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

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS; *AMICUS-CURIAE* BRIEF

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

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS

Pursuant to rule 8.520(f) of the California Rules of Court, Amici the Franciscan Friars of California, Inc. and Province of the Holy Name, Inc. (Western Dominican Province) respectfully request leave to file the attached amicus curiae brief in support of Defendants-Appellants Ledesma and Meyer Construction Company, Inc; Joseph Ledesma; and Chris Meyer ("L&M") on the issue certified by the Ninth Circuit Court of Appeals to this Court: "Whether there is an 'occurrence' under an employer's commercial general liability [CGL] 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."

The Amici are Roman Catholic religious orders that are independent of the Diocesan structure that employs most Roman Catholic priests and brothers in the United States. The Franciscan Friars Province of St. Barbara (known in civil law as the Franciscan Friars of California, Inc.) has 92 priests and brothers working in California and other western states. The Western Dominican Province (known in civil law as the Province of the Holy Name, Inc.) has 150 priests and brothers working in California and the other western states. Each of the Amici purchases its own insurance, including general liability insurance.

The Amici have an interest in the question before the Court because, like L&M, they have faced lawsuits by plaintiffs alleging liability for negligent hiring, retention, and or supervision of employees who sexually abused the underlying plaintiff. Also like L&M, the Amici have purchased standard form CGL policies that define the term "occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The Amici have depended on the insurance coverage provided by those CGL policies in the past to settle the wave of lawsuits brought by victims of sexual misconduct by priests or brothers who were members of the Amici's orders. Indeed, for one of the Amici that insurance coverage has been essential to providing fair compensation to sexual abuse victims without compromising the solvency of the order.

While that wave of sexual abuse litigation, which primarily arose from acts in the 1960's, 1970's and 1980's, has receded, additional victims may still come forward, and cases arising from more recent acts are possible as well. Amici are concerned that a ruling by this Court eliminating insurance coverage in sexual abuse cases based on negligent hiring/retention/supervision would radically change the way these cases have historically been handled, resulting in the withdrawal of insurance carriers from defense and settlement of these cases, with grave financial consequences for insureds and sexual abuse victims alike.

Amici believe that the proposed amicus curiae brief will assist the Court in deciding the matter because they provide a practical and simple perspective – largely absent from the briefing by the parties – that focuses on basic principles of policy interpretation and the objectively reasonable expectations of the typical, relatively unsophisticated insured.

No party or counsel for a party in the pending appeal authored any part of the proposed amicus brief or made any monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the Amici or their counsel in the pending appeal have made any monetary contribution intended to fund the preparation or submission of the proposed amicus curiae brief.

DATED: May 5, 2017

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By 
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AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS

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I. INTRODUCTION

The parties have filed lengthy and detailed briefs that parse the language and fact patterns of dozens of cases going back to *Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co.* (1959) 51 Cal.2d 558 and even earlier. Amici fear that the briefs, and even some of the opinions they discuss, lose sight of the forest because of the trees.

At the core of this dispute is a simple phrase – "caused by an [accident]" – and a simple set of principles for interpreting that phrase in the context of the insurance policy at issue. Those principles get little attention in the briefs filed by the parties (indeed, none at all in the brief filed by Liberty Surplus Insurance Corporation and Liberty Insurance Underwriters, Inc. ("Liberty")). Perhaps that is not surprising given the number of cases that have construed the phrase "caused by an "[accident]" in various contexts, but Amici submit that so much focus on the accretion of judicial gloss can obscure the simple issue at the core of this dispute. Amici therefore submit that a reality check is in order – a reality check based on first principles of insurance policy interpretation.

As discussed below, that reality check reveals that Liberty's position is untenable. Liberty contends that in determining whether an alleged injury resulted from an accident, it is necessary to sever the causal chain such that only what Liberty calls the "injury causing act itself" is considered the "actual cause," and only that act is relevant to the determination of coverage. Liberty Brief at 2. Liberty asserts that an act earlier in the causal chain (such as negligent supervision) cannot be an "actual cause." According to Liberty, such an act only "invites" the actual cause. *Id.* Under Liberty's "actual cause" requirement, it is not enough for the negligent supervision to be a "but for" cause of the underlying plaintiff's injury, nor is it enough for the negligent supervision to be a "substantial factor" in causing the underlying plaintiffs' injury and thus be sufficient for imposition of that liability. The problem for Liberty is not that its causation concept is not coherent, or that it would be impossible to have such a requirement. The problem for Liberty is that its requirement is nowhere to be found in the

language of the policy.

