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Liability Insurance Coverage for Clergy Sexual Abuse Claims

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LIABILITY INSURANCE COVERAGE FOR CLERGY SEXUAL ABUSE CLAIMS

Peter Nash Swisher *

Richard C. Mason **

TABLE OF CONTENTS

I. INTRODUCTION.....	356
A. CIVIL ACTIONS TO RECOVER FOR SEXUAL ABUSE.....	359
B. CHARACTERISTICS OF CIVIL ACTIONS AGAINST RELIGIOUS ORGANIZATIONS AND ORDERS.....	361
II. THE DEVELOPING LAW OF LIABILITY INSURANCE COVERAGE FOR SEXUAL ABUSE CLAIMS.....	367
A. OVERVIEW OF INSURANCE COVERAGE ISSUES.....	367
B. THE “EXPECTED” OR “INTENDED” ISSUE UNDER GENERAL LIABILITY POLICIES.....	368
1. The “Objective” or “Classic Tort” Standard for Determining Intentional Acts in Liability Insurance Coverage Disputes.....	369
2. The “Subjective” or “Particular Insured” Standard For Determining Intentional Acts in Liability Insurance Coverage Disputes.....	370
3. The “Inferred Intent” Standard as Applied to Child Sexual Abuse Cases.....	372
C. THE “EXPECTED” OR “INTENDED STANDARD APPLIED TO INSURANCE CLAIMS BY EMPLOYERS AND SUPERVISORS OF THE ABUSER.....	375
1. The “Accident” Requirement.....	375

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The views discussed in this article are those of the authors alone.

2. The “Objective” or “Classic Tort” Standard Applied to Insurance Claims Arising from Negligent Hiring or Supervision of a Molester.....	381
3. Reassessing the Crucial Causation Requirement in Liability Insurance Coverage Disputes Involving Sexual Abuse of Minors.....	386
4. What is “Expected” Injury, and Does “Expected” Have a Meaning Independent from “Intended?”.....	397
D. DECISIONS CONSIDERING WHETHER “NEGLIGENT SUPERVISION” CAN EVER BE AN “OCCURRENCE”.....	402
E. CLAIMS IN WHICH NEGLIGENCE IS PLED ALONGSIDE FACTS SHOWING ACTUAL KNOWLEDGE OR INTENT: LOOKING “BEYOND THE LABEL OF NEGLIGENCE”.....	404
F. CONSPIRACY ALLEGATIONS AND “NEGLIGENCE”.....	408
G. THE “BODILY INJURY” REQUIREMENT.....	409
III. CONCLUSION.....	411

I. INTRODUCTION

Sexual offenders constitute a grave social problem in contemporary American society.¹ For a quarter century, sexual abuse claims have been brought against an increasing number of Roman Catholic dioceses and priests,² and against members of other religious denominations as well.³

¹ See, e.g., *MySpace Pulls 90,000 Sex Offenders From Site*, RICH. TIMES-DISPATCH, Feb. 4, 2009, at A3 (noting that this figure was nearly double what MySpace officials had originally reported the previous year).

² See, e.g., Scott Glover & Jack Leonard, *Cardinal Mahony Under Federal Fraud Probe Over Abusive Priests, Sources Say*, L.A. TIMES, Jan. 29, 2009 (reporting that Cardinal Mahony “was accused of transferring priests who molested children to other parishes rather than removing them from the priesthood and alerting authorities.”); see also David L. Gregory, *Some Reflections on Labor and Employment Ramifications of Diocesan Bankruptcy Filings*, 47 J. CATH. LEGAL STUD. 97 (2008) (discussing the significance of Roman Catholic dioceses filing for bankruptcy in the wake of clergy sexual abuse scandals, and making significant mention of liability insurers proactively filing declaratory judgment actions to avoid coverage in clergy sexual abuse claims). Clergy sexual abuse claims have not been limited to the United States, and high profile clergy sexual abuse claims also have been reported in a number of other countries as well, including Australia, Brazil, Britain, Ireland, France, Italy, Germany, and Belgium. See, e.g., Henry

Sexual predators who abuse minor children should be prosecuted to the fullest extent of the law, and face serious criminal and civil liability for their detestable acts. But should these sexual abuse claims, including clergy sexual abuse, be covered under liability insurance policies, which commonly exclude acts that are “expected or intended from the viewpoint of the insured”? The courts have been far from uniform in addressing this and other related issues arising under liability insurance policies.⁴

Beginning with the earliest claims for insurance for sexual abuse, liability insurers typically have denied coverage for such claims under standard liability insurance policies. Insurers long have contended that the

Chu, *Cardinal Asked Victim to Keep Silent*, L.A. TIMES, Aug. 31, 2010 (“The former head of Belgium’s Roman Catholic Church acknowledged Monday that he was wrong to have urged a sexual abuse victim to stay quiet until after the bishop who repeatedly molested him over a span of 13 years could retire.”).

³ See, e.g., Carolyn Peirce, *Jewish Coalition Want Abuse Victims to Speak Out*, WASH. EXAMINER, Jan. 25, 2009, available at <http://washingtonexaminer.com/local/jewish-coalition-want-abuse-victims-speak-out> (reporting on an Orthodox Jewish cantor who had previously participated in an international child pornography ring. “It’s like the Catholic Church all over, but not as large,” one coalition member stated.); see also Charles Toutant, *Mormon Church Sued on Charges of Sexual Abuse by Youth Leader*, 185 N.J. L.J. 475 (2006) (reporting that a Mormon bishop from Provo, Utah notified the child abuser’s new ward, or congregation, about his previous criminal sexual offenses in Utah and Wisconsin, but the ward still put him in positions working with children in Dallas, Texas, and later working with children in Ledgewood, New Jersey).

⁴ See, e.g., STEVEN PLITT, DANIEL MALDONADO & JOSHUA D. ROGERS, COUCH ON INSURANCE 3D §§ 127:24-127:28 (2008 rev. ed.) [hereinafter COUCH ON INSURANCE]; JERRET E. SALE & LINDA M. BOLDUAN, *Insurance Coverage for Sexual Molestation*, in 3 Rowland H. Long, *The Law Of Liability Insurance* Ch. 11C (Matthew Bender ed. 2010) [hereinafter LONG ON LIABILITY INSURANCE]; see also Jesse J. Cooke, Book Note, *Beyond an Unfortunate “Occurrence”*: *Insurance Coverage and the Equitable Redress of Victims of Sexual Predator Priests*, 36 ARIZ. ST. L.J. 1039 (2004); Barron L. Weinstein, *Sexual Misconduct Claims: A Policyholder’s Perspective of Key Coverage Issues*, 38 THE BRIEF 49 (2009); James L. Rigelhaupt, Jr., Annotation, *Construction and Application of Provisions of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R. 4th 957 (1984); Joseph Conder, Annotation, *Liability of Church or Religious Society for Sexual Misconduct of Clergy*, 5 A.L.R. 5th 530 (1992), superseded in part by Marjorie A. Shields, Annotation, *Liability of Church or Religious Organization for Negligent Hiring, Retention, or Supervision of Priest, Minister, or Other Clergy Based on Sexual Misconduct*, 101 A.L.R. 5th 1 (2002).

standard general liability policy was not intended to cover intentional acts, including sexual abuse.⁵

At the same time, the insurance industry has made available a special “sexual abuse” coverage endorsement to add coverage specifically for sexual abuse. When the sexual abuse endorsement is purchased, liability coverage for sexual abuse is expressly afforded.⁶ However, most insureds have not purchased this add-on coverage.

Because insurance generally exists only to provide indemnity for fortuitous, unexpected, and accidental loss, and because insurance generally does *not* provide coverage for intentional acts, liability insurers usually except from coverage intentional acts, or “expected or intended” injury.⁷ Indeed, the underlying public policy rationale against insurance indemnification for intended loss is so strong that the courts will in some circumstances forbid payment of insurance benefits, even if the insurance policy is silent on this particular point. However, the states differ markedly on the type of intentional conduct that is sufficiently volitional in nature to bar coverage.⁸

Over the last decade, a number of policyholders facing sexual abuse claims, including clergy sexual abuse, have taken the position that even if a sexual offender’s acts arguably *were* “expected or intended,” and therefore excluded from coverage under a liability insurance policy’s “expected or intended” provision, the sexual offender’s employer, supervisor, or religious order might still come within policy coverage under the legal doctrine of negligent supervision, negligent hiring, negligent

⁵ See, e.g., *Grange Mut. Cas. Co. v. Thomas*, 301 So. 2d 158, 158-59 (Fla. Dist. Ct. App. 1974); *Altena v. United Fire & Cas. Co.*, 422 N.W.2d 485, 490 (Iowa 1988); *Rodriguez ex rel. Brennan v. Williams*, 713 P.2d 135, 137-38 (Wash. Ct. App. 1986) (“The average person purchasing homeowner’s insurance would cringe at the very suggestion” that the person was paying for coverage for sexual abuse, “[a]nd certainly [the person] would not want to share that type of risk with other homeowner’s policy holders.”).

⁶ See, e.g., *Jane D. v. Ordinary Mut.*, 38 Cal. Rptr. 2d 131 (Cal. Ct. App. 1995); *Dobbs v. State Farm Fire & Cas. Co.*, 773 N.E.2d 1251 (Ill. App. Ct. 2002).

⁷ See generally ROBERT H. JERRY II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW § 63C (4th ed. 2007); JEFFREY R. STEMPEL, STEMPEL ON INSURANCE CONTRACTS §§ 1.06[B], 1.08[2] (3d ed., rev. vol. 2010).

⁸ See generally EMERIC FISCHER, PETER N. SWISHER & JEFFREY W. STEMPEL, PRINCIPLES OF INSURANCE LAW 58-68 (3d rev. ed. 2006).

retention, or under similar doctrines based upon *negligence* principles rather than based on *intentional acts* by the insured.⁹

This article addresses issues that arise when a policyholder under a standard general liability insurance policy, not containing an express sexual abuse coverage endorsement (or an express sexual abuse exclusion), seeks insurance coverage for sexual abuse claims. Such cases continue to increase in frequency as the legacy of sexual abuse and molestation generates an unrelenting deluge of insurance coverage claims.

The purpose of this article is to explore and analyze the case law and various legal theories supporting and rejecting liability insurance coverage claims involving institutional sexual abuse allegations. This article concludes by recommending a better-reasoned objective concurrent causation legal doctrine that would bring a realistic, and more uniform, judicial approach to the liability insurance interpretive conundrum involving clergy sexual abuse coverage disputes. The article also synthesizes the law concerning other prominent coverage issues in the rapidly developing area of sexual abuse insurance claims.

A. CIVIL ACTIONS TO RECOVER FOR SEXUAL ABUSE.

Until the 1980s, civil actions for sexual abuse were uncommon, although examples dating back more than fifty years can be found.¹⁰ Certainly, in the United States there were far fewer reports of clergy sexual abuse in earlier years, and almost certainly fewer instances of sexual abuse

⁹ See, e.g., *Evangelical Lutheran Church in Am. v. Atl. Mut. Ins. Co.*, 169 F.3d 947 (5th Cir. 1999) (applying Illinois law) (holding that the negligent training and supervision of a minister was covered, even though the minister's sexual assault was not covered); *Mfrs. & Merchs. Mut. Ins. Co. v. Harvey*, 498 S.E.2d 222 (S.C. Ct. App. 1998) (holding that a claim of negligent entrustment was covered, although sexual molestation of minors by the insured was not covered). *But see* *Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386 (10th Cir. 1996) (applying Minnesota law) (holding that negligent and reckless supervision claims involving a priest child molester were *not* covered since the Archdiocese knew or should have known that personal injury from child sexual abuse was highly likely to occur); *Am. Commerce Ins. Co. v. Porto*, 811 A.2d 1185 (R.I. 2002) (holding that a separate negligent supervision claim was *not* covered since it causally resulted in the sexual molestation of a child).

¹⁰ See, e.g., *McLeod v. Grant Cnty. Sch. Dist. No. 128*, 255 P.2d 360 (Wash. 1953) (student who allegedly was raped at school claimed school was negligent in leaving students unsupervised and allowing access to darkened area).

in general.¹¹ However, by the late 1970s, reports of sexual abuse of children had sharply increased,¹² and claims seeking financial compensation for sexual molestation increased rapidly.

In recent decades, assorted youth organizations have been sued for sexual molestation, although in many cases the courts have held such sexual abuse was not foreseeable.¹³ In some of these cases, plaintiffs have alleged prior knowledge on the part of a responsible parent or supervisor. However, allegations concerning pervasive knowledge and deliberate tolerance of sexual abuse – and even conspiracies to allow it or to conceal it – are rarely pled in suits against lay organizations, although they have become a staple of clergy sexual abuse lawsuits during the last two decades, as discussed below.

Adults sued for sexual abuse occurring within their own home also have been held subject to liability under principles set forth in *Restatement (Second) of Torts* § 316 (Duty of Parent to Control Conduct of Child).¹⁴ *Restatement (Second) of Torts* § 316 provides that parents are obligated to prevent their children from creating a risk of bodily harm to others if the parent “(a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.”¹⁵

Similarly, one may be subject to liability for sexual offenses committed by one’s spouse. “[W]hen a spouse has actual knowledge or special reason to know of the likelihood of his or her spouse engaging in sexually abusive behavior against a particular person or persons, a spouse has a duty of care to take reasonable steps to prevent or warn of the harm . .

¹¹ See THE NAT’L REVIEW BD. FOR THE PROT. OF CHILDREN AND YOUNG PEOPLE, A REPORT ON THE CRISIS IN THE CATHOLIC CHURCH IN THE UNITED STATES 22-25 (2004).

¹² *Id.* at 23.

¹³ See, e.g., *Doe v. Goff*, 716 N.E.2d 323 (Ill. App. Ct. 1999) (holding that the Boy Scouts of America could not be held liable for failure to prevent the sexual assault of a Boy Scout because it was unforeseeable); *H.B. ex rel. Clark v. Whittemore*, 552 N.W.2d 705 (Minn. 1996) (holding that a trailer park manager did not have a duty to warn or protect children whom she knew were being sexually abused by a resident); *Montgomery v. YMCA of Cincinnati*, 531 N.E.2d 731 (Ohio Ct. App. 1996).

¹⁴ See, e.g., *Gritzner v. Michael R.*, 611 N.W.2d 906 (Wis. 2000).

¹⁵ *Id.* Likewise, there is a duty to control the conduct of a third person as to prevent him from causing physical harm to another if a “special relationship” exists between the actor and the other person that gives to the other a right of protection. See, e.g., RESTATEMENT (SECOND) OF TORTS § 315(a)–(b) (2010).

. [and] breach of such a duty constitutes a proximate cause of the resultant injury, the sexual abuse of the victim.”¹⁶ For example, a wife who invited children to visit her house, when she knew her husband had molested women and children in the past, was subject to liability in negligence.¹⁷ Even a grandmother was held subject to liability for failing to protect her granddaughter from a known risk of sexual abuse by the grandfather.¹⁸

Such actions, however, rarely compare to clergy sexual abuse litigation in terms of the alleged degree of institutional knowledge and culture of tolerance of sexual abuse. It is largely these features that generate profound questions whether general liability policies afford coverage in regard to clergy sexual abuse actions.

B. CHARACTERISTICS OF CIVIL ACTIONS AGAINST RELIGIOUS ORGANIZATIONS AND ORDERS

Public knowledge of sexual abuse by Roman Catholic clergy became widespread in 1984 with the well-publicized revelations concerning Father Gilbert Gauthé in Lafayette, Louisiana. Prior to 1984, the Catholic Church, like many organizations that minister to minors, long had been troubled by pedophilia and similar abuse by its employees and agents.¹⁹ In 1957, a Church expert in treating offenders reportedly had advised one or more archbishops that: “Experience has taught us these men are too dangerous to the children of the parish and the neighborhood” to

¹⁶ J.S. *ex rel.* C.S. v. B.J.H., 714 A.2d 924, 935 (N.J. 2000).

¹⁷ Pamela L. v. Farmer, 169 Cal. Rptr. 282 (Cal. Ct. App. 1980). *See also* Big Brother/Big Sister of Metro Atlanta, Inc. v. Terrell, 359 S.E.2d 241 (Ga. Ct. App. 1987) (social service organization); Enumclaw v. Wilcox, 843 P.2d 154 (Idaho 1982) (wife’s “acts or failure to act . . . may have created or contributed to the environment which permitted her ex-husband’s [molestation],” but did not constitute an occurrence under insurance policy because it was not the conduct that caused the injury); Metro. Prop. & Cas Ins. Co. v. Miller, 589 N.W.2d 297, 300 (Minn. 1999) (suing wife for her “alleged failure to warn of or prevent the abuse” where husband molested minor child).

¹⁸ Doe v. Franklin, 930 S.W.2d 921 (Tex. App. 1996). *But see, e.g.,* T.A. *ex rel.* Kramer v. Allen, 669 A.2d 360 (Pa. Super. Ct. 1995) (holding that step-grandparent did not owe any special duty to step-grandchildren to control her husband’s conduct, and was thus not liable for her husband’s abuse under negligence theory).

¹⁹ *See generally* Rev. Thomas Doyle, *A Very Short History of Clergy Sexual Abuse in the Catholic Church*, CRUSADE AGAINST CLERGY ABUSE, <http://www.crusadeagainstclergysbuse.com/htm/AShortHistory.htm> (last visited Feb. 22, 2011).

continue in their current ministries.²⁰ By 1971, there allegedly were discussions at the bishopric level concerning clergy sexual abuse.²¹

The perceived institutional character of the sexual abuse problem (particularly pedophilia) in religious organizations helps explain why civil complaints frequently allege facts indicating such organizations possessed a high degree of knowledge that minor laity were in jeopardy of abuse by priests. For example, complaints not uncommonly allege the failure of the religious organization to report prior known instances of child abuse.²² Allegations of prior knowledge are alleged with distinct conviction. A representative complaint alleges:

Although [defendant order of friars] knew Father Posey was unsuitable for his position, they failed to review and monitor his performance, to confront him, and to sanction him about “known irregularities in his employment,” e.g., taking young children on trips and to his home.²³

Civil conspiracy claims also frequently accompany claims of clergy sexual assault or abuse.²⁴ A typical complaint alleges that school administrators:

agreed or otherwise conspired to cover up incidents of sexual abuse of minors by Salesian priests and/or educators and to prevent disclosure, prosecution and civil litigation including, but not limited to: failure to report incidents of abuse to law enforcement or child protection agencies; denial of abuse [they] had substantiated; aiding criminal child molesters in evading detection, arrest and prosecution; allowing criminal child molesters to cross state and international borders for purposes of gaining access to uninformed parents whose innocent children could be sexually abused; failure to warn; and failure to

²⁰ *Id.*

²¹ *Id.*

²² *See, e.g.,* *Nunnery v. Salesian Missions, Inc.*, No. 07-2091, 2008 WL 1743436, at *6 (D.N.J. Apr. 15, 2008).

