TORT LIABILITY FOR INTENTIONAL ACTS OF FAMILY MEMBERS: WILL YOUR INSURER STAND BY YOU?

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Klebold is every parent's worst nightmare, not only for what he did but for how well he hid even the slightest indication that he worshipped death and violence. Klebold's father thought he had a great relationship with his son. "Dylan was his best friend," says . . . a former colleague . . . . "Tom says that he just spent endless, sleepless hours thinking, 'What did I miss?'"[1]

I. INTRODUCTION

For good or bad, the lives of family members are often inextricably intertwined. When children and spouses commit crimes, other family members bear the stigma, shame, guilt, and increasingly, the potential for civil liability as well. Public anger is often directed at the parents of teen criminals ("Where were the child's parents?") or the spouses of sexual predators ("She must have known something"); nevertheless, tort law has a long tradition of holding that parents and spouses have no general duty to protect or rescue third parties.

That tradition is quickly eroding. Increasingly, courts have been willing to entertain the notion of civil liability against family members for intentional misconduct of other family members. This may be a reaction to public indignation that family members are not, but ought to be, controlling their children and spouses or a growing recognition of society's mutual dependence and need for mutual protection.[2] Under new and old theories of liability, family members are being asked to account for the misdeeds of other family members.[3]

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1. Betsy Streisand et al., *Exorcising the Pain: Littleton Buries its Dead and Tries to Understand*, U.S. NEWS & WORLD REP., May 10, 1999, at 18.

2. "The law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence." RESTATEMENT (SECOND) OF TORTS § 314A cmt. b (1965).

3. Notably, some parents of victims of the Columbine High School shootings in Littleton, Colorado filed suit against the parents of teenage gunmen Eric Harris and Dylan Klebold. *See* Joannie M. Schrof, *Who's Guilty? Parents Are Being Sued and Jailed For Their Children's Sins*, U.S. NEWS & WORLD REP., May 17, 1999, at 60, 60-61 (discussing trends in civil and criminal litigation against parents); Caroline Forell, *Perspective on School Violence: Who Should Pay? All of Us*, L.A. TIMES, May 4, 1999, at B7 (commenting on litigation trends in school shooting cases from the perspective of a tort law professor); Margaret A. Jacobs,

In many states, statutes impose some civil liability on parents for the tortious acts of their children.[4] Further, under common law, some courts are liberally imposing duties to warn and protect based on "the continuity and nature of the social relationship" between neighbors.[5]

Insured family members facing claims for the intentional acts of other family members are placing new demands for a defense and for indemnity. When family members commit intentional torts and crimes, such as rape, child molestation, arson, or vandalism, victims often ask courts to find the parents and spouses civilly liable, alleging that they were a negligent cause of the other family member's intentional act.

Victims of crimes or intentional torts often sue innocent or negligent coinsured family members in order to gain access both to the assets of the coinsured and the proceeds of the homeowners' insurance policy. Savvy plaintiffs know that homeowners' insurance policies will not pay claims arising out of intentional conduct of an insured, but may cover a negligence claim against a merely negligent coinsured.[6] By drafting carefully crafted exclusions, insurers have attempted to erect barriers to this indirect recovery for intentional acts, but they have not been uniformly successful.[7]

Competing policies are at stake when insurers are asked to pay for injuries caused by intentional acts. Liability insurance is intended to both protect insureds from losses and to provide a source of funds to compensate victims.[8] Without insurance coverage, the family resources of insureds are exposed to great risk, and innocent victims may go completely or partially uncompensated even though insureds purchased liability insurance in order

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Assigning Blame in School Deaths Faces Obstacles, WALL ST. J., May 3, 1999, at B1 (discussing the merits of various claims against school officials, media and video companies, and the parents of teen gunmen in Littleton, Colorado; Paducah, Kentucky; Pearl, Mississippi; and Jonesboro, Arkansas); Martin Kasindorf, *Lawsuits May Be Step in Littleton's Grieving*, USA TODAY, May 20, 1999, at 13A (noting suits in other cases as well, including shootings in Pearl, Mississippi; Jonesboro, Arkansas; and West Paducah, Kentucky); John G. Salmon, *Irreparable Damage?*, DENV. POST, June 19, 1999, at B7 (criticizing the decision of the family of victim Isaiah Shoels to hire Geoffrey Fieger to file a $250 million lawsuit against the parents of the gunmen).

4. *See infra* notes 12-27 and accompanying text.

5. *See* J.S. v. R.T.H, 693 A.2d 1191, 1194 (N.J. Super. Ct. App. Div. 1997) (announcing the new duty of a wife to warn parents of neighborhood children in order to protect children from the sexual misconduct of her husband).

6. *See infra* notes 174-208 and accompanying text.

7. *See infra* notes 230-42 and accompanying text.

8. *See* ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW § 5.4(c)(5) (1988) (footnotes omitted) ("[I]t is generally said that the person whose economic interest is protected is the insured and not the person who sustains harm . . . [h]owever, . . . liability insurance is increasingly being viewed as a coverage that is designed for and available to protect innocent victims."); Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721, 1730 (1997).

to protect themselves and to pay claims for injuries they cause to others. Yet, despite the desirability of compensating victims and giving insureds the protection they have purchased, insurers have long excluded coverage for intentional torts and criminal acts because of the moral hazard involved.[9] There are compelling public policies against allowing an insurer to shoulder the liability of a criminal wrongdoer. In theory, if an insurer pays for intentional acts then the insured is not held to account for his or her misconduct. Without accountability, the wrongdoer may have no motivation to check his or her behavior. Consequently, the insurer's decision not to cover intentional acts has long met with judicial approval.[10]

When family members are sued for their own negligence or because a statute has made them vicariously liable for the conduct of their children, the public policies that militate against coverage for intentional acts are not as compelling. Insureds expect insurance coverage for claims that arise out of the blue. From the innocent insured's viewpoint, a lawsuit arising out of the intentional misconduct of a child or spouse is fortuitous, as unlikely and unexpected as any of those catastrophes of life for which insurance was intended. Yet, when some courts read the insurance contract language, they are mindful that allowing an intentional act of one insured to be recast as negligence of another insured indirectly accomplishes something that courts have long refused to allow.[11] When insurers pay for claims against family members of insured intentional wrongdoers, they are paying for injuries caused by intentional misconduct.

This Article explores both the expansion of civil liability against family members for the crimes and intentional acts of other family members and the related insurance coverage issues. Part II explores some of the bases of liability against family members for the intentional acts of their mates and children and discusses the fact-driven nature of these thorny claims. Part III examines typical insurance contract language that excludes coverage for intentional acts. While intentional wrongdoers are not afforded coverage under a typical homeowners' insurance contract, courts are divided as to whether those same contracts cover claims of negligence against coinsureds. This Article concludes that the premises that ground the intentional act exclusion, namely repugnance toward covering intentional wrongdoers and

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9. Insurers attempt to avoid the consequences of "two classic problems in insurance economics: adverse selection and moral hazard." Steven W. Pottier & Robert C. Witt, *On the Demand for Liability Insurance: An Insurance Economics Perspective*, 72 TEX. L. REV. 1681, 1686-87 (1994).

> Adverse selection is the tendency of those who seek to buy insurance to be those who expect to have the highest losses, that is, the worst risks .... Moral hazard refers to the tendency of people or business entities who have insurance to reduce safety precautions or the care they take to prevent and reduce potential losses.

Id.

10. *See infra* notes 159-73 and accompanying text.

11. *See infra* notes 174-208 and accompanying text.

the goal of deterrence, are less compelling as to innocent coinsureds. Therefore, the desirability of a coextensive tort and insurance schema and traditional default rules that favor the insured should guide courts considering coverage for innocent family members.

II. EXPANDING TORT LIABILITY FOR CRIMINAL ACTS OF FAMILY MEMBERS

A. Statutory Liability

Many states have enacted parental liability statutes at least as to the willful or criminal acts of their minor children.[12] Under the broadest of these statutes, parents are responsible for the torts of their children without qualification as to the nature of the tort or limitation on the amount of damages.[13] Most states have narrower laws, providing, for example, a limitation that excludes liability for ordinary negligence but that holds parents liable for "malicious or wilful misconduct of a minor which results in injury to the person or property of another."[14] Parental liability statutes often limit the amount of damages for which the parents are liable as well.[15] Parental

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12. *See, e.g.*, ALA. CODE § 6-5-380 (Supp. 1999); ARIZ. REV. STAT. ANN. § 12-661 (West Supp. 1998); ARK. CODE ANN. § 9-25-102 (Michie 1998); CAL. CIV. CODE § 1714.1 (West 1998); CONN. GEN. STAT. ANN. § 52-572 (West Supp. 2000); GA. CODE ANN. § 51-2-3 (Supp. 2000); HAW. REV. STAT. § 577-3 (1985); IDAHO CODE § 6-210 (1998); 740 ILL. COMP. STAT. ANN. 115/3 (West Supp. 2000); KY. REV. STAT. ANN. § 405.025 (Michie 1999); MASS. GEN. LAWS ANN. ch. 231, § 85G (West 2000); MISS. CODE ANN. § 93-13-2 (Supp. 2000); MO. ANN. STAT. § 537.045 (West 2000); NEB. REV. STAT. § 43-801 (1998); NEV. REV. STAT. § 41.470 (1997); N.C. GEN. STAT. § 115C-523 (1999); OR. REV. STAT. § 30.765 (1999); 23 PA. CONS. STAT. ANN. §§ 5502, 5505 (West 1991); R.I. GEN. LAWS § 9-1-3 (1997); TENN. CODE ANN. § 37-10-103 (1996); UTAH CODE ANN. § 78-11-16 (1996); WASH. REV. CODE ANN. § 4.24.190 (West Supp. 2000); W. VA. CODE §§ 55-7A-1, 55-7A-2 (2000); WIS. STAT. ANN. § 895.035 (West 1997); WYO. STAT. ANN. § 14-2-203 (Michie 1999); V.I. CODE ANN. tit. 14, § 484 (Supp. 1994).

13. *See* HAW. REV. STAT. § 577-3 ("The father and mother of unmarried minor children shall jointly and severally be liable in damages for tortious acts committed by their children, and shall be jointly and severally entitled to prosecute and defend all actions in which the children or their individual property may be concerned.").

14. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-661(A); *see also, e.g.*, IDAHO CODE § 6-210 (permitting recovery "for economic loss wilfully caused by a minor").

15. *See, e.g.*, ALA. CODE § 6-5-380 ($1,000 and court costs); ARIZ. REV. STAT. ANN. § 12-661(B) ($10,000); CAL. CIV. CODE ANN. § 1714.1 ($25,000); CAL. CIV. CODE § 1714.3 (West 1998) (capping parental firearm liability at $30,000 per death or injury not exceeding $60,000 per occurrence); CONN. GEN. STAT. ANN. § 52-572 ($5,000); GA. CODE ANN. § 51-2-3(a) ($10,000); IDAHO CODE § 6-210(2) ($2,500 and excluding "less tangible damage such as pain and suffering, wrongful death or emotional distress"); KY. REV. STAT. ANN. § 405.025 ($2,500); MASS. GEN. LAWS ANN. ch. 231, § 85G ($5,000); MISS. CODE ANN. § 93-13-2 ($15,000); MO. ANN. STAT. § 537.045 ($2,000); NEB. REV. STAT. § 43-801 ($1,000); NEV. REV.

liability under these statutes is usually joint and several.[16]

Generally, parental liability statutes complement common-law tort liability. Some statutes expressly provide that other theories of liability are not displaced.[17] Even without an express statutory preservation of common-law claims, case law typically holds that parental responsibility laws do not displace independent tort actions against parents for their own negligence.[18]

Some jurisdictions have enacted statutes targeted at parents whose children engage in particular acts, such as vandalizing school property,[19] shoplifting,[20] graffiti or theft,[21] making false alarm calls,[22] or for injuries by access to firearms.[23] In some instances, work in lieu of payment to the injured

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STAT. § 41.470 ($10,000); OR. REV. STAT. § 30.765 ($7,500); 23 PA. CON. STAT. ANN. § 5505 ($2,500 to all persons); WASH. REV. CODE ANN. § 4.24.190 ($5,000); W.VA. CODE §§ 55-7A-1, 55-7A-2 ($5,000); WYO. STAT. ANN. § 14-2-203 ($2,000); V.I. CODE ANN. tit. 14, § 484 ($10,000).

16. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-661(B); HAW. REV. STAT. § 577-3; NEV. REV. STAT. § 41.470.

17. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-572 (providing that liability "in this section shall be in addition to and not in lieu of any other liability which may exist at law"); GA. CODE ANN. § 51-2-3 (providing that this "section shall be cumulative and shall not be restrictive of any remedies now available . . . arising out of the acts, torts, or negligence of a minor child under the 'family-purpose car doctrine,' any statute, or common law in force and effect in this state"); NEV. REV. STAT. § 41.470 (providing that "liability imposed by this section is in addition to any liability now imposed by law"); OR. REV. STAT. § 30.765 (providing this remedy "[i]n addition to any other remedy provided by law").

18. *See* Fuller v. Studer, 833 P.2d 109, 112-13 (Idaho 1992) (holding that an action for negligent supervision is not abrogated by the $2,500 statutory liability imposed upon parents for willful torts of minors because negligent supervision is an independent act of negligence).

19. *See, e.g.*, CAL. EDUC. CODE § 48904 (West 1993); N.C. GEN. STAT. § 115C-523 (1999).

20. *See, e.g.*, IDAHO CODE § 48-702 (1997) (shoplifting up to $250); UTAH CODE ANN. § 78-11-16 (1996) (shoplifting up to $500).

21. *See, e.g.*, WIS. STAT. ANN. § 895.035 (West 1997) (imposing liability for stolen property and "etching or marking, drawing or writing with paint, ink or other substance").