Judicial interpretation of policy language is controlled by the "clear and explicit" meaning of the policy provisions, interpreted in their "ordinary and popular sense." Civ. Code §§ 1638 & 1644. Liberty's causation concept cannot be found in the policy language, let alone clearly expressed in the language when read in its ordinary and popular sense. The analysis could stop here, as L&M's reading of the policy comports with the ordinary and popular meaning of the language. But even if that were not true, Liberty still could not prevail, for then the policy interpretation analysis would look to the meaning that "the promisor believed, at the time of making it, that the promisee understood it." Civ. Code § 1649. This inquiry focuses on the objectively reasonable expectations of the insured. Amici submit that it would not be objectively reasonable for an insured to expect that the causation requirement for insurance coverage would be different from, and narrower than, the causation requirement sufficient to hold him liable for negligence. Again, Liberty does not appear to assert otherwise.

But for the sake of argument (and for the benefit of Liberty), let us assume that the objectively reasonable expectations of the insured cannot be discerned and that the Court must therefore proceed to the next step in the interpretive process. That step applies the rule that ambiguity is construed against "the party who caused the uncertainty to exist," i.e., Liberty as the drafter of the policy form. Civ. Code § 1654. Not only did Liberty create the problem, but Liberty has the power to fix the problem going forward – provided that Liberty concludes that it really needs to be fixed, as any policy that clearly adopted Liberty's causation requirement would surely be punished in the marketplace. Any rational insured would prefer coverage for things like negligent hiring, retention, and supervision, and no doubt other kinds of liabilities that would not be covered under Liberty's concept of "actual cause."

The Court should answer the certified question by stating that yes, 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.

II. ARGUMENT

A. Principles of Policy Interpretation Require That The Policy Language Be Construed in Favor of Coverage

Insurance policies are construed according to ordinary contract interpretation principles, as set forth in the Civil Code and laid out many times by this Court. As the Court explained in *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-22:

> Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.) (1) Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. [Citations omitted.]
>
> If there is ambiguity, however, it is resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promisee understood them at the time of formation. (Civ. Code, § 1649.) If application of this rule does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist. (*Id.*, § 1654.) (2a) In the insurance context, we generally resolve ambiguities in favor of coverage. [Citations omitted.] Similarly, we generally interpret the coverage clauses of insurance policies broadly, protecting the objectively reasonable expectations of the insured. [Footnote and citations omitted.] These rules stem from the fact that the insurer typically drafts policy language, leaving the insured little or no meaningful opportunity or ability to bargain for modifications. [Citations

omitted.] Because the insurer writes the policy, it is held "responsible" for ambiguous policy language, which is therefore construed in favor of coverage.

The concept of causation implicit in L&M's interpretation of the policy language "caused by an [accident]" is the familiar concept often called "but for" causation: but for L&M's negligent conduct in hiring, retaining, or supervising Hecht, the underlying plaintiff would not have been injured. Liberty does not appear to dispute that L&M's conduct was a but for cause of the injury. L&M's causation concept also meets the "substantial factor" requirement for causation that "subsumes" the but for test and that is sufficient for imposition of tort liability. *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052.[1] Liberty does not dispute that liability could not be imposed on L&M unless its conduct was a "substantial factor" in causing the underlying plaintiff's injury. Unlike tort causation, Liberty's causation concept severs the causal chain arbitrarily, as it counts only the last act in the chain before the injury.

