No. S236765

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

LIBERTY SURPLUS INSURANCE CORPORATION, ET AL.,

Plaintiffs and Respondents,

v.

LEDESMA AND MEYER CONSTRUCTION COMPANY, INC., ET AL.,

Defendants and Appellants.

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

APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND BRIEF *AMICUS CURIAE*

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APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to California Rules of Court, rule 8.520(f), proposed amicus, United Policyholders, hereby respectfully applies to this Court for leave to file the accompanying Brief of *Amicus Curiae* in Support of Defendants and Appellants Ledesma & Meyer Construction Company, Inc., et al. ("L&M") in the above-captioned case.[1]

United Policyholders ("UP") is a non-profit organization based in California that serves as a voice and information resource for insurance consumers in the 50 states. The organization is tax-exempt under Internal Revenue Code §501(c)(3). UP is funded by donations and grants and does not sell insurance or accept money from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help for victims of wildfires, floods, and other disasters); *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness); and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.uphelp.org.

UP monitors the insurance sales, claims and law sectors, conducts surveys and hears from a diverse range of individual and business policyholders throughout California on a regular basis. The

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[1] No party or counsel for any party authored any portion of the brief. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the *amicus curiae*, its members and its counsel made a monetary contribution intended to fund the preparation or submission of the brief. (California Rules of Court, rule 8.520(f)(4).)

organization interfaces with state regulators in its capacity as an official consumer representative in the National Association of Insurance Commissioners. UP provides topical information to courts via the submission of *amicus curiae* briefs in cases involving insurance principles that matter to people and businesses.

UP's consumer surveys recently assisted this Court in *Association of California Insurance Companies v. Jones* (2017) 2 Cal.5th 376, and this Court has adopted UP's arguments in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19 and *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815. UP has filed *amicus curiae* briefs in nearly 400 cases throughout the United States.

UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." (*Miller-Wahl Co. v. Commissioner of Labor & Indus.* (9th Cir. 1982) 694 F.2d 203, 204.) This is an appropriate role for *amicus curiae*. As commentators have stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." (Robert L. Stern et al., *Supreme Court Practice* (6th ed. 1986) 570-571 (citation omitted).)

UP is familiar with all the briefs that have been previously filed in this case. UP has experience with the legal issues of this case, and believes its experience in these issues will make its proposed brief of assistance to this Court in deciding the important certified question on which the Ninth Circuit sought guidance from this Court.

UP therefore respectfully requests leave to file the attached *amicus curiae* brief presenting additional authorities and discussion in support of Appellants' arguments.

DATE: May 10, 2017

Respectfully submitted,

COVINGTON & BURLING LLP
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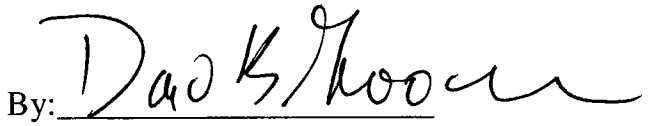
By: 

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INTRODUCTION

California courts have long held that liability insurance covers an employer's vicarious liability not just for its employee's negligence, but also for the employee's intentional torts: "[N]either [the statutory exclusion for willful injuries in] Insurance Code section 533 nor related policy exclusions for intentionally caused injury or damage preclude a California insurer from indemnifying an employer held vicariously liable for an employee's willful acts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 305 fn.9 (citing *Arenson v. Nat. Automobile & Cas. Ins. Co.* (1955) 45 Cal.2d 81, 83-84).) Thus, in countless decisions over the years, California courts have allowed employers to obtain insurance to cover their vicarious liabilities for the intentional, willful acts and torts of their employees under standard commercial or comprehensive general liability ("CGL") insurance policies, which typically provide coverage for bodily injury or property damage caused by an "accident." The courts have ruled in favor of coverage even though the law ascribes the employee's intentional tort to the vicariously liable employer.

(1) Ignoring those cases—indeed, never mentioning them anywhere in its brief—Respondents Liberty Surplus Insurance Corporation and Liberty Insurance Underwriters ("Liberty") argue that this Court should reject coverage as a matter of law when an employer is found liable for a *lesser tort* than the employee's willful misconduct: where the conduct for which the employer is held liable is not that of the employee but the *employer's own negligence* in hiring, supervising or retaining its employee. Liberty says that a negligent supervision claim can never be an "accident" for purposes of CGL coverage if a negligently supervised employee committed an intentional act with the

intent or expectation of causing harm. That has never been the rule in California and this Court should reject Liberty's attempt to rewrite the CGL policies that Liberty and scores of other insurers have sold to California businesses and individual consumers.

A fundamental rule of California insurance law, enunciated in many decisions, including this Court's latest discussion of the issue, is that an "accident" is viewed *from the perspective of the insured who is seeking coverage*, not from the perspective of someone else. Thus the starting point for determining whether an accident has taken place is the conduct of the insured. If *the insured* did not intend the act that caused the injury, or did not intend the consequences that resulted from the act, the injury was caused "by accident" as that term is used in standard CGL policies, even if someone else may have acted willfully, with intent to harm. (*See Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 311 ("Under California law, 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....This view is consistent with the purpose of liability insurance.") (citations omitted); *see also Arenson*, 45 Cal.2d at p. 84.) Thus, although the employee who committed a willful assault may not be entitled to coverage under his or her *own* CGL policy, the employer who bought insurance to protect itself from its own negligence would have coverage for its liability for negligent supervision of that employee. California's tort system is constructed on that basis.

(2) Liberty not only seeks to deprive California employers of insurance coverage for the torts of their employees, it also mounts a full scale assault on this Court's longstanding definition of "accident"—a definition that this Court held, just eight years ago, is incorporated by

law into every California CGL policy: "'an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause.'" (*Delgado,* 47 Cal.4th at 309, quoting *Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co.* (1959) 51 Cal.2d 558, 563-564.)

Under the express words of this definition, which has been the law in California for nearly 60 years, there is an accident if *either* a "happening" (the event or act) *or* a "consequence" (the result of the event or act) was unexpected, unforeseen or undesigned from the perspective of the insured. Liberty tries to read half of the Court's definition ("consequence") out of the CGL policy, arguing that if the person who inflicted the injury did so as the result of an intentional act, there can never be an "accident," regardless of whether the consequence of that conduct was unexpected or unforeseen by the insured.

Liberty's argument defies common sense: it would eliminate insurance coverage for the accidental consequences of a host of everyday intentional acts, like driving well above the speed limit (not knowing that a car is about to pull out of a driveway with no time for the speeding driver to stop) or striking a match (without knowing that there was a gas leak that will explode when ignited) or intentionally swinging a golf club (not knowing that someone is standing right behind the golfer). Of course, an ordinary, layperson insured—the person from whose perspective insurance policy language is construed—would understand that the unexpected and unintended consequences of these and countless other intentional acts are "accidents." Yet, if Liberty has its way, the Court would revolutionize insurance policies in California and deprive hundreds of thousands of

California businesses and individuals of insurance coverage for what everyone—apart from Liberty—knows full well is an accident.

(3) Liberty also argues that in determining whether an insured has CGL coverage for its liability arising from an injury to a third party, the Court can only consider the most immediate cause of the injury (here, the employee's assault, even though that act was not by the insured/employer). It argues that any earlier-in-time contributing cause (*e.g.*, the negligent supervision that allowed the assault to occur) is too "remote" or "attenuated" from the injury to serve as the source of insurance coverage. But Liberty's insurance policy does not say that. It nowhere limits the term "accident" to the event that is the "immediate" cause of the third party's injuries, and this Court "cannot read into the policy what [Liberty] has omitted" now that a claim has arisen. (*Safeco Ins. Co. of Am. v. Robert S.* (2001) 26 Cal.4th 758, 763.)