22. *See, e.g.*, IDAHO CODE § 18-6711A (1997) (allowing treble civil damages).

23. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3111(F) (West Supp. 1999). The Arizona statute states the following:

> If the court finds that the parent or guardian of a minor found responsible for violating this section knew or reasonably should have known of the minor's unlawful conduct and made no effort to prohibit it, the parent or guardian is jointly and severally responsible for any fine imposed pursuant to this section or for any civil actual damages resulting from the unlawful use of the firearm by the minor.

Id. The California statute states the following:

> Civil liability for any injury to the person or property of another proximately caused by the discharge of a firearm by a minor under the age of 18 years shall be imputed to a parent or guardian . . . for all purposes of civil damages, and such parent or guardian shall be jointly and severally liable with such minor . . . if such parent or guardian either permitted the minor to have the firearm or left the firearm in a place accessible to the minor.

may be ordered by a court, although the action is regarded as civil, not criminal, and the benefit inures to the victim, unlike criminal fines generally.[24]

Intended to "restrain juvenile delinquency, vandalism, and malicious mischief,"[25] the effect of these statutes is to hold parents vicariously liable for torts of their children, even where the common law would not.[26] As parental liability statutes are in derogation of common law, courts tend to construe them strictly.[27]

B. Negligent Supervision of Children

Common law traditionally has not imposed a broad duty upon individuals to control the conduct of others.[28] Absent statutes to the contrary, a parent is generally not liable for the torts of a child "on the mere ground of the parental relationship,"[29] nor are family members vicariously liable for the torts of other family members.[30]

However, common law does recognize that a special relationship exists between children and parents and therefore imposes a duty upon a parent to supervise a child.[31] This parental liability may arise from the parent's own negligence in performing the parental duty to supervise a child, even though the special relationship alone is insufficient to establish liability.[32] Under common law, parents may be liable "for their children's acts 'where the parent['s] [own] negligence has made it possible for the child to cause the

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CAL. CIV. CODE § 1714.3 (West 1998).

24. MO. ANN. STAT. § 537.045(3) (West 2000) ("[T]he judge may order the parent or guardian, and the minor who damaged the property or caused the personal injury, to work for the owner of the property damaged or the person injured in lieu of payment, if the [parties] are agreeable.").

25. *See* B.C. Ricketts, Annotation, *Validity and Construction of Statutes Making Parents Liable for Torts Committed by Their Minor Children*, 8 A.L.R.3D 612, 615 (Supp. 2000).

26. *Id.* at 614. These statutes have withstood constitutional challenges as a proper use of the state's police power. *Id.* at 615-16.

27. *Id.* at 616.

28. *See* DAN B. DOBBS, THE LAW OF TORTS § 329, at 891 (2000) ("The usual starting point is that the defendant is under no duty to control a dangerous person in the absence of a special relationship, either with the plaintiff or with the dangerous person."); MARSHALL S. SHAPO, THE DUTY TO ACT: TORT LAW, POWER, & PUBLIC POLICY 64-68 (1977) (arguing that such duties should be imposed).

29. *See* Williamson v. Daniels, 748 So. 2d 754, 758 (Miss. 1999).

30. *See* DOBBS, *supra* note 28, § 340, at 935.

31. *Id.* § 329, at 892 (citing RESTATEMENT (SECOND) OF TORTS § 316 (1965)).

32. Negligent supervision also arises when a child files suit against a tortfeasor and the tortfeasor brings in the parents as joint tortfeasors, alleging negligent supervision of the child. However, a child's claim is not reduced by negligence apportioned to the child's parents. *See, e.g.*, Y.H. Investments, Inc. v. Godales, 690 So. 2d 1273, 1278 (Fla. 1997) (holding that the parents' failure to supervise their child may be placed on the verdict form in apportioning fault).

injury complained of and probable that the child would do so.'"[33] The "cause of action . . . is based on the simple premise that parents have a societal duty to exercise reasonable care in the supervision of their minor children so as to prevent them from intentionally injuring others."[34]

The *Restatement (Second) of Torts* describes the obligations of parents as the following:

> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent:
>
> (a) knows or has reason to know that he has the ability to control his child, and
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> (b) knows or should know of the necessity and opportunity for exercising such control.[35]

An allegation of negligent supervision is frequently asserted when children commit intentional acts; it is a resilient claim that is difficult to resolve before trial although few plaintiffs ultimately prevail.[36] A negligent supervision claim often raises questions of fact that may not be decided easily on summary judgment[37] or at the very least may require substantial discovery and a detailed examination of the record prior to granting summary judgment.[38] Therefore, the claim is significant and costly to defend. Prior to

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33. *Williamson*, 748 So. 2d at 759 (quoting Tatum v. Lance, 117 So. 2d 795, 797 (Miss. 1960) (second alteration in original)).

34. *Id.*

35. RESTATEMENT (SECOND) OF TORTS § 316 (1965). The commentary notes that the rule derives from the historical notion that the father is "head of the family group" but that the rule extends to "the mother also." *Id.* at cmt. a. It applies only where there is both ability and opportunity to control the child. *Id.*

36. *See* Dinsmore-Poff v. Alford, 972 P.2d 978, 981-82 & nn.13-15 (Alaska 1999) (noting a paucity of reported cases actually finding parental liability on the evidence presented). *See generally* Wade R. Habeeb, Annotation, *Parents' Liability for Injury or Damage Intentionally Inflicted by Minor Child*, 54 A.L.R.3D 974 (1973 & Supp. 2000).

37. *See, e.g.*, Doe v. Jeansonne, 704 So. 2d 1240, 1247 (La. Ct. App. 1998) (reversing summary judgment and holding that there is a question of fact whether adult hosts provided adequate supervision at teen party where sexual acts occurred); Passe v. Holiday Inns, Inc., 670 N.Y.S.2d 272, 273 (N.Y. App. Div. 1998) (reversing grant of summary judgment due to question of fact whether parents could be held liable for child striking a third party and inflicting injury with a super ball); Sun Mountain Productions, Inc. v. Pierre, 929 P.2d 494, 500 (Wash. 1997) (reversing summary judgment because parent's knowledge that the child had stereo equipment in his room raised a question of fact concerning the child's participation in burglaries). *But see, e.g.*, Shepard v. Porter, 679 N.E.2d 1383, 1389-90 (Ind. Ct. App. 1997) (granting summary judgments to parents of children who allegedly set a child afire because the record did not contain evidence that minors "had a propensity to engage in such activity," and the act was therefore not foreseeable to the parents).

38. For example, in *Dinsmore-Poff*, the court granted summary judgment following an

resolving the claim on a motion for summary judgment or at trial, a court may demand evidence concerning the age of the child, the realistic ability of the parent to control the child,[39] the appropriateness of the parental response to prior instances of misconduct, and the parent's level of notice concerning the risk of this particular conduct.[40]

As to the fact-driven nature of the claim, *Williamson v. Daniels*[41] is instructive. There, Mavis Daniels received a phone call from her employer at 8:00 p.m., and her fifteen-year-old son, Eddie Smith, quietly left his mother's home and met three friends.[42] Just down the street, Johnny Lee Williamson, Jr., unacquainted with Eddie, was visiting with Williamson's girlfriend.[43] When Williamson heard his car alarm sounding, he went outside to investigate.[44] Once outside, Williamson found Eddie and his friends throwing a ball at the side of his car.[45] A verbal exchange ensued and then escalated, and Eddie pulled out a gun and shot Williamson, leaving him paralyzed.[46]

Eddie's mother testified that she was on the phone at the time Eddie left the house and that he left without her knowledge or permission.[47] She was still on the phone with her employer "when a neighbor came to the door to tell her that Eddie had shot someone."[48] She did not know Eddie had a gun.[49] Later, she asked him how he acquired it, and "he replied that he and another

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in-depth factual examination of how parents, once on notice of a child's dangerous propensities, responded to prior incidents, what steps the parents took to control future behavior, whether the specific incident was foreseeable, and if so, whether the parents took reasonable steps to prevent the incident. *Dinsmore-Poff*, 972 P.2d at 985-88. There, the court noted that while the parents were aware of the teen's dangerous propensities, they responded reasonably, including committing the teen to in- and out-patient treatment, establishing rules, and cooperating with his probation officer. *Id.* at 986. The court rejected the plaintiff's assertion that the parents should have "systematically search[ed] [the teen's] room and belongings for weapons" and enforced his curfew with more diligence. *Id.* at 986. For more information on the text's assertion, see Moore v. Crumpton, 295 S.E.2d 436, 442-43 (N.C. 1982) (affirming summary judgment and noting, "We fail to see that much more could have been done by them, short of physically restraining his movements and placing him under twenty-four hour a day observation.").

39. *See Dinsmore-Poff*, 972 P.2d at 982-83 (noting with approval "'the modern view . . . that the very youth of [a] child is likely to give [a] parent more effective ability to control [the child's] actions,' or the corollary view that it is harder to control a near-adult child") (alterations in original).

40. *See id.* at 985.

41. 748 So. 2d 754 (Miss. 1999).

42. *Id.* at 756.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 757.

47. *Id.*

48. *Id.*

49. *Id.*

boy from the neighborhood had found it and kept it hidden in his room."[50]

Eddie, a high school dropout who claimed teachers "pick[ed] on him," had been in trouble before.[51] At the time of the shooting, Eddie was under a court-ordered curfew of 7:30 p.m. on weeknights and 10:00 p.m. on weekends because he had previously struck a student at his school.[52] His mother attempted to enforce the curfew although he had violated it at least once before the shooting.[53] In the past, Eddie had assaulted a fellow student and rendered him unconscious, and he had inflicted a minor knife wound upon his uncle.[54] His mother had heard of other unproven allegations as well. For example, he was accused of threatening a girl with a pellet gun, but after investigating the allegation, his mother was convinced that the allegation was untrue.[55] Further, he might have served as a lookout for a robbery, but he was not prosecuted for that offense.[56]

Eddie's mother did not ignore his bad behavior; she disciplined him by "grounding him, taking away his video games, and applying corporal punishment."[57] After he dropped out of school, she sometimes took him to work with her and made him do chores there so she could watch him.[58] She sought counseling for him briefly at a mental health clinic.[59]

Despite Mavis Daniels' efforts to discipline and control Eddie, he slipped out of the family home in violation of his curfew on April 12, 1993 and shot Williamson.[60] Williamson sued Mavis Daniels, alleging that she failed to supervise her son with due care.[61] At the close of the plaintiff's case, Daniels moved for a directed verdict.[62] The court granted the motion, "finding that the acts of Eddie Smith constituted at least an independent, intervening cause of the plaintiff's injuries as related to any potential negligence on the part of the defendant."[63] A divided Mississippi Supreme Court affirmed.[64]

The Mississippi Supreme Court explained, "Parents have a duty to take reasonable measures to supervise their children so as to protect others from acts of their children which are reasonably foreseeable."[65] Notably, the court

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50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 756.
61. *Id.* at 757.
62. *Id.* at 756.
63. *Id.*
64. *See id.* at 762-65 (McRae & Sullivan, JJ., dissenting).
65. *Id.* at 759.

then commented that under traditional common law and the *Restatement (Second) of Torts*,[66] "parent[s] must have knowledge of prior malicious acts similar enough to the specific act complained of to put the parent on notice of the necessity to control the child."[67] A finding of constructive notice may result when a parent's ignorance of the child's propensities stems from the parent's negligent supervision.[68] But the court cautioned against a broad imposition of fault: "We think it important to note that the mere fact that the parents failed to control the child is insufficient to prove negligence; they must have failed to act as reasonably prudent parents based on notice of the child's propensity to do harm."[69] The plaintiff contended that the mother had knowledge of Eddie's violent bullying propensities, and the court agreed that there was sufficient evidence to support this contention.[70]

However, notice alone is insufficient to establish liability, and the court next examined four factors in particular to determine if a parent with knowledge of the child's propensities acts reasonably:

> (1) the appropriateness of the parent's response to specific acts of prior violence; (2) the reasonableness of the subsequent efforts to control the child; (3) whether the parents should have foreseen the need to prevent the specific incident at issue; and, if so, (4) the reasonableness of the parent's efforts to do so.[71]

The court examined the steps Eddie's mother took to control Eddie, including her efforts to obtain counseling for him and to discipline and supervise him, and found her response reasonable.[72] The court expressed a reluctance "to require parents to anticipate and guard against every logically possible instance of misconduct" and to "transform[] parents from care givers and disciplinarians into jailors and insurers of their minor children."[73]

Importantly, murder and mayhem are not the only sources of parental liability for teen misconduct. In *Doe v. Jeansonne*,[74] the parents of a fourteen-

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66. In this case, the court stated that it was unnecessary to follow the RESTATEMENT OF TORTS § 316, while nevertheless citing it with approval. *Id.*

67. *Id.* at 759-60.

68. *Id.* at 760.

69. *Id.*

70. *Id.*

71. *Id.* (citing Dinsmore-Poff v. Alvord, 972 P.2d 978, 985 (Alaska 1999)).

72. *See id.* at 760-62.

73. *Id.* at 762.

