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SAINTS AND SINNERS: IS AN INSURANCE POLICY REQUIRED TO INDEMNIFY THE CHURCH FOR THE WRONGFUL ACTS OF SEXUAL MISCONDUCT BY PRIESTS?

Abstract: On September 19, 2018, the United States Court of Appeals for the Second Circuit’s holding in *Hartford Roman Catholic Diocesan Corp. v. Interstate Fire & Casualty Co.* created two circuit splits regarding the interpretation of Interstate Fire and Casualty Co.’s insurance policy provisions, particularly in the context of indemnification for sexual abuse settlements. *Hartford* held that in insurance policy interpretation the presence of an occurrence is determined by a subjective test of expectation from the standpoint of the insured. The Second Circuit also held that the assault and battery exclusion excluded only those insureds that committed the assault and battery, not all insureds on the policy. As a result, the Second Circuit ruled in favor of the Archdiocese and concluded that it was entitled to coverage for its claims. This Comment argues that the Second Circuit’s interpretation accurately applied the rules of insurance policy interpretation, as well as the rules of grammar, to correctly interpret these policy provisions.

INTRODUCTION

The flurry of reports and lawsuits for sexual abuse by clergy around the country implicates religion in the larger realm of insurance policy interpretation.¹ A contract is the manifestation of the mutual intent of the parties.² Insurance policies are standard form contracts that courts traditionally interpret according to the rules for contract construction and interpretation.³ Courts are

¹ See *Hartford Roman Catholic Diocesan Corp. v. Interstate Fire & Cas. Co.*, 905 F.3d 84 (2d Cir. 2018) (deciding whether an Archdiocese is entitled to indemnification from its insurance policy for multiple settlements for sexual abuse claims); *Frequently Requested Church Statistics*, CTR. FOR APPLIED RES. APOSTOLATE, <https://cara.georgetown.edu/frequently-requested-church-statistics/> [https://perma.cc/F9ET-LN3A] (reporting the vast amount of sexual abuse by clergy).

² TIMOTHY MURRAY, CORBIN ON CONTRACTS § 1.1 (2020). The aim of contract law is to realize the reasonable expectations of the parties based upon the agreement. *Id.*

³ See *infra* notes 20–22 and accompanying text (explaining that insurance policies are long standard form contracts and, unless ambiguous, are interpreted according to their plain meaning). Standard form contracts are “contracts of adhesion,” meaning that they are offered on a “take-it-or-leave-it basis” with no room to bargain for terms. Christopher C. French, *Understanding Insurance Policies as Noncontracts: An Alternative Approach to Drafting and Construing These Unique Financial Instruments*, 89 TEMP. L. REV. 535, 546 (2017). In some cases, the complexity of the contract itself is what leads to the use of standard form contracts as a way to decrease time and costs associated with contract production. Matthew Jennejohn, *The Architecture of Contract Innovation*, 59 B.C.L. REV. 71, 73

cognizant, however, that insurance policyholders do not have the power or ability to negotiate and understand the terms of their insurance policies.⁴ As many forms of insurance are effectively mandatory, policyholders have minimal leverage to negotiate with insurance providers.⁵

In 2018, in *Hartford Roman Catholic Diocesan Corp. v. Interstate Fire & Casualty Co.*, the Second Circuit determined whether there was an occurrence that triggered coverage under an insurance policy.⁶ To determine whether there was an occurrence, the court first had to decide whether, based on the terms of the policy, the Archdiocese expected the injuries resulting from priests' en-

(2018). Thus, insurance policies are an example of contracts of adhesion, and insurers are typically the sole drafters of the policies. W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 26 (1984). Insurance policies are contracts that are meant to provide financial reimbursement to an individual or an entity when they suffer a loss or pay damages. *Insurance*, BLACK'S LAW DICTIONARY (11th ed. 2019). Insurance policies are between the person contracting for protection—the insured—and the company guaranteeing that protection—the insurer. *Understanding Your Insurance Policy*, NAIC: CONSUMER ALERT, https://www.scc.virginia.gov/boi/pubs/naic_und_pclcy.pdf [<https://perma.cc/M72B-96F5>]; see *infra* note 45 and accompanying text (defining an insured). Policyholders purchase insurance for a variety of purposes, including health insurance, life insurance, and automobile insurance. See *Insurance*, BLACK'S LAW DICTIONARY, *supra* (listing the various types of insurance). Although insurance policy interpretation begins in the same manner as any contract, there are many aspects of insurance policies that make it difficult to consider them true manifestations of mutual intent. See *W. World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990) (explaining that courts interpret ambiguous terms in insurance policies where mutual intent is unclear to grant coverage); *Heyman Assocs. No. 1 v. Ins. Co. of Pa.*, 653 A.2d 122, 130 (Conn. 1995) (same); French, *supra*, at 546 (describing policyholders' lack of bargaining power in drafting insurance policies). Some of these aspects include lack of negotiating power, lack of understanding, and lack of options. French, *supra*, at 546. Accordingly, courts have historically construed ambiguous terms in insurance policies strictly against the drafters, which are the insurers. Daniel Sanchez-Behar, Note, *California's Approach to the Interpretation of Insurance Policies*—MacKinnon v. Truck Insurance Exchange, 38 U.S.F. L. REV. 577, 579 (2004).

⁴ See Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 125 (2007) (noting that all insurance policies are provided in the same non-negotiable manner with little bargaining power and similar coverage so consumers cannot pursue better terms elsewhere); French, *supra* note 3, at 548–49, 551–52. Policyholders do not have the opportunity to read over the terms before purchasing an insurance policy. Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Insurance Policyholders' Objectively Reasonable Expectations of Insurance Coverage*, 5 CONN. INS. L.J. 335, 363–64 (1998). Rather, it is only after the policyholder purchases and receives a copy of the policy that they may attempt to understand the terms they have agreed to. *Id.* Nevertheless, almost no one attempts to understand the complicated terms. *Id.*

⁵ Julia Kagan, *Compulsory Insurance*, INVESTOPEDIA.COM (Apr. 3, 2020), <https://www.investopedia.com/terms/c/compulsory-insurance.asp> [<https://perma.cc/N7EB-APG3>]. Mandatory contracts of adhesion occur when the law requires individuals to purchase insurance when taking part in a particular activity, such as compulsory insurance for automobiles or workers' compensation. *Id.* Automobile insurance provides financial protection in the event of loss or damage. *Insurance*, BLACK'S LAW DICTIONARY, *supra* note 3. Workers' compensation insurance benefits workers injured at work by supplying them with support, such as payment for medical expenses and lost wages. *What Is Workers' Compensation?*, NATIONWIDE, <https://www.nationwide.com/lc/resources/small-business/articles/what-is-workers-compensation-insurance> [<https://perma.cc/G344-SUBD>].

⁶ *Hartford*, 905 F.3d at 93–94.

agement in sexual abuse.⁷ In making this determination, the Second Circuit held that it should analyze expectation by a subjective test, from the standpoint of the insured.⁸ *Hartford* therefore created a circuit split with the Eighth Circuit, which applied an objective test.⁹ Furthermore, the Second Circuit also created a circuit split with the Ninth Circuit by holding that an insurance policy's assault and battery exclusion excluded only the insured that engaged in the assault and battery, rather than the entire class of insureds.¹⁰

Part I of this Comment discusses the general rules of insurance policy interpretation and the *Hartford* court's affirmation that policies must be construed according to their plain meaning.¹¹ Part II explains the legal context surrounding the interpretation of similar insurance policies that led to two circuit splits.¹² Part III argues that the Second Circuit correctly interpreted the policy by the plain meaning of the terms in accordance with contract law.¹³

I. INSURANCE POLICY INTERPRETATION: THE NOT-SO-PLAIN MEANING

Insurance policies are lengthy and complex standard form contracts that involve a lack of bargaining power on behalf of policyholders in drafting the policies.¹⁴ The Second Circuit noted in *Hartford* the difficulty in interpreting policies according to the parties' intentions and the terms' plain meanings.¹⁵ It did so by holding that a subjective test is the proper test to determine whether a claim is an occurrence.¹⁶ The Second Circuit also broke with the Ninth Circuit by holding that an assault and battery exclusion in an insurance policy did not exclude the Archdiocese as a whole for liability stemming from the sexual misconduct of

⁷ *Id.*; see *infra* note 39 and accompanying text (defining an occurrence). Sexual abuse is "unwanted sexual activity" in which the victim fails to consent, is unable to consent, or is compelled physically. *Sexual Abuse*, AM. PSYCHOL. ASS'N, <https://www.apa.org/topics/sexual-abuse/> [<https://perma.cc/2UFL-24PA>]; see *infra* notes 76–89 and accompanying text (outlining the repeated bouts of sexual abuse in both *Hartford* and *Diocese of Winona v. Interstate Fire & Casualty Co.*, 89 F.3d 1386, 1391 (8th Cir. 1996) (*Winona II*)).

⁸ *Hartford*, 905 F.3d at 92–94; *Winona II*, 89 F.3d at 1391.

⁹ See *Hartford*, 905 F.3d at 92–94 (applying a subjective test to determine whether an incident was an occurrence); *Winona II*, 89 F.3d at 1391 (holding that the proper test for the expectation of an occurrence is from the standpoint of a reasonable person).