²³ *John Doe CS v. Capuchin Franciscan Friars*, 520 F. Supp. 2d 1124, 1130 (E.D. Mo. 2007).

²⁴ *See Nunnery*, 2008 WL 1743436.

seek out and redress the injuries its priests and / or educators had caused.²⁵

In litigation against Capuchin Franciscan Friars, it was alleged:

Defendants knowingly failed to disclose Father Posey's sexual misconduct. ... Defendant[s] and the Roman Catholic Archdiocese of St. Louis and the Archbishop of the Archdiocese of St. Louis, in concert with one another, and with the intent to conceal and defraud, conspired and came to a meeting of the minds whereby they would misrepresent, conceal, or fail to disclose information relating to the sexual misconduct of Defendant[s]' agents. By so concealing, Defendant[s] committed at least one act in furtherance of the conspiracy.²⁶

Such allegations, it has been held, are premised on factual assertions and thus "cannot be characterized as . . . 'bald assertions' and 'legal conclusions draped in the guise of factual allegations ...' "allegations."²⁷

In sum, complaints against clergy and religious institutions are often distinguished by (1) allegations of specific facts constituting prior knowledge, and (2) allegations of conspiracy, fraud, and other similar schemes. These alleged fact patterns form the predicate for an expanding body of law concerning insurance coverage for clergy sexual abuse.²⁸

Liability insurance policyholders who would be barred from coverage for acts of sexual misconduct that are expected or intended from

²⁵ *Id.* at *7.

²⁶ *Capuchin Friars*, 520 F. Supp. 2d at 1129.

²⁷ *Nunnery*, 2008 WL 1743436 at *7.

²⁸ Moreover, since a number of sexual abuse "occurrences" have taken place over a period of many decades, and since some states have suspended otherwise applicable statutes of limitation, and now allow plaintiffs in sexual abuse cases to bring previously barred claims, the possibility of multiple liability insurers and "lost policies" over many years may constitute another real problem. *See, e.g., City of Sharonville v. Am. Emp'rs Ins. Co.*, 846 N.E.2d 833 (Ohio 2006) (holding that when a liability insurance policy has been lost or destroyed, the existence of coverage may be proved by secondary evidence other than the policy itself, including circumstantial evidence of payment records, renewal letters, miscellaneous correspondence, or prior claim files, unless the record contains evidence that the policy was lost or destroyed in bad faith).

the viewpoint of the sexual molester,²⁹ are increasingly bringing coverage claims they assert are predicated upon *negligence*-based claims against the sexual molester's employer, supervisor, religious organization, or another co-insured. These underlying claims typically are based upon claims of negligent supervision, negligent employment, negligent retention, and other negligence principles involving vicarious liability. The courts have been far from uniform in how they treat such claims.³⁰

Although many courts have not recognized vicarious sexual abuse liability claims based upon agency principles³¹ or based upon the doctrine of *respondeat superior*,³² nevertheless the courts are deeply divided on the

²⁹ See generally *infra* Part II (discussing and analyzing the Intentional Acts Exclusion).

³⁰ See generally COUCH ON INSURANCE, *supra* note 4, § 127:27; LONG ON LIABILITY INSURANCE, *supra* note 4, ch. 11C.02[8]; Cooke, *supra* note 4; Weinstein, *supra* note 4; Conder, *supra* note 4; Shields, *supra* note 4.

³¹ See, e.g., *Capuchin Friars*, 520 F. Supp. 2d at 1137 (holding that sexual misconduct by a Roman Catholic priest toward his student did not fall within the scope of the priest's employment under Missouri law, and therefore a religious order could not be held liable for the priest's actions under an agency theory); *Gray v. Ward*, 950 S.W.2d 232 (Mo. 1997) (en banc) (similar holding); *Eckler v. Gen. Council of Assemblies of God*, 784 S.W.2d 935 (Tex. App. 1990) (summary judgment granted to defendant church based on an agency theory alleged by the plaintiff).

³² See, e.g., *Tichenor v. Roman Catholic Church*, 869 F. Supp. 429 (E.D. La. 1993), *aff'd*, 32 F.3d 953 (5th Cir. 1994) (holding that the Roman Catholic church was not liable under the doctrine of *respondeat superior* for the alleged illicit sexual acts of a Roman Catholic priest, where such acts were not in furtherance of the priest's duties and did not advance church doctrine, and where there was no evidence that the church authorized the priest's illicit sexual acts in advance, or ratified them afterwards); *Mark K. v. Roman Catholic Archbishop of Los Angeles*, 79 Cal. Rptr. 2d 73 (Cal. Ct. App. 1998) (holding that the doctrine of *respondeat superior* was not available to impose liability on a religious institution based upon allegations of childhood sexual abuse by a priest, since this sexual abuse was outside the scope of the cleric's employment); *Doe v. Norwich Roman Catholic Diocese*, 909 A.2d 983 (Conn. Super. Ct. 2006) (holding that a bishop, monsignor, and the church were not vicariously liable under the doctrine of *respondeat superior* for sexual assaults committed by a priest on a minor since it was contrary to the teachings of the church, and the priest's sexual assaults on the minor were repugnant to his employer's business and in contravention to the employer's aims and rules); *Elders v. United Methodist Church*, 793 So.2d 1038 (Fla. Dist. Ct. App. 2001) (holding that the local church, the church conference, and church district superintendents were not liable to a member of the congregation for alleged sexual misconduct by a pastor under the doctrine of *respondeat superior*, since the sexual

issue of whether a church or other religious organization should be held liable for the negligent hiring, the negligent retention, or the negligent supervision of a priest, minister, or other clergy member based upon allegations of sexual misconduct.

A number of courts have recognized such claims based upon vicarious liability principles of negligent hiring, negligent retention, or negligent supervision of a priest or other clergy member.³³ Other courts,

misconduct of the pastor was for personal motives, and not to further the interests of the church); *Olinger v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 521 F. Supp. 2d 577 (E.D. Ky. 2007) (holding that the church could not be vicariously liable under Kentucky law for a missionary's alleged sexual molestation of a minor child, since there was no evidence that the missionary or anyone else believed that he was acting to further the interest of the church at the time of the alleged sexual misconduct, and such sexual molestation was clearly outside the scope of the missionary's employment). *But see Doe v. Hartz*, 52 F. Supp. 2d 1027 (N.D. Iowa 1999) (plaintiff's *respondeat superior* claim survived motion to dismiss on basis that church knew or should have known about past misconduct and mental disease or defect made misconduct a realistic threat, but noting that this was a "remarkably tenuous" basis for imposing *respondeat superior* liability); *Parks v. Kownacki*, 711 N.E.2d 1208 (Ill. App. Ct. 1999) (holding that questions of material fact as to whether a parish priest was a child abuser or not, and whether the church or diocese which appointed the priest knew, or should have known, of his tendencies precluded the dismissal of a lawsuit against the church and the diocese based on the doctrine of *respondeat superior*), *rev'd*, 737 N.E.2d 287 (Ill. 2000).

³³ *See, e.g., Nutt v. Norwich Roman Catholic Diocese*, 56 F. Supp. 2d 195 (D. Conn. 1999) (applying Conn. law) (holding that the Roman Catholic Marianist Society had actual or constructive knowledge of the priest's grossly inappropriate sexual misconduct toward the plaintiffs); *Hartz*, 52 F. Supp. 2d at 1077-78 (applying Iowa law) (holding that a parishioner's allegation that the church, diocese, and bishop knew of a priest's "mental disease or defect" and the threat posed to parishioners was sufficient to state a claim for negligent supervision arising out of the priest's sexual assault of the parishioner); *Mark K.*, 79 Cal. Rptr. 2d at 78 (holding that in an action for negligent supervision and retention of a priest who sexually molested a child, the archdiocese had failed to warn the victim of the priest's known propensity for engaging in sexual misconduct with boys); *Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Maine 2005) (stating there were sufficient facts to hold the diocese liable for negligent supervision of a priest who sexually abused a parochial school student and altar boy); *Hutchison ex rel. Hutchinson v. Luddy*, 742 A.2d 1052 (Pa. 1999) (finding that the Roman Catholic Church, bishop, and diocese negligently hired, supervised, and retained a priest, despite knowledge of his pedophilic disposition, when the priest later molested a minor in a motel room).

however, have *not* recognized these vicarious liability claims sounding in negligence.³⁴ Still other courts have split in holding that the First Amendment of the United States Constitution may—or may not—bar a legal action against a church or other religious organization for the negligent retention or supervision of a clergy member who engaged in sexual misconduct.³⁵

³⁴ See, e.g., *Wilson v. Diocese of N.Y. of the Episcopal Church*, No. 96 Civ. 2400, 1998 WL 82921 (S.D.N.Y. Feb. 26, 1998) (applying N.Y. law) (holding that an Episcopal diocese and individual church were not liable for the negligent supervision or training of a priest who allegedly sexually assaulted the plaintiff, where there was no evidence that the diocese knew, or should have known, of any alleged propensity on the priest's part to commit sexual assault); *Beach v. Jean*, 746 A.2d 228 (Conn. Super. Ct. 1999) (holding that defendant Roman Catholic diocese and church could not foresee the specific sexual harm alleged by the plaintiff, and did not know or suspect that the pastor posed a risk to minors); *Iglesia Cristiana La Casa Del Señor, Inc. v. L.M.*, 783 So. 2d 353 (Fla. Dist. Ct. App. 2001) (holding that the church did not have actual or constructive notice of the pastor's sexual misconduct); *Pachulski v. Roman Catholic Diocese of Grand Rapids*, No. 205293, 1999 WL 33441139 (Mich. Ct. App. June 18, 1999) (holding that the diocese and the diocese's bishop had no actual knowledge of the priest's sexual misconduct with a minor); *C.B. ex rel. L.B. v. Evangelical Lutheran Church in Am.*, 726 N.W.2d 127 (Minn. Ct. App. 2007) (holding that church entities were not liable for the minister's sexual abuse of a minor under the theory of negligent supervision, since there was no evidence that the church was put on notice of the minister's sexual abuse); *N.H. v. Presbyterian Church*, 998 P.2d 592 (Okla. 1999) (holding that the critical element for recovery under a negligent hiring, retention, or supervision theory is the employer's prior knowledge of an employee's propensity to commit the harm, and the national organization had no notice of any previous act or incident that would have alerted it to the fact that the minister was a pedophile, and was sexually abusing children); *Eckler*, 784 S.W.2d at 941 (holding that in order for an act of negligence to be a proximate cause of the injury, it must be a cause in fact of the injury, and the injury must be reasonably foreseeable. The court noted that the general church council had not been notified of any complaints against the local church or a youth minister who had allegedly sexually abused children, and therefore it had no duty to supervise or investigate the local church and its ministers); *Doe v. Archdiocese of Milwaukee*, 700 N.W.2d 180 (Wis. 2005) (holding the archdiocese was not liable under a negligent supervision claim, since there was no evidence that the archdiocese knew or should have known of the priest's abusive tendencies at or before the time the minor was sexually abused).

³⁵ See, e.g., *Ehrens v. Lutheran Church—Missouri Synod*, 269 F. Supp. 2d 328 (S.D.N.Y. 2003); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991) (purportedly applying New York law); *Gray*, 950 S.W.2d 232; *Mars v. Diocese of Rochester*, 763 N.Y.S.2d 885 (N.Y. Sup. Ct. 2003); *L.L.N. v. Clauder*, 563

When the religious organization is subject to liability, the organization almost invariably looks to its insurer to defend it and to pay claims. We now analyze and discuss the developing law concerning insurance coverage for sexual abuse claims.

II. THE DEVELOPING LAW OF LIABILITY INSURANCE COVERAGE FOR SEXUAL ABUSE CLAIMS

A. OVERVIEW OF INSURANCE COVERAGE ISSUES

Modern standard general liability policies condition insurance coverage on whether there has been an “occurrence.” These policies typically define “occurrence” as:

An accident, including continuous or repeated exposure to general conditions, resulting in bodily injury or property damages neither expected nor intended from the standpoint of the insured.

Also, standard general liability policies often include the following exclusion:

We will not provide insurance:

2. For personal injury or property damage:
 - a. which is either expected or intended by you;

This is known as the “intentional act exclusion.”

In light of the afore-cited and similar provisions, many sexual abuse coverage disputes have turned upon: (1) whether sexual molestation falls within the policy’s intentional act exclusion, or (2) whether sexual molestation meets the “occurrence” definition in the policy. The decisions usually analyze whether bodily injury was “expected” or “intended” by the insured. In addition, some courts ask a threshold question: whether sexual abuse itself can be an “accident.”

N.W.2d 434 (Wis. 1997). *But see* *Bivin v. Wright*, 656 N.E.2d 1121 (Ill. App. Ct. 1995); *Fortin*, 871 A.2d 1208; *Olson v. First Church of the Nazarene*, 661 N.W.2d 254 (Minn. Ct. App. 2003); *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 654 N.Y.S.2d 791 (App. Div. 1997); *Christopher B. v. Schoeneck*, No. 99-0450, 1999 WL 1102901 (Wis. Ct. App. Dec. 7, 1999), *review denied*, 2000 Wisc. LEXIS 305 (Feb. 22, 2000).

The “expected or intended” question must be addressed even when the policy does not contain an “intentional act” exclusion. This is because the “occurrence” definition, contained in the vast majority of standard general liability policies, affords coverage only for bodily injury that is “neither expected nor intended from the standpoint of the insured.” It has been held that this “neither expected nor intended” clause in the “occurrence” definition is the equivalent of the intentional act exclusion.³⁶ Accordingly, decisions applying the intentional act exclusion, as discussed *infra* § IIB, frequently provide guidance regarding the “occurrence” question.

B. THE “EXPECTED” OR “INTENDED” ISSUE UNDER GENERAL LIABILITY POLICIES

An “occurrence” in homeowners and commercial general liability insurance generally is limited to unexpected, unintended, and accidental loss.³⁷ Also, many liability insurance policies contain an “intentional act exclusion” providing that coverage is excluded for “bodily injury or property damage that is expected or intended by the insured.”³⁸ The underlying public policy rationale of this “intentional act exclusion” in liability insurance is that it would defeat the purpose of insurance and encourage “moral hazard” if a policyholder could be compensated for losses he intentionally brings about, knowing that the insurer would be liable for any resulting damages or personal injury.³⁹

But how have the courts decided which acts are “expected or intended by the insured”? There are currently three major judicial

³⁶ *W. Va. Fire & Cas. Co. v. Stanley*, 602 S.E.2d 483, 492 (W. Va. 2004) (citing *Patrons-Oxford Mut. Ins. Co. v. Dodge*, 426 A.2d 888, 891 (Me. 1981)).

³⁷ See generally *STEMPEL*, *supra* note 7, at § 1.06[B][1].

³⁸ See 1 *SUSAN J. MILLER & PHILLIP LEFEBVRE, MILLER’S STANDARD INSURANCE POLICIES ANNOTATED* 214, 409, 414 (4th ed. 1995) (citing to the Insurance Services Office, Inc. (ISO) Forms HO 00 03 04 91 (Homeowners Insurance) and CG 00 01 10 93 (Commercial General Liability Insurance)); see, e.g., *Transamerica Ins. Grp. v. Meere*, 694 P.2d 181, 186 (Ariz. 1984) (en banc) (holding that there is a strong underlying public policy that forbids insurers from indemnifying persons against loss resulting from their own willful wrongdoing. The intentional act exclusion therefore “is designed to prevent an insured from acting wrongfully with the security of knowing that his insurance company will ‘pay the piper’ for the damages”).

³⁹ See, e.g., *W. Nat’l Assurance Co. v. Hecker*, 719 P.2d 954, 959-60 (Wash. Ct. App. 1986).

approaches for interpreting the “expected” or “intended” question under liability insurance policies involving sexual abuse claims: (1) the “objective” or “classic tort” standard for determining acts that are intended or expected from the viewpoint of the insured; (2) the “subjective” or “particular insured” standard for determining acts that are intended or expected from the viewpoint of the insured; and (3) the “inferred intent” standard as applied to child sexual abuse cases.⁴⁰

1. The “Objective” or “Classic Tort” Standard for Determining Intentional Acts in Liability Insurance Coverage Disputes

Under an “objective” or “classic tort” standard, a court will look at the natural and probable consequences of the insured’s deliberate act in order to determine the insured’s intent.⁴¹ If an intentional act by the insured results in injuries that are, in an objective sense, the natural, foreseeable, and probable result of the insured’s intentional act, such loss is excluded from coverage under the liability insurance intentional acts exclusion.⁴² Commentators have differed, however, on whether this

⁴⁰ See, e.g., Peter C. Haley, *Paradigms of Proximate Cause*, 36 TORT & INS. L.J. 147, 149 (2000) (“Proximate cause is a factor in all three types of civil actions seeking damages: common law torts, common law contract, and statutory. However, tort actions have been the subject of most of the judicial and scholarly attention devoted to proximate cause.”).

⁴¹ See, e.g., CNA Ins. Co. v. McGinnis, 666 S.W.2d 689, 691 (Ark. 1984) (sexual assault of a minor); see also Truck Ins. Exch. v. Pickering, 642 S.W.2d 113, 116 (Mo. Ct. App. 1982) (involving an intentional wrongful death action and holding that “one is presumed to intend the natural and probable consequences of his acts and conduct.”); Mutual Serv. Cas. Co. v. McGehee, 711 P.2d 826, 827-28 (Mont. 1985) (action for battery); Fuisz v. Selective Ins. Co. of America, 61 F.3d 238 (4th Cir. 1995) (applying Va. law) (defamation action). But see also Rodriguez v. Williams, 729 P.2d 627, 629-30 (Wash. 1986) (en banc) (criticizing this “objective” or “classic tort” standard in an insurance law context). See also *infra* note 43 (citing additional authority).