74. 704 So. 2d 1240 (La. Ct. App. 1997). Besides teen sex, teen parties and socializing may also give rise to claims for host liability for accidents caused by alcohol and substance abuse. *See, e.g.*, Murphy v. LaChapell, No. CV 97142410, 1999 WL 368069, at *1 (Conn. Super. Ct. May 26, 1999) (denying a motion to strike a count of negligent supervision against the parents of a teen who hosted a party at which there was alcohol, and the plaintiff's jaw was broken during a fight); Huston v. Konieczny, 556 N.E.2d 505, 510 (Ohio 1990) (holding that

year-old girl filed suit against the homeowners and other relatives who hosted a teen party where their daughter became pregnant by a fifteen-year-old guest. Intercourse occurred in the bathroom, and the young woman was equivocal about whether she consented or merely acquiesced to the boy's insistent overtures.[75] The chaperoning adults were ignorant of the incident although they greeted the teens initially and checked on the partygoers every twenty minutes.[76] One chaperone acknowledged finding the teens in a bedroom kissing early in the evening.[77] She explained that they stopped kissing when she encountered them, and she merely pointed a finger at them to indicate her disapproval but did not further reprimand them.[78] Teens at the party admitted to "making out," apparently under the covers and with some clothes off in an accessible downstairs bedroom where the door was open but the lights were off.[79] Besides "making out," unbeknownst to the chaperones at least one brief fight occurred outside the home.[80]

One month after the party, the female teen revealed to her parents that she was pregnant.[81] Her parents filed suit alleging that the teen party was not properly supervised, that teen sex was not stopped or properly disciplined, and that they were not warned of the general lack of supervision.[82]

The lower court granted summary judgment in favor of the chaperoning parents, but the appellate court reversed, finding that genuine issues of fact existed and stating:

> We believe that the deposition testimony offered by the plaintiffs established the existence of genuine issues of material fact. To begin with, Mrs. Standridge testified that she encountered the youngsters lying on a bed kissing in such a manner that they were not aware of her presence. In relation to this fact, we find relevant a statement by our supreme court: "In situations where children are injured, the known characteristics and instincts

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there is a material question of fact whether parents authorized the use of their home for an unsupervised teenage party at which alcohol was served and an auto accident followed); Horstman v. Farris, 725 N.E.2d 698, 708-09 (Ohio Ct. App. 1999) (holding that the teen host was not liable for the subsequent auto accident where teens engaged in "huffing" with airbrush propellant). Unsupervised play that erupts in violence may also be a source of liability if parents leave guns accessible. Seabrook v. Taylor, 199 So. 2d 315, 316-18 (Fla. Dist. Ct. App. 1967) (affirming a jury finding of negligence against parents where a teen located a loaded gun in his home and shot a neighbor following a dispute over a neighborhood basketball game).

75. *Jeansonne*, 704 So. 2d at 1242.

76. *Id.*

77. *Id.*

78. *Id.* at 1243.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* Plaintiffs also alleged that the act was not consensual, and the court determined that there were material issues of genuine fact concerning the girl's capacity to consent. *Id.* at 1247.

> of children must be considered in determining whether a person has exercised reasonable care." Thus, when we take into consideration the fact that these children were viewed in such an amorous position, we believe that the average adult would have gained some knowledge as to the sexual propensities of the two at this point, even if such propensities in children in this age group were previously unknown or unexpected.[83]

Of note, a chaperone came downstairs for the last half hour of the party to "round[] the kids up," but was unaware that these two teens, at that moment, were having sexual intercourse in the bathroom.[84] The court noted that the chaperoning parent's ignorance of other events that evening such as the fight and the making out "raise[d] genuine issues of fact as to whether the supervision employed was reasonable for this party and for this group of teens."[85]

These cases highlight the difficulty that defendants have in achieving an early resolution of the claims. Thus, even if plaintiffs rarely prevail, defending claims against parents for negligent supervision of children who commit intentional acts and crimes will require substantial time and expense, making resolution of insurance defense and coverage issues important.

C. Negligent Entrustment

Individuals with a right to control land or chattel also have a "duty to use reasonable care to control permissive users to prevent them from inflicting harm."[86] Under this principle, a parent who negligently entrusts a dangerous instrument to a child may be liable for the injury the child causes by its use.[87] Even in cases where the owner did not grant another express permission to use a dangerous object, the owner's failure to exercise due care in safeguarding

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83. *Id.* at 1245-46 (citation omitted).

84. *Id.*

85. *Id.*

86. DOBBS, *supra* note 28, § 330, at 892. The *Restatement (Second) of Torts* recognizes a variety of instances where negligent entrustment can create liability. For example, the *Restatement* places a duty on possessors of land or chattel to control foreseeable conduct of licensees where the owner has both ability to control and knowledge of the necessity to control the licensee. RESTATEMENT (SECOND) OF TORTS § 318 (1965). The *Restatement* also concludes:

> It is negligen[t] to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows . . . that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Id. § 308. Additionally, the *Restatement* finds liability for supplying "directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others." *Id.* § 390.

87. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 308, 318, 390 (1965).

a dangerous object and negligently allowing it to fall into the hands of another who might cause harm is also a species of negligent entrustment.[88] Like negligent supervision, "foreseeability of harm is the touchstone"[89] of a negligent entrustment claim. Under an entrustment theory of liability, parents may be liable when they allow a minor child access to a weapon,[90] a vehicle,[91] or an age-inappropriate item such as matches,[92] particularly when the parent is or should be acquainted with a child's dangerous propensities.[93] Thus, of significance for insurance purposes, like negligent supervision, claims of negligent entrustment are fact driven and not disposed of easily on summary judgment.

D. Liability for the Misconduct of a Spouse

Recently, there has been a dramatic expansion in the potential for tort liability of a spouse, on a negligence theory, for the intentional and criminal acts of their mates, particularly in child molestation cases.[94] Importantly, for purposes of liability insurance, the claim against the nonmolesting wife[95] is premised on her own negligence, although the injury itself was the result of an intentional act that would otherwise be excluded from insurance coverage.

Spousal liability claims differ from claims against parents for misconduct of children because courts have generally held that there is no special relationship between husbands and wives.[96] Ordinarily, the law imposes no

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88. DOBBS, *supra* note 28, § 330, at 893.

89. *Id.*

90. *See, e.g.*, Seabrook v. Taylor, 199 So. 2d 315 (Fla. Dist. Ct. App. 1967) (affirming a jury verdict against parents who left a loaded pistol within the access of a fourteen year old during times of unsupervised play).

91. *See, e.g.*, Hawaiian Ins. & Guar. Co. v. Chief Clerk of the First Circuit Court, 713 P.2d 427, 430-31 (Haw. 1986) (holding that an auto accident that results from negligent entrustment of a vehicle arises out of a motor vehicle accident and is therefore not covered under a homeowner's policy containing a motor vehicle exclusion).

92. Jarboe v. Edwards, 223 A.2d 402, 405 (Conn. Super. Ct. 1966) (affirming a jury verdict finding that the parents of a four-year-old child who had access to matches were liable for his actions that resulted in another child being burned).

93. Stewart v. Harvard, 520 S.E.2d 752, 757 (Ga. Ct. App. 1999); May v. Goulding, 111 N.W.2d 862, 862-63 (Mich. 1961); Langlois v. Pomerleau, 726 A.2d 1285, 1288 (N.H. 1999).

94. *See* Hazel Glenn Beh, *The Duty to Warn: Invading the Marital Bedroom and the Therapist's Couch*, 8 J.L. & SOC. WORK 63 (1998) (discussing expansion of spousal liability and implications for therapists).

95. The cases usually involve the non-offending wives of men sexually abusing children. *See id.*

96. *See, e.g.*, Wise v. Superior Court, 272 Cal. Rptr. 222, 224-25 (Cal. Ct. App. 1990); Touchette v. Ganal, 922 P.2d 347, 355 (Haw. 1996); T.A. v. Allen, 669 A.2d 360, 364 (Pa. Super. Ct. 1995).

duty on individuals to control the conduct of others who might do harm[97] or to aid or protect individuals from harm.[98] However, a special relationship with the wrongdoer imposes a duty in some circumstances to control the conduct of the wrongdoer, and a special relationship with the victim imposes a duty to protect.[99] Thus, a third person's duty to control a tortfeasor or to protect a victim usually arises out of a special relationship with either the tortfeasor or the victim, the result, for example, of custodial control of the tortfeasor or a heightened legal relationship with the victim.[100] Unlike the parent-child relationship, which courts do regard as a special relationship, courts do not view the marital relationship as special, principally because the law recognizes that neither spouse has an ability to control the other's conduct.[101]

However, the *Restatement (Second) of Torts* recognizes a limited, separate basis of liability for the conduct of another in limited circumstances where an individual may be said to have negligently caused intentional or criminal harm by another and so becomes responsible even absent a special relationship. While the *Restatement* notes that "[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal,"[102] it distinguishes affirmative acts from omissions, explaining:

> In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable [person] to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relationship between the actor and the other which gives rise to the duty.[103]

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97. RESTATEMENT (SECOND) OF TORTS § 315 (1965).

98. *Id.* § 314.

99. *Id.* § 315(a)-(b). Special relationships imposing a duty to protect include the common carrier to its passengers, the innkeeper to its guests, the possessor of land to its public invitees, and the custodial relationship. *Id.* § 314A. Special relationships imposing a duty to control the conduct of a third person include the master-servant relationship, the parent-child relationship, landowner-licensee, those "in charge" of one with dangerous propensities (custodial psychiatric relationship), and the jailor-prisoner relationship. *Id.* §§ 315-320.

100. *See id.* § 314A cmt. b.

101. *See, e.g.*, *Wise*, 272 Cal. Rptr. at 225 (holding that a wife has no duty to control sniper-husband injuring motorists); *Touchette*, 922 P.2d at 355.

102. RESTATEMENT (SECOND) OF TORTS § 302B (1965). The *Restatement* provides illustrations that include clear, affirmative acts such as providing a child with access to a weapon, leaving dangerous items in a high crime neighborhood, and failing to lock a rental car. *Id.* at cmt. e, illus. 5, 11, 14. Others are based upon traditional special relationships such as leaving a cab fare in a high crime area at night, failing to protect a hotel guest, or failure to guard a dangerous inpatient. *Id.* at cmt. e, illus. 3, 4, 12.

103. *Touchette*, 922 P.2d at 355-56 (quoting RESTATEMENT (SECOND) OF TORTS § 302 cmt.

Thus, under the *Restatement*, even without a special relationship, a person may be liable for injury caused by the criminal acts of another if one's own affirmative negligent act created a risk of such harm; but, without a special relationship, a person will not be liable for nonfeasance such as a failing to protect or warn.

Increasingly, courts have been willing to characterize a wife's indifference to her husband's criminal tendencies as an affirmative act, particularly when involving claims of child sexual molestation.[104] These courts conclude that the social utility of protecting children outweighs interests in protecting the once special private and confidential status of married couples that is deeply rooted in law, society, and religion.[105] Courts are increasingly willing to

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a (1965) (alteration in original)); *see also* JOHN DIAMOND, ET AL., UNDERSTANDING TORTS § 8.02, at 113-32 (1996); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373-78 (5th ed. 1984); John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 886; Jean Elting Rowe & Theodore Silver, *The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries*, 33 DUQ. L. REV. 807, 814-15 (1995).

104. While it is extremely desirable that wives of pedophiles and mothers of child-victims of incest protect children and warn others, the dysfunctional psychodynamics of these marital relationships suggest such proactive steps to protect children are not the norm. *See* BEVERLY GOMES-SCHWARTZ ET AL., CHILD SEXUAL ABUSE: THE INITIAL EFFECTS 114-17 (1990) (discussing studies concerning the actions mothers take on learning of child sexual abuse); SANDY K. WURTELE & CINDY L. MILLER-PERRIN, PREVENTING CHILD SEXUAL ABUSE 35-40 (1992) (discussing family dysfunction in incest homes); J. Boman Bastani & David K. Kentsmith, *Psychotherapy with Wives of Sexual Deviants*, 34 AM. J. PSYCHOTHERAPY 20 (1980) (discussing psychological characteristics of wives of sexual deviants, including pedophiles); Christine Adams, Note, *Mothers Who Fail to Protect Their Children from Sexual Abuse: Addressing the Problem of Denial*, 12 YALE L. & POL'Y REV. 519, 521-24 (1994) (discussing the response of mothers of incest victims and viability of criminal sanctions); Barbara A. Micheels, Comment, *Is Justice Served? The Development of Tort Liability Against the Passive Parent in Incest Cases*, 41 ST. LOUIS U. L.J. 809, 858-66 (1997); Amy L. Nilsen, Comment, *Speaking Out Against Passive Parent Child Abuse: The Time Has Come to Hold Parents Liable for Failing to Protect Their Children*, 37 HOUS. L. REV. 253, 275-79 (2000) (commenting favorably on passive parent tort liability in abuse and incest cases). Incest raises a slightly different analysis, both because the non-offending parent has a special relationship and duty to protect and because of the issues of family immunities.

105. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *431 (stating that "in trial[s] of any [s]ort, they are not allowed to be evidence for, or again[s]t each other: partly becau[s]e it i[s] impo[ss]ible for their te[s]timony to be indifferent; but principally becau[s]e of the union of per[s]on") (footnote omitted); GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 9.3, at 443 (1996) (enumerating that "[t]he invasion of private marital communications is an indelicate and distasteful undertaking that should not be sanctioned unless society's interest in disclosure is compelling"); *see also* MODEL CODE OF EVIDENCE Rule 215, cmt. a (1942), which

sustain negligence claims against spouses on failure to warn grounds for acts of pedophilia by their mates. These courts are sometimes willing to sidestep the requirement that the plaintiff must show an "affirmative negligent act" in order to establish a wife's liability for her husband's criminal conduct.[106]

In *Pamela L. v. Farmer*,[107] the trial court sustained the wife-defendant's demurrer, but a California court of appeals reversed the lower court.[108] The appellate court held that allegations within the complaint of the defendant-wife's conduct of luring the children and lulling their parents into complacency were sufficient, if true, to create the potential of negligence with regard to her husband's intentional acts.[109] In *Farmer*, three minors brought suit against Richard and Elsie Farmer, alleging that Richard sexually molested them as they played at the Farmer home.[110] The record indicated that Mrs. Farmer "encouraged and invited" the children to play at the couple's home and assured the children's parents that "it would be perfectly safe for the girls to swim" at their home without their parents.[111] Moreover, plaintiffs alleged that Elsie had "knowledge that Richard [Farmer] had molested women and children in the past and that it was reasonably foreseeable he would do so again if left alone with the children on the premises."[112]

Allegations that she knew of Richard's propensities, that she assured the

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states the following:

> The rule forbidding one spouse to testify against the other was said to be "based on principles which are deemed important to preserve the marriage relation as one of full confidence and affection, and that this is regarded as more important to the public welfare than that the exigencies of law suits should authorize domestic peace to be disregarded . . . ."

