least for claims involving bodily injury and property damage, is commonly limited to claims involving “accidents.” As a result, courts are often confronted with the question whether an insured’s deliberative conduct establishes an accident. For example, if the insured deliberately designs or constructs a

* Professor of Law, Southwestern Law School, Los Angeles, California.

product, but that product as designed or constructed is defective and results in bodily injury or property damage, is there an accident? If an insured deliberately cuts corners to save money in performing the construction contract, is a loss resulting from “corner cutting” an accident? If an insured plays a practical joke on another, expecting that the other will experience some slight discomfort or annoyance, but the practical joke backfires resulting in unintended, serious injury, is the loss an accident? In all of these cases, the actions of the insured were deliberate, but the consequences were unintended or unexpected. Should the resulting loss be characterized as accidental for purposes of liability insurance coverage?

There is a natural relationship between insurance and accidents. If you ask a layperson what insurance covers, she would probably say “an accident.” By the same token, a layperson would likely understand that insurance does not extend to deliberately incurred losses. If the insured deliberately burns down his house, the arson loss is not considered “an accident.”¹ As a general proposition, one who has obtained insurance against a certain type of loss cannot expect to recover the benefit of insurance when one intentionally causes the very loss one sought to protect oneself against.² Loss that is consciously and deliberately brought about by the insured strikes us intuitively as an inappropriate subject for indemnification through insurance.³ Yet, while that intuition is easily expressed, it is applied with

1. See *Home Sav. of Am., F.S.B. v. Cont'l Ins. Co.*, 104 Cal. Rptr. 2d 790, 799 (Ct. App. 2001) (“[T]he named insured who commits arson in order to recover under a homeowner’s policy will be barred from collecting on the policy.”).

2. CAL. INS. CODE § 22 (2009) (“Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event.”); see 7A JOHN A. APPLEMAN & JEAN APPLEMAN, *INSURANCE LAW AND PRACTICE*, § 4492 (1982) (“A basic principle of insurance law is that insurance will provide coverage only for fortuitous losses.”); see also LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* § 102:7 (rev. ed. 2013) (“Implicit in the concept of insurance is that the loss occur as a result of an event that is fortuitous, rather than planned, intended or anticipated.”).

3. See ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* § 5.4(b), at 497–99 (1988); see also STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW*, § 8.2.3, at 194–95 (1987) (stating that allowing insurance for deliberately inflicted harm would incentivize insureds to inflict harm).

difficulty in the legal system. Much like “beauty”⁴ and “pornography,”⁵ an “accident” may be more easily identified *ex post* than defined and understood, *ex ante*.

In recent years, California courts have struggled to determine where the line lies between covered accidents and uncovered deliberative acts. Sometimes the courts understand an accident as a fortuitous event,⁶ other times the courts understand an accident as a fortuitous injury.⁷ Sometimes the courts combine the two concepts and add the filter of intent or expectation, e.g., did the insured intend or expect that his conduct would result in harm to another.⁸ These formulations confuse whether the emphasis is on the conduct that causes the loss or on the loss resulting from the conduct. That confusion results in inconsistency in the case law.

4. The subjectivity of the perception of beauty is expressed by the idiom “beauty is in the eye of the beholder.” *See, e.g.*, WILLIAM SHAKESPEARE, LOVE’S LABOUR’S LOST act 2, sc. 1 (“beauty is bought by judgment of the eye”).

5. *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material [hard-core pornography] I understand to be embraced within the shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .”).

6. *See Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. 273 (Ct. App. 1989) (involving claim for coverage arising out of acts of sexual activity with another).

In terms of fortuity and/or foreseeability, both the *means* as well as the result must be foreseen, involuntary, unexpected, and unusual. We agree coverage is not always precluded merely because the insured acted intentionally and the victim was injured. An accident, however, is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage. Clearly, where the insured acted deliberately with the intent to cause injury, the conduct would not be deemed an accident. Moreover, where the insured intended all of the acts that resulted in the victim’s injury, the event may not be deemed an “accident” merely because the insured did not intend to cause injury. Conversely, an “accident” exists when any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity.

Id. at 279 (citations omitted) (internal quotation marks omitted).

7. *See Geddes & Smith, Inc. v. Saint Paul-Mercury Indem. Co.*, 334 P.2d 881, 884 (Cal. 1959) (defining an “accident” as an “undesigned happening or consequence from a known or unknown cause”).

8. *See Northland Ins. Co. v. Briones*, 97 Cal. Rptr. 2d 127, 137 (Ct. App. 2000) (“Cases also hold that if an insured intends to do an act that results in injury, whether or not there was any expectation or intent that harm would result from the act, there is no covered “accident” or “occurrence” under the policy.”) (citations omitted).

We should not be surprised at some level of inconsistency in the case law. Decision making is a human enterprise and judges will necessarily disagree over the application of rules and principles to specific situations at the margin. Inconsistency, however, becomes a concern when it relates to core doctrinal concepts. That is the case here. It is fundamental to insurance that coverage is extended to accidental or fortuitous losses.⁹ Imprecision as to the legal definition of an accident creates substantial uncertainty over the availability of “bodily injury” and “property damage” coverage under standard liability insurance because the concept of “accident” is integral to coverage. This is a particularly acute problem in California because the courts have used the concept of an accident in defining the state’s statutory prohibition against insuring for loss caused by “willful act of the insured,”¹⁰ thus potentially extending the understanding of the term “accident” to all insurance policies.¹¹

In this article, I explore California’s recent turn in determining what is “an accident” for purposes of liability insurance coverage. The focus is on section 533 of the California Insurance Code. I adopt this approach for two reasons. First, willful action has come to be understood by California courts as the antithesis of an accident.¹² Second, section 533 has recently received an expansive interpretation

9. See *supra* notes 2–3 and accompanying text.

10. CAL. INS. CODE § 533 (“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.”).

11. See *J.C. Penney Cas. Ins. Co. v. M.K.*, 804 P.2d 689 (Cal. 1991). (“Section 533 is ‘an implied exclusionary clause which by statute is to be read into all insurance policies.’” (quoting *U.S. Fid. & Guar. Co. v. Am. Employer’s Ins. Co.*, 159 Cal. App. 3d 277, 284 (Ct. App. 1984)); see also *B & E Convalescent Ctr. v. State Comp. Ins. Fund*, 9 Cal. Rptr. 2d 894 (Ct. App. 1992).

In this case, of course, the rejection of the coverage obligation does not depend upon express policy language. The coverage preclusion here is a statutory one imported into the policy as a matter of law. The question is, does that make any difference? We have been presented with and can divine no reason why it should. Section 533, as an implied term of the State Fund liability policy, is as much a part of the insurance contract as any express exclusion.

Id. at 909 (citations omitted).

12. *Armstrong World Indus., Inc. v. Aetna Cas. & Surety Co.*, 52 Cal. Rptr. 2d 690, 718 (Ct. App. 1996) (“Prior to 1966, standard liability policies covered injuries ‘caused by accident.’ The words ‘caused by accident’ served to exclude coverage from willful acts of the insured.”).

that creates problems when the statutory mandate is integrated with the standard liability insurance policy. This article criticizes that expansion and examines how section 533 and standard liability insurance policies should work together. The article concludes that section 533's statutory test should be limited to overarching public policy concerns; that the current tests violate that principle; and, that the California Supreme Court should restore order to this area of the law by returning to its earlier, narrow interpretation of the statute to specifically intended losses.

I. CURRENT POLICY LANGUAGE

An insurance policy is basically a contract between the insured and the insurer.¹³ The basic form for many liability insurance policies in California, and nationally, is the standard form Commercial General Liability (CGL) policy.¹⁴ The current standard form is referred to as an "occurrence" policy.¹⁵ Although the CGL policy changed from an accident to occurrence form after 1966, the change was less dramatic in substance than usually acknowledged. Under Coverage A of the CGL policy, the insurer agrees to indemnify the insured for damages the insured becomes legally obligated to pay because of bodily injury or property damage.¹⁶ A critical component of coverage is that the injury must "occur" during the policy period and be caused by "an occurrence."¹⁷ If it

13. Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 659 (2013) ("Courts commonly remind the parties that an insurance policy is, after all, a contract, and that departures from the contract must be limited if the contract is to have any meaning.").

14. The Insurance Service Office (ISO) provides standardized policy language based on actuarial and rating information it collects. See *Harford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993) (describing the functions of the ISO).

15. See *Montrose Chem. Corp. v. Superior Court*, 913 P.2d 878, 891 (Cal. 1995).

16. Coverage A of the standard ISO CGL policy provides coverage for bodily injury and property damage caused by the insured. Coverage B of the policy provides coverage for certain enumerated harm caused by the insured, such as advertising injury. ISO PROPERTIES, INC., FORM NO. CG 00 01 12 07, COMMERCIAL GENERAL LIABILITY FORM 1-8 (2006) [hereinafter GENERAL LIABILITY FORM], available at <http://www.sloanmason.com/files/pdf/ISO%20PDF%20CG%2000%2001%2012%2007.pdf>.

17. *Id.* at 1. Most California courts have held that the "occurrence" happens in the policy period when actual injury (bodily injury or property damage) occurs. See *Hallmark Ins. Co. v. Superior Court*, 247 Cal. Rptr. 638 (Ct. App.

does, a prima facie case of coverage is established and the insurer must assume those duties to which it has committed itself under the policy, unless the insurer can establish a policy defense.¹⁸

Standing alone, the terms “occur” and “occurrence” are very broad. The term “occurrence” has been interpreted as a “happening” or an “event.”¹⁹ The 1966 change in nomenclature did not, however, fundamentally alter the scope of coverage because the occurrence policy is a misnomer. The CGL policy language actually defines an occurrence as an accident for most instances:

Occurrence means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.²⁰

This quoted language began to be used with the 1966 ISO CGL form, which at the time was described as the “Comprehensive” General Liability Form. Prior to 1966, many liability policies defined coverage in terms of “damage caused by accident.” Several decisions suggested that “caused

1988).

Delta relies on *Sylla v. United States Fidelity and Guaranty Co.* and *Oil Base, Inc. v. Continental Casualty Co.*, in which the respective courts described “accident” as the occurrence which is the cause of the injury. . . . Delta invites us to disagree with *Schrillo* and the long line of California cases which have rejected the *Sylla* and *Oil Base* reasoning. We decline the invitation based on our conclusion that (1) the time of the accident is the time when the complaining party was actually injured; and (2) the definition of the time of the occurrence of an accident in *Sylla*, *Oil Base*, and *Evanston* is out of line with the prevailing rule in this state.

Id. at 639–40 (citations omitted).

18. Establishing a policy defense that will excuse the insurer’s duty to provide a defense to its insured is a high burden in California. See *Montrose Chem.*, 861 P.2d at 1162 (stating that to establish a duty to defend the insured “must prove the existence of a *potential for coverage*,” the insurer, on the other hand to avoid the duty to defend “must establish the absence of any such potential”).

19. *Ins. Co. of N. Am. v. Sam Harris Constr. Co.*, 583 P.2d 1335, 1337 (Cal. 1978); see also THE NEW OXFORD AMERICAN DICTIONARY 1177 (Erin McKean et al. eds., 2d ed. 2005) (defining an occurrence as “an incident or an event”).

20. GENERAL LIABILITY FORM, *supra* note 16 at 1. For example, an eviction is an occurrence in the sense of an event, but it is not an accident. *Swain v. Cal. Cas. Co.*, 120 Cal Rptr. 2d 808, 812 (Ct. App. 2002). Similarly, a breach of contract is an event, but it is not an accident. *Stein-Brief Group, Inc. v. Home Indem. Co.*, 76 Cal Rptr. 2d 3, 8 (Ct. App. 1998) (stating that “nonaccidental acts arising out of a breach of contract do not constitute an ‘occurrence’ within the meaning of a CGL policy”).

by accident” meant the loss be sudden and unexpected;²¹ thus, the losses arising from gradual, progressive causes or events might not be covered.²² The 1966 formulation of coverage was designed to make explicit that gradual, progressive losses would be covered as an “occurrence,” unless the insurer specifically excluded such losses from coverage.²³ The 1966 reformulation did not, however, define all exposures, events, or happenings as “accidents.” Only those continuous exposures resulting in bodily injury or property damage *in the policy period* were deemed occurrences under the policy language.²⁴ Thus, under the 1966 formulation, an

21. See, e.g., *Geddes & Smith, Inc. v. Saint Paul-Mercury Indem. Co.*, 334 P.2d 881, 884 (Cal. 1959) (“The door failures [loss] were unexpected . . . [T]hey occurred suddenly . . . [W]e are concerned, not with a series of imperceptible events that finally culminated in a single tangible harm . . . but with a series of specific events, each of which manifested itself at an identifiable time and each of which caused identifiable harm at the time it occurred.”).

22. *Am. Home Prod. v. Liberty Mut. Ins. Co.* 565 F. Supp. 1485, 1501 (S.D.N.Y. 1983), *aff’d*, 748 F.2d 760 (2d Cir. 1984).

The CGL evolved out of the difficulties faced by courts and parties in dealing with personal injuries and property damage sustained as a result of gradual processes. Prior to 1966, general liability policies covered liability because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, *caused by accident* and arising out of the hazards hereinafter defined. The word accident suggested an intent to cover only sudden, unexpected but identifiable events. The courts were left in doubt as to whether, and to what extent, the standard policy was meant to cover liability for injuries that resulted from gradual processes, rather than from sudden events.

Id. at 1500–01 (citation omitted).