⁴² See, e.g., COUCH ON INSURANCE, *supra* note 4, at § 127:2d (“A majority of courts utilize an objective standard to determine whether the injury was intentional. Accordingly, sexual abuse is considered an intentional act when the injury is the natural and probable consequence of the insured’s conduct.”) (citing to a number of cases arguably supporting this proposition, including B.B. v. Cont’l Ins. Co., 8 F.3d 1288, 2195 (8th Cir. 1993) (applying Mo. law); Horace Mann Ins. Co. v. Fore, 785 F. Supp. 947, 956 (M.D. Ala. 1992); Troy v. Allstate Ins. Co., 789 F.

traditional “objective” or “classic tort” standard applied to cases of rape, sexual assault, and sexual molestation is the majority view,⁴³ or a minority view.⁴⁴

2. The “Subjective” or “Particular Insured” Standard for Determining Intentional Acts in Liability Insurance Coverage Disputes

Under a “subjective” or “particular insured” standard, the court must find not only that the insured intended a specific act, but *also* that the insured intended a specific harm.⁴⁵ The “subjective” standard—that the insured must have intended *both* the conduct in question, *and* the insured must have intended some type of injury,⁴⁶ or a particular type of injury,⁴⁷ is the majority approach today⁴⁸ involving most intentional acts committed by

Supp. 1134, 1136 (D. Kan. 1992); *Fernandez v. Strand*, 63 F. Supp. 2d 949, 956 (E.D. Wis. 1999)).

⁴² *See, e.g.*, *JERRY & RICHMOND*, *supra* note 7, at 439-69 (commenting that the “classic tort” or “objective” standard is a minority approach); *LONG ON LIABILITY*, *supra* note 4, at § 11C.02[1][c][i] (same).

⁴³ *See, e.g.*, *MacKinnon v. Hanover Ins. Co.*, 471 A.2d 1166, 1167 (N.H. 1984) (concerning battery and negligent infliction of emotional distress claims arising out of the alleged sexual abuse of a minor); *N. Sec. Ins. Co. v. Stanhope*, No. 09-078, 2010 WL 3934335, at *5 (Vt. 2010).

⁴⁴ *See, e.g.*, *JERRY & RICHMOND*, *supra* note 7, at 439-69 (commenting that the “classic tort” or “objective” standard is a minority approach); *LONG ON LIABILITY*, *supra* note 4, at § 11C.02[1][c][i] (same).

⁴⁵ *See, e.g.*, *MacKinnon v. Hanover Ins. Co.*, 471 A.2d 1166, 1167 (N.H. 1984) (concerning battery and negligent infliction of emotional distress claims arising out of the alleged sexual abuse of a minor); *N. Sec. Ins. Co. v. Stanhope*, No. 09-078, 2010 WL 3934335, at *5 (Vt. 2010);

⁴⁶ *See, e.g.*, *Am. Family Mut. Ins. Co. v. Johnson*, 816 P.2d 952 (Colo. 1991) (assault and battery claims); *Amco Ins. Co. v. Haht*, 490 N.W.2d 843 (Iowa 1992) (alleged battery and wrongful death claim caused by a thrown baseball); *Tenn. Farmers Mut. Ins. Co. v. Evans*, 814 S.W.2d 49 (Tenn. 1991) (alleged arson of property).

⁴⁷ *See, e.g.*, *Providence Mut. Ins. Co. v. Scanlon*, 638 A.2d 1246 (N.H. 1994) (personal injury from a BB gun); *Columbia Cas. Co. v. Westfield Ins. Co.*, 617 S.E.2d 797 (W.Va. 2005) (suicide deaths of inmates). *But see also* *FISCHER, SWISHER & STEMPEL*, *supra* note 8, at 62 (“The specific intent view errs too greatly in favor of the policyholder by insulating him or her from the financial consequences of antisocial conduct.”).

⁴⁸ *But see supra* note 43 and accompanying text.

an insured in liability insurance coverage disputes *other* than child sexual abuse cases.⁴⁹

A growing number of courts have questioned whether this majority “subjective” standard approach is appropriate in liability insurance claims involving child sexual abuse allegations. Although an insured seeking coverage for injuries arising out of sexual misconduct and sexual abuse may argue that he or she had no subjective intent to “harm” the minor child,⁵⁰ most courts have characterized these subjective assertions made by adult sexual molesters that they did not subjectively intend to harm their child sexual abuse victims as “absurd” and “irrational”⁵¹ For example, the California Supreme Court in the case of *J.C. Penney Casualty Insurance Co. v. M.K.*,⁵² observed that the insurer contended coverage was excluded:

[T]he [sexual] molestations were intentional. Defendants respond that even an intentional and wrongful act is not excluded from coverage unless the insured acted with a “preconceived design to inflict injury.” They contend psychiatric testimony shows that molesters . . . often intend no harm despite the depravity of their acts, and that the

⁴⁹ See generally FISCHER, SWISHER & STEMPEL, *supra* note 8, at 58-65; JERRY & RICHMOND, *supra* note 7, at 463-67.

⁵⁰ See, e.g., *Atl. Emp’rs Ins. Co. v. Tots & Toddlers Pre-Sch. Day Care Ctr., Inc.*, 571 A.2d 300, 303 (N.J. Super. 1990) (“While socially unacceptable, [the insured sexual molester] argue[s] a pedophile or other sexual deviant may not necessarily [subjectively] intend to cause his or her victims any injury, even though that behavior may constitute criminal activity.”); see also *Northland Ins. Cos. v. Coconut Island Corp.*, 961 F. Supp. 20, 22 (D. Maine, 1997); *Fire Ins. Exch. v. Abbott*, 251 Cal. Rptr. 620, 629 (Cal. Ct. App. 1988) (similar subjective arguments made by sexual abusers).

⁵¹ See, e.g., *Landis v. Allstate Ins. Co.*, 546 So. 2d 1051, 1053 (Fla. 1989) (holding that the sexual molester’s subjective argument “defied logic”); *Mut. of Enumclaw v. Merrill*, 794 P.2d 818, 820 (Ore. Ct. App. 1990) (holding that the sexual molester’s subjective argument was “little short of absurd”); see also *CNA Ins. Co. v. McGinnis*, 666 S.W.2d 689, 691 (Ark. 1984) (“We agree with the view expressed by the dissent in the Court of Appeals in this case, that for a stepfather in such a situation ‘to claim that he did not expect or intend to cause injury, flies in the face of all reason, common sense and experience.’”) (quoting *CNA Ins. Co. v. McGinnis*, 663 S.W.2d 182, 185 (Ark. Ct. App. 1984) (Corbin, J., dissenting)).

⁵² *J.C. Penney Cas. Ins. Co. v. M.K.*, 804 P.2d 689 (Cal.), *cert. denied sub nom.*, 502 U.S. 902 (1991).

molestation is often a misguided attempt to display love and affection for the child.⁵³

The court concluded:

We conclude there is no coverage as a matter of law. No rational person can reasonably believe that sexual fondling, penetration, and oral copulation of a five-year-old child are nothing more than acts of tender mercy . . . The courts of many other states also have considered the issue and, almost without exception, have held there is no coverage.⁵⁴

Because the subjective intent test is capable of reaching a conclusion – that the molester intended no harm – that is anathema to prevailing logic and public policy sensibilities regarding child abuse and molestation, it has fallen into extreme disfavor over the last decade. Accordingly, the “inferred intent” standard has emerged as the majority view today.

3. The “Inferred Intent” Standard as Applied to Child Sexual Abuse Cases

A substantial majority of courts have applied an “inferred intent” standard to bar coverage in sexual molestation cases involving an adult sexual predator and a sexually abused child, even when the insured sexual molester asserts the absence of any subjective intent to harm the child.⁵⁵

⁵³ *Id.* at 693.

⁵⁴ *Id.*

⁵⁵ *See, e.g.,* State Farm Fire & Cas. Co. v. Abraio, 874 F.2d 619, 623 (9th Cir. 1989) (applying Cal. law) (holding that there is an irrebuttable presumption of intent to harm as a matter of law in child molestation cases); *J.C. Penney*, 804 P.2d at 695 (“There is no such thing as negligent or even reckless sexual molestation. The very essence of child molestation is the gratification of sexual desire. The act is the harm. There cannot be one without the other. Thus, the intent to molest is, by itself, the same as the intent to harm.”), *cert. denied sub nom, Kelley v. J.C. Penney Cas. Ins. Co.*, 502 U.S. 902 (1991); *Allstate Ins. Co. v. Mugavero*, 589 N.E.2d 365, 369 (N.Y. 1992) (“[I]n the exceptional case of an act of child molestation, cause and effect cannot be separated; that to do the act is necessarily to do the harm which is its consequence; and that since unquestionably the act is intended, so also is the harm.”). *See generally* Wiley v. State Farm Fire & Cas.

The underlying public policy rationale for this “inferred intent” standard when applied to child sexual abuse claims is premised on a state’s criminal prohibition of sexual contact between an adult and a child,⁵⁶ as well as the reasonable expectations of the parties to coverage.⁵⁷

Although a majority of courts have adopted and applied this “inferred intent” standard in cases where the insured asserts a subjective intent not to harm the minor victim, a more subtle issue is raised when the insured asserts an incapacity to form *any* requisite intent. Some courts have reasoned that if the nature and character of the act are such that an intent to harm may be inferred, such as in cases involving the insured’s acts of child sexual abuse, then any question of an inability to form this intent to harm, whether it arises out of alleged mental disease or incapacity, or whether it arises out of voluntary intoxication, is immaterial in resolving the insurer’s obligation to coverage, and the insured’s intent to harm in

Co., 995 F.2d 457, 461-62 nn.5-6 (3d Cir. 1993) (applying Pa. law) (stating that this majority “inferred intent” standard applied as a matter of law to child sexual abuse claims has been adopted in Alabama, Alaska, Arkansas, Arizona, California, Colorado, Delaware, Florida, Georgia, Iowa, Kansas, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Washington, West Virginia, and Wisconsin); *see also* Allstate Ins. Co. v. Roelfs, 698 F. Supp. 815 (D. Alaska 1987); State Farm Fire & Cas. Co. v. Davis, 612 So.2d 458, 463-64 (Ala. 1993) (also collecting cases from other jurisdictions); Allstate Ins. Co. v. Troelstrup, 789 P.2d 415, 418-19 (Colo. 1990), *rev’g*, 768 P.2d 731 (Colo. Ct. App. 1988); Allstate Ins. Co. v. Mugavero, 589 N.E.2d 365, 368 (N.Y. 1992), *rev’g*, 561 N.Y.S.2d 35 (N.Y. App. Div. 1990) (also collecting cases from other jurisdictions).

⁵⁶ *See, e.g.*, State Farm Fire & Cas. Co. v. Smith, 907 F.2d 900, 902 (9th Cir. 1990) (predicting Nev. law); Landis v. Allstate Ins. Co., 546 So. 2d 1051, 1053 (Fla. 1989); Allstate Ins. Co. v. Mugavero, 589 N.E.2d 365, 369 (N.Y. 1992); Nationwide Ins. Co. v. Abernethy, 445 S.E.2d 618, 620 (N.C. Ct. App. 1994); Rodriguez v. Williams, 729 P.2d 627, 630 (Wash. 1986).

⁵⁷ *See, e.g.*, Wiley v. State Farm Fire & Cas. Co., 995 F.2d 457, 464 (3d Cir. 1993) (applying Pa. law) (“[T]he average person purchasing homeowner’s insurance would cringe at the very suggestion that he was paying for [coverage for liability arising out of his sexual abuse of a child]. And certainly he would not want to share that type of risk with other homeowner’s policy holders.”) (quoting Rodriguez *ex rel.* Brennan v. Williams, 713 P.2d 135, 137-38 (Wash. Ct. App.), *aff’d*, 729 P.2d 627 (Wash. 1986)); *see also* Allstate Ins. Co. v. Mugavero, 589 N.E.2d 365, 370 (N.Y. 1992); Horace Mann Ins. Co. v. Leeber, 376 S.E.2d 581, 586 (W. Va. 1988) (similar holdings).

such a context therefore is irrelevant.⁵⁸ Other courts hold that, as a matter of law, an insured may never assert a lack of capacity to form intent caused by voluntary intoxication as a defense to the application of an intentional act exclusion, regardless of the act committed.⁵⁹ A minority of other courts have held, however, that where an incapacity to form intent to harm is alleged, that incapacity may render unintentional any harm caused by the insured, so that such an incapacity must be considered by the finder of fact when resolving the issue of any existence of intent to harm.⁶⁰

In conclusion, under either the “objective” or “classic tort” standard,⁶¹ or under an “inferred intent” standard,⁶² the overwhelming majority of American courts have persuasively-- and correctly-- held that an adult sexual molester of an abused child will *not* be entitled to coverage under a liability insurance policy based upon its intentional acts exclusion.⁶³

⁵⁸ See, e.g., *State Farm Fire & Cas. Co. v. Estate of Jenner*, 874 F.2d 604, 605, 607 (9th Cir. 1989) (applying Cal. Law); *Landis v. Allstate Ins. Co.*, 546 So.2d 1051, 1053 (Fla. 1989); *Pub. Emps. Mut. Ins. Co. v. Rash*, 740 P.2d 370, 373 (Wash. Ct. App. 1987).

⁵⁹ See, e.g., *Allstate Ins. Co. v. Hampton*, 433 N.W.2d 334, 336 (Mich. Ct. App. 1988); *Hanover Ins. Co. v. Newcomer*, 585 S.W.2d 285, 289 (Mo. Ct. App. 1979).

⁶⁰ This is the minority “Arizona rule.” See, e.g., *Globe Am. Cas. Co. v. Lyons*, 641 P.2d 251, 254 (Ariz. Ct. App. 1981) (“derangement of . . . intellect”); *Parkinson v. Farmers Ins. Co.*, 594 P.2d 1039, 1041 (Ariz. Ct. App. 1979) (voluntary intoxication); see also *Hanover Ins. Co. v. Talhouni*, 604 N.E.2d 689, 691-93 (Mass. 1992) (further explaining *Worcester Ins. Co. v. Fells Acres Day Sch., Inc.*, 558 N.E.2d 958, 965 (Mass. 1990)). See *Wiley v. State Farm Fire & Cas. Ins. Co.*, 995 F.2d 457, 465-67 (3d Cir. 1993), for the application of Pennsylvania law to and a general discussion of these three judicial approaches to the “inferred intent” rule when the insured asserts his or her incapacity for an intent to harm.

⁶¹ See *supra* notes 41-44 and accompanying text.

⁶² See *supra* notes 54-59 and accompanying text.

⁶³ See generally COUCH ON INSURANCE, *supra* note 4, at § 127:26; FISCHER, SWISHER & STEMPER, *supra* note 8, at 64-66; LONG ON LIABILITY, *supra* note 4, at § 11C:02[1]. Although the underlying rationale for applying an “inferred intent” standard when the sexual abuse victim is a minor may not always apply when the victim is an adult, a majority of courts nevertheless still apply this “inferred intent” standard to adult sexual abuse victims, as well as to child sexual abuse victims. See, e.g., *W. Am. Ins. Co. v. Vago*, 553 N.E.2d 1181, 1185 (Ill. Ct. App. 1990); *Rulli v. State Farm Fire & Cas. Co.*, 479 N.W.2d 87, 89 (Minn. Ct. App. 1992); see also *W. Nat’l Assur. Co. v. Heckler*, 719 P.2d 954, 960 (Wash. Ct. App. 1986)

C. THE “EXPECTED OR INTENDED” STANDARD APPLIED TO INSURANCE CLAIMS BY EMPLOYERS AND SUPERVISORS OF THE ABUSER

Most current insurance coverage claims involve the sexual molester’s employer, supervisor, or religious organization who is allegedly responsible under a legal doctrine of negligent supervision, negligent hiring, negligent retention, or under a similar vicarious liability doctrine based upon *negligence* principles, rather than based upon the *intentional acts* of a sexual molester that were “expected or intended” by the insured.

1. The “Accident” Requirement

Most contemporary homeowners and general liability insurance policies provide coverage only for *accidental* “occurrences.” For example, a typical homeowner’s policy provides coverage for “bodily injury” or “property damage” caused by an “occurrence.” Occurrence typically is defined to mean “an *accident*, including continuous or repeated exposure to substantially the same general harmful conditions.”⁶⁴ General liability insurance policies likewise cover “bodily injury” or “property damage” caused by an “occurrence,” where an “occurrence” generally is defined as “an *accident*, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.”⁶⁵

An “occurrence” under liability insurance coverage must be an *accidental* event. It has been said that an “accident” is an unintended and unanticipated event, and that it occurs without design, coordination, or expectation.⁶⁶ In other words, bodily injury or property damage that is the

(“[T]he nature of the act, its forcible and nonconsensual character, and the harm that certainly results makes the inference of intent no less strong [than in a child sexual abuse case]”).

⁶⁴ See, e.g., Insurance Services Office Inc. [ISO] Form HO 00 03 04 91 [Homeowners Insurance].

⁶⁵ See, e.g., Insurance Services Office Inc. [ISO] Form GL 00 00 01 73 [General Liability Insurance] (emphasis in original). See generally LONG ON LIABILITY, *supra* note 4, at § 11C.02[1][a].

⁶⁶ See, e.g., Allstate Ins. Co. v. Steele, 74 F.3d 878, 880 (8th Cir. 1996) (applying Minn. law) (“[An accident is] an unexpected happening without intention or design.”); High Country Assocs. v. N. H. Ins. Co., 648 A.2d 474, 478 (N.H. 1994) (“[W]e interpret ‘accident’ in the definition of ‘occurrence’ to mean

probable, intended, or expected result of the insured's actions is *not* injury or damage that was caused by an *accidental* occurrence.⁶⁷ Whether an accidental event occurred for the purpose of liability insurance coverage usually is considered from the viewpoint of the tortfeasor-insured.⁶⁸

Decisions outside the realm of sexual abuse claims sometimes have turned on the "neither expected nor intended" wording in the "occurrence" clause in determining whether particular forms of misconduct qualified as an "occurrence." These decisions assume that if the resulting injury was not expected or intended by the insured, coverage exists even if the underlying tort, such as gradual pollution or long-term asbestos exposure arguably was not what ordinary people would refer to as an "accident."⁶⁹

Such decisions do not treat "accident" as an independent requirement for an "occurrence" to exist.⁷⁰ Rather, they implicitly conclude that the "expected or intended" clause does not narrow the meaning of "accident," but instead subsumes the term "accident." A

circumstances . . . that were unexpected and unintended from the viewpoint of the insured."); *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200, 1203 (Ore. 1996) ([T]he word 'accident' denotes an incident or occurrence that happened by chance, without design, and contrary to intention and expectation.") (quoting *Finley v. Prudential Ins. Co.*, 388 P.2d 21, 26 (Or. 1963)).