¹⁰ *Hartford*, 905 F.3d at 89–90; see *Interstate Fire & Cas. Co. v. Roman Catholic Church of the Diocese of Phoenix*, 761 F.3d 953, 955 (9th Cir. 2014) (holding that the same assault and battery exclusion precluded coverage for all of the insureds, not just the priests accused of sexual abuse); *infra* note 17 and accompanying text (defining and explaining the Archdiocese). The entire class of insureds refers to all of the people that the Archdiocese's policy covers, such as the clergy, the bishops, and the staff. *Interstate*, 761 F.3d at 955.

¹¹ See *infra* notes 14–62 and accompanying text.

¹² See *infra* notes 63–113 and accompanying text.

¹³ See *infra* notes 114–138 and accompanying text.

¹⁴ See French, *supra* note 3 (defining standard form contracts).

¹⁵ *Hartford*, 905 F.3d at 89–90.

¹⁶ *Id.*

priests.¹⁷ Section A of this Part describes the interpretation of insurance policies and how they relate to the general law of contracts.¹⁸ Section B of this Part outlines the Second Circuit's interpretation of the policy in *Hartford* that led to two circuit splits.¹⁹

A. Deciphering Insurance Policies and the Rules of Their Interpretation

Insurance policies largely resemble other lengthy contracts, but due to the policyholders' relative lack of participation in drafting the terms, courts construe insurance policies differently.²⁰ Not only do most policyholders not understand the policy prior to purchasing it, but once the policy is issued, policyholders rarely attempt to read or understand the terms.²¹ Even if policyholders attempted to understand the policy, drafters write most policies in such complex and confusing manners that real comprehension is unlikely.²²

¹⁷ *Id.* at 92–93. An assault and battery exclusion is a clause in an insurance contract that explicitly states there is no coverage for assault and battery committed by the insured. 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, § 2(a) (2019). Assault occurs when a person intentionally makes another fearful of an actual harm. *Assault and Battery*, JUSTIA, <https://www.justia.com/criminal/offenses/violent-crimes/assault-battery/> [<https://perma.cc/V59Z-68HE>]. Battery occurs when someone intentionally touches another without consent, and that touching is offensive or harmful. *Id.* “Archdiocese” and “diocese” are terms used in the Catholic faith to refer to geographical areas overseen by archbishops and bishops, respectively. *What Is the Difference Between a Diocese and Archdiocese? What About a Bishop and Archbishop?*, CATHOLICSTRAIGHTANSWERS.COM, <http://catholicstraightanswers.com/what-is-the-difference-between-a-diocese-and-an-archdiocese-what-about-a-bishop-and-an-archbishop/> [<https://perma.cc/7Z8N-Y8L4>]. An archdiocese covers a larger area than a diocese; archdiocese is comparable to a city, whereas a diocese is like a town, and an archbishop or bishop, respectively, oversees their area and the parishes and priests within it. *Id.*

¹⁸ See *infra* notes 20–42 and accompanying text.

¹⁹ See *infra* notes 43–62 and accompanying text.

²⁰ French, *supra* note 3, at 546–49; see also RESTATEMENT OF THE LAW OF LIAB. INS. § 2 cmt. h (AM. LAW INST., Proposed Final Draft 2017) (stating that although insurance policy interpretation is a category of contract law, the context is different and thus the rules diverge). Contracts of adhesion, such as insurance policies, are valid forms of standardized contracts wherein the non-drafting party cannot negotiate the language contained in the contract. See, e.g., *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645, 653 (Ct. App. 2001) (discussing contracts of adhesion). Contracts of adhesion are very common and almost inescapable in many industries today. *Id.* at 654.

²¹ Anderson & Fournier, *supra* note 4, at 363–64. Policyholders often continue to lack understanding of the terms of their policy after purchase because policies tend to be complex and confusing. See *Universal Underwriters Ins. Co. v. Travelers Ins. Co.*, 451 S.W.2d 616, 622–23 (Ky. Ct. App. 1970) (describing the complex nature of insurance policies and corresponding challenge of comprehension). Due to the information imbalance, some courts have developed and applied a reasonable expectations doctrine that dictates that if a policyholder's expectations were objectively reasonable, a court should rule in favor of the insured. See, e.g., *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 107 F. Supp. 2d 841, 851 (W.D. Mich. 2000).

²² French, *supra* note 3, at 548–49. State courts have commented on the complexity of insurance policies. See *id.* at 549 (citing *Storms v. U.S. Fid. & Guar. Co.*, 388 A.2d 578, 580 (N.H. 1978)) (describing insurance policies as incomprehensible because of their wordiness). For example, the Court of Appeals of Kentucky described insurance policies as confusing puzzles and opined that even me-

Due to its complexity, the interpretation of an insurance policy is a question of law for a court to decide.²³ To interpret insurance policy terms as they apply to the specific claim being made, courts employ the plain meaning rule.²⁴ The plain meaning rule gives a term its most literal explanation.²⁵ Under this rule, the court generally does not consider evidence that is outside the four corners of the insurance policy unless the evidence shows that a reasonable policyholder would give it a more legitimate meaning than the obvious one.²⁶ Contracts, including insurance policies, are meant to be the final manifestation of the agreement.²⁷ Thus, if the meaning is readily understandable, the court will not look further than the contract itself.²⁸ If, however, the language is reasonably susceptible to more than one meaning, and the mutual intent of the parties is indeterminable, courts may apply the doctrine of *contra proferentem*, which requires the court to construe the disputed term against the drafter.²⁹ A

ticulous examination would not provide clarity. *See id.* at 449–50 (citing *Universal Underwriters*, 451 S.W.2d at 622–23) (reasoning that insurers try to convince customers that coverage is comprehensive, and courts that coverage is limited).

²³ RESTATEMENT OF THE LAW OF LIAB. INS. § 2; *see also* Sanchez-Behar, *supra* note 3, at 577 (explaining that courts often wrestle with insurance policy interpretation, which leads to variation in results). Questions of law are questions that a judge must determine as opposed to a jury. *Question of Law*, LAW.COM, <https://dictionary.law.com/Default.aspx?selected=1704> [<https://perma.cc/8SF9-ELQ4>].

²⁴ *See* RESTATEMENT OF THE LAW OF LIAB. INS. § 3 (providing that the court will not take into account evidence outside of the language of the policy to prove a term is ambiguous unless it shows a reasonable policyholder would interpret it differently). In recognition of the unequal bargaining power, the courts apply a strict liability standard that always finds in favor of insureds and against insurers when there are ambiguities within the language. Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 538 (1996); *Strict Liability*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_liability [<https://perma.cc/3UT9-TQ7Q>]. The strict liability standard avoids many of the issues that accompany negligence standards, which require drafting with only the care of a typical drafter. Abraham, *supra*, at 538; *Negligence*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/negligence> [<https://perma.cc/2T5L-VWAN>].

²⁵ RESTATEMENT OF THE LAW OF LIAB. INS. § 3.

²⁶ *Id.*

²⁷ MURRAY, *supra* note 2, § 1.1.

²⁸ *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 405 (4th Cir. 1998) (citing *Lerner v. Gudelsky Co.*, 334 S.E.2d 579, 584 (Va. 1985)). *Pacific Insurance Co. v. America National Fire Insurance Co.*, before the Fourth Circuit in 1998, involved a claim for reimbursement after a former employee sued his former company, Rail Link, for severe injuries sustained while working. *Id.* at 399. The insurers claimed that the policies did not cover this type of claim. *Id.* The Fourth Circuit held that the language of the exclusion explicitly excluded claims brought under the specific employment laws at issue in *Pacific. Id.* at 406. Some scholars suggest emphasizing an area of law called contract discretionary power that supports opening up the standard form portions of contracts that are consistent across policies to the discretion of the law, thus allowing the court to determine the contract's meaning. *See, e.g.*, W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853, 870–76.

²⁹ RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981); *see* RESTATEMENT OF THE LAW OF LIAB. INS. § 4 (providing that in the event of an ambiguous term, courts interpret it against the drafter unless extrinsic evidence proves that result unreasonable); *see also* Abraham, *supra* note 24, at 538 (explaining that construing ambiguous terms in favor of insureds avoids many issues that would accompany a negligence standard). The *contra proferentem* doctrine addresses multiple concerns

court's approach to interpreting insurance policies often takes the nature of contracts of adhesion into account by strictly construing ambiguous language against the insurer.³⁰ By implementing the *contra proferentem* approach, courts encourage policy drafters to clearly outline coverage.³¹

When interpreting insurance policies, courts consider each term to guarantee its effectiveness.³² Courts believe that if the parties included a term within a policy, it must have been for a specific purpose.³³ Taking into account the complex nature of insurance policies, courts limit the application of exclusionary clauses.³⁴ The purpose of exclusionary clauses is twofold: (1) to incentivize the insured to guard against risk of moral hazard, and (2) to prevent the insurer from having to cover the insured's wrongdoing.³⁵ Accordingly, courts

that courts express regarding insurance policy interpretation, including the imbalance of understanding between the parties to the contract, inability of policyholders to pursue better terms, and lack of mutual intent between parties due to non-negotiable terms. French, *supra* note 3, at 553, 546, 559. This doctrine generally results in construing inclusions of coverage expansively and exclusions, or limitations, modestly. *Id.* at 554–55. See *Econ. Premier Assurance Co. v. W. Nat'l Mut. Ins. Co.*, 839 N.W.2d 749, 755 (Minn. Ct. App. 2013) (stating that *contra proferentem* applies when there are ambiguous terms because insurance policies employ intricate terms, but policyholders are generally inexperienced).

