NO. S155129

In the Supreme Court of the State of California

JONATHAN DELGADO,
Plaintiff and Appellant,

vs.

INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA,
Defendant and Respondent.

APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF UNITED POLICYHOLDERS

IN SUPPORT OF JONATHAN DELGADO

Appeal from the Superior Court of the State of California
For the County of Los Angeles

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Cassandra S. Franklin (Bar No. 119408)
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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

United Policyholders ("UP") respectfully requests leave to file the attached brief amicus curiae in this appeal, and in support of this application shows:

1. UP is a not-for-profit corporation (tax-exempt under Internal Revenue Code section 501(c)(3)) founded in 1991 to educate the public, the judiciary, and elected officials on insurance issues and the rights of insureds. Funded by donations and grants from individuals, businesses, and foundations, UP is based in Northern California and operates across the United States. Among other things, UP monitors legal developments that impact insureds and publishes materials aimed at educating insureds and insurers alike. UP has previously appeared as amicus curiae in over 220 cases in the California courts, including a number of times in this Court. *See, e.g.*, *Powerine Oil Co. v. Superior Court*, 37 Cal. 4th 377 (2005); *Dart Indus., Inc. v. Comm. Union Ins. Co.*, 28 Cal. 4th 1059 (2002); *Kransko v. Am. Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390 (2000). UP has also appeared as amicus curiae in cases before the United States Supreme Court and was the only national consumer organization to submit an *amicus* brief in the landmark case of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

2. This case concerns the proper scope of an insurer's duty to defend its insured in circumstances indicating that the insured may have acted in self-defense. Homeowners' policies and commercial general liability ("CGL") policies commonly provide that the insurer has a duty to defend its insured in suits involving an occurrence that is neither expected nor intended from the standpoint of the insured. Thus, this case involves issues of importance to insureds throughout the state. This case presents an opportunity to clarify the circumstances under which an insurer has a duty to defend a lawsuit alleging negligent self-defense.

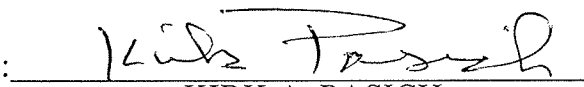
3. UP is familiar with the appellate briefing in this case. In its attached brief, UP does not address or agree with all the arguments of either party. However, UP raises arguments and considers relevant case law not discussed by the parties. In particular, UP addresses the historical breadth and importance of the duty to defend and the drafting history of the "occurrence" provision, as well as the history of coverage for lawsuits involving allegations of self-defense in this and other states. In so doing, UP provides the Court with a unique perspective that should be helpful in resolving these issues on appeal.

4. Accordingly, UP respectfully seeks leave to file the attached brief so that, in resolving this matter, the Court will have the benefit of the perspectives presented in the brief, as well as of the arguments and authorities not heretofore presented.

WHEREFORE, UP respectfully requests leave to file the attached brief amicus curiae.

DATED: February 29, 2008

DICKSTEIN SHAPIRO LLP

By: 

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I. INTRODUCTION

This brief amicus curiae is directed at the key issue in this case—whether an insurer has a duty to defend its insured in a lawsuit involving the potential that the insured acted in self-defense. As shown below, the answer is that whenever the lawsuit contains factual allegations or extrinsic evidence from which the insurer can infer that the insured may have acted under the apprehension, even if erroneous, that he or she may be in danger, the insurer has a duty to defend.

The duty to defend is a fundamental aspect of insurance coverage. Historically California courts have been especially protective of an insured's right to call upon the superior resources of its insurer. In keeping with this view, California cases have determined that insurers have a duty to defend an underlying lawsuit when there is a potential that the insured reasonably or unreasonably acted in self-defense, i.e., without intent to cause injury.

In other states, the courts are split regarding the issue of coverage for self-defense. However, the drafting history of liability policies indicates that the drafters intended to cover intentional acts that resulted in unintended harm, such as acts taken in self-defense. Additionally, given the breadth of the term "accident," a reasonable insured would likely expect to be covered when acting defensively to counter a perceived threat. Thus, the determination as to whether an insured's claim of self-defense involves an "accident" should be made not by examining just the insured's act in isolation, but by examining the act in combination with the insured's intent regarding the resulting injury as well as in the context of the circumstances in which the act occurred.

Accordingly, at a minimum, the Interinsurance Exchange of the Automobile Club (the "Exchange") had a duty to defend its insured, Reid. (It is undisputed that Reid assigned certain claims to Delgado in exchange for an agreement not to execute on a portion of the stipulated judgment in Delgado's underlying lawsuit against Reid.)

The underlying complaint alleged that Reid kicked and hit Delgado and that he negligently acted in self-defense when he did so. These facts at least potentially establish coverage. The Exchange was clearly in possession of facts indicating a potential for coverage when it received the underlying complaint. Certainly, the Exchange could not conclusively negate all facts suggesting this potential on demurrer. Thus, the Court of Appeal correctly followed California precedent and reversed the trial court's dismissal of this action. The Court of Appeal's well-reasoned decision should be affirmed.

II. THE DUTY TO DEFEND IS A CRITICAL ASPECT OF INSURANCE COVERAGE UNDER CALIFORNIA LAW

In a seminal decision regarding the duty to defend, this Court stated:

> The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability. As a consequence, California courts have been consistently solicitous of insureds' expectations on this score.

Montrose Chem. Corp. v. Superior Court, 6 Cal. 4th 287, 295-96 (1993). Accordingly, when "a liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity . . . . [T]he carrier must defend a suit which *potentially* seeks damages within the coverage of the policy." *Id.* at 295 (citations and internal quotation marks omitted). Indeed, the duty exists not only when the likelihood of coverage is clear; but when coverage is dubious and may never develop. *Id.*; *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal 4th 1076, 1081 (1993) (duty to defend is broader than duty to indemnify and may apply even in action where no damages are ultimately awarded).

> If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage.

Scottsdale Ins. Co. v. MV Transp., 36 Cal. 4th 643, 655 (2005). Accordingly, if any allegation in a complaint potentially is covered, an insurer must defend the entire action. *Horace Mann*, 4 Cal. 4th at 1084 (allegations in complaint gave rise to duty to defend entire action even though other allegations in complaint clearly were not covered); *see also Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 276-77 (1966) ("An insurer, therefore, bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy.").

Thus, "that the precise causes of action pled by the third-party complaint may fall outside policy coverage does not excuse the duty to defend where, under the facts alleged, reasonably inferable, or otherwise known, the complaint could fairly be amended to state a covered liability." *Scottsdale*, 36 Cal. 4th at 654; *see also Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 19 (1995) ("Facts extrinsic to the complaint give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy."); *CNA Cas. v. Seaboard Sur. Co.*, 176 Cal. App. 3d 598, 609 (1986) (potential liability, suggested by facts alleged or otherwise available to insurer, determines duty to defend). And, even when the insured is unsuccessful in his defense and the insured party recovers based on a finding of willful conduct by the insured, the duty to defend does not dissolve. *Gray*, 65 Cal. 2d at 277; *Buss v. Superior Court*, 16 Cal. 4th 35, 46 (1997) (duty to defend "is extinguished only prospectively and not retroactively").[1]

The Exchange policy in this case provided typically broad "duty to defend" coverage: "We will defend any suit claiming damages for bodily injury . . . to which this coverage applies . . . even if the allegations are groundless, false, or fraudulent."

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[1] Indeed, the insurer can obtain reimbursement of defense payments *only* if it can show that it expressly reserved its right to seek reimbursement and can prove that the payments were made on a claim that was never even potentially covered. *Buss*, 16 Cal. 4th at 49-50; *Scottsdale*, 36 Cal. 4th at 657.

2 CT000140[2]. Thus, under long-settled California law, the Exchange had duty to defend any suit alleging a potentially covered claim.