⁶⁷ *See, e.g., Fed. Ins. Co. v. Gen. Mach. Corp.*, 699 F. Supp. 490, 494 (E.D. Pa. 1988) ("An 'accident' is an event which takes place without having been foreseen, expected, or anticipated by anyone If an occurrence is the ordinary and expected result of the performance of an operation, then it cannot be termed an accident."); *Green Const. Co. v. Nat'l Union Fire Ins. Co.*, 771 F. Supp. 1000, 1002 (W.D. Mo. 1991) ("An 'accident,' as that term is used in standard CGL policies 'means that which happens by chance or fortuitously, without intention or design, and which is unexpected, unusual, and unforeseen.'"), *vacated on other grounds*, 975 F. Supp. 1365 (W.D. Mo. 1996); *Gassaway v. Travelers Ins. Co.*, 439 S.W.2d 605, 608 (Tenn. 1969) ("[D]efined accident as used in liability insurance policies as an event not reasonably to be foreseen, unexpected and fortuitous.").

⁶⁸ *See, e.g., Capitol Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1085 (D. Nev. 1999); *Agoado Realty Corp. v. United Int'l Ins. Co.*, 733 N.E.2d 213, 216 (N.Y. 2000).

⁶⁹ *E.g., Mass. Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d at 396, 400-01 (Tex. 1967) (holding that the negligent application of a pesticide that had a cumulative toxic effect was an "accident"); *see also King v. Dallas Fire Ins. Co.*, 27 S.W.3d 117, 123 (Tex. Ct. App. 2000).

⁷⁰ *See Sheets v. Brethren Mut. Ins. Co.*, 679 A.2d 540, 548 (Md. 1996) (negligence is deemed "accidental" so long as it causes damage that is unforeseen or unexpected by the insured).

number of decisions have followed this analysis in sexual abuse cases, concluding that damage was not “expected or intended,” without considering further whether what occurred would be regarded by anyone as an “accident.”⁷¹

These decisions, however, do not confront the issue of whether the term “accident” in the definition of “occurrence” possesses a meaning that is independent of the “neither expected nor intended” clause. On the other hand, a significant number of other courts – particularly when addressing sexual abuse and molestation claims on public policy grounds – have concluded that the term “accident” *does* have independent meaning. These decisions, involving sexual abuse allegations, generally hold that, in determining whether the sexual misconduct has resulted in an “occurrence,” the threshold question is whether the alleged misconduct can aptly be regarded as an “accident.” If it cannot, there is no further inquiry.

For example, as the Colorado Court of Appeals, in *Mountain States Mutual Casualty Co. v. Hauser*, recently observed, even if the insured’s negligence in hiring the perpetrator is alleged as a cause of the victim’s injuries, “it was not a risk covered by the policy since it was not an ‘accident.’”⁷² Citing decisions from California and New York, the court held: “Negligent hiring/supervision [of a sexual molester] is not an ‘accident.’”⁷³ The court explained further:

[The insured] cites no case where an intentional act of sexual assault constituted an “accident” or “occurrence” within the meaning of a comprehensive general liability policy. Rather than resort to “head-spinning judicial efforts at definition,” we conclude that the common understanding of an “accident” does not include the [sexual] assault that occur here.⁷⁴

⁷¹ See *Safeco Ins. Co. of Am. v. White*, 913 N.E. 2d 426, 431-32 (Ohio 2009) (citing cases in other jurisdictions).

⁷² *Mountain States Mut. Cas. Co. v. Hauser*, 221 P.3d 56, 60 (Colo. Ct. App. 2009) (citing *Am. Empire Surplus Lines Ins. Co. v. Bay Area Cab Lease*, 756 F. Supp. 1287, 1290 (N.D. Cal. 1991) (cab company employee sexually molested a passenger)).

⁷³ *Id.* at 60 (citing *Bay Area Cab Lease*, 756 F. Supp. at 1289).

⁷⁴ *Id.* The *Hauser* court indicated that absent an “accident” the “standpoint of the insured-employer” was irrelevant. However, because the insured-employer allegedly expected injury, the court did not need to decide whether a non-expectation of injury has any relevance where the underlying event was not an “accident.” *Id.* at 62.

An accident is never present when a deliberate act is performed unless some additional, unexpected, independent and unforeseen happening occurs which produces the damage, the court added.⁷⁵ This analysis assumes particular importance in “negligent hiring” and “negligent supervision” cases (as in *Hauser*) where the policyholder usually asserts the injuries were neither “expected nor intended” from *its standpoint* (as distinguished from the molester’s standpoint). The “accident” requirement also can limit coverage for abuse claims based on alleged “misrepresentations” by a school or church that children would be safe from abuse.⁷⁶

It is difficult to predict how influential the *Hauser* approach will be. Certainly, the alternate approach – which focuses exclusively on the “expected or intended” clause – may be unwelcome in those jurisdictions that claim to place particular emphasis on reading insurance contract provisions as a whole, so that each provision is afforded meaning.⁷⁷ But

⁷⁵ *Id.*

⁷⁶ *John Doe 1 v. Archdiocese of Milwaukee*, No. 2009AP2266, 2010 WL 4723728, at *4 (Wis. Ct. App. Nov. 23, 2010) (“The cause of the plaintiffs’ injuries, the misrepresentation by the Archdiocese, cannot be characterized as accidental. The affirmative representations of safety by the Archdiocese did not occur by chance, nor was it unforeseen or unintended. . .”).

⁷⁷ *See, e.g., Ohio Cas. Ins. Co. v. Union Pac. R.R. Co.*, 469 F.3d 1158, 1163 (8th Cir. 2006) (applying Ark. law) (“Different clauses of an insurance contract are read together to harmonize all parts because it is error to give effect to one clause over another when the two clauses are reconcilable.”); *Liberty Mut. Ins. Co. v. Treedale, Inc.*, 418 F.3d 330, 336 (3d Cir. 2005) (applying Penn. law) (“[Insured] focuses on phrases that it believes are favorable to its interpretation and ignores all of the other language that runs counter to its interpretation.”); *Premcor USA, Inc. v. Am. Home Assur. Co.*, 400 F.3d 523, 529 (7th Cir. 2005), *as amended on reh'g*, (Apr. 21, 2005) (applying Ill. law) (“Our task is to determine whether this provision remains ambiguous when viewed in the context of the entire . . . policy.”); *Herman Miller, Inc. v. Travelers Indem. Co.*, 162 F.3d 454, 455 (6th Cir. 1998) (applying Mich. law) (“Viewed alone, we could not say that the terms ‘piracy,’ ‘idea misappropriation,’ or ‘unfair competition’ could never constitute patent infringement. However, to draw such an inference when considering these terms within the policy as a whole construes them too broadly.”); *Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.*, 842 F. Supp. 1151, 1159 (W.D. Ark. 1994), *aff’d*, 33 F.3d 1476 (8th Cir. 1994); *Am. Guarantee and Liab. Ins. Co. v. Shel-Ray Underwriters, Inc.*, 844 F. Supp. 325, 331 (S.D. Tex. 1993); *Allstate Ins. Co. v. Hardnett*, 763 So. 2d 963, 965 (Ala. 2000) (“The provisions of the policy cannot be read in isolation, but, instead, each provision must be read in context with all other provisions.”); *Van Ness v. Blue Cross of Cal.*, 104 Cal. Rptr. 2d 511,

those court decisions that conflate “injury neither expected nor intended” with “accident” seem to read the policy as if it defined “occurrence” as:

An accident, meaning an event, including continuous or repeated exposure to conditions, causing property damage or bodily injury that is neither expected nor intended from the standpoint of the insured.

However, this questionable interpretation differs from how the clause *actually* reads, which is:

An accident, including continuous or repeated exposure to conditions, resulting in property damage or bodily injury that is neither expected nor intended from the standpoint of the insured.

Thus, in the “occurrence” definition, as it *actually* reads, the clause beginning “resulting in” modifies, and narrows, the definition of “accident.” By analogy, the words “that is” within this clause have an effect much like they would in a sentence reading: “I am looking to buy a

516 (Cal. Ct. App. 2001); O'Brien v. Progressive N. Ins. Co., 785 A.2d 281, 287 (Del. 2001) (“[A] court’s interpretation of an insurance contract [sic] must rely on a reading of all of the pertinent provisions of the policy as a whole, and not on any single passage in isolation.”); Playtex FP, Inc. v. Columbia Cas. Co., 622 A.2d 1074, 1076 (Del. Super. Ct. 1992) (“[T]he meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement’s overall scheme or plan.”) (citations omitted); Clarendon Am. Ins. Co. v. 69 W. Wash. Mgmt. LLC, 870 N.E.2d 978, 983 (Ill. App. Ct. 2007); Emp’rs Mut. Liab. Ins. Co. of Wis. v. Mich. Mut. Auto Ins. Co., 300 N.W.2d 682, 684 (Mich. Ct. App. 1980); Northbrook Ins. Co. v. Am. States Ins. Co., 495 N.W.2d 450, 453 (Minn. Ct. App. 1993); Ins. Co. of Pa. v. W. Plains Air, Inc., 637 S.W.2d 444, 446 (Mo. Ct. App. 1982); Lindell v. Ruthford, 598 P.2d 616, 618 (Mont. 1979); Commercial Union Assur. Cos. v. Gollan, 394 A.2d 839, 842 (N.H. 1978); Atlas Assur. Co. v. General Builders, Inc., 600 P.2d 850, 852 (N.M. Ct. App. 1979); Long Island Lighting Co. v. Allianz Underwriters Ins. Co., 749 N.Y.S.2d 488, 494 (N.Y. App. Div. 2002); Little v. Blue Cross of W. N.Y., Inc., 424 N.Y.S.2d 553, 555 (N.Y. App. Div. 1980); Burgess v. N.C. Farm Bureau Mut. Ins. Co., 261 S.E.2d 234, 236 (N.C. Ct. App. 1980); Cincinnati Ins. Co. v. CPS Holdings, Inc., 875 N.E.2d 31, 34 (Ohio 2007); Nat’l Union Fire Ins. Co. v. Shane & Shane Co., 605 N.E.2d 1325, 1328 (Ohio Ct. App. 1992); Eddystone Fire Co. No. 1 v. Cont’l Ins. Cos., 425 A.2d 803, 805 (Pa. Super. 1981).

new car *that is* neither damaged nor defective.”⁷⁸ No one reading this particular sentence would conclude that the writer had made an offer to accept an undamaged and non-defective *used* car. True, “undamaged and non-defective” are essential characteristics of a new car – just as “unexpected and unintended injury” are essential characteristics of an “accident” – but the meaning is quite clear: the car must be new. In the same interpretive manner, for an “occurrence” to be found, even unintended injury must still result from an “accident.”

As one court has explained, the final clause to the “occurrence” definition “makes it clear that not all injuries from an intended act will be excluded, but only those injuries that were intended.”⁷⁹ And as another court has correctly observed: “There are two components that must be shown to establish an ‘occurrence’ under the policy: (1) an accident; and (2) personal injury or property damage neither expected nor intended from the standpoint of the insured.”⁸⁰

Courts that give independent meaning to the term “accident” persuasively conclude that sexual abuse and molestation is not an “occurrence,” even if such an injury was not expected or intended by the supervisor-insured. In contrast, those judicial decisions that conflate the two prongs of the “occurrence” definition do not explain how their particular approach can avoid offending the interpretative rule, emphasized in so many jurisdictions, that insurance contract provisions must be read as a whole, giving meaning to the entire document.⁸¹

Had the “occurrence” definition merely provided that “occurrence” means “property damage or bodily injury neither expected nor intended from the standpoint of the insured” – omitting the “accident” predicate – then whether the act itself was “accidental” would be beside the point. But given that “occurrence” is defined as “*an accident* ... resulting in damage

⁷⁸ See generally, *N. Crossarm, Inc. v. Chem. Specialties, Inc.*, No. 03-C-415-C, 2004 WL 602648 (W.D. Wis. Mar. 16, 2004); *Faris Mailing v. Dep’t of State Revenue*, 512 N.E.2d 480, 485 (Ind. T.C. 1987).

⁷⁹ *Great Am. Ins. Co. v. Gaspard*, 608 So. 2d 981, 985 (La. 1992); see also *United Pac. Co. v. McGuire Co.*, 281 Cal. Rptr. 375 (Cal. Ct. App. 1991) (“Since the word ‘event’ is not limited to fortuitous happenings, the phrase ‘not expected or intended’ cannot be read as language confirming the meaning of the term; . . . the phrase must be regarded as language of limitation, narrowing the coverage otherwise provided by the word ‘event.’”).

⁸⁰ *Norwalk Ready Mixed Concrete, Inc. v. Travelers Ins. Co.*, 246 F.3d 1132, 1137 (8th Cir. 2001) (quoting *W. Bend Mut. Ins. Co. v. Iowa Iron Works, Inc.*, 503 N.W.2d 596, 600 (Iowa 1993)).

⁸¹ See *supra* note 75 and accompanying text.

neither expected nor intended by the insured, a different intent is apparent. That is:

1. Something must happen that an ordinary person would regard as an “accident;”
2. If an “accident” has occurred, there is coverage if it results in bodily injury that is neither expected nor intended from the standpoint of the insured claiming coverage.

Nevertheless, the courts are still divided between those that grant meaning to the term “accident” within the “occurrence” definition, and those that focus exclusively on the “expected or intended” clause. Courts following the former line of decisions are likely to regard claims arising from sexual abuse and molestation as falling outside the subject of insurance coverage, while those courts following the latter line of decisions must determine whether the insured “expected or intended” the sexual abuse.⁸²

2. The “Objective” or “Classic Tort” Standard Applied to Insurance Claims Arising from Negligent Hiring or Supervision of a Molester

The crucial underlying legal requirement found in most clergy negligent hiring, negligent retention, and negligent supervision cases is largely based upon whether the priest or clergyman’s supervising church, bishop, diocese, or other religious organization *knew or should have known* of the offender’s sexual abuse toward minors.⁸³ The courts have been far from uniform in addressing this issue. As discussed earlier,⁸⁴ for many claims arising from sexual abuse, whether an “occurrence” has transpired frequently is determined according to whether the injury caused by the sexual misconduct was “expected or intended from the viewpoint of the insured.” This test is derived from the final clause of the “occurrence” definition, requiring that the injury has been neither “expected” nor “intended.”

⁸² See generally *infra* Part II.B (involving the molester-insured); *infra* Part II.C.2 (involving the supervisor-insured).

⁸³ See *supra* note 33 and accompanying text.

⁸⁴ See *supra* note 33 and accompanying text.

Only a few cases across the country have comprehensively analyzed whether liability insurers can defeat coverage by asserting that, based on their knowledge of the circumstances, an employer or supervisor “expected or intended” injury to a sexual molestation victim.⁸⁵ One commentator notes that some courts have applied an *objective standard* of what a reasonable supervisor-insured “knew or should have known,” involving the “substantial probability” that certain consequences would result; while other courts have applied a *subjective standard* involving what a particular supervisor-insured *actually* “knew or believed.”⁸⁶

A prime example of this *objective standard* is the case of *Diocese of Winona v. Interstate Fire & Casualty Co. et al.*⁸⁷ The particular circumstances surrounding this liability insurance coverage dispute involved a pedophilic priest, Father Adamson, who subjected several children to prolonged periods of sexual molestation.⁸⁸ The plaintiff, Mrozka, sued the Diocese and Archdiocese, alleging they negligently and recklessly supervised Adamson, allowing Adamson to sexually abuse Mrozka when he was a minor. Both the Diocese and the Archdiocese conceded negligence, but disputed their recklessness. “The jury awarded Mrozka \$821,250 in compensatory damages and, finding recklessness, awarded \$2,700,000 in punitive damages,” a punitive damage award that was later reduced to \$187,000.⁸⁹ The Minnesota Court of Appeals previously had found sufficient evidence “from which the jury could conclude that Church officials *repeatedly* and *knowingly* placed Adamson in situations where he could sexually abuse boys and then failed to properly supervise him and disclose his sexual problem.”⁹⁰

During the period Mrozka was sexually abused by Father Adamson, the Diocese and the Archdiocese had standard occurrence-based Commercial General Liability (CGL) policies from various insurers covering, among other things, “an accident, including continuous or

⁸⁵ See, e.g., Weinstein, *supra* note 4, at 50.

⁸⁶ *Id.*

⁸⁷ *Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386 (8th Cir. 1996) (applying Minn. law).

⁸⁸ See *Diocese of Winona v. Interstate Fire & Cas. Co.*, 858 F. Supp. 1407 (D. Minn. 1994) (detailing facts surrounding Father Adamson’s accused sexual molestation); *Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992) (same).

⁸⁹ 89 F.3d at 1389.

⁹⁰ 482 N.W.2d at 813.

repeated exposure to conditions, which results in personal injury . . . *which is neither expected nor intended from the standpoint of the insured.*"⁹¹

The Eighth Circuit Court of Appeals stated that although "an insured has a reasonable expectation in securing a CGL policy that the policy will cover *some* negligent acts, it does not necessarily follow that *all* negligent acts are covered."⁹² Accordingly:

[t]he issue then is whether a reasonably prudent person in the position of the Diocese and the Archdiocese *knew or should have known* that Adamson's abuse of Mrozka was *substantially probable* as a result of the continuing exposure caused by their willful indifference. In defining substantial probability, this court has stated, "[t]he indications must be strong enough to alert a reasonably prudent man not only to the possibility of the results occurring but the indications also must be sufficient to forewarn him that the results are highly likely to occur."⁹³

The case therefore was remanded to the federal district court to enter judgment in accordance with this *objective "reasonable person" standard.*⁹⁴

On the other hand, an example of a *subjective* or "*particular insured*" standard is found in the case of *Roman Catholic Bishop of San Diego v. Superior Court*,⁹⁵ where a parish priest, Father Omemaga, sexually abused 15-year-old Jane D. The plaintiff alleged that the Roman Catholic diocese and church negligently hired, retained, and supervised Omemaga, since it knew or should have known of his dangerous propensities as a sexual exploiter of children.