23. The purpose of using the term “occurrence” rather than the term “accident” was to expand coverage only in the sense of eliminating the doubt about whether, and to what extent, a standard commercial general liability (CGL) policy was intended to cover liability for injuries that resulted from gradual processes, rather than sudden events. *APPLEMAN & APPLEMAN*, *supra* note 2, §§ 4492–4492.05; see also *Kremers-Urban Co. v. Am. Emp’rs Ins. Co.*, 351 N.W.2d 156, 166 (Wis. 1984). In one way the definition reduced coverage as it was specified that the insured’s viewpoint controlled, not the victim’s, as some courts had concluded. See *infra* note 108.

24. *ALLAN D. WINDT*, 3 *INSURANCE CLAIMS AND DISPUTES* §11.3 (6th ed. 2013).

[L]iability policies typically afford coverage, subject to various limitations and exclusions, for property damage or bodily injury caused by an occurrence. An *occurrence* is typically defined to mean an accident, although the definition in recent policies also typically defines an occurrence to include a “continuous or repeated exposure to conditions.” Although the latter provision somewhat broadens the scope of the term, it does not eliminate the need for an accident.

Id. (footnotes omitted).

“occurrence,” as contemplated by the policy, could arise in two ways: (1) an accident or (2) a continuing injurious exposure within the policy period.

Post 1966 variations of the CGL policy have also included additional language that compliments the concept of fortuity embedded in the formulation of an occurrence as “an accident.” Under these newer provisions, an occurrence must be “neither expected nor intended.” The phrase can either be included in the definition of occurrence, or written as an exclusion to the coverage. The “neither expected nor intended” language has created some problems concerning proper understanding of the CGL policy because the words “expected” and “intended” are also found when interpreting the word “accident.”²⁵ The coverage term “accident” and the limitation phrase “neither expected nor intended” are, in effect, cognates of each other.

With so much riding on a definition, one would expect a comprehensive, well delineated definition of the term “accident” in the policy. Just the reverse is true. Insurance policies do not define the term accident. This raises two interrelated questions. First, why is the policy silent on this critical point? Second, how is the term “accident” understood given policy silence?

II. WHAT IS AN ACCIDENT?

In *Geddes & Smith, Inc. v. Saint Paul-Mercury Indemnity Co.*²⁶ the Court defined an “accident” as follows:

No all-inclusive definition of the word ‘accident’ can be given. 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 consequence from either a known or an unknown cause.”²⁷

25. See *supra* note 21; see also *infra* notes 31–32 and accompanying text.

26. 334 P.2d 881 (Cal. 1959).

27. *Id.* at 884 (emphasis added) (citations omitted) (internal quotation marks omitted).

The quoted definition largely tracts dictionary definitions.²⁸ The key terms are “suddenness” and “unexpectedness”; however, those terms are as abstract and as general as the term “accident.” When all the terms are considered together, they provide some clarification; however, understanding the concept of an “accident” still requires the exercise of intuition and judgment. What, after all, does it mean to say that an event is “sudden” or “unexpected”? For example, if a home is destroyed by a tornado, is the loss “sudden” if the storm evolved and was tracked over a time period of several hours? Was the loss “unexpected” if the house was constructed in an area known for its high incidence of tornados? As numerous courts have noted, when these terms were paired in the qualified pollution (“sudden and accidental”) exclusion,²⁹ the term “sudden” can be understood as synonymous with “unexpected” or it can be understood as in a temporal sense of “quick” as opposed to “delayed.”³⁰ Ultimately, definitions may help, but they cannot eliminate the inherent uncertainty of the term “accident.”³¹

28. Courts frequently refer to standard English language dictionaries for assistance when interpreting insurance policy language. *See, e.g.*, *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1267 (Cal. 1990).

29. 1 JEFFREY W. STEMPEL, *STEMPEL ON INSURANCE CONTRACTS*, §§ 4.05[C], 14.11 (3d ed. Supp. 2009) (discussing the rise and fall of the “qualified pollution exclusion” and the ascendancy of the “absolute pollution exclusion as a result of strict judicial construction of the former” because the use of the terms “sudden” and “accidental” was deemed ambiguous). The exclusion is referred to as “qualified” because it excluded coverage for losses resulting from pollution unless the discharge, dispersal, or release of the pollutants was “sudden and accidental,” in which case the policy covered the resulting bodily injury or property damage. Carl A. Salisbury, *Pollution Liability Insurance Coverage, the Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia*, 21 ENVTL. L. 357, 370 (1991).

30. The issue was whether the terms “sudden” and “accidental” are equivalents or whether each term comprehends a different viewpoint with “sudden” encompassing the notion of temporality and “accidental” encompassing the notion of expectancy or intention. *See Sauer v. Home Indem. Co.*, 841 P.2d 176, 182 n.8 (Alaska 1992) (noting disagreement in the cases over proper interpretation of the linked terms); *see generally* Claudia G. Catalano, Annotation, *Construction of Qualified Pollution Exclusion Clause in Liability Insurance Policy*, 88 A.L.R.5th 493 (2001).

31. For example, the California Supreme Court defined an accident in terms of temporal suddenness. *Geddes & Smith*, 334 P.2d at 884. Other courts, however, define accident as having the quality of unexpectedness without mentioning the concept of suddenness. *Hauenstein v. Saint Paul-Mercury Indem. Co.*, 65 N.W.2d 122, 126 (Minn. 1954) (“Accident, as a source and cause of damage to property, within the terms of an accident, is an unexpected,

Insurers respond to this uncertainty by relying on judicial resolution of the meaning of the term “accident.” Insurers appear to prefer a judicial resolution for several reasons. First, insurers have apparently been unable to conjure up a satisfactory definition in the policy. Too broad a definition will make risk exposure unacceptable from an underwriting perspective; too narrow a definition will make the risk exposure unacceptable from a sales perspective. Although insurance contracts are typically perceived as the ultimate form of adhesion contracts, insurers must still draft contracts with an eye to consumer³² and regulatory acceptance.³³ Insurers do not have a totally free hand when it comes to drafting policy language.

Second, any policy definition of an “accident” is subject to the vicissitudes of the rules of insurance policy interpretation, which tend to favor policyholders over insurers.³⁴ No matter

unforeseen, or undesigned happening or consequence from either a known or unknown cause.”).

32. See *Montrose Chem. Corp. v. Superior Court*, 913 P.2d 878, 903 (Cal. 1995) (noting insured resistance as reason for industry decision to draft particular policy language).

33. Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107 (2007).

The laws of every state require regulatory review and approval of insurance policies prior to their use. Statutes typically provide that regulators must disapprove a policy form that violates the insurance code; has titles or headings which are misleading; or is substantially illegible. A number of state statutes further require disapproval of a policy form where it contains inconsistent, ambiguous, or misleading clauses, or exceptions and conditions that deceptively affect the risk purportedly assumed. Others mandate disapproval of any policy that contains provisions which are unjust, unfair, or inequitable, or contrary to public policy.

States also regulate the format and appearance of insurance policies, typically specifying the size of the type and requiring a table of contents or index. The statutes also require spacing and formatting to aid comprehension. Many states impose “readability” standards. Some of these readability statutes require calculations involving syllable, word, and sentence counts, often specifying a particular maximum score on the Flesch Readability test (typically between 40–50; passages with scores of 90–100 are easily understandable by average 5th graders and passages with scores of 0–30 can be best understood by college graduates.).

Id. at 128–29 (footnotes omitted); see also STEMPPEL, *supra* note 29, § 9.01; STEVEN PLITT ET AL., 1 COUCH ON INSURANCE 3D § 2.8 (2010).

34. ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW (5th ed. 2012).

The rules of general contract interpretation discussed in the foregoing

how painstakingly clear the insurer attempts to be, there is always some cognizable risk a court will find the language ambiguous.³⁵ Insurance law trends towards pro-coverage rules of interpretation that seek to balance the playing field and reduce the insurer's advantage as policy drafter.³⁶ And while there is some disagreement whether this is right,³⁷ and some disagreement over the degree to which courts deliberately override insurer draftsmanship,³⁸ there is no disagreement that the rules of insurance policy interpretation favor policyholders to some extent.³⁹

Third, judicial definitions are not subject to pro-insured rules of interpretation.⁴⁰ Unless the court deems the term

section are applicable to any contract. Some courts have said that insurance contracts are to be construed like any other contract, and nothing more is required. But most decisions are fairly read as putting insurance contracts in a different category, and applying some kind of heightened review or alternative interpretive principles.

Id. § 25A[C]. California jurisprudence provides practical examples of this heightened review. *See, e.g.*, *White v. Western Title Ins. Co.*, 710 P.2d 309, 313 (Cal. 1985) (stating that contract terms providing coverage will be construed liberally, whereas terms restricting coverage (exclusions) will be construed narrowly); *Century Bank v. St. Paul Fire & Marine Ins. Co.*, 482 P.2d 193, 194 (Cal. 1971) (stating that the language of the insurance contract is to be construed in accordance with the reasonable understanding of a layperson); *Pageol Truck & Coach Co. v. Pac. Indem. Co.*, 117 P.2 669, 671 (Cal. 1941) (stating that if semantically possible, the contract will be construed so as to achieve its objective of securing indemnity to the insured for the loss to which the insurance relates).

35. *See, e.g.*, *Equitable Life Assurance Soc'y of the U.S. v. Dyess*, 109 S.W.2d 1263 (Ark. 1937) ("If appellant meant to exclude liability for double indemnity while riding as a passenger or otherwise in any kind of aircraft, why did it not say so in such plain language *that a wayfaring man, though a fool*, might not be deceived thereby?") (emphasis added).

36. *See* James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text versus Context*, 24 ARIZ. ST. L.J. 995, 1001–08 (1992) (listing pro-coverage rules).

37. *See* David S. Miller, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849 (1988); Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should not be Construed Against the Drafter*, 30 GA. L. REV. 171 (1995).

38. Compare Fischer, *supra* note 36 (arguing that pro-coverage rules dominate), with Peter Nash Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543 (1996) (arguing that for the most part courts construe insurance contracts much like all other contracts).

39. KENNETH S. ABRAHAM, *INSURANCE LAW & REGULATION* 37 (5th ed. 2010).

40. *Rafeiro v. Am. Emp'rs' Ins. Co.*, 85 Cal. Rptr. 701, 706 n.4 (Ct. App. 1970). The pro-insured approach is also not applied where the policy language is in a form mandated by statute. *Interinsurance Exch. v. Marquez*, 172 Cal.

“accident” to be ambiguous, which most courts have refused to do,⁴¹ the judicial interpretation will become the *de jure* meaning of the term.⁴² Insurers have found that the judicial definition of the term “accident” is acceptable for underwriting purposes and avoids the risk that the term will be construed with a policyholder bias. While a court, if left untethered, might construe the term liberally in favor of the policyholder, the force of precedent and a settled judicial construction imposes constraint.⁴³ For these reasons, insurers have delegated to the judiciary the task of defining the term “accident” rather than defining the term in the policy.

III. WHAT CONSTITUTES AN “ACCIDENT” IN THE CONTEXT OF LIABILITY INSURANCE?

California courts have developed several approaches in determining whether a loss was the result of an accident in the context of standard CGL policies. The approaches purport to be dictated by section 533.⁴⁴ Section 533 provides: “An insurer is not liable for a loss caused by the willful act of

Rptr. 263, 264 (Ct. App. 1981) (“Conceding that any ambiguity or uncertainty [in] an insurance policy will be construed against the insurer which caused the ambiguity, where the language is that of the Legislature, then that rule does not apply.”).

41. See *Tex. Farm Bureau Mut. Ins. Co. v. Sturrock*, 146 S.W.3d 123, 126 (Tex. 2004). There is a California decision to the contrary, but it has been repeatedly disapproved and not followed. See *Wolf Mach. Co. v. Ins. Co. of N. Am.*, 183 Cal. Rptr. 695, 696–97 (Ct. App. 1982) (noting disapproval). On the other hand, courts have found the term “occurrence,” if undefined in the policy, to be ambiguous. See sources cited *supra* note 19; *cf. World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 180 (2d Cir. 2003) (involving question whether terrorist attack on World Trade Center on September 11, 2001 constituted one occurrence or more than one occurrence).

42. *Delgado v. Interinsurance Exch. of Auto. Club*, 211 P.3d 1083, 1086 (Cal. 2009) (“In the context of liability insurance, an accident is an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause. This common law construction of the term “accident” becomes part of the policy and precludes any assertion that the term is ambiguous.”) (citations omitted) (internal quotation marks omitted).

43. This is not to state that all or even a majority of judges exhibit a pro-policyholder bias in their interpretation of insurance contracts. In drafting policy language, however, insurers will be concerned about those judges, of whom there are many, who will exhibit such an approach if given the opportunity to do so.

44. See cases cited *supra* note 11 (noting that California Insurance Code section 533 is an “implied exclusionary clause which by statute is to be read into all insurance policies.”).

the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others."⁴⁵ The statute distinguishes between a willful act and negligence without expressly acknowledging or addressing that negligence usually includes a willful act.⁴⁶

It is difficult to conceive of any act, ultimately characterized as negligent, that does not have its roots in intentional, deliberate conduct. Driving in excess of the speed limit, hitting an errant golf ball, creating a hazardous condition, or maintaining an attractive nuisance are all activities that are deliberate in origin yet yield consequences that are consistently deemed to be accidents. The task for courts has been to devise a test that gives meaning to both the "willful act" and "negligence" elements of section 533. Dictionary definitions are unhelpful. The standard dictionary definitions of "accident" tend to eschew references to negligence.⁴⁷ An earlier version of Black's Law Dictionary made the distinction express.⁴⁸ This would suggest that losses caused by negligence are not accidents.⁴⁹ The current version of Black's elides the issues by specifically referencing insurance law treatment in the definition,⁵⁰ but the definition

45. CAL. INS. CODE § 533 (2005). The provision was initially adopted in the early 1880s and has not been substantively modified since that time. Cal. Cas. Mgmt. Co. v. Martocchio, 15 Cal. Rptr. 2d 277, 280 (Cal. Ct. App. 1992).