III. PRINCIPLES OF POLICY INTERPRETATION

The fundamental goal of contract interpretation is to ascertain and effectuate the intention of the parties. Cal. Civ. Code § 1636; *Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 763 (2001); *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 867 (1993); *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 821 (1990). In assessing that intent, the words of a contract are generally to be understood in their "ordinary and popular sense." Cal. Civ. Code § 1644; *AIU*, 51 Cal. 3d at 22.

"[I]f the meaning a lay person would ascribe to contract language is not ambiguous, we apply that meaning." *AIU*, 51 Cal. 3d at 822; *see also* Cal. Civ. Code §§ 1638, 1639. However, if the wording is susceptible to two or more reasonable interpretations, it is ambiguous. *Safeco*, 26 Cal. 4th at 763. Ambiguities are

> resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promisee understood them at the time of formation. If application of this rule does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist. This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, the objectively reasonable expectations of the insured.

Id. at 879 (citations and internal quotations omitted). *See also Kazi v. State Farm Fire & Cas. Co.*, 24 Cal. 4th 871, 878 (2001) ("Any ambiguous terms are resolved in the insureds' favor, consistent with the insureds' reasonable expectations."). Indeed, the insured's reasonable expectations are the benchmark for interpretation of an insurance policy, regardless of whether it is ambiguous on its face. *Kazi*, 24 Cal. 4th at 879 (court concluded policy language was unambiguous but still interpreted in manner

[2] All cites to the record are to the two volumes of Clerk's Transcript in this matter.

"[c]onsistent with the insureds' reasonable expectations"); *AIU*, 51 Cal. 3d at 824 n.10 (focusing on insured's expectation regarding meaning of unambiguous term "legally obligated"); *accord Reserve Ins. Co. v. Pisciotta*, 30 Cal. 3d 800, 809 (1982) ("When confronted with standardized provisions in a form insurance contract, the primary focus of our inquiry is on the reasonable expectations of the insured at the time he purchased the coverage. The ordinary expectation of one who purchases liability insurance is that he will be covered for any liabilities incurred as a result of the activity to which the policy relates."); *Gray*, 65 Cal. 2d at 271 n.7 ("Not only the provisions of the policy as a whole, but also the exceptions to the liability of the insurer, *must be construed so as to give the insured the protection which he reasonably had a right to expect . . .*."); *Hendrickson v. Zurich Am. Ins. Co. of Ill.*, 72 Cal. App. 4th 1084, 1089 (1999) ("Our interpretation of the subject policies requires that we first examine the insuring clauses which are interpreted broadly to protect the objectively reasonable expectations of the insured." (citation omitted)); *Prudential-LMI Commercial Ins. Co. v. Reliance Ins. Co.*, 22 Cal. App. 4th 1508, 1513 (1994) ("Ultimately, [in interpreting an insurance policy] the test is whether coverage is 'consistent with the insured's objectively reasonable expectations.'" (quoting *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1265 (1992))).

Furthermore, the meaning of contractual language cannot be resolved in a vacuum. *Bay Cities*, 5 Cal. 4th at 867. As courts and commentators alike have long understood, whether a contractual provision is clear or ambiguous will vary, depending on the event at hand. *Id.*; *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 38 (1968) ("[w]ords . . . do not have absolute and constant referents") (hereafter, "*PG&E*"); *Towne v. Eisner*, 245 U.S. 418, 425 (1918) ("[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used"); Margaret N. Kniffin, *A New Trend In Contract Interpretation:*

The Search for Reality As Opposed to Virtual Reality, 74 Or. L. Rev. 643, 644 (1995) ("the meaning of a word cannot be clear without reference to its context"); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 417 (1899) ("A word generally has several meanings, even in the dictionary."). Accordingly, contractual language must be interpreted in the context of the instrument as a whole, as well as the circumstances surrounding its inception and the matter giving rise to the claim for coverage. Cal. Civ. Code §§ 1641, 1647; *Bay Cities*, 5 Cal. 4th at 867; *Bank of the West*, 2 Cal. 4th at 1265 (1992).

Thus, to understand the meaning of policy language, courts often refer to drafting history. *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 643 (2003) (reviewing drafting history of "occurrence" provisions in context of analysis of pollution exclusion); *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 669-73 (1995) (industry publications and drafting history could be helpful in policy interpretation). For example, in *Montrose*, the Court considered insurance industry drafting history. It explained:

> Most courts and commentators have recognized, however, that the presence of standardized industry provisions and the availability of interpretive literature are of considerable assistance in determining coverage issues. ... Such interpretive materials have been widely cited and relied on in the relevant case law and authorities construing standardized insurance policy language.

10 Cal. 4th at 670 (citation omitted).

A similar approach was taken in *Golden Eagle Insurance Co. v. Insurance Co. of the West*, 99 Cal. App. 4th 837, 847-48 (2002), where the court cited a bulletin published by the National Underwriters Association, noting that the bulletin was "used by insurance agents and brokers to interpret standard insurance policy provisions." The court explained that, "'[R]eliance on [an] FC & S bulletin is appropriate under Civil Code section 1645 which provides: "Technical words are to

be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."'" (quoting *Maryland Casualty Co. v. Reeder*, 221 Cal. App. 3d 961 (1990)).

Other courts have echoed these views. As one court stated, "[I]nsurance industry publications are particularly persuasive as interpretive aids where they support coverage on behalf of the insured. Ultimately, the test is whether coverage is 'consistent with the insured's objectively reasonable expectations.'" *Prudential-LMI Commercial Ins. Co. v. Reliance Ins. Co.*, 22 Cal. App. 4th 1508, 1513 (1994) (citation omitted); *see also Vandenberg v. Superior Court*, 21 Cal. 4th 815, 834-35 (1999) (citing insurance treatises and insurance industry commentary); *Martin Marietta Corp. v. Ins. Co. of N. Am.*, 40 Cal. App. 4th 1113, 1123 (1995) (considering insurance industry commentary and drafting history in interpreting "personal injury" provision).

IV. THE DRAFTING HISTORY OF OCCURRENCE COVERAGE

As this Court has previously noted:

> Prior to 1966, the standard-form CGL policy provided coverage for bodily injury or property damage caused by an "accident." The term "accident," however, was not defined in the policy. As a result, courts throughout the country were called upon to define the term, which they often interpreted in a way as to encompass pollution-related injuries [and find coverage]. In response, the insurance industry revised the CGL policy in 1966 and changed the former "accident"-based policy to an "occurrence"-based policy. The new policy specifically defined an "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury and property damage that was neither expected nor intended from the standpoint of the insured."[3]

[3] Although the policy at issue in this case is a standard form "Preferred Homeowners Policy—Form 3," the drafting history of the standard provisions for liability coverage for bodily injury is essentially the same. *Accord Ohio Cas. Ins. Co. v. Henderson*, 939 P.2d 1337, 1342 (Ariz. 1997). Indeed, although liability policies are written in many forms and vary as to the risks insured, "virtually all [liability] policies contain

MacKinnon, 31 Cal. 4th at 643; *see also* Donald F. Farbstein & Francis J. Stillman, *Insurance for the Commission of Intentional Torts*, 20 Hastings L.J. 1219, 1219 n.1, 1220 (hereafter "Farbstein") (because term "accident" was not defined in pre-1966 policies and became subject of much litigation, policy forms were modified in 1966, reflecting "changes in wording although not in philosophy").

Thus, the 1966 policy by its definition of "occurrence" tied coverage to "accident." However, the coverage definition further circumscribed the meaning of "accident" to encompass only bodily injury "that was neither expected nor intended from the standpoint of the insured."[4] Moreover, the express focus of this circumscription is on the insured's intent regarding the resulting injury rather than the act that led to the injury. As William Obrist, then an assistant manager of the General Accident Group, stated:

> [I]nstances arise when the injury is an unintended result of an intentional act. The two situations, an absence of intent or an unexpected result, would be covered under either the "accident" or "occurrence" definition.

