S236765

SUPREME COURT OF CALIFORNIA

LIBERTY SURPLUS INSURANCE CORPORATION, et al.,

Plaintiffs and Appellees,

v.

LEDESMA AND MEYER CONSTRUCTION COMPANY, INC., et al.,

Defendants and Appellants.

9th Cir. No. 14-56120

OPENING BRIEF ON THE MERITS

After Order Certifying Question by the
U.S. Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

ISSUE FOR REVIEW

Whether there is an "occurrence" under an employer's commercial general liability policy when an injured third party brings claims against the employer for the negligent hiring, retention, and supervision of the employee who intentionally injured the third party.

INTRODUCTION

Jane Doe was sexually molested by Darold Hecht, an employee of appellant Ledesma & Meyer Construction Co., Inc. ("L&M"). She sued L&M, alleging that it had been negligent in hiring, retaining, and supervising Hecht. L&M's liability insurer, Liberty, denied coverage for Doe's claim and filed a federal declaratory-relief action to establish non-coverage. The district court granted summary judgment for Liberty, finding that there had been no "occurrence," which its policy defined as an "accident."

The court relied on twin rationales for this finding: (a) L&M's intentional acts of hiring, retaining, and supervising Hecht did not constitute an "accident" simply because they resulted in harm to Doe that L&M did not intend; and (b) L&M's negligent acts were "too attenuated" from Hecht's injury-causing conduct to qualify as an occurrence.

When the Ninth Circuit attempted to ascertain the soundness of these rulings under California law it encountered deep splits of authority and strong internal disagreements in the Court of Appeal. These fissures have spread into the California's district courts.

This is an overview of the current legal landscape:

This Court's precedents

In decisions dating to 1891, this Court has consistently defined *accident* to include the unexpected, unintended consequences of the insured's deliberate acts. Indeed, the definition of *accident* that this Court

adopted in 1989 for use in all liability policies defines that term as "an unexpected, unforeseen, or undesigned happening *or consequence* from either a known or an unknown cause."[1] The Court has applied this definition to find coverage for liability incurred by a company that sold defective doors that failed after installation,[2] and for a company that sold a defective saw that cut lumber too narrowly.[3]

These precedents plainly support a finding that claims for an employer's negligent management of its employees fall within the scope of CGL coverage. Indeed, Liberty admitted in its correspondence with L&M that the negligence claims against it "were accidental in nature."[4]

It was for this reason that Liberty relied on its "attenuation" argument. But that concept runs counter to the rule that the causation standard for liability policies mirrors the causation standard in tort. Hence, if the insured's conduct will allow the insured to be held liable to the claimant, that conduct is not too "attenuated" to be covered by the insured's liability policy.

The Court of Appeal's precedents

Some courts have held, in accordance with this Court's precedents, that damage resulting from the unforeseen consequences of the insured's

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[1] *Delgado v. Interinsurance Exchange of Automobile Club of So. California* (2009) 47 Cal.4th 302, 308, emphasis added.

[2] *Geddes & Smith, Inc. v. St. Paul-Mercury Indem. Co.* (1959) 51 Cal.2d 558, 564.

[3] *Hogan v. Midland National Ins. Co.* (1970) 3 Cal.3d 553, 559.

[4] 3ER 371. ("ER" refers to the "excerpts of record" filed by L&M in the Ninth Circuit as required by Ninth Cir. Rule 30-1.)

deliberate acts can qualify as an "accident."[5] But this has become the minority view. The prevailing view is that "the term 'accident' refers to the nature of the insured's conduct, and not to its unintended consequences."[6]

The most influential appellate opinion on this subject is *Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50 (*"Merced"*), which holds that the relevant inquiry focuses on whether the insured's *acts* are "unforeseen, involuntary, [and] unexpected;" not on whether the consequences of those acts are unexpected. *Merced*'s analysis of *accident* has become the template used in the California and federal courts, having been cited directly in at least 66 cases and having indirectly influenced many more.

Unfortunately, the *Merced* court was unwittingly using the wrong definition for *accident*. The rules that it cited actually define a different, more limited insurance concept, called "accidental means." The distinguishing feature of "accidental means" coverage is that it does not cover the unintended consequences resulting from the insured's deliberate acts. This is why the insurance industry created it, and why this Court has consistently rejected attempts to merge the two types of coverage.

The result of *Merced* having done so is akin to having the courts apply the test for "actual agency" in every case where "ostensible agency" is asserted. The results may turn out correctly on occasion, but not for the right reasons.

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[5] *See, e.g., State Farm Fire and Cas. Co. v. Superior Court (Wright)*(2008) 164 Cal.App.4th 317, 328.

[6] *See, e.g., Albert v. Mid-Century Insurance Company* (2015) 236 Cal.App.4th 1281, 1291.

The Court of Appeal's hostility to the idea that an "accident" can include the unexpected consequences of the insured's deliberate acts is unjustified. It results from an understandable reluctance to embrace a test for *accident* that might allow insureds to preserve insurance coverage for patently harmful conduct, like sexual assault, by claiming that they intended no harm.

But the proper way to avoid making repugnant acts insurable is not to adopt an overly restrictive definition of "accident." It is to recognize that courts have other tools at their disposal to deal with the problem. This Court's precedents already hold that an accident does not include the *intended* consequences of the insured's intentional acts; nor does it include cases where the insured's deliberate conduct is inherently harmful, regardless of what the insured expects. Courts can also rely on the policy's exclusions if they bar coverage, without first having to decide whether the conduct was accidental in the first instance.

The type of negligence at issue in this case — an employer's negligent acts in managing its workforce — constitutes precisely the type of negligent conduct that CGL policies routinely cover and were designed to cover. If insurers want to exclude coverage for negligent-supervision claims and their ilk, they can, but only if they place clear exclusions in their policies.

The courts should not allow insurers to skirt the strict scrutiny that exclusions normally receive by placing the "occurrence" limitation in the policy's insuring clause and then relying on that limitation as a vague multi-purpose exclusion for some undefined universe of claims.

STATEMENT OF THE CASE

A. Factual Summary

1. The underlying judgment against L&M in the *Doe* action

For the most part, the following factual summary is drawn directly from the Ninth Circuit's request to this Court to answer the certified question ("Cert. Req."), which is published at 834 F.3d 998, 1000 (9th Cir. 2016):

> "In April of 2002, Ledesma & Meyer Construction Company, Inc., Joseph Ledesma, and Kris Meyer (collectively "L&M") entered into a Construction Management Contract with the San Bernardino County Unified School District to complete construction work at the Cesar E. Chavez Middle School (the "Project"). . . .
>
> "In 2003, L&M hired Darold Hecht and assigned him to the Project as an Assistant Superintendent. On January 12, 2010, L&M received notice that a tort claim had been filed against the School District, arising out of allegations that Hecht sexually abused a 13-year old student at the Middle School beginning in October of 2006. The School District tendered the defense and indemnification of the claim to L&M pursuant to the Construction Contract.
>
> "In May of 2010, Jane JS Doe, filed a complaint in state court (the "Underlying Action"), naming as defendants, L&M, the School District, Hecht, Joseph Ledesma, Kris Meyer, and others. Doe amended the complaint twice. The operative complaint in the underlying action alleged claims for Negligence; Negligent Hiring/Retention and Supervision; Violation of the

California Education Code; Violation of California Civil and Penal Codes; Intentional Infliction of Emotional Distress; Violation of 42 U.S.C. § 1983; and Battery. (Cert. Req., 834 F.3d at p. 1000, all ellipses and material in brackets and parentheses in original.)[7]

2. The relevant terms of L&M's liability policy

"Liberty Surplus Insurance Co. had issued L&M a commercial general liability policy ("General Policy") for the relevant time period. The General Policy between the parties provided, in pertinent part:

SECTION I—COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" ... to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" ... to which this insurance does not apply....

b. This insurance applies to "bodily injury" and "property damages" only if:

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[7] The appellate record shows that Doe ultimately prevailed on her claims against L&M for general negligence, negligent hiring, and negligent supervision. (1ER 3.)

(1) The "bodily injury" ... is caused by an "occurrence" that takes place in the "coverage territory";

* * *

SECTION V—DEFINITIONS

...

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. (ER 267–268, 289.) (Cert. Req., 834 F.3d at pp. 1000, 1001, ellipses in original.)