46. J.C. Penney Cas. Ins. Co. v. M.K., 804 P.2d 689 (Cal. 1991).

The statutory language sheds little light on the precise question before us. (Nor is there any legislative history to assist us.) Read literally, section 533 is internally inconsistent. Its first sentence purports to exclude coverage for all willful acts. The second sentence, however, expressly provides that the insured's negligence does not allow an insurer to disclaim coverage.

Id.

47. See WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 11 (Jean L. McKenchie et al. eds., 2d ed. 1983); WEBSTER'S NEW COLLEGIATE DICTIONARY 7 (1979) (using the word "careless[]" in its definition of "accident," although it otherwise tracks the New Twentieth Century definition of "accident").

48. BLACK'S LAW DICTIONARY 30 (rev. 4th ed. 1968) (noting that "[i]n its proper use the term [accident] excludes negligence").

49. Dictionaries collect permissible usages of a word or term. See, e.g., HENRY M. HART, JR. & ALBERT M. SAKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1190, 1375-76 (Williams N. Eskridge, Jr. & Phillip P. Frickey eds., 1994); see also LEXICOGRAPHY: PRINCIPLES AND PRACTICES 5 (R.R.R. Hartmann ed., 1985). Consequently, the omission of a usage evidences that the defined term does not include that usage within its understood meanings.

50. BLACK'S LAW DICTIONARY 16 (9th ed. 2009) (quoting JOHN F. DOBBYN,

is self-referential as it relies on judicial treatment rather than popular usage. The obvious problem is that if a statute barred insurance coverage for accidental losses, that bar would undermine the pillar of insurance upon which the modern edifice of tort liability is constructed.⁵¹ Not surprisingly, California courts historically refused to give section 533 a literal construction that would cause it to broadly preclude the availability of insurance for tort liability.⁵²

For many years, California courts narrowly defined section 533's prohibition on indemnity for "loss caused by willful act of the insured."⁵³ In *Clemmer v. Hartford Insurance Co.*⁵⁴ the California Supreme Court identified section 533's willful act test as only encompassing situations when the insured harbored a "preconceived design" to inflict harm or injury.⁵⁵ This narrow approach essentially limited section 533 to instances when harm was premeditated, which was a high threshold that substantially limited the reach of the statute. All losses that were not premeditated were resolved under the language of the policy.

A "preconceived design" test permits, but does not require, coverage for losses that, while intentional, are not premeditated on the part of the insured. As a consequence, it is left to the insurance policy to define and prescribe any narrower limits on coverage for losses resulting from the insured's deliberate actions.⁵⁶ This was generally

INSURANCE LAW IN A NUTSHELL 128 (3d ed. 1996)).

51. See DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION 802 (5th ed. 2005) ("One important effect of liability insurance is that it provides a fund available to pay judgments for injured persons, without which legal liability might be meaningless."); see generally KENNETH S. ABRAHAMS, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 (2008) (noting the symbiotic relationship between liability insurance and tort law's expansion throughout the twentieth century).

52. See *infra* notes 53–55 and accompanying text.

53. CAL. INS. CODE § 533 (2005).

54. 587 P.2d 1098 (Cal. 1978).

55. *Id.* at 1110.

56. Krause v. W. Heritage Ins. Co., No. 07CC00537, 2010 WL 2993991, at *14 (Cal. Ct. App. Aug. 2, 2010).

In sum, broad assault or battery exclusions have been held to be unambiguous and given effect in California and other states. But we disagree with the premise that any exercise of force to protect persons or property, whether self-defense or not, necessarily involves an assault or battery under the policy. As the out-of-state authorities above

accomplished by the inclusion of a provision that effectively defined covered events as “accidents” and excluded coverage for “bodily injury” or “property damage” “expected or intended by an insured.” Insurers could also attempt to exclude coverage for deliberate conduct likely to cause bodily injury or property damage through a “criminal acts exclusion.”⁵⁷

In *J.C. Penney Casualty Insurance Co. v. M.K.*⁵⁸ the California Supreme Court retreated somewhat from *Clemmer*’s “preconceived design” test,⁵⁹ but the Court did so under unusual facts. The claim alleged sexual molestation of a child by the insured. The coverage claim was based on the argument the molester did not intend to harm the child. The Court dismissed the application of the “preconceived design” test to child molestation claims noting that “child molestation is always wrongful as a matter of law” and child molestation

suggest, there may exist factual scenarios in which the use of physical force by an insured, which leads to bodily injury, does not entail a lack of possible coverage under an assault or battery exclusion.

Id.

57. See Daniel C. Edismoe & Pamela K. Edwards, *Home Liability Coverage: Does the Criminal Acts Exclusion Work Where the “Expected or Intended” Exclusion Failed?*, 5 CONN. INS. L.J. 707 (1998–1999).

58. 804 P.2d 689 (Cal. 1998).

59. *Id.* at 696 (referring to *Clemmer*’s “preconceived design” language as a “brief reference”). The court was correct; the reference was brief, but that was only because the court in *Clemmer*, identified the test as one followed by prior California courts when interpreting section 533. This is what the *Clemmer* court said:

The instruction given, Hartford asserts, 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. It is clear, however, that this 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.” (*Walters v. American Ins. Co.* (1960) 185 Cal. App. 2d 776, 783, 8 Cal. Rptr. 665; see also *Meyer v. Pacific Employers Ins. Co.* (1965) 233 Cal. App. 2d 321, 327, 43 Cal. Rptr. 542; see generally *Gray v. Zurich Insurance Co.* (1966) 65 Cal. 2d 263, 273–74 & n.12, 54 Cal. Rptr. 104, 419 P.2d 168, and cases there cited.) 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.

Clemmer, 587 P.2d at 1110. The reference was “brief” because prior to *J.C. Penney*, the law was well settled.

is always intentional.⁶⁰ The Court expressly advised the precedential force of the opinion would be constrained due to the specific facts of sexual molestation of a minor.⁶¹ The California Supreme Court's cautionary language in *J.C. Penney* has, however, been ignored.⁶²

J.C. Penney provided an opening that other courts have generously exploited.

One approach emphasizes whether the manner by which the loss was produced was an accident. A second approach rejects the idea that an accident can exist when the insured acts deliberately, but under a mistaken belief or without appreciation that the deliberate acts will produce the actual consequences realized. A third approach emphasizes the extent to which the insured purposively engaged in the deliberate conduct. All three approaches are somewhat closely connected, but vary in emphasizing different aspects of the concept of an accident. This section briefly recaps the development of each approach, and the following section of this article then examines the approaches in further detail.

The "manner by which the accident occurred" approach was articulated in a decision that was decided several years before *J.C. Penney*, but has proven influential as a gloss on the retreat from the "preconceived design" test that *J.C. Penney* inspired.⁶³ *Merced Mutual Insurance Co. v. Mendez*,⁶⁴ like *J.C. Penney*, involved a claim of alleged sexual molestation of a child. Like *J.C. Penney*, the *Mendez* court found the claim was not covered.⁶⁵ In doing so, the *Mendez* court drew a distinction between deliberate conduct that results in unintended consequence and deliberate conduct that operates through the instrumentality of unintended and

60. *J.C. Penney*, 804 P.2d at 697–98.

61. *Id.* at 700.

Some of the amici curiae briefs in this case have suggested that a decision denying coverage will encourage insurers to deny coverage for many other types of wrongdoing. Not so. *We cannot emphasize too strongly to the bench and bar the narrowness of the question before us.* The only wrongdoing we address is the sexual molestation of a child. Whether other types of wrongdoing are also excluded from coverage as a matter of law by section 533 is not before us.

Id. (emphasis added).

62. *See infra* notes 63–76 and accompanying text.

63. *See infra* notes 64–66 and accompanying text.

64. 261 Cal. Rptr. 273 (Cal. Ct. App. 1989).

65. *Id.* at 281.

unexpected forces.

We agree coverage is not always precluded merely because the insured acted intentionally and the victim was injured. An accident, however, is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage. Clearly, where the insured acted deliberately with the intent to cause injury, the conduct would not be deemed an accident. Moreover, where the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an "accident" merely because the insured did not intend to cause injury. Conversely, an "accident" exists when any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity.⁶⁶

The second approach to comprehending what constitutes a "willful act" for purposes of section 533 is set forth in *State Farm General Insurance Co. v. Frake*.⁶⁷ In *Frake*, the insured and his friend (the claimant) had a history of engaging in a juvenile form of horseplay—hitting each other in the groin area.⁶⁸ On the particular occasion, this horseplay led to serious injuries. Not surprisingly, alcohol was involved. During a bout of drinking, the claimant (King) tried to strike the insured (Frake) in the groin as he had numerous times in the past without serious incident. Frake blocked the strike. Later, Frake swung his arm at King, striking King in the groin, this time causing serious injury. The jury found Frake was negligent and awarded \$450,000 in damages.⁶⁹ The insurer refused to provide indemnity and the coverage litigation ensued. The court held that there was no coverage. Relying extensively on *Delgado v. Interinsurance Exchange of the Automobile Club*,⁷⁰ the court distilled that the test as to whether there is an accident is the accidental nature of the conduct:

In sum, *Delgado* contains no language indicating that the California Supreme Court intended to overrule prior case law holding that "the term 'accident' does not apply to an

66. *Id.* at 279 (citation omitted).

67. 128 Cal. Rptr. 3d 301 (Ct. App. 2011).

68. *Id.* at 303.

69. *Id.* at 306.

70. 211 P.3d 1083 (Cal. 2009).

act's consequences, but instead applies to the act itself." Instead, the Court directed that the word accident "refers to the injury-producing acts of the insured," and specifically approved prior case law that rejects the very argument Respondents present here.⁷¹

A third approach to the interpretation of section 533's willful act exclusion is the incorporation of the concepts of expectation and intent into the definition of willful act. For example, in *Mez Industries, Inc. v. Pacific National Insurance Co.*,⁷² the claim involved patent infringement. The court held that such a claim would fall within section 533 when the insured's conduct in inducing an infringement constituted a "knowing, intentional, and purposeful act."

We conclude that section 533 prohibits indemnification of more than just intentional acts that are subjectively desired to cause harm and acts that are intentional, wrongful, and necessarily harmful regardless of subjective intent. A willful act under section 533 must also include a deliberate, liability-producing act that the individual, before acting, expected to cause harm. Conduct for which the law imposes liability, and which is expected or intended to result in damage, must be considered wrongful and willful. Therefore, section 533 precludes indemnification for liability arising from deliberate conduct that the insured expected or intended to cause damage.⁷³

Courts adopting this approach have not consistently addressed how the concepts of "expected" or "intended" should be understood when considered in connection with the concept of "an accident" as opposed to the extensive case law that has developed with respect to the ISO standard form "expected-intended" exclusion in the CGL policy.⁷⁴ A gloss on the "expected-intended" approach was adopted in *Downey Venture v. LMI Insurance Co.*,⁷⁵ where the court identified the central principle of section 533 as whether the insured's "act

71. *State Farm Gen. Ins. Co.*, 128 Cal. Rptr. 3d at 313.

72. 90 Cal. Rptr. 2d 721 (Cal. Ct. App. 1999).

73. *Id.* at 736 (quoting *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815 (Cal. Ct. App. 1993)) (internal quotation marks omitted).

74. James L. Rigelhaupt, Jr., Annotation, *Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured*, 31 A.L.R. 4th 957 (1984). The case law is enormous as evidenced by the fact that the annotation currently exceeds 400 pages in length.

75. 78 Cal. Rptr. 2d 142 (Ct. App. 1998).

was both intentional and wrongful *and* the harm caused was inherent in or predictably resulted from the act.”⁷⁶

IV. THE THREE APPROACHES AS GLOSSES ON LIABILITY INSURANCE COVERAGE

A. *Accident Must Result from Non-Deliberate Conduct*

The first approach, articulated in *Mendez*, is essentially an application of language used in Accidental Death policies, which typically define the insured event as a “death by accidental means.”⁷⁷ Courts interpreting these policies were confronted with the issue of whether a death “by accidental means” was different from a death “by accident.” Some courts concluded the two phrasings were different. For some courts, when the policy defined coverage in terms of “death by accidental means,” it was necessary to demonstrate that the manner or method by which the loss was inflicted was accidental.⁷⁸

If we transpose the concept of “accidental means” to the context of a CGL policy, a touching that resulted from an inadvertent slip would be an accident because the means (cause) by which the loss arose was accidental—inadvertent

76. *Id.* at 155 (emphasis added). *Downey Venture* collects many of the decisions addressing section 533’s statutory willful act exclusion in the opinion written by California’s foremost judicial authority on Insurance Law. Justice Croskey’s distillation of a unifying principle is very close to that argued for in this article.

77. See Adam F. Scales, *Man, God, and the Serbonian Bog: The Evolution of Accidental Death Insurance*, 86 IOWA L. REV. 173 (2000) (extensively discussing the “accidental means” requirement).

78. *Rock v. Traveler’s Insurance Co.*, 156 P. 1029 (Cal. 1916). The California Supreme Court identified the distinguishing feature of an accidental means policy as follows:

The policy, it will be observed, does not insure against accidental death or injuries, but against injuries effected by accidental means. A differentiation is made, therefore, between the result to the insured and the means which is the operative cause in producing this result. It is not enough that death or injury should be unexpected or unforeseen, but there must be some element of unexpectedness in the preceding act or occurrence which leads to the injury or death. . . . A person may do certain acts, the result of which acts may produce unforeseen consequences and may produce what is commonly called accidental death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result may be accidental.