Id. (quoting Knowles v. People, 15 Mich. 408, 413 (1867); 8 JOHN HENRY WIGMORE, EVIDENCE § 2332, at 642-44 (John T. McNaughton rev., Little, Brown & Co. 1961) (1904); Pringle v. Pringle, 59 Pa. 281, 288 (1868) (stating that "[i]t is necessary to preserve family peace and maintain that full confidence which ought to subsist between husband and wife").

106. *See* Beh, *supra* note 94 (discussing cases in context of duties of therapists to warn). There also have been extensions of this theory beyond child molestation cases. For example, in *Touchette*, the Hawaii Supreme Court held that a wife who negligently "flaunt[s] her extra marital love affair" and engages in "conduct of taunting and humiliating" her spouse may be liable for a murderous rampage that results if her conduct foreseeably creates risk of harm in another. *Touchette*, 922 P.2d at 358 (emphasis removed). There have also been unsuccessful attempts to hold spouses liable for murders. *See* Hansra v. Superior Court, 9 Cal. Rptr. 2d 216, 227 (Cal. Ct. App. 1992) (holding that the plaintiff failed to state a legally cognizable claim against the mother and brother of a murderer for failing to prevent murder); *Wise*, 272 Cal. Rptr. at 224-25 (holding that a wife of a sniper is not liable where the allegation is that she "permitted decedent [spouse] to occupy the house with knowledge that he was a human time bomb").

107. 169 Cal. Rptr. 282 (Cal. Ct. App. 1980).

108. *Id.* at 283, 285.

109. *Id.* at 284-85.

110. *Id.* at 283.

111. *Id.* at 284.

112. *Id.*

parents the visits were safe, and that she encouraged the children to visit suggested that Elsie may have acted affirmatively to create circumstances where Richard "would have peculiar opportunity and temptation to commit such misconduct."[113] The vulnerability of children justified imposing a heightened duty according to the court: "[T]here is moral culpability for respondent's conduct which increased the risk of harm. The victims were children entitled to more stringent precautions than necessary for an adult."[114] In a later case, a California appellate court cautioned that a spouse must have "actual knowledge and not merely constructive knowledge or notice" of the other spouse's "deviant propensities" in order to be liable.[115]

More recent cases from other jurisdictions have not stringently demanded affirmative negligent conduct beyond mere acquiescence to the child's visit in the home. For example, in *Doe v. Franklin*,[116] the Texas Court of Appeals reversed summary judgment in favor of the wife-defendant.[117] The court examined whether a grandmother could be liable when her husband molested a grandchild.[118] The child alleged that she had been sexually molested by her grandfather over a four- or five-year period, until the age of nine. Yet when the child confided the abuse to her grandmother, the grandmother did nothing to prevent the abuse, but instead shook the child and admonished the child to "[n]ever say anything like that again."[119]

The court acknowledged the general rule that "a person does not have a duty to prevent another's criminal acts"[120] and held that the grandmother did not have a special relationship with her husband that imposed a duty on her to control him.[121] However, the court applied the classic tort duty formula that a legal duty arises when "the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant" justifies imposing a duty.[122] As in *Pamela L.*,

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113. *Id.*

114. *Id.* at 285. The court also held, alternatively, that a special relationship existed between a homeowner and a visiting child. *Id.*

115. Chaney v. Superior Court, 46 Cal. Rptr. 2d 73, 76 (Cal. Ct. App. 1995) ("[Plaintiff] also suggests that a wife must always assume that her husband is likely to molest a child who comes into his home unless the wife is diligent in her supervision of the child .... A wife has no such duty."). The court also noted that the public policy at issue requires a strong showing of foreseeability based upon actual knowledge, not "merely constructive knowledge or notice." *Id.*

116. 930 S.W.2d 921 (Tex. Ct. App. 1996).

117. *Id.* at 929.

118. *Id.*

119. *Id.* at 924-25. The grandmother did not believe the allegations until "years later, when her husband confessed to sexually molesting his other granddaughter." *Id.* at 923.

120. *Id.* at 927.

121. *Id.*

122. *Id.*

Farmer required the plaintiff to allege an affirmative act.[123]

The court examined allegations against the wife to ascertain whether she had a duty to protect the children.[124] The court concluded that when one undertakes to care for and supervise a child, "the act of leaving a young child under the care and supervision of a person who is known or should be known to be a pedophile" constitutes an affirmative act.[125] The court commented that working-class households in which both parents work are particularly vulnerable because of their increased child care needs: "Indeed, as we approach the dawning of a new century, care giving is more a social necessity than a social utility."[126] Because of the social utility of warning, the court was willing to hold that merely allowing children to visit one's home, without any enticement, obliges an adult to protect and warn.[127]

In balancing the duty formula, the court concluded that the social utility of protecting children outweighed potential burdens on the marital relationship:

> Placing a child in a situation in which another can take advantage of her helplessness has no social utility . . . . Applying these balancing factors to the facts before us, we find that a duty exists to not place a child in a situation in which the risk of sexual abuse is heightened and in which the risk is foreseeable.[128]

The Appellate Division of the Superior Court of New Jersey also recently announced that a wife has a duty to warn or protect minors visiting the marital home to see her husband. In *J.S. v. R.T.H.*,[129] the court held that a lower court improperly granted summary judgment to a wife, "Mary," and held that she had a duty to warn their neighbors, the parents of teen/pre-teen girls, of her husband's sexual interest in their girls.[130] The plaintiffs alleged that "Mary 'was negligent in that she knew and/or should have known of her husband's proclivities/propensities' and that as a result of her negligence the girls were physically and emotionally injured."[131] The twelve- and fifteen-year-old neighbors of the defendants Mary and John "frequently visited, helping to care for [Mary's and John's] horses and [to] horseback rid[e] with John."[132] Although Mary denied knowledge of her husband's sexual activities with the girls, in the complaint the two girls alleged that Mary once announced, "'Your

123. *Id.*
124. *Id.*
125. *Id.* at 927-28.
126. *Id.* at 928.
127. *Id.* at 928-29.
128. *Id.*
129. 693 A.2d 1191 (N.J. Super. Ct. App. Div. 1997).
130. *Id.* at 1192.
131. *Id.*
132. *Id.*

whores are here,' and that she addressed them as 'you bitches.'"[133] The court said, "Those words, if accurately quoted, permit an inference that Mary was aware of John's sexual abuse of the girls."[134]

Like *Franklin* and *Pamela L.*, the New Jersey court did not hold that the marital relationship is a special relationship. Yet, the New Jersey court also did not identify any particular affirmative acts on the wife's part; Mary apparently did not encourage the children's visits or lull their parents with false reassurance. The court concluded that Mary's duty arose simply from the foreseeability of the harm, explaining that the allegations, if true, created an inference that Mary knew about her husband and that the danger was therefore foreseeable.[135] The social relationship among neighbors justified warning of the foreseeable risk:

> After "weighing . . . the relationship of the parties, the nature of the risk, and the public interest," we conclude that if plaintiffs prove Mary was aware of her husband's conduct or history, it was foreseeable that he posed a danger to these young girls, and it is fair to hold that Mary had a duty to take reasonable steps to protect them from such danger. Our conclusion derives from the continuity and nature of the social relationship between these next-door neighbors and the girls' habitual and repeated visits of which Mary was clearly aware. Under such circumstances, the girls and their parents had a reasonable expectation that Mary would not knowingly expose them to the risk of sexual assault by her own husband.[136]

The court held that the duty arose based on the social relationship between neighbors, the risk of harm, and the public interest served by warning the neighbors.[137]

E. Premises Liability

When the criminal act occurs at the family home, in some instances courts have approved the prosecution of civil claims against the non-offending homeowner on a premises liability theory. The most common cases of liability for criminal conduct on the property arise in the commercial business context.[138] Premises liability claims for criminal conduct on residential

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133. *Id.*

134. *Id.*

135. *Id.* at 1194.

136. *Id.* (citations omitted) (first alteration in original). This deviates from the traditional approach because the wife had apparently assumed no responsibilities as to the children or made any assurances to the parents. *See* Adler, *supra* note 103, at 874 n.32.

137. *J.S.*, 693 A.2d at 1194.

138. *See* Eric J. v. Betty M., 90 Cal. Rptr. 2d 549, 554 (Cal. Ct. App. 1999). The court stated the following:

> In "public" or business property, liability has been allowed when there is something . . .

premises are unusual and typically unsuccessful.[139] Nevertheless, questions of fact may preclude summary judgment if a court is willing to entertain the novel theory. For example, in *Doe v. Batson*,[140] Donald Batson, an adult son of Merle Batson, resided in Merle's home. He was accused of molesting young males both at Merle's home and at the church where he worked as a youth minister.[141] The plaintiffs alleged that Merle was home on some occasions when boys were with Donald in his bedroom and that she did nothing to warn parents or to otherwise secure the children's safety.[142] The appellate court reversed summary judgment granted by the lower court in Merle's favor, suggesting two bases for Merle's liability: an independent duty to warn and premises liability.[143]

The court acknowledged that vicarious liability for acts of adult family members was unavailing; nevertheless, the court suggested that Merle might have a duty to protect arising from the special circumstances of childhood molestation, stating:[144]

> In this case, the specific persons to be harmed were readily identifiable as the minor males brought to Batson's home and taken to her son's room. At each instance, if Batson knew or should have known of their presence and of the threat . . . her son posed . . . , but failed to warn them, such may constitute a failure to warn of a specific threat to a specific victim.
>
> "Typically, courts are reluctant to find family members liable for an assailant's actions when the liability is premised on negligence-based actions which charge the family members with such things as failure to warn of the assailant's dangerous propensities . . . ." However, case law from other jurisdictions lends credence to Doe's assertion that Batson had a duty to warn in this case.[145]

The court next approved premises liability as a second basis of potential liability.[146] Ordinarily, possessors of land owe "a duty '[t]o use reasonable

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about the nature of the activity conducted on the property or the property itself which fixes on the landowner the duty to take some sort of precaution. . . . Or the *area* may be such that the presence of miscreants is generally a foreseeable risk . . . [O]r the owner has in some way undertaken, as part of the organized activity on the land, care for the safety of the plaintiff against criminal acts of third parties.

Id.

139. *See id.* at 555.

140. 525 S.E.2d 909, 911 (S.C. Ct. App. 1999).

141. *Id.*

142. *Id.*

143. *Id.* at 912-15.

144. *Id.* at 914.

145. *Id.* (citations omitted).

146. The court examined three cases; notably, plaintiffs did not prevail in any of the cases. *Id.* at 914-15 n.4. In *Thiebeault v. Seifert*, 388 So. 2d 224 (Fla. Dist. Ct. App. 1980), a trial court found parents liable for their adult son's harassing behavior toward neighbors. *Id.* at 225.

care to warn [social guests] of any *concealed dangerous conditions* or activities which are known to the possessor.'"[147] The court explained, "At a minimum, the victims in this case were social guests in Batson's home. Therefore, the law imposes upon Batson a duty to warn of concealed, dangerous conditions on the premises of which she knew or should have known, but which were unknown to the victims in this case."[148]

III. INSURANCE COVERAGE

Given the myriad of potentially viable legal theories sounding in negligence that may be brought against family members of wrongdoers, it should come as no surprise that the claims against insurers for coverage have also proliferated. As the preceding sections demonstrate, even though it might be difficult to ultimately prevail against an allegedly innocent or negligent coinsured, the claims are difficult to resolve and so become quite important in litigation. These legal theories provide plaintiffs with potential access to the nonactor's personal assets and to insurance, despite the intentional act exclusion within the typical insurance contract. These cases are often inappropriate for summary judgment given the fact-driven nature of the claims against family members when the outcome turns on what the family member specifically knew of the spouse's or child's propensities and when it was known and what actions were or were not taken. Thus, even if the plaintiff is unlikely to prevail, the presence of insurance to defend and possibly indemnify other family members raises the stakes and is important to both

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The appellate court reversed, but a dissent argued that under a premises liability theory the property owners owed a duty to their neighbors to ensure that people who occupied the premises did not harass others. *Id.* at 226 (Grimes, J., dissenting). In *Youngblood v. Schireman*, 765 P.2d 1312 (Wash. Ct. App. 1988), the court acknowledged the viability of a premises liability claim, but only if the parents had specific knowledge of a "necessity and opportunity of exercising control." *Id.* at 1318. Similarly, in *Barmore v. Elmore*, 403 N.E.2d 1355 (Ill. Ct. App. 1980), the court recognized that homeowners may be liable for criminal acts of adult family members in the home if they have reason to know of the danger; however, the court determined that the defendant had insufficient knowledge of the risk to justify holding that a duty existed. *Id.* at 1357-58; *see also* Eric J. v. Betty M., 90 Cal. Rptr. 2d 549, 558-59 (Cal. Ct. App. 1999) (holding that parents had no duty to warn their son's girlfriend of their son's propensity to molest minors under a premises liability theory where the son had a prior conviction for molestation). *But see* Cain v. Cain, 870 S.W.2d 676, 680-81 (Tex. Ct. App. 1994) (holding that under a premises liability theory, an uncle who invited a child to his home had a duty to warn of his adult son's propensity to molest children and of his son's probationary status for sexual assault of a child). *See generally* Kimberly C. Simmons, Annotation, *Liability of Adult Assailant's Family to Third Party for Physical Assault*, 25 A.L.R.5TH 1 (1994 & Supp. 2000).