William Obrist, *The New Comprehensive General Liability Insurance Policy: A Coverage Analysis* 6-7 (Defense Research Institute, Inc. Nov. 1966) ("Obrist"). "[T]he only thing that the drafters sought to exclude from coverage was the intentional results of intentional acts such as murder." *See Ohio Cas. Ins. Co. v. Henderson*, 939 P.2d 1337, 1340, citing *Trial Transcript of In re Asbestos Ins. Coverage Cases* at 15901-02 (Mar. 4, 1986) (Testimony of Herbert Schoen, drafter of

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the same provisions regarding the kind of injury or harm insured by the policy." Donald F. Farbstein & Francis J. Stillman, *Insurance for the Commission of Intentional Torts*, 20 Hastings L.J. 1219, 1219 (1969) (hereafter, "Farbstein").

[4] Rather than defining "accident," the pre-1966 policies included an exclusion for injuries "intentionally caused by the insured." Farbstein, 20 Hastings L.J. at 1220. The drafting history indicates that the sole intent behind the retention of the term "accident" in liability policies was "to clarify the intent with respect to the time of coverage and the application of policy limits to a particular occurrence." Obrist at 6.

1966 policy language, also stating that even exclusion for injury that was objectively "reasonable certainty" given nature of insured's intended act was rejected by drafters because it was "too rough to inflict upon our insureds").

At some later point, the standard policy forms moved the "expected or intended" defining language out of the definition of "occurrence." For example, the 1999 form used in the homeowner's policy at issue in this case provides a duty to pay (i.e., indemnity) coverage for "Bodily injury . . . caused by an occurrence to which this coverage applies." 2 CT 000140. "Occurrence" is, in turn, defined simply as "an accident . . . which, during the policy period, results in bodily injury . . . ."[5] Thus, by defining "occurrence" simply as an "accident," this drafting change reflected a return to the broader "accident" policy language in existence in the 1966 form. And, as this Court has noted, the definition of "occurrence" that uses the term "accident" in a homeowners' policy "promise[s] coverage for liability resulting from the insured's negligent acts." *Safeco*, 26 Cal. 4th at 765 (insured's unintentional shooting of another child covered because, although insured pulled trigger intentionally, he believed gun to be unloaded and did not intend gun to fire)[6]; *accord MacKinnon*, 31 Cal. 4th at 649 (noting that language in CGL policy limited to coverage for occurrences and providing coverage for all sums that insured becomes legally

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[5] The "expected or intended" language has been moved to the exclusion section of the policy. *See* 2 CT 000141.

[6] The Exchange suggests that Delgado's reliance on this language in *Safeco* is irrelevant because the language is used in the context of the Court's interpretation of an "illegal acts" exclusion. *See* the Exchange's Reply Brief at 7-8 n.7. However, this distinction is one without a difference. It is clear from *Safeco* that the Court was interpreting the definition of "occurrence" in a homeowners' policy—a definition that appears identical to the definition at issue in this case. *See Safeco*, 26 Cal. 4th at 764-65. In analyzing the term "accident," the Court was evaluating the coverage granted under the policy. *See id.* In that context, the Court stated that "the term 'accident' is more comprehensive than the term 'negligence' and thus includes negligence." *Id.* at 765; *see also MacKinnon*, 31 Cal. 4th at 649 (occurrence policy construed to establish "a reasonable expectation that the insured will have coverage for ordinary acts of negligence resulting in bodily injury").

obligated to pay as damages caused by bodily injury "establishes a reasonable expectation that the insured will have coverage for ordinary acts of negligence resulting in bodily injury").

V. MANY STATES HAVE REASONABLY CONSTRUED POLICIES TO AFFORD COVERAGE FOR SELF-DEFENSE

As the Exchange notes in its Opening Brief, some courts have found acts of self-defense to fall outside the definition of "occurrence" or "accident."[7] *See* Opening Brief at 37 n.12. However, a split of authority exists on this issue. A number of jurisdictions hold that acts of self-defense are covered accidents under liability policies. These courts interpret the policies in a common sense manner and in light of the fact that a reasonable insured's interpretation of the policy would include coverage for acts taken in self-defense. As the court explained in *Allstate Ins. Co. v. Takeda*, 243 F. Supp. 2d 1100 (D. Haw. 2003):

> A layperson reading the definition of "occurrence" would have no reason to think that an act of self-defense was necessarily excluded from that definition. Nothing in the policy suggests than an act of self-defense committed by an insured instinctively or out of necessity would fall outside the definition of an "occurrence."

[7] The factual circumstances of Exchange's cases are quite dissimilar from the facts of this case. *See Beckwith v. State Farm Fire & Cas. Co.*, 83 P.3d 275, 276-77 (Nev. 2004) (refusing to find "occurrence," even if insured did not intend harm, when insured struck third party in the eye after ingesting alcohol, LSD, and marijuana); *Allstate Ins. Co. v. Bauer*, 977 P.2d 617, 619-21 (Wash. Ct. App.1999) (refusing to find death caused by firing gun multiple times at close range accidental because shooting was deliberate and result reasonably expected); *Auto. Club Group Ins. Co. v. Burchell*, 642 N.W.2d 406, 414-15 (Mich. Ct. App. 2001) (rejecting insured's "transparent attempt" to characterize tortious conduct of assault and battery as "negligent touching," given nature of substance of claims and severity of injuries alleged); *McAndrews v. Farm Bureau Mut. Ins. Co.*, 349 N.W.2d 117, 120 (Iowa 1984) (concluding after jury verdict against insured on assault and battery claim that insured's striking of third party was excluded from coverage).

Id. at 1106; *see also Safeco Ins. Co. of Am. v. Tunkle*, 997 F. Supp. 1356, 1357-58 (D. Mont. 1998) (concluding shooting was "accident" within generally understood dictionary definitions, and therefore, "occurrence" under policy).[8]

Furthermore, as discussed in the immediately preceding section, removal of the "neither expected nor intended" language from the coverage provision of the insuring agreement to a separate exclusion does not limit the scope of insurance coverage. Indeed, some courts have found removal of the "neither expected nor intended" language makes the policy definition of "occurrence" ambiguous, requiring construction of the policy in the insured's favor. *Tunkle*, 997 F. Supp. at 1358 n.1 ("[Insurer] chose to define 'occurrence' as 'accident' and to insert the "neither-expected-nor-intended" language as a separate exclusion. In so doing, [insurer] made its policy definition of 'occurrence' ambiguous."). Moreover, because insurance policies must be interpreted as a whole, the "occurrence" coverage clause and "accident" definition should be read in conjunction with the "expected or intended" exclusion. *E.g.*, *Fire Ins. Exch. v. Berray*, 694 P.2d 191 (Ariz. 1984).

Numerous jurisdictions refuse to mechanically and narrowly conclude that acts of self-defense necessarily fall outside the scope of coverage:

- Arizona: *Transam. Ins. Group v. Meere*, 694 P.2d 181, 189 (Ariz. 1984) ("If the finder of fact determines that [insured's] conduct was not intentionally wrongful, but that he acted instead in self-defense with no basic purpose to injury, the [intentional injury] exclusion will not apply");

[8] This view is in accord with California law. *See MacKinnon*, 31 Cal. 4th at 649 (reasonable insured would expect to have coverage for "ordinary acts of negligence resulting in bodily injury"); *Safeco*, 26 Cal. 4th at 765 (same).