Id. at 1031 (citations omitted) (internal quotation marks omitted).

slip. On the other hand, if the act was intended, i.e., the insured deliberately “touched” the claimant, the loss would not be an accident, even if the insured intended no harm or mistakenly thought the claimant consented to the touching. This was the case in *Lyons v. Fire Insurance Exchange*,⁷⁹ where the court held that the insured’s mistaken belief that his deliberate act of touching a woman on her wrist and taking her to an alcove for the purpose of pursuing a sexual encounter was consented to by the woman did not transform his deliberate conduct into an accident.⁸⁰

The “accidental means” test is often criticized,⁸¹ primarily on the ground that it is divorced from the common understanding as to what constitutes an “accident.”⁸² While “accidental means” may reflect an intuitive conception for some of what constitutes an accident,⁸³ that concession

79. 74 Cal. Rptr. 3d 649 (Ct. App. 2008).

80. *Id.* at 655–56.

81. See Douglas R. Richmond, *Drugs, Sex, and Accidental Death Insurance*, 45 TORT TRIAL & INS. PRAC. L.J. 57, 66–70 (2009).

82. See *Lewis v. Ocean Accident & Guarantee Corp., Ltd., of Eng.*, 120 N.E. 56 (N.Y. 1918) (Cardozo, J.) (involving death resulting from the deliberate act of puncturing a pimple with a needle).

We think there is testimony from which a jury might find that the pimple had been punctured by some instrument, and that the result of the puncture was an infection of the tissues. If that is what happened, there was an accident. We have held that infection resulting from the use of a hypodermic needle is caused by ‘accidental means.’ The same thing must be true of infection caused by the puncture of a pimple. Unexpected consequences have resulted from an act which seemed trivial and innocent in the doing. Of itself, the scratch or the puncture was harmless. Unexpectedly it drove destructive germs beneath the skin, and thereby became lethal. To the scientist who traces the origin of disease there may seem to be no accident in all this. ‘Probably it is true to say that in the strictest sense, and dealing with the region of physical nature, there is no such thing as an accident.’ But our point of view in fixing the meaning of this contract must not be that of the scientist. It must be that of the average man. Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident. This test—the one that is applied in the common speech of men—is also the test to be applied by courts.

Id. at 57 (citations omitted).

83. See Scales, *supra* note 77.

This dichotomy between “means” and “results” weakly captures an intuitive and rough distinction between when someone (usually the insured) has done something incorrectly, which may seem accidental, and when something unpleasant has merely happened to the insured. However, courts and insurers did not readily grasp the limitations of thinking about accidental death insurance this way. While the logical

assumes that judicial intuitions square with popular intuitions.⁸⁴ Moreover, even if the intuitive link is accepted, there is substantial disagreement as to how that intuitive concept can be applied to concrete cases.

Those difficulties alone would bespeak caution before introducing the accidental means requirement to the virgin territory of liability insurance. Accidental Death insurance is specific risk, first party coverage. The insurance covers a specific type of loss, “accidental” death, rather than ordinary death covered by life insurance policies. Liability insurance, on the other hand, is third party coverage designed to protect the insured from loss due to injury to others. In the context of liability insurance, the term “accident” is not used to differentiate the risk that is insured; rather, it reaffirms that coverage is dependent on the loss being fortuitous,⁸⁵ which means that the specific loss sustained by the claimant be unexpected, unintended, and unanticipated.⁸⁶ Liability insurance is not designed to compete with accidental death insurance and no reason is given by the courts to adopt the

space between “means” and “results” may be reasonably clear, insurance policies failed to articulate a definition of “accidental means”—something antecedent—which did not include some aspect of the “results” or consequences.

Id. at 208 (footnotes omitted).

84. See James M. Fischer, *The Doctrine of Reasonable Expectation is Indispensable, If Only We Knew What For*, 5 CONN. INS. L.J. 151, 153, 162–63 (1998) (noting absence of evidence that a judge’s understanding of a party’s “reasonable expectations” is congruent with the party’s actual expectations and that a reasonableness test permits judges to adopt positions that cohere with the judge’s intuitive sense of fairness); see also Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 879–80 (2009) (discussing the tendency of judges to fall victim to the cultural bias heuristic when resolving factual disputes). The cultural bias heuristic is the tendency to assume that one’s culturally biased views of the world are shared by the larger, general community. See *id.* at 861–62, 873.

85. See KEETON & WIDISS, *supra* note 3, §5.3(a); see also SCA Serv., Inc. v. Transp. Ins. Co., 646 N.E.2d 394 (Mass. 1995).

[T]he basic purpose of insurance is to protect against fortuitous events and not against known certainties. Parties wager against the occurrence or nonoccurrence of a specified event; the carrier insures against a risk, not a certainty. It follows from this general principle that an insured cannot insure against the consequences of an event which has already begun. Once the risk is eliminated, the contract for insurance no longer exists.

Id. at 397 (citations omitted).

86. See SCA Serv., 646 N.E.2d at 397.

accidental death concept of an accident to liability insurance.

What is significant about this transposition of the “accidental means” requirement to liability insurance is that courts have done so in the absence of the predicate fact that initially raised the issue in the accidental death context—coverage defined as loss caused “by accidental means.” CGL policies do not use “accidental means” language; coverage is defined in terms of an “occurrence,” which in turn is defined as an “accident.”⁸⁷ In the context of Accidental Death policies, the presence of “accidental means” language was critical. If the policy provided coverage for “death by accident,” a death that was unexpected, unintended, or the result of mistaken belief satisfied the requirement.⁸⁸ California courts have not explained why the absence of “accidental means” language permits the use of an accidental means test.⁸⁹

A number of courts have implied that an accidental-means-type test may be justified, notwithstanding absence of “accidental means” language in the insurance contract, based on the distinction contained in the following, often cited hypothetical from *Mendez*:

When a driver intentionally speeds and, as a result, negligently hits another car, the speeding would be an intentional act. However, the act directly responsible for the injury—hitting the other car—was not intended by the driver and was fortuitous. Accordingly, the occurrence resulting in injury would be deemed an accident. On the other hand, where the driver was speeding and deliberately hit another car, the act directly responsible for the injury—hitting the other car—would be intentional and any resulting injury would be directly caused by the driver’s intentional act.⁹⁰

87. The policy further defines an “accident” to include certain types of “exposure,” but that addition is not relevant here. See GENERAL LIABILITY FORM, *supra* note 16, at 14.

88. See *Olsen v. American Bankers Ins. Co.*, 35 Cal. Rptr. 2d 897, 900–01 (Ct. App. 1994).

89. The courts might respond that they are not literally using the “accidental means” test and the term “accidental means” will not be found in the opinions. But this would simply elevate form over substance. Like Monsieur Jourdain, the courts have been speaking prose (“accidental means”) all this time. MOLIÈRE, *THE BOURGEOIS GENTLEMAN* act 2, sc 4 (Philip Dwight Jones trans., Gutenberg Project ed. 2008), available at www.gutenberg.org/ebooks/2992.

90. *Merced Mut. Ins. Co v. Mendez*, 261 Cal. Rptr. 273, 279–80 (Ct. App.

The distinction has been cited and relied on by subsequent courts as supporting a narrow interpretation of the concept of an “accident.”⁹¹ The distinction does not, however, support the adoption of the “accidental means” approach. Saying that the action constituted an accident because the insured intended to speed, but did not intend to strike the other car simply redefines an act (striking) as an unintended consequence of a prior act (speeding). Why is this necessarily different from an intent to strike but not inflict injury or an intent to touch because consent is mistakenly assumed?

There is no analytical or actual difference between deliberately putting the automobile in the intersection with the intent to not collide with another vehicle and deliberately putting the automobile in the intersection with the mistaken belief that there will not be a collision. In each case, the deliberate act is the same. Any resulting injury is deemed an accident not because the entry into the intersection was a mishap or was inadvertent, but because the resulting injury was not mentally contemplated, i.e., was unintended. Of course, the closer the likelihood that the deliberate act will result in an accident, the more likely one would conclude the injury was an expected result of the act. Deliberately striking another vehicle at some reasonable speed is likely to cause injury, but there is no disagreement on that issue. The *Mendez* court’s hypothetical attempts to resolve a difficult issue by stating the obvious, but that does not resolve the deeper issues that are presented by deliberate action that results, somewhere down the causal chain, in an unexpected or unintended injury.⁹²

1989). The hypothetical pre-dates the *Mendez* decision. See *Meyer v. Pac. Emp’rs Ins. Co.*, 43 Cal. Rptr. 542, 546 (Ct. App. 1965). Ironically, in *Meyer* the hypothetical was used to illustrate that unanticipated consequences of even reckless conduct would qualify as an “accident.” See *id.*

91. See *State Farm General Ins. Co. v. Frake*, 128 Cal Rptr. 3d 301, 310 (Ct. App. 2011); see also *Civil Serv. Emps. Ins. Co. v. Superior Court*, No. A104876, 2004 WL 1466214, at *7 (Cal. Ct. App. June 30, 2004); see also *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1364 (9th Cir. 1991); *Commercial Underwriters Ins. Co. v. Superior Court*, 100 Cal. Rptr. 2d 699, 710 n.8 (Ct. App. 2000) (depublished). In two federal district court decisions, the hypothetical was noted, but its distinction was not relied on. See *Quigley v. Traveler’s Prop. Cas. Ins. Co.*, 630 F. Supp. 2d 1204, 1216 (E.D. Cal. 2009); see also *McGranahan v. Ins. Co. of N.Y.*, 544 F. Supp. 2d 1052, 1059 (E.D. Cal. 2008).

92. The *Mendez* court’s hypothetical is essentially an application of the last

The form of decision making reflected in the *Mendez* court's hypothetical is flawed because it is inherently malleable. The court's approach can be used to redefine situations and reverse decisions in nearly any scenario where a court might have previously found the action accidental. For example, in *Fire Insurance Exchange v. Superior Court*,⁹³ the court concluded that a trespass was not accidental when the act (entering the property of another) was done deliberately, but with the mistaken belief that it was lawful. This was deemed to be the same as deliberately striking a vehicle rather than accidentally striking the vehicle as a result of speeding. But the situation could just as easily be characterized as trespass (consequence) because of mistaken belief (act), as did the dissenting judge.⁹⁴ Indeed, there does not seem to be any reason to prefer one construction over the other as a matter of characterizing the cause—effect relationships, unless one is going to adopt a mind-body distinction that assumes that conduct is divorced from the mental commands that induce the conduct.

Even if the “accidental means” test is applied, it does not support the distinction between speeding and deliberate striking that the *Mendez* court believed existed between the two methods of causing a loss and which underlie its speeding hypothetical.⁹⁵ Speeding is intentional conduct. An injury caused by speeding is not an injury caused by accidental means; rather, the injury would have to be caused by some inadvertent or negligent act or condition that operated through the medium of the speeding, such as a pothole or

or immediate cause test which has been generally rejected as a causation test in the area of liability insurance. *See infra* notes 102–03 and accompanying text.

93. *Fire Ins. Exch. v. Superior Court*, 104 Cal. Rptr. 3d 534 (Ct. App. 2010).

94. *Id.* at 544–45; *see also* *Mesa v. Hartford Cas. Ins. Co.*, No. C-03-02769 RMW, 2004 WL 1753413, at *13 n.10 (N.D. Cal. July 26, 2004) (distinguishing situation (non-accidental) when insured engages in a sexual contact—in which case consequences are irrelevant because the consequences all flow from the intended contact—and the installation of a defective floor—in which case the consequences if unintended satisfy the requirement that the loss be accidental even though the loss flows from the intended act of installation); *see also* *N.W. Elec. Power Coop., Inc. v. Am. Motorists Ins. Co.*, 451 S.W.2d 356, 362–64 (Mo. Ct. App. 1969) (holding that damage to land caused by the placement of a power line outside the allowable easement was an “accident;” while the placement of the line was deliberate, the injury was not inflicted intentionally because the line placement was thought to be within the easement).

95. *See Fire Ins. Exch.*, 104 Cal. Rptr. 3d at 544–45; *see also supra* notes 90–94 and accompanying text.

uneven pavement that caused the insured to lose control of the vehicle resulting in the loss. For the speeding to be deemed accidental there would have to be some unanticipated intervening action that caused the loss, e.g., unintended acceleration due to a defective throttle or floor pedal.

This points out the fundamental problem with the application of the “accidental means” approach to liability insurance claims. If applied consistently, it would operate to nullify coverage in many contexts when the presence and availability of insurance is accepted.⁹⁶ This is particularly true to the extent courts hold, suggest, or imply that the “accidental means” type test is part of section 533, which applies to all insurance policies.⁹⁷ Limiting the test to Coverage A of the standard CGL policy means that coverage for bodily injury or property damage is constrained to some imprecise extent. Tying the “accidental means” test to section 533 means that Coverage B of the standard CGL policy is illusory as that coverage involves deliberate conduct that results in foreseeable economic loss.⁹⁸ One doubts that this is what California courts intend, but the court’s loose language

96. *N.W. Elec. Power*, 451 S.W.2d at 363.

That instant defendant’s acts were *intended* did not exclude the *unintended* result from coverage under the policy in suit. To entertain a contrary view would work an exclusion from coverage of many, if not most, claims for damages arising out of the negligence of insureds and thus defeat the primary purpose for which liability insurance coverage is purchased.

Id.

97. *See supra* note 11 and accompanying text.