³⁰ Abraham, *supra* note 24, at 538; see also RESTATEMENT OF THE LAW OF LIAB. INS. § 2 cmt. a (describing the approach that courts take when interpreting insurance policies). Strict construction is a strict liability standard by which the meaning of ambiguous language that favors the policyholder prevails because the policyholder did not have power in drafting the policy. Abraham, *supra* note 24, at 538.

³¹ French, *supra* note 3, at 556.

³² See, e.g., *Buell Indus. v. Greater N.Y. Mut. Ins. Co.*, 791 A.2d 489, 497–98 (Conn. 2002) (quoting *Hansen v. Ohio Cas. Ins. Co.*, 687 A.2d 1262, 1267 (Conn. 1996) (emphasizing the importance of each clause within an insurance policy)). The case *Buell Industries v. Greater New York Mutual Insurance Co.*, in the Supreme Court of Connecticut in 2002, involved an environmental claim regarding contaminated sites. *Id.* at 492. Buell Industries sought indemnification from its insurance companies, but they denied coverage due to a pollution exclusion. *Id.* at 493–94. The court interpreted the policy according to its plain meaning, giving each clause an operative meaning, and held that the pollution exclusion barred coverage. *Id.* at 510. *Hansen v. Ohio Casualty Insurance Co.*, decided by the Supreme Court of Connecticut in 1996, was a dispute about an underinsured motorist's policy. 687 A.2d at 1262. There, the policy's language was ambiguous so the court construed the policy against the insurer. *Id.* at 1267.

³³ See *Buell*, 791 A.2d at 497–98 (quoting *Hansen*, 687 A.2d at 1267) (stating that every policy term must have an effect).

³⁴ *Reserve Ins. Co. v. Pisciotto*, 640 P.2d 764, 768 (Cal. 1982). Courts construe clauses that grant coverage more expansively. *Id.* An example of a clause granting, rather than excluding, coverage is: "We will pay all sums the 'insured' is legally entitled to recover as compensatory damages from the owner or driver of an 'uninsured motor vehicle.' The damages must result from 'bodily injury' sustained by the 'insured' caused by an 'accident.'" *Hansen*, 687 A.2d at 1267. In contrast, an exclusionary clause is: "This coverage does not apply: (a) To liability of any Assured for assault and battery committed by or at the direction of such Assured except liability for Personal Injury or Death resulting from any act alleged to be assault and battery for the purpose of preventing injury to persons or damage to property." *Hartford*, 905 F.3d at 88.

³⁵ *Arrigo's Fleet Serv., Inc. v. Aetna Life & Cas. Co.*, 221 N.W.2d 206, 210 (Mich. Ct. App. 1974). Insurers object to indemnifying policyholders for their own wrongdoing because insurance is meant to provide protection for loss that is not expected. See *Insurance*, BLACK'S LAW DICTIONARY, *supra* note 3 (stating that insurance provides protection for a contingency, which is an event that is

interpret any unclear terms in exclusionary clauses against the insurance company.³⁶

Moreover, based on the terms of an insurance policy, claims must qualify as occurrences to be covered.³⁷ Commercial liability policies routinely contain occurrence requirements to ensure that insurers indemnify only claims based on accidents or unintended events, rather than the wrongful acts of the insured.³⁸ Events that qualify as occurrences must be accidents that insureds did not expect or intend.³⁹ Thus, expectation is relevant, because if an event was expected, it may not be an accident and therefore would not be covered.⁴⁰ When considering expectation, a court may consider whether the insured expected either the incident or the resulting injury.⁴¹ Thus, whether the court applies an objective or a subjective standard guides the court's determination on whether the accident was expected.⁴²

B. The Insurance Policy in Hartford and the Issues Creating the Circuit Splits

In 2018, in *Hartford*, the Second Circuit interpreted an insurance policy to determine whether indemnification was appropriate.⁴³ Specifically, the Second Circuit considered who was protected as an insured under a policy of the Archdiocese of Hartford, Connecticut.⁴⁴ An insured, or assured, is an individu-

possible, but not certain, to occur). If a policyholder expects the harm, it would not align with the purpose of contracting for the insurance policy and thus should be beyond the scope. *See id. But cf. Hartford*, 905 F.3d at 89 (holding that applying the exclusion to all people covered by the policy would be contrary to the intention of an exclusion). A moral hazard is a “hazard that has its inception in mental attitudes, such as dishonesty, carelessness, and insanity.” *Hazard*, BLACK’S LAW DICTIONARY, *supra* note 3. Applied in the insurance context, a moral hazard could ultimately allow the insured to unjustly collect under the policy. *Id.*

³⁶ *Arrigo’s*, 221 N.W.2d at 209–10. *Arrigo’s* involved an incident where, while undergoing repairs, a fire damaged cargo within a truck’s trailer. *Id.* at 208. The Michigan Court of Appeals held the language of the policy exclusion at issue to be ambiguous and ruled against the insurer. *Id.* at 212.

³⁷ *Hartford*, 905 F.3d at 90.

³⁸ *Winbush*, *supra* note 17, § 2(b).

³⁹ *Hartford*, 905 F.3d at 90.

⁴⁰ *Id.*

⁴¹ *See id.* at 93 (focusing on whether the injury was expected). *But see* Diocese of Winona v. Interstate Fire & Cas. Co., 858 F. Supp. 1407, 1416 (D. Minn. 1994) (*Winona I*) (stating the issue was whether the abuse was expected).

⁴² *See Hartford*, 905 F.3d at 90 (applying an objective test rather than a subjective test to determine the insured’s expectation); RESTATEMENT OF THE LAW OF LIAB. INS. § 2 cmt. h (describing insurance policy interpretation as a question of law for the court to decide); French, *supra* note 3, at 546–49 (explaining the extremely complex nature of insurance policies).

⁴³ 905 F.3d at 90. Indemnification is the purpose of insurance—to provide compensation for loss or damage. *Indemnification*, BLACK’S LAW DICTIONARY, *supra* note 3.

⁴⁴ *Hartford*, 905 F.3d at 90.

al whose liabilities will be indemnified by the policy.⁴⁵ The Archdiocese's maintained an insurance policy with Interstate between September 1978 and September 1985.⁴⁶ By June 2008, the Archdiocese notified Interstate of four lawsuits against priests for sexual misconduct that took place during the policy term.⁴⁷ The four claims in question were against three priests within the Archdiocese: Father Robert Ladamus, Father Stephen Crowley, and Father Ivan Ferguson.⁴⁸

Between May 2010 and May 2012, the Archdiocese reached settlements for all four claims and requested coverage under the policy with Interstate.⁴⁹ Of the four, the insurance company only challenged one of the claims against the priests on the basis that the claim did not qualify as an occurrence.⁵⁰ Interstate also disputed that the policy covered any of the four claims because they fell under an assault and battery exclusion in the insurance policy.⁵¹ The par-

⁴⁵ See *Insured*, BLACK'S LAW DICTIONARY, *supra* note 3 (defining an insured as someone an insurance policy protects and noting the synonymous term "assured").

⁴⁶ Appellee's Principal & Response Brief at 1, *Hartford*, 905 F.3d 84 (Nos. 16-2999(L), 17-2484(XAP)). The Archdiocese maintained multiple policies in the form of excess indemnity policies that different liability amounts triggered. *Hartford Roman Catholic Diocesan Corp. v. Interstate Fire & Cas. Co.*, 199 F. Supp. 3d 559, 563–64 (D. Conn. 2016). For example, in *Hartford*, the Archdiocese was self-insured up to \$60,000 from 1978 to 1981 and \$100,000 after 1981. *Id.* at 563 n.1. If a settlement exceeded that value, the first two insurance companies would cover the excess up to \$200,000. *Id.* Finally, if it exceeded \$200,000, Interstate was responsible for covering the remaining amount up to \$5 million. *Id.*

⁴⁷ See Appellee's Principal & Response Brief, *supra* note 46, at 14–17 (describing the claims against the priests that the Archdiocese employed).

⁴⁸ *Hartford*, 199 F. Supp. 3d at 565. Father Ferguson was the alleged assailant for two of the claims. *Id.* Each claim took place at some point between 1977 and 1985. *Id.*

⁴⁹ Appellee's Principal & Response Brief, *supra* note 46, at 14–17. The settlements for the four claims were \$295,000, \$299,000, \$750,000, and \$775,500. *Hartford*, 199 F. Supp. 3d at 615.