- Arkansas: *U.S. Fire Ins. Co. v. Reynolds*, 667 S.W.2d 664, 667-68 (Ark. Ct. App. 1984) (determining "expected or intentional injuries" exclusion inapplicable when shot fired in self-defense);
- Delaware: *Deakyne v. Selective Ins. Co. of Am.*, 728 A.2d 569, 572 (Del. Super. Ct. 1997) (finding injuries arising as result of self-defense are not "expected or intended" by insured);
- Hawaii: *State Farm Fire & Cas. Co., v. Poomaihealani*, 667 F. Supp. 705, 709 (D. Haw. 1987) ("if it appears [insured's] actions were in self-defense, [insurer] is required under the insurance policy to defend him");
- Minnesota: *W. Fire Ins. Co. v. Persons*, 393 N.W.2d 234, 237-38 (Minn. Ct. App. 1986) (finding trial court erred in failing to instruct jury as to self-defense as possible bar to application of "expected or intended bodily injury" provision);
- Nebraska: *Allstate Ins. Co. v. Novak*, 313 N.W.2d 636, 641 (Neb. 1981) ("An injury resulting from an act committed by an insured in self-defense is not, as a matter of law, an expected or intended act within the meaning of a policy of insurance exempting bodily injuries or property damages which are either expected or intended from the standpoint of the insured.");
- Montana: *Tunkle*, 997 F. Supp. at 1357-60 (finding ambiguity in "occurrence" and "accident" definition of policy and stating, "The duty to defend arises when the insured has a colorable claim of self-defense");
- New York: *Auto. Ins. Co. of Hartford v. Cook*, 850 N.E.2d 1152, 1156 (N.Y. 2006) (opining in dicta as to whether acts of self-defense are intentional acts precluding coverage under homeowner's policy, "Suffice it to say that a

reasonable insured under these circumstances would have expected coverage under the policy");

- Ohio: *Preferred Mut. Ins. Co. v. Thompson*, 491 N.E.2d 688, 691 (Ohio 1986) ("When an insured admits that he intentionally injured a third party and the surrounding circumstances indicate that he acted in self-defense in causing the injury, the insured's insurance company may not refuse to defend the insured from the third party's intentional tort claim on the grounds that the third party injuries fall within an exclusion from coverage for "bodily injury . . . which is either expected or intended from the standpoint of the [i]nsured.");
- South Carolina: *Vermont Mut. Ins. Co. v. Singleton By and Through Singleton*, 446 S.E.2d 417, 420-21 (S.C. 1994) (determining intentional act exclusion inapplicable where insured claimed self-defense);
- South Dakota: *Stoebner v. S. Dakota Farm Bureau Mut. Ins. Co.*, 598 N.W.2d 557, 559-60 (S.D. 1999) (declining to follow cases holding that injuries inflicted in self-defense are expected or intended injuries under intentional acts exclusion); and
- West Virginia: *Farmers & Mechs. Mut. Ins. Co. v. Cook*, 557 S.E.2d 801, 809-10 (W. Va. 2001) (determining self-defense is not, as a matter of law, expected or intended act).

As the *Meere* court explained:

> [P]rinciples of contractual "intent" and public policy coincide; the [intentional injury] provision is designed to prevent an insured from acting wrongfully with the security of knowing that his insurance company will "pay the piper" for damages. That design is not served by interpreting the [intentional injury] provision to exclude coverage in self-defense situations where the insured is not acting by conscious design but is attempting to avoid a "calamity" which has befallen him.

694 P.2d at 186. "It would be ironic to exonerate an individual on the basis of self-defense but deny him insurance coverage of the costs of defense; yet allow insurance coverage to a person who negligently causes injury." *Poomaihealani*, 667 F. Supp. at 708-09.

In sum, while there are jurisdictions that have declined to allow coverage for self-defense, a number of others have decided that, interpreting the policy as a whole in light of an insured's reasonable expectations, acts taken in self-defense fall within the scope of a liability policy's coverage, regardless of whether the "expected or intended" limiting language is located in the definition of "occurrence" as an accident or in the exclusion section. *See Berray*, 694 P.2d at 194 (noting that location of intentional acts exclusion is irrelevant). Like these jurisdictions, this Court should take into consideration the purpose of the intentional injury exclusion, public policy considerations, and the transaction as a whole to conclude that acts of self-defense may fall within the policy's coverage. *See also Safeco*, 26 Cal. 4th at 765 (same).

VI. COVERAGE FOR SELF-DEFENSE UNDER CALIFORNIA LAW

A. HISTORICAL BACKDROP

California courts have long struggled with the question of when an act constitutes an "accident." However, in two seminal property damage cases, this Court clearly confirmed that, while there is "no all-inclusive definition of the word," the term accident means an "unexpected, unforeseen, or undersigned happening *or consequence* from either a known or unknown cause." *Hogan v. Midland Nat'l Ins. Co.*, 3 Cal. 3d 553, 559 (1970) (emphasis added; internal quotation marks omitted); *Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.*, 51 Cal. 2d 558 (1959). Under this approach, "accidents" include unintended consequences of an insured's intentional actions.

In *Geddes,* the insured was a building contractor who installed doors that later failed. When installing the doors, the insured was unaware that they were defective.

And, of course, although the insured intentionally installed the doors, the insured had no intention that they would later fail. The insured's policy provided coverage for property damage caused by accident. The Court held that the door failures were accidental. 51 Cal. 2d at 564.

In *Hogan*, the underlying plaintiff purchased the insured's saw for use in its lumber business. Unbeknownst to the plaintiff and the insured, the equipment was defective and the saw cut the plaintiff's lumber too narrow. When the plaintiff realized that the machine was undercutting the lumber, the plaintiff deliberately overcut the lumber in an attempt to compensate for the machine's malfunctioning. Later, the plaintiff sued the insured and the insured tendered the suit to its insurer. The insurer denied coverage for either defense or indemnity. The Court reiterated the notion that coverage for "accidents" turns on intent regarding the *consequences* of one's actions. 3 Cal. 3d at 559. When it was unknown that the saw was defective, while the act of sawing was intentional, the resulting undercut lumber was not. Accordingly, there was coverage for the undercut lumber. *Id.* at 560. By contrast, however, the overcutting was deliberate, "i.e., he contemplated the *result* of his act before he cut the boards." *Id.* at 560 (emphasis added). Thus, not only was the act intentional as to the overcut lumber, but the result was as well. *Id.* Thus, "no *accident* occurred" and there was no coverage. *Id.* at 560-61.

Indeed, a number of California cases has recognized that an "accident" is not to be judged solely by whether there was an intent to perform the act, but rather should include consideration of whether there was intent to cause, or an expectation of, the resulting consequences. For example, there is a duty to defend the insured when the insured intends to engage in an act, but has no clear expectation or intent that injury will follow. *See, e.g.*, *Gray*, 65 Cal. 2d at 274 (duty to defend assault and battery case when insured asserted that acted in self-defense); *Meyer v. Pac. Employers Ins. Co.*, 233 Cal. App. 2d 321, 327 (1965) (coverage not barred when "no evidence that well

drillers intended or expected the vibrations which their operation set in motion would cause damage to plaintiffs' property"). In *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal. App. 4th 1 (1996), the Court of Appeal reached a similar conclusion:

> Insurance is purchased and premiums are paid to indemnify the insured for damages caused by accidents, that is, for conduct not meant to cause harm but which goes awry. The insured may be negligent indeed in failing to take precautions or to foresee the possibility of harm, yet insurance coverage protects the insured from his own lack of due care. If coverage is lost for damage which a prudent person should have foreseen, there would be no point to purchasing a policy of liability insurance.

Id. at 73.

Additionally, where the insured lacks the capacity to form the wrongful intent or to recognize that the consequences would follow the act (e.g., insanity) there is coverage—even though the insured engaged in an intentional act. *See, e.g., Clemmer v. Hartford Ins. Co.,* 22 Cal. 3d 865 (1978) (coverage afforded for wrongful death suit even though insured convicted of second-degree murder because insured may have lacked sufficient mental capacity).