The church moved for summary judgment on the basis [that] it was not negligent because it did not know and had no reason to suspect Omemaga posed any risk to parishioners prior to Jane's report. In essence, the church argued it had no civil duty to investigate its employees and the constitutional requirement separating church and state

⁹¹ 89 F.3d at 1389-91 (emphasis added).

⁹² *Id.* at 1392 (emphasis added).

⁹³ *Id.* at 1391 (emphasis added) (citations omitted).

⁹⁴ *Id.* at 1399.

⁹⁵ 50 Cal. Rptr. 2d 399 (Cal. Ct. App. 1996).

barred Jane's civil action for negligent hiring and supervision of a priest.⁹⁶

As evidence of negligent hiring and negligent supervision of Father Omemaga, the plaintiff submitted Bishop Robert Brom's interrogatory response stating that "depending on whether a priest is new to the Diocese or whether he is known within the Diocese, the Chancellor of the Diocese may ask priests ... whether they have any past or present problems with their celibacy, and whether anyone has ever made a claim of sexual misconduct against them." And "[a]lthough there were no detailed guidelines how a priest demonstrates his fitness," Father Thomas Doyle, a canon law expert, and an expert in the field of sexual abuse of children by clergy, testified "it is expected that a host bishop make specific inquiries as to the priest's background, his work record, and his character" and "Doyle expected bishops to be 'much more careful and even scrupulous when investigating the qualifications of priests who will work in their dioceses.'"⁹⁷ Moreover, there was also evidence that Omemaga had two prior sexual relationships in the Philippines, and one sexual relationship in San Diego with a parishioner, and Jane's attorney argued that the church was negligent in hiring Omemaga because, as part of the screening process, the church failed to ask him "whether he had problems with his vows of celibacy."⁹⁸

Nevertheless, the California Court of Appeal observed that Jane D. did *not* have an actionable negligent hiring, negligent retention, or negligent supervision claim against the Diocese under a *subjective* "particular insured" standard. Opined the court: "Even if the church had learned of Omemaga's prior sexual affairs with adults, it is illogical to conclude the church should have anticipated Omemaga would commit sexual crimes on a minor."⁹⁹ The decision demonstrates how the subjective standard varies from the objective standard exemplified in cases such as *Diocese of Winona*. As one commentator notes, in jurisdictions that apply

⁹⁶ *Id.* at 400-01.

⁹⁷ *Id.* at 403.

⁹⁸ *Id.* at 401, 405.

⁹⁹ *Id.* at 405. But query: Why is it so "illogical" that a priest who has broken his vow of celibacy with adults may also break his vow of celibacy with minors as well? See also *Mark K. v. Roman Catholic Archbishop of Los Angeles*, 79 Cal. Rptr. 2d 73 (Cal. Ct. App. 1998) (holding that in an action for negligent retention and negligent supervision of a priest who sexually molested a child, the archdiocese failed to warn the victim of the priest's propensity for engaging in sexual misconduct with boys).

this *subjective standard*, “even the egregious facts in *Diocese of Winona* likely would not be sufficient to trigger the expected or intended exclusion” to liability insurance coverage.¹⁰⁰

Which is the better-reasoned interpretive approach—the *objective standard* as illustrated in the *Diocese of Winona* case, *supra*, or the *subjective standard* as illustrated in the *Bishop of San Diego* case, *supra*?

It is submitted that the *objective standard* clearly is the better-reasoned interpretive approach for four compelling reasons:

First, the claims of negligent hiring, negligent supervision, and negligent retention brought against church organizations and their supervisors for the sexual abuse of minors by priests or other clergymen all sound in *negligence* which traditionally is based upon an *objective* “reasonable person” standard of care.¹⁰¹ Moreover, in a liability insurance context involving claims of negligence, a court generally applies an “eight corners rule”—that is, the court will compare the “four corners” of the underlying tort complaint with the “four corners” of the insurance policy to determine coverage.¹⁰²

Second, the “objective” or “classic tort” standard for determining intentional acts in liability insurance coverage disputes, or alternately the “inferred intent” standard as applied to child sexual abuse cases, is generally recognized in an overwhelming majority of states as opposed to the minority “subjective” or “particular insured” standard, based upon strong public policy reasons.¹⁰³

Third, a substantial majority of courts have now recognized that the crucial underlying requirement in negligent hiring, negligent retention, and negligent supervision of clergy cases largely is based upon whether the priest or clergyman’s supervising church, bishop, diocese, or other

¹⁰⁰ Weinstein, *supra* note 4, at 50.

¹⁰¹ The law of negligence generally imposes on each person an obligation to conform to a reasonable person of ordinary prudence standard, an objective standard that is now well-established in American negligence law. *See, e.g.,* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32 (W. Page Keeton ed., 5th ed. 1984); *see also* DAN B. DOBBS, THE LAW OF TORTS § 258 (2000).

¹⁰² *See, e.g.,* Pekin Ins. Co. v. Dial, 823 N.E.2d 986, 990 (Ill. App. Ct. 2005) (finding no duty to defend the insured in a sexual molestation case).

¹⁰³ *See generally infra* Part II.B.

religious organization *knew or should have known* of the sexual offender's abuse toward minors—which, again, is an objective standard.¹⁰⁴

Fourth, and of primary importance, the crucial *causation requirement* in both tort law and insurance contract law *also* requires the application of an objective “efficient or predominant cause” interpretive analysis, as is discussed in more detail directly below.

3. Reassessing the Crucial Causation Requirement in Liability Insurance Coverage Disputes Involving Sexual Abuse of Minors

The *causation requirement* is a crucial factor in both tort law¹⁰⁵ and insurance law,¹⁰⁶ especially involving liability insurance coverage disputes.

¹⁰⁴ See Cooke, *supra* note 4, at 1063 (“If a reasonably prudent person in the position of the Church would expect or should expect that an employee is a danger to innocent life, the church should bear responsibility for all resulting liability.”).

¹⁰⁵ According to Professor William Lloyd Prosser, to establish a *bona fide* tort action sounding in negligence, the plaintiff must plead and prove: (1) that the defendant owed plaintiff a duty of due care to act in a reasonable manner toward the plaintiff; (2) that defendant breached this duty of due care to the plaintiff; (3) that defendant's acts were the *causal connection* between the defendant's conduct and the resulting injury; that is to say, it was the *cause in fact* and the *proximate cause* of plaintiff's injury or loss; and (4) actual damage or loss occurred to the plaintiff as a result of defendant's actions. See, e.g., Keeton, *supra* note 101, at 164-65. The proposed RESTATEMENT (THIRD) OF TORTS § 6 cmt. b (2010) states that there are five elements to any *prima facie* case in negligence: (1) “duty”; (2) “failure to exercise reasonable care”; (3) “*factual cause*”; (4) “physical harm”; and (5) “harm within the scope of liability (which historically has been called ‘*proximate cause*’)” (emphasis added).

¹⁰⁶ In an insurance law context, Professor Banks McDowell argues that the following four factors need to be considered: (1) the coverage provisions of an insurance policy; (2) the occurrence of the event; (3) the loss or damage; and (4) the *causal “connector”* between the event and the loss. Banks McDowell, *Causation in Contracts and Insurance*, 20 CONN. L. REV. 569, 575 (1988) (emphasis added). McDowell goes on to state that causation “should be limited to the connector between what, consistent with insurance terminology, may be called an ‘occurrence,’ and the loss suffered by the insured . . .” *Id.* at 575-76. See also Sidney I. Simon, *Proximate Cause in Insurance*, 10 AM. BUS. L.J. 33, 35-36 (1972) (“The insurance rule is that only the proximate cause of the loss, and not the remote cause, is to be regarded in determining whether recovery may be had under an insurance policy, and the loss must have been proximately caused by a peril insured against. . . . The proximate cause of loss or damage to an insured's property or injury to his person is not necessarily the last link in the chain of

In an insurance law context, the courts are split on whether to apply causation rules recognizing either: (1) the cause nearest the loss;¹⁰⁷ or (2) the efficient or predominant cause of the loss.¹⁰⁸ As one of the authors of this article previously has observed:

A growing number of American courts ... have rejected a strict immediate cause rule in favor of an efficient or dominant proximate cause rule, analogous to a tort-based proximate cause rule, in order to validate the reasonable expectations of the insured policyholder to coverage. Under this reasonable expectations hybrid of tort and contract causation law, there will be coverage if a risk of loss that is specifically insured against in the insurance policy sets in motion, in an unbroken causal sequence, the events that cause the ultimate loss, even though the last immediate cause in the chain of causation is an excluded cause.¹⁰⁹

preceding events, but the procuring, efficient cause from which the effect might be expected to follow without concurrence of any unforeseen circumstances.”)

¹⁰⁷ See, e.g., *Queen Ins. Co. of Am. v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 492 (1924) (involving a war risk marine insurance policy) (“[T]he common understanding is that in construing these [insurance] policies we are not to take broad views but generally are to stop our inquiries with the cause nearest to the loss.”); *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1007 (2d Cir. 1974) (applying N.Y. law) (involving aviation insurance) (“These cases establish a mechanical test of proximate causation for insurance cases, a test that looks only to the ‘causes nearest to the loss.’”). See also *Bruener v. Turin City Fire Ins. Co.*, 222 P.2d 833, 834-35 (Wash. 1950) (involving automobile insurance) (similar holding), *overruled by Graham v. Pub. Emps. Mut. Ins. Co.*, 656 P.2d 1077, 1081 (Wash. 1983) (involving a homeowners insurance coverage dispute) (adopted the efficient or predominant proximate cause rule).

¹⁰⁸ See, e.g., *TNT Speed & Sport Ctr., Inc. v. Am. States Ins. Co.*, 114 F.3d 731, 733 (8th Cir. 1997) (applying Mo. law) (involving commercial property insurance); *State Farm Mut. Auto. Ins. Co. v. Roberts*, 697 A.2d 667 (Vt. 1997) (involving automobile insurance). See generally Stempel, *supra* note 7, § 7.02; Jerry & Richmond, *supra* note 7, § 67[b].

¹⁰⁹ Peter Nash Swisher, *Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal Causation “Riddles”*, 43 TORT TRIAL & INS. PRAC. L.J. 1, 23-24 (2007) (citing as authority *Graham*, 656 P.2d at 1081 (Wash. 1983) (involving homeowners insurance)). See also *John Drennon & Sons Co. v. N.H. Ins. Co.*, 637 S.W.2d 339, 341 (Mo. Ct. App. 1982) (involving machinery and equipment insurance).

This is especially true with *liability insurance* coverage issues, since in order to determine

whether an insurer has a duty to defend [or provide coverage for] its insured in a lawsuit, a court should generally apply an “eight corners rule”—that is, the court should compare the four corners of the underlying tort complaint with the four corners of the insurance policy and determine whether the facts alleged in the underlying complaint fall within, or potentially within, the insurance policy’s coverage.¹¹⁰

Next, this crucial causation “connector” requires proof by the plaintiff of the *probability of harm*—rather than a mere “possibility” of harm—based upon defendant’s conduct toward the plaintiff.¹¹¹

Finally, when two or more defendants actively cause the plaintiff harm, most courts will apply a “substantial factor” test, which holds that those defendants who were a “substantial factor” and constituted the “efficient or predominant cause” of the ultimate harm to the plaintiff, within an unbroken casual chain of events, will be the cause-in-fact and the proximate cause of the plaintiff’s injuries.¹¹² This “efficient or predominant

If the clergy sexual abuse was the “efficient or predominant cause” of the injury, and if it is excluded from coverage under an intentional acts exclusion in the policy, then the insured will *not* be able to recover under the liability insurance policy. This same result would also occur under “the cause nearest the loss” interpretive analysis.

¹¹⁰ *Pekin Ins. Co. v. Dial*, 823 N.E.2d 986, 990 (Ill. App. Ct. 2005) (finding there was no duty to defend the insured in a sexual molestation action).

¹¹¹ See generally *Keeton*, *supra* note 101, at 269-72; RESTATEMENT (SECOND) OF TORTS §§ 430-433 (1965). See, e.g., *Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386, 1391 (8th Cir. 1996) (applying Minn. law) (“The issue then is whether a reasonably prudent person in the position of the Diocese and the Archdiocese knew or should have known that Adamson’s abuse of Mrozka was substantially probable as a result of the continuing [clergy sexual abuse] exposure caused by their willful indifference. In defining substantial probability, this court has stated, “[t]he indications must be strong enough to alert a reasonably prudent man not only to the possibility of the results occurring but the indications also must be sufficient to forewarn him that the results are highly likely to occur.”) (citations omitted).

¹¹² See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 431, 432(2), 433, 435 (1965). See generally *Dobbs*, *supra* note 101, at 414-17, 447-51; *Keeton*, *supra* note 101, at 263-68.

cause” analysis is recognized in an insurance law context as well.¹¹³ But in a liability insurance context, what “efficient or predominant cause” would (or would not) constitute an “occurrence” in a causal chain of events involving more than one defendant?

Since few cases to date have comprehensively analyzed whether liability insurers can defeat coverage by asserting that a church organization, employer, or supervisor negligently “knew or should have known” of the “expected or intended” injuries to a sexual molestation victim initially caused by a priest or clergyman, especially from a necessary *causation* perspective, we need to analyze some analogous liability insurance cases dealing with this crucial *causation requirement*.

For example, in the analogous case of *Farmers Alliance Mutual Insurance Co. v. Salazar*,¹¹⁴ a homeowner’s insurer brought a declaratory judgment action, seeking judicial determination that it had no obligation to defend or indemnify either the insured son, Manuel Corrales, for his negligent entrustment of his gun to a fellow gang member, or the insured mother, Ofelia Salazar, for her negligent supervision of her 16-year-old son Manuel, based on wrongful death claims arising out of her son’s participation in the murder of another boy, Thomas Byus.¹¹⁵

The insurance company’s “duty to defend and indemnify Ms. Salazar and Manuel Corrales turns on whether Thomas Byus’s death was a ‘bodily injury . . . caused by an occurrence’” under the homeowners’ liability insurance coverage. Farmers Alliance Insurance Company argued that the murder of Thomas Byus, by firing the bullet into his head, was the event that must qualify as an “occurrence.” Byus’s administrator in this wrongful death action, however, “asks us to cast our focus further up the causal chain to Ms. Salazar’s negligent supervision of Manuel and Manuel’s negligent entrustment of the murder weapon to Jacob De LaCruz.”¹¹⁶

In a case of first impression, the Eighth Circuit Court of Appeals, applying Oklahoma law, stated:

Our search for “occurrence” policy case law addressing a causal chain that begins with a negligent act or omission

¹¹³ See generally Jerry & Richmond, *supra* note 7, § 67[b]; Stempel, *supra* note 7, § 7.02; see also Keeton, *supra* note 100, § 82 (Liability Insurance and its Impact on Tort Law).

¹¹⁴ 77 F.3d 1291 (10th Cir. 1996) (applying Okla. law).

¹¹⁵ *Id.* at 1293-94.

¹¹⁶ *Id.* at 1295.

and ends with an intentional tort has uncovered the decisional equivalent of a famine. We have located no cases addressing the issue facing us today. Therefore, we begin our analysis with cases that might help by analogy or deduction. Of the scores of decisions interpreting “occurrence” policies, two categories of cases prove particularly instructive. The first category answers the question of when an “occurrence” happens, and the second focuses on where.¹¹⁷

The court then discussed the generally prevailing rule, recognized by most courts, that “the time of an ‘occurrence’ generally is determined by ‘the time the complaining party was actually damaged,’” and “the location of an ‘occurrence’ is determined by the place where the injury happened; it does not matter that a precipitating event took place elsewhere.”¹¹⁸ Although these cases did not address the court’s causal link issue directly, the court found their reasoning to be dispositive. Accordingly, the court held in determining whether a bodily injury was “‘caused by an occurrence’ the question of whether there *was* an ‘occurrence’ should be resolved by focusing on the injury and its immediately attendant causative circumstances.”¹¹⁹

Based upon the facts of this particular case, the “occurrence” was when and where Jacob De La Cruz murdered Thomas Byus, which was an intentional act, and therefore it could *not* qualify as an “accident . . . [that was] neither expected nor intended from the standpoint of the insured.”¹²⁰ Consequently, the court concluded that it “need not reach the issue of whether Ms. Salazar or Manuel Corrales actually intended or expected Thomas Byus’s death, because intentional murder is not ‘an accident’ under the insurance policy’s ‘occurrence’ provision.”¹²¹

This same legal argument might also be applied in a liability insurance context when a priest or clergyman intentionally sexually abuses

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1296 (citation omitted).

¹¹⁹ *Id.*

¹²⁰ *Salazar*, 77 F.3d at 1297.

¹²¹ *Id.* Although the court did not directly address the negligent supervision allegation involving Ms. Salazar in this particular case, the court may also have utilized the same causation analysis found in analogous cases interpreting “Liquor Liability Exclusions” or “Assault and Battery Exclusions” as discussed below. See *supra* notes 95-103 and accompanying text.

a minor, which clearly is *not* an “accidental” occurrence under the policy coverage provisions.¹²²

Other analogous cases have dealt with “Liquor Liability Exclusions” or “Assault and Battery Exclusions,” which are conceptually similar to the “Intentional Act Exclusions” involved in clergy sexual abuse claims. For example, in the case of *Property Owners Ins. Co. v. Ted’s Tavern, Inc.*,¹²³ a tavern’s commercial general liability (CGL) insurance policy contained an exclusion—exclusion 2(c)—concerning bodily injury resulting from causing or contributing to the intoxication of a person, or furnishing alcoholic drinks to someone who was under the influence of alcohol.¹²⁴ When a motorist was killed by a drunk patron, who was driving home from the tavern, the personal representative of the deceased motorist brought a wrongful death action against the tavern’s liability insurance carrier, arguing that the Ted’s Tavern and its employees were liable under the CGL policy for their negligent hiring, negligence training, and negligent supervision, rather than coming under the policy’s liquor liability exclusion 2(c). But the Indiana Court of Appeals disagreed with the plaintiff’s argument, based upon relevant *legal causation* principles:

Regardless of the theories of liability a resourceful attorney may fashion from the circumstances of this case, the allegations [of negligently hiring, training, and supervising the tavern employees] are general “rephrasings” of the core negligence claim for causing/contributing to [the patron’s] drunk driving. The events outlined in [the plaintiff’s complaint] simply *are not wholly independent* of “carelessly and negligently” serving and continuing to serve alcoholic beverages to [the impaired patron] when the defendants *knew or should have known* he was intoxicated and soon thereafter could be driving drunk. To the contrary, the... negligent hiring, training, and supervision *are so inextricably intertwined* with the underlying negligence [under the liquor liability exclusion] that there *is no independent act* that would avoid exclusion 2(c). Hence, while a valiant effort to procure coverage, the creative pleadings of [negligent hiring, negligent training, and negligent supervision of the

¹²² See *supra* notes 64-81 and accompanying text.

