S236765

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

LIBERTY SURPLUS INSURANCE CORPORATION, et al.

Plaintiffs and Respondents,

vs.

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

Defendants and Appellants.

U.S. Court of Appeal, Ninth Appellate District No. 14-56120;
U.S. District Court, Central District of California No. 2:12-cv-00900,
Honorable R. Gary Klausner, Presiding

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF CALIFORNIA CATHOLIC CONFERENCE AND ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL

WEINSTEIN & NUMBERS, LLP
*Barron L. Weinstein #067972
bweinstein@mwncov.com
Charles H. Numbers #124651
cnumbers@mwncov.com
Shanti Eagle #267704
seagle@mwncov.com
115 Ward Street
Larkspur, California 94939
Telephone: (415) 927-6920
Facsimile: (415) 927-6929

Attorneys for *Amici Curiae*
CALIFORNIA CATHOLIC CONFERENCE AND
ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

S236765

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

LIBERTY SURPLUS INSURANCE CORPORATION, et al.

Plaintiffs and Respondents,

vs.

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

Defendants and Appellants.

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE CALIFORNIA CATHOLIC CONFERENCE AND ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL IN SUPPORT OF DEFENDANTS-APPELLANTS

Amici California Catholic Conference and Association of Christian Schools International pursuant to California Rules of Court Rule 8.520(f), 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.

The California Catholic Conference ("Conference") is the public policy arm of the Roman Catholic Church in California. The Conference's mission is to advocate for the Catholic Church's public policy interests and to facilitate common pastoral efforts in the Catholic community. The Conference speaks on behalf of California's two Catholic archdioceses and ten dioceses, which include the system of private Catholic education

operated across the entire State of California. In California, the Catholic education system is comprised of more than 500 elementary and 100 secondary schools that educate approximately 140,000 elementary students, and 68,000 secondary students. Most of these schools are covered under general liability insurance policies.

The Association of Christian Schools International ("ACSI") is the largest Protestant educational organization in the world, representing nearly 24,000 member schools in 100 countries, with 3,000 member schools in the United States and more than 5.5 million students worldwide. In California ACSI represents 16 colleges and universities serving 23,500 students, 300 K-12 private schools serving 86,500 students, and 79 preschool programs serving 6,700 students. Many of ACSI's California schools are small and independently financed. Others are ministries of churches in which the insurance policies of both the church and school are combined. Additionally, ACSI itself is incorporated as a nonprofit corporation under the laws of the state of California.

California's Catholic dioceses and private schools are vulnerable to lawsuits for injuries to children and adults caused by third parties negligently hired and/or supervised by those dioceses and schools. Over the years (and particularly during the past 20 years or so), there have been thousands of cases in California involving claims of childhood sexual abuse against various religious and secular entities, including dioceses and religious orders, schools, and scouting organizations. Virtually every category of organization that employs adults to interact with children is vulnerable to claims of inappropriate conduct and/or injury to children. In fact, all businesses are vulnerable to claims that an employee intentionally injured another person despite the business' best efforts to properly supervise the employee.

In most of these cases, the perpetrator is judgment proof and the injured party sues the entity that hired the perpetrator, claiming negligent hiring, supervision, and retention of the employee-perpetrator. Typically, insurance carriers defend and indemnify these claims, unless there is a sexual abuse exclusion or other applicable exclusion. In California alone, insureds and insurance carriers have partnered to raise hundreds of millions of dollars to compensate children and adults who have suffered abuse by employees or agents of the insured entities. *Amici* represent the very types of entities vulnerable to these claims, and these entities purchase general liability insurance to protect themselves against such claims.

Even entities with insurance have been forced into bankruptcy by such claims. Without any insurance to respond, however, many of these entities would be exposed to financial ruin if a such a claim were made and, more importantly, the victims of such claims would have no chance of being compensated by schools and religious organizations. For example, a small local church, mosque, or synagogue with a religious school funded by congregant dues and donations, or a small community daycare, school, or after-school care facility, simply could not exist if it had no insurance to defend and indemnify it against a possible claim that one of its teachers, staff or volunteers, despite all reasonable efforts to screen and supervise, engaged in inappropriate conduct with one of the children. Such a claim would be made based on allegations that the school was negligent in hiring or supervising the staff member, and that this negligence caused the injury to the child. If the child could prove that the school was negligent, and that its negligence was a substantial cause of the abuse, then the child could obtain a verdict against the school based on the school's unintentional, negligent conduct. Such claims may allege abuse that occurred decades ago. This is precisely the type of risk against which a school seeks to protect itself by purchasing general liability insurance. And if Liberty's

proposed rule were adopted by the Court, many community organizations, churches, mosques, and synagogues would be unable to survive.