Moreover, adopting Liberty's argument would require this Court to disavow decades of California insurance coverage jurisprudence holding that courts must determine whether an accident took place based on the range of causes that are sufficiently connected to the injury "that the law is justified in imposing liability" on the insured. (*Delgado,* 47 Cal.4th at 315 (citation omitted).) L&M's negligent hiring and supervision is the "cause" at issue here for which L&M was liable to the injured party, and is precisely the type of cause that this Court has held sufficient to support CGL coverage.

Remarkably, in making its arguments, Liberty says nothing about *Lisa M.* and the other vicarious liability cases; ignores *Delgado's* direction to focus on the cause of the injury that was the basis for the insured's tort liability; suggests that only one negligent supervision case found CGL coverage when there are many; invokes "trigger of

coverage" cases that, in fact, are contrary to Liberty's theory in this appeal; and relied, in convincing the federal district court to support its position, on *L.A. Checker Cab v. First Specialty Ins. Co.* (2010) 184 Cal.App.4th 767, which this Court had previously *depublished.*[1]

(4) In short, Liberty's position is not only inconsistent with the language of its standard form CGL policy, it also effectively asks the Court to reject or disapprove at least four longstanding lines of cases emanating from this Court's decisions: (1) those holding that an employer or other insured who did not personally engage in the intentionally harmful act can have CGL coverage for the intentionally harmful act of an employee; (2) those holding that there is an accident when there are *either* unintended happenings *or* unintended consequences; (3) those holding that whether something is an accident must be viewed from the perspective of *the insured* and the insured's own conduct; and (4) those holding that insurance coverage is determined not by considering one so-called "immediate" (or closest in time) cause of the injury but by evaluating the causes that serve as the basis for imposition of liability on the insured.

United Policyholders therefore asks this Court to answer the Ninth Circuit's certified question in the affirmative and reaffirm that there can be an "occurrence" under CGL policies that define "occurrence" to include an "accident" when an insured employer faces liability to third persons based on the employer's negligent hiring, supervision or retention of an employee, even if the employee's conduct was an intentional tort. United Policyholders also asks the Court to resolve the confusion and conflicting decisions of the California Courts of Appeal as to what is an "occurrence" or an

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[1] *Amicus* United Policyholders, represented by this firm, submitted the request for depublication that this Court granted.

"accident" by reaffirming its prior decisions adopting the *Geddes/Delgado* definition of "accident," and clarifying that there is an "accident" when, from the perspective of the insured seeking CGL coverage for its own liabilities, the "happening" (or conduct) *or* the "consequence" (or result) of the "happening" was unexpected, unforeseen, or undesigned.

ARGUMENT

I. THIS COURT ESTABLISHED THE DEFINITION OF "ACCIDENT" IN CGL POLICIES DECADES AGO, AND CONFIRMED IN 2009 THAT THIS DEFINITION IS INCORPORATED BY LAW INTO ALL CGL POLICIES

CGL policies, like the Liberty policies at issue in this appeal, generally cover bodily injury and property damage "caused by an occurrence." Such policies, as here, typically define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (ER 267-268, 289.) The key word is "accident," which the policies do not define. But this Court definitively interpreted that term in the context of CGL policies nearly sixty years ago.

In *Geddes*, 51 Cal.2d at pp. 563-564, the Court surveyed possible definitions of "accident" and, for purposes of CGL policies that cover "accidents," adopted the following definition: "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." This definition has stood the test of time. Just eight years ago, this Court reaffirmed that the quoted *Geddes* definition is still the law of California, holding that this definition is incorporated by law into all liability insurance policies covering "accidents" (at least where the policy does not define the term):

> In the context of liability insurance, an accident is "an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause." (*Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co.* (1959) 51 Cal.2d 558, 563-564 [334 P.2d 881] (*Geddes*); accord, *Hogan v. Midland National Ins. Co.* (1970) 3 Cal.3d 553, 559 [91 Cal.Rptr. 153, 476 P.2d 825].) "This common law construction of the term 'accident' becomes part of the policy and precludes any assertion that the term is ambiguous." (*Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 810 [26 Cal.Rptr.2d 391]; *see Bartlome v. State Farm Fire & Casualty Co.* (1989) 208 Cal.App.3d 1235, 1239 [256 Cal.Rptr. 719].)

(*Delgado*, 47 Cal.4th at p. 308.) Thus, for purposes of the certified question that this Court agreed to decide, the *Geddes/Delgado* definition of "accident" should be the starting place.

Specifically, under this Court's precedent: (A) because the definition of "accident" is framed in the disjunctive, an "accident" takes place if *either* the act *or* its consequences was unexpected, unforeseen, or undesigned; (B) whether the act or its consequences was unexpected, unforeseen, or undesigned is viewed from the perspective of *the insured*, not from that of a third party; and (C) the act or consequences that are relevant to whether an "accident" has taken place are those that form the basis for the imposition of liability on the insured, not the conduct for which a third party might be held liable. Liberty's argument misunderstands all three of these rules.

A. An Accident Occurs Where *Either* The Act Of The Insured *Or* The Consequences Of The Insured's Act Were Unintentional

Under the established definition of "accident" that is "part of the policy," an accident has taken place if there was an unexpected, unforeseen, or undesigned "happening" ***or*** an unexpected, unforeseen, or undesigned "consequence" of a happening, even if the happening itself was intentional. (*Delgado*, 47 Cal.4th at p. 308.) Liberty looks

only at the "happening" and not the "consequences." But the express words of the definition leave no room for an argument that both the happening ***and*** the consequence of the happening must be unexpected and unintended, nor do they leave room for an argument that only the "happening" (the event or act) is relevant to whether an "accident" occurred, as that would improperly read the "consequence" language out of the definition. (*Cf. Insurance Co. of N. Am. v. Sam Harris Constr.* (1978) 22 Cal.3d 409, 411 (when an insurance policy provision is in the disjunctive, the Court applies the portion of the provision that supports coverage).)

A "happening," in lay terms (which is how insurance policies must be interpreted, *see E.M.M.I. Inc. v. Zurich Am. Ins. Co.* (2004) 32 Cal.4th 465, 471), is a broad term that simply means an "an occurrence or event." (*Random House Dict. of the English Language* (1966), p. 644.) A "consequence," again in lay terms, is the "effect, result or outcome of something occurring earlier." (*Id.* at p. 312.) Because this Court has held that *both prongs* are part of the definition of "accident" and apply in the alternative—using "or"—a court must consider both prongs of the definition.

Using this appeal as an example to illustrate how the two prongs would apply, L&M's negligent hiring, retention, and supervision of its employee Hecht was a "happening"; and Hecht's molestation of the student was the unfortunate "consequence" of L&M's negligent hiring, retention, and supervision of Hecht. Thus, under the Court's longstanding definition of "accident," as long as one prong of the definition—the "happening" or the "consequence"—was unexpected, unforeseen, or undesigned (*e.g.*, if L&M *negligently* failed to supervise Hecht properly, or if L&M acted *negligently* in hiring Hecht, or if the injury was unintended by L&M), those "happenings" or

"consequences" would comprise an "accident." (*See Safeco Ins. Co. of America v. Robert S.*, 26 Cal.4th at p. 765 (holding, with respect to a homeowner's liability policy covering "accidents": "Because the term 'accident' is more comprehensive than the term 'negligence' and thus includes negligence ..., Safeco's homeowners policy promised coverage for liability resulting from the insured's negligent acts.") (citation omitted).)