Of course, as this Court has also recognized, in certain circumstances, the insured's act is so inherently harmful that wrongful consequences are deemed to have been either expected or intended. *See, e.g., J.C. Penney Cas. Ins. Co. v. M. K.*, 52 Cal. 3d 1009, 1021 (1991) (recognizing that a "wilful" act requires "something more than the mere intentional doing of an act constituting [ordinary] negligence," but holding that there is no coverage for child molestation because there "is no such thing as negligent or even reckless sexual molestation" because "the intent to molest is, by itself, the same as the intent to harm"). Although not expressly relying on *J.C. Penney*, subsequent cases based solely on allegations of sexual misconduct have similarly been deemed to fall outside coverage. *See, e.g., Quan v. Truck Ins. Exch.*, 67 Cal. App. 4th 583 (1998) (allegations of forced sexual conduct could not have been

covered; therefore, no duty to defend); *Merced Mut. Ins. Co. v. Mendez*, 213 Cal. App. 3d 41, 52 (1989) (declining to construe term "accident" to include "conduct constituting crime of forcible oral copulation and/or assault with intent to commit forcible oral copulation)[9]. *But see Horace Mann*, 4 Cal. 4th at 1083,1084-85 (even allegations in sexual molestation case of unwanted touching may not have amounted to inherently harmful sexual abuse and therefore duty to defend existed); *David Kleis, Inc. v. Superior Court*, 37 Cal. App. 4th 1035, 1050-51 (1995) (assuming duty to defend allegations of sexual harassment).[10] *Compare Allstate Ins. Co. v. Kim W.*, 160 Cal. App. 3d 326, 333 (1984) (insured admitted acts were intentional in answer and never attempted to allege that "although his acts were wilful, their harmful consequences were unexpected, or that he had no intent to harm his victim").

When these California cases are looked at collectively, they stand for a simple proposition: The mere intent to engage in an act does not necessarily mean that there was no "accident." *See Shell Oil co. v. Winterthur Swiss Ins. Co.*, 12 Cal App. 4th 715, 751 (1993) ("we should not be misunderstood as suggesting that an expected or intended act at any point in the causal chain of events means that any resulting damage was not caused by accident"). Rather, the determination as to whether there is an "accident" should be made not by examining just the act in isolation, but by examining the act in combination with the insured's intent regarding the resulting injury as well as in the context of the circumstances in which the act occurred, unless the act is so inherently harmful that intent to act necessarily constitutes intent to harm.

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[9] To the extent that *Merced* can be read to rest on the notion that criminal conduct can never be an "accident," it is no longer viable after this Court's decision in *Safeco*, 26 Cal. 4th at 765 (even criminal conduct such as the felony of involuntary manslaughter may be "accident" falling within coverage where conduct).

[10] *Blue Ridge Insurance Co. v. Stanewich*, 142 F.3d 1145 (9th Cir. 1998), surely falls into this category. In that case, the defendants sought coverage for an insured's forcible intrusion into the victims' home and subsequent torture and attempted robbery of the victims. No reasonable insured would expect such conduct to be deemed a covered "accident."

This conclusion is consistent not only with the decisions discussed herein, but also with the intent of the insurance industry, as reflected in the drafting history discussed above.

B. DUTY TO DEFEND SELF-DEFENSE

The courts' focus on the insured's intent regarding the results of his or her acts is especially significant in the context of the central issue before this Court—the duty to defend in which the insured may have acted in self-defense—where the mere potential for coverage governs. *E.g.*, *Gray*, 65 Cal. 2d at 273 n.12 ("an act which under the traditional terminology of the law of torts is denominated 'intentional' or 'wilful' does not necessarily fall outside insurance coverage"); *Mullen v. Glens Falls Ins. Co.*, 73 Cal. App. 3d 163, 171 (1977) (recognizing potential for coverage when "[i]t is possible that an act of the insured may carry out his 'intention' and also cause unintended harm"); *accord Horace Mann*, 4 Cal. 4th at 1083-87 (duty to defend suit in which "dominant factor" was sexual molestation because of possibility of coverage for nonsexual battery).

> As the court pointed out in *Gray v. Zurich*, if the insured is afforded a defense against a claim based on an intentional tort, he has as much protection as he might reasonably be led to expect by the language of the policy. In those cases where the allegations of intentional wrongdoing are exaggerations, he is not denied the protection of his insurance by a false statement of the facts upon which the claim is predicated. Imposing the duty to defend in such situations is thus in the best interest of the insured and is not in conflict with the concept held by many insurers of their duties under the defense clause.

Farbstein, 20 Hastings L.J. at 1236.

In *Gray,* the seminal case in this area, the insured was sued for "brutally and intentionally assaulting" a third party. Although there were no allegations of negligent conduct in the underlying plaintiff's complaint, the insured told the insurer that he had acted in self-defense when he requested a defense. The insurer denied coverage because the complaint against the insured alleged an intentional tort. The

insured then lost the lawsuit when his self-defense claim was rejected. This Court held that even an exclusion for injury "caused intentionally" by the insured did not apply to bar coverage. The Court noted that "an act of the insured may carry out his 'intention' and also cause unintended harm." 65 Cal. 2d at 273. "Even conduct that is traditionally classified as 'intentional' or 'willful' has been held to fall within indemnification coverage." *Id.* at 277; *accord Lowell v. Maryland Cas. Co.*, 65 Cal. 2d 298, 300-01 (1966) (insurer had duty to defend action alleging assault and battery where policy covered bodily injury caused by accident, including assault and battery "unless committed by or at the direction of the insured").[11]

In *Mullen*, 73 Cal. App. 3d at 172, the insured's son was sued for negligence, assault, and battery. The underlying complaint alleged that the son struck the plaintiff's arm and injured him. However, it was not clear how the son came to strike the plaintiff. Accordingly, the court reasoned, for all the insurer knew at the time it denied coverage, the insured's son may have struck the plaintiff's arm in self-defense. *Id.* at 170.

> It is possible that an act of the insured may carry out his "intention" and also cause unintended harm. . . . Further an insured might be able to show that in physically defending himself, even if he exceeded the reasonable bounds of self-defense, he did not commit willful and intended injury, but engaged only in nonintentional tortious conduct.

Id. at 171 (citations omitted). Thus, although later the judgment in the underlying action established that the insured's son committed "a willful, unprovoked assault," at the time the claim was tendered to the insurer, the allegations of the complaint established a potential for coverage. *Id.* at 172-74. Accordingly, the insurer had a duty to defend the insured against allegations of assault. *Id.*; *see also Allstate Ins. Co.*

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[11] The Exchange attempts to distinguish *Gray* on the ground that the *Gray* policy contained no limitation of coverage to "accidents." As discussed above, the addition of "accident" to the coverage clause was intended solely to clarify the application of the policy limits. *See* n.4 above.

v. Overton, 160 Cal. App. 3d 843 (1984) (insurer had duty to defend where allegations not clear regarding self-defense, even though insured previously convicted of misdemeanor battery).

A party acting reasonably in self-defense is not even acting tortiously. *Walters v. Am. Ins. Co.*, 185 Cal. App. 2d 776, 783 (1960) ("If plaintiff acted in self-defense then although he 'intended the act," plaintiff acted by chance and without a preconceived design to inflict injury just as though he were acting intentionally, although negligently, and injured someone."). When, as alleged in Delgado's underlying complaint, the person acts unreasonably or uses excessive force in the course of self-defense, such conduct is potentially covered "nonintentional tortious conduct." *Gray*, 65 Cal. 2d at 277; *Mullen*, 73 Cal. App. 3d at 171. Thus, *Gray* and its progeny recognized a significant distinction between the "intent" of an attacker and that of one who acts in self-defense. The mental state of even one who overreacts in self-defense is different from that of the attacker because the defender's act is taken to repel an attack. *See Meere*, 694 P.2d at 187.