98. Coverage B of the standard form ISO CGL policy provides coverage for a series of offenses and deliberate actions often referred to as “business torts,” such as false arrest, malicious prosecution, wrongful eviction, defamation and disparagement, advertising injury, etc. GENERAL LIABILITY FORM, *supra* note 16. Traditionally, California courts have not erected a *per se* ban to insuring these torts even though the wrongful conduct is intentional, as long as the resulting injury was unintended. *See Gen. Accident Ins. Co. v. W. Am. Ins. Co.*, 49 Cal. Rptr. 2d 603, 606–07 (Ct. App. 1996).

Unlike liability coverage for property damage or bodily injury, personal injury coverage is not based on an accidental occurrence. Rather, it is triggered by one of the offenses listed in the policy. In the world of liability insurance, personal injury coverage applies to injury which arises out of the commission of certain enumerated acts or offenses.

Id. at 606 (citation omitted) (internal quotation marks omitted); *see also Fibreboard Corp. v. Hartford Accident & Indem. Co.*, 20 Cal. Rptr. 2d 376, 388 (Ct. App. 1993) (stating that “[i]n the world of liability insurance, personal injury coverage applies to injury which arises out of the commission of certain enumerated acts or offenses”).

and porous reasoning leads logically to that result.⁹⁹

This scope problem has so far largely been avoided because the coverage issue has arisen in specialized contexts, such as child molestation, sexual misconduct, and sexual assault and battery. In these contexts, the availability of insurance is questioned because of the socially deplorable nature of the misconduct. The problem is that the “accidental means” test is not gauged to operate only in these limited, socially deplorable contexts, and this is particularly so when the test is appended to a statutory exclusion (section 533) that applies to all insurance contracts. By adapting a quasi “accidental means” test to the question of whether a course of conduct is a willful act within section 533, the courts have brought an Uzi to a knife fight. We are beginning to see this as courts begin to extend the coverage precedents developed in the area of sexual torts to non-sexual conduct such as horseplay and practical jokes.¹⁰⁰

B. Accident and Foreseeability

The second approach courts have elicited from *J.C. Penney Cas. Ins. Co.* represents an amalgamation of three factors: (1) the means by which the loss occurred, (2) the chronology of events leading to the loss, and (3) a reluctance on the part of some courts in recognizing unforeseen or unanticipated consequences as an escape from willful actions. Although this approach is influenced by the accidental means test and perhaps mimics that test, I treat the second approach as a distinct approach because there appears to be a concern by some courts that too generous an interpretation of “unforeseen” or “unanticipated” consequences would eviscerate the section 533 statutory exclusion. That concern appears to be driving the slightly different approach.

99. The interpretation of “willful” acts in section 533 as excluding losses that directly result from deliberate conduct could be read as barring life insurance benefits when the insured commits suicide beyond the traditional one or two year policy exclusion for suicide. It is highly unlikely courts intend this result, but it is clearly within the court’s formulation and, as noted previously, section 533 is an implied term in all insurance policies. *See supra* note 11 and accompanying text.

100. *See, e.g., State Farm Gen. Ins. Co. v. Frake*, 128 Cal. Rptr. 3d 301 (Ct. App. 2011).

This approach was articulated in the *State Farm General Ins. Co. v. Frake* decision,¹⁰¹ which in turn relied heavily on *Delgado v. Interinsurance Exchange of the Automobile Club*.¹⁰² *Frake*, however, misapplied *Delgado* by overlooking the very limited and severely circumscribed holding in *Delgado*.

Delgado involved a claim that the insured's subjective belief that he was acting in self-defense raised the insurer's duty to defend under *Gray v. Zurich Ins. Co.*¹⁰³ The court rejected this contention, but did so with the specific reference that the insured's claim of self-defense was unreasonable as a matter of law.¹⁰⁴ The *Delgado* court did not consider *Clemmer's* preconceived design test and addressed section 533 only once in passing. The *Delgado* court did, however, speak to the issue of unintended consequences, albeit, in a tightly constrained manner. In responding to the insured's contention that an unforeseen response by the claimant to deliberate conduct on the part of the insured would satisfy the requirement that the injury be the result of an accident, the *Delgado* court sought to distinguish different types of "unintended" consequences—those of the insured and those of the victim. Only the acts of the insured were relevant to the determination whether the insured acted in reasonable self-defense:

Here, *Delgado's* complaint alleges acts of wrongdoing by the insured against him. Those are the acts that must be considered the starting point of the causal series of events, not the injured party's acts that purportedly provoked the insured into committing assault and battery on *Delgado*. The term "accident" in the policy's coverage clause refers to the injury-producing acts of the insured, not those of the injured party. In determining whether the injury is a result of an accident, taking into consideration acts or events before the insured's acts would be illogical and contrary to California case law.¹⁰⁵

101. *Id.* at 309–10; *see supra* notes 62–64 and accompanying text.

102. 211 P.3d 1083 (Cal. 2009).

103. *Id.* at 1089 (citing *Gray v. Zurich Ins. Co.*, 419 P.2d 168 (Cal. 1966)).

104. *Delgado*, 211 P.3d at 1089.

105. *Id.* at 1091 (citations omitted). *Delgado* had received an assignment of the insured's claim against the insurer. Thus, *Delgado* claimed the insurer had breached its duties to its insured. *Id.* at 1085.

The distinction lends minimal support to the position taken in *Frake* that an accident requires that the event that produces the harm be inadvertent or accidental because *Frake's* conclusion and application of the distinction ignores the very narrow context in which the *Delgado* court addressed the issue.

Both *Frake* and *Delgado* accept the principle that unanticipated consequences may permit deliberate conduct to be deemed accidental rather than willful;¹⁰⁶ however, each decision concludes that the principle does not apply in the case before the court.¹⁰⁷ Both decisions fail to explain when unanticipated consequences would be deemed material to a determination that an accident has occurred. For example, if the parties in *Frake* had been engaged in a different form of horseplay other than striking a sensitive area of male anatomy, such as the groin,¹⁰⁸ would the claim that the loss was unforeseen or unanticipated be credited? *Frake* and *Delgado* both involve situations when the court perceived that the likelihood of injury was so high that the court would neither consider the claim to the contrary nor permit the issue to be considered by a jury.¹⁰⁹ This is the approach courts take with molestation cases where intent to harm is irrebuttably inferred.¹¹⁰ Had the court made a policy-based

106. *Id.* at 1088–89 (distinguishing between deliberate conduct intended to inflict injury and deliberate conduct (shielding) that is not intended to cause injury, but is intended to ward off a blow); *Frake*, 128 Cal. Rptr. 3d at 310 (noting that coverage is not “always precluded merely because the insured acted intentionally and the victim was injured” (quoting *Quan v. Truck Ins. Exch.*, 79 Cal. Rptr. 2d 134, 143–43 (Ct. App. 1998))).

107. *Delgado*, 211 P.3d at 1089–90; *Frake*, 128 Cal. Rptr. 3d at 310.

108. *See, e.g.*, *Pachucki v. Republic Ins. Co.*, 278 N.W.2d 898, 903–04 (Wis. 1979) (holding that injury to co-player’s eye due to misguided bobby pin was not covered because of “expected-intended” exclusion).

109. *Delgado*, 211 P.3d at 1086 (stating that appeal was from granting of demurrer, which requires that all well-pleaded facts be admitted, to insured’s complaint that insurer breached duty to defend; the Supreme Court effectively affirmed the trial court’s decision); *Frake*, 128 Cal. Rptr. 3d at 307 (stating that appeal was from cross motions for summary judgment, which requires that there be no triable issue of fact; the court reversed judgment for the insured and remanded with direction that judgment be entered for the insurer).

110. *See, e.g.*, *J.C. Penney Ins. Co. v. M.K.*, 804 P.2d 689 (Cal. 1991).

We find nothing in the statute, however, to support defendants’ view that a child molester can disclaim an intent to harm his victim. There is no such thing as negligent or even reckless sexual molestation. The very essence of child molestation is the gratification of sexual desire. The act is the harm. There cannot be one without the other. Thus, the

decision that certain activities are so inherently likely to cause injury that the insured cannot contend to the contrary, the decisions might not pose as great a threat to a workable understanding of the concept of an accident. Each category would stand or fall on its own rationale.¹¹¹ Unfortunately, the courts used a dysfunctional understanding of the term “accident,” obtained by an expansive interpretation of the willful act element of section 533, thereby decoupling the approach from its original application in child molestation cases and extending it into the general field of negligent conduct.¹¹²

Delgado also suggested that the causal sequence by which the loss occurs is relevant to determining whether the loss was willful, i.e., not an accident. The suggestion was made in response to the claim that whenever a provocative act by the injured person is part of the causal chain of events that ultimately led to the insured’s injury-causing conduct—here the striking of the groin as horseplay—the insured’s conduct should be considered accidental. The court responded to the contention as follows:

Delgado overlooks the context in which the Court of Appeal in *Merced Mutual Ins. Co. v. Mendez*, made the statement in question. In the same paragraph, the court also observed: “[a]n accident, however, is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen

intent to molest is, by itself, the same as the intent to harm. *Id.* at 695. Later, the court added: “Because child molestation is always wrong as a matter of law, the insured’s intent (or motive) is irrelevant . . .” *Id.* at 697 (citation omitted).

111. On the merits, that argument that the conduct was inherently harmful may be difficult to make. The facts (horseplay in *Frake*) or public policy (self-defense in *Delgado*) may not lend themselves to the resolution the court wishes to reach, which may explain why the approach was not used.

112. This is not an approach limited to California. In many cases when courts define the term “accident,” the case involves clear, anti-social conduct. *See, e.g.,* *Gearing v. Nationwide Ins. Co.*, 665 N.E. 2d 1115, 1118 (Ohio 1996) (rejecting contention that harm caused by sexual molestation could be deemed an accident because no harm was intended by insured). The problem that arises is whether the approach should be extended to less socially harmful contexts. *See Morner v. Giuliano*, 857 N.E.2d 602, 607 (Ohio Ct. App. 2006) (holding that discharge of BB gun which injured claimant could not be deemed an accident within the insured’s homeowner’s policy notwithstanding claim that loss was unintended). The allegation in the claim against the insured was that the shooter (the insured’s son) deliberately shot the BB gun with the intent to cause “a stinging sensation or a welt.” *Id.* at 604.

happening occurs that produces the damage. Clearly, where the insured acted deliberately with the intent to cause injury, the conduct would not be deemed an accident.” Thus, the statement upon which *Delgado* relies—that an accident exists whenever *any* part of the causal events leading to the injury was unintended—referred to events in the causal chain *after* the acts of the insured, not to events preceding the acts of the insured.¹¹³

The problem with this language is that it adopts a causation theory that is inconsistent with California common law. This approach suggested by *Delgado* is a variation of the last or immediate cause test.¹¹⁴ While this approach has found favor in some jurisdictions,¹¹⁵ California has adopted an approach that in the liability insurance context more closely aligns liability causation with coverage causation.¹¹⁶ The underlying idea is that absent unambiguous contract language to the contrary, liability exposure and liability coverage should be in alignment.¹¹⁷

113. *Delgado*, 211 P.3d at 1091 (citations omitted).

114. See, e.g., *Pan American World Airways v. Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2d Cir. 1974). Although the case involved a property insurance claim where causation principles are applied differently from liability insurance, the case is helpful in understanding the last or immediate cause approach. In *Pan American World Airways*, hijackers seized a Boeing 747 over London. The airplane was blown up after having been flown to Beirut and then to Cairo. The passengers left the plane prior to it being destroyed by explosion. The plane was insured, but the policy excluded loss resulting from “war,” “warlike operations,” “insurrection,” and similar events. The court concluded:

Remote causes of causes are not relevant to the characterization of an insurance loss. In the context of this commercial litigation, the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings. The words ‘due to or resulting from’ limit the inquiry to the facts immediately surrounding the loss.

Id. at 1006 (citations omitted); see generally Randall L. Smith and Fred A. Simpson, *Causation in Insurance Law*, 48 S. TEX. L. REV. 305, 346 (2006) (discussing “immediate causation” approach).

115. Smith & Sampson, *supra* note 114, at 347 (noting that “[t]he immediate cause doctrine has largely been replaced by efficient proximate cause . . .”).

116. *State Farm Mut. Auto. Ins. Co. v. Partridge*, 514 P.2d 123, 129 (Cal. 1973) (stating that in a third party liability insurance context the proper causation test is “concurrent proximate cause[]”); see *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 705 (Cal. 1989) (stating that in first party property insurance context proper causation is “efficient proximate cause,” but reaffirming *Partridge* test for third party liability insurance).

117. Ellen S. Pryor, *The Economic Loss Rule and Liability Insurance*, 48 ARIZ L. REV. 905, 906 n.3 (2006) (“[T]he existence of a connection between tort law and liability insurance markets cannot be contested.”) (citations omitted); see

C. Accident and Anticipation

The third approach California courts have used to identify whether a loss is the result of an accident or willful act under section 533 is to determine whether the insured “expected” or “intended” the loss. This approach shares similarities with the second approach in the attention given to whether the loss was deliberate. In the second approach, whether the loss was deliberate is combined with a focus on the chronological progression of act and effect. In this third approach, the focus is entirely on the effect (loss) and the question is whether the loss was expected or intended at the time the insured acted to bring about the loss.

The “expected-intended” language has origins in early definitions of the term “accident.”¹¹⁸ Today, liability insurance policies have taken the “expected-intended” language and placed it in an exclusion to coverage; however, even when it was part of the definition of an “occurrence” in the early versions of the 1966 standard form, many courts treated the language as a limitation on coverage and subjected the terms to the same scrutiny reserved for exclusions.¹¹⁹

The specific inclusion in the policy of the “neither expected nor intended” language raises several questions. First, does the language add anything to the standard understanding of the term “accident”? In other words, standing alone would an “accident” be a loss that was neither expected nor intended? If a loss is “expected,” is the loss an accident? If a loss is “intended,” is the loss an accident? While the “standpoint of the insured” language provides some

James M. Fischer, *The Presence of Insurance and the Legal Allocation of Risk*, 2 CONN. INS. L.J. 1 (1996) (noting general judicial policy to align and match legal risk to party with insurance); see sources cited *supra* note 51.