In the underlying proceeding, the arbitration panel imposed liability on L&M solely for negligent hiring, retention, and supervision (4 AER 54), not for an intentional tort. Negligence is precisely the type of conduct that fits within this Court's longstanding definition of "accident," so L&M should have coverage.

But even setting aside L&M's negligent "acts" of hiring, retention, and supervision, the unintended and unforeseen "consequence" of those acts, *i.e.*, Hecht's misconduct, is also an "accident" because "accident" is viewed from the perspective of the insured, L&M, and there is no evidence that L&M intended, or even expected, Hecht to commit an intentional tort. As is discussed next, Liberty's sole focus on the conduct of Hecht is inconsistent with established California law.

B. An Accident Must Be Evaluated From The Perspective Of The Insured, Not Another Actor

In *Delgado*, this Court followed decades of California precedent holding that whether an event or its consequences are an "accident" must be evaluated from the perspective of the insured, not from the perspective of the injured victim or some other actor in the chain of events that led to the injury. (*Delgado*, 47 Cal.4th at p. 311.)

In *Delgado*, the insured, Reid, intentionally assaulted the victim, Delgado, intending to injure him. Delgado settled with Reid, obtaining

an assignment of Reid's rights against Reid's insurer. Delgado then sued Reid's insurer, arguing that his claims against Reid were covered by Reid's CGL policy because the injuries were an "accident" from his perspective as the victim, even if there was no accident from the insured's perspective.

Rejecting that argument, this Court confirmed that the focus is on *the insured's* conduct:

> Under California law, 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. (*Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 596 [79 Cal.Rptr.2d 134]; *Collin v. American Empire Ins. Co.*, supra, 21 Cal.App.4th at p. 804.) This view is consistent with the purpose of liability insurance. Generally, liability insurance is a contract between the insured and the insurance company to provide the insured, in return for the payment of premiums, protection against liability for risks that are within the scope of the policy's coverage.

(*Ibid.* (emphasis added).) In so holding, the Court rejected the argument that whether an accident took place is "to be determined from the perspective of the injured party *independent of the insured's intention*" (*id.* at p. 309 (emphasis added)), again confirming that CGL coverage must be determined from the insured's perspective and intentions, not someone else's perspective and intentions. (*See also, e.g., Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 596 ("Under California law, the term [accident] refers to the nature of the insured's conduct") (citation omitted).)

This Court again evaluated coverage based on the *insured's* conduct in *Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, which, like the present appeal, involved an insured's liability for negligent supervision of another person who had committed an

intentional tort. The issue in *Minkler* was whether the exclusions in the insurance policy applied to every insured or just the insured seeking coverage.[2] The insurer—sensibly—did not even try to dispute that the conduct of the insured who faced negligent supervision liability was an accident, and this Court therefore did not address the issue, instead directing the reader to *Delgado* to determine the standard for whether an accident had taken place. (*Id.* at p. 322 & fn.3.) Thus, in its most recent decision in a case involving a claim of negligent supervision of someone who had committed an intentional tort, this Court cited to *Delgado*, which held that the relevant conduct is that of the insured who is seeking insurance coverage.

In sum, in determining whether negligent hiring, retention, and supervision is an "accident," the Court focuses on the perspective of the insured, here, L&M the employer, rather than on the non-insured Hecht's perspective. Liberty's arguments to the contrary cannot be squared with this Court's precedent.

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[2] *Minkler* addressed a "severability clause," which treated each insured under the policy as if it had its own separate insurance policy when applying exclusionary language barring coverage for "an insured" or "the insured." That distinction is irrelevant to the "occurrence" definition in the Liberty policy, which does not use the word "insured" in addressing whether an "accident" has taken place. In fact, in *Delgado*, the claimant argued that since prior versions of the definition of "occurrence" had included exclusionary language that barred coverage for bodily injury or property damage that was expected or intended from the standpoint of the insured, the current version of the "occurrence" definition should not be construed with the insured's standpoint in mind—an argument that this Court had no trouble rejecting, based on long-standing California precedent assessing "accident" from the perspective of the insured. (*Delgado*, 47 Cal.4th at pp. 310-311.)

C. Whether An Accident Occurred Turns On The Specific Conduct Of The Insured That Gave Rise To The Insured's Underlying Liability

In determining whether an accident has taken place, the relevant conduct of the insured is the specific act or omission of the insured for which the injured party sought to hold the insured liable in the underlying tort case. It is worth quoting *Delgado* again: "Under California law, 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.*" (*Delgado*, 49 Cal.4th at p. 311 (emphasis added).) In other words, if the basis for the insured's liability to a third party is negligent hiring and supervision, a court must focus whether the negligent hiring and supervision was accidental.

When, as here, the insured's negligent hiring and supervision is the sole basis for the insured's liability, the coverage question is relatively straightforward because that conduct easily fits within the definition of "accident": the hiring and supervision was a negligent "happening" (the insured did not intend to hire, retain and supervise Hecht in a way that allowed Hecht to assault a student), and it also led to an unexpected, unforeseen "consequence" from L&M's perspective, *i.e.*, Hecht's tort.

II. THE POLICY LANGUAGE AND THIS COURT'S PRIOR DECISIONS PRECLUDE LIBERTY'S LYNCHPIN ARGUMENTS

A. Neither The Insurance Policy's Language Nor Existing Law Supports Liberty's Attempt To Focus Solely On The "Immediate" Cause Of The Injury

Liberty argues that in determining whether the insured's liability arose from an "accident," a court must look *only* at the "immediate" (*i.e.*, closest in time) cause of the injuries to the third party who sued

the insured, here, Hecht's act of sexual molestation. Liberty contends that all other antecedent causes of the injuries are too "remote" (or "too attenuated" according to the district court's summary judgment order that is on appeal in the Ninth Circuit) to be relevant to insurance coverage. (*E.g.* RB, pp. 1, 2, 20; *Liberty Ins. Corp. v. L&M & Meyer Construction Co.* (C.D. Cal., Jan. 23, 2013) 2013 WL 12143958, at *3.)[3] This argument posits that in any given insurance coverage case, only one cause of injury, the "immediate" cause, is relevant to whether an accident took place, so courts should ignore other causes, even when they are the very acts or omissions of the insured that gave rise to the insured's tort liability. The language of Liberty's standard form CGL policy imposes no such requirement. And, to adopt Liberty's "immediate cause" rule would require the Court to disavow its own prior rulings on the common law meaning of "accident," which this Court has held are "'part of the [CGL] policy'...." (*Delgado*, 47 Cal.4th at p. 308 (citation omitted).)

1. Liberty's One "Immediate" Cause Position Finds No Support In The Plain Language Of Its CGL Policy

The insuring agreement at issue here, typical of most CGL policies, provides that "[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' ... to which this insurance applies." It goes on to state that "[t]his

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[3] Liberty also tells the Court that the victim's "'bodily injury' was caused by Hecht's molestation and rape, not L&M's alleged negligent retention or supervision of Hecht." (Respondent's Answering Brief ("RB"), p. 2.) Liberty cites no authority for that remarkable statement and there is none. On the contrary, L&M was held liable to the victim for her injuries, and substantial damages were awarded to the victim, based on a finding that negligent hiring, retention, and supervision were a cause of the victim's injuries. (2 AER 54.)

insurance applies to 'bodily injury' ... only if: (1) "[t]he 'bodily injury' ... is caused by an 'occurrence' that takes place in the 'coverage territory.'" "Occurrence means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Cert. Req., 834 F.3d at 1000, 1001 (ellipses in original).)