⁵⁰ *Hartford*, 905 F.3d at 91; see *supra* note 39 and accompanying text (explaining that to be an occurrence under the policy the insured must not intend or expect the accident). Interstate conceded that one of the four claims was an occurrence, and based on its conclusions of fact, the court held that the second was also an occurrence because the Archdiocese had no prior reports about Fathers Ladamus or Crowley. *Hartford*, 199 F. Supp. 3d at 595. For the first claim against Father Ferguson, the court concluded that the priests who were aware of his tendencies to sexually abuse children were not sufficiently high in the church's hierarchy to qualify as the Archdiocese's proxy. *Id.* at 596. The court held it would be unfair to impute a priest's knowledge onto the Archdiocese as a whole because, in the hierarchy, there are many priests below a particular archbishop. *Id.*

⁵¹ *Hartford*, 905 F.3d at 88. The assault and battery exclusion said there was no coverage for assault and battery "of any Assured" that was "committed by or at the direction of such Assured." *Id.* (emphasis added); Appellee's Principal & Response Brief, *supra* note 46, at 11. The practice of excluding assault and battery from insurance coverage is based on the idea that a person should not be indemnified for that person's own wrongful actions. Winbush, *supra* note 17, § 2(a)–(b). When there have been wrongful actions, insurance companies likely prefer to preclude coverage for all insureds. See Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 569–70 (1988) (explaining that an employer's vicarious liability for employees' wrongdoing helps to ensure payment and also induce employers to better control employees' behavior). In this way, an assault and battery exclusion may serve as an incentive to ensure that employees or other insureds do not commit assault and battery, thereby creating an overall deterrent

ticular exclusion in Interstate's policies precluded coverage for the liability of "any Assured" for assault committed by "such Assured."⁵²

On November 19, 2012, the Archdiocese filed a complaint in the U.S. District Court for the District of Connecticut against Interstate for its failure to indemnify and asserted multiple claims, including breach of contract and breach of the covenant of good faith and fair dealing.⁵³ Interstate denied all claims and asserted fourteen affirmative defenses for the denial of coverage, including: lack of an occurrence because the acts were expected or intended, lack of coverage for the underlying claims based on the relevant policy terms, and preclusion of coverage based on the assault and battery exclusion.⁵⁴ The district court held, by applying the subjective test, that Interstate was liable for

effect. See *Hartford*, 905 F.3d at 93–94 (ruling against Interstate's argument that the Archdiocese "should have known" the abuse would continue and noting that the Connecticut Supreme Court in *Capstone Building Corp. v. American Motorists Insurance Co.*, 67 A.3d 961 (Conn. 2013), has rejected the "should have known" standard); Sykes, *supra*, at 569–70 (explaining an employer's economic incentive to closely monitor employees to decrease the number of lawsuits). Generally, however, exclusions that bar coverage due to assault do not apply to an insured that was only vicariously liable for the assault, such as an employer, but who did not actually commit the assault. Christopher C. French, *Debunking the Myth That Insurance Coverage Is Not Available or Allowed for Intentional Torts or Damages*, 8 HASTINGS BUS. L.J. 65, 90 (2012). Vicarious liability is the liability of someone in their capacity as a supervisor. *Vicarious Liability*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/vicarious_liability [<https://perma.cc/C8FA-TSFQ>].

⁵² *Hartford*, 905 F.3d at 88. The policy, in *Hartford*, was in the name of the Archdiocese and it said insurance does not apply "to liability of any Assured for assault and battery committed by or at the direction of such Assured." *Id.* at 88–89 (emphasis added) An insured under the policy included any employee of the Archdiocese that worked in an organization of the Archdiocese and acted in the scope of such position. *Interstate*, 761 F.3d at 955. The Second Circuit noted that, as the priests were acting outside of the scope of their employment when they committed the sexual abuse, they were likely not insureds under the policy at that time. *Hartford*, 905 F.3d at 89. In fact, the court suggested that Interstate should stand by its own interpretation of the contract, because in its denial of coverage letter to the Archdiocese, Interstate pointed out that the priests were acting beyond the scope of their position and should not be considered insureds. *Id.* If the priests were not considered insureds when acting outside the scope of their positions, their sexual assaults could not have triggered the exclusion because the exclusion only applied to acts of insureds. See *id.* at 88–89 (stating that the wording of the exclusion only excluded coverage to insureds who committed an assault). The Second Circuit considered the priests to be insureds under the policy, similar to employees under an employer's insurance policy. *Id.* at 89.

⁵³ Complaint at 11–13, *Hartford*, 199 F. Supp. 3d 559 (No. 3:12cv01641). A breach of contract claim arises when a party has broken a term of the contract or has left a promise unperformed. *Breach of Contract*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/breach_of_contract [<https://perma.cc/H342-RRFA>]. Breach of good faith and fair dealing refers to a requirement that is implied within all contracts that parties will uphold the contract and treat each other appropriately. *Implied Covenant of Good Faith and Fair Dealing*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/implied_covenant_of_good_faith_and_fair_dealing [<https://perma.cc/4CQP-W6WM>]. The Archdiocese also asserted a claim against Interstate for violations of the Connecticut Unfair Insurance Practices Act and the Connecticut Unfair Trade Practices Act. Complaint, *supra*, at 14–18. The district court found for Interstate and the Second Circuit affirmed in respect to these claims. *Hartford*, 905 F.3d at 94–97; *Hartford*, 199 F. Supp. 3d at 615–16.

⁵⁴ Answer & Affirmative Defenses at 8–12, *Hartford*, 199 F. Supp. 3d 559 (No. 3:12cv01641).

failing to reimburse the Archdiocese for the four settlements relating to the sexual assaults that the three priests allegedly committed.⁵⁵ Specifically, the court questioned whether, from the viewpoint of the Archdiocese, there was a substantial probability that the Archdiocese knew that the abuse would likely continue, therefore making the injuries expected.⁵⁶

On appeal to the Second Circuit, Interstate argued that (1) the district court's construction of the policy was incorrect, (2) the proper standard for determining whether there was an occurrence is an objective test, and (3) the court should have followed the Connecticut Superior Court's decision in 1995 in *Linemaster Switch Corp. v. Aetna Life & Casualty Corp.*⁵⁷ In *Linemaster*, the court held that although the test is generally subjective, in certain extraordinary situations it should become an objective test.⁵⁸ If the objective test applied, the court would consider the expectation of the sexual assaults from the viewpoint of a reasonable Archdiocese, rather than from the viewpoint of the

⁵⁵ *Hartford*, 199 F. Supp. 3d at 594, 615; see *infra* note 68 and accompanying text (explaining the difference between the subjective and objective tests). The fourth claim, involving the second allegation against Father Ferguson, was the sole claim on appeal regarding whether there was an occurrence. *Hartford*, 905 F.3d at 91. Father Ferguson was the only priest that the Archdiocese had prior knowledge of committing past sexual abuse. *Id.* For the second claim against Father Ferguson, which allegedly began in the summer of 1981, Interstate challenged the claim's status as an occurrence because the Archdiocese received a report of a different instance of Father Ferguson's sexual abuse in March of 1979. *Id.* The report made against Father Ferguson in March 1979 corresponded to the first claim against him. *Id.* As it was the first report of Father Ferguson's sexual abuse, it was not expected by the Archdiocese and therefore qualified as an occurrence. *Id.* Therefore, Interstate argued that because the Archdiocese was under notice of Father Ferguson's sexual misconduct, the Archdiocese should have expected the subsequent incident. *Id.* The court, however, found that the Archdiocese reasonably relied on the opinion of Father Ferguson's doctor that Father Ferguson would abstain from sexual misconduct. *Hartford*, 199 F. Supp. 3d at 597. The doctor formed his opinion based on Father Ferguson's admittance of the incidents and confession that he was an alcoholic. *Hartford*, 905 F.3d at 91. Due to this revelation, Father Ferguson underwent treatment. *Id.* After treatment, the doctor concluded that as long as Father Ferguson refrained from alcohol, he would refrain from sexual misconduct. *Id.*

⁵⁶ *Hartford*, 199 F. Supp. 3d at 594.

⁵⁷ *Hartford*, 905 F.3d at 94; *Linemaster Switch Corp. v. Aetna Life & Cas. Corp.*, No. CV91-03964325, 1995 Conn. Super. LEXIS 2229, at *70 (July 25, 1995).

⁵⁸ See *Linemaster*, 1995 Conn. Super. LEXIS 2229, at *69-70 (holding that a subjective test can be replaced with an objective test when there are exceptional circumstances). In considering whether there are exceptional circumstances, courts look to factors such as the duration of the act, or if the act was intentional such that subjective intent is clear from the circumstances themselves. In *Linemaster*, *Linemaster* sued its insurance company for failure to defend *Linemaster* pursuant to the insurance policy in an action brought by the EPA. *Id.* at *1. In applying the plain meaning to the terms of the insurance policy, the Superior Court of Connecticut held that there was no duty to defend according to the terms because there was no suit pending. *Id.* at *112. Similarly, in *Hartford*, Interstate argued that there were exceptional circumstances and, therefore, that the court should apply an objective test and the incidents of sexual abuse should not be occurrences. 905 F.3d at 94. (citing *Linemaster*, 1995 Conn. Super. LEXIS 2229, at *70). The court in *Hartford*, however, declined to recognize an exceptional circumstance and refused to apply an objective test in this case. *Id.*

Archdiocese in question.⁵⁹ Interstate attempted to use the Archdiocese's ruling of recklessness from a prior civil suit involving Father Ferguson's sexual abuse of another boy as proof of knowledge or expectation.⁶⁰ The court rejected this argument and concluded that it was acceptable for the Archdiocese to rely on a doctor's opinion that Father Ferguson would not regress to sexual abuse.⁶¹ Thus, in *Hartford*, the court's determination on whether the claims were occurrences and whether the assault and battery provision excluded coverage created the circuit splits.⁶²

II. LEGAL CONTEXT OF *HARTFORD*'S INSURANCE POLICY CONSTRUCTION

The Second Circuit's decision in *Hartford Roman Catholic Diocesan Corp. v. Interstate Fire & Casualty Co.* created a circuit split with the Eighth Circuit regarding what constitutes an occurrence under identical Interstate Fire & Casualty Co. insurance policies, and with the Ninth Circuit over the construction and interpretation of the assault and battery exclusion.⁶³ Part A discusses the split with the Eighth Circuit regarding the proper test for an occur-

⁵⁹ See *Hartford*, 905 F.3d at 93 (holding that the district court was correct to apply a subjective test from the standpoint of the insured); *Winona II*, 89 F.3d at 1391 (stating that the proper question was whether a reasonable person in the position of the church would have expected the abuse to continue).