VII. THE COURT OF APPEAL PROPERLY DECIDED THIS CASE

The Court of Appeal correctly recognized this established California authority providing coverage in self-defense cases. Slip. Op. at 12-16. The policy in this case defines an "occurrence" as an "accident . . . which . . . results in bodily injury. . . ." 2 1 CT 000122-23. The policy also excluded bodily injury arising out of "[a]cts or omissions committed by or at the direction of any insured with the intent to produce bodily injury."*or* "[i]ntentional acts . . . committed by or at the direction of any insured that are: (a) of a willful and malicious nature; or (b) grossly negligent or reckless; and which could reasonably be expected to result in bodily injury. . . . This applies whether or not the insured forms the intent or has the mental capacity to form the intent to cause bodily injury." 2 CT 000141. Thus, when the policy is read as a whole, it expressly allows coverage for intentional acts of the insured so long as they

are not committed with wrongful intent. And, as the Court of Appeal also correctly noted, "the complaint showed potentially covered conduct because it alleged plainly that Reid acted in self-defense." Slip. Op. at 16. Accordingly, the Court correctly concluded that the trial court abused its discretion in sustaining the Exchange's demurrer. Slip Op. at 18.[12]

Nonetheless, the Exchange argues that self-defense should not be covered because the term "accident" in the policy focuses on the insured's intent to act, rather than the insured's intent to harm. According to the Exchange, where the insured's intentional act directly causes the injury, there can be no coverage unless some unexpected, unforeseen, or undersigned event occurred between the insured's act and the resulting injury.

In support of its theory, the Exchange relies on a number of cases with fact situations markedly different from the circumstances that lead an individual to asserting self-defense. For example, the Exchange relies heavily on cases involving allegations of sexual abuse or misconduct, which, as discussed above, involve special considerations given the inherently harmful nature of the conduct alleged. *See, e.g.*, *J.C. Penney*, 52 Cal. 3d at 1021 ("The act [of child molestation] is the harm. There cannot be one without the other. Thus, the intent to molest is, by itself, the same as

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[12] Of course, this case involves coverage for an individual insured and does not involve coverage for a corporation's vicarious liability for the intentional acts of its employees. There can be no doubt that intentional acts taken by a corporate insured's employee are not intended from the standpoint of the employer/insured and therefore coverage exists. *See, e.g.*, *Downey Venture v. LMI Ins. Co.*, 66 Cal. App. 4th at 512 (when principal is held vicariously liable for agent's intentional act, there is no obstacle to indemnifying principal); *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 12 Cal. 4th 291, 305 n.9 (1995) ("policy exclusions for intentionally caused injury or damage [do not] preclude a California insurer from indemnifying an employer held vicariously liable for an employee's willful acts"); *Dart Indus., Inc. v. Liberty Mut. Ins. Co.*, 484 F.2d 1295, 1298-99 (9th Cir. 1973) (absent showing that board of directors either authorized or ratified libelous acts, intentional conduct exclusion did not bar coverage for corporation for corporate president's willful acts of libel).

the intent to harm.").[13] *Accord Swain v. California Cas. Ins. Co.*, 99 Cal. App. 4th 15, 9 (2002) (wrongful eviction allegation of act so obviously harmful that deemed intentional infliction of harm); *St. Paul Fire & Marine Ins. Co. v. Superior Court*, 161 Cal. App. 3d 1199, 1202-03 (1984) (wrongful termination through subterfuge must be deemed to have been purposeful).

Additionally, the Exchange relies on a number of cases involving misrepresentation. However, these cases by their nature involve intent to induce reliance—i.e., intent regarding the consequences of the insured's acts. *See, e.g., Ray v. Valley Forge Ins. Co.*, 77 Cal. App. 4th 1039,1044, 1046 (1999) (allegations of intent to induce reliance on flawed recommendations; not tort liability covered by CGL policy, which does not provide coverage for erroneous advice)[14]; *Dykstra v. Foremost Ins. Co.*, 14 Cal. App. 4th 361 (1993) (intent to induce reliance not covered); *Royal Globe Ins. Co. v. Whitaker*, 181 Cal. App. 3d 532, 538 (1986) (action alleging only fraud and deceit not potentially covered where no evidence that insurer knew of other facts that might potentially be covered).

The Exchange asserts that these cases support its interpretation of the term "accident." And, indeed, a number of court of appeal decisions have stated the view that "occurrence" defined as an "accident resulting in bodily injury or property

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[13] Exchange attempts to liken these cases to self-defense cases, by suggesting that the "consent" defense is just like a "self-defense" defense. However, the distinction between the two is clear. The "consent" defense focuses on whether the alleged harm was intended from the standpoint of the victim. The "self-defense" defense, on the other hand, instead focuses on the insured's state of mind, consistent with the policy's focus on whether injury was "expected or intended from the standpoint of the insured."

[14] Many of Exchange's cases also involve circumstances not traditionally thought of as "bodily injury" or "property damage" claims falling within occurrence coverage. *See, e.g., Modern Dev. Co. v. Navigators Ins. Co.*, 111 Cal. App. 4th 932 (2003) (errors and omissions type claim against developer for failing to properly comply with requirements of Americans with Disabilities Act in design of swap meet); *St. Paul Fire & Marine Ins. Co. v. Superior Court*, 161 Cal. App. 3d 1199 (1984) (wrongful termination).

damage" limits coverage to unintentional acts, without regard for the insured's intended consequences. *Shell Oil* stated this view particularly cogently: "When 'occurrence' is defined as an 'accident,' . . . injury caused by expected or intended actions is not covered." 12 Cal. App. 4th at 750. The court based its decision on a technical distinction between earlier policies which defined "occurrence" as an "'accident'" or "'continuous or repeated exposure to conditions which results in . . . property damage during the policy period'" and later policies defining "occurrence as "'an *accident, including* continuous or repeated exposure to conditions which results in . . . property damage.'" *Id.* at 748. The court viewed the use of "or" instead of "including" to mean that "accident" in the first policy was not modified by the "results in" clause, while "accident" in the second policy was. *Id.*

However, the drafting history discussed above makes clear that the linguistic shifts in the policy language were not meant to narrow the scope of coverage. It also makes clear that the term "accident" is not to be interpreted in a vacuum, without reference to the "expected or intended" limitation. The industry intended to provide insurance coverage for damage that, from the insured's perspective, was the unintended *result* of even intentional acts. *See generally* Farbstein, 20 Hastings L.J. at 1237. Thus, it is clear that, despite its syntactically convoluted structure, the "occurrence" definition is meant to provide coverage for unintended consequences as well as unintentional acts.

This is especially evident in the policy form providing coverage for an "accident, including injurious exposure to conditions, which results, during the policy period, in *bodily injury . . . neither expected nor intended from the standpoint of the insured.*" As the Exchange readily admits, this policy definition "places the focus squarely on the unintended nature of the 'injury,' not the 'act.'" Opening Brief at 42. However, the Exchange asserts that, once the italicized language is moved to the exclusions section, there is no such focus. Thus, the Exchange's interpretive

distinction reads the "occurrence" definition in isolation from the exclusion for "expected or intended" injury, despite the fact that the exclusion was once part of the definition of "occurrence." Such a reading is contrary to the drafting history of the policy and the rule that insurance policies are to be interpreted as a whole. *E.g., Bay Cities*, 5 Cal. 4th at 867 (language in policy to be interpreted in context of "instrument as a whole").

The Exchange also argues that the removal of this language from the coverage grant to the exclusions section of the policy makes the coverage grant *narrower*. As noted above, the "expected or intended from the standpoint of the insured" language has drifted into and out of the definition of "occurrence." *See generally* Farbstein, 20 Hastings L.J. 1219. However, regardless of whether this language is included in an exclusion or in the "occurrence" definition, the language "focuses on the intent to injure rather than on the intent to act." *Id.* at 1237; *see also* 2 Rowland H. Long & Mark S. Rhodes, *Law of Liability Insurance* §10.04, at 10-40 to 44 2007) ("As a general rule, if the results are not expected or intended, there is an accidental 'occurrence' . . . ."). Thus, this argument too is contrary to the drafting history of occurrence-based policies as well as established principles of policy interpretation.

Moreover, coverage clauses are to be interpreted broadly in favor of coverage, while exclusions are interpreted narrowly. *E.g.*, *MacKinnon*, 31 Cal. 4th at 648. Thus the removal of this language, clearly *limiting* accidents to injuries that are both unexpected and unintended from the standpoint of the insured, to the exclusions section of the policy cannot *narrow* the coverage clause, which should, if anything be read more *broadly* without the presence of the limiting language.

