Sexual Abuser Insurance in Alaska: A Note on *St. Paul Fire & Marine Insurance Co. v. F.H.; K.W.*[*]

This Note discusses the insurability of acts of sexual abuse as raised in the recent Ninth Circuit case of St. Paul Fire & Marine Insurance Co. v. F.H.; K.W. *After reviewing the facts of* St. Paul Fire, *the Note discusses Alaska's law on the issues of insurability of intentional acts in general and whether sexual abuse can ever be within the scope of employment. The Note then compares Alaska's law to that of other states. Finally, the Note analyzes the Ninth Circuit's decision in* St. Paul Fire *and concludes that although sexual abuser insurance currently exists in Alaska as a result of this case, Alaska's courts should reject this policy when they next consider the issue.*

I. INTRODUCTION

K.W. was sexually abused for three years by the executive director of Big Brothers and Big Sisters of Alaska ("Big Brothers").[1] Big Brothers's insurance company sought a declaratory judgment that the professional liability policy it had issued to Big Brothers did not cover the executive director's acts of sexual abuse.[2] In 1995, without any guidance from Alaska's courts, the United States Court of Appeals for the Ninth Circuit decided that insurance for acts of sexual abuse is not against Alaska's public policy.[3]

Insurance is generally not available to cover an individual's own intentional acts.[4] Sexual abuse is an intentional act and is

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* 55 F.3d 1420 (9th Cir.), *cert. denied*, 116 S.Ct. 674 (1995). Note that the name of the boy and his guardian are omitted to preserve confidentiality.

1. *Id.* at 1421.

2. St. Paul Fire & Marine Ins. Co. v. F.H., No. A90-042 Civ. (D. Alaska July 13, 1993).

3. *St. Paul Fire*, 55 F.3d at 1425.

4. *See, e.g.*, Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co., 18 Cal. Rptr. 2d 692, 704 (Cal. Ct. App. 1993) (citing Cal. Ins. Code § 533 (West 1994)) (reflecting the "fundamental public policy of denying coverage for willful wrongs"); Atlantic Employers Ins. Co. v. Chartwell Manor Sch., 655 A.2d 954, 957 (N.J. Super. Ct.

therefore generally considered uninsurable.[5] Although Alaska's courts have never specifically addressed this issue, the Ninth Circuit Court of Appeals held that Big Brothers's insurance company was financially liable for damages caused by the executive director's intentional acts of sexual abuse.[6]

After a brief look at the facts of *St. Paul Fire & Marine Insurance Co. v. F.H.; K.W.*[7], this Note outlines the state of Alaska law prior to that decision. Because Alaska's law on the insurability of acts of sexual abuse is virtually nonexistent, this section of the Note will focus on rulings in two main areas that hint at the direction in which Alaska law had been moving. First, although the law is sparse, Alaska had considered the insurability of intentional acts as a class.[8] Second, Alaska had considered whether it is possible to abuse someone sexually without exceeding the scope of one's employment.[9] Most of the law in this area focuses on the issue of respondeat superior liability.[10] After considering the law as it stood in Alaska, this Note will compare Alaska's law to the law in other states. The Note will then appraise the Ninth Circuit's decision in *St. Paul Fire* and consider issues of public policy.

II. THE FACTS OF THE CASE

Kenneth McQuade was employed as the executive director for Big Brothers when he began to sexually abuse K.W., one of the children in the program.[11] One of McQuade's duties as executive

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App. Div. 1995) (stating that intentional acts are normally not covered by insurance as a matter of public policy); State Farm Mut. Auto. Ins. Co. v. Martin, 660 A.2d 66, 68 (Pa. Super. Ct. 1995), *appeal denied*, 678 A.2d 366 (Pa. 1996) (stating it is against public policy to provide insurance coverage for intentional acts).