B. Procedural Summary

1. Liberty's declaratory-relief action against L&M to establish non-coverage

"Pursuant to the General Policy, and other insurance policies, both L&M and the School District tendered their defense in the Underlying Action to Liberty Surplus Insurance Corporation and Liberty Insurance Underwriters, Inc. (collectively "Liberty"). Liberty defended L&M under a reservation of rights . . . .

"Liberty commenced the current action in the United States District Court for the Central District of California, seeking a declaration that, among other things, it was under no obligation to defend or indemnify L&M or the School District in the Underlying Action. . . . (Cert. Req., 834 F.3d at p. 1001, footnote omitted.)

2. The federal district court grants summary judgment for Liberty

The district court granted summary judgment for Liberty. (*Id.* at p. 1001; 1ER 14, 15.) In general, it found that *accident* as used in the policy

referred to "unforeseen or unexpected injury *resulting from unintentional conduct.*" (1ER 14, emphasis added.) The court concluded that L&M's negligence in managing Hecht could not qualify as an "occurrence" for two reasons: (1) it did not qualify as an "accident" under *Merced* because it was deliberate conduct; and (2) it was too attenuated from the injury-causing conduct committed by Hecht to constitute an "occurrence." (1 ER 14, 15.)

3. The Ninth Circuit is unable to resolve L&M's appeal in light of the muddled state of California law, and asks this Court to answer its certified question concerning the meaning of "occurrence" in liability-insurance policies

L&M appealed the adverse judgment against it to the U.S. Court of Appeals for the Ninth Circuit. After receiving full briefing from the parties and holding oral argument, the Ninth Circuit asked this Court to answer its certified question under Rule 8.548 of the California Rules of Court. (Req., 834 F.3d at p. 1000.) This Court granted review without restating the question. (Order granting review, filed Oct. 21, 2016.)

ARGUMENT

A. This Court should hold that an employer's negligent management of its employees can constitute an "occurrence" under standard liability policies

1. An employer's negligent management of its employees fits comfortably within the rubric of "accident" already adopted by this Court

This Court has thus far decided only three third-party cases[8] that have directly presented the issue of whether the claim asserted by the insured constituted an "accident" that qualified for coverage under a

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[8] First-party coverage insures against loss or damage sustained directly by the insured, whereas third-party coverage protects the insured against liability to a third party. (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 663, citation omitted.)

liability policy: *Geddes & Smith, Inc. v. St. Paul-Mercury Indem. Co.* (1959) 51 Cal.2d 558; *Hogan v. Midland National Ins. Co.* (1970) 3 Cal.3d 553; and *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302. Of this trio, *Geddes* and *Hogan* are particularly relevant, because they involve claims against a business for harm caused by the negligent conduct of its operations.

Geddes

In *Geddes,* the insured (Aluminum Products) supplied the plaintiff, a building contractor (Geddes), with 760 aluminum doors, which Geddes installed in 76 houses. All of the doors were defective. After they had been installed they sagged, went out of shape, and fell apart. (*Id.*, 51 Cal.2d at pp. 560, 564.) Aluminum Products attempted to supply replacement doors, but most of these proved defective too. (*Id.* at p. 561.) Eventually, Aluminum Products shipped a total of 2,604 doors before enough suitable doors were obtained, and Geddes "was engaged in handling, storing, repairing, removing, and installing doors for over a year." (*Id.*)

Geddes sued Aluminum Products for breach of warranty and negligence. (*Id.*) Aluminum Products tendered the defense to its liability insurer, which refused to defend, claiming that the damage did not arise from an accident as the policy required. (*Id.* at p. 562.) After obtaining a judgment against Aluminum Products, Geddes sued its insurer to recover on the policy as a judgment creditor. (*Id.*) Geddes lost in the trial court. In this Court the insurer defended that result, arguing that there had been no property damage "caused by accident." (*Id.*, 51 Cal.2d at p. 563.) This Court held otherwise.

Justice Traynor's opinion for the Court initially observed that, "No all-inclusive definition of the word 'accident' can be given." (*Id.*) It cited

varying definitions of *accident* from a number of earlier cases. But the definition that the Court relied on to resolve the case was drawn from the Minnesota Supreme Court's decision in *Hauenstein v. Saint Paul-Mercury Indem. Co.*(1954) 242 Minn. 354, 358-359, 65 N.W.2d 122, 126: "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." (*Geddes*, 51 Cal.2d at p. 564.)

Using this definition the Court held that the harm to Geddes from the door failures was "accidently caused" because the door failures were unexpected, undesigned, and unforeseen. (*Id.*)[9]

Hogan

Hogan, like *Geddes*, involved a product-defect claim. The insured, Diehl Machines, Inc. ("Diehl"), manufactured wood-processing machinery. It sold a saw to Kaufman for his lumber business, which Kaufman put into service in September 1961. (*Id.*, 3 Cal.3d at pp. 557, 558.) Kaufman immediately experienced problems with the saw's performance, which he tried over several months to remedy with Diehl's assistance. (*Id.*, 3 Cal.3d at p. 558.)

As the opinion explains, "From the beginning there were problems with the size of the lumber that came through the saw, the widths cut being

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[9] Ultimately, the Court held that the cost of the doors themselves was barred by a policy exclusion and that the damage to Geddes's business and goodwill was not recoverable because it did not constitute property damage. But Geddes was permitted to recover under the policy for the costs of removing and replacing the doors, the costs of handling the defective doors and their replacements, and for the loss of use of the houses. (*Geddes*, 51 Cal.2d at p. 564.)

too narrow. However, these deficiencies were not sufficiently serious to cause customers to reject the lumber until the spring of 1962." (*Id.*) Beginning in April 1962, some of Kaufman's customers began rejecting lumber shipments because the lumber was too narrow. As a result, after April 24, 1962, Kaufman began to deliberately cut lumber wider than specified to avoid further complaints. (*Id.*, 3 Cal.3d at p. 559.) No customers rejected orders because of the overcutting. (*Id.*)

Kaufman sued Diehl for the losses he claimed to have sustained as a result of the saw's defects. Diehl's liability insurer refused to defend Diehl against the lawsuit. (*Id.* at p. 558.) Diehl defended at its own expense, was held liable, and then assigned its claim against its insurer to Hogan, who filed the coverage action against the insurer, Midland. (*Id.*)

When the action reached this Court, Midland argued that none of the damages assessed against Diehl were covered because they were not the result of an accident. Rather, it contended that they "were not only foreseeable and expectable but were in fact foreseen since Kaufman knew from the outset that the saw was defective and would not cut lumber to the precise size desired." (*Id.* at p. 559.)

With respect to what constituted an "accident," the Court quoted its discussion of that issue in *Geddes*, but it shortened it using an ellipsis to say, "No all-inclusive definition of the word 'accident' can be given * * * as a source and cause of damage to property, within the terms of an accident policy, (accident) is an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause." (*Hogan*, 3 Cal.3d at p. 559, citing *Geddes*, 51 Cal.2d at pp. 563-564, internal quotation marks omitted.)

The Court held that the damage from the boards cut too narrow met the *Geddes* definition because Kaufman had been unaware of the problem when he cut the boards. (*Id.*, 3 Cal.3d at pp. 559-560.) But the Court held that Kaufman's deliberate cutting of the boards too wide failed to satisfy the *Geddes* definition of *accident* because the boards had been cut that way "by design." (*Id.* at p. 560.)

As the Court explained, "Whatever the motivation, there is no question that these boards were deliberately cut wider than necessary; the conduct being calculated and deliberate, no accident occurred within the *Geddes I* definition." (*Id.*)

Delgado

The insurance claim in *Delgado* arose from an assault and battery by the insured (Reid) against Delgado. Delgado sued Reid, alleging that he had "physically struck, battered and kicked Delgado" without provocation or justification, causing serious and permanent injuries. (*Id.*, 47 Cal.4th at p. 306.) He also alleged that Reid had "negligently and unreasonably believed" that he was engaging in self-defense when he repeatedly struck and kicked Delgado. (*Id.*)

Delgado obtained a judgment against Reid, together with an assignment of Reid's claim against his insurer. Delgado then filed suit against the insurer seeking to establish that Reid's policy provided coverage for Delgado's judgment. Two aspects of the *Delgado* opinion are particularly relevant here:

(1) The Court decided that the same definition of *accident* that it applied in *Geddes* and *Hogan* would henceforth become the common-law definition of *accident* that applies to all liability policies in California. (*Id.*, 47 Cal.4th at p. 308.); and

(2) The Court made clear that the determination of what constitutes an "accident" under a liability policy must be made from the perspective of the insured, not a third party. (*Delgado*, 47 Cal.4th at p. 310.) Hence, "the word *accident* in the coverage clause of a liability policy refers to the conduct of the insured for which liability is sought to be imposed on the insured." (*Id.* at p. 311.)