Absent from the insuring agreement, from the definition of "occurrence," from the *Geddes/Delgado* definition of "accident" that is incorporated into all CGL policies covering "accidents," and indeed from any provision of the Liberty policy (or any other standard form CGL policy) is any reference, let alone the requisite conspicuous, plain and clear reference, to a restriction on coverage to the "immediate" or "closest in time" cause of the injuries. (*See Haynes v. Farmers Ins. Exch.* (2004) 32 Cal.4th 1198, 1204 (limitations on coverage must be "conspicuous, plain and clear" to be enforceable).) Nor does the CGL policy language anywhere suggest that "occurrence" is determined by reference to a *single* cause of the injuries. Rather, the CGL policy provides only that the bodily injuries must be "caused" by an occurrence, which, interpreted broadly in favor of coverage, as it must be (*see MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648), includes the various causes of the injury that led to the insured's liability, not just the final cause.

Liberty could have used language limiting its coverage obligations to liability arising from one cause, or from the "immediate" cause of the injuries, but it did not. Having failed to do so, Liberty cannot ask the Court to rewrite its insurance policy now. (*See Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal.4th at p. 764 ("courts are not to

insert [into an insurance policy] what has been omitted") (citations omitted).)[4]

2. Liberty's "Immediate" Cause Position Is Inconsistent With This Court's Prior Decisions As To What Is An "Accident" Or "Accidental"

If this Court were to adopt Liberty's "immediate" cause position, the Court would also need to disavow key aspects of at least two of its recent decisions. It should not do so.

First, in *State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, this Court held that the correct focus for determining CGL coverage is on *any* cause of the injuries that gives rise to the tort liability of the insured seeking coverage, not necessarily the immediate cause closest in time to the injury. This Court observed: "[T]he right to coverage in the third party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty." (*Id.* at p. 1031.) The Court then said that "the contractual scope of third party liability insurance coverage, as reflected in the policy language, depends on the tort law source of the insured's liability," and that "we look to whether a covered act or event subjected the insured to liability for the disputed property damage or injury under the law of torts." (*Ibid.*) Based on these principles, the Court held:

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[4] *Amici* Franciscan Friars of California, Inc. and Province of the Holy Name, Inc. correctly point out the absence of language in the CGL policy supporting Liberty's position. United Policyholders notes that an analysis of the CGL policy language would lead to a ruling in favor of coverage whether the Court relies on the cases from the early 1990s cited by those *amici* or under the somewhat broader standards for construing insurance policy language set forth in this Court's more recent insurance coverage cases, such as *State v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 195-196 and *Powerine Oil Co. v. Superior Court* (2005) 37 Cal.4th 377, 390.

> If the insured's nonexcluded negligence "suffices, in itself, to render him fully liable for the resulting injuries" or property damage ..., the insurer is obligated to indemnify the policyholder even if other, excluded causes contributed to the injury or property damage.

(*Ibid.* (citation omitted.)) In other words, courts must look to the multiple causes that, together, caused the injury for which the insured is liable, not just to one "immediate" cause of the injury. If one of those causes is covered, the insurance policy covers the claim. (*Ibid.*)

Second, in *Delgado*, this Court again rejected the notion that in determining CGL coverage there can only be one relevant cause of injury (like Liberty's so-called "immediate" cause):

> Any given event, including an injury, is always the result of many causes." (1 Dobbs, The Law of Torts (2001) § 171, p. 414.) For that reason, the law looks for purposes of causation analysis "to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." (Prosser & Keeton on Torts (5th ed. 1984) § 41, p. 264.)

(*Delgado*, 47 Cal.4th at p. 315.) *Delgado* also cited *Merced Mut. Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50 for the proposition that "an 'accident' exists when *any aspect* in the *causal series of events* leading to the injury or damage was unintended by the insured." (*Ibid.* (emphasis added).) Thus, in several parts of the *Delgado* opinion, this Court instructed the lower courts to look to the "causes" (using the plural) and "any aspect in the causal series of events" (again using the plural "events") that provide a basis for tort law to impose liability on the insured.

Consistent with the statements quoted above, the Court also ruled in *Delgado* that in deciding which of the many possible causes of an injury could be relevant to CGL coverage for a particular insured, the courts should focus on those causes that involve the insured's

conduct (not someone else's conduct) and, in particular, the specific conduct of the insured that gives rise to the insured's liability:

> Under California law, 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.) Hammering home this point, this Court added:

> ***Here, Delgado's complaint alleges acts of wrongdoing by the insured against him. Those are the acts that must be considered the starting point of the causal series of events***, ... The term "accident" in the policy's coverage clause refers to the injury-producing acts of the insured, not those of the injured party....

(*Id.* at p. 315 (emphasis added).)

The wrongful acts that were asserted against L&M were the negligent hiring, retention, and supervision of Hecht; and Hecht's own later misconduct did not sever the causal chain under which L&M was liable in tort for its own acts since the arbitration panel awarded damages against L&M based on L&M's *own* conduct. (4 AER 54.) That award is consistent with this Court's ruling in *Hoyem v. Manhattan Beach City School Dist.* (1978) 22 Cal.3d 508 regarding liability for negligent supervision. In that case, the Court held that when a school was sued for injuries to a student allegedly caused by the school's negligent supervision, the subsequent wrongful conduct of a third party (the immediate cause of the injury) was not a "superseding cause" that rendered the school's negligent supervision irrelevant or insufficient to be a basis for imposing liability on the school: "The fact that another student's misconduct was the *immediate* precipitating cause of the injury does not compel a conclusion that negligent supervision was not the proximate cause of Michael's death. *Neither the mere involvement of a third party nor that party's wrongful conduct is sufficient in itself to absolve the defendants of liability, once a*

negligent failure to provide adequate supervision is shown." (*Id.* at p. 521 (emphasis added; footnote and citations omitted.) While *Hoyem* was not an insurance case, it confirms that negligent supervision can be a relevant cause of injury, even if the chain of events might include subsequent wrongful conduct by someone else.

Likewise in this case, the "starting point" for evaluating whether the cause of the injuries to the student was an accident must be the acts of L&M for which L&M was alleged to be liable in tort, *i.e.*, its negligent hiring, supervision and retention of Hecht. As discussed above, even Liberty does not appear to dispute that this conduct was an "accident" under its policy.

In sum, neither *Allstate* nor *Delgado* nor any other decision of this Court holds that whether the "accident" took place is determined solely by reference to the one "immediate" cause of the injuries, particularly when that cause is not the one that resulted in the imposition of tort liability on the insured. And these cases certainly do not hold that the insured's negligent hiring, retention and supervision of an employee who commits an intentional tort is too "attenuated" from the injuries to constitute the basis for finding an accident as to the insured. On the contrary, *Allstate* and *Delgado* dictate that if the law imposes liability on the insured for a particular act or omission in the causative chain of events culminating in injury to a third party, that act or omission is a cause relevant to insurance coverage.