5. *See, e.g.*, St. Paul Ins. Co. v. Cromeans, 771 F. Supp. 349, 352-53 (N.D. Ala. 1991) (noting that all contracts insuring against damage from sexual misconduct are void as against public policy under applicable Alabama law); Horace Mann Ins. Co. v. Barbara B., 846 P.2d 792, 801 (Cal. 1993) (Baxter, J., concurring) (holding that public policy prohibits an insurer from providing coverage for injuries resulting from the sexual molestation of a child); Smith v. Sears, Roebuck & Co., 447 S.E.2d 255, 257 (W. Va. 1994) (noting that most courts deny liability insurance coverage for alleged sexual misconduct).

6. *St. Paul Fire*, 55 F.3d at 1425.

7. 55 F.3d 1420 (9th Cir. 1995).

8. *See, e.g.*, Atlas Assurance Co. of Am. v. Mistic, 822 P.2d 897 (Alaska 1991) (holding that an arsonist cannot recover on his fire insurance policy as a matter of public policy).

9. *See, e.g.*, Doe v. Samaritan Counseling Ctr., 791 P.2d 344 (Alaska 1990).

10. *Id.*

11. *St. Paul Fire*, 55 F.3d at 1421.

director was to match the volunteer "big brothers" and "big sisters" with the boys and girls in the program.[12] McQuade matched himself with K.W. as the boy's "big brother."[13] McQuade continued his abuse of K.W. for three years, until he was arrested in 1986.[14]

The boy's mother, F.H., brought a civil action against McQuade and Big Brothers in Alaska Superior Court in 1986.[15] The superior court granted partial summary judgment to Big Brothers, holding that the organization was not liable under the doctrine of respondeat superior for McQuade's acts of sexual abuse.[16] F.H. settled the claims against Big Brothers and dismissed them from the litigation.[17] F.H. later settled with McQuade for an amount in excess of one million dollars.[18] Under the settlement agreement, F.H. and K.W. agreed not to enforce the monetary settlement against McQuade in return for his assignment of any rights he had against St. Paul Fire & Marine Insurance Company as a result of his sexual abuse liability.[19]

St. Paul Fire & Marine Insurance Company had issued a professional liability insurance policy to Big Brothers that stated that "[t]he named insured shall include any individual or organization named in this coverage summary. It also includes any partner, executive officer, director, stockholder or employee working for you within the scope of their duties."[20] The policy also added an exclusion stating that "[t]here is no coverage for the individual Big Brother and Big Sister if the event is in violation of any federal, state, or local law."[21] Finally, the policy added another exclusion within the criminal acts exclusion, stating that "[t]his specific exclusion of violations of law does not apply to other insureds named in this agreement."[22]

Basing jurisdiction on diversity of citizenship, St. Paul Fire & Marine Insurance Co. sought a declaratory judgment in the United States District Court for the District of Alaska that the policy it issued to Big Brothers did not cover McQuade for the sexual abuse

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. Reply Brief of Appellants at 9, St. Paul Fire & Marine Ins. Co. v. F.H., 55 F.3d 1420 (9th Cir. 1995) (No. 93-35746).
21. *Id.* at 9-10.
22. *Id.* at 10.

of K.W.[23] The district court believed that Alaska law was unclear on the issue of coverage and attempted certification to the Alaska Supreme Court under Alaska Rule of Appellate Procedure 407, but the supreme court declined to respond.[24]

The district court granted St. Paul Fire's motion, citing its own 1987 decision in *Allstate Insurance Co. v. Roelfs*[25] in finding that "it is against Alaska's public policy to permit a person to be insured against a claim of sexual abuse."[26] The district court reasoned that "[i]t is possible that the Alaska Supreme Court considered *Roelfs* when it decided that Alaska law was sufficiently clear on the certified issues that further elucidation was not required."[27] F.H. and K.W. appealed to the Court of Appeals for the Ninth Circuit.[28]

III. LEGAL BACKGROUND

A. Alaska Law Prior to *St. Paul Fire*

Alaska law on insurance coverage for intentional acts is sparse, and Alaska law on insurance coverage for sexual abuse is essentially nonexistent. As one of the main issues in *St. Paul Fire* is whether sexual abuse can occur within the scope of employment, much of the relevant law in Alaska involves respondeat superior liability, which also depends on what actions are considered to be within the scope of employment.[29]

The Alaska Supreme Court addressed the issue of allowing insurance coverage for intentional acts in *Atlas Assurance Co. of America v. Mistic*.[30] The case involved a woman whose husband burned down a house that they shared as tenants in common and whether she could receive any compensation under the fire insurance policy in which they were named as co-insureds.[31] The

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23. St. Paul Fire & Marine Ins. Co. v. F.H., No. A90-042 Civ. (D. Alaska July 13, 1993).