Amici respectfully submit the attached brief to attempt to sharpen the focus on why negligent hiring, supervision, and retention has been and continues to be an "occurrence" (defined as an "accident") within the meaning of a general liability insurance policy. In addressing this issue, *Amici* respond to the Court's invitation in the Minkler decision to explain why the Delgado and Hogan cases do not support the conclusion that negligent hiring or supervision that allows the commission of childhood sexual abuse cannot be an "accident." Minkler v. Safeco Ins. Co. of Am., 49 Cal. 4th 315, 322 fn. 3 (2010). No party or counsel for a party in the pending appeal authored any part of the proposed *amici* brief or made any monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than A*mici* or their counsel in this matter have made any monetary contribution intended to fund the preparation or submission of the proposed *amici curiae* brief.

Respectfully submitted,

DATED: May 10, 2017

WEINSTEIN & NUMBERS, LLP

By: 
Barron L. Weinstein

Attorneys for Amici Curiae
California Catholic Conference and
Association of Christian Schools
International

BRIEF OF AMICUS CURIAE CALIFORNIA CATHOLIC CONFERENCE AND ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL IN SUPPORT OF DEFENDANTS-APPELLANTS

I. INTRODUCTION

Two questions appear to drive the issue of whether the underlying plaintiff's injuries were "caused by an occurrence" (defined as an "accident"): first, whether negligent hiring and supervision of an employee can be an accident; and second, if so, whether that accident is "too attenuated" for the injury to be "caused by an occurrence" within the meaning of a general liability policy.

As to the first issue, where there is a duty to use due care in selecting and supervising employees, negligent breach of that duty unquestionably constitutes an accident within the meaning of a general liability policy. California recognizes tort liability of an employer for negligent supervision and hiring, and the majority of coverage cases involving such underlying claims assume, if not hold directly, that such tort liability is covered under general liability policies covering "occurrences" defined as "accidents."

As to the issue of "attenuation," the District Court and Liberty appear to assert that a negligent act that is antecedent to an intentional injury-producing act cannot be a covered "accident." But there are numerous cases in which general liability policies cover negligence that facilitated a criminal act against the injured party. And there is no body of case law or policy language that bars coverage for negligence that facilitates, but precedes, an injury by means of a criminal act.

The notion that only the most immediate cause can be the accident confuses the rule in first party property insurance cases with the quite different rule in third party liability cases. In first party insurance cases, only the "efficient proximate cause" is the covered occurrence. But in third

party cases, the "concurrent causation" doctrine applies, and coverage exists for the claim as long as one of several concurrent causes is covered.

Liberty relies heavily on Hogan and Delgado to support this "attenuated antecedent" act argument. But Hogan and Delgado did not hold that a negligent act by the insured that precedes an intentional injury-producing act by a third party cannot be an accident. The factual context of those two cases demonstrates that the holdings are far more limited. In Hogan, the Court ruled that there was no accident where the immediate injury-producing act was intentionally committed by the *plaintiffs themselves*. And in Delgado, the Court ruled that an intentional act by *the insured* could not be turned into an accident simply because of the insured's unreasonable belief that his intentional act was necessary to protect himself. But neither case addressed the present situation where the insured is held liable for its own negligence in facilitating a third party's criminal act against the injured person, and the insured's negligence is unquestionably a substantial cause of the injury.

The policy covers bodily injury "caused by *an* occurrence" (not *the* occurrence). As long as the insured's negligent act is a substantial cause of the plaintiff's injury, regardless of whether a third party's intentional act may also be a substantial cause, there is coverage under a general liability policy.

II. ARGUMENT

A. Negligent Hiring, Supervision, or Retention Is Not Deliberate or Intentional Conduct and Can Be an Accident

In the underlying case, Jane JS Doe alleged that L&M was responsible for causing her injuries based on L&M's own acts, its own independent negligence, not for committing the sexual assault. Nor is L&M

alleged to be vicariously liable for its employee's acts.[1] This is an important distinction. The perpetrator, Hecht, is not the insured, and no party is arguing that an insured should be covered under a general liability policy for sexual assault committed by that insured.

As this Court has stated, however, there is no reason why negligence that contributes to abuse should not be covered by insurance.

> [T]he public policy against insurance for one's own intentional sexual misconduct does not bar liability coverage for others whose mere negligence contributed in some way to the acts of abuse. In such cases, there is at least no overriding policy reason why a person injured by sexual abuse should be denied compensation for the harm from insurance coverage purchased by the negligent facilitator.

Minkler v. Safeco Ins. Co. of Am., 49 Cal. 4th 315, 327 fn. 4, opinion after certified question answered sub nom. Minkler v. Safeco Ins. Co., 399 F. App'x 230 (9th Cir. 2010).