147. *Batson*, 525 S.E.2d at 915 (quoting Frankel v. Kurtz, 239 F. Supp. 713, 717 (W.D.S.C. 1965) (alterations in original)).

148. *Id.*

defendants and plaintiffs alike.[149]

A. The Intentional Act Exclusion

In addition to insuring against various property losses, the typical homeowner insurance policy today contains valuable third-party insurance[150] coverage as well.[151] Just as fire or theft may unexpectedly threaten an insured's property, so too may unexpected lawsuits that arise out of the normal conduct of one's life, and so third party insurance is a valuable and important feature of the homeowner's insurance contract.[152]

The liability portion of the typical homeowners' insurance contract generally provides liability coverage for many claims against insureds sounding in negligence,[153] but excludes coverage for claims of liability arising from intentional acts of insureds.[154] The intentional act exclusion requires

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149. In a more general sense, Professor Kent Syverud theorizes that the presence of insurance actually promotes increased liability claims and findings of liability. *See* Kent D. Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1632-38 (1994).

150. Third-party insurance is commonly known as liability insurance. In the insurance context, "a 'first-party claim' refers to an insurance agreement where the insurer agrees to pay claims submitted to it by the insured for losses suffered by the insured" whereas "[a] 'third party claim' is one where the insurer contracts to defend [its own] insured against claims made by third parties against the insured and to pay any resulting liability, up to the specified dollar limit." Best Place, Inc. v. Penn Am. Ins. Co., 920 P.2d 334, 338 n.4 (Haw. 1996).

151. *See* ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 60B(b), at 266-68 (1987) (providing an overview of homeowner policies).

152. *See, e.g.*, Aceto v. Hanover Ins. Co., No. CV950371556, 1996 WL 24563, at *5 (Conn. Super. Ct. Jan. 9, 1996) ("When viewed from the perspective of the insureds, the conduct of their unemancipated minor child in assaulting [the plaintiff] was an unintended and unexpected event and, therefore, for purposes of determining whether the policy provides coverage to the insureds, was an 'accident.'"). Indeed, the prospect of tort liability and litigation as a threat to a family's assets may appear just as fortuitous as a fire or flood to many consumers. *See* Syverud, *supra* note 149, at 1630 (noting that some characterize the "growth of liability insurance as a wasteful byproduct of our tort law and civil jury system—an unpredictable lottery that usually results in overcompensation for minor injuries, undercompensation for serious injuries, and a waste of money through the costs of processing claims").

153. If the policy language does not otherwise provide, *see infra* notes 209-29 and accompanying text, insurers usually cover statutory parental liability because the claim results from an "accident" or "occurrence" in that it was an unintended or unexpected event from the viewpoint of the parents. *See, e.g.*, Nationwide Mut. v. Mazur, No. CV98-0489231S, 1999 WL 417346, at *4-*8 (Conn. Super. Ct. June 3, 1999); Property Cas. Co. v. Conway, 687 A.2d 729, 731-33 (N.J. 1997). *But see* Randolph v. Grange Mut. Cas. Co., 385 N.E.2d 1305, 1307-08 (Ohio 1979) (Whiteside, J., concurring).

154. *See* KEETON & WIDISS, *supra* note 8, § 5.4(d)(1), at 518-19. *See generally* Daniel C. Eidsmoe & Pamela K. Edwards, *Home Liability Coverage: Does the Criminal Exclusion Work Where the "Expected or Intended" Exclusion Failed?*, 5 CONN. INS. L. J. 707 (1998); James A.

courts to determine whether conduct falls into one or the other category, a formidable task.[155] Covering claims arising out of unintentional injuries provides insureds with the insurance they desire to meet unexpected losses. Excluding coverage for intentional acts protects society by holding individuals financially responsible for their own deliberate wrongdoing.

When the claim against the insured is not unequivocally intentional or negligent, fundamental and irreconcilable public policy tensions that favor broad coverage for the insured's negligence and no coverage for the insured's intentional acts lead to vastly divergent judicial responses. First, these cases are caught between dual judicial aims of using insurance to compensate victims, but not rewarding wrongdoers.[156] Second, courts are wary as they decide these cases because insurance law dictates that they must be liberal in finding a duty to defend, yet courts also know that the outcome is largely determined by the pleadings of a plaintiff in the underlying lawsuit, who has virtually unchecked power to characterize a claim in any manner that suggests a covered claim. Plaintiff's inordinate power to determine the outcome of the defense and coverage dispute between the insured and his or her insurer leaves the judicial system and the insurer wary of the artful pleading tactics of the plaintiff.[157] Finally, in deciding whether an act is intentional and not covered or negligent and covered, courts must also reconcile the traditional insurance law bias favoring the reasonable expectations of the insured by reading the insurance contract broadly in the insured's favor and against the insurer with the judicial desire not to thwart the deterrence aspect of uninsured civil liability.[158]

1. The Competing Tensions Between Victim Compensation and the Hazards of Covering Wrongdoers

The intentional act exclusion partly is premised on the principle that insurance is intended to transfer the risk of fortuitous losses, not those within the control of the insured.[159] The exclusion also reflects the public policy

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Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95 (1990).

155. *See generally* JERRY, *supra* note 151, § 63C, at 300-02; Eidsmoe & Edwards, *supra* note 154; Fischer, *supra* note 154; David S. Florig, *Insurance Coverage for Sexual Abuse or Molestation*, 30 TORT & INS. L.J. 699 (1995); Cynthia A. Muse, Note, *Homeowners Insurance: A Way to Pay for Children's Intentional—and Often Violent—Acts?*, 33 IND. L. REV. 665 (2000); Joseph J. Porzenski, Note, *Providing Insurance Coverage for Intentional Torts: The Inequitable Application of* American Family Mutual Insurance Co. v. Pacchetti *in* Economy Fire & Casualty Co. v. Haste, 38 ST. LOUIS U. L.J. 257 (1993).

156. *See infra* notes 159-73 and accompanying text.

157. *See infra* notes 174-208 and accompanying text.

158. *See infra* notes 209-29 and accompanying text.

159. *See* JERRY, *supra* note 151, § 63(C) at 300-02 (stating that "[i]t is a fundamental requirement in insurance law that the insurer will not pay for a loss unless the loss is

principle that insureds should not be indemnified "against the civil consequences of... willful criminal conduct" because it might undermine the deterrence imposed by financial responsibility.[160] Courts honor the exclusion of intentional injury from coverage because of the "fear that an individual might be encouraged to inflict injury intentionally if he was assured against the dollar consequences."[161] From the insurer's viewpoint, it is undesirable to provide coverage or defense for claims that are within the control of the insured, for such coverage might encourage misconduct, frustrate the insurer's calculation of fair rates, and contravene public policy.[162]

"On the other hand, public policy also favors affording compensation to victims,"[163] particularly because the tort and liability insurance schema serves as the primary method of compensation for persons injured through the fault of others.[164] Courts must chart a course between Scylla and Charybdis in order "to compensate victims with insurance proceeds to the extent that that compensation will not condone and encourage intentionally-wrongful conduct."[165] To strike the proper balance in interpreting the intentional act exclusion, a court must recognize "the public interest that the victim be compensated,"[166] the fact that the victim's interest is derivative of the insured,[167] and that "the victim is aided by the narrowest view of the policy exclusion consistent with the purpose of not encouraging an intentional attack."[168]

Although it is undesirable to cover intentional misconduct of insureds, when the claim is not asserted against the wrongdoer, but a family member,

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'fortuitous,' meaning that the loss must be accidental in some sense"); KEETON & WIDISS, *supra* note 8, § 5.4(d)(1), at 518-19. As one court explained:

> An agreement to indemnify against intentional misconduct would, as a general rule, be contrary to public policy and unenforceable.... Violent criminals should not be permitted to profit from their own intentional misconduct. Furthermore, exclusions for intentional acts are necessary to help insurers set rates and supply coverage. If a single insured is allowed . . . to consciously control risks covered by the policy, the central concept of insurance is violated.

Lincoln Logan Mut. Ins. Co. v. Fornshell, 722 N.E.2d 239, 242 (Ill. Ct. App. 1999) (citations omitted).

160. KEETON & WIDISS, *supra* note 8, § 5.4(d)(1), at 519 (quoting Ambassador Ins. Co. v. Montes, 388 A.2d 603, 606 (N.J. 1978) (omission in original)). California excludes coverage for any "willful act" by statute as well. *See* CAL. INS. CODE § 533 (West 1993); Fischer, *supra* note 154, 110-18 (discussing the statutory prohibition).

161. Voorhees v. Preferred Mut. Ins. Co., 607 A.2d 1255, 1263 (N.J. 1992) (quoting Burd v. Sussex Mut. Ins. Co., 267 A.2d 7, 15 (N.J. 1970)).

162. *See* JERRY, *supra* note 151, § 63, at 300-24.

163. *See Lincoln Logan Mut.*, 722 N.E.2d at 242 (citations omitted).

164. *Voorhees*, 607 A.2d at 1263 (quoting *Burd*, 267 A.2d at 15).

165. *Id.*

166. *Burd*, 267 A.2d at 15.

167. *Id.*

168. *Id.*

the risks become attenuated and the compelling public policies diluted; thus, the compensatory goals favoring coverage ought to override them.[169] Consider Mavis Daniels,[170] a single mother raising Eddie, her troubled teenage son. While she counseled, disciplined, and supervised Eddie, she was unable to prevent him from shooting an innocent stranger.[171] She was on the phone with her employer when Eddie snuck out of the house and shot the victim, Williamson. She had no part in his crime, although Eddie's conduct may have resulted from her inattention and ineffective parenting. There was no suggestion that her conduct was intentional. Admittedly, the insurer might have to defend Mavis Daniels for a claim arising out of the intentional acts of Eddie, another insured. However, nothing in the facts suggest that the claim against Mavis Daniels could be characterized as anything but negligence. Defending and indemnifying her will not thwart the civil liability public policy goals of deterrence and of not rewarding intentional wrongdoers.[172] Moreover, covering Mavis Daniels will achieve the compensatory purpose of liability insurance by compensating the victim.[173]

2. The Plaintiff's Artful Pleadings Determine Coverage

The injured plaintiff has an oddly primary role in the outcome of duty-to-defend litigation between the insured and insurer, even though the plaintiff is not a party to the insurance contract nor usually regarded as a third party beneficiary to the defendant's insurance contract.[174] Essentially, the plaintiff's pleadings in the underlying litigation determine whether the insurer has a duty

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169. In *Property Cas. Co. v. Conway*, 687 A.2d 729 (N.J. 1997), the court justified coverage for a statutory parental liability claim, noting:

> Neither the terms nor history of the statute . . . indicate that the [l]egislature believed that permitting parents to insure against vicarious liability would subvert the goal of deterrence . . . . Recogniżing coverage for the parents . . . does not lead to coverage for the child who intentionally damages school property. . . . Permitting parents to insure against their vicarious liability increases the likelihood that funds will be available to compensate for damage to school property. Denying the insurance could expose parents, many of whom may be doing the best they can, to financial ruin.

Id. at 732-33.

170. Williamson v. Daniels, 748 So. 2d 754 (Miss. 1999); *see supra* notes 41-73 and accompanying text.

171. *Williamson*, 748 So. 2d at 757.

172. Hanover Ins. Co. v. Crocker, 688 A.2d 928, 931 (Me. 1997); *Property Cas.*, 687 A.2d at 732-33. *But see* Jessica M.F. v. Liberty Mut. Fire Ins. Co., 561 N.W.2d 787, 795-96 (Wis. 1997) (Schudson, J. concurring) (suggesting that wives of pedophiles will have no deterrence to prevent sexual assaults if they are covered by insurance).

173. *See Property Cas.*, 687 A.2d at 732-33.

174. *See* JERRY, *supra* note 151, § 84(b), at 418-20; ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES § 9.11 (1995 & Supp. 2000).

to defend the insured.[175] Moreover, a plaintiff wanting to encourage the participation of the defendant's insurer is aided by the unique rules of insurance contract interpretation. For example, even if the existence of a duty to defend is factually[176] or even legally disputable,[177] courts have long favored the insured over the insurer in establishing a duty to defend.[178] The duty[179] to defend is both separate[180] and far broader than an insurer's duty to pay claims.[181] This duty includes the defense of even frivolous, baseless suits,[182] and it arises even when there is only a "mere potential for coverage,"[183] no matter how remote.[184]

The broad scope of the duty to defend means that liberally construed allegations in the plaintiff's complaint in the underlying litigation chiefly determine whether there is a duty to defend.[185] Plaintiffs generally recognize

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175. *See generally* Pryor, *supra* note 8 (discussing litigation practices of "underpleading" and "underlitigating" intentional torts to access liability insurance); Syverud, *supra* note 149, at 1642-44.

176. *See, e.g.*, Petr-All Petroleum Corp. v. Fireman's Ins. Co., 593 N.Y.S.2d 693, 695 (N.Y. App. Div. 1993) (holding that "[t]he insurer 'has a duty to defend its insured . . . even though facts outside the four corners of the pleadings indicate that [the] claim may be meritless or not covered'") (alterations in original).

177. *See, e.g.*, Interstate Fire & Cas. Co., Inc. v. 1218 Wisconsin, Inc., 136 F.3d 830, 835 (D.C. Cir. 1998); Sentinel Ins. Co. v. First Ins. Co., 875 P.2d 894, 907 (Haw. 1994) (finding that "[t]he mere fact that the answers to those [legal] questions in this jurisdiction were not then and are not presently conclusively answered" establishes a duty to defend); *see also* WINDT, *supra* note 174, § 4.02 (criticizing decisions).