Synthesis of the third-party decisions

The definition of *accident* that this Court adopted in *Delgado* extends by its terms to both "happenings" and "consequences" from either a known or unknown cause, as long as that happening or consequence is "unexpected, unforeseen, or undesigned." (*See Delgado*, 47 Cal.4th at p. 308.) A *consequence* is "a result that follows as an effect of something that came before." (*Black's Law Dictionary* (10th Ed., 2014.)

Hogan and *Geddes* illustrate the application of this definition in practice. Both cases show that harm that is an unintended or unforeseen consequence of deliberate conduct — such as negligently selling defective doors or negligently sawing lumber to the wrong dimension — can constitute an accident. (*Geddes,* 51 Cal.2d at pp. 563-564; *Hogan*, 7 Cal.3d at p. 560.)

This rule plainly does not extend to *all* consequences from *all* acts that insured might commit. *Hogan* shows that the consequences that the insured expects to result from its conduct—such as deliberately cutting boards wider than specified —do not qualify as an accident. (*Id.*, 3 Cal.3d at p. 560.) And *Delgado* shows that the consequences of "acts done with intent to cause injury" are likewise not the product of an "accident," as a matter of law. (*Id.*, 47 Cal.4th at pp. 311-312.)

But as long as the resulting harm from the employer's deliberate (but negligent) conduct was unexpected or unforeseen, it would qualify as an "accident" under a liability policy, just as it did in *Geddes* and *Hogan.* This is because the harm to the third party would be an undesigned consequence of the employer's negligent conduct in managing the employee. Liberty has directly *admitted* that L&M's negligence in hiring and supervising Hecht was "accidental in nature."[10]

Delgado also makes it clear that the relevant inquiry focuses on the employer's negligent conduct, and not whether that conduct may facilitate the intention of an intentional tort by an employee. In that event *the employee's* conduct would not be an "accident," because intentional wrongful conduct is not accidental. (*Id.*, 47 Cal.4th at pp. 311-312 ["an injury-producing event is not an 'accident' within the policy's coverage language when all of the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor"].)

But the conduct at issue for the purposes of determining the availability of liability coverage is the conduct of *the insured*, "for which liability is sought to be imposed on the insured."[11] (*Delgado*, 47 Cal.4th at

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[10] 3ER 371. This statement is contained in a letter from Liberty's counsel to L&M's counsel attempting to explain why Liberty was denying coverage *even though* L&M's conduct was accidental.

[11] This principle does not appear to have been applied in *Hogan.* There, the insured was Diehl, and its conduct was selling a defective saw to Kaufman and thereafter servicing the saw. The accident found to create coverage under Diehl's policy, however, was Kaufman's conduct in using the defective saw. Under *Delgado*, Diehl's coverage for the claims asserted against it by Kaufman would have to be evaluated based on the harm resulting from Diehl's conduct, not Kaufman's conduct. But under *Geddes*, Diehl's sale of a defective saw that caused unintended damage to a customer qualified as an accident.

p. 311.) And the insured employer's conduct is not the employee's intentional tort; it is the employer's negligence in managing the employee in a way that allowed the intentional tort to occur.

This point is illustrated in *Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 325. There, the insured (Betty) was being sued by a third party (Scott), who alleged that Betty's son (David) had sexually molested him in Betty's home. Scott sued Betty for her negligence in failing to prevent the molestation. The Court explained that this claim was independent of Scott's claim against David:

> Safeco suggests Betty could not reasonably expect coverage for 'parasitic' claims against her arising from David's intentional acts. But this is not a situation where the only tort was the intentional act of one insured, and where the liability of a second insured, who claims coverage, is merely *vicarious* or *derivative*. On the contrary, Scott's claim against Betty clearly depends upon allegations that she herself committed an *independent tort* in failing to prevent acts of molestation she had reason to believe were taking place in her home. (*Minkler*, 49 Cal.4th at p. 325, emphasis in original.)

While Betty was not David's employer, that distinction is immaterial here. The nature of the claim against her is identical to a claim asserted against an employer for its negligent management of an employee who commits an intentional tort. (*See, e.g., Underwriters Ins. Co. v. Purdie* (1983) 145 Cal.App.3d 57, 67-71 [holding that employer's CGL policy provided coverage for claim against it for negligently hiring and supervising employee who shot victim during an argument].)

2. The employer's negligent management of its employees is not "too attenuated" to constitute an occurrence because the causation standard for liability coverage mirrors the causation standard in tort

Although Liberty conceded that L&M's negligent acts of hiring, retaining, and supervising Hecht were accidental, its coverage position was that those acts could not constitute an "occurrence" under L&M's liability policy because they were "too attenuated" from Hecht's injury-causing conduct. (3ER 371.) The district court agreed. (Cert. Req., 834 F.3d at p. 1001.)

As Liberty framed this "attenuation" argument in its Ninth Circuit briefing, "[T]he term 'accident' unambiguously refers to the event causing damage, not the earlier event creating the potential for future injury." (Liberty Appellee's br. at 31.) Hence, "the focus of the analysis here must be on the conduct that directly produced [the claimant's injury], not some remote act that had the potential for producing a future injury." (*Id.*) The employer's negligent supervision, according to Liberty, "was not the direct cause of the [claimant's] injury, but, if anything, only a remote antecedent cause which does not qualify as an 'occurrence' under the policy." (*Id.*)[12]

This "attenuation" argument relies on flawed premises to derive a conclusion that this Court has already expressly rejected, in *State v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1031.

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[12] In making this argument Liberty relied heavily and openly on the depublished opinion in *L.A. Checker Cab Co-op., Inc. v. First Specialty Ins. Co.* (2010) 112 Cal.Rptr.3d 335, 338, ordered depublished on Oct. 27, 2010. Liberty argued that even though this Court had ordered its depublication, the opinion still somehow provided a reliable view of California law. (Liberty Appellee's br. at 31; 3ER 371.)

First, the concept that *accident* refers to the event causing damage is drawn from decisions dealing with "trigger of coverage" issues.[13] Common trigger-of-coverage issues include determining which of two policies will cover a loss, or whether acts occurring during the policy period trigger coverage for damage occurring after the policy expires. The answer to these questions often depends on the specific language of the policy.[14] But the general rule, at least in cases that do not involve progressive deterioration, is that coverage under *occurrence* policies is triggered when the injury takes place. (*Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, 39–40.)

This rule has no application here, and does not speak to the issue of what constitutes an "accident." Liberty has not raised any trigger-of-coverage issues in this case, and the policies it sold to L&M do not specify when the coverage-triggering occurrence must take place. They merely require that the bodily injury or property damage resulting from the occurrence be sustained during the policy period. (3ER 268; 4ER 421.)

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[13] This Court has explained that "trigger of coverage is a term of convenience used to describe that which, under the specific terms of an insurance policy, must happen in the policy period in order for the potential of coverage to arise. The issue is largely one of timing—what must take place within the policy's effective dates for the potential of coverage to be 'triggered'?" (*Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal.4th at p. 655, n.2.)

[14] *Compare, e.g., Remmer v. Glens Falls Indem. Co.* (1956) 140 Cal.App.2d 84, 86 [where policy required injury to occur during policy period, damage occurring in 1952 not covered under policy canceled in 1948]; with *Insurance Co. of North America v. Sam Harris Constr. Co.* (1978) 22 Cal.3d 409, 412 [in light of ambiguities in policy, insured's negligent maintenance of airplane during policy period is deemed an *occurrence* causing a crash after policy cancelled].)

Second, the contention that the focus of the analysis must be on the event that "directly produced injury" is not a requirement in the policy or an aspect of what constitutes an "accident." It is based on a snippet from the opinion in *Delgado*, taken out of context. Specifically, it comes from the Court's rejection of the contention that Reid's deliberate attack on Delgado — which the Court held was not an "accident" — could be converted into one simply because Delgado had unexpectedly made some provocative comments to Reid before he attacked Delgado. (*Delgado*, 47 Cal.4th at p. 314.)