Employers can be and regularly are held liable for their negligent acts in failing to prevent or facilitating intentional criminal acts by employees or agents. While some liability-producing managerial acts by an employer, such as wrongful termination, obviously may be non-accidental deliberate acts (see, e.g., St. Paul Fire & Marine Ins. Co. v. Sup. Ct., 161 Cal. App. 3d 1199 (1984); Commercial Union Ins. Co. v. Sup. Ct., 196 Cal. App. 3d 1205 (1987)), other acts are obviously not deliberate, such as the negligent failure to properly conduct a background check prior to hiring, or the negligent failure to properly train or supervise an employee. Even if inadequate vetting of a candidate or inadequate supervision of an employee

---

[1] This Court has noted, however, that "Neither Insurance Code section 533 nor related policy exclusions for intentionally caused injury or damage precludes a California insurer from indemnifying an employer held vicariously liable for an employee's willful acts." Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 12 Cal. 4th 291, 305 fn. 9 (1995) (citations omitted).

could somehow be intentional, that is a factual question for the trial court. The question here is whether negligent hiring or supervising *may* be an accident that causes an injury under a general liability policy. The answer to this question is that it clearly can.[2] Moreover, insurers and insureds have assumed that such conduct is a covered occurrence without addressing the issue in virtually every case.[3]

---

[2] Appellants make a related argument that the unintended consequences of a deliberate act can be an accident. Amici agree with Appellants' analysis, but do not address it here because it does not appear necessary to reach a decision on the question presented in this case.

[3] Absent exclusionary language, insurers have routinely afforded coverage to employers for these types of claims, and now seek to eliminate this coverage retroactively. If the industry wishes to eliminate coverage for negligent supervision, it can add clear exclusions to its policies. In fact, there are examples of just that. There are exclusions for sexual abuse, assault and battery, firearms, pollution, earth movement, and many more. These exclusions demonstrate an effort by the industry to exclude certain activities or causes even if the insured's negligence is also a substantial cause of the injury (putting aside counter arguments based on, for example, severability clauses). See, e.g., Underwriters Ins. Co. v. Purdie, 145 Cal. App. 3d 57, 61 (Cal. Ct. App. 1983) (firearm exclusion); Century Transit Sys., Inc. v. Am. Empire Surplus Lines Ins. Co., 42 Cal. App. 4th 121, 124 (1996) (applying "assault and battery exclusion which provided that 'No coverage shall apply under this policy for any claim, demand or suit based on assault and battery and assault shall not be deemed an accident, whether or not committed by or at the direction of the insured'); Safeco Ins. Co. v. Thomas, No. 13-CV-0170-AJB (MDD), 2013 WL 12123852, at *5 (S.D. Cal. Nov. 26, 2013) ("the Molestation Exclusion is broad and unambiguous, precluding coverage to bodily injury 'arising out of ... sexual molestation...' no matter who committed the act. This serves to exclude an entire category of injury based on the cause, not just the person who committed the harmful act.") If negligent supervision of an employee that engages in intentional conduct were not a accident, a sexual abuse exclusion, or assault and battery exclusion, would be unnecessary and superfluous, which is contrary to the rules of contract interpretation. See Civ.C. § 1641; Palmer v. Truck Ins. Exch. 21 Cal. 4th 1109, 1116 (1999); Great Western Drywall, Inc. v. Interstate Fire & Cas. Co. 161 Cal. App. 4th 1033, 1042 (2008) ("we must avoid interpretations that would create redundancy in policy language").

This Court has held that in the "context of liability insurance, an accident is 'an unexpected, unforeseen, or undersigned happening or consequence from either a known or unknown cause,'" and "refers to the conduct of the insured for which liability is sought to be imposed on the insured." Delgado v. Interins. Exch. of Auto. Club of S. Cal., 47 Cal. 4th 302, 308, 311 (2009). An insured's negligent supervision that facilitates an intentional act by a third party fits easily within this definition.

The District Court and parties in the present case have cited only two cases that found that negligent hiring and supervision were not an accident. Neither of these cases is persuasive. One case, L.A. Checker Cab, was depublished by this Court, and therefore cannot be relied on.[4] The other, Bay Area Cab Lease, was a federal district court case that provided no relevant analysis on the issue. Am. Empire Surplus Lines Ins. Co. v. Bay Area Cab Lease, Inc., 756 F. Supp. 1287, 1288 (N.D. Cal. 1991).

The trial court in this case relied heavily on Bay Area Cab Lease, a district court order on summary judgment. However, the holding that negligent supervision was not an "accident" was not necessary to the decision, because a) the policy was not a general liability policy, but was instead premises-specific, limited to "'accidents' occurring 'on the premises'"; and b) the policy contained an unambiguous assault and battery exclusion which applied irrespective of who committed the assault. Id. at

---

Moreover, exceptions to the exclusions would be illusory. Nat'l Union Fire Ins. Co. v. Lynette C., 228 Cal. App. 3d 1073, 1078 (Cal. Ct. App. 1991), reh'g denied and opinion modified (Apr. 18, 1991) (finding coverage for wife of molester because "if her interpretation is not accepted, the Exclusion (1) exception is rendered meaningless, contrary to settled principles of insurance policy interpretation.").