⁶⁰ *Hartford*, 905 F.3d at 93. Recklessness occurs when an actor does not intend any negative result, but is aware of its possibility and proceeds regardless. *Recklessness*, BLACK'S LAW DICTIONARY, *supra* note 3. Interstate argued that there was no occurrence because the Archdiocese should have expected the injury due to its conscious decision to ignore the risk and allow Father Ferguson to continue having close interactions with children. *Hartford*, 905 F.3d at 93.

⁶¹ *Hartford*, 905 F.3d at 92. Father Dr. Peterson, a psychiatrist, oversaw Father Ferguson's treatment for substance abuse. *Id.* at 91. He reasoned that Father Ferguson's alcohol abuse caused his pedophilia; therefore, if he no longer struggled with alcohol abuse, then he could resist the pedophilia. *Id.*

⁶² *Id.* at 94.

⁶³ See *Hartford Roman Catholic Diocesan Corp. v. Interstate Fire & Cas. Co.*, 905 F.3d 84, 89–90, 93 (2d Cir. 2018) (applying a subjective test to determine the insured's expectation and holding that an assault and battery exclusion applied only to the insureds that committed the assault); *Interstate Fire & Cas. Co. v. Roman Catholic Church of the Diocese of Phoenix*, 761 F.3d 953, 955 (9th Cir. 2014) (holding that an assault and battery exclusion prohibited coverage for all insureds under the policy); *Diocese of Winona v. Interstate Fire & Cas. Co. (Winona II)*, 89 F.3d 1386, 1391 (8th Cir. 1996) (applying an objective test to determine whether a reasonable insured would have expected the sexual abuse). All three cases revolved around the construction of identical provisions, yet the courts came to opposite conclusions. *Hartford*, 905 F.3d at 89–90; *Interstate*, 761 F.3d at 954–55; *Winona II*, 89 F.3d at 1391. Insurance policy interpretation, as with all contracts, is a question of law for the court. *Hartford*, 905 F.3d at 88. Courts must give the terms in the policy their ordinary meaning and try to determine the intent of the parties with respect to coverage. *Id.* The burden is on the insurer to prove that an exclusion denies coverage under the policy. *Id.*

rence under the policies at issue.⁶⁴ Part B discusses the various interpretations of the assault and battery exclusion by the Second and Ninth Circuits.⁶⁵

A. *Expectation of Occurrence—Objective and Subjective Tests*

Courts struggle with whether to apply an objective test or a subjective test to determine whether there was an expected occurrence.⁶⁶ The language in insurance policies dictates that to be an occurrence, the insured must not have intended or expected the policy to cover it.⁶⁷ Courts approach this question in two different ways: (1) they assess expectation objectively based on a reasonable person standard or (2) subjectively based on the viewpoint of the insured.⁶⁸ The policy in *Hartford* defined occurrence as an unfortunate incident that “unexpectedly and unintentionally results in personal injury.”⁶⁹ In *Hartford*, Interstate did not suggest that the Archdiocese intended any of the abuses to occur; rather, Interstate suggested that the Archdiocese should have expected Father Ferguson’s abuse based upon prior knowledge.⁷⁰ Thus, Interstate argued that the abuse should not be an occurrence.⁷¹

⁶⁴ See *infra* notes 66–89 and accompanying text (explaining the circuit split regarding the proper test to apply to determine an insured’s expectation).

⁶⁵ See *infra* notes 90–113 and accompanying text (discussing the circuit split regarding the proper scope of an assault and battery exclusion).

⁶⁶ *Hartford*, 905 F.3d at 90; *Winona II*, 89 F.3d at 1391. Sexual abuse cases are not the only instances where courts consider an objective or subjective test. See *Morton Int’l v. Gen. Accident Ins. Co.*, 629 A.2d 831, 833–34 (N.J. 1993) (holding, in an environmental damages claim case, that the test of expectation for an occurrence is subjective); *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 275 (Ky. 1991) (same).

⁶⁷ *Hartford*, 905 F.3d at 92; *Winona II*, 89 F.3d at 1391; see Winbush, *supra* note 17, § 2(b) (explaining that insurance should not be available for improper actions by the insured).

⁶⁸ Compare *Winona II*, 89 F.3d at 1391 (stating the question of expectation is, objectively, whether a reasonably prudent person in the insured’s position knew or should have known), with *Hartford*, 905 F.3d at 93 (holding the test for expectation is, subjectively, whether the insured expected the resulting injury). In *Hartford*, Interstate also argued that to be an occurrence, the incident, or event, itself should have been unexpected. 905 F.3d at 92. Nevertheless, the court concluded that the appropriate consideration is whether the injury was expected, not the event. *Id.* at 92–93; see also *Winona II*, 89 F.3d at 1391 (requiring an occurrence to result in an unexpected injury). But see Pa. Gen. Ins. Co. v. Thakur, No. 3:12CV1799(AWT), 2014 U.S. Dist. LEXIS 110404, at *9–10 (D. Conn. Aug. 11, 2014) (defining an occurrence as an unexpected or unintended incident, rather than an unexpected or unintended injury).

⁶⁹ *Hartford*, 905 F.3d at 90.

⁷⁰ *Id.* at 91.

⁷¹ *Id.*; see also *Diocese of Winona v. Interstate Fire & Cas. Co. (Winona I)*, 858 F. Supp. 1407, 1409–13 (D. Minn. 1994) (holding that a reasonable person in the Diocese’s position would have been aware of the risk of continued abuse). *Hartford* differed slightly from the *Winona* case to the extent that a doctor linked Father Ferguson’s proclivity towards sexual abuse to his alcoholism; whereas in *Winona I*, no similar explanation existed. *Hartford*, 905 F.3d at 596–97. *Contra Winona I*, 858 F. Supp. at 1410 (accepting Father Adamson’s sexual orientation disturbance and noting a simple inability to control his urges).

Hartford created a circuit split between the Second and Eighth Circuits regarding the proper test, objective or subjective, to determine whether the insured expected the incident.⁷² In 1996, in *Diocese of Winona v. Interstate Fire & Casualty Co.* the Eighth Circuit addressed claims involving a priest that committed numerous sexual abuses during a period of over two decades.⁷³ The main issue in *Winona* was whether the Diocese and Archdiocese expected the abuse to continue.⁷⁴ The court determined the expectation by using an objective test from the standpoint of a prudent policyholder.⁷⁵

In *Winona*, the Eighth Circuit employed an objective test for expectation of an occurrence and determined that the Archdiocese should have expected the sexual abuse would continue.⁷⁶ Specifically, the court considered whether a reasonably prudent person in the insured's position would have expected the abuse.⁷⁷ Thus, the court asked whether the Diocese and Archdiocese knew or should have known that there was a substantial probability that the priest, Father Thomas Adamson, would sexually abuse a boy who attended his church.⁷⁸ In *Winona*, the Diocese knew that Father Adamson had sexually abused young boys intermittently between 1964 and 1984, leading to six confirmed incident reports.⁷⁹ Interstate argued that the Diocese and Archdiocese should have known, therefore, that there was a substantial probability that the abuse would occur.⁸⁰ Nevertheless, throughout this period, Father Adamson went through various bouts of therapy and treatment, both inpatient and outpatient, in an attempt to prevent further incidents.⁸¹ The Diocese argued that, based on the extensive treatment and therapy, it assumed Father Adamson was cured and therefore it did not expect continued abuse.⁸² The Eighth Circuit concluded

⁷² *Hartford*, 905 F.3d at 93; *Winona II*, 89 F.3d at 1391.

⁷³ *Winona I*, 858 F. Supp. at 1409–13.