118. See *infra* Part V.

119. See, e.g., *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1205 (2d Cir. 1995) (“[U]nder New York law, the exclusionary effect of policy language, not its placement, controls allocation of the burden of proof.”); *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116, 1126 (N.J. 1998) (stating that unexpected and unintended language constitutes an exclusion; the burden of proof is, thus, with the insurer, regardless of whether language is located in an exclusion section or is within the coverage section of the policy as part of the definition of an “occurrence”); *contra* *Consol. Edison Co. of New York, Inc. v. Allstate Ins. Co.*, 774 N.E.2d 687, 691–92 (N.Y. 2002) (holding that placement within the policy controls whether the insured has the burden of proof).

clarification by eliminating the argument that the victim's perspective is critical,¹²⁰ it is questionable whether the "neither expected nor intended" language adds or subtracts from the basic understanding of "accident." The provision simply repeats language courts have used to define an accident.

Second, and perhaps as a consequence of the first question, the presence of the "neither expected nor intended" exclusion has induced courts, when interpreting these terms, to move towards an evaluation of the mental state of the insured whose conduct proximately causes the loss? Both "expected" and "intended" have been interpreted with respect to the insured's mental state. And while courts have differed whether the terms are synonymous¹²¹ or express distinct, albeit complimentary, views of the insured's mental state,¹²² it is clear that in all contexts the insured's mental state is the focus. While act and intent are both aspects of the concept of an "accident," the policy's focus on expectation and intent has caused coverage determinations to be more profoundly shaped by the court's assessment of the specific insured's mental state than by an analysis whether the average person would consider the loss an accident. This approach is necessary because specific inclusion in the policy of "expected-intended" language requires that it be given an interpretation that separates the language from the definition of accident, otherwise the language is redundant. Courts generally decry redundancy and attempt to interpret insurance policies to

120. See, e.g., *Patrons v. Oxford Mut. Ins. Co v. Dodge*, 426 A.2d 888, 890–91 (Me. 1981) (victim's viewpoint determines whether loss was intentional or accidental). Courts, today, generally reject this approach. See *Delgado v. Interinsurance Exch. of Auto. Club of S. Cal.*, 211 P.3d 1083, 1088 (Cal. 2009) ("We are not persuaded that because the coverage clause of ACSC's policy does not use the words 'neither expected nor intended from the standpoint of the insured,' the word 'accident' as used in the policy means that whether an event is an accident must be determined from the injured party's viewpoint. The phrase 'neither expected nor intended from the standpoint of the insured' in earlier comprehensive general liability policies has been construed as modifying the policy term 'injury and damages,' not 'accident.'").

121. See James L. Rigelhaupt, Jr., Annotation *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected By the Insured*, 31 A.L.R. 4th 957 § 4(a) (1984) (collecting decisions holding that terms "expected" and "intended" are synonymous).

122. *Id.* § 4(b) (collecting decisions holding that the terms "expected" and "intended" are distinct).

avoid redundancy.¹²³

Three approaches have been developed to determine whether a certain course of action will be deemed “intentional” for purposes of the exclusion:

The classic tort approach of deeming results and losses intended, if they are the natural and probable consequences of the insured’s loss producing actions.¹²⁴

The middle ground approach that deems results and losses intended if the insured intended the loss producing actions *and* intended to cause some kind of loss as a result of his actions.¹²⁵

The subjective intent approach that deems results and losses intended only if the insured actually intended to inflict the very type of loss actually sustained.¹²⁶

The first approach calculates intent based on the objective, reasonable person standard. If such a person would comprehend the consequences of his actions, the insured is irrebuttably presumed as a matter of law to have contemplated and appreciated the consequences of his behavior. The second and third approaches focus on the

123. *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1268–69, 1276 (Cal. 1990) (refusing to adopt interpretation of insurance policy term that would render other terms and provisions of the policy “redundant”); *Dimmitt Chevrolet, Inc. v. Southeastern Fid. Ins. Corp.*, 636 So. 2d 700, 704 (Fla. 1993) (stating that “to construe sudden also to mean unintended and unexpected would render the words sudden and accidental entirely redundant,” which should be avoided). The reference in *Dimmitt Chevrolet* was to the 1970 Qualified Pollution Exclusion in the ISO CGL form. *Id.* at 703.

124. *Meridian Oil Prod., Inc. v. Hartford Accident & Indem. Co.*, 27 F.3d 150, 152 (5th Cir. 1994) (applying Texas law). In some cases this test is associated with the coverage term “accident” rather than the “expected-intended” exclusion. *See City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052, 1057–58 (8th Cir. 1979) (collecting decisions); *see also Murray v. Landenberger*, 215 N.E.2d 412, 416 (Ohio Ct. App. 1966) (“While we may wish to say that the result, which is the natural, probable and foreseeable consequence of a willful act, or intentional course of action, is not an ‘accident,’ as that term is used in this insurance policy, we cannot do so in the light of the general rule.”).

125. *State Farm & Cas. Co. v. Martin*, 710 N.E.2d 1228 (Ill. 1999) (holding that there was no coverage for wrongful death of fire-fighters killed while extinguishing arson fire instigated by insured to destroy the property so that a claim could be made for the insurance proceeds); *United States Fid. & Guar. Co. v. American Emps.’ Ins. Co.*, 205 Cal. Rptr. 460, 466 (Ct. App. 1984).

126. *Cf. Conn. Indem. Co., v. Nestor*, 145 N.W.2d 399 (Mich. Ct. App. 1966) (permitting indemnification when child set a fire to frighten inhabitants of a structure, but the fire spread causing extensive property damage); *see generally KEETON & WIDISS, supra* note 3, §5.4(d) (discussing availability of liability insurance coverage for intentional conduct).

insured's subjective intent and treat the issue as one of actual, rather than implied, intent. The two approaches differ in the specific consequence the insured must comprehend; the second approach requires that the insured comprehend and intend the consequence of some harm; the third approach requires that the insured appreciate and intend the specific consequence that is the basis of the claim asserted against the insured.

California courts have not engaged in extensive analysis of the "expected-intended" exclusion. Instead, as noted in this article, the courts' focus has been on section 533's statutory exclusion for loss resulting from a willful act and the general understanding of what distinguishes an "accident" (negligence) from a deliberate loss (willful act). What California case law does exist, however, suggests a narrow application of the terms "expected" and "intended," when the terms are used as a limitation on coverage.

The most extensive discussion of the "expected-intended" language can be found in *Shell Oil Co. v. Winterthur Swiss Ins. Co.*¹²⁷ *Shell Oil Co.* involved environmental contamination over many years at the Rocky Mountain Arsenal, a United States Army complex. Shell settled the environmental claims (cost of cleanup) and sought to hold its insurers responsible for those costs. The insurers argued, among other things, that Shell expected or intended the environmental damage or part of its operations as a lessee on the complex grounds. The court concluded that the terms "expected" and "intended," in the context of a policy exclusion, were not ambiguous.¹²⁸ With respect to the term "expected," the court concluded:

The ordinary and popular meaning of "expect" connotes subjective knowledge of or belief in an event's probability. We see no material difference if the degree of that probability is expressed as substantially certain, practically certain, highly likely, or highly probably; the terms are minor shadings of the same idea. All convey the ordinary and popular sense that we do not think of events we "expect" as absolute certainties. Accordingly, we cannot adopt the more restrictive interpretation of some courts that "the phrase 'neither expected nor intended' should be

127. 15 Cal. Rptr. 2d 815 (Ct. App. 1993).

128. *Id.* at 835.

read only to exclude those damages that the insured knew would flow directly and immediately from its intentional act.”¹²⁹

The court did not provide a separate definition of “intended;” however, it did indicate that it would set a similarly high standard for that term by citing and approving an out-of-state decision in which the court had defined “intended” as “damage that the insured in fact subjectively wanted,”¹³⁰ which sets a very high threshold for an insurer to meet as it effectively encompasses the “intend to inflict the actual injury” test.

The problem here is that while we have some understanding as to what the terms “expected” and “intended” mean in the context of an exclusion when the objective is clearly focused, that consensus quickly collapses when we expand the focus beyond the obvious. For example, if the insured wishes to burn the insured premises to collect the insurance proceeds, there is no confusion as to the insured’s aims, intentions, and expectations. What are the insured’s aims, intentions, and expectations if the arson fire results in bodily injury to others, e.g., tenants, guests, or firefighters? What if the insured sets the fire as a practical joke, not specifically expecting nor intending injury to result?¹³¹ The law has developed a number of tests to resolve this problem, but the fact remains that once we broaden the

129. *Id.* (citations omitted).

130. *Id.*

Our conclusion on the meaning of “expected or intended” is not unique. *Patrons-Oxford Mut. Ins. Co. v. Dodge*, adopted essentially the same interpretation, albeit without examining the words’ ordinary and popular meanings. The court decided that damage “. . . which is either expected or intended from the standpoint of the Insured” refers only to damage “that the insured in fact *subjectively wanted* (‘intended’) to be a result of his conduct or in fact *subjectively foresaw as practically certain* (‘expected’) to be a result of his conduct.”

Id. (citation omitted).

131. *Compare* *Trafalski v. Allstate Ins. Co.*, 685 N.Y.S. 2d 351 (App. Div. 1999) (holding that insurer failed to establish as a matter of law that insured reasonably expected victim to sustain burn injuries when he set the victim’s jeans on fire while engaging in horseplay), *with* *Morner v. Giuliano*, 857 N.E.2d 602 (holding that discharge of BB gun that caused injury greater than shooter expected could not as a matter of law be deemed an accident); *but see* *State Farm Fire & Cas. Co. v. Muth*, 207 N.W. 2d 364, 366 (Neb. 1973) (affirming trial judge’s finding that insured who fired B-B gun intending “to scare somebody” did not intend or expect to inflict harm on person who was struck by BB).

scope of our focus beyond what was actually the insured's aims, intentions, and expectations, we create a legal construct that attributes to the insured *as a matter of law* certain aims, intentions, and expectations. Moreover, interpretation of the terms "expected" or "intended" in the context of an exclusion does not mean that the terms will receive the same interpretation when used to define the scope of coverage. What is "expected" when the term is used to define an "accident" may vary from what is "expected" when the term is a limitation on coverage simply because a different rule of construction applies—coverage terms are construed broadly, limitations on coverage are construed narrowly.

The "intended-expected" language creates a zone of legal responsibility that often operates independently of the insured's actual intentions and expectations.¹³² Courts attribute certain intentions and expectations to the insured, regardless of the insured's actual mental state, consistent with the court's view whether indemnification is proper given the insured's conduct and the social context in which the conduct occurs.¹³³ We can see this in the child molestation cases. Courts have simply ignored extensive social science research that molesters often do not intend or expect harm to their victims.¹³⁴ Rather, courts, perhaps more sensitive to the

132. Courts occasionally assert that identifying a person's actual expectations is "difficult, if not impossible." *Wickman v. Nw. Nat'l Ins. Co.*, 908 F.2d 1077, 1087–88 (1st Cir. 1990) ("[T]he subjective state of the mind of the insured cannot be generally known." (quoting *Hoffman v. Life Ins. Co.*, 669 P.2d 410, 419 (Utah 1983))). As an abstract, metaphysical question the court is possibly correct; however, courts are frequently called on to determine whether a person actually intended or expected a certain consequence, as for example, when the issue of scienter or malice is involved. In these contexts, courts exhibit no hesitancy or reluctance to make the necessary factual determinations of actual expectation, intention, or knowledge.

133. See *Rigelhaupt*, *supra* note 74, § 4.

134. *J.C. Penney Ins. Co. v. M.K.*, 804 P.2d 689, 700 (Cal. 1991):

Defendants and their amici curiae argue at length that psychiatric testimony would show that child molesters are really sheep in wolves' clothing—that their abuse of children is an attempt at affection. We are reluctant to venture into uncertain territory still being explored by psychiatrists. We note, however, that testimony, psychiatric or otherwise, that no harm was intended flies in the face of all reason, common sense, and experience. Such testimony is also irrelevant in light of the rule that a child molester's subjective intent is irrelevant to the question of insurance coverage. Moreover, if psychiatry can satisfactorily corroborate defendants' view and demonstrate the need for a change in the law, the proper forum is the Legislature, where

political and social situation, have consistently invoked the legal fiction that intent to harm necessarily exists on the part of sexual molesters to preclude indemnification.¹³⁵ It is questionable whether the legal fiction of “intent to harm” works properly and optimally when interpreting the “expected-intended” exclusion. Those concerns are ratcheted up exponentially when the court applies the “expected-intended” legal fiction as a gloss on a willful act (section 533) and thereby, defines, as a matter of public policy, what may be insured and what may not be insured. There are many accepted coverage areas, such as defective product design or defamation,¹³⁶ where coverage would be questionable under the view that to constitute an accident under an occurrence policy the event itself must be unexpected or unintended. Simply put, neither a defective design nor a defamatory publication is an unexpected or unintended event; yet, I suspect that there is no disagreement that losses resulting from mistaken decisions that produce a defectively designed product or a defamatory statement are proper subjects for liability insurance coverage. The California courts conflation of section 533’s concept of “willful act” with accidental means” puts that general understanding at risk.

broad-based, perhaps conflicting empirical evidence can be presented and considered.

Id. (citations omitted) (internal quotation marks omitted).