[4] Nevertheless, it should be noted that L.A. Checker Cab relied exclusively on Delgado. For the reasons discussed below, Delgado does not dictate a finding of no occurrence.

1289, 1291. Moreover, although the order included a heading entitled "[n]egligent hiring/supervision is not an 'accident' even if it could be said to have occurred 'on the premises,'" the court only found that "the *hiring* of Woods could not seriously be characterized as an 'accident.'" Id. at 1290 (emphasis added). The order did not discuss the negligent supervision claim, which involved negligent acts that were completely different from the act of hiring. While the act of hiring an employee may be intentional, it is difficult to conceive how inadequate supervision can be an intentional act. The Bay Area Cab Lease court did not address the question of how negligent supervision could be anything but an accident.

In addition, Bay Area Cab Lease's discussion of negligent hiring relied on only three court of appeal cases, none of which involved the question of whether negligent supervision constituted an accident. Maples v. Aetna Cas. & Sur. Co., 83 Cal. App. 3d 641, 647-648 (1978), and State Farm Mut. Auto Ins. Co. v. Longden, 197 Cal. App. 3d 226, 233 (1987), both involved the question of whether an act in one policy period that caused damage in another policy period could trigger the first policy. The courts in those cases held that the policy in effect when the damage occurred was the triggered policy. Although there is language in those cases addressing when an "accident" occurred, there is no analysis of whether the act in the first policy could have constituted an occurrence if the damage had occurred in that same policy period.[5]

The third case, Foremost, involved a car accident in Mexico where the car had been loaned by the insured to the driver. Foremost Ins. Co. v. Eanes, 134 Cal. App. 3d 566 (1982). The policy excluded accidents in

[5] In Farmers v. Allstate, the district court indicated that it was "inclined" to follow Maples, but did not have to rule on the issue. Farmer ex rel. Hansen v. Allstate Ins. Co., 311 F. Supp. 2d 884, 893 (C.D. Cal. 2004), aff'd sub nom. Farmer v. Allstate Ins. Co., 171 F. App'x 111 (9th Cir. 2006).

Mexico, but the insured loaned the auto to the driver in the U.S. The insured argued that the loaning of the auto was an accident, but the court of appeal disagreed. The court, however, clarified its ruling by stating:

> While a manufacturing defect (see *Oil Base, supra*) or a negligent repair (see *Sylla, supra)* may conceivably fit within this rubric ["accident"], the intentional loaning of a vehicle to friends does not. *This is especially true if there is no owner negligence involved and liability is premised on the strict liability provisions of Vehicle Code section 17150.* Under such circumstances, we find it impossible to view the totally expected and totally reasonable actions of the vehicle owner as constituting an "accident" within the meaning of the policy.

Id. at 571 (emphasis added). Had the owner been negligent in loaning the car, the court suggests it may have ruled differently. In any event, the Foremost decision has little to do with negligent supervision.

The fact that the Bay Area Cab Lease court found only these three cases to support its conclusion that negligent hiring is not an accident is instructive. These cases all dealt with issues very different from the present case. Maples and Longden addressed the question of which policy is triggered when an act is committed during one policy period that produces injury in another. And Foremost found that an uncovered accident in Mexico could not be converted into a covered accident merely by the fact that the insured loaned the car to the driver in the U.S. These decisions are not useful without considering their factual contexts, none of which is close to the facts of the present case.

Notably, the district court in Bay Area Cab Lease considered whether the concurrent causation analysis in Partridge should change the court's conclusion. Bay Area Cab Lease, 756 F.Supp. at 1291. The court observed the Partridge case's holding that "when independent, negligent acts concur to produce one injury, each act should be viewed separately to

determine liability." Id. at 1291 (citing State Farm v. Partridge, 10 Cal. 3d 94 (1973), discussed *infra*). The court found that concurrent causation did not apply because "[t]he court has interpreted the policy to extend only to liability arising out of the condition or maintenance of the building. Thus, although *this might indeed be a case of joint causes*, neither of them is an insured cause." Id. (emphasis added).

This discussion of Partridge demonstrates that the court's interpretation of "accident" was somewhat of a red herring. In the context of the case before it, because coverage was limited to particular premises and there was a clear assault and battery exclusion, there was no covered accident because the incident occurred outside of the covered premises and involved an assault and battery. The opinion's closing remarks support this conclusion. The court distinguished Underwriters Ins. Co. v. Purdie, 145 Cal. App. 3d 57 (Cal. Ct. App. 1983), a case which found that negligent hiring that led to a shooting by a store clerk was an accident, despite an exclusion for firearms. Bay Area Cab Lease, 756 F.Supp. at 1291. The Bay Area Cab Lease court distinguished Purdie not based on the interpretation of "accident," but based on the differences between the policy in Purdie and the policy in Bay Area Cab Lease.