3. Liberty's One "Immediate" Cause Position Contradicts This Court's Concurrent Causation Rulings

Liberty's attempt to focus on one cause of the injury to the exclusion of all other causes contravenes yet another line of this Court's cases. In *State Farm Mutual Automobile Insurance Co. v.*

Partridge (1973) 10 Cal.3d 94, reaffirmed in *Allstate*, 45 Cal.4th at p. 1029, this Court held that CGL policies provide coverage when a covered cause and a noncovered cause combine to produce injury. In so holding, the Court recognized that any given injury may be the result of multiple causes and that all contributing proximate causes, not just the most "immediate" cause, must serve as the basis for determining whether coverage exists under a CGL policy.

Liberty contends that this Court's "concurrent cause" rule does not apply to the negligent hiring, retention and supervision claim against L&M because, in Liberty's view, the rule applies only when the two causes are wholly independent of each other: "Without the alleged intentional sexual assaults by Hecht, there is no injury, and thus no independent liability for L&M's alleged negligence." (RB p. 34.) But as explained in L&M's reply brief, this Court did not hold in *Allstate* or *Partridge*, or in any other case, that the "concurrent cause" rule applies only when multiple causes are completely independent. Indeed, in *Partridge* itself the injury was not the result of two wholly independent causes, each of which alone would have caused the injury and liability. The *Partridge* insured's act of filing a gun down to a hair trigger would not alone have led to liability since the insured would not have shot the victim but for combination of the hair trigger *and* negligent driving; and the *Partridge* insured's act of driving negligently would not alone have caused the victim's injury since the gun would not have fired except for the earlier filing of the hair trigger. The two acts in combination caused the injury. Thus, when two "risks constitute concurrent proximate causes of an accident, the insurer is liable so long as one of the causes is covered by the policy." (*Partridge*, 10 Cal.3d at p. 102; *see also Brooks v. Metropolitan Life Ins. Co.* (1945) 27 Cal.2d 305, 309-310 (if an accident was a proximate cause of an injury, the

policy provides coverage even though an excluded cause was also in the chain of events).)

Likewise, in *Allstate*, the insurance policies covered liability for property damage caused by an accident, but not property damage caused by a non-accidental release of pollutants. The question was whether coverage exists for "property damage caused by a set of pollutant discharges, some sudden and accidental, and some gradual or nonaccidental." (45 Cal.4th at p. 1030.) This Court applied the rule from *Partridge*: there is coverage "whenever an insured risk constitutes a proximate cause of an accident, even if an excluded risk is a concurrent proximate cause." (*Id.* at pp. 1029, 1032.) The insured would have been fully liable for the damage based on the sudden and accidental releases (just as L&M was fully liable based on its own negligence), and coverage was not barred by the fact that non-accidental, and thus not covered releases, also were causes of the property damage.

Similarly here, the injury to the student occurred as the result of the combination of L&M's negligence in hiring, retaining and supervising Hecht and Hecht's intentional act. Hecht's intentional act against the student would not have happened without L&M's negligence, which allowed Hecht to commit the intentional tort. Of the two causes, L&M was held *fully liable on the basis of its own negligence* (2 AER 54), and that negligence fits squarely within the definition of "accident."

4. Liberty's Reliance On "Trigger Of Coverage" Cases Undercuts Its Position

Liberty also invokes the federal district court opinion in this case to support its argument that only the last, "immediate" cause in the chain of events is relevant to whether an accident has taken place. (RB,

pp. 14-15, 35-41; *Liberty Ins. Corp. v. Ledesma & Meyer Construction Co., supra*, 2013 WL 12143958, at *3.) But the district court misunderstood the issue. All but one of the cases on which the district court relied concerned the "trigger of coverage," that is, under the specific terms of the policy what "must happen in the policy period in order for the *potential* of coverage to arise." (*Montrose Chem. Corp. of Cal. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 655 fn.2 (emphasis in original).)[5]

The cases the district court cited were weighing into a debate in the California courts concerning whether, under CGL policies covering injuries during the policy period, the "trigger" was a "wrongful act" during the policy period that subsequently led to bodily injury or property damage after the policy period, or the occurrence of bodily injury or property damage during the policy period. (*Id.* at pp. 669-670.) The California courts eventually came to a consensus that, for purposes of "trigger" (or timing), the injury—and not the events or acts that caused the injury—was the "trigger of coverage" under the language of standard form CGL policies. (*Ibid.*) Those courts were not addressing the issue here: what (not when) is an "accident" when the term "accident" (according to *Geddes* and *Delgado*) includes both the insured's acts and the consequences of those acts, so applying the "trigger" rule to the meaning of the term "accident" as Liberty proposes would, again, require the Court to disavow *Geddes* and *Delgado*.

Critically, under the rule adopted in the "trigger" cases, the wrongful acts of the insured (or of anyone else, for that matter) are not

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[5] The other case the district court cited, *Merced Mut. Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, in turn relied on a Washington state court decision that found coverage for the negligent supervision of a student who had committed an intentional tort. (*See Unigard Mut. Ins. Co. v. Spokane School Dist.* (Wash. App. 1978) 579 P.2d 1015.)

relevant at all; the "trigger" depends solely on the timing of the claimant's resulting bodily injury or property damage. (*Ibid.*) Thus, if the reasoning of the trigger cases on which the district court and Liberty rely were to govern, Liberty would be seeking a ruling that the "accident" requirement should be measured from the perspective of the victim—the very position that this Court rejected in *Delgado*, 47 Cal.4th at p. 311.

B. This Court's Prior Decisions Also Preclude A Rule That An "Accident" Cannot Occur When The Insured Engaged In Some Sort Of Intentional Conduct

That the insured's conduct was intentional in the sense that the insured intended to do an act (*e.g.*, hire or supervise an employee, manufacture a product, send a contaminant to a waste disposal site) is not, in and of itself sufficient for a court to hold as a matter of law that there was no accident.[6] Many cases have found coverage under "accident" policies for negligent hiring, retaining or supervision of another, even though, as here, the hiring, retaining and supervision

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[6] For example, in *State of California v. Allstate Ins. Co.*, 45 Cal.4th at p. 1025, this Court held that even though the insured had intentionally released contaminants into the environment, causing damage, that release can be "accidental" because it was done at the direction of state authorities to prevent potentially worse damage. While the context of this ruling in *Allstate* is different from the issue here—it involved the "accidental" requirement in the exception to the standard form pre-1985 pollution exclusion rather than the "accident" requirement in the "occurrence" definition—the Court recognized that an act that is intentionally performed, even one that was intentionally performed knowing that it would cause some harm, can nonetheless be considered accidental. The point is that determining whether something is an accident requires more than looking at whether the insured acted intentionally; it also involves consideration of surrounding factors, such as why the act was done, with what knowledge of its potential consequences, and with what intentions. (*See also* cases cited in Section III *infra*.)

were, in a sense, intentional acts. (*See* Section III *infra.*) That is because a rule focusing *solely* on whether the act itself was intentionally done would run afoul of the second prong of the definition of "accident": there is an accident if *either* the "happening" (*e.g.*, the act) was unintentional *or* the "consequence" of the happening or act was unintended when the act was done. (*Delgado*, 47 Cal.4th at p. 308.) In other words, the unintended consequence of an intentional act can be an accident under this Court's longstanding precedent.

A few examples highlight the importance of the "consequence" language in protecting the reasonable expectations of hundreds of thousands of California businesses and individual insureds.