¹²³ 853 N.E.2d 973 (Ind. Ct. App. 2006).

¹²⁴ *Id.* at 978.

employees] cannot hide the reality that *the immediate and efficient cause* of the injuries was drunk driving precipitated by the negligent service of alcohol. As such, exclusion 2(c) precludes coverage.¹²⁵

Thus, the *Ted's Tavern* court adopted an “efficient or predominant cause” analysis, where the liquor liability exclusion—exclusion 2(c)—barred any recovery from the liability insurance company, since the related allegations of negligent hiring, negligent training, and negligent supervision were *not wholly independent of*, and were *inextricably intertwined with*, the liquor liability exclusion.

Allegations of misconduct have been deemed to be “interdependent” with a negligence claim when the negligence claim incorporated the facts alleged to support deliberate misconduct.¹²⁶ Thus, for example, if Count I of the complaint alleges that the insured knew the molester presented a high level of risk of injury to children, and Count II of the complaint “incorporates and realleges” the facts set forth in Count I, then the court may conclude that the “negligence” count reflects an “expectation” of harm as well.

This holding is consistent with decisions from other jurisdictions as well.¹²⁷ A Delaware court, for example, considered a case in which, following the forcible removal of a patron from an amusement park, the patron sued the park alleging assault, battery, false imprisonment, and “injury with ill will, intent to injure or malice,” and also pled “negligent supervision.”¹²⁸ The court observed: “where negligence claims against an employer such as negligent hiring, negligent training, and negligent entrustment, are related to and interdependent on the intentional misconduct of an employee, the “ultimate question” for coverage purposes is whether the employee’s intentional misconduct itself falls within the definition of ‘occurrence.’” Likewise, a Missouri court observed, in an action against a bar owner for injuries inflicted by intoxicated patrons, that:

¹²⁵ *Id.* at 983 (emphasis added) (citations omitted). See also *Scottsdale Ins. Co. v. Lankford*, No. 07C-06-254 RRC, 2007 WL 4150212 (Del. Super. Ct. Nov. 21, 2007), *aff'd*, 947 A.2d 1121 (Del. 2008) (similar holding).

¹²⁶ See, e.g., *Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 666 S.E.2d 897, 900 (S.C. 2008).

¹²⁷ See *Bituminous Fire and Marine Ins. Co. v. Huttu*, No. 4:06CV67TSL-LAA, 2007 WL 188661, at *1 (S.D. Miss. Jan. 23, 2007).

¹²⁸ *TIG Ins. Co. v. Premier Parks*, No. Civ.A02C04126JRS, 2004 WL 728858 (Del. Super. Ct. Mar. 10, 2004).

The damages arise from the assault and battery. Without the underlying assault and battery, there would have been no injury and therefore no basis for plaintiffs' action against Harverfield for negligence. The assault and battery and Haverfield's negligence are not mutually exclusive; rather the acts are related and interdependent.¹²⁹

Courts in Texas have applied this doctrine in several other cases as well.¹³⁰

When a supervisor's liability is stated to be on account of its own negligence, but this negligence is alleged to be interrelated with deliberate misconduct, the deliberate misconduct, according to these courts, becomes determinative.¹³¹ When the negligent hiring or negligent supervision claims require "proof of misconduct" by the offender, the only question is whether the *offender's* acts are covered under the definition of "occurrence."¹³²

Accordingly, an emerging line of cases persuasively hold that when the insured's liability is "related to and interdependent on other tortious activities," the nature of that other tortious activity will determine whether the insurance policy covers the insured supervisor.¹³³ In *Mt. Vernon Fire Ins. Co. v. Stagebands*, for example, claims of "negligent design" (of a parking lot) did not permit a finding that injury was expected or intended. The court observed:

There is no question Cortes's injuries were caused by the gun-shot – even if the parking layout was an after-the-fact contributing and worsening cause. In sum, the fact that [the insureds'] parking design negligence may have

¹²⁹ *Hunt v. Capitol Indem. Corp.*, 26 S.W.3d 341, 345 (Mo. Ct. App. 2000).

¹³⁰ *See State Farm Lloyds v. Borum*, 53 S.W.3d 887 (Tex. App. 2001); *Folsom Invs. Inc. v. Am. Motorists Ins. Co.*, 265 S.W.3d 556, 559 (Tex. App. 2000).

¹³¹ *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80, 87 (5th Cir. 1997) (applying Tex. law) (citing to *N.Y. Life Ins. Co. v. Travelers Ins. Co.*, 92 F.3d 336 (5th Cir. 1996) (applying Tex. law)).

¹³² *Id.*

¹³³ *See Am. States Ins. Co. v. Bailey*, 133 F.3d 363, 371 (5th Cir. 1998) (applying Tex. law); *Cornhill*, 106 F.3d at 87 (no duty to defend employer for negligent hiring and failure to provide safe workplace where employee sexually harassed another employee); *cf. Mount Vernon Fire Ins. Co. v. Stagebands Inc.*, 636 F. Supp. 2d 143 (D. R.I. 2009).

affected [the victim] after he was shot does not make it unrelated and independent of the assault.¹³⁴

When courts have applied this analysis to negligent supervision claims in the context of sexual abuse and molestation, they have held that the resulting injury was not an “occurrence” within the meaning of a general liability insurance policy:

If [the perpetrator] had not sexually molested the Isbell daughters, Linda Isbell would have no claim for damages against [the mother-defendant]. Thus, we find [her] liability to be ‘related to and interdependent on’ the tortious acts of [the perpetrator]. Because [the perpetrator’s] underlying acts are not encompassed within the definition of ‘occurrence,’ [the insurer] has no duty to defend.¹³⁵

These decisions reason that negligent hiring and supervision, in and of themselves, are not actionable, and hence immaterial, absent the non-accidental act of molestation.

Other cases are in accord with this persuasive and compelling causation analysis. For example, in the case of *Terra Nova Insurance Co. v. Nanticoke Pines, Ltd.*,¹³⁶ a liability insurer brought an action seeking a declaratory judgment that it had no obligation to defend or indemnify its insured tavern keeper for claims asserted by Kevin Gibbs, who was shot by the tavern’s security officer, John Hargett. The plaintiff argued that the liability insurance coverage was premised on the negligent hiring and the negligent supervision of the tavern’s security guard under the doctrine of *respondeat superior*.¹³⁷ The insurer argued, however, that it was *not* liable under its “assault and battery” exclusion in the policy.

The federal district court, applying Delaware law, held that:

¹³⁴ *Stagebands*, 636 F. Supp. 2d. at 148-49.

¹³⁵ *Am. Nat. Gen. Ins. Cos. v. Ryan*, 274 F.3d 319, 325 (5th Cir. 2001) (applying Tex. law); *accord* *W. Am. Ins. Co. v. Embry*, No. Civ.A. 3:04CV-47-H, 2005 WL 1026185 (W.D. Ky. Apr. 25, 2005); *Nw. G.F. Mut. Ins. Co. v. Norgard*, 518 N.W.2d 179, 184 (N.D. 1994).

¹³⁶ 743 F. Supp. 293 (D. Del. 1990).

¹³⁷ *Id.* at 294.

based on the assault and battery exclusion, the complaint does not allege a risk covered by the policy.... [T]he plain language of the exclusion bars coverage for any claim based on assault and battery....All the issues the complaint raises about Nanticoke's negligence and recklessness [including allegations of negligent hiring and negligent supervision] concern conduct of Nanticoke *that helped make the assault possible*, and are thus *fundamentally premised on the assault itself*.¹³⁸

Delaware's "fundamentally premised" causation analysis is essentially the same as the "efficient or predominant cause" analysis adopted in the *Ted's Tavern* case, *supra*,¹³⁹ and a number of other cases also are in accord with this generally accepted causation analysis.¹⁴⁰

On the other hand, policyholders might contend that the "expected or intended" clause is not offended by affording coverage to a supervisor-insured, given that, in such a case, "the insured" claiming coverage is not the perpetrator. The *Terra Nova* court noted, without deciding, this particular distinction.¹⁴¹ Also, an Ohio court recently opined: "[T]orts 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."¹⁴² The court reasoned that the negligent act, standing alone, was the "occurrence."

Insurers might respond that, given the inevitable presence of supervisors in connection with any such claim under a commercial liability

¹³⁸ *Id.* at 297 (emphasis added).

¹³⁹ See, e.g., *Scottsdale Ins. Co. v. Lankford*, No. 07C-06-254 RRC, 2007 WL 4150212, at *10 (Del. Super. Ct. 2007), *aff'd*, 947 A.2d 1121 (Del. 2008).

¹⁴⁰ See, e.g., *Terra Nova Ins. Co. v. Thee Kandy Store Inc.*, 679 F. Supp. 476, 478 (E.D. Pa. 1988) ("Regardless of the language of the allegations, the original cause of the harm arose from an alleged assault and battery"); *Terra Nova Ins. Co. v. North Carolina Ted, Inc.*, 715 F. Supp. 688, 691 (E.D. Pa. 1989) (similar holding); see generally Kimberly J. Winbush, Annotation, *Validity, Construction, and Effect of Assault and Battery Exclusion in Liability Insurance Policy at Issue*, 44 A.L.R. 5TH 91 (1996) (reporting that the vast majority of cases are in accord with this general causation principle).

¹⁴¹ *Nanticoke Pines*, 743 F. Supp. at 298 n. 9.

¹⁴² *Safeco Ins. Co. of N. Am. v. White*, 913 N.E.2d 426, 434 (Ohio 2009).

policy issued to an organization, the “fundamentally premised” doctrine properly serves to avoid nullifying the “expected or intended” clause. Further, courts applying the “fundamentally premised doctrine” to exclusions, consistently have supported their decisions as necessary to defeat “artful pleading” by underlying plaintiffs.¹⁴³ As stated in a decision recently affirmed by the Delaware Supreme Court in *Lankford v. Scottsdale Insurance Co.*, “[t]he purpose of Delaware’s ‘fundamentally premised’ analysis is to prevent an injured party from circumventing the clear terms of an insurance policy by allying with the insured and by fashioning expansive theories of liability.”¹⁴⁴ The *Lankford* court cited an American Law Reports annotation’s recognition of “the anomalous legal posture of an insured and a victim, adversaries in one case, siding against an insurer seeking to apply an ... exclusion to the litigated claims.”¹⁴⁵

In *Nationwide Mutual Fire Ins. Co. v. Lajoie*, for example, the Vermont Supreme Court rejected a claim for “negligent infliction of emotional distress” arising from the insured’s alleged sexual abuse of a minor as “simply a disingenuous attempt to create a factual dispute.”¹⁴⁶ Courts should seek to prevent the absurdity, and possible fraud upon the court, that might result if the law were to allow a superficial claim of “negligence” to supersede factual allegations that reveal intentional and deliberate conduct by the insured.¹⁴⁷

Accordingly, this “efficient or predominant cause” interpretive analysis may be applied—and, indeed, should be applied—to clergy sexual abuse claims. For example, a number of courts have held that various churches, bishops, dioceses, and other religious organizations may be held tortiously liable for their negligent hiring, negligent supervision, or negligent retention of a sexually abusive priest or clergyman if the church, bishop, diocese, or other religious organization *knew or should have known* of the priest’s or clergyman’s sexual misconduct.¹⁴⁸ But in a *liability insurance context*, if this negligent hiring, negligent supervision, or negligent retention of a sexually abusive priest or clergyman was so *inextricably intertwined with, interdependent, and not independent of*, the priest or clergyman’s sexual misconduct—which was excluded under the

¹⁴³ See, e.g., Winbush, *supra* note 140.

¹⁴⁴ See, e.g., *Scottsdale Ins. Co. v. Lankford*, No. 076-06-254 RRC, 2007 WL 4150212, at *8 (Del. Super. 2007), *aff’d*, 947 A.2d 1121 (Del. 2008).

¹⁴⁵ *Id.* at *8 n.47 (citing Winbush, *supra* note 140, at 91).

¹⁴⁶ *Nationwide Mut. Fire Ins. Co. v. Lajoie*, 661 A.2d 85, 86 (Vt. 1995).

¹⁴⁷ The distinction between *actual* “negligence” and the mere labeling of a claim as “negligence” is discussed in further detail below. See *infra* Part II.E.

¹⁴⁸ See *supra* notes 31-35 and accompanying text.

liability insurance policy's intentional act exclusion, and which was the "efficient or predominant cause" of the plaintiff's sexual abuse claim—then the supervising church, bishop, diocese, or other religious organization should *not* be covered by its liability insurer under generally accepted tort and insurance law cause-in-fact and proximate cause *causation principles*.¹⁴⁹

Consequently, if a priest or clergyman sexually abuses a minor, this sexual abuse generally will be barred under a liability insurance policy's "expected or intended" exclusion, under either an objective or "classic tort" analysis,¹⁵⁰ or under an "inferred intent" standard as applied to child sexual abuse cases.¹⁵¹ Likewise, if a supervisory church, diocese, bishop, or other religious organization objectively *knew or should have known* of the priest's or clergyman's sexual abuse of a minor—which was the "efficient or predominant cause" of the minor's sexual abuse claim—and this negligent hiring, supervision, or retention of the sexually abusive priest or clergyman was *connected to* and was *not independent from* the priest or clergyman's sexual misconduct, then liability insurance should not cover such negligence under relevant cause-in-fact and proximate cause principles either.

4. What is "Expected" Injury, and Does "Expected" have a Meaning Independent from "Intended"?

As discussed above, the question whether an insured "intended" injury has been regarded by a significant number of courts as governed by an "objective" standard or, with children, an "inferred intent" standard.¹⁵² If a reasonable person would have foreseen injury, then, consistent with tort law precedent, the insured's state of mind will be deemed to reflect intent.

¹⁴⁹ See *supra* notes 82-103 and accompanying text. See, e.g., *Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386 (8th Cir. 1996) (applying Minn. law); see also *Am. Commerce Ins. Co. v. Porto*, 811 A.2d 1185 (R.I. 2002) (holding that a separate negligent supervision claim was *not* covered since it was causally connected to the sexual molestation of a child, which was excluded from coverage under the parties' homeowners insurance policy). This same result would apply if a particular jurisdiction applies a more traditional "cause nearest the loss" interpretive analysis, rather than applying the modern and majority "efficient or predominant cause" interpretive analysis.

¹⁵⁰ See *supra* notes 41-44 and accompanying text.

¹⁵¹ See *supra* notes 56-63 and accompanying text.

¹⁵² See *infra* Part II.B.

In interpreting “expected” or “intended” provisions, however, the “expected” prong, inexplicably, is often overlooked. Yet it is as much an interpretive hurdle to a finding of coverage as the requirement that the injury would not have been “intended.” Thus, even when the injury was not “intended,” a second question still remains: If injury was not “intended,” might it nevertheless have been “expected”? The answer is “yes,” when supported by operative facts, according to those courts that have given independent meaning to *both* terms: *i.e.*, “expected,” as well as “intended.”

Some decisions, it should be noted, have deemed “expected” to be synonymous with “intended.”¹⁵³ A few courts have assumed there is no difference between the terms “expected” and “intended” in determining whether the “intentional acts exclusion” applies.¹⁵⁴ Other courts, however, have concluded that the terms “expected” and “intended” are *not* synonymous.¹⁵⁵ It has been observed: “Determining a person’s *expectation* involves a different inquiry than does determining his or her *intent*.”¹⁵⁶ If only “intention” needed to be considered, the use of the word ‘expected’ would be mere surplusage, which is a result to be avoided in interpretation.”¹⁵⁷

Generally speaking, an insured “expects an injury if he or she is *subjectively* aware that injury is substantially certain to result.”¹⁵⁸

¹⁵³ See, e.g., *Poston v. U.S. Fid. & Guar. Co.*, 320 N.W.2d 9, 11-12 (Wis. Ct. App. 1982).

¹⁵⁴ See, e.g., *Grange Mut. Cas. Co. v. Thomas*, 301 So.2d 158 (Fla. Dist. Ct. App. 1974); *Jones v. Norval*, 279 N.W.2d 388 (Neb. 1979); *State v. Glens Falls Ins. Co.*, 404 A.2d 101 (Vt. 1979); *Poston v. U. S. Fid. & Guar. Co.*, 320 N.W.2d 9 (Wis. Ct. App. 1982).

¹⁵⁵ See, e.g., *Badger Mut. Ins. Co. v. Murry*, 370 N.E.2d 295, 299-300 (Ill. Ct. App. 1977) (pointing out that if “intended” and “expected” were synonymous, there would be no point in including them both within the language of the intentional act exclusion); see also *Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052 (8th Cir. 1979) (applying Iowa law); *Armstrong Cleaners, Inc. v. Erie Ins. Exch.*, 364 F. Supp. 2d 797 (S.D. Ind. 2005); *Farm Bureau Town & Country Ins. Co. of Mo. v. Turnbo*, 740 S.W.2d 232 (Mo. Ct. App. 1987); *Nw. Nat. Cas. Co. v. Phalen*, 597 P.2d 720 (Mont. 1979); *Seymour v. Lenoir Cnty.*, 567 S.E.2d 799 (N.C. Ct. App. 2002); *Abrams v. Gen. Star Indem. Co.*, 67 P.3d 931 (Or. 2003).

¹⁵⁶ *N. Sec. Ins. Co. v. Perron*, 777 A.2d 156, 158 (Vt. 2001) (citing *City of Burlington v. Ass’n of Gas and Electric Ins. Serv., LTD.*, 751 A.2d 284, 288 (Vt. 2000)); *Espinet v. Horvath*, 597 A.2d 307, 310 (Vt. 1991).