> The only real issue that [Purdie] raises is whether the conclusion that negligent hiring is not covered is an erroneous one. The policy in [Purdie] contained essentially the same language with regard to coverage for bodily injury and property damage as the policy in the instant case. However, the [Purdie's] policy was a broader, liability insurance policy and the policy in this case is a concededly narrower Owner's, Landlord's & Tenant's policy.

Id. The court then concluded the opinion with the following instructive comment:

> The issue here is not whether Cab Co. should have to answer for its allegedly negligent hiring of potential child molesters

> to ferry vulnerable children from place to place but rather whether it purchased the right insurance policy to protect itself from liability in the event that something like this occurred. The court finds that it did not.

Id. When read in context, the opinion in Bay Area Cab Lease is about the exclusions, not about the insuring clause. Had the policy been a general liability policy rather than a premises-specific policy, and had the policy not contained the assault and battery exclusion, the court implies that the insured in that case would have "purchased the right insurance policy," and the negligent supervision would have been covered. Id.

Other cases have found that negligent supervision can constitute an occurrence under a general liability policy. In TWT, Inc., the district court rejected the insurer's argument that the underlying allegations, which included negligent supervision, could not constitute an "occurrence" under the policies because they were by definition intentional." Westfield Ins. Co. v. TWT, Inc., 723 F. Supp. 492, 495 (N.D. Cal. 1989). The district court distinguished cases finding wrongful termination to be intentional, and found that the negligent supervision claims asserted were not intentional acts and "could constitute an 'occurrence' under the policy language. Id. at 496; accord, Fireman's Fund Ins. Co. v. Nat'l Bank for Cooperatives, 849 F. Supp. 1347, 1368 (N.D. Cal. 1994) (finding negligent supervision was an occurrence, agreeing with Keating and Westfield).

In State Farm Fire & Cas. Co. v. Westchester Inv. Co., 721 F. Supp. 1165, 1168 (C.D. Cal. 1989), the district court "found that a complaint alleging housing discrimination triggered a duty to defend under an "accident" policy. The complaint alleged intentional racial discrimination by the property managers. The court disagreed with the insurer that the intentional act of discrimination was the occurrence and therefore not covered.

> State Farm incorrectly asserts that there is no "occurrence" here that would trigger coverage. They contend that the intentional act of discrimination does not constitute an accident. However, an examination of the ... complaints reveal that there is possible liability ... under a negligent supervision of the property managers. This type of recovery does not require intent and can therefore constitute an "accident" that is entitled to coverage.

Id. (citations omitted). Likewise, in Keating v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 754 F. Supp. 1431, 1440 (C.D. Cal. 1990), rev'd on other grounds 995 F.2d 154 (9th Cir. 1993), the district court found that the potential for liability for negligent supervision in allowing negligent misrepresentations to be made was an "occurrence" and created a duty to defend.

> It is clear that an accident is not present when the *insured* performs a deliberate act. ... However, "an 'accident' exists when any aspect in the causal series of events leading to the injury or damages was unintended by the insured and a matter or fortuity." Merced Mutual makes clear that the focus is on whether the event was an accident from the *perspective of the insured.*

Keating v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 754 F. Supp. 1431, 1440 (C.D. Cal. 1990) (emphasis added) (quoting Merced Mutual Insurance Co. v. Mendez, 213 Cal. App. 3d 41 (1989), rev'd on other grounds 995 F.2d 154 (9th Cir. 1993) (reversing due to finding that unfair competition claims were not covered under advertising injury coverage provision and economic loss causing emotional distress was not covered, without addressing "occurrence" issue); see also Chatton v. National Union Fire Ins. Co., 10 Cal. App. 4th 846, 862 (1992) (distinguishing Keating because the only claims were negligent representations, and there were no claims of negligent supervision).

Other jurisdictions that have addressed the issue have also found that negligent supervision can be an occurrence or "accident" under a general liability policy. The Sixth Circuit addressed this issue and found that negligent hiring and supervision claims are an occurrence (defined as an accident) within a general liability policy as a matter of first impression under Kentucky law. Westfield Ins. Co. v. Tech Dry, Inc., 336 F.3d 503, 509–10 (6th Cir. 2003). In determining that there was coverage for the employer's negligent hiring and retention where the employee had committed a murder, the Sixth Circuit surveyed cases from other states and found that

> [w]hen courts deny coverage in negligent hiring cases, they arguably transform an employer's negligent acts into intentional acts, dissolving the distinction between negligent and intentional conduct. To avoid this problem, we will "look to the actions of the insured and not the perpetrator of the intentional act in determining whether there is coverage"....