135. See, e.g., *Am. Family Mut. Ins. Co. v. Purdy*, 483 N.W.2d 197, 200 (S.D. 1992) (“[T]he majority view in criminal sexual contact cases is to infer, as a matter of law, that harm was expected or intended. We find the majority position persuasive.”); *Colo. Farm Bureau Mut. Ins. Co. v. Snowbarger*, 934 P.2d 909, 911 (Colo. App. 1997) (“[I]ntent to harm is inferred as a matter of law when the defendant has engaged in sexual misconduct with a child.”); see generally David S. Florig, *Insurance Coverage for Sexual Abuse or Molestation*, 30 TORT & INS. L. J. 699, 699–700 (1995) (“Most courts refuse coverage to the insured perpetrator of abuse when the perpetrator is an adult and the victim is a minor. In such cases the nearly unanimous rule is that the intent to injure is inferred as a matter of law from the act of abuse itself (the inferred intent rule).”).

136. “Personal and advertising injury” is defined in the standard CGL policy to encompass a number of deliberate offenses, including false arrest, malicious prosecution, defamatory publication, etc. See GENERAL LIABILITY FORM, *supra* note 16, at 5.

V. WHAT IS AN ACCIDENT REVISITED

“Accident” has no *a priori* meaning.¹³⁷ When courts addressed the issue in the past, they gave the term “accident” an inclusive construction, stating that an accident could refer to both mishaps and unforeseen consequences.¹³⁸ The current trend by California courts to define the term “accident” narrowly is, thus, inconsistent with historic practice.

We might begin by asking what considerations are driving California courts to adopt such a constrained view of the concept of an accident? Courts may be concerned that a broad conception of the term “accident” provides no logical stopping point if an accident includes unanticipated consequences of deliberate conduct.¹³⁹ The assertions that the insured intended, expected, or otherwise anticipated the consequences of his conduct are just that—assertions. They are not based on expert evidence or a fully developed record.

Courts appear to be wary of the ease by which unexpectedness may be alleged. Expert evidence that the insured did not expect the consequences of his conduct is generally shunned and decision-making by a trier-of-fact is avoided.¹⁴⁰ Judges use their own internal sense of the insured’s state of mind, “the nature of things,” or the proverbial “judicial hunch”¹⁴¹ to justify the conclusion that the

137. *Burr v. Commercial Traveler’s Mut. Acc. Ins. Co.*, 67 N.E.2d 248, 251 (N.Y. 1946).

Legal scholars have spent much effort in attempts to evolve a sound theory of causation and to explain the nature of an ‘accident.’ Philosophers and lexicographers have attempted definition with results which have been productive of immediate criticism. No doubt the average man would find himself at a loss if asked to formulate a written definition of the word. Certainly he would say that the term applied only to an unusual and extraordinary happening; that it must be the result of chance; that the cause must be unanticipated *or, if known, the result must be unexpected.*

Id. (emphasis added).

138. *See Geddes & Smith Inc. v. Saint Paul-Mercury Indem. Co.*, 51 Cal. 2d 558, 563–64 (1959); *Burr*, 67 N.E.2d at 251.

139. This problem has been identified from a different perspective by Ellen Pryor who has questioned whether insureds would optimally desire liability insurance for intentionally inflicted losses. Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721, 1746 (1997).

140. *See* cases cited *supra* note 98 (noting tendency of court to treat question as outside purview of the jury); *see also* Rigelhaupt, *supra* note 121, § 4(b) (noting judicial unwillingness to consider expert evidence).

141. The judicial hunch can be seen as a byproduct of the judge’s experience

conduct for which the insured is being sued was not an accident, and therefore, not covered. This, of course, is a recurrent event in the law. The “reasonable person” standard and the insured’s “reasonable expectations of coverage” test are common examples of judicial constructs. Judges will, in the absence of more specific authority, necessarily opine on these issues.¹⁴² Courts avoid the expansion of liability insurance coverage that the presence of an allegation of “unintendedness” or “unexpectedness” would permit by simply declining to allow the allegation to be considered.

Tied to the above is perhaps a related concern caused by broad definitions of the insurer’s duty to defend. California, along with many jurisdictions, holds that an insurer must provide the insured with a defense whenever the complaint alleges a complaint “potentially” within coverage.¹⁴³ “Potentially,” while not unlimited,¹⁴⁴ casts a broad net.¹⁴⁵

and situation sense. See Joseph C. Hutchenson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274, 285–86 (1929). However, it can also be seen as a means of collecting a series of decision points that may permit a more informed and better reasoned decision over the long term. See generally Charles E. Lindblom, *The Science of “Muddling Through”*, 19 PUB. ADMIN. 79, 79 (1959).

142. See Frederick Schauer, *Legal Fictions Revisited* (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904555# (working paper discussing preference of courts to use legal fictions to camouflage policy-based decisions).

143. See *Buss v. Superior Court*, 939 P.2d 766, 773 (Cal. 1997); *CNA Cas. of Cal. v. Seaboard Sur. Co.*, 222 Cal. Rptr. 276, 279 (Ct. App. 1986).

144. *Hurley Const. Co. v. State Farm Fire & Cas. Co.*, 12 Cal. Rptr. 2d 629, 631 (Ct. App. 1982) (“[T]he insured may not speculate about unpled third party claims to manufacturer coverage”); *but cf.* *Stone v. Hartford Cas. Co.*, 470 F. Supp. 2d 1088, 1096 (C.D. Cal. 2006) (“The potential for coverage may arise from the underlying complaint, the terms of the policy, possible amendments to the complaint, or any other extrinsic evidence known to the insurer which would give rise to liability under the policy, even if coverage is ultimately found lacking.” (citations omitted)).

145. *Cal. Union Ins. Co. v. Club Aquarius, Inc.*, 169 Cal. Rptr. 685, 686 (Ct. App. 1980) (“[T]here exists a duty on the insurer to defend an action if potential liability to pay exists, even though that potential liability to pay is remote.”); *CNA Cas.*, 222 Cal. Rptr. at 283 (holding that despite the federal court’s dismissal of the pendent second cause of action, which was the sole basis for raising the insurer’s duty to defend, the possibility that the complaint could still be amended had it not been precluded; therefore, there remained the possibility that a claim within coverage would be asserted and the insurer’s duty to defend attached); see also *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 176 n. 15 (Cal. 1966) (stating that the duty to defend is excused only where “the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage”).

Moreover, to escape the defense obligation, the insurer must conclusively establish that no duty to defend exists.¹⁴⁶ Failing that, the insurer must defend the entire claim even though only a portion of the claim is potentially within coverage.¹⁴⁷ And, the consequences for breaching the duty to defend can be draconian.¹⁴⁸

The practical effect of the above is that unless courts treat certain types of claims as *de jure* outside coverage, insurers would be forced to defend, and perhaps compromise with payment, claims that courts have repeatedly said should not be covered. The sentiment that such a requirement is bad public policy appears to be generally accepted when applied to child molesters and their ilk. The problem is the approach lacks a thesis that limits it to the perceived evil that spawned

146. *Montrose Chem. Corp. v. Superior Court*, 861 P.2d 1153, 1161 (Cal. 1993).

To prevail, the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it cannot. Facts merely tending to show that the claim is not covered, or may not be covered, but are insufficient to eliminate the possibility that resultant damages (or the nature of the action) will fall within the scope of coverage, therefore add no weight to the scales. Any seeming disparity in the respective burdens merely reflects the substantive law.

Id. (emphasis in original).

147. *Buss*, 939 P.2d at 775.

148. Under California law the insurer who breaches the duty to defend must pay as damages the reasonable defense costs paid or incurred by the insured. *See Hogan v. Midland Nat'l Ins. Co.*, 476 P.2d 825, 831–32 (Cal. 1970). The insured may enter into a “reasonable” settlement of the claim in good faith and may then maintain an action against the insurer to recover the amount of the settlement up to policy limits. *Clark v. Bellefonte Ins. Co.*, 169 Cal. Rptr. 832, 837 (Ct. App. 1980). Under such circumstances the insurer must reimburse the insured for her settlement costs unless the insurer can demonstrate that the settlement was reached through fraud and collusion or the insured was not covered by insurance for the underlying claim. *Sunseri v. Camperas Del Valle Stables, Inc.*, 230 Cal. Rptr. 23, 24 (Ct. App. 1986) (stipulated judgment). The insurer’s tortious rejection of the defense may subject the insurer to liability for a judgment in excess of policy limits. *Bogard v. Emp’rs Cas. Co.*, 210 Cal. Rptr. 578, 583 (Ct. App. 1985). Similarly, the tortious handling of the defense or the abrupt termination of the defense in a manner that prejudices the insured may subject the insurer to a judgment in excess of policy limits. *See Travelers Ins. Co. v. Leshner*, 231 Cal. Rptr. 791 (Ct. App. 1986). The insurer’s breach of the duty to defend may subject it to an excess of limits exposure if there is a within limits offer of settlement that the insured cannot accept because of financial limitations or the unavailability of other insurance resources. *See Safeco. Ins. Co. of Am. v. Parks*, 88 Cal. Rptr. 3d 730, 742–43 (Ct. App. 2009).

it. Courts have extended the approach to areas outside the child molestation coverage claims in which these arguments were initially formulated. There is no principled basis for constraining the expansion of the legal fiction that the insured can be deemed to have intended to harm the victim-claimant if the insured acted deliberately. If courts are concerned that a broad definition of accident has no logical stopping place, the court's answer suffers from the reverse concern—contraction of the concept of accident post *J.C. Penney Cas. Ins. Co.* has no logical stopping place other than the Minoan labyrinth of “accidental means.”

Consider in this regard the decision in *State Farm Fire & Casualty Company v. Superior Court*.¹⁴⁹ The insured (Lint) and another person (Wright) began to argue. Lint picked up Wright with the intent to throw Wright in the pool, which he did. Unfortunately, Lint didn't throw Wright far enough. Wright landed on the pool steps and sustained serious injury. One would think, based on *Mendez*, that such conduct would be deemed not an accident. The conduct (throwing the person in the pool) was deliberate; the result (injury due to misjudgment on the part of the insured as to the amount of force necessary to accomplish that objective) was unanticipated, but there was nothing in the conduct that suggested a mishap or inadvertent act. The court, however, found that here the injury was the result of an accident. The court noted that an accident refers to “the intended or unexpected” *consequence* of the act,¹⁵⁰ which was, according to the court, arguably the case here.¹⁵¹ The court distinguished

149. 78 Cal. Rptr. 3d 828 (Ct. App. 2008).

150. *Id.* at 833 (emphasis in original).

151. *Id.* at 836.

Although he deliberately picked up Wright and threw him in the pool, Lint did not intend or expect the consequence, namely, that Wright would land on a step. Lint miscalculated one aspect in the causal series of events leading to Wright's injury, namely, the force necessary to throw Wright far enough out into the pool so that he would land in the water. It is disputed that Lint did not intend to hurt Wright; he merely intended that Wright land farther out into the water and “get . . . wet.” No doubt Lint acted recklessly . . . Lint rashly threw Wright at the pool without expecting that Wright would land on the cement step. Stated otherwise, the act directly responsible for Wright's injury, throwing too softly so as to miss the water, was an *unforeseen or undesigned happening or consequence* and was thus fortuitous.

Id. (emphasis in original).

Mendez by asserting:

[T]he act directly responsible for Wright's injury, throwing too softly so as to miss the water, was an *unforeseen or undesigned happening or consequence* and was thus fortuitous. The event here was an accident because *not* all of the acts, the manner in which they were done, and the objective accomplished transpired exactly as Lint intended.¹⁵²

The court's purported distinction of *Mendez* is, however, illusory. If the insured's mistake in the mental calculation of the amount of force necessary to carry out the objective transforms willful conduct into an "accident," then all mistaken beliefs support a finding that deliberate conduct is an accident.¹⁵³ The insufficient force was not a consequence of the insured slipping on a wet surface, which caused the insured to exert insufficient force so as to cause the victim to hit the pool steps rather than the pool water. All deliberate conduct is the product of human calculation. Coverage was proper in *State Farm Fire & Casualty Company* because, while the insured engaged in deliberate conduct, he did so with a reasonably mistaken belief that no serious injury would result. As a result, the loss was constituted an accident.

Courts initially triangulated the concept of accident to permit them to carve out an exception for molestation cases. One suspects that the carve out does not generate much public disagreement when applied to sexual molestation claims. The carve out has, however, created its own cottage industry of legal rules and those rules are now expanding into areas, e.g., "horseplay," or can logically be applied, e.g., "strict liability torts" where the policy against indemnity is less clear and the lack of clarity is generating confusion. And, having extended into these new areas, there is no logical stopping point to stem the tide.¹⁵⁴ The problem is no formula or test

152. *Id.* (citations omitted) (emphasis in original).

153. Several California courts have distinguished *State Farm Fire and Casualty Company v. Superior Court* on the ground that it was decided prior to *Delgado*. See *State Farm General Ins. Co. v. Frake*, 128 Cal. Rptr. 3d 301, 313–14 (Ct. App. 2011). As noted previously, however, *Delgado* is somewhat limited as a precedent due to its unique facts (unreasonable belief in need for self-defense). See *supra* notes 103–104 and accompanying text.

154. See, e.g., *Frake*, 128 Cal. Rptr. 3d at 310 (horseplay resulting in groin injury; court found no accident even though court held that injury was not

has been announced that permits a rational guess as to when an unanticipated loss arising from deliberate conduct will be deemed an accident and when it will be deemed not an accident. The courts have been placed in the same position as Kipling's young jaguar whose mother told him that if he found a tortoise, he should scoop it out of its shell and if he found a hedgehog he should hold it in water until it uncoils, but did not instruct him how to tell a tortoise from a hedgehog.¹⁵⁵

In all of these cases restrictively interpreting the concept of "accident," the claim can be made that the insured acted negligently based on a mistaken belief; however, assessment of the veracity of that alleged belief is difficult because the assessment centers on the insured's subjective awareness and intentions. While subjective belief may be established by circumstantial evidence, much of this evidence is likely in the insured's control or is privileged. Moreover, at the time the insured's subjective belief is being assessed, the insured has a self-motivated reason to lie. Claiming mistake gains access to insurance. While these factors may be present in some typical negligence cases, e.g., road rage verses negligent operation of a motor vehicle, these factors are invariably present in the cases when California courts have expressed a reserved, restricted understanding of the concept of accident.