Additionally, reading the coverage clause narrowly to provide coverage only for unintentional acts would render the "expected or intended injury" exclusion surplusage. California law is clear that policies should be construed to avoid such an effect. *E.g.*, *AIU*, 51 Cal. 3d at 827 (declining to apply definition of "damages" that

would render "redundant" phrase "legally obligated to pay"); *Shell Oil*, 12 Cal. App. 4th at 753 ("The way we define words should not produce redundancy. . . ."). If all intended acts fall outside the scope of coverage, it is hard to imagine why there would be any need for a clause excluding resulting harm "expected or intended from the standpoint of the insured." Rare indeed would be the circumstances where the insured's unintended acts would somehow manage to accomplish the insured's intended harm.

The Exchange's proposed rule also suggests that the insured should reasonably be expected to understand that the term "occurrence" or "accident" in its policy is premised on technical legal concepts of causation. The Exchange argues that, only if the chain of causation flowing from the insured's act is interrupted by an independent intervening cause should there be coverage. Opening Brief at 20. Yet, terms in an insurance policy are to be given their "ordinary and popular" sense. *MacKinnon*, 31 Cal. 4th at 649. And, as the Court recently noted, an insured should not be charged with knowledge of "subtle legal distinctions." *Safeco*, 26 Cal. 4th at 765-66. As noted above, given the breadth of the term "accident," the insurer would reasonably expect the term to cover, at a minimum, intentional acts that, although negligent, result in unintended harm. *See MacKinnon*, 31 Cal. 4th at 654; *Safeco*, 26 Cal. 4th at 765-66.[15]

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[15] Exchange also invokes criminal law concepts to avoid coverage, noting that self-defense and accident are inconsistent terms. Opening Brief at 35 n.10 (citations omitted); *See also id.* n.11. On this basis, and without any support, Exchange leaps to the conclusion that "acts committed in self-defense and by accident are no less inconsistent in the civil context for purpose of insurance coverage for accidents." Exchange's attempt to rely on this technical distinction in criminal law should hold no weight.

As in *Safeco*, the policy in this case contained no "criminal act exclusion." Since Exchange chose not to include a criminal act exclusion, "[the court] cannot read into the policy what the [insurer] has omitted. To do so would violate the fundamental principle that in interpreting contracts, including insurance contracts, courts are not to insert what has been omitted." *Safeco*, 26 Cal. 4th at 764.

Even if the Exchange's focus on causation were to be accepted, there should be at least a potential for coverage in this case. One cannot view the causal chain from the limited perspective of the Exchange's structure. Rather, the entire dispute, including the acts that led the insured to react, should be evaluated. In situations of self-defense, by definition, the victim's unexpected provocative acts may be said to set the incident in motion. When faced with the threat of harm, the insured's defensive act cannot be deemed truly intentional. Rather, the insured is likely acting out of self-protective reflex. Such an act cannot be said to be intentional because it is an instinctive reaction. *See Poomaihealani*, 667 F. Supp. at 708.

This point is illustrated in *Grain Dealers Mutual Insurance Co. v. Marino*, 200 Cal. App. 3d 1083, 1087 (1988), the insured shot and killed a man and was convicted in a criminal action. The parents of the man who was shot sued the insured in a civil action. The insured's policy provided coverage for bodily injury caused by an occurrence and neither expected or intended from the standpoint of the insured. The insurer argued that the criminal conviction estopped the insured from asserting that the shooting was accidental. However, excerpts of the trial record suggested that the insured may have acted in self-defense in reaction to the victim. If so, the court reasoned, although the insured may have acted intentionally, his act was by chance because it was part of a chain of events that started with the victim's behavior. *Id.* at 1088. Accordingly, "if [the insured] acted in self-defense [the] policy would provide

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Moreover, Exchange's assertion that "self-defense" and "accident" are always inconsistent flies in the face of the doctrine of "imperfect self-defense." This long-established rule states that an honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury, although insufficient for self-defense, is sufficient to negate malice aforethought, the mental element necessary for murder, and thus to reduce murder to manslaughter. *See, e.g., People v. Flannel*, 25 Cal. 3d 668, 674-75 (1979), *superceded by statute as to other grounds*, Cal. Penal Code § 28 (regarding defense of diminished capacity). The crime of involuntary manslaughter, by its very nature implies an "accident." *See Safeco*, 26 Cal. 4th at 766.

coverage for his conduct." *Id.* The court of appeal reversed the trial court's decision resolving this factual issue against the insured in facts in a summary proceeding. *Id.*

As the Court of Appeal correctly noted, the underlying complaint in this case alleged that Reid's unreasonable self-defense led to Delgado's bodily injury (albeit in a bare bones "notice pleading" form).[16] Slip. Op. at 16. Accordingly, as in *Gray*, where the complaint was silent but the insured told its insurer that he had acted in self-defense, the Exchange was aware that there was a potential for coverage. Even more so than in *Gray*, the allegations in the underlying complaint demonstrated a clear potential that Reid acted instinctively or reflexively in response to Delgado's threats, rather than intending his act at all. Alternatively, as in *Gray*, the allegations of the underlying complaint raised the possibility that Reid, although he acted intentionally, acted with the intent to defend himself, rather than out of a design to harm Delgado. Under either scenario, the facts may have shown that Reid's acts were part of a causal chain that started with Delgado. Therefore, even if a causation analysis is used to decide coverage, Delgado's provocative acts potentially were an independent cause of his own injury.

In sum, the Exchange was clearly in possession of facts indicating a potential for coverage. The Court of Appeal correctly concluded that the allegations of the complaint were sufficient to support a claim for breach of the duty to defend. Slip. Op. at 16-17.

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[16] Indeed, given the allegations of the underlying complaint, Reid might ultimately have been able to prove that his actions were not unreasonable. This, of course, should have exonerated him from all liability. Although Exchange would not ultimately have had a duty to indemnify in such circumstances, it would still have had a duty to defend because the bodily injury alleged in the complaint. *Compare MacKinnon*, 11 Cal. 4th at 23, 26-27 (1995) (not even potential coverage for intangible economic losses that cause emotional distress).

VIII. CONCLUSION

This case was dismissed at the demurrer phase, where the allegations of the complaint must be accepted as true and all reasonable inferences must be liberally construed in favor of the viability of the complaint. *Neilson v. California City*, 133 Cal. App. 4th 1296, 1305 (2005). The reviewing court must reverse a judgment of dismissal after sustaining a demurrer when the complaint has stated a cause of action under any possible legal theory or the plaintiff shows that there is a reasonable possibility that the complaint can be cured by amendment. *Id.* The allegations of Delgado's complaint, liberally construed, were easily sufficient to meet this standard. Even more so than the improper summary judgment in *Grain Dealers*, the trial court erred in resolving factual issues regarding the potential for coverage of the underlying action on demurrer.[17] This Court should affirm the correct and well-reasoned decision of the Court of Appeal.

Respectfully submitted,

DATED: February 29, 2008

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[17] While they are beyond the scope of this amicus brief, the remaining issues also appear not proper for resolution on demurrer. As the Court of Appeal correctly concluded, the indemnity issue could not be resolved on the pleadings. Furthermore, given that there was a factual dispute that arguably gave rise to the duty to defend, on demurrer, the genuine dispute doctrine would not apply to extinguish the bad faith claim. No California case has applied the genuine dispute doctrine to bar a bad faith claim in a duty to defend case. *See, e.g., Century Sur. Co. v. Polisso*, 139 Cal. App. 4th 922 (2006) (no genuine dispute regarding duty to defend when complaint and extrinsic evidence raise factual issues raising potential for coverage). Exchange seems to concede that the genuine dispute doctrine should not apply to factual disputes establishing a potential for coverage. *See* Opening Brief at 49-50 n.18.