As explained above, this Court rejected that argument, noting that it is the "wrongdoing by the insured" that constitutes "the starting point in the causal series of events" that is examined to determine whether coverage exists. (*Id.* at p. 315.) The Court explained that, in determining whether the injury was the result of an accident, it would be illogical to take into consideration "acts or events *before the insured's acts.*" (*Id.* at p. 315, emphasis added.)

L&M's claim for coverage for liability resulting from its own negligent management of its employee does not contain the flaws that Delgado's argument did. Delgado was not the insured in his case, Reid was. So the Court said that the relevant causal chain started with Reid's acts. Here, L&M is the insured. Hence, the relevant casual chain starts with its negligent acts, not the damage inflicted on Doe by Hecht.

Third, the "attenuation" argument creates a confounding Catch-22 for policyholders. The proper test for proving causation in a lawsuit is the

"substantial factor" test.[15] Thus, Doe could prevail against L&M on her negligent-hiring and supervision claims by showing that its negligence was a substantial factor in causing her harm.

Yet, under Liberty's "attenuation" argument L&M would have no insurance coverage for its liability to Doe because its conduct — the same conduct that Doe had proven constituted a substantial factor in causing her injuries — would be deemed "too attenuated" to constitute an occurrence under its liability-insurance policies.

Fortunately for policyholders, this Court has already eliminated the potential for this type of causation-based gap in liability coverage. In *State v. Allstate Ins. Co.*, 45 Cal.4th at p. 1035, it held that the causation standard for liability-insurance policies must necessarily mirror the causation standard in tort:

> In analyzing coverage under a liability policy, a 'tort approach' . . . to causation of damages is precisely what is called for . . . . When the insurer has promised to indemnify the insured for all 'sums which the Insured shall become obligated to pay ... for damages ... because of' nonexcluded property damage, or similar language, coverage necessarily turns on whether the damages for which the insured became liable resulted—*under tort law*—from covered causes. Thus, the right to coverage in the third party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty." (*State v. Allstate Ins. Co.*,

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[15] CACI Instruction 430; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052-1053; *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1092–1093 ["The proper test for proving causation is the 'substantial factor' test.].

45 Cal.4th at p. 1035, citations and internal quotation marks omitted.)

Under *State v. Allstate*, the same causation standard governs both Doe's tort claim against L&M and the scope of L&M's liability coverage for that tort claim. Hence, if L&M's negligent hiring or supervision of Hecht can be deemed a substantial factor in causing Doe harm, that same conduct cannot be deemed "too attenuated" to constitute an occurrence under L&M's liability policies.

3. CGL coverage is sold for the purpose of protecting businesses from liability arising out the negligent management of their business operations — including the negligent management of their workforce

L&M's negligence in managing Hecht qualifies as "accidental" under this Court's precedents, and that negligence was not "too attenuated" to be considered an "occurrence." This alone should be sufficient to allow this Court to answer the Ninth Circuit's question. But it is fair to ask whether there might be some broader principle of public policy, or some inherent limitation in CGL coverage, that might cause this Court to conclude that Doe's claims against L&M should fall outside the scope of what CGL polices insure against.

If so, neither Liberty nor the district court has articulated such a principle, and L&M is unaware of one. To the contrary, extending CGL coverage to Doe's claims against L&M is fully consistent with California public policy making businesses responsible for the externalities that their operations impose, and with the purpose of CGL coverage itself.

Businesses in California are required, as a cost of doing business, to pay for the losses "caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise" (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 959-960.)

Employers generally face potential legal liability for claims of this type under two legal theories —*respondeat superior* and direct liability. (*See, e.g., Diaz v. Carcamo*, 51 Cal.4th (2011) 51 Cal.4th 1148, 1151–1152.)

Under *respondeat superior* employers are held vicariously liable — that is, liable without regard to fault — for torts committed by their employees while acting in the course and scope of employment. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296.) The principal justification for imposing vicarious liability "is the fact that the employer may spread the risk *through insurance* and carry the cost thereof as part of his costs of doing business." (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 450, emphasis added.)

An employer's liability under *respondeat superior* can extend to an employee's intentional, willful, or malicious torts. (*Lisa M.*, 12 Cal.4th at p. 296.) When it does, and the employer is held liable, the resulting liability is still insurable under California law. (*Id.* at p. 305, n.9.) That is, for the purposes of determining coverage, the willful or intentional nature of the employee's act is not imputed to the employer, and therefore the claim is not rendered uninsurable under the statutory exclusion for willful acts, Insurance Code section 533, or under contractual exclusions for intentionally-caused injury or damage. (*Id.*)[16]

In some cases the employee cannot fairly be regarded as having acted within the course and scope of employment, so *respondeat superior* is not available. In these cases the injured party may still pursue a direct-liability claim against the employer based on the employer's own negligence. (*See, e.g., John R. v. Oakland Unified School Dist.*, 48 Cal.3d at p. 451 [school

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[16] A policy may, of course, contain exclusions that would defeat coverage in a particular case, as shown in the discussion, *infra*.

district not subject to *respondeat superior* for a sexual assault committed by a teacher, but could face claim based on its direct negligence in managing teacher]; *Underwriters Ins. Co. v. Purdie*, 145 Cal.App.3d at p. 69 [California law allows an employer to be liable for its negligence in hiring or retaining an employee who is incompetent or unfit].)

Imposing direct liability on a business for its lack of due care in managing its workforce serves the same policy goals that underlie the doctrine of *respondeat superior*; that is, holding a business accountable for "the risks inherent in or created by the enterprise." (*Hinman v. Westinghouse Elec. Co.*, 2 Cal.3d at p. 960.) Since claims based on *respondeat superior* are insurable, so too are claims alleging direct liability based on the employer's negligence.

Businesses typically insure against potential liability arising under either vicarious or direct liability by purchasing a CGL policy. "Most commercial liability insurance is written on a standard form, the 'Commercial General Liability' policy . . . published by the Insurance Services Office ('ISO'). This form is commonly known as the 'CGL form.'" (Croskey, Heeseman, Ehrlich & Klee, *California Practice Guide: Insurance Litigation* (Rutter 2016)("*Ins. Litigation*") § 7:10.)

The CGL policy form was developed to cover liability incurred by a commercial enterprise (subject to various limitations and exclusions) for four general hazards:

(1) bodily injury or property damage resulting from an activity or condition on the insured's premises;

(2) bodily injury or property damage resulting from the insured's operations in progress;

(3) bodily injury or property damage resulting from the goods or products made, sold, or distributed by the insured; and

(4) bodily injury or property damage arising from the insured's completed operations. (*Ins. Litigation*, § 7:19-7:24.)

Because insurers sell CGL coverage to cover claims against businesses resulting from the conduct of their operations, the claims under consideration in this lawsuit — claims against an employer for its negligent management of its employees — fall squarely within the type of risk that is insurable under a CGL policy. There is nothing special or different about claims involving the negligent management of employees that should take them outside the species of risk that CGL policies are designed to insure.

When businesses are negligent in deciding which employees to hire, how to train them, or how to supervise them, they can be held liable for the harm caused by that negligence. (*See, e.g., Diaz v. Carcamo*, 51 Cal.4th at p. 1152 [employer potentially liable for its own negligence in choosing an employee to drive a vehicle]; *Far West Financial Corp. v. D & S Co.* (1988) 46 Cal.3d 796, 812 [a defendant may "bear some direct responsibility for an accident, either on the basis of its own action—for example, the negligent hiring of an agent—or of its own inaction—for example, the failure to provide adequate supervision of the agent's work.")

And even without Liberty's concession that the negligent-management claims should fall within the scope of CGL coverage because they arise from the employer's accidental conduct, the cases show that they do. For example, in *Underwriters Ins. Co.* v. *Purdie*, 145 Cal.App.3d at p. 62, a liquor-store clerk became involved in an argument with a driver making a delivery to the store, and shot him with a gun kept on the

premises. The victim sued the store owner, for *inter alia*, its negligence in hiring the clerk. (*Id.*)

The *Purdie* court held that the particular CGL policy at issue did not cover the claim for assault and battery because it contained an unambiguous exclusion for claims arising from the use of firearm. (*Id.*, 145 Cal.App.3d at pp. 66, 67.) But the court went on to hold that the policy nevertheless provided coverage for the negligent-hiring claim, because it viewed the employer's negligent hiring as a risk separate from the risk excluded by the firearm exclusion. (*Id.* at pp. 67-71.)