178. *See* WINDT, *supra* note 174, § 4.02.

179. The typical insurance policy provides that the defense of a case is both the insurer's right and its duty. The insurer desires the right to defend and to protect its interest in litigation and settlement. *See id.* § 4.01.

180. *Sentinel Ins.*, 875 P.2d at 904.

181. *See, e.g.*, I.C.D. Indus., Inc. v. Federal Ins. Co., 879 F. Supp. 480, 485 n.5 (E.D. Pa. 1995). The duty to indemnify "is triggered only when the claim is '*actually* within the policy coverage.'" *Id.* (quoting Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co., 707 F. Supp. 762, 766 (E.D. Pa. 1989), *aff'd in part* 25 F.3d 177 (3d Cir. 1994)).

182. *See* WINDT, *supra* note 174, § 4.01.

183. Commerce & Indus. Ins. Co. v. Bank of Hawaii, 832 P.2d 733, 735 (Haw. 1992); *see* American Contract Bridge League v. Nationwide Mut. Fire Ins. Co., 752 F.2d 71, 75 (3d Cir. 1985).

184. *See* Trizec Properties, Inc. v. Biltmore Constr. Co., 767 F.2d 810, 812 (11th Cir. 1985) (citing 7C JOHN ALAN APPLEMAN, INSURANCE LAW & PRACTICE WITH FORMS, 99-100 (Walter F. Berdal ed., 1979)); WINDT, *supra* note 174, § 4.02.

185. It has long been held that insurers have a duty to defend where unpleaded, extrinsic facts would give rise to a duty to defend. *See, e.g.*, Standard Oil Co. v. Hawaiian Ins. & Guar. Co., 654 P.2d 1345, 1349 (Haw. 1982) (holding that an insurer is obligated to undertake an independent investigation to ascertain facts that might give rise to a duty to defend); *see* WINDT, *supra* note 174, § 4.03. However, mindful of the inordinate control plaintiffs possess to draw insurers into litigation, courts have struggled to address whether the insurer can look to extrinsic

that even if the defendant's claim for indemnification against the insurer is weak, it is nevertheless desirable to draw the insurer into the litigation both to serve as a possible source of financial recovery, should the plaintiff prevail and the claim be covered, and to enhance the settlement potential of the case through insurer participation even if a determination of coverage is unlikely.[186]

One judicial response to the plaintiff's power to draw insurers into litigation through artful pleading may be a heightened judicial scrutiny of the pleadings and novel evasive maneuverings. Consider, for example, the court's response in *Jessica M.F. v. Liberty Mutual Fire Insurance Co.*[187] There, grandchildren and parents filed suit against their grandfather and grandmother for sexual abuse by the grandfather.[188] The allegation against the grandmother was negligent failure to protect and supervise the children.[189] Because negligent supervision claims necessarily require an allegation of notice,[190] the plaintiffs alleged that the grandmother "knew or . . . should have known that [the grandfather] was engaging in sexual conduct . . . with [the grandchildren]."[191] The court transformed this standard element of negligent supervision[192] into inferred intent[193] and read the complaint against the grandmother to allege, not a negligent act, but an intentional one for insurance coverage purposes:

> The complaint alleges that the grandmother "knew or, in the exercise of reasonable care, should have known" of the grandfather's sexual abuse of their four grandchildren. We, like the trial court, "must assume that the facts pleaded are true." Unquestionably, therefore, as a matter of law . . . if the grandmother "knew" of her husband's actions, she "expected or intended"

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facts to avoid the duty to defend. *See* Dairy Rd. Partners v. Island Ins. Co., 992 P.2d 93, 113-17 (Haw. 2000) (discussing a split of authority and adopting the majority rule that the insurer may not use extrinsic facts to disclaim a duty to defend except when it can also show that "*none* of the facts upon which it relies might be resolved differently in the underlying lawsuit").

186. *See* Ellen S. Pryor, *The Tort Liability Regime and the Duty to Defend*, 58 MD. L. REV. 1, 19-20 (1999) (noting that the costs of defense and the amount of loss may make settlement of doubtful coverage cases a reasonable business decision).

187. 561 N.W.2d 787 (Wis. Ct. App. 1997).

188. *Id.* at 789.

189. *See id.*

190. *See supra* notes 66-70.

191. *Jessica M.F.*, 561 N.W.2d at 789 (alterations in original).

192. *See* DOBBS, *supra* note 28, at 877-78, 893 (discussing foreseeability).

193. The court relied on earlier precedent that holds "'that sexual molestation of a minor falls within [the] category' of 'intentional conduct . . . substantially likely to cause injury so as to warrant an inference of an intent to injure.'" *Jessica M.F.*, 561 N.W.2d at 792 (quoting K.A.G. v. Stanford, 434 N.W.2d 790, 793 (Wis. Ct. App. 1988) (second alteration in original)). The doctrine of inferred intent has been used against molesters who seek insurance coverage by claiming that they did not intend to harm the child by their conduct. *See, e.g.*, Gearing v. Nationwide Ins. Co., 665 N.E.2d 1115, 1118-20 (Ohio 1996); *see also* KEETON & WIDISS, *supra* note 8, at 520-22 (describing three judicial approaches to the question of intent).

the harm to her grandchildren.[194]

This strained and technical reading of the complaint is contrary to the general requirement that insurers must defend when there is a potential for coverage under a broad reading of the complaint.[195]

Other courts have acknowledged unease about allowing plaintiffs' pleadings to drive the insurance defense determination,[196] which is a concern shared by scholars discussing the abuses that may arise.[197] This unease about the tort plaintiff's powerful role in duty-to-defend cases has prompted some courts to examine the factual allegations with a relatively careful eye and disregard the plaintiff's characterization of the legal claim.[198] For example, an allegation of sexual assault might not be covered simply because a plaintiff characterizes it as negligent.[199] Courts have held that "a pleader's overstatements, hyperbole or other vagrancies [sic] do not control whether an insured is entitled to a defense"[200] and that "[a] plaintiff may not dress up a complaint so as to avoid the insurance exclusion."[201]

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194. *Jessica M.F.*, 561 N.W.2d at 792-93 (citations omitted).

195. *See* JERRY, *supra* note 151, § 111(c)(3), at 566.

196. *See, e.g.*, Colorado Farm Bureau Mut. Ins. Co. v. Snowbarger, 934 P.2d 909, 912 (Colo. Ct. App. 1997); Bagley v. Monticello Ins. Co., 720 N.E.2d 813, 816-17 (Mass. 1999); First Wyo. Bank v. Continental Ins. Co., 860 P.2d 1094, 1099 (Wyo. 1993).

The unease is apparent in a series of decisions in Hawaii. In *Bayudan v. Tradewind Insurance Co.*, 957 P.2d 1061 (Haw. Ct. App. 1998), the plaintiff alleged negligent sexual assault and kidnapping in the underlying litigation. *Id.* at 1063. She later amended her complaint to allege a negligent slip and fall arising out of the same incident. *Id.* at 1064. In the coverage context, the Intermediate Court of Appeals of Hawaii rejected coverage based on negligence for the assault. *Id.* at 1070. However, the court remanded the case, explaining that if the fall were sufficiently related to the intentional acts, it too would not be covered. *Id.* at 1074. "If [the plaintiff] fell solely because she was scared and nervous from the alleged assault, then the slip and fall claim would fail to trigger [the insurer's] duty to defend . . . ." *Id.* A few years later, the Hawaii Supreme Court, in *Dairy Road Partners v. Island Insurance Co.*, 992 P.2d 93 (Haw. 2000), called *Bayudan* into doubt and overruled earlier cases to the extent that they suggested that the insurer may rely upon disputed extrinsic facts that are relevant to the tort litigation to disclaim a duty to defend. *Id.* at 116-17.

197. *See* Pryor, *supra* note 8, at 1763-64; Pryor, *supra* note 186, at 6; Syverud, *supra* note 149, at 1642 (commenting that "plaintiffs' attorneys have no interest in limiting the moral hazard that liability insurance creates").

198. *See* WINDT, *supra* note 174, § 4.02 (stating that courts will ignore as mere surplusage the characterization of an intentional tort as negligence).

199. *See, e.g.*, *Bayudan*, 957 P.2d at 1068.

200. Nationwide Mut. Ins. Co. v. Yaeger, No. CIV. A. 93-3024, 1994 WL 447405, at *1 (E.D. Pa. Aug. 19, 1994) (citing Safeguard Scientifics, Inc. v. Liberty Mut. Ins. Co., 766 F. Supp. 324, 330 (E.D. Pa. 1991)).

201. *Id.* at *2; *see also* National Union Fire Ins. Co. v. Gates, 530 N.W.2d 223, 229 (Minn. Ct. App. 1995) (holding that a claim for negligence arising out of sexual assault of cohorts is precluded in an insurance contract denying coverage for intentional acts as the allegation

A direct but problematic approach to check a plaintiff's power to draw the insurer into litigation is not to give deference to the plaintiff's allegations as the arbiter of the duty to defend, but to allow the facts adduced in the dispute between the insured and the insurer to govern that dispute and to allow the insurer to consider extrinsic evidence beyond the plaintiff's pleading to resolve the duty-to-defend issue.[202] This approach "ensure[s] that plaintiffs [can] not, through artful pleading, bootstrap the availability of insurance coverage under an insured defendant's policy."[203] Under this approach, "a court may inquire into the underlying facts 'to avoid permitting the pleading strategies, whims, and vagaries of third party claimants to control the rights of [the] parties to an insurance contract.'"[204]

Allowing an insurer to rely on extrinsic facts that must be litigated in the underlying tort suit is largely unsatisfactory to most courts[205] because it has the potential to force the insured to "adduce facts proving his or her own liability in the underlying lawsuit in order to satisfy the insurer that there may be merit to the underlying covered claim"[206] and also "raises the potential for inconsistent judgments."[207] Therefore, while courts recognize a plaintiff's inordinate power to draw in insurers, no good answer to the problem has yet emerged.

When nonoffending family members are drawn into litigation arising out of intentional acts based on allegations of negligence against them, the same

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precluded in an insurance contract denying coverage for intentional acts as the allegation derives from the intentional acts).

202. *See, e.g.*, Winnacunnet Coop. Sch. Dist. v. National Union Fire Ins. Co., 84 F.3d 32, 35-36 (1st Cir. 1996) (applying New Hampshire law); Hawaiian Ins. & Guar. Co., v. Blanco, 804 P.2d 876, 879-80 (Haw. 1990) (considering extrinsic evidence in a duty-to-defend case), *overruled by* Dairy Rd. Partners v. Island Ins. Co., 992 P.2d 93, 116-17 (Haw. 2000); Tschimperle v. Aetna Cas. & Sur. Co., 529 N.W.2d 421, 424 (Minn. Ct. App. 1995); Pennsylvania Millers Mut. Ins. Co. v. Rigo, 681 N.Y.S.2d 414, 415 (N.Y. App. Div. 1998).

203. *Dairy Rd. Partners*, 992 P.2d at 112.

204. *Winnacunnet Coop. Sch. Dist.*, 84 F.3d at 35-36 (applying New Hampshire law).

205. *See* WINDT, *supra* note 174, § 4.04 (concluding that allowing insurers to rely on extrinsic facts is "clearly bad law"); Pryor, *supra* note 186, at 47, 54; *see also* Prudential Property & Cas. Ins. Co. v. Karlinski, 598 A.2d 918, 922 n.4 (N.J. Super. Ct. App. Div. 1991) ("Notwithstanding the theoretical possibility of collusion between the injured and the insured party to formulate a non-excluded claim, this may well be a case in which the coverage determination should await outcome of the underlying tort action.").

206. *Dairy Rd. Partners*, 992 P.2d at 112; *see* Allstate Ins. Co. v. Harris, 445 F. Supp. 847, 851 (N.D. Cal. 1978) (noting that a trial in a declaratory action could expose the insured to tort liability and punitive damages "all because of the facts established against him in this [c]ourt by Allstate").

207. *Dairy Rd. Partners*, 992 P.2d at 112. The preferred rule does not allow the insurer to adduce facts extrinsic to the pleadings in order to decline insurance defense except those extrinsic facts that "will not be resolved by the trial of the third party's suit against the insured." *Id.* at 113 (quoting Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 483 A.2d 402, 406 (N.J. 1984)); *see also* WINDT, *supra* note 174, § 4.04.

artful pleading issues remain. Moreover, plaintiffs also must take care in their pleadings to avoid characterizing the nonactor's part in the injury as intentional and must instead plead the elements of negligence.[208]

3. Achieving Reasonable Expectations of Insureds

The reasonable expectation doctrine[209] adds yet a further layer of complexity to this already conflicted battlefield. In its broadest formulation the doctrine advances the notion that the "objectively reasonable expectations" of insurance consumers should be honored, "even though painstaking study of the policy provisions would have negated those expectations."[210] In actuality, few jurisdictions permit consumer expectations that are truly at variance with the contract language to override the contract

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208. Statutory liability poses a different issue because the claim does not arise from parental negligence, but is based on a vicarious liability theory. *See* Aceto v. Hanover Ins. Co., No. CV950371556, 1996 WL 24563, at *3 (Conn. Super. Ct. Jan. 9, 1996); Property Cas. Co. v. Conway, 687 A.2d 729, 731-32 (N.J. 1997). Nevertheless, the analysis as to the insurance contract remains virtually the same; courts ask whether the event was unexpected from the standpoint of the insured. *See, e.g.*, Arenson v. National Auto. & Cas. Ins. Co., 286 P.2d 816, 818 (Cal. 1955) (en banc) (holding that the insurer must provide coverage of a claim under a parental liability statute for a child's act of setting a fire at school); *Aceto*, 1996 WL 24563, at *3; *Property Cas.*, 687 A.2d at 731-32; Liberty Mut. Ins. Co. v. Davis, 368 N.E.2d 336, 338-39 (Akron Mun. Ct. 1977) (holding "a judgment against a minor's parents is not based on the parent's intentional act and therefore is not excluded" and that the insurer must defend and pay the claim for damages arising from a minor child's burglary where the parents are held liable under a parental liability law). Likewise, where the court concludes that the insurance contract does not cover a parent's negligent acts, it will similarly conclude that the policy does not cover statutory liability. *See, e.g.*, Chacon v. American Family Mut. Ins. Co., 788 P.2d 748, 752 (Colo. 1990) (en banc) (holding that a policy that excludes coverage for the intentional acts of "any" insured does not cover claims against a parent under a parental liability statute).