- An insured lights a cigarette and throws the match on the ground, not knowing there was gasoline on the ground. The gasoline ignites, causing damage to an adjacent building. Under Liberty's (and the federal district court's) proffered rule, that would not be an accident, and the insured would have no coverage, because the insured intended to light the cigarette and toss the match on the ground. There were no additional acts after the intentional tossing of the match. But any reasonable layperson insured would believe the explosion and fire were caused by an accident, and would expect insured's the CGL policy to provide coverage, because the consequence of the intended act was unintended.
- The insured intends to swing a golf club, not realizing that someone is standing close behind him, and the golf club hits that person. Under Liberty's rule, the insured intended to perform the act that was the immediate cause of the injuries, and the insured would have expected the

golf club to hit anyone who was in the way, so there would be no coverage. But that is the classic example of an accident because, even though the act was intentional, the consequences of it were not.

- A disgruntled chef decides to get back at the restaurant that employs him by deliberately putting laxative in the soup, knowing that this would upset the stomachs of the restaurant patrons. Of course, the restaurant would expect CGL coverage to apply if the patrons were to sue the restaurant owner for negligent supervision or for the restaurant's vicarious liability.
- Or take *Partridge* itself, where the insured intentionally filed his gun down to a hair trigger and that act was a proximate cause of the injury. Yet this Court referred to the occurrence of an "accident" 65 times in its opinion because that is the natural, lay understanding of "accident."

These examples highlight why this Court was correct fifty-eight years ago, and was again correct eight years ago, in establishing and confirming that the meaning of "accident" in CGL policies encompasses not only happenings or acts of the insured that are unintended but also the unexpected, unintended consequences, or results, of intentional conduct. The Court should reject Liberty's invitation to read the "consequences" language out of the CGL policy's coverage for "accidents."

C. This Certified Question Provides An Opportunity For The Court To Confirm That Its Interpretation Of The Term "Accident" Governs

As is reflected in the parties' briefing, a number of Court of Appeal decisions, some from the 1980s and early 1990s, principally in the context of a claim for CGL coverage for the no-longer-recognized tort of wrongful termination, and again more recently after this Court issued its decision in *Delgado*, have misunderstood and misapplied this Court's definition of "accident." Those courts held that in determining whether an accident took place, the sole inquiry is whether the "happening"—*i.e.*, the act that caused the injury—was an intentional act by someone. If it was, they find no coverage, regardless of whether that act was committed by the insured seeking coverage, regardless of whether the insured intended to cause any harm, and regardless of whether the consequences of the act were unexpected, unforeseen, or undesigned by the insured. This case provides the opportunity to bring this area of law back into line with the reasonable expectations of insureds and this Court's prior decisions, including *Delgado*, and to eliminate the current state of confusion about what is or is not an "accident."

State Farm General Ins. Co. v. Frake (2011) 197 Cal.App.4th 568 is an example of a Court of Appeal that misunderstood *Delgado* and the definition of "accident." There, some college students were horsing around when one of them, the insured, threw "his arm out to the side, where King was standing, and struck King in the groin." (*Id.* at p. 572.) The testimony in the underlying tort case was that the insured did not intend in that instance to hit his friend in the groin, and did not intend to hurt him at all, but unfortunately he did. (*Id.* at p. 573.) The jury in the tort action imposed liability solely on the basis of

negligent conduct. (*Id.* at p. 575.) In layperson terms, the injuries were caused by an accident, the insured's negligent act. But the Court of Appeal held that there was no coverage because, in its view, "the term 'accident' does not apply to an act's *consequences*, but instead applies to the act itself." (*Id.* at p. 579 (emphasis added).) That court thus expressly read the "consequences" language out of the "accident" definition, notwithstanding this Court's rulings in *Geddes* and *Delgado*.

Another example is *Albert v. Mid-Century Ins. Co.* (2015) 236 Cal.App.4th 1281. In that case, the Los Angeles Fire Department directed a homeowner to clear the area around a small grove of olive trees on the property line with her neighbor. Believing the trees to be on her property, and that she was obligated to trim them to maintain safety, she did so year-after-year without complaint from her neighbor, and without the neighbor's claiming ownership of the trees. However, the neighbor at some point filed suit, asserting that he owned the trees and that the insured homeowner had damaged them. (*Id.* at p. 1286.) The Court of Appeal concluded that there was no "accident" because the physical act of trimming the trees was intentional. Citing *Frake*, the court said: "The term 'accident' refers to the nature of the insured's conduct, and not to its *unintended consequences*." (*Id.* at p. 1291 (emphasis added).) In other words, the court acknowledged that the injury involved an unintended consequence, a key part of this Court's definition of "accident." But the court still found no accident, based on its view that an intentional act can never be an accident unless there is a subsequent unintended "happening" (*ibid.*), which contradicts this Court's ruling that either the happening *or* the consequence (the result) of the happening can be unintended.

Or in *Dyer v. Northbrook Property & Casualty Insurance Co.* (1989) 210 Cal.App.3d 1540, 1547-1548, the Court of Appeal held that

an accident cannot occur when an insured intends to terminate an employee even if the employee then suffers severe emotional distress, which the insured did not expect to occur. The Court of Appeal acknowledged that this Court had defined "accident" to include either an unintentional act or unexpected consequences of an intentional act, but decided, for no valid reason, that the latter prong of the definition was limited to products liability cases.

There are other similar examples but these three suffice to show that some courts have stripped from the definition of "accident" the concept of unintended "consequences." Yet, in *Delgado*, this Court expressly reaffirmed, and imposed on every CGL policy, the *Geddes* definition that covers both unintended happenings *and* unintended consequences. (*Delgado*, 47 Cal.4th at p. 308.) So how did these lower courts erroneously conclude that *Delgado* and *Geddes* jettisoned the consequences prong of the definition? They appear to have misconstrued certain other statements in *Delgado* by taking them out of context.[7]

In *Delgado*, the insured deliberately assaulted the victim, intending to cause injury. That, on its face, would not be an accident because both the act and the consequence were intended. Thus, in an effort to obtain coverage, the victim—who was the person seeking

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[7] In the wrongful termination context, it appears that the lower courts were attempting to protect CGL insurers against liability for damages that might have been awarded in what then appeared to be a rapidly expanding tort of wrongful termination, which did not exist when the CGL policies were drafted (and which this Court then curtailed). As this Court subsequently held, however, CGL policies cover liabilities that fall within the policy language even if the liabilities had not been created when the policies were drafted. (*See AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822 fn.8.)

coverage (standing in the shoes of the insured) because he had been assigned the insured's rights against the insurance company—argued that the insured's unreasonable belief in the need for self-defense, transformed the insured's intentional act, committed with intent to harm, into an accident.[8] The victim also argued that "accident" should be viewed from his perspective rather than that of the insured.

This Court rejected the victim's argument, explaining that when the insured intended the act and the consequent harm, the victim's earlier conduct (which supposedly led to the unreasonable belief in the need for the insured to defend himself) cannot save the day. In the course of focusing the inquiry on the acts of the insured rather than the acts of the victim, the Court stated: "Under California law, 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), and "[t]he term 'accident' in the policy's coverage clause refers to the injury-producing acts of the insured, not those of the injured party." (*Id.* at p. 315.)