¹⁵⁷ *Horvath*, 597 A.2d at 310; see also *Phalen*, 597 P.2d at 726.

¹⁵⁸ *Perron*, 777 A.2d at 158 (citing *Horvath*, 597 A.2d at 310); accord *Jenkins v. Koester*, No. 268175 2007 WL 2429846, at *1 (Mich. Ct. App. Aug. 28, 2007);

However, given that the insured rarely will concede that he or she expected harm, the analysis usually turns on whether, objectively, the insured should be regarded as having expected injury.¹⁵⁹ The Eighth Circuit, in *Diocese of Winona* defined this standard as follows:

[U]nder the substantially probable test ... if an insured is alerted to the problem, its cause, and knows or should have known of the likelihood of the problem's recurrence, it cannot ignore such problem and then look to its insurer to reimburse it for the liability incurred by reason of such inaction.¹⁶⁰

Thus, even in jurisdictions that have not expressly recognized an objective test for "intended" injury, coverage may be barred for insureds that did not wish harm to anyone, if the insured expected such injury. A prominent case concerning expectation of harm in the context of insurance where injury is a "substantial probability" is the Eighth Circuit's decision in *City of Carter Lake v. Aetna Casualty & Surety Co.* There, the court held that "substantial probability" means "[t]he indications must be strong enough to alert a reasonably prudent man not only to the possibility of the results occurring, but the indications also must be sufficient to forewarn him that the results are highly likely to occur."¹⁶¹ Similarly, California courts have held that: "[t]he appropriate test for 'expected' damage is whether the insured knew or believed its conduct was substantially certain or highly likely to result in that kind of damage."¹⁶²

It is sometimes argued that giving the term "expected" its usual meaning, and precluding claims where the insured "should have known"

Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 882 P.2d. 703, 721-27 (Wash. 1994).

¹⁵⁹ *Argento v. Vill. of Melrose Park*, 838 F.2d 1483, 1497 (7th Cir. 1988) ("whether [property damage] was expected is a subjective inquiry, but a subjective expectation can be inferred from objective evidence that the injury was the natural and probable result from the act.") .

¹⁶⁰ *Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386, 1392 (8th Cir. 1996) (applying Minn. law) (citing *City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052, 1059 (8th Cir. 1979)); *accord* *Baystate Ins. Co. v. Wilson*, 451 N.E.2d 880, 882-83 (Ill. 1983); *cf.* *Lutheran Benevolent Ins. Co. v. Nat'l Catholic Risk Retention Grp.*, 939 F. Supp. 1506, 1513 (N.D. Okla. 1995).

¹⁶¹ *City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052, 1059 (8th Cir. 1979) (applying Neb. law).

¹⁶² *FMC Corp. v. Plaisted & Cos.*, 72 Cal. Rptr. 2d 467 (Cal. Ct. App. 1998).

the harm would occur, cuts too broadly in precluding coverage for a “negligence” claim. However, in *Diocese of Winona*, the court explained that giving meaning to the term “expected” bars coverage only for some, but not all, negligence claims. “While an insured has a reasonable expectation in securing a CGL policy that the policy will cover some negligent acts, it does not necessarily follow that all negligent acts are covered.... [T]here may be instances when, although an insured was negligent, she knew or should have known that resulting damage was expected.”¹⁶³ Ordinary negligence has not been deemed sufficient reason to conclude that sexual abuse was “expected” by a supervisor or employer. In such instances, the “expected” prong has not been deemed to bar coverage.¹⁶⁴

The requisite level of “expectation” was well-explained in a homeowners insurance case in which the underlying complaint alleged that the parents had knowledge of their son’s deviant sexual propensities, and that he was a “continuing danger” to the claimant.¹⁶⁵ These facts, the court held, showed that “as competent adults, [the insureds] would have at least *expected* harm to result to [the claimants] as a result of their conduct.”¹⁶⁶ Similarly, under New Jersey law, if a spouse, even if ignorant of the actual abuse, has “special reason to know that it was likely to occur,” no insurance coverage exists. “Although the bodily injury for which she was being sued may have been unintended from her perspective ... it was not unexpected; consequently, it was not an accident from her perspective and it was outside the coverage of the policy.”¹⁶⁷

In a recent decision, an Ohio court of appeals observed that an insured’s denial of intent to harm was irrelevant when the act in question was “substantially certain to result in injury.”¹⁶⁸ There, the court held:

¹⁶³ *Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1392 (8th Cir. 1996) (applying Minn. law) (citing *Auto Owners Ins. Co. v. Jensen*, 667 F.2d 714, 719 (8th Cir. 1981)).

¹⁶⁴ See, e.g., *Lutheran Benevolent Ins. Co. v. Nat’l Catholic Risk Retention Grp., Inc.*, 939 F. Supp. 1506, 1512-13 (N.D. Okla. 1995) (distinguishing ordinary negligence, which may give rise to a covered “occurrence,” from gross negligence, which may not); *accord Am. Family Mut. Ins. Co. v. Bower*, No. 1:07 CV 254, 2010 WL 4630486 (N.D. Ind. Nov. 5, 2010).

¹⁶⁵ *W. Va. Fire & Cas. Co. v. Stanley*, 602 S.E.2d 483, 498 (W.Va. 2004).

¹⁶⁶ *Id.* at 497.

¹⁶⁷ *J.C. v. Allstate Ins. Co.*, 762 A.2d 1062, 1064 (N.J. Super. Ct. App. Div. 2000) (citing *Allstate Ins. Co. v. Steele*, 74 F.3d 878, 880 (8th Cir. 1996)).

¹⁶⁸ *Cincinnati Ins. Co. v. Oblates of St. Francis de Sales*, No. L-09-1146, 2010 WL 3610451, at *4 (Ohio Ct. App. Sept. 17, 2010).

Based upon the Oblates' knowledge of Rapp's history and his need for supervision and ongoing treatment, the Oblates' decision to give Rapp unfettered access to Assumption's parishioners, without warning, was substantially certain to result in additional incidents of sexual molestation of boys. Accordingly, we find that the Oblates' actions did not cause accidental injury to Rapp's victim.¹⁶⁹

"Rather," the court concluded, "the injury to Rapp's victim was expected, *i.e.*, substantially certain to occur, and, therefore, the Oblates' actions were not 'occurrences' pursuant to CIC's policy."¹⁷⁰

Applied in this manner, the "expected" standard is akin to a gross negligence standard.¹⁷¹ Thus, where the claimant alleged that the perpetrator had a history of mistreating and assaulting female employees, and the supervisor-insured knew of at least one incident where the perpetrator had assaulted an employee, the court concluded the insured "knew full well what was potentially going to happen with their son [the employee-perpetrator] and the female employees and did not care."¹⁷² The insurer demonstrated that the perpetrator's "conduct was foreseeable and not unexpected" on the part of the supervisor. Thus, with a negligent hiring claim, "foreseeability of harm to the plaintiff is a prime factor in the duty analysis."¹⁷³ The court concluded: "Under such circumstances, we cannot conclude that the negligent hiring and supervision ... was an 'occurrence' or 'accident' within the meaning of the policy."¹⁷⁴

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ "Ordinary negligence" has been defined as "want of ordinary care and diligence" where "gross negligence" is defined as the "want of slight care and diligence." *See Lutheran Benevolent Ins. Co. v. Nat'l Catholic Risk Retention Grp. Inc.*, 939 F. Supp. 1506, 1512 (N.D. Okla. 1995).

¹⁷² *Mountain States Mut. Cas. Co. v. Hauser*, 221 P.3d 56, 58 (Colo. App. 2009).

¹⁷³ *Id.* at 61 (citing *Raleigh v. Performance Plumbing & Heating, Inc.*, 130 P.3d 1011, 1016 (Colo. 2006)).

¹⁷⁴ *Id.* In light of the high degree of foreseeability required to establish negligent hiring/supervision, the court indicated that injury in such cases may, by definition, be "expected" (and thus ineligible for insurance coverage), though the court did not need to decide the point in light of the allegations that the insured knew of prior incidents.

“The terms ‘expected’ and ‘intended’ are not synonymous...; expectation is easier to prove...”¹⁷⁵ “Intended” injury will always be “expected,” but “expected” injury may not have been intended. This distinction between “expected” and “intended” is of the greatest significance where the insured was not the sexual abuser, and may not have intended injury. For example, a religious institution might be deemed to have “expected” its employee to sexually molest minors if that employee had a significant history of inappropriate conduct concerning minors.

In sum, “expected” appears to present a lower threshold than “intended,” coming into play in circumstances when the insured-supervisor’s error is principally one of omission rather than of commission. “Injury is ‘expected’ even when the damages are not accomplished by design or plan, *i.e.*, not ‘intended,’ but are ‘of such a nature that they should have been reasonably anticipated (expected) by the insured.’”¹⁷⁶ As the Eighth Circuit concluded, “[t]he difference between damages that are reasonably foreseeable and damages that are substantially probable is one of degree of expectability.”¹⁷⁷

D. DECISIONS CONSIDERING WHETHER “NEGLIGENT SUPERVISION” CAN EVER BE AN “OCCURRENCE”

A significant number of courts have concluded explicitly or implicitly that negligent supervision is, by itself, an “occurrence,”¹⁷⁸ and such courts will “examine the injuries arising from the negligent act on their own accord, not as part of the negligent acts.”¹⁷⁹

Decisions holding to the contrary, however, have reasoned that the tort of negligent supervision requires, as an essential element, damage to a

¹⁷⁵ *Argento v. Vill. of Melrose Park*, 838 F.2d 1483, 1497 (7th Cir. 1988) (applying Ill. law).

¹⁷⁶ *Westfield Mut. Ins. Co. v. Cont’l Cmty. Bank & Trust Co.*, 804 N.E.2d 601, 608 (Ill. 2003).

¹⁷⁷ *Diocese of Winona v. Interstate Fire & Casualty Co.*, 89 F.3d 1386, 1392 (8th Cir. 1996) (citing *Auto-Owners Ins. Co. v. Jensen*, 667 F.2d 714, 719 (8th Cir. 1981)).

¹⁷⁸ *See, e.g., Safeco Ins. Co. v. White*, 913 N.E.2d 426, 434 (Ohio 2009) (“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 tort actionable.”).

¹⁷⁹ *Id.*

third party.¹⁸⁰ “The elements of a claim for negligent hiring are: (1) a specific tortious act by the employee; (2) the employee’s incompetence or unfitness; (3) the employer’s actual or constructive notice of the employee’s incompetency or unfitness; and (4) injury.”¹⁸¹ Absent the fourth element – “injury” – nothing of legal significance has “occurred.” As was said in another context, “negligence in the air, so to speak, will not do.”¹⁸² Hiring, supervision, and retention that fall short of the standard of care, without causing injury, are of no legal consequence.

A line of decisions reasons that, in cases of negligent supervision or hiring, the “accident,” for purposes of considering whether an “occurrence” happened, remains the injury-causing event – such as sexual molestation – rather than any precipitating negligence by the insured. The term “accident,” it has been held, “unambiguously refers to the event causing the damage, not the earlier [negligent hiring] creating the potential for future injury.”¹⁸³ Courts in Illinois and in the Eleventh Circuit have observed that a claim for negligence against an insured-employer does *not* transform a non-accident (sexual molestation) into an accident, even if the insured-employer did not expect harm.¹⁸⁴ In *SCI Liquidating Corp. v. Hartford Ins. Co.*, for example, the Eleventh Circuit Court of Appeals held that allegations of intentional sexual harassment, assault, and battery against a manager, which formed the predicate for a claim of “negligent retention” by the employer, are not ‘accidents’ and therefore do not constitute an “occurrence.” The insurance coverage inquiry, it has been held, must “focus on the ‘immediately causative circumstances.’”¹⁸⁵ Molestation, a deliberate act, may mean that allegations of mere negligent supervision are irrelevant, because “[t]he intentional act interrupts the causal chain between negligent supervision and injury.”¹⁸⁶

¹⁸⁰ *Canatillo Ind. Sch. Dist. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 99 F.3d 695, 705 (5th Cir.1996) (applying Tex. law).

¹⁸¹ *White v. Consolidated Planning, Inc.*, 603 S.E.2d 147 (N.C. 2004), *rev. denied*, 610 S.E.2d 717 (N.C. 2005).

¹⁸² *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928), *cited in* *Cooper v. Eberly*, 508 P. 2d 943 (Kan. 1973).

¹⁸³ *Maples v. Aetna Cas. & Sur. Co.*, 148 Cal. Rptr. 80, 84 (Cal. Ct. App. 1978), *cited in* *Northern Sec. Ins. Co. v. Perron*, 777 A.2d 161, 162 (Vt. 2001).

¹⁸⁴ *Sears, Roebuck & Co. v. Nat’l Union*, 772 N.E.2d 247, 256 (Ill. 2002); *SCI Liquidating Corp. v. Hartford Fire Ins. Co.*, 181 F.3d 1210, 1214-17 (11th Cir. 1999).

¹⁸⁵ *SCI*, 181 F.3d at 1216-17 (applying Ga. law).

¹⁸⁶ *TIG Ins. Co. v. Premier Parks*, No. Civ.A.02C04126JRS, 2004 WL 728858, at *10 (Del. Super. Ct. Mar. 10, 2004).

In another case, the court considered a sexual assault lawsuit brought against the owner of a cab company that had hired a cab driver who sexually assaulted his customer. The court held that whether or not the cab company “expected or intended injury” was beside the point. Its hiring of the molester was not the accident. The cab company’s acts or omissions “merely created the potential for injury ... but was not itself the cause of the injury.”¹⁸⁷ And in a case of negligent supervision against a woman whose son committed murder, the court reasoned: “[t]hrough myriad other events of an earlier time and different place may have contributed to the claimed injury, to determine whether there was an ‘occurrence’ within the meaning of the policy we must focus on those events directly responsible for the injury.”¹⁸⁸

Each of these decisions reasons that hiring a bad actor, such as a pedophile, may be negligence, but it is not an “accident.” Certainly, negligent hiring may form part of the circumstances contributing to deliberate injury. Nevertheless, negligent hiring is not an “accident” within the ordinary use of that word, these courts observe, and therefore “sexual abuse” claims do not give rise to an “occurrence.” As one court opined, where abuse has been alleged, a negligent supervision claim does not exist without the damage caused by the sexual abuse.¹⁸⁹

E. CLAIMS IN WHICH NEGLIGENCE IS PLED ALONGSIDE FACTS SHOWING ACTUAL KNOWLEDGE OR INTENT: LOOKING “BEYOND THE LABEL OF NEGLIGENCE”

An issue of critical significance with regard to an insurer’s duty to defend the insured arises when a sexual molestation complaint pleads facts showing specific knowledge on the part of a religious organization, consistent with an expectation of harm, but adds a count for “negligence” as well. Should such a count be regarded as defeating the expectation of harm reflected by the complaint’s other allegations?

A considerable number of decisions acknowledge that when the complaint alleges facts consistent with an expectation of harm, further allegations that the insured “should have known” of the potential for injury,

¹⁸⁷ *Am. Empire Surplus Lines Ins. Co. v. Bay Area Cab Lease, Inc.*, 756 F. Supp. 1287, 1289-90 (N.D. Cal. 1991).

¹⁸⁸ *Farmers Alliance Mut. Ins. Co. v. Salazar*, 77 F.3d 1291, 1296-97 (10th Cir. 1996).

¹⁸⁹ *Canutillo Ind. Sch. Dist v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 99 F.3d 695, 705 (5th Cir. 1996) (applying Tex. law).

or that the insured acted “negligently and/or intentionally,” do not override factual allegations indicating intent. It has been said that, even when a complaint pleads a count for negligence, “we must look beyond the label of negligence to determine if the insurer had a duty to defend.”¹⁹⁰

Not all courts agree, and some have allowed a “negligence” allegation to override allegations of specific knowledge. A good example of this methodology is found in the Texas Court of Appeals decision in *Roman Catholic Diocese of Dallas v. Interstate Fire & Casualty Co.*¹⁹¹ There, the sexual abuse victim’s causes of action against the Diocese included:

- (1) failing to warn of known dangerous propensities;
- (2) knowingly breaching and participating in breaches of its fiduciary duties to plaintiff;
- (3) fraud;
- (4) acting with malice and conscious indifference; and
- (5) conspiring to cover up incidents of priests sexually abusing minors.

Notwithstanding these allegations, the Complaint also alleged the Diocese was negligent in hiring and retaining the priest-molester “when it [knew or] should have known of his dangerous sexual propensities.”¹⁹² Based on the “should have known” allegation, the court concluded the insurer was obligated to defend, because the latter allegations did not require the Diocese to have known about the perpetrator’s sexual propensities for the plaintiff to succeed. “Viewed from the Diocese’s viewpoint, if it did not know of [the perpetrator’s] sexual propensities, then his molesting [plaintiff] was both unexpected and unintentional, and [thus potentially] within coverage.”¹⁹³

In contrast, the vast majority of cases considering whether the mere label of negligence overcomes facts demonstrating a higher level of fault have concluded that when allegations of negligent supervision are accompanied by allegations of deliberate misconduct, the supervisor-

¹⁹⁰ *Collins Holding Corp. v. Wausau Underwriters*, 666 S.E.2d 897, 900 (S.C. 2008) (where insured distributed gambling machines equipped so as to permit manipulation, thus violating laws protecting the public from excessive gambling, the allegations failed to support a claim for negligent conduct).

¹⁹¹ *Roman Catholic Diocese of Dallas v. Interstate Fire & Cas. Co.*, 133 S.W.3d 887 (Tex. Ct. App. 2004).

¹⁹² *Id.* at 895.

¹⁹³ *Id.*

insured is not entitled to coverage.¹⁹⁴ Courts long have recognized that the nature of the liability set forth in the complaint is to be “determined by the quality and purpose of the transaction as a whole.”¹⁹⁵ Courts “looking beyond the label of negligence” examine the “‘quality and purpose’ of the complaint as a whole, not simply the use of a word such as ‘negligence.’”¹⁹⁶

In these decisions, the inclusion of a negligence count in the complaint does not trigger coverage when “the facts alleged in the complaint are inconsistent with unintentional conduct or injury.”¹⁹⁷ The nature of a tort action, such courts conclude, is not changed merely by deploying the word, “negligence.”¹⁹⁸ The focus is on the facts alleged rather than a label of “negligence.”¹⁹⁹

In this regard, the Court of Appeals for the Seventh Circuit has observed that the choice of legal theories in the complaint is not important in determining whether an insurance company has a duty to defend. Instead, the question is whether the “conduct as alleged in the complaint is at least arguably within one or more of the categories of wrongdoing that the policy covers.”²⁰⁰ Likewise, in *C.L. by Guerin v. School Dist. of*

¹⁹⁴ See, e.g., *Colony Ins. Co. v. Events Plus, Inc.*, 585 F. Supp. 2d 1148, 1156 (D. Ariz. 2008).