While it is fair to argue that the familiar "but for" standard reflects the "clear and explicit" meaning of the policy language when construed in its "ordinary and popular" sense, particularly given that the context in which the language appears is a policy purchased to protect the insured from tort liability, this is not necessary for L&M to prevail in this case. So let us assume that L&M does not prevail at the first step in the interpretive process – applying the "clear and explicit" meaning of the policy language when construed in its "ordinary and popular sense." Because Liberty's "actual cause" concept cannot be said to reflect the "clear and explicit" meaning of the policy language when construed in its "ordinary and popular sense," we must turn then to the next step in the interpretive process, which is to examine "the sense the promisor (i.e., the insurer) believed the promisee understood [the policy language] at the time of

[1] While "but for" causation and "substantial factor" causation are not entirely congruent, *Mitchell*, 54 Cal.3d at 1052-53, the isolated cases where they produce different results are not important for this case, where L&M's conduct was clearly a "but for" cause and in which the substantial factor requirement would have to be satisfied if liability were to be imposed.

formation. *AIU,* 51 Cal.3d at 822 (*citing* Civ. Code, § 1649.).[2]

Delgado v. Interinsurance Exchange of Automobile Club of Southern California (2009) 47 Cal.4th 302, 308, does not preclude application of the statutory rules for construing ambiguous policy language in this case. *Delgado* quotes the definition of "accident" applied in *Geddes* ("an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause") and then quotes *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 810 for the proposition that "[t]his common law construction of the term 'accident' becomes part of the policy and precludes any assertion that the term is ambiguous." However, the *Geddes* definition is a very general definition that in no way describes Liberty's "actual cause" requirement for an accident. Once again, while it is reasonable to argue that L&M's interpretation plainly meets the *Geddes* definition, it is not possible to say the same thing for Liberty's interpretation. Therefore, Liberty's interpretation cannot be accepted without proceeding further in the interpretive process. Put another way, because the policy language (or, for that matter, the *Geddes* gloss) does not unambiguously reflect Liberty's construction, the analysis must proceed with the rules for resolving ambiguity in policy language.

As this Court explained in *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-65, the rule of interpretation codified in Section 1649 "protects not the subjective beliefs of the insurer, but, rather, 'the objectively reasonable expectations of the insured." *See also Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 324-25 (resolving conflict between intentional acts exclusion and severability condition in favor of coverage in order to conform to "the objectively reasonable coverage expectations of the insured" sued for negligent supervision resulting in sexual abuse); *State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1021 (finding coverage because "[a] reasonable insured would not understand an exclusion for 'release' of pollutants to apply where, as here, the wastes are deposited into intended

[2] Liberty does not argue that the phrase "caused by an [accident]" was used by the parties in a technical sense or that a special meaning was given to the phrase by usage. Civ. Code § 1638.

containment ponds and do not behave as environmental pollutants until they are later released or discharged *from* the ponds."); *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 654 (finding coverage because a reasonable insured would not understand spraying of pesticides to control insects in a building as an act of pollution); *E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004), 32 Cal.4th 465, 473-74 (finding coverage under jewelry policy because "[t]o construe the exception to the vehicle theft exclusion, and specifically the word "upon," as applying only to situations in which the insured is inside or physically touching the vehicle would upset the reasonable expectations of the insured.").

Amici submit that no objectively reasonable insured would expect that causation sufficient to establish the insured's tort liability would be insufficient for coverage under a general liability policy where the policy does not say anything about Liberty's invented "actual cause" requirement. To the contrary, the insured would expect coverage for its negligent acts notwithstanding the intentional conduct of a third person, unless the policy contains a relevant exclusion or other language that clearly limits coverage.

At this second step of the interpretive process, as at the first step, adoption by the Court of L&M's interpretation is not necessary in order for L&M to prevail in this case. If neither party establishes that its approach reflects the objectively reasonable expectations of the insured, we must proceed to the third step in the process – construing the policy language against the drafter. Because Liberty is the drafter of its policy form, L&M's interpretation of the language must prevail.

The "reality check" provided by the basic principles of policy interpretation thus confirms the longer and more involved analytical route set forth in L&M's briefs. The result is the same -- insurance monies are available to compensate the sexual assault plaintiff who was injured by L&M's failure to exercise due care in supervising (or hiring and retaining) Hecht.