⁷⁴ *Winona II*, 89 F.3d at 1391.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Winona I*, 858 F. Supp. at 1409–13. The first confirmed report involving Father Adamson came in 1964. *Id.* at 1409. When the Diocese confronted Father Adamson, he vowed to stop, and the Diocese transferred him to a different school. *Id.* Then, in 1966 or 1967, when the Diocese received a second report, Father Adamson underwent a few months of counseling, and the Diocese transferred him again. *Id.* at 1409–10. A third incident in early 1974 led to both out-patient and in-patient psychotherapy. *Id.* at 1410. A fourth report came later the same year and eventually led to Father Adamson losing his position at the congregation. *Id.* The Diocese transferred him and he underwent further therapy. *Id.* The fifth and sixth incidents occurred in 1980 and 1983, which led to further treatment and another transfer. *Id.* at 1411–12. In addition, Father Adamson had maintained a sexual relationship with a boy beginning in 1979, when the boy was thirteen, and continuing until 1987. *Id.* at 1412.

⁸⁰ *Winona II*, 89 F.3d at 1391.

⁸¹ *Winona I*, 858 F. Supp. at 1410.

⁸² *See id.* (noting that Father Adamson's therapist wrote that "it is unlikely he will regress to this behavior in the foreseeable future").

that because the incidents happened repeatedly, the Diocese expected the abuse and, therefore, it was not an occurrence within the terms of the policy.⁸³

Hartford involved a similar set of facts, but the Second Circuit employed a subjective, rather than objective, test to determine whether insurance coverage was appropriate.⁸⁴ In this case, the Archdiocese had received numerous reports that one of its priests, Father Ferguson, had sexual contact with young boys.⁸⁵ Upon receiving a report on March 7, 1979, the Archdiocese was on notice of Father Ferguson's prior abuse.⁸⁶ The Archdiocese responded by sending him to treatment, after which his psychiatrist informed the Archdiocese that as long as Father Ferguson controlled his alcoholism, it was safe to assign him to a boy's school again.⁸⁷ Because of the psychiatrist's report, when the Second Circuit applied the subjective test, the court concluded that the Archdiocese reasonably relied on the psychiatrist's professional opinion that Father Ferguson would not resort to sexual abuse.⁸⁸ Thus, unlike the Eighth Circuit, the Second Circuit held that the Archdiocese did not expect Father Ferguson to abuse again.⁸⁹

⁸³ *Id.* at 1393–96. The court stated that although Father Adamson underwent treatment, he continued to inappropriately touch young boys, and the Diocese continued to receive reports of incidents. *Id.* at 1394. The court concluded it was clear that the Diocese was aware that it had yet to successfully treat Father Adamson, as the sexual abuse did not cease. *Id.*

⁸⁴ See *Hartford*, 905 F.3d at 93 (stating that the district court correctly applied a subjective test). The Second Circuit's approach in *Hartford*, notably, aligned with the majority of courts in insurance policy disputes when considering whether an insured expected an injury. See *id.* (noting that the *Winona* cases relied on Minnesota law to apply objective tests, but that Minnesota is an outlier); *Linemaster Switch Corp. v. Aetna Life & Cas. Corp.*, No. CV91-03964325, 1995 Conn. Super. LEXIS 2229, at *68–69 (July 25, 1995) (stating the majority rule is a subjective test for determining the insured's expectations). The other cases that held the test to be subjective involved environmental damage claims. See *Morton*, 629 A.2d at 833–34, 879 (stating that courts will look into the insured's subjective intent); *James Graham Brown Found.*, 814 S.W.2d at 275, 278–79 (stating that the question for expectation was whether the insured had the subjective intent to cause harm).

⁸⁵ *Hartford*, 905 F.3d at 91–92. The first reports of Father Ferguson's abuse were made to pastors. *Id.* at 91. The district court concluded that the pastors' position within the Archdiocese was not enough to warrant treating their knowledge as the Archdiocese's. *Id.* Thus, the court did not consider the Archdiocese to have known about Father Ferguson's incidents of sexual abuse.

⁸⁶ *Id.* at 91.

⁸⁷ *Id.* at 92. Father Ferguson went to both an inpatient treatment program and then an outpatient program. *Id.* The treating psychiatrist concluded that his alcoholism caused the pedophilia, and, therefore, by ending his alcoholism, the sexual abuse would also cease. *Id.*

⁸⁸ *Id. Contra Winona II*, 89 F.3d at 1391–93 (applying the objective test and affirming that although Father Adamson underwent repeated treatment, a reasonably prudent person would have expected the abuse to continue). Interstate argued that the question of the insured's expectation should be whether the Archdiocese objectively expected the abuse, rather than the resulting injury. *Hartford*, 905 F.3d at 92. Along these lines, Interstate urged the court to conclude that, due to the knowledge of Father Ferguson's proclivities, a reasonably prudent person would believe that it was inevitable that he would resort to sexual abuse again. *Id.* The court rejected this argument based on the policy's definition of occurrence as an accident that results in injury and also because the test should be subjective. *Id.*

⁸⁹ *Hartford*, 905 F.3d at 92. *Contra Winona II*, 89 F.3d at 1391–93 (holding that the Diocese and Archdiocese expected the priest in question to abuse again).

B. The Assault and Battery Exclusion in Interstate's Policies

The decision in *Hartford* also created a circuit split between the Second and the Ninth Circuits regarding identical assault and battery exclusions in the context of sexual misconduct by priests.⁹⁰ In 2014, in *Interstate Fire & Casualty Co. v. Roman Catholic Church of the Diocese of Phoenix*, a case involving ongoing sexual abuse by a priest in Phoenix, Arizona, the Ninth Circuit considered the exact same policy form and exclusionary clause from the same insurance company as in *Hartford*.⁹¹ The policy exclusion denied coverage “to liability of *any Assured* for assault and battery committed by or at the direction of *such Assured*.”⁹² The circuits split over the scope of “any” and “such” because it would determine which insureds were denied coverage due to the assault and battery exclusion.⁹³ Although both *Interstate* and *Hartford* relied upon similar definitions of the word “such” when interpreting the policy, the circuits interpreted the exclusion differently.⁹⁴

In *Interstate*, the Diocese sought indemnification for four underlying settlements.⁹⁵ *Interstate* argued that the assault and battery exclusion applied to all four claims and barred coverage of the claims for the Diocese.⁹⁶ The District Court granted the Diocese summary judgment stating that the assault and battery exclusion did not prevent coverage.⁹⁷ On appeal, the Ninth Circuit reversed the District Court’s judgment by excluding coverage due to the assault and battery exclusion.⁹⁸ Specifically, the Ninth Circuit read “such Assured” in the exclusion as referring back to “any Assured.”⁹⁹ Further, according to the court, “any Assured” excluded coverage for all insureds, meaning the Diocese

⁹⁰ *Hartford*, 905 F.3d at 88; *Interstate*, 761 F.3d at 955.

⁹¹ *Hartford*, 905 F.3d at 88; *Interstate*, 761 F.3d at 954–55.

⁹² *Hartford*, 905 F.3d at 88; *Interstate*, 761 F.3d at 954. Both the Second and Ninth Circuits stated that “such” refers to whatever was just specified in the policy. *Hartford*, 905 F.3d at 89; *Interstate*, 761 F.3d at 955.

⁹³ *Hartford*, 905 F.3d at 88; *Interstate*, 761 F.3d at 954.

⁹⁴ Compare *Hartford*, 905 F.3d at 88–90 (concluding that the exclusion only applied to the insureds that committed the assault and battery), with *Interstate*, 761 F.3d at 954–56 (concluding that the exclusion prevented coverage to all insureds under the policy).

⁹⁵ *Interstate*, 761 F.3d at 954. The four settlements involved alleged abuse committed by two different priests, Father Henry Perez and Father John Giandelone. Opening Brief of Plaintiff-Counterdefendant-Appellant-Cross-Appellee *Interstate Fire & Cas. Co.* at 11–12, *Interstate*, 761 F.3d 953 (No. 12-17195, No. 12-17264, No. 13-15223). Claims alleged that the two abuses by Father Perez occurred between 1978 and 1981. *Id.* at 11. Further claims alleged that the two abuses by Father Giandelone occurred between 1981 and 1985. *Id.* at 11–12.

⁹⁶ *Interstate*, 761 F.3d at 955. The district court held that the assault and battery exclusion applied only to the insured that committed the assault and battery, rather than all of the insureds. *Id.* On appeal, the insurance company argued that the court incorrectly interpreted the policy. *Id.*

⁹⁷ *Id.* at 954–55.