Purdie's conclusion that the firearm exclusion did not preclude coverage for negligent-hiring claim has been subject to criticism in later cases. (*See, e.g., Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co.* (1996) 42 Cal.App.4th 121, 128, n.6;[17] *Maryland Cas. Co. v. Gonzalez* (E.D. Cal. 2012) 848 F.Supp.2d 1144, 1151.) But their criticism was limited to *Purdie*'s refusal to apply the policy's firearm exclusion to all the claims asserted against the employer. Neither case suggested that claims against an employer for negligent management of its employees fell outside of the insuring clause of a CGL policy.

In sum, claims against employers resulting from their negligent management of their employees are simply a subset of the broader class of claims that employers face when any of their choices about how to manage their businesses are made without due care, resulting in harm to third

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[17] *Century Transit Systems* also illustrates that courts have the power, when construing insurance policies, to invoke an exclusion that bars coverage without first determining whether the claim falls within the insuring clause. (*Id.*, 42 Cal.App.4th at p. 127 [finding that exclusion bars coverage regardless of scope of promised coverage; *Volf v. Ocean Acc. & Guarantee Corp.* (1958) 50 Cal.2d 373, 375 [same].)

parties. CGL policies were developed and sold specifically to meet the need for liability coverage for this type of claim. There is, accordingly, no reason to exclude claims arising from an employers' negligent management of its employees from the scope of what is insurable under a standard CGL policy.

B. The Court of Appeal has developed a substantial body of law, which the federal courts have adopted, that makes liability coverage unavailable for conduct that is undeniably accidental under this Court's precedents

1. The majority view in the Court of Appeal is that an "accident" does not include the unexpected consequences of the insured's deliberate acts

The definition of *accident* that this Court adopted in *Delgado* and applied in Geddes and *Hogan* shows that the concept of "accident" for the purposes of liability coverage can extend to the unforeseen or undersigned consequences that flow from the insured's deliberate acts. As explained in detail below, this Court has consistently held that view since 1891.

Accordingly, there are some decisions by the Court of Appeal that reflect this understanding of *accident.*[18] But it has become the minority view in the Court of Appeal. The prevailing view is that the term *accident* seldom, if ever, includes the unexpected consequences flowing from the

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[18] *See, e.g., State Farm Fire and Cas. Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 325 (insured's attempt to throw his friend into a swimming pool, which unintentionally resulted in friend's injury when he landed on pool step, qualified as an "accident"); *Chu v. Canadian Indemnity Co.* (1990) 224 Cal.App.3d 86, 96 (developer's sale of defective condominium units qualified as "accident" under *Geddes* where developer was unaware of defects); *Meyer v. Pacific Employers Ins. Co.* (1965) 233 Cal.App.2d 321, 323 (insured's act of drilling well on its property, resulting in vibrations that inadvertently caused damage on neighbor's property, qualified as an accident).

insured's deliberate acts. This passage from *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 810, illustrates the prevailing point of view:

> Because the term 'accident' refers to the insured's intent to commit the act giving rise to liability, as opposed to his or her intent to cause the consequences of that act, the courts have recognized—virtually without exception—that deliberate conduct is not an 'accident' or 'occurrence' irrespective of the insured's state of mind.

Two early adherents to this approach were *Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537; and *Commercial Union Ins. Co. v. Superior Court* (1987) 196 Cal.App.3d 1205, 1209, which rely upon identical analysis.

In *Whitaker*, the insured, Knighten, promised a couple that he would build a house, sell it to them, and close escrow by a specified date. When he delayed the closing by three weeks the couple sued him, alleging two causes of action: breach of contract and fraud (making a promise he had no intention of performing.)

The court held that Knighten's CGL policy provided no coverage because there was no accident: "All the evidence . . . . shows the act by . . . Knighten, was intentional. An intentional act is not an "accident" within the plain meaning of the word. [Citations.] The same roadblock at the definition of 'accident' halts any argument claiming [Knighten] intended his act but not the resulting harm." (*Id.*, 181 Cal.App.3d at p. 537.)

In *Commercial Union*, the insured was an insurance agent who was sued by his former employee for wrongful termination. The trial court held that there was potential coverage under his liability policy because, although he fired the employee intentionally, the resulting harm from that act might

be unexpected or unforeseen. The Court of Appeal reversed, finding that the trial court had "erroneously applied the term 'accident' to the consequences of the act rather than to the happening of the act itself." (*Id.*, 196 Cal.App.3d at p. 1208.)

Citing *Whitaker*, the court explained, "An intentional termination is not an 'occurrence' under the policy because it is not an accident. The definition of 'accident' halts any argument that real party intended his act but not the resulting harm." (*Commercial Union*, 196 Cal.App.3d at p. 1209.)

Other courts apparently recognized that this absolute approach seems too harsh, and have modified it slightly. The leading exponent of this modified view is the opinion in *Merced*, 213 Cal.App.3d at p. 50, which holds that the unintended consequences of a deliberate act can possibly constitute an accident, but *only* when "some additional, unexpected, independent, and unforeseen happening occurs that produces the damage."(*Id.*)

Merced's discussion of the meaning of the term *accident* has been highly influential. The *Merced* opinion has been described as "the most comprehensive discussion of the term [*accident*]."[19]At least 11 published California appellate opinions rely directly on *Merced*'s analysis[20] and even

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[19] *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 810.

[20] *See, e.g., State Farm Fire & Casualty Co. v. Eddy* (1990) 218 Cal.App.3d 958, 971; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 751; *Collin v. American Empire Ins. Co.*, 21 Cal.App.4th at p. 810; *Dalrymple v. United Services Auto. Assn.* (1995) 40 Cal.App.4th 497, 522; *Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 596; *Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880, 887; *State Farm General Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, 579; *Fire Ins. Exchange v.*

more have relied on it indirectly.[21] In addition, the Ninth Circuit adopted *Merced's* approach in *Chamberlain v. Allstate Ins. Co.* (9th Cir. 1991) 931 F.2d 1361, 1364, establishing it as "law of the circuit" that binds both the district courts and other panels of the Ninth Circuit.[22]

In all, L&M's research shows that at least 66 state and federal decisions have relied on *Merced*'s definition of what constitutes an "accident," and its influence extends beyond those cases because some additional decisions rely on *Merced*'s progeny without citing their source.

2. The Court of Appeal's restrictive view is inconsistent with this Court's precedents, which since 1891 have consistently construed *accident* to include the unexpected consequences of deliberate conduct

The prevailing view on this issue in the Court of Appeal and the Ninth Circuit cannot be squared with this Court's precedents. As already explained above, each of the Court's decisions concerning third-party liability policies shows that an "accident" can include the unintended consequences of deliberate acts. This view is consistent with how the Court has construed the term *accident* for over 125 years.

Richards v. Travelers' Ins. Co. (1891) 89 Cal. 170, 175, is the first insurance case in which this Court addressed the meaning of *accident*. The

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Superior Court (Bourguignon)(2010) 181 Cal.App.4th 388, 392; *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins.* (2010) 187 Cal.App.4th 766, 781; *Albert v. Mid-Century Insurance Company* (2015) 236 Cal.App.4th 1281, 1291; and *Gonzalez v. Fire Insurance* (2015) 234 Cal.App.4th 1220, 1233.

[21] *See, e.g., Upasani v. State Farm General Insurance Company* (2014) 227 Cal.App.4th 509, 521 (not citing *Merced*, but citing other decisions that apply its approach).

[22] *Hart v. Massanari* (9th Cir. 2001) 266 F.3d 1155, 1171 (explaining the concept of "law of the circuit").

insurance policy in that case provided that if the insured, Richards, was injured in an accident he could recover a weekly sum. And if he died as a result of the injury his estate would receive $5,000. (*Id.*, 89 Cal. at p. 173.) On the night of April 22, 1887, Richards was brought to a physician, suffering from a severe head wound. He died five weeks later. (*Id.* at p. 174.)

The Court explained that there was evidence tending to show that the wound was caused by a fall from an elevated sidewalk to the street. (*Id.* at p. 175.) But the insurer claimed that Richards had been struck in the head by a third party, H.J. Dassonville, after an unsuccessful attempt to blackmail Richards. (*Id.*)

The insurer appealed a jury verdict in favor of Richards's estate, arguing that the trial court had erred in giving the following jury instruction:

> If the death of Philip Richards was caused by a blow dealt him by H. J. Dassonville, or some other person, that would not prevent plaintiffs from recovering in this action, if you believe from the evidence that when Dassonville or such other person inflicted such blow he did not mean to kill said Philip Richards. (*Id.*, 89 Cal. at p. 177.)