Id. at 509–10 (citations omitted); see also U.S. Fid. & Guar. v. Toward, 734 F. Supp. 465, 468 (S.D. Fla. 1990) (finding claims of an employer's negligent hiring, retention, and supervision of a child abuser qualified as "an accident" and stating "the insurer cannot dispute that the term 'accident' includes direct acts of negligence such as unreasonable care in supervising and hiring the school's employees. An accident is an unexpected occurrence not actually foreseen by the insured."); Hortica-Florists' Mut. Ins. Co. v. Pittman Nursery Corp., No. 07-CV-1119, 2010 WL 749368, at *4 (W.D. Ark. Mar. 2, 2010) (finding "the term 'occurrence' is basically defined as an accident, which includes direct acts of negligence, such as unreasonable care in supervising and hiring employees," in cases involving employee's intentional extortion); but see

Erie Ins. Co. v. Am. Painting Co., 678 N.E.2d 844, 846 (Ind. Ct. App. 1997) (negligent hiring and retention were intentional, not accidental).

The Ohio Supreme Court also squarely addressed this issue and found that claims of negligent supervision against the parents were occurrences or accidents, where the son committed a criminal assault.

> [W]hen a liability insurance policy defines an "occurrence" as an "accident," a negligent act committed by an insured that is predicated on the commission of an intentional tort by another person, e.g., negligent hiring or negligent supervision, qualifies as an "occurrence."

Safeco Ins. Co. of Am. v. White, 122 Ohio St. 3d 562, 569 (2009). The Ohio high court also discussed that its holding was consistent with prior cases finding that coverage for negligent hiring or supervision of child molesters was not barred intentional conduct. The court stated that

> torts like negligent supervision, hiring, retention, and entrustment are separate and distinct from the related intentional torts (committed by other actors) that make the negligent torts actionable. Thus, in determining whether a policy exclusion precludes coverage for that negligent act, we must examine the injuries arising from the negligent act on their own accord, not as part of the intentional act.

Id. at 570–71 (2009). The court reiterated its rule that "'the intentions or expectations of the negligent insured must control the coverage determination, and not the intentions or expectations of the molester" because "a contrary decision would 'effectively dissolve[ ] the distinction between intentional and negligent conduct, allowing the intentional act to devour the negligent act for the purpose of determining coverage.'" Id. at 568 (citations omitted) (quoting Doe v. Shaffer, 90 Ohio St.3d 388, 738 (2000)). These cases demonstrate the correct view, consistent with this Court's precedents, that for the purpose of liability insurance the accident analysis must focus on the actions or omissions of the insured.

B. Where the Law Holds a Party Liable in Tort For Having Caused an Injury, the Causation Is Not "Too Attenuated" To Come within Liability Coverage

Not all tort liability necessarily falls within the scope of a general liability insurance policy. However, where an insured is held liable for its part in causing an injury, the scope of the insurance coverage must focus on the cause for which the insured is being held liable—the insured's conduct—even if that conduct is not the only or most immediate cause. To find that there is only one "injury causing event" of an injury under a general liability policy, though there may be multiple legal causes and multiple liable parties, is unsupported by the language of the policy and California case law.

Liberty argues that the accident is solely the immediate injury causing act—the intentional molestation—not "antecedent" conduct by the insured. Such an analysis conflates the negligent acts of the insured and the intentional acts of the third party. Instead, courts should focus on the *insured's* liability producing acts, consistent with this Court's precedents. In Delgado, this Court refused to view the accident from the perspective of the injured party, ruling instead that"[u]nder 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, 47 Cal. 4th at 311(emphasis added).[6] The Court found that an

---

[6] In support of its argument that in this case, the insured's perspective is irrelevant, Liberty argues that the modification of the insurance form to omit the language "from the standpoint of the insured" is significant and demonstrates that the perspective of the insured is not to be taken into account. Respondent's brief at p. 35-37. In Delgado the claimant argued that the removal of the phrase "neither expected nor intended from the standpoint of the insured" meant that the term accident should be construed from the perspective of the injured party). Delgado, 47 Cal. 4th at 310-312. This Court *rejected* that argument, finding that the history of the change

insured's intentional conduct could not be transformed into an accident because of the insured's mistaken belief that he was acting in self-defense.

As this Court recognized in Delgado,

> Any given event, including an injury, is always the result of many causes." 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.

Id. at 315 (2009) (citations omitted). Although Delgado goes on to say that "[t]o look to acts within the causal chain that are antecedent to and more remote from the assaultive conduct would render legal responsibilities too uncertain," (id. at 315–16), that does not mean, as Liberty asserts, that conduct earlier in the causal chain cannot be the focus of the accident analysis *where liability is imposed based on that "antecedent" conduct.*

Where an insured's acts are a legal cause of an injury, that is an injury-causing act for purposes of analyzing the scope of liability coverage, irrespective of whether or not there were other, more "immediate" causes. The Delgado Court's statement that looking at "acts within the causal chain that are antecedent to and more remote ... would render legal responsibilities too uncertain" is inextricable from the fact that the insured and the claimant were the only actors involved. Delgado, 47 Cal. 4th at 315-16. Thus, events earlier in the causal chain that changed the *insured's* state of mind were disregarded. Where the insured and the intentional actor are not the same, this analysis does not work.