⁹⁸ *Id.*

⁹⁹ *Id.*

as a whole.¹⁰⁰ The Ninth Circuit considered the plain meaning of the terms “any” and “such” to determine the policy’s clearest meaning.¹⁰¹ The Ninth Circuit determined that the only term that “such” could refer to was “any Assured” because it had the “quality just specified.”¹⁰² To determine the meaning of “any Assured,” the court relied on Arizona case law holding that an exclusion of “any insured” included all persons that the policy insures.¹⁰³ Therefore, the court excluded coverage for the entire Diocese, rather than just the priest accused of sexual abuse.¹⁰⁴

In *Hartford*, Interstate attempted to use the Ninth Circuit’s holding regarding the same insurance policy language to its advantage.¹⁰⁵ Interstate argued that the Ninth Circuit correctly held that “such Assured” in the assault and battery exclusion referred back to “any Assured,” and therefore the clause excluded coverage for all insureds.¹⁰⁶ Interstate argued that the term “any Assured” meant that the coverage excluded the entire Diocese, rather than only the priests alleged to have committed the sexual abuses.¹⁰⁷ The Second Circuit, however, disagreed with this reading of the exclusion.¹⁰⁸ The court concluded that the word “such” should be read as limiting that class of insureds to which the exclusion applied.¹⁰⁹ By limiting the class, the court prohibited the exclusion from applying to all insureds.¹¹⁰ Rather, the exclusion only applied to the

¹⁰⁰ *Id.* The Ninth Circuit relied on *Brown v. U.S. Fidelity & Guaranty Co.*, 977 P.2d 807, 817 (Ariz. Ct. App. 1998), and *American Family Mutual Insurance Co. v. White*, 65 P.3d 449, 457 (Ariz. Ct. App. 2003), which are two other Arizona cases, to reach this conclusion. *See id.* at 955–56 (concluding that “the language ‘any insured’ express[es] a contractual intent to prohibit recovery by innocent co-insureds”) (quoting *Am. Family Mut. Ins.*, 65 P.3d at 457). In *American Family Mutual Insurance Co.*, in front of the Court of Appeals of Arizona in 2003, however, the exclusionary clause differed from the clause in *Hartford*. Compare *Am. Family Mut. Ins.*, 65 P.3d at 452 (stating that there would be no coverage for any damages resulting from a criminal act “for which *any insured* is convicted”) (emphasis added), with *Hartford*, 905 F.3d at 88 (denying coverage for “*any Assured* for assault and battery committed by or at the direction of *such Assured*”) (emphasis added).

¹⁰¹ *Interstate*, 761 F.3d at 955.

¹⁰² *Id.*; *see supra* note 92 (defining “such” as having the quality just specified).

¹⁰³ *Interstate*, 761 F.3d at 955; *Am. Family Mut. Ins.*, 65 P.3d at 452; *Brown*, 977 P.2d at 817 (stating that when a clause excluded recovery to “any insured” that included all insureds).

¹⁰⁴ *Interstate*, 761 F.3d at 955.

¹⁰⁵ 905 F.3d at 89–90.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 90. Although Interstate cited some Connecticut case law where “any” was construed to exclude all of a class, the Second Circuit pointed out that the exclusionary clauses in those cases used dissimilar language than the one considered in *Hartford*. *Id.* *See generally* *McWeeny v. City of Hartford*, 946 A.2d 862 (Conn. 2008) (analyzing the relationship between the terms “such individual” and “any individual” in Connecticut’s discriminatory employment practices statute).

¹⁰⁹ *Hartford*, 905 F.3d at 89.

¹¹⁰ *Id.* The court’s conclusion in *Hartford* is in line with the general rules of contract interpretation, which give each term a meaning. *See* *Buell Indus. v. Greater N.Y. Mut. Ins. Co.*, 791 A.2d 489, 497–98 (Conn. 2002) (quoting *Hansen v. Ohio Cas. Ins. Co.*, 687 A.2d 1262, 1267 (Conn. 1996)) (reasoning that each term should be effective because the drafters included each clause in an insurance

insureds that committed the assault and battery, which were the priests that committed sexual abuse.¹¹¹ Because of this interpretation, the court concluded that the assault and battery committed by the priests triggered the assault and battery exclusion only for those individuals, not the entire Archdiocese.¹¹² The Second Circuit attempted to follow the rules of insurance policy interpretation to interpret terms according to their plain meaning.¹¹³

III. THE SECOND CIRCUIT'S RULING SUPPORTS CLEAR AND PURPOSEFUL INSURANCE POLICY DRAFTING

Any court in interpreting an insurance policy will strive to give the provisions of the policy their plain and ordinary meaning.¹¹⁴ In breaking from the Eighth Circuit regarding the proper viewpoint to consider expectation when defining an “occurrence,” the Second Circuit gave the terms defining an occurrence their ordinary meaning.¹¹⁵ Similarly, the Second Circuit broke with the Ninth Circuit regarding the interpretation of the assault and battery exclusion, when it gave the exclusion its ordinary meaning.¹¹⁶ The Second Circuit's insurance policy interpretation correctly incentivizes insurance companies to employ more careful drafting.¹¹⁷ The Second Circuit based its decision in *Hartford Roman Catholic Diocesan Corp. v. Interstate Fire & Casualty Co.* entirely upon the policy's drafting.¹¹⁸ Under the policy, occurrences included the claims of sexual abuse at issue.¹¹⁹

policy for a reason); *Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 450 (Tex. 2015) (explaining that each term in a contract should be given meaning).

¹¹¹ *Hartford*, 905 F.3d at 89.

¹¹² *Id.*

¹¹³ *Id.* at 89, 93.

¹¹⁴ RESTATEMENT OF THE LAW OF LIAB. INS. § 2 (AM. LAW INST., Proposed Final Draft 2017). Insurance policy interpretation, like that of all contracts, is a question of law for the court to decide. *Flint v. Universal Mach. Co.*, 679 A.2d 929, 932 (Conn. 1996).

¹¹⁵ *Hartford Roman Catholic Diocesan Corp. v. Interstate Fire & Cas. Co.*, 905 F.3d 84, 89–90 (2d Cir. 2018); *Diocese of Winona v. Interstate Fire & Cas. Co. (Winona II)*, 89 F.3d 1386, 1391 (8th Cir. 1996); *Heyman Assocs. No. 1 v. Ins. Co. of Pa.*, 653 A.2d 122, 130 (Conn. 1995).

¹¹⁶ *Hartford*, 905 F.3d at 89–90; *Interstate Fire & Cas. Co. v. Roman Catholic Church of the Diocese of Phoenix*, 761 F.3d 953, 955 (9th Cir. 2014); *Heyman*, 653 A.2d at 130.

¹¹⁷ *See Heyman*, 653 A.2d at 130 (stating that when provisions of insurance policies are not clear, then the court must use the interpretation that covers the loss); Ronald J. Gilson et al., *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 40–41 (2014) (explaining that careful drafting can help to avoid costly litigation and unfavorable settlements if the meanings of the terms are contested). Furthermore, specifically for exclusionary clauses, the insurance company has the burden to prove that the exclusion applies to bar coverage. *W. World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990).

¹¹⁸ 905 F.3d at 90–94.

¹¹⁹ *Id.* Following the traditional rules of contract construction, courts give all unambiguous terms their ordinary meanings and only consider extrinsic evidence when ambiguities exist. *W. World*, 922 F.2d at 121; *Heyman*, 653 A.2d at 130; RESTATEMENT OF THE LAW OF LIAB. INS. § 3. When interpret-

As insurance policies are contracts of adhesion, the inquiry into the intent of the parties to an insurance policy should focus on what the policyholder expected to be covered and what the insurance company intended to be covered.¹²⁰ Unfortunately, because insurance companies are the sole drafters of their policies, they control what is actually covered, usually by employing complex and confusing drafting techniques.¹²¹ In evaluating whether the claims at hand were occurrences, the Second Circuit determined that the Archdiocese must not have subjectively expected the resulting injury.¹²² The Second Circuit correctly applied a subjective test from the standpoint of the insured to determine the expectation of an occurrence.¹²³ This aligns with the majority approach, and it is also in line with the bedrock principle that the parties' intentions should govern contract interpretation.¹²⁴

ing the terms of a typical contract, the central question involves the parties' intentions. Bank of the W. v. Superior Ct., 833 P.2d 545, 552 (Cal. 1992); *Heyman*, 653 A.2d at 130.

¹²⁰ French, *supra* note 3, at 543; Slawson, *supra* note 3, at 26. With respect to an insurance policy, inquiring into the intent of the parties is slightly misleading because most insurance policy terms are not up for negotiation. French, *supra* note 3, at 543. Nonetheless, in a standard form contract, such as an insurance policy, the terms are enforceable as long as the parties have assented. *Id.* at 544. In regards to standardized agreements, it is acknowledged, and even endorsed, by the American Law Institute that individuals assent to terms they do not understand. RESTATEMENT (SECOND) OF CONTRACTS § 211(1) (AM. LAW INST. 1981); *see also* Anderson & Fournier, *supra* note 4, at 363–64 (noting that hardly anyone expects the owner of an insurance policy to have read the terms or to understand the policy). The *Restatement* accounts for such lack of understanding by stating that the contract is assumed to treat people of comparable circumstances the same. RESTATEMENT (SECOND) OF CONTRACTS § 211(1); *see also* Slawson, *supra* note 3, at 25–26 (explaining how the growth of standard form contracts has led consumers to agree to terms without understanding the implications). Although consumers typically do not understand what they are agreeing to when they enter into standard form contracts, consumers tend to have certain expectations as to what those agreements include. Slawson, *supra* note 3, at 26. Because one party has all of the drafting power, the party with the power can manipulate the contract in ways that lead to unexpected ramifications for the consumer. *Id.*

¹²¹ *See* Universal Underwriters Ins. Co. v. Travelers Ins. Co., 451 S.W.2d 616, 622–23 (Ky. Ct. App. 1970) (reasoning that insurers attempt to make customers believe more is covered than courts are willing to recognize); *see also* Rodriguez v. Nw. Nat'l Ins. Co., 358 So. 2d 1237, 1240 (La. 1978) (stating that many states are adopting anti-technical statutes to guard policyholders from confusing insurance policy terms); Lorang v. Fortis Ins. Co., 192 P.3d 186, 213 (Mont. 2008) (noting that even the most knowledgeable policyholders can be deluded by the intricacies of insurance policies).