After reviewing various authorities concerning the meaning of *accident*, the Court concluded that there was no error in giving the instruction:

> There were circumstances in evidence tending to show that if Dassonville did give the blow which resulted afterwards in the death of deceased, he did not intend such result, and it would not be a correct construction of the clause of the policy under review to say that it includes every case where a blow not intended to kill unfortunately and undesignedly

> produces death, and particularly when we consider the rules of construction which apply to the makers of instruments. (*Id.*)

This Court next dealt with a claim under an accident policy in *Jenkin v. Pacific Mut. Life Ins. Co. of California* (1900) 131 Cal. 121.There, the policy covered the insured's death from "accidental injuries" but did not cover death from "intentional injuries inflicted by the insured or any other person." (*Id.* at p. 122.) The insured died of a gunshot wound, but there was no evidence to establish how the shooting occurred. The Court held that absent any evidence that the insured had committed suicide or was murdered, it would be presumed that death would be "attributed to accidental causes." (*Id.*, 131 Cal. at p. 124.)

Fifteen years later, in *Price v. Occidental Life Ins. Co.* (1915) 169 Cal. 800, 803, the Court re-affirmed this rule, but it held that this presumption can be overcome by evidence that the insured had "himself invited and brought on such conflict." (*Id.*) The Court adopted the reasoning of an Eight Circuit opinion, which stated,

> Where a person thus invites another to a deadly encounter, and does so voluntarily, his death, if he sustains a mortal wound, cannot be regarded as accidental . . . . It might as well be claimed that death is accidental when a man intentionally throws himself across a railroad track in front of an approaching train, or leaps from a high precipice . . . . It is possible that death may not result from either of these acts, but death is the result which would naturally be expected, and, if such is the result, it is not accidental." (*Id.*)

Hence, by 1915, this Court had determined that the unexpected or unintentional results that flow from the insured's intentional conduct can constitute an accident, but that when the insured engages in conduct in which harm would "naturally be expected" there is no accident if that harm actually occurs.

This Court reiterated that definition of *accident* in *Rock v. Travelers' Ins. Co. of Hartford, Conn.* (1916) 172 Cal. 462, 465, stating that deliberate acts could produce "unforeseen consequences" that would produce "what is commonly called accidental death." Likewise, in *Olinsky v. Railway Mail Ass'n* (1920) 182 Cal. 669, 672-673, the Court explained that "[w]here the death is the result of some act, but was not designed and not anticipated by the deceased, though it be in consequence of some act voluntarily done by him, it is accidental death."

Rock and *Olinsky* made these observations in the course of differentiating policies that covered death caused by "accident" from those that required that the death or injury result from "accidental means." This distinction will take on considerable importance below, but what is relevant here is how the Court described coverage for "accidents."

In a contemporary decision commenting on the same distinction between "accident" and "accidental means," the Court referred to policies that promise coverage for "death or injury caused by accident" as "accidental results" policies, noting that such policies are typically construed to provide coverage "unless the insured virtually intended his injury or death." (*Weil v. Federal Kemper Life Assurance Co.* (1994) 7 Cal.4th 125, 140, citations omitted.)

In sum, in both the first-party and third-party context this Court has consistently held that a policy that provides coverage for harm caused by an

"accident" will cover harm resulting from the insured's deliberate acts, as long as that harm was an unexpected or unintended result of the insured's acts.

3. The Court of Appeal's restrictive view is largely the result of a scrivener's error that has had the effect of unduly restricting the scope of liability coverage

a. The *Merced* court unwittingly transposed the definition of "accident" and "accidental means"

The *Merced* opinion merits close examination because it announced what has become the *de facto* standard for determining whether or not the insured's conduct can qualify as an "accident" under California law.

The insurer in *Merced* had filed a declaratory-relief action against its insured, Mendez, who had been sued by a co-worker for sexual assault. Although Mendez claimed that the encounter was consensual, the court noted that "Peery's recital of events reveals a brutal physical attack culminating in forced oral copulation and three attempts by Mendez to repeat the act." (*Merced,* 213 Cal. App.3d at p. 44.)

The trial court ruled in favor of the insurer on the ground that there had been no "accident" and therefore no occurrence under the policy. Mendez appealed, arguing that "an accident occurs even if the acts causing the alleged damage were intentional as long as the resulting damage was not intended." (*Id.*, 213 Cal.App.3d at p. 48.) The *Merced* court rejected this view. It first surveyed a number of California cases concerning the meaning of *accident.* (*Id.*, 213 Cal.App.3d at pp. 48-50.) It then announced its holding:

> We reject appellants' argument that in construing the term "accident," chance or foreseeability should be applied to the resulting injury rather than to the acts causing the injury. In terms of fortuity and/or foreseeability, both "the

means as well as the result must be unforeseen, involuntary, unexpected and unusual." (*Unigard Mut. Ins. Co. v. Argonaut Insurance Co.* (1978) 20 Wash.App. 261, 579 P.2d 1015, 1018, fn. omitted, emphasis added.)

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. (*Ibid.*)

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. (*Merced*, 213 Cal.App.3d at p. 50.)

The court then provided an "illustrative example" to demonstrate the proper application of the principles it had just announced:

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 the other 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. (*Id.*, 213 Cal.App.3d at p. 50.)

The cornerstone of *Merced*'s distinction between what qualifies as an "accident" and what does not rests on these two legal propositions:

- "In terms of fortuity and/or foreseeability, both the *means* as well as the result must be unforeseen, involuntary, unexpected and unusual;" and
- "An accident . . . is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage." (*Id.*, 213 Cal.App.3d at p. 50.)

The *Merced* court did not cite any California authority for either proposition. Instead, it relied solely upon the decision of the Washington Court of Appeal in *Unigard Mut. Ins. Co. v. Argonaut Insurance Co.* (1978) 20 Wash.App. 261, 579 P.2d 1015, 1018 ("*Unigard*"). The *Unigard* court, in turn, relied on eight decisions from the Washington Supreme Court and Washington Court of Appeal, which it quoted accurately.

The *Unigard* court was interpreting a standard liability policy that promised coverage for property damage caused by an occurrence, which the policy defined as "an accident." (*Id.*, 20 Wash.App. at p. 262.) But all of the cases that it relied on were interpreting first-party policies for injury or death caused by "accidental means."[23] As a result, all of the legal support

[23] In support of the proposition that "both the *means* as well as the result must be unforeseen, involuntary, unexpected and unusual" the *Unigard*

for the two propositions that *Unigard* used to define what constituted an "accident" were actually defining the legal requirements necessary to obtain coverage under an "accidental means" policy.

In fairness to the *Unigard* court, the decisions on which it relied did sometimes use the terms "accident" and "accidental means" interchangeably, but none of them were actually defining "accident" using the terms the *Unigard* court quoted; rather, they were defining the concept of "accidental means."

The *Unigard* court therefore unwittingly transposed the definition of "accident" and "accidental means" and the *Merced* court then transplanted that error into California law.[24] As later decisions of the Court

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court cited *Johnson v. Business Men's Assur. Co. of America* (1951) 38 Wash.2d 245, 228 P.2d 760; *McMahan v. Mutual Benefit Health and Accident Ass'n* (1949) 33 Wash.2d 415, 206 P.2d 292; *McMahan v. Mutual Benefit Health and Accident Ass'n* (1947) 28 Wash.2d 202, 182 P.2d 4; *Evans v. Metropolitan Life Ins. Co.* (1946) 26 Wash.2d 594, 174 P.2d 961; *Hayden v. Insurance Co. of North America* (1971) 5 Wash.App. 710, 490 P.2d 454. In support of the proposition that "An accident is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage," the court cited *Johnson v. Business Men's Assur. Co. of America* (1951) 38 Wash.2d 245, 228 P.2d 760; *Pierce v. Pacific Mut. Life Ins. Co.* (1941) 7 Wash.2d 151, 162, 109 P.2d 322; *Briscoe v. Travelers Indemnity Co.* (1977) 18 Wash.App. 662, 666, 571 P.2d 226. (*Unigard,* 20 Wash.App. at p. 264, fns. 2, 3.) Each of these decisions construed a first-party "accidental means" policy.