24. *Id.*

25. 698 F. Supp. 815 (D. Alaska 1987).

26. St. Paul Fire & Marine Ins. Co. v. F.H., No. A90-042 Civ. (D. Alaska July 13, 1993).

27. *Id.* at 2 n.2.

28. St. Paul Fire & Marine Ins. Co. v. F.H., 55 F.3d 1420 (9th Cir.), *cert. denied*, 116 S. Ct. 674 (1995).

29. *See, e.g.*, Williams v. Alyeska Pipeline Service Co., 650 P.2d 343 (Alaska 1982); Luth v. Rogers & Babler Construction Co., 507 P.2d 761 (Alaska 1973); Fruit v. Schreiner, 502 P.2d 133 (Alaska 1972).

30. 822 P.2d 897 (Alaska 1991).

31. *Id.* at 898.

Alaska Supreme Court held that when the insured intentionally burned down the house, the innocent co-insured was entitled to recover some portion of proceeds unless the policy had a clear exclusion for intentional acts.[32] However, the court noted that public policy dictates that an insured who intentionally sets fire to property covered by the insurance policy may not recover under the policy.[33] Perhaps more importantly, the court also noted that "[w]here policy language clearly precludes recovery if any of the co-insureds wrongfully cause the loss, the courts will deny recovery [even] to an innocent co-insured."[34] In this case, however, Atlas conceded that it was not clear from the language of the policy whether Mistic was precluded from recovery.[35]

Although Alaska's courts have not specifically addressed the question of allowing insurance for one's acts of sexual abuse, the Alaska Supreme Court has considered whether sexual abuse can occur within the scope of employment. In *Doe v. Samaritan Counseling Center*,[36] a patient sought to hold a counseling center liable under respondeat superior for sexual acts of one of its therapists.[37] The therapist had allegedly kissed and fondled Doe during two of her sessions.[38] Doe canceled her counseling sessions, but she alleged that she and her former therapist continued to meet outside the office for about a month, until sexual intercourse occurred.[39]

The supreme court ruled that respondeat superior liability on the part of the clinic was not precluded simply because the employee's alleged acts were sexual, and that the time and place of the alleged conduct was sufficiently related to the employee's work to allow respondeat superior liability.[40] In so holding, the court diverged from its analysis in previous cases of respondeat superior liability[41] and "significantly expanded the boundaries of an employer's vicarious liability under Alaska common law."[42]

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32. *Id.* at 899.
33. *Id.*
34. *Id.* at 900.
35. *Id.*
36. 791 P.2d 344 (Alaska 1990).
37. *Id.* at 345.
38. *Id.*
39. *Id.*
40. *Id.* at 348-49.
41. *See* Luth v. Rogers & Babler Construction Co., 507 P.2d 761 (Alaska 1973); Fruit v. Schreiner, 502 P.2d 133 (Alaska 1972).
42. Cliona Mary Robb, Note, *Bad Samaritans Make Dangerous Precedent: The Perils of Holding an Employer Liable for an Employee's Sexual Misconduct*, 8 ALASKA L. REV. 181 (1991).

The court in *Samaritan* acknowledged the general rule that "[u]nder the doctrine of respondeat superior, an employer will be held liable for the tort of its employee [only] if the employee's act was committed within the 'scope of the employment,'"[43] but it added that "[w]hile most authorities concur with this basic principle, there is disagreement over the meaning of the term 'scope of employment.'"[44] The court referenced a line of Alaska cases beginning in 1972 that sought to define the term.[45]