¹²² *Hartford*, 905 F.3d at 93. The Second Circuit based its decision on the policy's definition of occurrence. *See id.* (stating that occurrences are events not intended or expected by the insureds). The issue of prior notice also weighed heavily in *Winona* because the priest in that case, Father Adamson, committed various confirmed sexual contacts with boys, yet the Diocese, and later the Archdiocese, forced him to undergo therapy and then placed him in a new school. *Diocese of Winona v. Interstate Fire & Cas. Co. (Winona I)*, 858 F. Supp. 1407, 1409–13 (D. Minn. 1994). This repeated cycle of treatment and sexual abuse led the court to conclude that the Diocese and Archdiocese should have expected it to continue. *Winona II*, 89 F.3d at 1393–96.

¹²³ *See Hartford*, 905 F.3d at 92–94 (holding that intention and expectation should be considered from the insured's position).

¹²⁴ *See id.* at 93; Pa. Gen. Ins. Co. v. Thakur, No. 3:12CV1799(AWT), 2014 U.S. Dist. LEXIS 110404, at *9–10 (D. Conn. Aug. 11, 2014); *Heyman*, 653 A.2d at 130; *Linemaster Switch Corp. v. Aetna Life & Cas. Corp.*, No. CV91-039643251995, Conn. Super. LEXIS 2229, at *69–70 (July 25,

Similarly, the Second Circuit correctly held that the assault and battery exclusion only applied to the insureds who committed the assault and battery.¹²⁵ The assault and battery exclusionary clause in *Hartford* illustrates how insurance companies draft purposefully confusing and ambiguous policies.¹²⁶ Through its drafting, Interstate made the exclusion appear limited in scope in a denial letter to the Archdiocese, but later argued that the exclusion could be read broadly by drafting it with nondescript adjectives like “any” and “such.”¹²⁷ Insurance companies utilize this type of confusing drafting to argue that a policy does not cover a particular claim.¹²⁸ Insurance companies also argue that policies do not cover sexual abuse because the insurers believe they should not be responsible for the wrongful acts of the insureds.¹²⁹ Furthermore, it is in society’s best interest to incentivize employers with the threat of an exclusion to ensure that their employees are not committing sexual assault.¹³⁰

Ironically, Interstate’s drafting led the court to hold that the policy required the insurance company to cover the claims in *Hartford*.¹³¹ In its interpretation, the Second Circuit began with the language of the policy to determine whether the policy required Interstate to indemnify the Archdiocese.¹³² By applying grammar rules to find the plain meaning of the words in the policy, the court de-

1995). The Second Circuit correctly concluded, based on a simple reading of the policy clause, that the appropriate question is whether the Archdiocese expected the injury, rather than the abuse. See *Hartford*, 905 F.3d at 93; SCOTT GODES & DAN MCGUIRE, 3 LAW OF LIABILITY INSURANCE § 20.01 (2019). The policy defined an occurrence as an accident that unexpectedly resulted in injury; therefore, the clearest understanding of the term is that the resulting injury must not be expected by the insured to be an occurrence and trigger coverage by the policy. See *Hartford*, 905 F.3d at 93.

¹²⁵ See *Hartford*, 905 F.3d at 89.

¹²⁶ See *id.* at 88; *Universal Underwriters*, 451 S.W.2d at 222–23 (stating that insurers draft policies so that they are susceptible to multiple readings). But see Gilson et al., *supra* note 117, at 40–41 (explaining that there are financial reasons why drafters would be in a better position if they employed careful, explicit drafting).

¹²⁷ *Hartford*, 905 F.3d at 88–89. Nondescript drafting may be successful for the insurer, as long as it is clear enough that the court does not consider the language “ambiguous.” *Id.*; see *Universal Underwriters*, 451 S.W.2d at 222–23 (critiquing the use of ambiguous language in insurance policies that make them difficult to understand). If the language is ambiguous, however, or may be interpreted more than one way, it is construed strictly against the drafter of the policy, i.e. the insurer. Abraham, *supra* note 24, at 538.

¹²⁸ French, *supra* note 3, at 548–49.

¹²⁹ Winbush, *supra* note 17, § 2(b).

¹³⁰ See Deborah A. DeMott, *Organizational Incentives to Care About the Law*, 60 LAW & CONTEMP. PROBS. 39, 39–40 (1997) (explaining that the ability of an employer to control its employees’ conduct through incentives supports the application of vicarious liability); Sykes, *supra* note 51, at 569–70 (articulating economic incentives of an employer to utilize certain tactics to ensure its employees are avoiding liability, such as close monitoring and compensation changes); *supra* note 51 and accompanying text (discussing the incentive for all employers to ensure that their employees are not committing sexual abuse if they know that the entire pool of insureds would not be covered in the event of a lawsuit or settlement).

¹³¹ *Hartford*, 905 F.3d at 88–89.

¹³² See *id.* at 89–90 (analyzing the language and structure of the exclusion).

terminated that the clause only excluded coverage for the insured who committed the assault and battery.¹³³ In this case, the insureds who committed the acts were the priests responsible for the sexual abuse rather than the entire Archdiocese.¹³⁴ The Second Circuit appropriately interpreted the assault and battery exclusion according to the rules of interpretation by giving the clause its ordinary meaning and ensuring it served a purpose.¹³⁵ Furthermore, if the court interpreted the exclusion to exclude all insureds, insureds that had not committed sexual abuse would be excluded from coverage.¹³⁶ Lastly, “such” is meant to exclude something specified from the whole, and it would have no limiting effect if it referred to the entire class of insureds.¹³⁷ Thus, the Second Circuit correctly broke from the Eighth and Ninth Circuits and gave the terms of the insurance policy their plain meanings.¹³⁸

CONCLUSION

In 2018, in *Hartford Roman Catholic Diocesan Corp. v. Interstate Fire & Casualty Co.*, the Second Circuit broke from the Eighth and Ninth Circuits’ interpretations of insurance policies with Interstate Fire and Casualty Co. The Second Circuit split with the Eighth Circuit regarding the test to determine whether an insured expected an “occurrence.” The Second Circuit ruled that the proper test is a subjective one, applied from the standpoint of the insured. It

¹³³ *Id.* at 89.

¹³⁴ *Id.* The Second Circuit quickly dispensed with the issue of interpretation of the assault and battery exclusion on appeal by stating simply that “the rest is grammar.” *Id.* The Second Circuit also referenced the dissenting opinion written by Judge Dorothy W. Nelson in *Interstate. Id.* at 89–90; *Interstate*, 761 F.3d at 956–58 (Nelson, J., dissenting). Judge Nelson concluded that the definition of “such” meant “having the quality just specified.” *Interstate*, 761 F.3d at 956–57 (Nelson, J., dissenting). She believed that the word “such” could be referring to three different groups: (1) the insureds at risk for liability, (2) the entire class of insureds, or (3) those insureds that carried out the assault. *Id.* Of those, the insured that committed the assault was the only one specified in the policy, and, therefore, that is who coverage should exclude. *Id.* at 957.

¹³⁵ See *Hartford*, 905 F.3d at 89 (holding that each word of an insurance policy should be effective); *W. World*, 922 F.2d at 121 (same); *Buell Indus., Inc. v. Greater N.Y. Mut. Ins. Co.*, 791 A.2d 489, 497–98 (Conn. 2002) (same); *Heyman*, 653 A.2d 130 (same); RESTATEMENT OF THE LAW OF LIAB. INS. § 3 (stating that insurance policy terms should be given their plain meaning). A clear reading of the exclusionary clause illustrates that liability is not covered for the insured that the “assault and battery is committed by or at the direction of.” *Hartford*, 905 F.3d at 88–89.

¹³⁶ *Hartford*, 905 F.3d at 89.

¹³⁷ *Id.*; see also *Interstate*, 761 F.3d at 957 (Nelson, J., dissenting) (stating that if “such” refers to all insureds, the exclusion is meaningless). It would be nonsensical for an exclusion to bar coverage for all insureds regardless of their innocence or guilt regarding the assault and battery. See *Hartford*, 905 F.3d at 89. (explaining the purpose of “such” as a limitation). If that were the intent of the drafters, they could have simply expressed that desire through clear and purposeful drafting. *Id.* The insurers, however, drafted the policy in such a way to preserve their arguments against coverage in court. See *Universal Underwriters*, 451 S.W.2d at 622–23 (suggesting that insurers draft insurance policies in a way to persuade policyholders that the policy covers everything and courts that it covers nothing).

¹³⁸ *Hartford*, 905 F.3d at 89, 93.

also held that the proper question was whether the insured expected the injury, rather than whether the insured expected the abuse that caused the injury. Furthermore, the Second Circuit split with the Ninth Circuit in concluding that this assault and battery exclusion applied only to those insureds who committed the assault and battery, rather than to the entire class of insureds. The court reached these well-reasoned decisions by adhering to the traditional rules of contract interpretation, and specifically, insurance policy interpretation. By construing the policy according to the rules of grammar, with attention given to the intent of the parties, the Second Circuit complied with the rules of contract interpretation.

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