[24] Actually, the first case to make this error was *Hyer v. Inter-Insurance Exchange of Auto. Club of Southern Cal.* (1926) 77 Cal.App. 343, 349, where the majority noted that, in general, *accident* could be viewed either as a cause or an effect, but stated that, "as used in liability insurance contracts the word is employed to denote the cause, rather than the effect." As support for this statement it cited *Tuttle v. Pacific Mut. Life Ins. Co.* (1920) 58 Mont. 121, 190 P. 993, 994, a Montana decision construing an

of Appeal and the federal courts have uncritically followed *Merced,* they have distorted and narrowed the meaning of *accident.*

Plainly, not every aspect of the *Merced* opinion is incorrect. Its observation that 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.*, 213 Cal.App.3d at p. 50) is in harmony with this Court's precedents, and other courts have relied on it to explain why the unforeseen consequences of the insured's deliberate act can qualify as an accident. (*See, e.g., State Farm Fire and Cas. Co. v. Superior Court (Wright)* 164 Cal.App.4th at p. 328 [accident results from insured's deliberate act if insured miscalculates the physics involved when undertaking that act].)

Likewise, the opinion's illustrative example is correct in observing that there would be no "accident" where a driver deliberately crashed into another car, Neither the intended consequences of intentional acts, nor acts undertaken to cause harm, can qualify as "accidents." (*Hogan*, 3 Cal.3d at p. 560; *Delgado*, 47 Cal.4th at pp. 311-312.)

Unfortunately, these bits of clarity in *Merced* have been overshadowed by the opinion's unfounded use of the definition of "accidental means" to define "accident."

b. The use of "accidental means" to define "accident" unduly restricts the scope of liability coverage

In *Weil*, this Court explained that the insurance industry developed "accidental means" policies in response to early judicial decisions that had

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"accidental means" policy. The dissenting justice in *Hyer* noted the error. (*Id.*, 77 Cal.App. at p. 357, Craig, J., dissenting.)

interpreted the term *accident* more broadly than the industry desired. (*Id.*, 7 Cal.4th at p. 135, n.5.) In *Weil*, the Court held that although the insured's death from a cocaine overdose was accidental, it was not the result of "accidental means" because the insured took the cocaine deliberately. (*Id.*, 7 Cal.4th at p. 149.)

This Court's first opinion explaining the distinction between policies that cover injury or death resulting from "accidents" and those that cover injury or death resulting from "accidental means" was in 1916, in *Rock v. Travelers' Ins. Co.*, 172 Cal. at p. 463. In that case the Court held that there was no coverage under the insured's "accidental means" policy where his death was the result of heart failure brought on by the exertion of carrying a casket as a pallbearer at a funeral:

> Briefly stated, the case is simply this: Rock undertook to carry a heavy casket down a flight of stairs. In carrying it down he did not slip or stumble, nor did the casket fall against him. The entire operation was carried out in precisely the manner intended and designed by Rock. The exertion which he thus assumed was, however, beyond his strength, and imposed upon his vital organs a burden which, as it turned out, they could not bear. . . . On these facts . . . the death of the insured was [not] caused by accidental means." (*Id.*, 172 Cal. at p. 468.)

The Court explained the difference between the two types of coverage in these terms:

> 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. (*Id.*, 172 Cal. at p. 463.)

Rock and *Weil* show that policies that cover "accidental death" will cover a death that results as an unexpected consequence of the insured's intentional conduct, while policies that only cover death by "accidental means" do not. (*Rock*, 172 Cal. at p. 465.) Stated differently, "accidental death" policies cover deaths that result unexpectedly from something that the insured does; "accidental means" policies only cover deaths that result from something that unexpectedly happens *to* the insured.

In light of this distinction, this Court has consistently and carefully kept the two concepts separate. It has resisted attempts from insurers to narrow the scope of *accident* by using the definition of "accidental means.[25] And it has likewise resisted attempts by policyholders to broaden the scope of their "accidental means" coverage by using the definition of *accident.*[26]

That was what the policyholders were urging the Court to do in *Weil.* They argued that term "accidental means" was inherently ambiguous and noted that 25 states had come to reject the distinction between "accidents" and "accidental means." (*Id.*, 7 Cal.4th at pp. 134-139.) They argued that, since the insured had not taken cocaine with the intent to cause

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[25] *See, e.g., Fidelity & Cas. Co. of New York v. Industrial Acc. Commission of Cal.* (1918) 177 Cal. 614, 616 [refusing to construe "accident" in worker's compensation statute as though it said "accidental means"].)

[26] *Weil*, 7 Cal.4th at p. 139.

his death, the death should be viewed as an "accident" and therefore having occurred through "accidental means." (*Id.*)

The Court expressly declined to abandon the distinction between the two types of policies, stating:

> Unless the limitation of coverage of 'accidental means' policies to a narrower class of cases than is covered by 'accidental death' insurance would violate a particular statute or other express public policy, it is not our proper role to mandate that the two types of policies be interpreted as coextensive. By repudiating the distinction, the court in effect would be ignoring the fact that the policy does employ the word 'means.' (*Id.*, 7 Cal.4th at p. 139.)

The *Merced* court, and the courts that have followed its approach, have inadvertently done what this Court has consistently declined to do, collapse the distinction between the two concepts. And they have done it by importing the limitations inherent in "accidental means" into the concept of "accident," unduly narrowing its scope.

Specifically, "accident" policies do *not* require that "both the *means* as well as the result must be unforeseen" as the *Unigard* and *Merced* courts stated, and as the courts that follow *Merced* now hold. Rather, this is the test for what "accidental means" policies require, as the language from *Rock* cited above makes clear.

Likewise, an "accident" *can* be present when the insured performs a deliberate act — even without "some additional, unexpected, *independent*, and unforeseen happening occurs that produces the damage." (*Merced*, 213 Cal.App.3d at p. 50, emphasis added.) This too is an "accidental means" construct, as this Court's opinion in *Weil* confirms.

The portion of the *Weil* opinion surveying accidental-means law in other jurisdictions cites another Washington case, *Whiteside v. New York Life Ins. Co.* (1972) 7 Wash.App. 790, 503 P.2d 1107, 1109-1110, and summarized its holding this way: "[I]insured, who . . . died by self-injecting an overdose of methedrine and morphine, held not to have died by *accidental means—which the court held are not present when a deliberate act is performed, unless an additional independent and unforeseen event intervenes.*" (*Weil*, 7 Cal.4th at p. 146, emphasis added.)

Although *Merced* and its progeny cite this "independent event" test as though it broadens the rule that the unexpected consequences of the insured's deliberate acts cannot be considered an accident, the test actually precludes that outcome. By requiring that the "additional intervening event" not only be unforeseen and unexpected, but also *independent* of the insured's deliberate act, the test functionally requires that the additional event be a superseding cause.[27]

Hence, the "independent event" test was designed not to allow unintended consequences flowing from the insured's deliberate acts to be considered "accidents;" it was designed to ensure that there would be no coverage unless the insured's deliberate acts played no material role in the chain of causation — which is the goal of "accidental means" coverage.

The way that the transposition of "accidental means" and "accident" distorts the scope of liability coverage can be seen through the following illustration:

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[27] *See, e.g., Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573, n.9 (superseding cause exists when an independent event intervenes in the chain of causation).

Smith tries to throw a baseball to his neighbor's child. But he inadvertently throws the ball over the child's head, and the ball breaks his neighbor's window.

Most insureds would consider this scenario an "accident" that could be covered by Smith's insurance if his neighbor made a claim. And most lawyers would understand it as an "accident" under the definition of that term adopted in *Delgado* and applied in *Geddes* and in *Hogan*. But under *Merced* and its progeny Smith's claim would not be covered.

Under their approach, Smith's deliberate act of throwing the ball would preclude any finding of accident, since, "When an insured intends the acts resulting in the injury or damage, it is not an accident 'merely because the insured did not intend to cause injury. The insured's subjective intent is irrelevant.'" (*Albert v. Mid-Century Insurance Company*, 236 Cal.App.4th at p. 1291; citing *Fire Ins. Exchange v. Superior Court* (*Bourguignon*), 181 Cal.App.4th at p. 392; and *Merced*, 213 Cal.App.3d at p. 48.)