209. The doctrine sprung from the work of Professor (now Judge) Robert Keeton in two seminal articles: Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970) [hereinafter Keeton I] and Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part Two*, 83 HARV. L. REV. 1281 (1970) [hereinafter Keeton II]. *See generally* Robert H. Jerry, II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 CONN. INS. L.J. 21 (1998) (discussing the doctrine as conceptualized by Keeton). While there is relatively broad acceptance of the doctrine, judicial interpretation and application of the doctrine is variable. *See* Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181, 182-83, 191 (1998) (describing judicial approaches and noting both liberal and narrow approaches among the 38 states that have purported to have adopted the doctrine). *See generally* Peter Nash Swisher, *A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations*, 35 TORT & INS. L.J. 729 (2000) (exploring judicial responses and proposing a middle ground approach).

210. *See* Keeton I, *supra* note 209, at 967.

language absent an ambiguity or other reasons.[211] But this doctrine and other pro-insured contract interpretation rules justify holdings that favor coverage in otherwise doubtful instances.[212]

Discerning precisely what consumers' objectively reasonable expectations are with regard to suits against family members is difficult,[213] but news accounts suggest that parents are surprised by intentional and criminal teenage behavior.[214] Early insurance cases extended coverage to coinsureds who were sued on negligence or vicarious liability theories for the intentional torts of their coinsureds with relative ease.[215] But, recently, the law has grown conflicted, based both on reading the ever-changing insurance contract language and on an evaluation of the public policies that underlie the issues.

Generally, even as to the intentional actor, the intentional act exclusion must be interpreted narrowly as "the insured, in his own right, is . . . entitled to the maximum protection consistent with the public purpose the exclusion is intended to serve."[216] But where intent to injure is clear,[217] courts generally have little difficulty in concluding that insureds would not expect to be

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211. *See* Stempel, *supra* note 209, at 191-95 (discussing state court approaches); Swisher, *supra* note 209, at 777. As to the special rules of insurance contract interpretation, see generally, James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995 (1992).

212. *See* Swisher, *supra* note 209, at 778.

213. Of course, the doctrine itself indulges the legal fiction that consumers by and large hold objectively reasonable expectations. As Jeffrey Thomas notes, consumers do not comparison shop, understand basic coverage and exclusion terms, or develop specific expectations with regard to the insurance they purchase. *See* Jeffrey E. Thomas, *An Interdisciplinary Critique of the Reasonable Expectations Doctrine*, 5 CONN. INS. L.J. 295, 304-24 (1998). Moreover, agents generally do not provide detailed explanations of the insurance products. *Id.* at 319, 323.

214. One thing is certain: neither schools nor parents can predict with certainty which children will commit criminal acts against others. *See* Angie Cannon et al., *Why? There Were Plenty of Warning Signs, but No One Stopped Two Twisted Teens*, U.S. NEWS & WORLD REP., May 3, 1999, at 16, 18-19; Mary Lord, *The Violent-Kid Profile: A Controversial New Technique for Beating Violence*, U.S. NEWS & WORLD REP., Oct. 11, 1999, at 56, 56-57 (discussing difficulties associated with profiling); Lisa Stein, *Do You Know Where Your Children Are? Parents Can Tune in to Signs of Trouble*, U.S. NEWS & WORLD REP., May 3, 1999, at 22, 22-23.

215. KEETON & WIDISS, *supra* note 8, § 5.4(d)(5), at 527-29; *see, e.g.*, Allstate Ins. Co. v. Harris, 445 F. Supp. 847, 849 (N.D. Cal. 1978) (holding that as to parents, acts are predicated on negligence and are therefore covered); Arenson v. National Auto. and Cas. Ins. Co., 286 P.2d 816, 818 (Cal. 1955); Pawtucket Mut. Ins. Co. v. Lebrecht, 190 A.2d 420, 423 (N.H. 1963).

216. Burd v. Sussex Mut. Ins. Co., 267 A.2d 7, 15 (N.J. 1970).

217. When the nature of the conduct is not clear, then there is a duty to defend the actor. *See, e.g.*, General Cas. Co. v. Anderson, No. 96-1497, 1996 WL 653691, at *3 (Wis. Ct. App. Nov. 12, 1996) (remanding for trial on the question of whether the insured acted in self defense and if so, then injury was not intended, but was fortuitous).

covered for their own intentional misconduct.[218]

When individuals are sued for the intentional acts of their family members, it is more difficult to surmise just what an insured's reasonable expectations might or ought to be, and courts are divided on this issue. For some judges, the answer is perfectly clear even though it differs from that of their fellow jurists. For example, in *Jessica M.F. v. Liberty Mutual Fire Insurance Co.*,[219] Judge Schudson wrote confidently in his concurring opinion that policyholders would not reasonably expect insurance coverage for a grandmother's negligent failure to protect grandchildren from molestation by their grandfather.[220] Although acknowledging that "relatively few homeowners actually contemplate the precise parameters of their coverage"[221] or "whether their insurance covers sexual misconduct,"[222] the judge concluded that policyholders do not expect coverage that might "remove *any deterrence that the threat of a money judgment provides*."[223] The judge, expressing strong public policy concerns, feared that coverage for the innocent homeowner might result in collusive consequences:

> [W]hat now may seem a remote possibility could become far less remote should courts ever conclude that the so-called "non-offending" spouse could receive homeowner insurance coverage for the offender's abuse. Not only would prevention, intervention, and deterrence of sexual abuse decline, but collusion could increase as sexually-abusive families discovered they could not only assault children, but gain insurance recoveries as well.[224]

Yet other courts reach the opposite result when considering the reasonable expectations of the insured and balancing the public policies of compensation and deterrence.[225] The decision in *C.P. v. Allstate Insurance Co.*,[226] is illustrative. There, the court concluded that coverage for the parents of an adult son who sexually abused a child in their home achieved the reasonable

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218. *See, e.g.*, State Farm Fire & Cas. Co. v. Neises, 598 N.W.2d 709, 711-12 (Minn. Ct. App. 1999) (holding that the insured's acts of grave robbing and mutilating a corpse carried an inferred intent to cause injury to the parents of the decedent); Hagen v. Gulrud, 442 N.W.2d 570, 573 (Wis. Ct. App. 1989).

219. 561 N.W.2d 787 (Wis. Ct. App. 1997).

220. *Id.* at 795-96 (Schudson, J., concurring).

221. *Id.* at 795 (Schudson, J., concurring).

222. *Id.* (Schudson, J., concurring).

223. *Id.* at 796 (Schudson, J., concurring) (quoting *Hagen*, 442 N.W.2d at 573).

224. *Id.* at 796 (Schudson, J., concurring).

225. *See, e.g.*, Pawtucket Mut. Ins. Co. v. Lebrecht, 190 A.2d 420, 423 (N.H. 1963) (stating that "[t]here is no such [public] policy against insurance to indemnify an insured against the consequences of a violation of law by others without his direction or participation, or against his own negligence, or the negligence of others").

226. 996 P.2d 1216 (Alaska 2000).

expectations of the insureds and implicitly did not offend public policy.[227] The court wrote of the parents' expectations:

> From the standpoint of the elder Lancasters, it is not unreasonable that their interpretation of the policy focuses on the acts C.P. attributed to them, as distinct from the acts she attributes to Harold. They were sued for their conduct, not Harold's. C.P. did not attempt to make them vicariously liable for Harold's acts. Rather, her complaint alleged that the elder Lancasters' negligence legally caused injury to her. To prevail against them on that theory, C.P. had to prove that her injuries resulted from their negligence . . . regardless of whether there was more than one cause of her injuries.[228]

The court concluded that from the viewpoint of the parents, the allegation that they were a proximate cause of the intentional act of their son constituted an accident.[229]

4. "An," "Any," and "The"

Remarkably, with so many conflicting and competing tensions, the final determination of whether the non-offending family member has coverage for negligence claims often turns on the subtle distinctions between the meanings of "an," "any," or "the" in the intentional act exclusion.[230] When an insurance

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227. *Id.* at 1223-24.

228. *Id.*

229. *Id.* at 1224 (citing Allstate Ins. Co. v. Worthington, 46 F.3d 1005, 1012-13 (10th Cir. 1995)); *see also* Aceto v. Hanover Ins. Co., No. CV950371556, 1996 WL 24563, at *5 (Conn. Super. Ct. Jan. 9, 1994) (holding that from the standpoint of the parents, an assault by their minor son was unexpected and unintended).

230. Occasionally, the coverage question is resolved by deciding whether the act and resulting injury was an "occurrence," which is defined as an "accident" within the policy. *See, e.g.*, Manufacturers & Merchants Mut. Ins. Co. v. Harvey, 498 S.E.2d 222, 225-27, 229 (S.C. Ct. App. 1998) (covering as an "occurrence" a negligent entrustment claim related to child sexual abuse, but not the intentional acts). *See generally* Michael A. Orlando et al., *Recent Developments in Insurance Coverage Litigation*, 34 TORT & INS. L.J. 481, 482-83 (1999).

The Insurance Services Office, Inc.'s Homeowner's Policy Agreement (ISO H0-3), a widely used standard form, contains a definition of occurrence as "an accident, including exposure to conditions, which results, during the policy period, in . . . bodily injury . . . or . . . property damage." Insurance Services Office, Inc., *Homeowners 3 Special Form* at 1, *reprinted in* KENNETH H. YORK, ET AL., GENERAL PRACTICE INSURANCE LAW app. at 820 (3d ed. 1994) (emphasis omitted). That version of the HO-3 also contains an exclusion for bodily injury or property damage that "is expected or intended by the 'insured.'" *Id.* at 11, *reprinted in* Insurance Services Office, Inc., *Homeowners 3 Special Form 1*, *reprinted in* KENNETH H. YORK, ET AL., GENERAL PRACTICE INSURANCE LAW app. at 830 (3d ed. 1994) (emphasis added). The ISO HO-3, the most common homeowners' policy, has evolved over time. Prior to 1976, the policy excluded coverage for injury that "is either expected or intended from the standpoint of the insured." Email correspondence with Ralph Maffei, Manager, Personal Lines Division,

contract excludes coverage for injury or property damage arising out of the intentional conduct of "an insured"[231] or "any insured,"[232] courts sometimes, but not always,[233] conclude that negligent supervision claims are not covered. On the other hand, where the insurance contract excludes coverage for intentional acts of "the insured," other insureds, against whom the underlying negligence or statutory claim is brought, are arguably covered.[234] Despite the

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Insurance Services Office, Inc. (March 31, 2000) (on file with author); HO 76, 84, and 91 excluded coverage for bodily injury that "is expected or intended by the insured." *Id.* The October 1994 Interim Revision to HO 91 provided, "which is expected or intended by one or more insureds." *Id.* Finally, the HO 2000 will state, "which is expected or intended by an insured even if the resulting bodily injury or property damage: a. Is of a different kind, quality or degree than initially expected or intended; or b. Is sustained by a different person, entity, real or personal property, than initially expected or intended." ISO Circular, LI-HO-2000-026 Homeowners 2000 Program Multistate Forms Filing Document Updated; Filing Schedule Revised, at 13, 89 (reporting revisions in the 2000 form from the last multistate revision in 1994). New policy forms are adopted slowly; they generally must be filed in each state. Consequently, several versions of ISO policies may be in force at a given time. *See* Jeffrey W. Stempel, Law of Insurance Contract Disputes § 4.05, at 4-26 (2d ed. Supp. 2000).

231. *See, e.g.*, Allstate Ins. Co. v. Stamp, 588 A.2d 363, 364-65 (N.H. 1991) (holding that there is no coverage where a policy excludes coverage for intentional acts of "an insured"); *see also, e.g.*, Allstate Ins. Co. v. McCranie, 716 F. Supp. 1440, 1448-49 (S.D. Fla. 1989); Allstate Ins. Co. v. Roelfs, 698 F. Supp. 815, 821-22 (D. Alaska 1987).

232. *See, e.g.*, Chacon v. American Family Mut. Ins. Co., 788 P.2d 748, 751-52 (Colo. 1990) (holding that there was no coverage where a policy excludes coverage for an injury expected or intended by "any insured"); *see also, e.g.*, Swentkowski v. Dawson, 881 P.2d 437, 439 (Colo. Ct. App. 1994); Allstate Ins. Co. v. Jordan, 16 S.W.3d 777, 780-83 (Tenn. Ct. App. 1999) (holding that there is no coverage of parents on a negligent supervision claim under an "any insured" policy).