Unfortunately, certain courts attempting to follow *Delgado* have erroneously focused on the Court's references to "conduct" and "injury-producing acts," mistakenly concluding that whether something is an accident depends only on whether any person's act was intentional, trumping the "consequences" prong of this Court's definition of "accident." Those courts did not appreciate that the purpose of the Court's statements, which the Court tied to "the

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[8] The Court did not decide whether an intentional assault might be an accident if the insured had a *reasonable* belief in the need for self-defense. Finding that to be an accident would be consistent with this Court's decision in *Allstate* that intentional releases of pollutants could be accidental where they were committed with a salutary purpose of avoiding worse harm.

insured," was to focus the inquiry on *the insured's* conduct and intentions, rather than on the victim's. Read in context, then, these and other statements in *Delgado* were simply rejecting the argument that the *victim's* earlier acts are relevant to whether an accident took place, and directing courts to focus instead on the acts "of the insured." Thus, said *Delgado*, the "starting point" for determining whether there is an accident is the acts of the insured for which the insured is liable under tort law. (*Id.* at p. 315.)

It cannot be the case that *Delgado* eliminated the critical "consequences" prong of the "accident" definition *sub silentio* while reaffirming that definition in its entirety elsewhere in that very same decision, and holding that the two-prong definition is incorporated by law into every CGL policy. In fact, the Court did not need to address the "consequences" prong in *Delgado* because there was no dispute that the insured intended the consequences (the injury) of his intentional assault.[9]

The Court should clarify that both the "happening" and "consequence" prongs of the accident definition must still be considered, and, in so doing, instruct lower courts to focus on the happenings and the consequences of the happenings that are closely

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[9] In addition, in *Delgado* the act of the insured for which he was held liable, and for which coverage was sought by the victim standing in his shoes, *was* the immediate cause of the injury. So the Court did not even have occasion to rule that the focus is only on the immediate cause, or on the conduct of the person committing the assault or other intentional tort even when the insured's liability is based on a different tort, *i.e.*, its own negligent conduct. Thus, *Delgado* cannot be viewed as calling into question the many decisions finding coverage for insureds who are vicariously liable for someone else's intentional tort, or directly liable for something other than the intentional tort.

enough related to the injury that the law may or has imposed tort liability on the insured.

III. CGL POLICIES COVER AN EMPLOYER'S LIABILITY FOR NEGLIGENT HIRING, RETENTION AND SUPERVISION

A. This Court Has Repeatedly Held That Employers Vicariously Liable For An Employee's Intentional Tort Are Entitled To CGL Coverage

Underlying the question that the Ninth Circuit certified to this Court is a fundamental issue for California businesses and individual consumers who face liability for the acts of others, that is, whether CGL policies cover claims against an employer or other principal for negligent supervision of its employees or agents. This issue is far from novel, however.

Nearly fifty years ago, this Court explained that California imposes liability on an employer for the torts of its employees because the employer "is better able to absorb [losses caused by an employee's torts], and to distribute them, through prices, rates *or liability insurance*, to the public, and so to shift them to society, to the community at large." (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 960 (quoting Prosser, *Law of Torts* (3d ed. 1964), p. 471) (emphasis added).) In a long line of cases, starting with *Hinman*, this Court and many Courts of Appeal repeatedly held that an employer that is vicariously liable for the acts of its employees is entitled to insurance coverage for that liability under its own CGL policy. Indeed, the rationale for imposing vicarious liability was, in part, that the employer is better able to absorb and spread the losses, including through the purchase of insurance covering such liability.

This Court also held that liability insurance will cover an employer's vicarious liability not just for an employee's negligence but

also for an employee's intentional torts. As this Court said, "neither [the statutory exclusion for willful injuries in] Insurance Code section 533 nor related policy exclusions for intentionally caused injury or damage preclude a California insurer from indemnifying an employer held vicariously liable for an employee's willful acts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital*, 12 Cal.4th at p. 305 fn.9 (citing *Fireman's Fund Ins. Co. v. City of Turlock*, 170 Cal.App.3d at pp. 1000-1001 and *Arenson v. Nat. Automobile & Cas. Ins. Co.*, 45 Cal.2d at pp. 83-84).)[10]

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[10] *See also, e.g., Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 513 ("Where a principal is held vicariously liable for an agent's act of malicious prosecution, section 533 poses no obstacle to indemnifying the principal"); *Melugin v. Zurich Canada* (1996) 50 Cal.App.4th 658, 666 ("section 533 would not necessarily bar coverage to Canada Life for its own strict liability as a result of [its employee] Melugin's wrongful acts"); *Keating v. National Union Fire Ins. Co.* (C.D.Cal. 1990) 754 F.Supp. 1431, 1440, *rev'd on other grounds*, 995 F.2d 154 (9th Cir. 1993) (finding negligent supervision of employees who made false statements to investors can be a covered "occurrence" and not barred by section 533) (applying California law); *American States Ins. Co. v. Borbor by Borbor* (9th Cir. 1987) 826 F.2d 888, 894 (section 533 bars insurer from indemnifying first partner who committed willful acts, but not second partner, who was vicariously liable for those acts); *Dart Indus., Inc. v. Liberty Mut. Ins. Co.* (9th Cir. 1973) 484 F.2d 1295, 1297 ("[T]here is also a public policy and established business practice to permit persons including corporation to purchase insurance to indemnify them against damages which might be imposed for not only tortious acts of agents or employees, but also willful acts of the agents or employees, for which vicarious liability may be imposed....[Absent a] showing that the corporation by some form of informal action had indicated prior approval or later acquiescence, section 533 did not constitute a legal defense.") (applying California law); *Nuffer v. Insurance Co. of N. Am* (1965) 236 Cal.App.2d 349, 356 ("The general rule codified in Insurance Code section 533 specifically does not foreclose recovery by an insured upon a fire insurance policy for a loss caused by arson of the insured's agent, and the courts of many jurisdictions...have asserted as a general rule

It thus is long settled in this State that an insured employer vicariously liable for the intentional tort of its employee (including sexual assault, battery, etc.) can recover insurance benefits even though the *only* tort or conduct, *i.e.*, the *only* "happening" underlying the employer's liability. is the employee's intentional tort.[11]

B. Since An Employer Has Coverage For Its Vicarious Liability For An Employee's Intentional Tort, It Necessarily Must Also Have Coverage For The Lesser Tort Of Negligent Hiring And Supervision

The present appeal concerns not the employer's vicarious liability for an intentional tort but its liability for something far less: the employer's own *negligent* hiring, retention or supervision of an employee who might present a risk of harm to third parties.

Nearly seventy-five years ago, in *Fernelius v. Pierce* (1943) 22 Cal.2d 226, this Court explained the difference between the two torts. *Fernelius* concerned whether, and on what basis, public officials in Oakland who supervised police officer employees of the City could be liable for assaults that the police officers had committed. This Court first explained the basis for vicarious liability:

> Under the rule of respondeat superior, as ordinarily understood, the master is held liable for the torts of his servants committed within the course of their employment. In the typical case the neglect is only that of the servant; the master is himself without fault. But because the servant is engaged in the master's work and

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the right of such an insured to recover for such a loss.").

[11] Liberty tells the Court that sexual assault is "'necessarily nonaccidental.'" (RB, p. 18 (citation omitted.)) Whether that is correct from the perspective of Hecht, the employee who committed the intentional tort, is not the issue before this Court, however. The issue instead is whether Hecht's conduct was accidental from the perspective of the insured—his employer, L&M—which was held liable to pay damages to the victim of the assault solely on a negligent hiring, retention and supervision theory.

> is doing it in place of, or for, the master, the act of the servant is regarded as the act of the master. Responsibility devolves up through the relationship to the master and the question of proximate cause of the injury relates only to the act (or neglect) of the servant.