Indeed, a contrary conclusion would lead the Court into a headlong conflict with the rule implicit in Civil Code sections 1638 and 1644 and articulated repeatedly by this Court: policy language must be interpreted "as a layman would read it and not as it might be analyzed by an

attorney or insurance expert." *E.M.M.I.*, 32 Cal.4th at 471 (*quoting Crane v. State Farm Fire & Cas. Co.* (1971) 5 Cal.3d 112, 115); *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1209. Liberty's narrow and legalistic distinction between an "actual cause" and a cause that satisfies causation requirements of tort liability would confound the layman and cannot limit coverage unless it is expressed in the policy, which it most definitely is not.

B. Construing The Policy Language Against Liberty Would Allow Insurance Markets To Operate Efficiently.

Of course it is within Liberty's power to change its policy forms to reflect its "actual cause" standard. Then insureds could understand the limitations on coverage that Liberty seeks to impose, and it would allow the marketplace to set different prices for different levels of coverage. It is one thing for Liberty to advocate a narrow construction of its coverage when facing liability for a claim. It is quite another for Liberty to try to sell narrow coverage in the marketplace, particularly where the type of coverage at issue is general liability insurance, which has historically protected insureds from unknown or unanticipated kinds of liabilities, including liabilities arising from the actions of employees whom the insureds are found liable for having failed to supervise.

There may be some kinds of insureds who would want to purchase Liberty's curtailed coverage for a lower price. For others, such as the Franciscans and the Dominicans, eliminating coverage for negligent conduct occurring early in a causal chain, such as negligent supervision, would be a very important issue. These organizations face few general liability exposures other than those that would be eliminated by Liberty's "actual cause" approach. Indeed, nearly all of the general liability claims these organizations have incurred over the last twenty-five years have been sexual abuse claims predicated on negligent supervision of employees. Currently such liabilities may be excluded from coverage by sexual abuse exclusions that make clear to the insured that no coverage exists, and the insured can judge the coverage/premium trade-off accordingly. But coverage-limiting constructions should not be retroactively imposed on insureds who had no reason to know about them. That is what Liberty seeks to do here.

III. CONCLUSION

The Court should answer the certified question by stating that yes, 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.[3]

DATED: May 5, 2017

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[3] Amici note that both L&M and Liberty treat the insured's acts in hiring, retaining, and supervising Hecht as intentional acts. E.g., L&M Opening Brief at 2-4; Liberty Brief at 41. The District Court did the same. 1 AER 12-16. While the analysis presented above makes clear that this point is not important for the outcome of this case, Amici submit that nevertheless any opinion by this Court should be careful to acknowledge that negligent supervision liability may arise from the insured's unintentional acts as well. Negligent supervision liability often arises from a failure to act. The insured may not have been aware that supervision was needed, and indeed may never have even considered the issue. So while negligent hiring and negligent retention involve the intentional acts of hiring or retaining and employee, negligent supervision need not involve any intentional act by the insured.

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

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 101 California Street, Suite 2300, San Francisco, California 94111.

On **May 5, 2017** I served the foregoing document described as **APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS; *AMICUS CURIAE* BRIEF** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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Hon. R. Gary Klausner United States District Court Central District of California 350 West 1st Street, Courtroom 9B, 9th Floor Los Angeles, California 90012	Case No. 2:12-cv-00900-RGK-SP

☒ **By Mail**. I placed the above-documents in sealed envelope(s), with postage thereon fully prepaid, for collection and mailing at San Francisco, California, following ordinary business practices. I am readily familiar with the practices of Kasowitz Benson Torres LLP for processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for processing.

Clerk of the Supreme Court
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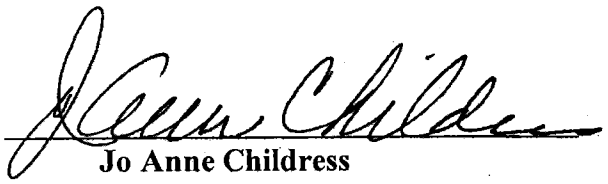
(Original and 8 copies / plus electronic submission)

☒ **By Overnight Delivery**. I caused a true and correct copy of the above document to be delivered by hand to the addressees noted above via Federal Express.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 5th day of May, 2017, in San Francisco, California.



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