233. *See, e.g.*, Nationwide Mut. v. Mazur, No. CV98-0489231S, 1999 WL 417346, at *9 (Conn. Super. Ct. June 3, 1999); Premier Ins. Co. v. Adams, 632 So. 2d 1054, 1056-57 (Fla. Dist. Ct. App. 1994) (holding that there was coverage under an "any insured" policy in light of severability clause); Brumley v. Lee, 963 P.2d 1224, 1227-28 (Kan. 1998) (holding that there is coverage under an "any insured" policy in light of a severability clause); Walker v. Lumbermens Mut. Cas. Co., 491 S.W.2d 696, 697-99 (Tex. Ct. App. 1973) (holding that there is coverage to a parent under an "an insured" policy in light of a severability clause).

234. *See, e.g.*, Cambridge Mut. Fire Ins. Co. v. Perry, 692 A.2d 1388, 1390-91 (Me. 1997); Hanover Ins. Co. v. Crocker, 688 A.2d 928, 930-31 (Me. 1997); Vanguard Ins. Co. v. McKinney, 459 N.W.2d 316, 319-21 (Mich. Ct. App. 1990) (discussing different meanings of "the," "any," "a," and "an"); Pawtucket Mut. Ins. Co. v. Lebrecht, 190 A.2d 420, 422-23 (N.H. 1963); Property Cas. Co. of MCA v. Conway, 687 A.2d 729, 732 (N.J. 1997); Prudential Property & Cas. Ins. Co. v. Boylan, 704 A.2d 597, 600-01 (N.J. Super. Ct. App. Div. 1998); Prudential Property & Cas. Ins. Co. v. Karlinski, 598 A.2d 918, 920-21 (N.J. Super. Ct. App. Div. 1991); Williamson v. Vanguard Underwriters Ins. Co., No. 14-97-00276-CV, 1998 WL 831476, at *6 (Tex. Ct. App. Dec. 3, 1998); Uniguard Mut. Ins. Co. v. Argonaut Ins. Co., 579 P.2d 1015, 1019 (Wash. Ct. App. 1978); *cf.* National Union Fire Ins. Co. v. Lynette, 279 Cal. Rptr. 394, 396-99 (Cal. Ct. App. 1991) (discussing "the" and "an" insured in the context of a policy specifically excluding coverage for sexual misconduct).

subtle distinction in the various clauses[235] and the fiction that consumers read the contracts with such care as to understand that distinction, many courts conclude the differences between "an," "any," and "the" are patently clear.[236] Other judges are equally adamant that the language is ambiguous.[237]

Typically, the homeowners' insurance contract contains a severability clause as well, and this provision adds another source of ambiguity. "Severability clauses effectively create 'multiple policies with identical terms but different insureds.'"[238] A typical clause provides: "This insurance applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence."[239] Thus, except for construing policy limits, the clause requires courts to determine the applicability of coverage and

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235. *Black's Law Dictionary* is sometimes cited in these cases. *Black's* states in its definition of "the" that "[t]he most unlettered persons understand that 'a' is indefinite, but 'the' refers to a certain object." BLACK'S LAW DICTIONARY 1324 (5th ed. 1979). However, *Black's* own definitions of "the" versus "any" and "an" are not a model of clarity. The "[w]ord 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one.'" *Id.* at 86. According to *Black's*, "an" is "equivalent to 'one;' or 'any.'" *Id.* at 77. "The," on the other hand, "particularizes the subject spoken of." *Id.* at 1324. The word "a" may mean "one where only one is intended, or it may mean any one of a greater number" and is "placed before nouns of the singular number, denoting an individual object or quality individualized." *Id.* at 1.

Having worked through the various definitions, Justice Theiler, who dissented in *Allstate Insurance Co. v. Freeman*, 408 N.W.2d 153 (Mich. Ct. App. 1987), commented:

> I now recognize, after dictionary perusal, that "an" is the indefinite article sometimes used in place of "a." Further, "an" is in contrast to "the" and denotes a thing or person not previously noted or recognized. Such distinction would not be clearly recognized in ordinary context. It becomes significant here only after a close, detailed and technical analysis of the policy. It is akin to trying to catch and recognize the distinction between "a" and "the" when read in defining proximate cause concepts. Such fine distinctions may satisfy the law, but leave much to be desired in the art of communication.

Id. at 159 (Theiler, J., concurring in part and dissenting in part) (footnote omitted), *aff'd*, 443 N.W.2d 734, 770-78 (1989).

236. *See, e.g.*, *Brumley*, 963 P.2d at 1234-37 (Six, J., dissenting); *Freeman*, 443 N.W.2d at 751-54; *Vanguard*, 459 N.W.2d at 319 (reviewing both dictionary definitions and decisions of other courts concerning distinctions between "an," "any," "the," and "a" and commenting that "[a]dherence to a correct usage of the English language in insurance contract construction promotes a uniform, reliable, and reasonable foundation upon which policyholders and insurers alike may rely when they enter into a contractual agreement").

237. *See, e.g.*, *Freeman*, 408 N.W.2d at 159 (Thieler, J., concurring in part and dissenting in part), *aff'd*, 443 N.W.2d at 770 (Archer, J., concurring in part and dissenting in part), 774 (Cavenagh, J., concurring in part and dissenting in part) (concluding that "an" insured language is ambiguous and highly technical).

238. *Williamson*, 1998 WL 831476, at *7 (quoting Douglas R. Richmond & Darren A. Black, *Expanding Liability Coverage: Insured Contracts and Additional Insureds*, 44 DRAKE L. REV. 781, 808 (1996)).

239. *Brumley*, 963 P.2d at 1227 (emphasis omitted).

exceptions to coverage separately for each insured.[240] Courts, considering the effect of the clause in conjunction with the intentional act exclusion, may conclude that the severability clause creates an ambiguity as to claims against negligent family members. This conclusion might be drawn because, on one hand the contract excludes coverage for injury arising from the intentional acts of any insured, but on the other hand the contract assures that each insured enjoys severable contractual rights.[241] However, not all courts agree on the effect of the severability clause. For example, some courts conclude that no ambiguity is created and that the specific exclusion should control over the more general severability clause.[242]

The cases reveal that the subtle distinctions between "an," "any," and "the," particularly when coupled with the severability clause common to most insurance contracts, perplex many courts and leave them deeply divided as to the meaning of these terms and clauses within the insurance contracts. This deep disagreement among courts suggests that the plain reading of current insurance contracts will not alone yield a predictable result.

B. Should Non-Offending Family Members Be Covered for Statutory and Negligent Claims of Liability Arising Out of Intentional Acts of Family Members?

Results in these cases are guided by the court's perception of the reasonable expectations of insureds, on the court's careful reading of the insurance contract, and on the underlying public policies of not paying claims arising from intentional acts. Yet, as enumerated above, there is no clear

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240. *See* Walker v. Lumbermens Mut. Cas. Co., 491 S.W.2d 696, 699 (Tex. Civ. App. 1973).

241. *Brumley*, 963 P.2d at 1228; *see also* Talley v. MFA Mut. Ins. Co., 620 S.W.2d 260 (Ark. 1981) (holding that coverage for claims against parents are severable and are not expected or intended from the standpoint of the insured parents); Arenson v. National Auto. & Cas. Ins. Co., 286 P.2d 816, 818 (Cal. 1955); Premier Ins. Co. v. Adams, 632 So. 2d 1054, 1057 (Fla. Dist. Ct. App. 1994) (holding that an exclusion of coverage for intentional acts of "any" insured creates an ambiguity when read with the severability clause and provides coverage to parents of a minor who sexually abused a child); *Walker*, 491 S.W.2d at 699.

242. In rejecting the ambiguity argument, one court explained that "[t]he inclusion of a severability clause within the contract is not inconsistent with the creation of a blanket exclusion for intentional acts. Instead, the inquiry is whether the contract indicates that the parties intended such a result." Chacon v. American Family Mut. Ins. Co., 788 P.2d 748, 752 n.6 (Colo. 1990) (en banc). When the policy provides that coverage "does not apply to property damage 'which is expected or intended by any insured . . . [the] provision clearly and unambiguously expresses an intention to deny coverage to all insureds when damage is intended or expected as a result of the actions of any insured.'" *Id.* at 752; *see also* Worcester Mut. Ins. Co. v. Marnell, 496 N.E.2d 158, 161 (Mass. 1986); American Family Mut. Ins. Co. v. Copeland-Williams, 941 S.W.2d 625, 628-30 (Mo. Ct. App. 1997); Caroff v. Farmers Ins. Co., 989 P.2d 1233, 1237 (Wash. Ct. App. 1999).

judicial trend in claims for coverage by the non-offending spouse or parents in these cases. The cases reveal that courts are deeply conflicted on whether insurers should defend and pay these claims against innocent coinsureds. Strict reliance on contract interpretation has proven to be an unsatisfactory approach because judicial interpretation of the insurance contract is incredibly variable, even on identical or very similar language. The reasonable expectation doctrine is not a particularly satisfying tool to inform decision-making; it largely turns on what a judge believes those expectations to be, and it has proven equally variable.

Relying more on an analysis of public policy concerns to determine the outcome may yield a more satisfactory result. Public policies in favor of and against coverage are not equally balanced when it comes to deciding coverage for the merely negligent coinsured. It is true that, in these cases, arguments in favor of deterrence and against insuring for anything but fortuitous and unintentional occurrences collide with arguments in favor of victim compensation and application of default rules in favor of the insured. However, few courts suggest that providing insurance coverage may encourage wives to conspire with pedophilic husbands[243] or parents to neglect their parental duties. An insurance contract covering the negligence claim does not reward the intentional wrongdoer except indirectly insofar as the wrongdoer is also a plaintiff. Further, deterrence principles are less compelling against the negligent coinsured.

One justification for allowing coverage derives from the principle that tort law and insurance law ought to be coextensive to the extent possible. Courts have exposed ordinary people to civil liability for the everyday tragedies of dysfunctional family life in jurisdictions where judicial decisions have eroded the traditional barriers to liability for the conduct of others and moved tort law toward a vision of society steeped in "mutual dependency" with interconnected duties and obligations to one another. These new social obligations and tort liability risks demand insurance no less than liability for any other negligence. Clearly the social utility of new duties comes with a price—the potential for new liability. For the consumer, the worst situation is to reside in a jurisdiction that establishes duties of mutual protection from intentional acts of others and then eschews coverage for negligent failure to protect. As Professor Fischer explains, a more or less coextensive insurance and tort system is generally desirable and logical:

> Joining the expansion of rules of substantive liability and obligation with the expansion of insurers' consensual obligations is hardly surprising. The presence of insurance has long influenced the development of doctrine

243. *But see Brumley*, 963 P.2d at 1237 (Six, J., dissenting) (quoting Jessica M.F. v. Liberty Mut. Fire Ins. Co., 561 N.W.2d 787, 796 (Wis. Ct. App. 1997) (Schudson, J., concurring) (warning that "collusion could increase as sexually-abusive families discover[] they could not only assault children, but gain insurance recoveries as well")).

> in both policy-based (i.e., tort) and consensual transaction (i.e., contract) responsibility. For one to expect that courts would build a legal structure of doctrine designed to provide compensation to victims without also ensuring the presence of available means to provide compensation to those victims is illogical.[244]

It is admittedly simplistic to argue that the risk of liability upon innocent or negligent coinsureds must fall somewhere and that insurers have a greater ability to bear such a cost than a single family.[245] However, insurers know or at least have some ability to anticipate how a jurisdiction might view claims of negligent supervision or claims against spouses and the scope of statutory parental liability laws. Insureds, on the other hand, lack such specific legal knowledge about viable tort theories that may deplete their financial resources. Moreover, particularly in light of the variability of judicial decisions and insurer responses to claims, consumers do not have specific information about how their insurance contact's particular intentional act exclusion will be interpreted. The insurer's superior access to information about tort law, its ability to "calculat[e] the aggregate risk,"[246] and its risk spreading potential, justifies placing the burden on insurers over insureds in close cases.[247] In a general sense, consumers only understand that insurers purport to sell and consumers need to purchase insurance that keeps pace with the tort duties imposed upon them so that they can safeguard their family assets.[248] When courts determine that it is desirable under tort law to impose certain duties on individuals and to compensate certain kinds of victims, then, absent clearly written exclusions and except when clear public policy dictates otherwise, interpreting insurance contracts in favor of coverage yields a superior outcome both for the consumer and the victim[249] without exposing an insurer to incalculable risks.

IV. CONCLUSION

Increasingly, tort and statutory law is expanding individual duties to others. Statutory parental liability laws impose vicarious liability on parents for the misdeeds of their children, regardless of parental negligence. In the area of negligent supervision, negligent entrustment, and premises liability,

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244. Fischer, *supra* note 211, at 1059-60 (footnotes omitted).

245. *See id.* (noting that insurers are efficient risk spreaders and risk bearers and that broadening legal liability has been influenced by the assumption that insurance is available to spread and bear risks).

246. *Id.* at 1062.

247. *See id.* at 1047-50.

248. Fischer explains that pro-insured default rules are justified in part because of the imbalance in information between the insured and the insurer and the resulting incentive to provide more information to the insured. *Id.* at 1059-64.

249. *Id.* at 1060-61.

the fact intensive nature of the claims means that they are costly claims to litigate. Furthermore, courts now seem more willing to consider negligence claims against spouses for the criminal conduct of their mates because courts deem it desirable that individuals look out for others, particularly children.

The related insurance issues confound courts. Innocent or negligent coinsureds, pulled into tort litigation by expanding tort duties, are caught between competing public policy tensions. Deterrence aspects of civil liability and the fortuity limitation on one hand compete with victim compensation and insurance law's built-in preference toward coverage on the other. The concerns against coverage that ground the intentional act exclusion are attenuated, at best, in claims against innocent or negligent coinsureds because these claims are not based on intentional conduct, but have developed wholly out of negligence law principles, even though the claims do spring from someone's intentional conduct. In this morass, court decisions are variable and unpredictable and might yield more satisfying and consistent decisions by considering public policy.