In order to avoid this result Smith would have to show that the broken window was caused by some additional intervening event that was *independent* of his throw — something like a bird colliding with the ball in flight and directing it toward the window; or having the ball land on a trampoline in the neighbor's yard, propelling it through the window. Absent this kind of an independent event, there would be no coverage.[28]

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[28] For similar reasons, the "illustrative example" that the *Merced* court provided, which has been widely cited, is problematic because it does not synch with the legal rule that the *Merced* court announced. Under the "accidental means" approach that the *Merced* court inadvertently adopted, if a driver was intentionally speeding, and as a result of that speeding ended up colliding with another car, there would be *no* coverage because the

Neither this view of what constitutes an "accident," nor the outcomes it produces, are consistent with this Court's definition of *accident* or with what most reasonable insureds would understand their liability coverage to cover.

C. Insurers should be required to clearly exclude risks they do not wish to insure instead of relying on the "occurrence" requirement as multi-purpose exclusion

As a general rule the provisions of an insurance policy that provide coverage are broadly construed, so as to afford the greatest possible protection to the insured, whereas exclusionary clauses are interpreted narrowly against the insurer. (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.) The rules for interpreting exclusions are particularly strict: "the burden rests upon the insurer to phrase exceptions and exclusions *in clear and unmistakable language.*" (*Id.*, emphasis added.) Moreover, the burden of proof rests on the insured to establish that the claim falls within the scope of coverage, and on the insurer to prove that it is excluded. (*Id.*)

Given these rules, it would be rational for insurers to try to lighten their burden by placing exclusionary language in the insuring clause. And Liberty, like all CGL issuers, has done just that with the "occurrence" limitation in its policy. The policy's insuring clause promises coverage in paragraph 1.a. for bodily injury and property damage "to which this insurance applies." Paragraph 1.b. of the same clause then says, "This insurance applies to "bodily injury' and 'property damages' *only if*: (1) The

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collision was simply the unexpected consequence of the driver's intentional act of speeding —and there is no additional "independent act" that breaks the chain of causation.

'bodily injury' ... is caused by an 'occurrence' that takes place in the 'coverage territory.'" (Emphasis added.)

By its plain terms, paragraph (b) of the insuring clause is an exclusion. It exists only to narrow the scope of coverage promised in paragraph (a). Liberty could have placed it with the other exclusions in the policy without changing a word. The court in *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 805, acknowledges that the "occurrence" requirement in the CGL policy's insuring clause is a "limitation on coverage."

In theory, Liberty's gambit should not work because it is the function served by policy language, not its location in the policy, that is determinative of the rules to be applied to the language. (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1191.) But in practice, courts often ignore this rule, and have allowed insurers to place exclusionary language in the insuring clause without subjecting that language to the analysis normally reserved for exclusions.[29]

If the "occurrence" limitation in Liberty's policy had been placed with the policy's exclusions, it is doubtful that any court would find that it "clearly and unmistakably" informed L&M that Doe's claims for negligently managing Hecht were excluded.

Yet, for years, the insurance industry has been relying on the "occurrence" condition in the insuring clause of CGL policies to bar all manner of claims, including claims against a homeowner whose contractor

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[29] In fact, this Court took that approach in *Delgado*, 47 Cal.4th at p. 313 ("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.")

negligently trimmed trees that she believed were on her property;[30] claims against a homeowner for building a structure that mistakenly encroached on a neighbor's lot;[31]claims against the insured who, during "horseplay," negligently struck his friend and caused injury; [32] claims against the insured for negligently failing to rescue the victim from a sexual assault;[33]claims that an MRI machine's failure to restart after being "ramped down" was not an accident because it was ramped down deliberately;[34] and damages resulting from an allegedly wrongful termination,[35] to name a few.

This case shows how unfair this approach is to the insured. Liberty controls the language of its policies. If Liberty had wanted the policy it sold to L&M to exclude claims arising from the negligent management of its employees it should have included an exclusion to that effect in the policy. Had it done so, L&M would have been put on clear notice when it purchased the policy that it had no protection for liability resulting from its negligent hiring, retention, or supervision of its employees. It could have either knowingly foregone such coverage or gone into the market to buy additional protection.

But without the benefit of an exclusion, L&M never received clear notice that its policy would not cover negligent-supervision claims. Instead,

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[30] *Albert v. Mid-Century Insurance Company* (2015) 236 Cal.App.4th 1281, 1289.

[31] *Fire Ins. Exchange v. Superior Court* (*Bourguignon*) (2010) 181 Cal.App.4th 388, 396.

[32] *State Farm General Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, 581.

[33] *Gonzalez v. Fire Insurance Exchange* (2015) 234 Cal.App.4th 1220, 1234.

[34] *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins.,* 187 Cal.App.4th at p. 781.

[35] *Commercial Union Ins. Co. v. Superior Court*, 196 Cal.App.3d at p. 1209.

Liberty has relied on the "occurrence" exclusion to bar coverage, and L&M can only find out about the true scope of its liability coverage after it has already been found liable to Doe and at the conclusion of a judicial odyssey that began in February 2012, when it was sued by its own insurer.

This is not satisfactory. Insurers should draft policies that clearly inform their policyholders about the scope of the policy's coverage. Their failure to do so has been a source of complaint by this Court for a long time.

For example, in *Bareno v. Employers Life Ins. Co.* (1972) 7 Cal.3d 875, 878, the Court began its opinion this way: "On countless occasions we have inveighed against the careless draftsmanship of documents of insurance and have decried the evil social consequences that flow from lack of clarity. [Citations.] We have emphasized that the uncertain clause leaves in its murky wake not only the disillusioned insured and the protesting insurer but also the anguished court."

And 57 years ago, in his concurring opinion in *Geddes*, Justice Carter addressed this very issue:

> It is my view that this court could and should . . . hold without equivocation that the provisions which are confusing and ambiguous as to the liability covered will be resolved in favor of the insured. If a few of such forthright decisions were rendered by this court in this field it would not be long before insurance policies were more clearly and understandably written to express the true intent of the parties and there would be less litigation involving insurance policies. (*Geddes,* 51 Cal.2d at p. 567, Carter, J., concurring.)

The time has come for the type of "forthright decision" that Justice Carter envisioned. That opinion should give teeth to the oft-stated and commonly ignored admonition that, "The policy should be read as a layman would read it and not as it might be analyzed by an attorney or an insurance expert." (*Crane v. State Farm Fire & Cas. Co.* (1971) 5 Cal.3d 112, 115.) As Justice Mosk observed, "It is not easy for lawyers and judges to read a legal document as a layperson would, but we must make the effort." (*Weil*, 7 Cal.4th at pp. 156–157, Mosk, J., dissenting.)

By engaging in that effort this Court would see that, by treating the "occurrence" limitation in the CLG's policy's insuring clause as a multi-purpose exclusion, the insurance industry has managed to shield that limiting language from appropriate judicial scrutiny. No court has asked whether the occurrence limitation "clearly and unmistakably" communicates to policyholders what the policy covers. Plainly, it does not. As a result, it is impossible for lay insureds to understand the scope of their liability coverage.

CONCLUSION

"Insurance is purchased and premiums are paid to indemnify the insured for damages caused by accidents, that is, for conduct not meant to cause harm but which goes awry." (*Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th at pp. 72-73.) In other words, "insurance coverage protects the insured from his own lack of due care. If coverage is lost for damage which a prudent person should have foreseen, there would be no point to purchasing a policy of liability insurance." (*Id.*)

L&M has been held liable to Doe for its lack of due care in hiring, retaining, and supervising its employee. That claim qualifies for coverage under this Court's precedents, and there is no reason to limit their scope. Accordingly, the Court should answer the Ninth Circuit's question in the affirmative.

Dated: December 19, 2016

Respectfully submitted,

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Dated: December 19, 2016.

Jeffrey I. Ehrlich

Liberty Surplus Insurance Corporation, et al. v. Ledesma and Meyer Construction, et al.
Supreme Court No. S236765
9th Circuit No. 14-56120
D.C. No. 2:12-cv-00900-RGK-SP

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On **December 19, 2016,** I served the foregoing documents described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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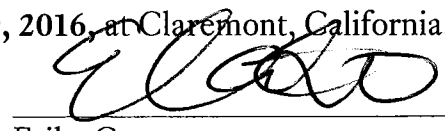
Executed on **December 19, 2016,** at Claremont, California.



Erika Castro

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