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ADDENDUM

The New Comprehensive General Liability Insurance Policy

A Coverage Analysis

To Increase the Professional Skill and Enlarge the Knowledge of Defense Lawyers

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DRI STATEMENT OF PURPOSE

The purpose or purposes for which said corporation is organized shall be to promote improvements in the administration of justice and enhance the service of the legal profession to the public; to support and work for the improvement of the adversary system of jurisprudence in the operation of the courts; to encourage the prompt, fair and just disposition of tort claims; to enhance the knowledge and improve the skills of defense lawyers; to advance the equitable and expeditious handling of disputes arising under all forms of insurance and surety contracts; to work for the elimination of court congestion and delays in civil litigation; to cooperate with programs of public education directed toward highway safety and the reduction of losses and costs resulting from highway and other casualties; and to carry on other related and similar activities in the public interest.

November, 1966

conditions that the result is confounding almost to the point of being unintelligible."

Jacket

The new format will include a standard policy jacket containing all of the common provisions such as policy definitions, conditions, and supplementary payments. Added to this jacket will be various coverage parts: manufacturers and contractors; owners, landlords and tenants; and comprehensive general liability-automobile. Together, these will form a complete policy. There are different ways in which the policy jackets and coverage parts may be printed and assembled, but the wording will be standard.

With such changes an insured needs only to read the particular coverage part which he has purchased, resulting in less confusion for both the insured and the courts.

One rigid rule must be observed in setting up the forms — the coverage exclusions must follow immediately after the coverage provisions. This rule stresses the close relationship between the granting of coverage and its limits and gives equal emphasis to the exclusions. It also clearly establishes that there is no duty to defend a claim for an excluded injury.

The new policy uses more definitions than previous policies and as a result the coverage and exclusions provisions should be less complicated. Defined words or phrases will mean the same thing in the coverage provisions as in the exclusions.

Occurrence

A major substantive change is to afford coverage on an occurrence basis. This policy defines "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." The word "accident" has been retained to clarify the intent with respect to the time of coverage and the application of policy limits to a particular occurrence. For example, the liability of a contractor arising out of the derailment of 10 or 12 freight cars caused by a collision with a piece of his equipment would be subject to one application of the occurrence limits of the policy. Retention of the word "accident" is limiting in this sense and in no other. Present policies do not define the term "accident."

The "occurrence" definition in the new policy refers to "exposure to conditions which results in injury." Hence, "suddenness" will no longer be a requirement when injury occurs. In the future when deciding whether an occurrence is indicated, we shall deal primarily with the matters of foreseeability and intent.

Although most injuries occur simultaneously with the exposure, there are many instances in which injuries take place over an extended period before they become evident as in slow ingestion of foreign substances or inhalation of noxious fumes.

In some exposure cases involving cumulative injuries, it is possible that more than one policy will afford coverage, each to apply to bodily injury or property damage occurring during its policy period. The policy will not depend upon the causative event of occurrence but will be based upon injuries or damages which result from such an event and which happened during the policy period. It will not be material whether the causative event happened during or before the policy period.

Present policies frequently have been interpreted to apply at the time of a negligent act rather than the time of the accident which caused injury or property damage. Under the new policy, coverage applies when the bodily injury or property damage occurs during the policy period.

The definition of "occurrence" also includes the words "bodily injury or property damage neither expected nor intended from the standpoint of the insured." This phrase is intended to eliminate the necessity for an "assault and battery" condition or exclusion. Further it should eliminate the precedent of court decisions which have applied the concept of fortuity from the point of view of the injured party rather than the insured.

Two factors must be considered in connection with this definition; one involves intent and the other, foreseeability. Whether intention is or is not involved ordinarily does not present special problems although it must be pointed out that while an insured's act might appear to be intentional, he may be incompetent to form such an intent. Further, instances arise when the injury is an unintended result of an intentional act. The two situations, an

absence of intent or an unexpected result, would be covered under either the "accident" or "occurrence" definition.

As to foreseeability, there are a number of cases in which courts denied coverage because it was evident that the damage was clearly foreseeable. For example, coverage was denied where dust and other debris escaped from a building demolition job and damaged merchandise of an adjacent tenant. The definition of "occurrence" and reference to an "unexpected event" would not change the fact that there is no "accident" if the injury was clearly foreseeable or intended.

A new provision sets forth the insured's duties in the event of an occurrence, claim or suit. At his own expense, the named insured must promptly take all reasonable steps to prevent other bodily injury or property damage from arising out of the same or similar conditions. Current policies do not specifically require the insured to take such action. Under the new policy, if the insured does not take steps to prevent added bodily injury or property damage, then any such additional injury or damage would not be really unexpected by the insured. Furthermore, lack of action would probably constitute a breach of the policy condition and would not be covered.

Property Damage

The new policy contains a definition of "property damage" as "injury to or destruction of tangible property." This definition is necessary and has been added because present policies have relied on the basic limitation of "caused by accident" to deny coverage for damage to intangible property. This limitation is not available in the new policy, and the definition is included to clarify the underwriting intent.

Under the present policies there has been contention between the insureds and the insurers in regard to the scope and extent of the coverage provided for property damage liability. This controversy has extended to the new policy even though the intention was to clarify the coverage.

The new definition omits any requirement of physical injury as a prerequisite for coverage. The National Bureau states that the policy will cover the insured's legal liability if no specific exclusion applies even though the tangible property is not physically damaged but is made useless by the act of an insured. An example would be the breaking down of a large piece of contractor's equipment on a public street in such a manner that the street must be closed off for a period of time and the public has limited or no access to the stores located in the block affected. Under the definition of "damages" loss of use claims from the operators of these stores would be covered. There is no prerequisite of physical injury to the stores. It seems sufficient that the stores sustained damage when they could not be used for the purpose for which they were designed or intended.

The use of the word "tangible" should not have the effect of restricting coverage under the new policy when compared to the current policy which provides coverage for damage to undefined property. The change for some companies will depend upon how they interpreted the current policy. If their present interpretation is that the current policy limits coverage to a physical injury to tangible property, then the new policy will mean a broadening of coverage.

The new policy should result in more consistent treatment of claims by insurers who use it. The Bureau interpretation should also eliminate many troublesome areas which were an increasing source of litigation regarding questions of coverage between the insured and the insurer.

Product Liability — Completed Operations

One of the most important revisions in the new policy arose from the need for clarification of the scope of coverage provided for product liability-completed operations which were never defined before, leading to considerable confusion in claim departments, among insureds and the courts. Decisions have been made which were contrary to the underwriting intent. Some courts held, under the current policies, that the completed operations hazard did not apply separately from the product hazard. This led to the rule that a contractor who does not deal with products as such has no need for completed operations coverage since his manufacturers and contractors insurance which covers operations in progress would also cover his lia-

PROOF OF SERVICE

Case Number S155129
Case Title: Jonathan Delgado vs. Interinsurance Exchange of the Automobile Club

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party in the above-entitled action. I am employed in the County of Los Angeles and my business address is 2049 Century Park East, Suite 700, Los Angeles, CA 90067-3109.

On February 29, 2008, I served the attached document described as:

APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF UNITED POLICYHOLDERS IN SUPPORT OF JONATHAN DELGADO

on the parties in this matter at the addresses below as follows:

BY PERSONAL SERVICE: I caused to be delivered the foregoing document(s) to the addressee(s) specified:

Clerk of the Court
Supreme Court of California
Ronald Reagan Building
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013

Original and Thirteen Copies

VIA FEDERAL EXPRESS: By causing such envelopes to be deposited or delivered in a box or other facility regularly maintained by Federal Express authorized to receive documents, or delivering to a courier or driver authorized by said express service carrier to receive documents, the copy of the foregoing document in a sealed envelope designated by the express service carrier, addressed as stated above, with fees for overnight (next business day) delivery paid or provided for and causing such envelope to be delivered by said express service carrier on February 29, 2008:

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Executed on February 29, 2008

By: _____
Donna Boss