Hogan is distinguishable because the *claimant* deliberately made the over-width cuts for which he was seeking compensation. Hogan v. Midland Nat'l Ins. Co., 3 Cal. 3d 553 (1970). Hogan held that the lumber deliberately cut too wide was "not damaged as the result of an accident."

---

was an attempt to clarify a split in the courts, but did not change the meaning: that "accident" refers to "the conduct of the insured." Id. at 311.

Id. at 558. In fact, the lumber was not damaged at all; there was no property damage and no customers rejected the lumber. The only claimed "damage" was the economic loss measured by the cost for additional lumber and added freight for the boards which were intentionally cut wider than necessary. Id. at 560. The lack of resulting damage explains why undercut lumber (which was accidental) was different from intentionally overcut wood (which was not).

If, for example, a customer who purchased the over-cut lumber had brought a claim directly against the saw manufacturer because his house was out-of-plumb and suffered damage due the boards being too wide (assuming the manufacturer insured could be held liable) the result likely would have been different.

The concern that liability insurance will have to step in and cover cases where the cause is "too attenuated" is already accounted for by the law of torts, which draws a line between causes for which liability can be imposed and remote causes which cannot. Heightened standards of foreseeability are applied before negligent party can be held liable for the criminal acts of another. Delgado v. Trax Bar & Grill, 36 Cal. 4th 224, 240 fn. 20 (2005) (a proprietor may be held liable for its own negligence in in selecting, training, supervising, or retaining security guards to protect patrons from criminal acts). As such, where the law finds causation sufficient to impose liability, that cause cannot be "too attenuated" for purposes of general liability coverage.

C. Under Partridge and Garvey, Liberty's Causation Analysis Applies Only To First Party Property Insurance, Not To Liability Insurance

Liberty's argument that only the "immediate cause" of the injury determines whether or not there is an "accident" ignores California's

concurrent causation doctrine, and seeks to use the "efficient proximate cause" analysis that is applicable only to first party property insurance cases.

In Partridge, 10 Cal. 3d 94, the insured was driving his car and his gun discharged when he went over a bump, striking his passenger. The insured had filed the gun's trigger to make it a "hairpin trigger." The sensitive trigger caused the gun to fire when the car hit the bump. The insured's homeowner insurance policy excluded liability arising from the use of an automobile. This Court found that the hairpin trigger was a concurrent proximate cause of the injury, so there was coverage under the homeowner policy even though the more immediate injury-producing act was driving the automobile over the bump. Id., at 132. Applying Partridge, there is coverage under a general liability policy for an insured's covered negligent conduct as long as the conduct was a legal cause of the injury, even if other, uncovered events also were legal causes of the injury:

> 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.
>
> Under Partridge, then, we look to whether a covered act or event subjected the insured to liability for the ... injury under the law of torts. ... 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.

State v. Allstate Ins. Co., 45 Cal. 4th 1008, 1031 (2009) (internal citations omitted) (quoting Partridge, 10 Cal. 3d 94).

Importantly, the "concurrent causation" doctrine in Partridge does not apply in first party property insurance cases. Garvey v. State Farm Fire & Cas. Co., 48 Cal. 3d 395(1989). Garvey held that the concurrent causation doctrine in Partridge was appropriate for third party liability

cases, but not for first party property cases. For first party cases, the court adopted the "efficient proximate cause" test. Under the efficient proximate cause test, "when a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss." State Farm & Cas. Co. v. Von Der Lieth, 54 Cal. 3d 1123, 1131 (1991). Conversely, the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate cause. Id.

The Garvey Court analyzed at length the difference between third party liability insurance and first party property insurance, and concluded that the "concurrent causation" doctrine applied to liability insurance disputes, and the "efficient proximate cause" test applied to property insurance cases. Garvey, 48 Cal. 3d 395. The Court explained that property losses frequently involve more than one peril that might be considered legally significant. If one of the perils is covered and the other is not, "the task becomes one of identifying the most important cause of the loss and attributing the loss to that cause." Id. at 406. But this analysis *does not* apply to liability insurance:

> On the other hand, the right to coverage in a third-party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty. This liability analysis differs substantially from the coverage analysis in the property insurance context, which draws on the relationship between perils that are either covered or excluded in the contract. In liability insurance, by insuring for personal liability, and agreeing to cover the insured for his own negligence, the insurer agrees to cover the insured for a broader spectrum of risks.

Id. at 407. The Court quoted from Partridge in reiterating that:

> "Although there may be some question whether either of the two causes in the instant case can be properly characterized as *the* "'prime,' 'moving' or 'efficient' cause of the accident

> we believe that *coverage under a liability insurance policy* is equally available to an insured whenever an insured risk constitutes simply *a* concurrent proximate cause of the injuries.".