It is not unusual for courts to exhibit caution when confronted with situations when subjective beliefs significantly influence the availability of legal rights. Non-economic damages, e.g., emotional distress,¹⁵⁶ and negligent

intended); *Fire Ins. Exch. v. Superior Court*, 104 Cal. Rptr. 3d 534, 544–45 (Ct. App. 2010) (trespass resulting from mistaken belief as to location of property line; court found there was no accident even if belief was reasonable); *Lyons v. Fire Ins. Exch.*, 74 Cal. Rptr. 3d 649, 655–56 (Cal. Ct. App. 2008) (holding that sexual touching resulted from mistaken belief that consent to touch existed; court held mistaken belief, even if reasonable, did not make touching accidental).

155. RUDYARD KIPLING, *The Beginning of the Armadillos*, in *JUST SO STORIES FOR LITTLE CHILDREN* 101–02 (London, MacMillan & Co. 1902).

156. RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965) (noting concerns that claims for emotional distress can be easily falsified); see *Hernandez v. McDonald's Corp.*, 975 F. Supp. 1418, 1428 (D. Kan. 1997) (stating that purpose behind limitation on emotional distress claims is to guard against fraud and exaggeration); *Payton v. Abbott Labs*, 437 N.E.2d 171, 179 (Mass. 1982) (noting that "emotional distress can be both real and serious in some situations, while trivial, evanescent, feigned, or imagined in others").

infliction of emotional distress¹⁵⁷ are two examples of situations where the subjectivity of the subject matter influences doctrinal development. That factor may be at play here.

Further compounding the confusion in this area is the fact that in expanding the carve out first developed in the molestation cases, the courts have used the statutory exclusion, thereby incorporating the approach into all insurance policies and correspondingly negating, *sub silencio*, substantial case law in the process.

Consider for example, the impact of this approach on the often cited decision in *Gray v. Zurich Ins. Co.*¹⁵⁸ In *Gray*, the California Supreme Court expounded extensively on the proper interpretation of an exclusion, which rejected coverage for loss “caused intentionally by or at the direction of the insured.”¹⁵⁹ The insured was involved in an automobile accident that escalated into a fight. The insured was sued for battery. He claimed he acted in self-defense. The court concluded that the exclusion was ambiguous as to whether it barred coverage because the insured may have acted reasonably in self-defense or the complaint may be amended to allege the insured acted negligently. The Section 533 statutory exclusion was briefly referenced and found to be inapplicable because the statute did not extend to the duty to defend and a “mere accusation of a willful tort” does not implicate the statute.¹⁶⁰

In *Delgado v. Interinsurance Exchange of the Automobile Club*,¹⁶¹ the Court was again confronted with a claim that self-defense converted deliberate conduct into an accident. The insured relied on *Gray*. The court summarily dismissed the reference:

Delgado relies on that statement from *Gray* and on several cases that have cited *Gray* for the proposition that acts done in self-defense are unintentional and therefore accidental.

157. JAMES M. FISCHER, UNDERSTANDING REMEDIES § 12.3 (2nd Ed. 2006) (noting requirement that before plaintiff may recover for negligent infliction of emotional distress plaintiff must satisfy “physical harm” or “manifestation of harm” requirements to corroborate genuineness of claim).

158. 419 P.2d 168 (Cal. 1966).

159. *Id.* at 170–71.

160. *Id.* at 177.

161. 211 P.3d 1083 (Cal. 2009).

That reliance is misplaced. *Gray* and the cases that have cited it pertained to the question of unreasonable use of force or unreasonable self-defense in the context of an insurance policy's *exclusionary* clauses, not as here in the context of a policy's coverage clause. At issue here is whether unreasonable self-defense comes within the policy's coverage for "an accident," not whether it falls within a particular policy exclusion.¹⁶²

But if the concept of an accident underlying the statutory exclusion is as constrained as the courts have held, then what room is there for any term in the policy that applies to the concept of an "accident"? Because section 533 sets state policy, it cannot be expanded by a broader definition of "accident" in the coverage provision. What public policy bars may not be reintroduced by policy language.¹⁶³ Because section 533 sets state policy, it cannot be expanded by a narrow interpretation of the "expected-intended" exclusion. The effect of a narrow interpretation of the "expected-intended" exclusion would be to suggest the possibility of coverage that is foreclosed by the narrow definition of an accident required by section 533. Because section 533 sets state policy, the self-defense exception to the standard ISO "expected-intended" exclusion is a nullity if injury inflicted in self-defense is not an accident, which *Delgado* implies and a recent California court has suggested.¹⁶⁴

In *Clemmer v. Hartford Ins. Co.*,¹⁶⁵ the Court adopted a narrow interpretation of the section 533 statutory exclusion that left to the parties to the insurance contract primary responsibility for delineating the scope of the liability insurance coverage. The courts' current approach, which broadly, but uncertainly, asserts that unintended or unexpected consequences may or may not reflect an accident,

162. *Id.* at 1089–90 (citations omitted) (emphasis in original).

163. *Combs v. State Farm Fire & Cas. Co.*, 49 Cal. Rptr. 3d 917, 920 (Ct. App. 2006) (concluding that insurer cannot indemnify an insured for a loss that is "willful" pursuant to Section 533); *cf.* *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 907 (Cal. 2006) (insurers may not write around statutorily mandated language).

164. *Sutton v. Interinsurance Exch. of Auto. Club of Southern California*, No. B198855, 2010 WL 522719, at *3 (Cal. Ct. App. February 16, 2010). The insurance policy did not have a self-defense exception, but under the reasoning of this case, such an exception would fall under the constraint imposed by section 533.

165. 587 P.2d 1098 (Cal. 1978).

takes away from the parties to the insurance contract the ability to define the scope of coverage. This is done by tethering the definition of an accident to the statutory concept of willful act. Even if one concedes that the initial decision to carve out coverage for molestation claims was proper, the extension of that carve out into more general areas such as injuries arising from “horseplay” or “practical jokes” raises serious concern and substantial confusion as to what is an “accident” under California law. A return to *Clemmer’s* “preconceived design to injure” would obviate these problems and restore to the parties to the liability insurance contract the ability to define the scope of the desired coverage. Courts could preserve the denial of coverage for child molestation because of the *de jure* presumption of intent to injure, which while factually questionable, has been universally accepted for public policy reasons.¹⁶⁶

CONCLUSION

Historically, courts have understood the concept of an “accident” to encompass the unintended or unexpected consequences of deliberate conduct. That construction has long been also understood to conform to the popular, lay understanding of the term. These reasons should inform the construction of the term “accident” in the standard liability insurance policy. This does not ignore concerns that insurers may be required to provide a defense to insureds accused of deliberately injuring another whenever an insured claims that the injury was unintended. Providing a defense to a charge of wrongdoing has not been understood as raising public policy concerns as does indemnifying a person for the financial consequences of intentionally causing injury to another.¹⁶⁷ Moreover, a claim of unintended or unexpected consequences must be reasonable; otherwise, no duty to

166. *J.C. Penney Casualty Ins. Co. v. M.K.*, 804 P.2d 689, 693 (Cal. 1991) (noting that every court that has considered the issue of insurance coverage for child molestation has, almost without exception, held there is no coverage). The jurisdictional alignment has not changed in the intervening twenty years.

167. *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 178 (Cal. 1966) (holding that public policy preventing insurance coverage from encouragement of willful tort by denying wrongdoer indemnification for the wrong is not violated when the insurer provides a defense against the accusation of willful wrongdoing; providing a defense does not encourage wrongful conduct).

defend is owed.¹⁶⁸ Finally, insurers retain the power of the pen. They can draft specific exclusions to coverage if the risk, and its related cost, is undesirable from an underwriting perspective.¹⁶⁹

Unless conduct is inherently dangerous, there is no reason for a public policy rule that focuses exclusively on conduct to determine if the actor may be indemnified for the consequences of that conduct. It is simply meaningless for the courts to engage in an extended analysis of an insured's conduct without expressly evaluating that conduct in the larger context of the harm resulting from that conduct. The law long ago made peace with the idea that losses resulting from negligent conduct would not violate public policy.¹⁷⁰ That position has been extended to reckless conduct.¹⁷¹ And while the resolve still exists, for the most part, not to extend coverage to deliberately inflicted losses, the critical insight is that the concern is focused on the intention to cause the harm, not the intention to engage in the act. A driver who intends to speed does not lose coverage when speeding results in a loss because, while the loss is foreseeable, it is not the object of the actor's conduct. A person who touches another

168. It must, however, be acknowledged that insurers face a difficult burden of persuasion on this issue. *Montrose Chemical Corp. v. Superior Court*, 861 P.2d 1153, 1162 (Cal. 1993) (holding that to escape the duty to defend altogether, the insurer must establish that the underlying claim cannot come within policy coverage).

169. *Carson v. Mercury Ins. Co.*, 148 Cal. Rptr. 3d 518, 532 (Ct. App. 2012) ("It is a well-established principle that an insurer has the right to limit policy coverage in plain and understandable language and that it may limit the nature of the risk it undertakes to assume.").

170. KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11* 3 (Harvard University Press 2008) (particularly chapter VI, which discusses the relationship between tort law and liability insurance).

171. *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 833 (Ct. App. 1993).

Nevertheless, it is now clear that section 533 does not prohibit coverage for reckless conduct. Also, the Supreme Court has said in dictum that some forms of conduct amounting to a conscious disregard to others' safety might not constitute an uninsurable "willful act" under section 533. As a practical matter, the distinction between reckless conduct and "positive, active, wanton, reckless and absolute disregard of [an act's] possibly damaging consequences" is too fine to be significant.

Id. (citations omitted) (alteration in original); see *Sheehan v. Goriansky*, 72 N.E.2d 538, 543 (Mass. 1947) (holding that reckless conduct on the part of the insured does not mean that the resulting loss was not accidental); see also *Meyer v. Pacific Emp'rs Ins. Co.*, 43 Cal. Rptr. 542, 546 (1965) (same).

believing, mistakenly as it turns out, that the touching is desired does not act to cause injury. The law may treat the touching as a battery,¹⁷² but that legal classification does not define the actor's mental intentions or expectations for purposes of liability insurance coverage.

Liability insurance and tort law reflect a grand bargain constructed by courts and legislatures over the course of the 20th century to engage in risk spreading. Liability insurance is the funding mechanism that enables tortfeasors to efficiently absorb the risks assigned to them by the tort system.¹⁷³ In a real and meaningful way, liability insurance law and tort law exist in an equilibrium. Tort law cannot exceed the capacity of liability insurance; if it does, there is no capacity to pay claims and risk spreading fails. Liability insurance law must be responsive to the demands of tort law for the same reason.¹⁷⁴

Liability insurance by its terms covers accidents. As this article has attempted to demonstrate, an accident can be an open-ended question. The critical question, however, is

172. RESTATEMENT (SECOND) OF TORTS § 13 cmt. c (1965).

If an act is done with the intention described in this Section, it is immaterial that the actor is not inspired by any personal hostility to the other, or a desire to injure him. Thus the fact that the defendant who intentionally inflicts bodily harm upon another does so as a practical joke, does not render him immune from liability so long as the other has not consented. This is true although the actor erroneously believes that the other will regard it as a joke, or that the other has, in fact, consented to it. One who plays dangerous practical jokes on others takes the risk that his victims may not appreciate the humor of his conduct and may not take it in good part.

Id. There has been some debate whether the tort of battery should (or does) contain an intent to harm element. See Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. U. L. REV. 1585 (2012) (surveying the conflicting commentary and case law).

173. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500–01 (1961). Not all commentators agree that risk distribution should be the basis for tort liability, but it appears to have been the most influential reason for judicial extension of tort liability in the twenty century. Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1595 (1997) (“Historically, the most prominent justifications for strict products liability have compared products manufacturers to insurers”); William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120–22 (1960) (noting the influence of Justice Traynor’s concurring opinion in *Escola v. Coca Cola Bottling Co.*, which espoused the argument of risk distribution as the justification for manufacturer product liability).

174. See sources cited *supra* note 51.

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whether that open-endedness should be artificially constrained by a narrow focus on the operative conduct by the insured without explicit consideration of the insured's understanding of the likely consequences of that conduct. The conclusion offered is that it should not. Courts should accept and apply the traditional and general understanding that deliberate conduct that results in foreseeable, but unintended or unexpected, consequences is an accident.¹⁷⁵ As such, the practical joke that misfires and causes unintended or unexpected injury should be no less a candidate for coverage as an accident than an errantly driven automobile or golf ball.

175. *Outlaw v. Bituminous Ins. Co.*, 357 So. 2d 1350, 1354 (La. Ct. App. 1978) (holding that where insured drove his golf ball and hit a nine-year-old who raised his head above a golf bag, and the driven ball struck the nine-year old in the eye, destroying his sight, the insured golfer was negligent and the insurer would be liable). There are no reported cases where a court has treated a golfing injury as non-accidental, although there are numerous cases addressing the liability of golfers whose deliberately, but errantly, driven golf balls strike another. David M. Holliday, Annotation, *Liability to One Struck by Golf Ball*, 53 A.L.R. 4th 282 (1987).