¹⁹⁵ *Messersmith v. Am. Fid. Co.*, 133 N.E. 432 (N.Y. 1921).

¹⁹⁶ *Cont'l Cas. Co. v. Moser*, No. 4:05CV00979 JLH, 2006 WL 827319, at *4 (E.D. Ark. 2006) (quoting *Fisher v. Travelers Indem. Co.*, 398 S.W.2d 892 (Ark. 1966)).

¹⁹⁷ *Serecky v. Nat'l Grange Mut. Ins.*, 857 A.2d 775, 781 (Vt. 2004) (citing *TBH ex rel. Howard v. Meyer*, 716 A.2d 31, 34 (Vt. 1998)).

¹⁹⁸ *Fisher v. Travelers Indem. Co.*, 398 S.W.2d 892 (Ark. 1966); *Standard Fire Ins. Co. v. Proctor*, 286 F. Supp. 2d 567, 572 (D. Md. 2003).

¹⁹⁹ “We must focus on the factual allegations in [the underlying complaint] and not on the legal theories asserted, and unless the complaint alleges facts within the coverage of the policies, [the insurer] has no duty to defend or indemnify.” *Meyer*, 716 A.2d at 34. See also *Carolina Cas. Ins. Co. v. Pinacol Assur. Co.*, 425 F.3d 921, 929 (10th Cir. 2005); accord *Colony Ins. Co. v. Events Plus, Inc.*, 585 F. Supp. 2d 1148, 1154-55 (D. Ariz. 2008) (“To conclude otherwise would only allow the parties to render such exclusions essentially meaningless through artful pleadings and would allow them to circumvent the terms and intent of the policy and its exclusions.”); *Link Snacks Inc. v. Fed. Ins. Co.*, No. 08-cv-714-slc, 2009 WL 3380383 (W.D. Wis. Oct. 20, 2009).

²⁰⁰ *Curtis-Universal, Inc. v. Sheboygan Emergency Med. Servs., Inc.*, 43 F.3d 1119, 1122 (7th Cir. 1994) (applying Wis. law). See also *St. Paul Fire and Marine Ins. Co. v. Hausman*, 604 N.W.2d 908, 911-12 (Wis. Ct. App. 1999) (“We

Menomonee Falls,²⁰¹ the court concluded that an insurance company was not obligated to defend an insured against a claim labeled “negligence” in the complaint, even though the policy – like any standard liability insurance policy – covered negligent conduct. The court observed that “the facts alleged involved sexual abuse (which is intentional conduct by definition),” and thus the complaint did not state a claim that would be covered by the policy. The legal theory denominated in the complaint was therefore irrelevant.

This approach may be particularly apt in sexual abuse cases involving the alleged “negligence” of a supervisor or employer. In such cases, courts have discounted nominal allegations of negligence when they are side-by-side with allegations of actual knowledge or purposeful action. Thus, in an insurance action brought by parents of the alleged molester, the court held: “Although the word ‘negligent’ is used in their allegations against [the parent-insureds], intentional conduct is actually described. For example, the complaint alleges that Glen and Helen Stanley had *actual* knowledge that Jesse possessed deviant sexual propensities and was a continuing danger to [the victim], but that they *permitted* him to continually sexually abuse and sexually exploit [the victim] [as a result of their conduct].”²⁰² These decisions analyze whether allegations such as “should have known” override allegations of specific knowledge.

The logic is worth exploring. Consider the following hypothetical allegations:

The Insured employer:

- (1) knew the molester had molested minors before;
- (2) knew the molester aimed to molest minors again;
- (3) knew and/or *should have known* the molester was a threat to minors.

In this example, does the inclusion of “should have known” in the third allegation mean the insured did not expect molestation? Only if the first two allegations are (improperly) overlooked. To illustrate, consider another analogous example:

determine whether insurance coverage exists by focusing on the incident itself and not the theory of liability.”).

²⁰¹ C.L. and T.W. *ex rel.* Guerin v. Sch. Dist. of Menomonee Falls, 585 N.W.2d 826, 830 (Wis. Ct. App. 1998).

²⁰² W. Va. Fire & Cas. Co. v. Stanley, 602 S.E.2d 483, 498 (W. Va. 2004).

The Apartment Building:

- (1) Has its top floor on the eighth floor.
- (2) Has an elevator with buttons one through eight.
- (3) Contains up to eight, and at least four, stories.

Does the equivocal third paragraph permit the conclusion that the building is less than eight stories high? Not in light of paragraphs one and two. So too in the first example above, the equivocal “and/or should have known” in paragraph three does not mean – in light of paragraphs one and two – that something other than intentional harm has occurred.

Such cases may be contrasted with the common claim of “negligence” involving a bouncer or similar employee of an insured tavern employer, who batters a bar patron, subjecting the insured to liability. In such cases, when the facts may equally suggest (i) an intent to injure, or (ii) merely an intent to relocate the patron outside the establishment, courts have found a potential “occurrence” under liability policies.²⁰³ The difficulty of judging specificity of intent in a situation where persons may or may not be acting to avoid injuries to third parties, rather than cause injuries, explains why the “bar patron” cases, with some justification, tend to find the alleged injury was neither “expected nor intended.”²⁰⁴ It is rare in such cases to find specific facts demonstrating both expectation of harm and intent to harm, in contrast to many clergy sexual abuse cases.

F. CONSPIRACY ALLEGATIONS AND “NEGLIGENCE”

Clergy abuse lawsuits in particular often allege a conspiracy among church officials to conceal, if not to permit, abuse by clergymen. Such complaints may allege a fact-based pattern of concerted efforts. For example, allegations against a religious order that supervised a priest accused of molestation stated that the supervisors:

agreed or otherwise conspired to cover up incidents of sexual abuse of minors by Salesian priests and/or educators and to prevent disclosure,

²⁰³ *E.g.*, *Britamco Underwriters, Inc. v. Weiner*, 636 A.2d 649 (Pa. Super. Ct. 1994); *cf.* *Gene’s Restaurant, Inc. v. Nationwide Ins. Co.*, 548 A.2d 246 (Pa. 1988).

²⁰⁴ *See Sans, et al. v. Monticello Ins. Co.*, 676 N.E.2d 1099 (Ind. Ct. App. 1999) (shooting that occurred during a bar fight did not necessarily mean the shooter “intended” injury).

prosecution and civil litigation including, but not limited to: failure to report incidents of abuse to law enforcement or child protection agencies; denial of abuse [they] had substantiated; aiding criminal child molesters in evading detection, arrest and prosecution; allowing criminal child molesters to cross state and international borders for purposes of gaining access to uniformed parents whose innocent children could be sexually abused; failure to warn; and failure to seek out and redress the injuries its priests and/or educators had caused.²⁰⁵

Conspiracy allegations do not reflect mere negligence, because the tort of civil conspiracy involves “actions intended by the insured” and therefore does not “meet the definition of ‘occurrence’” under the policy at issue.”²⁰⁶ There is no such thing as a “negligent conspiracy.” There is, rather, “a conscious, decision making [sic] element that takes civil conspiracies out of the range of behavior encompassed within the meaning of ‘occurrence.’”²⁰⁷

For these reasons, conspiracy allegations have generally been fatal to claims for insurance coverage, even when the underlying complaint includes allegations of “negligence.”²⁰⁸

G. THE “BODILY INJURY” REQUIREMENT

Standard commercial general liability policies provide coverage only for “Personal Injury” or “Bodily Injury.” Under such policies, even if injury was neither “expected nor intended,” and even if the injury was the result of an “accident,” there is no coverage unless the claimant suffered “bodily injury.”

Such injury sometimes is defined to mean: “bodily injury or if arising out of bodily injury, mental anguish.” “Bodily Injury” frequently is

²⁰⁵ *Nunnery v. Salesian Missions, Inc.*, No. 07-2091, 2008 WL 1743436, at *7 (D.N.J. Apr. 15, 2008).

²⁰⁶ *State Bancorp Inc. v. U.S. Fid. & Guar. Ins. Co.*, 483 S.E.2d 228 (W. Va, 1997), *quoted in* *W. Va. Fire & Cas. Co. v. Stanley*, 602 S.E.2d 483, 495 (W. Va. 2004).

²⁰⁷ *Fibreboard Corp. v. Hartford Accident & Indem. Co.*, 20 Cal. Rptr. 2d 376, 387 (Cal. Ct. App. 1993).

²⁰⁸ *See id.*

defined in commercial general liability policies to mean “bodily injury, sickness, or disease.” In contrast, other standard form policies define “bodily injury” to include mental harm, defining “bodily” or “personal injury” as “bodily injury, shock, mental anguish, sickness or disease, including death at any time resulting therefrom.”

Sexual abuse claims range from an abuser masturbating while in proximity to a plaintiff, to instances of penetration, including penetration resulting in physical damage. Sexual abuse involving clergy has included penetration by objects, penile or digital penetration, vaginally or anally, as well as oral copulation. Physical injury sometimes is alleged, though often complaints allege harm limited to “anxiety, embarrassment, and emotional distress.”

In considering whether the alleged sexual abuse equates to “bodily injury,” a number of courts have concluded that emotional damages arising from sexual molestation may constitute “bodily injury” under a commercial liability policy.²⁰⁹ These courts have held that bodily touching alone is a sufficient predicate to support coverage. Other courts, reasoning that physical *injury* and physical *touching* are not synonymous, conclude that emotional damage (even if arising from touching) is not “bodily injury.”²¹⁰ They have held that bodily injury, including sickness and disease, “does not include emotional distress, at least where, as here, the distress is not caused by physical trauma.”²¹¹

Quite a few courts have held that various forms of touching and fondling in the course of sexual abuse do not constitute “bodily injury.” A 2005 federal court decision catalogued insurance coverage cases nationwide in which plaintiffs’ private parts had been grabbed, squeezed or fondled, yet no “bodily injury” was deemed to have occurred. The court held: “The phrase ‘bodily injury’ simply cannot be read as synonymous with the phrase ‘physical contact.’”²¹² In 2008, the New Mexico Court of Appeals reasoned that “bodily injury” had not occurred where a neighbor molested a child by squeezing her chest through her clothes, and rubbing

²⁰⁹ *Wayne Twp. Bd. of Sch. Comm’rs v. Ind. Ins. Co.*, 650 N.E.2d 1205, 1210 (Ind. Ct. App. 1995); *Allstate Ins. Co. v. McCranie*, 716 F. Supp. 1440, 1443 (S.D. Fla. 1989); *Cnty. of Chemung v. Hartford Cas. Ins. Co.*, 496 N.Y.S.2d 933, 935 (Conn. Super. Ct. 1985).

²¹⁰ *Am. & Foreign Ins. Co. v. Church Sch.*, 645 F. Supp. 628, 632 (E.D. Va. 1986); *Chatton v. Nat’l Union Fire Ins. Co.*, 13 Cal. Rptr. 2d 318, 323 (Cal. Ct. App. 1992).

²¹¹ *Allstate Ins. Co. v. Tozer*, 392 F.3d 950, 953 (7th Cir. 2004) (applying Ind. law).

²¹² *Id.*

his hand up and down her leg.²¹³ These touchings “did not include any physical injury such as bruises, scrapes, or cuts.” Rather, the claim was confined to “the physical, cognitive or emotional manifestations of the effects of the sexual touching.”²¹⁴ In insurance cases where the injuries alleged are purely emotional or mental in nature, a number of courts have held that “bodily injury” coverage is not available.²¹⁵ In particular, that reasoning may be difficult to assail when the policy defines “bodily injury” as “bodily injury, sickness or disease,” with no reference to “mental anguish.”

In contrast, physical penetration of the body has been deemed to be a “violation of the bodily integrity of the victim, and therefore an infliction of actual physical injury on her, even if not accompanied by bleeding or broken bones.”²¹⁶ A number of jurisdictions have adopted this analysis.²¹⁷ No court has concluded that physical penetration in the course of sexual abuse would not represent “bodily injury” for purposes of insurance coverage.

The decisions that require some actual physical injury, such as penetration, as a predicate for insurance coverage, may be influenced by the fact that certain insurance policy forms are available to cover emotional damages, distress, and mental anguish. Policy forms that do not include these forms of non-bodily harm more likely will be read to preclude coverage in the absence of some bodily trauma caused by the sexual abuse.

III. CONCLUSION

Clergy sexual abuse and molestation of minors constitutes a grave contemporary social problem. But not all clergy sexual abuse claims can be

²¹³ *Hart v. State Farm Mut. Ins. Co.*, 193 P.3d 565, 568 (N.M. Ct. App. 2008).

²¹⁴ *Id.*

²¹⁵ *Nationwide Mut. Fire Ins. Co. v. Mrs. B.G.*, No. Civ.A. 05-578, 2005 WL 3434137 (W.D. Pa. Dec. 13, 2005) (collecting cases).

²¹⁶ *United Servs. Auto. Ass'n v. Doe*, 792 N.E.2d 708, 744-45 (Mass. Ct. App. 2003).

²¹⁷ *See Prof'l Staffing-A.B.T.S., Inc. v. Ill. Union Ins. Co.*, No. 8:04-CV-793T30EAJ, 2005 WL 2290243, at *1 (M.D. Fla. Sept. 19, 2005); *Allstate Ins. Co. v. Thomas*, 684 F. Supp. 1056, 1059-60 (W.D. Okla. 1988); *Allstate Ins. Co. v. Roefls*, 698 F. Supp. 815, 818, 821 (D. Alaska 1987); *J.C. Penney Cas. Ins. Co. v. M.K.*, 804 P.2d 689 (Cal. 1991); *Allstate Ins. Co. v. Troelstrup*, 789 P.2d 415, 417 n.5 (Colo. 1990) (en banc); *Auto-Owners Ins. Co. v. Gardipey*, 434 N.W.2d 220 (Mich. Ct. App. 1988); *N.N. v. Moraine Mut. Ins. Co.*, 450 N.W.2d 445 (Wis. 1990).

compensated through liability insurance coverage, which commonly excludes acts “that are expected or intended from the viewpoint of the insured.”

In a majority of states today, liability insurance coverage for the molester-insured generally is barred, either under an “objective” or “classic tort” standard for determining intentional acts, or under an “inferred intent” standard when applied to child sexual abuse cases.

The courts have not been uniform, however, in how they treat liability insurance coverage disputes pertaining to the sexual molester’s supervisory employer or religious organization, specifically when the supervisor-insured is sued for the *negligent* supervision, employment, or retention of a sexually abusive priest or clergyman, rather than based on the molester’s *intentional* acts *per se*.

Some courts have held that an underlying insured “occurrence” must also be “accidental,” and therefore “negligent supervision” of a sexual molester can never be an “accident.”²¹⁸

Other courts have applied an “objective” or “classic tort” interpretive standard to liability insurance claims arising out of the negligent hiring, supervision, or retention of a clergyman-molester, including the prominent *Diocese of Winona* case.²¹⁹

It is submitted that the objective *Diocese of Winona* approach applied to liability insurance coverage disputes involving supervisory-insureds of clergy sexual molesters is the better-reasoned interpretive approach for the following reasons: First, the claims of negligent hiring, negligent supervision, and negligent retention brought against church organizations and their supervisors for the sexual abuse of minors by priests or other clergymen all sound in *negligence* which traditionally is based upon an objective “reasonable person” standard of care. Second, this “objective” or “classic tort” standard for determining intentional acts in liability insurance coverage disputes, or alternately the “inferred intent” standard as applied to child sexual abuse cases, is recognized in an overwhelming majority of states, as opposed to the minority “subjective” or “particular insured” standard, based upon strong public policy reasons.

²¹⁸ See, e.g., *Mountain States Mut. Ins. Co. v. Hauser*, 221 P.3d 56, 60 (Colo. Ct. App. 2009). *But see contra* *Safeco Ins. Co. of N. Am. v. White*, 913 N.E.2d 426 (Ohio 2009) (holding that torts like negligent supervision, hiring, and retention are separate and distinct from the related intentional torts committed by the original actor, such as a priest or clergyman-molester).

²¹⁹ See *Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386 (8th Cir. 1996) (applying Minn. law).

Third, a substantial majority of courts now recognize that the crucial underlying requirement in negligent hiring, negligent supervision, and negligent retention cases is based upon whether the priest or clergyman's supervising church, bishop, diocese, or other religious organization *knew or should have known* of the sexual offender's abuse toward minors—which, again, is an objective standard. Fourth, and of primary importance, the crucial *causation requirement* in both tort law and insurance contract law *also* requires the application of an objective “efficient or predominant cause” interpretive analysis. Thus, in a liability insurance context, if the negligent hiring, negligent supervision, or negligent retention of a sexually abusive priest or clergyman was so *inextricably intertwined with*, and *not independent of*, the priest or clergyman's sexual misconduct, then the supervising church, bishop, diocese, or other religious organization should *not* be covered under generally accepted tort and insurance law causation principles.

In sum, the most commonly litigated issue, as discussed at length in this article, is whether injury resulting from clergy sexual abuse and molestation was “intended” or “expected” by the molester-insured and the supervisor-insured. It is our conclusion that determining this issue according to the “objective” insured test is the better-reasoned approach, and is most in accord with generally accepted tort law and insurance law principles. This means that when the supervisor-insured has knowledge that harm was substantially likely to occur to the sexual abuse victim, then coverage usually will be deemed to have been “intended.” However, this would normally involve a gross negligence standard, rather than an ordinary negligence standard, for precluding coverage.

The “intent” interpretive issue has dominated many liability insurance coverage disputes, sometimes to the exclusion of other important interpretive issues raised by liability insurance policy provisions. The most important of these, which may need to be resolved regardless of whether an insured “intended” injury or not, are: (1) whether the insured “expected” injury; (2) whether the injury arose from an “accident”; and (3) whether “bodily injury” occurred. Courts, policyholders, and insurers must also be prepared to confront each of these issues in the context of insurance claims for sexual abuse.