(*Id.* at p. 233.) In other words, there is no "act" of the employer on which to base liability, so the law holds the employer liable only because "the act of the servant [the employee's intentional tort] is regarded as the act of the master [employer]." The Court then explained the difference between vicarious liability and liability based on the negligent acts of the supervisor that allowed the employee to cause the injury:

> In the case now presented by plaintiffs, however, we have a basically different factual pattern. The neglect charged here [against supervisory officials of Oakland] was not that of the subordinate [police] officers; they did what was reasonably to be expected of them in view of their known propensities. *The neglect that is pleaded is that of the defendants themselves. The legal fault charged here as the ground of liability is directly and personally that of the superior officers (the defendants)* ... and the question of proximate cause of the injury relates directly to the neglect of the defendants [the supervising officials].

(*Id.* at pp. 233-234 (emphasis added).) In other words, in a negligent supervision case, the focus is on the conduct of *the employer*—not the conduct of the employee who committed the intentional tort.

This Court reaffirmed the distinction between these two torts in recent cases. For example, in *Minkler*, this Court acknowledged that an insured is sometimes liable vicariously for the intentional acts of those it supervises, but the insured also may be liable, and reasonably expect insurance coverage, for direct liability based on the separate tort of negligence:

> 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. Under such circumstances, she had objective grounds to assume she would be covered, so long as she herself had not acted in a manner for which the intentional acts exclusion barred coverage.

(*Minkler*, 49 Cal.4th at p. 325; *see Diaz v. Carcamo* (2010) 51 Cal.4th 1148, 1157-1158 (distinguishing between vicarious liability for acts of an employee and direct liability for the employer's negligence in hiring or retaining the employee); *see also Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 ("the liability for negligent supervision or retention of an employee is one of direct liability for negligence, not vicarious liability").)

In this appeal, Liberty asks this Court to strip the employer of insurance coverage when the employer's liability is based not on the intentional tort of the employee but on the employer's own lesser tort of negligent hiring, retention or supervision. In that situation, the employer's conduct, which is the focus of the coverage question, is mere negligence—conduct that, this Court has held, is encompassed by the word "accident." (*Safeco,* 26 Cal.4th at p. 765.) It would be strange indeed if insurance law were such that an employer can have coverage for vicarious liability based solely on the intentional torts of its employee but not have coverage for liability based on its own, lesser, negligent acts that contributed to the same injury.[12]

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[12] Liberty's brief attributes to L&M the argument that the employer's vicarious liability for its employee's intentional act is the

C. Cases Applying California Law Have Found Insurance Coverage For Negligent Supervision Claims

Liberty implies that only one other California case has addressed whether insurance coverage is available for a negligent supervision claim. (RB, p. 43.) Not so. Many cases applying California law have found insurance coverage for negligent supervision. In *Minkler*, as described above, this Court found that negligent supervision is an independent tort that can be grounds for coverage. The insured accused of negligently failing to prevent acts of molestation in her home could reasonably expect coverage unless she herself acted in a way that barred coverage. (49 Cal.4th at p. 325.)

Negligent supervision may also constitute an accident when an insured is alleged to have negligently allowed others to make false and misleading statements that cause bodily injury. (*See, e.g., Keating v. National Union Fire Ins. Co. of Pittsburgh, Pa.* (C.D. Cal. 1990) 754 F.Supp. 1431, 1441, *rev'd on other grounds* (9th Cir. 1993) 995 F.2d 154; *see also Fireman's Fund Ins. Co. v. National Bank for Cooperatives* (N.D. Cal. 1994) 849 F.Supp. 1347, 1368 (agreeing with *Keating* that negligent supervision is an accident and can constitute an occurrence).) An insured might be liable both for personally making false statements and also for negligently allowing others to do so. (*Keating*, 754 F.Supp. at p. 1440.) Similarly, in *Westfield Ins. Co. v.*

"accident" for purposes of insurance coverage; Liberty then cites *Dyer v. Northbrook Prop. & Cas. Ins. Co.*, 210 Cal.App.3d 1540 as authority purportedly refuting L&M's purported argument. (RB, p. 19.) In fact, L&M's liability was not *vicarious* but was based on L&M's *direct* liability for its own negligent hiring, supervision and retention (2 AER 54), and that conduct is undeniably the "accident" here. And while touting *Dyer*, Liberty never tells the Court about this Court's subsequent decision in *Lisa M.* and the pre- and post-*Dyer* cases upholding insurance coverage for vicarious liability.

TWT, Inc. (N.D. Cal. 1989) 723 F.Supp. 492, 495, some allegations involved intentional acts and others arose from acts that were "not necessarily intentional," such as negligent supervision. "Negligent supervision could constitute an 'occurrence' under the policy language." (*Ibid.*)[13] Liberty cites *Minkler*, albeit in a different context, but it never discusses the other cases finding coverage for negligent supervision claims, even though several were mentioned in the Ninth Circuit's certification order.

These cases find insurance coverage because they correctly view the "accident" from the perspective of the employer who faces vicarious liability or liability for its own negligent conduct; the employee or agent may engage in non-accidental conduct but, as far as the employer is concerned, the injury is caused accidentally.[14]

CONCLUSION

For all of the foregoing reasons and the reasons set forth in the Sections A and B of Appellant's Opening and Reply Briefs, the Court

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[13] *See also American States Ins. Co. v. Borbor by Borbor* (9th Cir. 1987) 826 F.2d 888, 895 (the statutory exclusion in Ins. Code, § 533 for willful injuries does not bar coverage where the plaintiff alleges that the insured was "merely negligent in her supervision" of a person who committed an intentional tort). Of course, in some instances, the insured employer is liable not for negligence but for willful misconduct. (*See Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1603 (Ins. Code, § 533 bars coverage when an employer is liable for the willful misconduct of its CEO, whose misconduct was known to and ratified by the company's board).) The victim did not allege such facts in the underlying arbitration against L&M, however.

[14] *Amicus* notes that both L&M and Liberty have briefed additional issues (such as the burden of proving whether an accident took place or whether the "accident" is determined under a purely objective standard) that the Ninth Circuit did not certify to this Court and, thus, are not properly before this Court. This brief does not address those issues.

should answer the question that the Ninth Circuit certified in the affirmative and hold that there can be an occurrence under a CGL policy when an injured third party brings claims against an employer for the negligent hiring, retention and supervision of an employee who intentionally injured the third party.

DATE: May 10, 2017.

Respectfully submitted,

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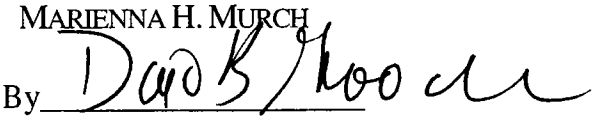
By 
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CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. R. CT. 8.520(c)

Pursuant to California Rule of Court 8.520(c), and in reliance upon the word count feature of the software used to prepare this document, I certify that the foregoing Brief *Amicus Curiae* of United Policyholders contains 11,136 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

DATED: May 10, 2017.

DAVID B. GOODWIN

PROOF OF SERVICE
Case No.236765

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is One Front Street, 35th Floor, San Francisco, California 94111-5356. On May 10, 2017, I served the following document(s) described as:

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- **BRIEF *AMICUS CURIAE* OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANTS**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this proof of service is executed at San Francisco, California on May 10, 2017.

Dawn Halverson

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