Id. at 405.

Liberty's proposed "immediate cause" test is really the "efficient proximate cause" test that can only be applied in the first party insurance context. Liberty would have the Court choose only the "immediate cause" to determine coverage, whereas the policy covers the insured's *liability*, which "draws on traditional tort concepts of fault, proximate cause and duty." Id. at 407. Applying the correct test—concurrent causation—to this third party liability case, it is clear that L&M's negligent supervision was an independent concurrent cause of Doe's injuries, whether it was "immediate" or not; it was "an occurrence" that caused the injuries, and is covered under L&M's liability policy.

D. Policy Considerations and Ramifications

An insured's sexual molestation is excluded from coverage both by public policy and policy exclusions for intentional acts. *See* Ins. Code § 533. However, where the insured employer is liable only if its own separate acts or omissions, such as negligently failing to conduct a background check, or negligent supervision, are determined to be a cause of the injury, no such policy precluding coverage exists.

As discussed above, defining accident from the viewpoint of the insured "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." Delgado, 47 Cal. 4th at 311. Businesses and individuals

purchase insurance to defend and indemnify them for their acts and omissions that create potential liability. Making that protection dependent on the actions of third parties, which are beyond their control, is inconsistent with that purpose.

For example, a landlord could be liable for creating a dangerous nuisance if it created an unsafe roof deck and allowed the tenants to use it. The landlord would have coverage if someone negligently bumped into the claimant, or the claimant tripped and fell off the roof. If someone intentionally pushed the claimant off the roof, however, the landlord could be liable, but under Liberty's analysis the landlord would lose coverage because the third party acted intentionally. Why should the independent acts of a third party dictate whether or not there is liability coverage where the landlord had no control over the third party, and is held liable irrespective of the third party's intent? Nothing in the policy language or the definition of accident mandates such an internally inconsistent result, and such a result would be contrary to the reasonable expectations of the insured.

Similarly, a school can be liable for failing to protect a child from foreseeable risks, including by third parties. Liberty's proposed rule could mean that a school would have coverage if a child were run over by a negligent driver while leaving school, but not if the child was shot by a gang member on school grounds. See, e.g., Hoyem v. Manhattan Beach City Sch. Dist., 22 Cal. 3d 508, 512 (1978) (school district can be held liable for negligent supervision which proximately causes student's injuries, even if incurred off campus, when truant student was hit by a car); Brownell v. Los Angeles Unified Sch. Dist., 4 Cal. App. 4th 787, 798 (1992) (reversing award for negligent supervision of student shot by a gang member because of lack of foreseeability based on facts, but acknowledging the potential for liability where there was history of similar

criminal activity).

A holding that negligent supervision is not an "occurrence" or "accident" would have wide-reaching ramifications. It would eliminate coverage and therefore compensation to victims of abuse. It would eliminate coverage for negligent vetting, training and/or supervision of counselors, scout leaders, teachers, etc. for all manner of private schools, camps, scouts, religious organizations, and governmental entities that are held liable for negligent supervision of individuals who engage in intentional misconduct. These entities have separate tort liability because of their own negligent conduct in failing to properly vet, train, or supervise employees. See, e.g., Z.V. v. Cty. of Riverside, 238 Cal. App. 4th 889, 902 (2015), review denied (Sept. 23, 2015) (county could be liable for negligent supervision if a person in a supervisorial position over the actor had prior knowledge of the actor's propensity to do the bad act); Doe 1 v. City of Murrieta, 102 Cal. App. 4th 899, 913 (2002) (police department could be liable for negligent failure to "follow explorer program rules and guidelines" in supervising officers' interactions with minors participating in "Explorers" program).

III. CONCLUSION

A holding that there is an "occurrence" under a general liability policy when a claimant sues the employer for negligence in hiring, retaining, or supervising an employee who intentionally injured the claimant is consistent with this Court's precedents, the insurance industry's historical conduct, the reasonable expectations of the insureds, and California public policy.

For all these reasons, Amici respectfully submit that the Court should answer the certified question from the Ninth Circuit in the affirmative.

Respectfully submitted,

DATED: May 10, 2017

WEINSTEIN & NUMBERS, LLP

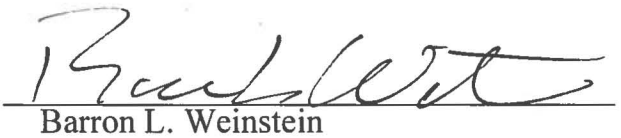
By: 
Barron L. Weinstein

Attorneys for Amici Curiae
California Catholic Conference and
Association of Christian Schools
International

CERTIFICATE OF WORD COUNT

The text of this brief consists of 7,344 words as counted by Microsoft Office Word2010.

Dated: May 10, 2017

By: 
Barron L. Weinstein