In *Fruit v. Schreiner*,[46] the Alaska Supreme Court rejected the traditional "control theory," which limits the employer's liability to acts that the employee "committed with the implied authority, acquiescence or subsequent ratification of the employer,"[47] and adopted instead the "enterprise theory," which essentially uses a "motivation to serve" test.[48] The court found that a trip by an insurance salesman to socialize with other insurance salesmen during a sales convention might have been at least partially motivated by the salesman's desire to improve his own sales skills, thus benefitting his employer.[49] Respondeat superior liability might therefore be appropriate for injuries inflicted by the salesman's automobile accident while en route.[50]

Interestingly, the *Fruit* court seemed specifically to disallow respondeat superior liability (i.e., finding an act within the scope of one's employment) for intentional acts. The court noted that "[t]he rule of respondeat superior . . . is limited to requiring an enterprise to bear the loss incurred as a result of the employee's *negligence*."[51] The court further noted that to find an act within the scope of one's duties, "[t]he acts of the employee need be so

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43. *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 346 (Alaska 1990).

44. *Id.*

45. *Id.* (citing Fruit v. Schreiner, 502 P.2d 133 (Alaska 1972); Luth v. Rogers & Babler Construction Co., 507 P.2d 761 (Alaska 1973); Williams v. Alyeska Pipeline Service Co., 650 P.2d 343 (Alaska 1982)).

46. 502 P.2d 133 (Alaska 1972).

47. *Id.* at 140.

48. The court focuses on the benefit conferred by the employee to the employer rather than using the term "motivation to serve," but describes a situation in which liability arises through the work the "'servant was employed to do'" and "from the relationship of the enterprise to society rather than from . . . misfeasance on the part of the employer." *Id.* (quoting Young B. Smith, *Frolic & Detour*, 23 COL. L. REV. 716, 717 (1923)). See Robb, *supra* note 42, at 186, for additional support that this amounts to a "motivation to serve" test.

49. *Fruit*, 502 P.2d at 142.

50. *Id.*

51. *Id.* at 141 (emphasis added).

connected to his employment as to justify requiring that the employer bear that loss."[52]

One year after *Fruit*, the Alaska Supreme Court again addressed the definition of "scope of employment" in *Luth v. Rogers & Babler Construction Co.*[53] *Luth* involved another automobile accident, this one occurring while the employee was returning home from a work site about twenty-five miles away.[54] The *Luth* court noted that *Fruit* had adopted the "enterprise theory" without rejecting the criteria of the *Restatement (Second) of Agency*.[55]

More importantly, the *Luth* court specifically listed the factors that it considered important in finding vicarious liability.[56] The court noted that the definition of "'scope of employment' has long been tied to the employer's right to control the employee's activity at the time of his tortious conduct,"[57] but acknowledged that while control is a factor in determining whether the employee's activity is sufficiently related to the employer's enterprise to find vicarious liability, it is not a prerequisite.[58] Similarly, the court noted that the benefit to the employer from the employee's activity is a relevant factor in determining liability, but it is not the sole determinant of whether vicarious liability exists.[59] The court left open the question of whether benefit to the employer was a necessary, but not sufficient factor, or a factor that was not even necessary.

Beyond these two traditional factors, the court listed as additional considerations every factor cited in sections 228 and 229 of the *Restatement (Second) of Agency*.[60]

> In regard to the standards of Restatement (Second) of Agency § 228 (1958), we think the following conduct of a servant may be considered as indicative that it is within the scope of employment: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

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52. *Id.* (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 69, at 459 (4th ed. 1971)).

53. 507 P.2d 761 (Alaska 1973).

54. *Id.* at 762.

55. *Id.* at 763.

56. *See id.* at 764.

57. *Id.*

58. *Id.*

59. *Id.*

60. RESTATEMENT (SECOND) OF AGENCY §§ 228-229 (1958).

> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.[61]

The court added the language of the *Restatement (Second) of Agency*, section 229:[62]

> (1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized. (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered: (a) whether or not the act is one commonly done by such servants; (b) the time, place and purpose of the act; (c) the previous relations between the master and the servant; (d) the extent to which the business of the master is apportioned between different servants; (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, ha[s] not been entrusted to any servant; (f) whether or not the master has reason to expect that such an act will be done; (g) [the] similarity in quality of the act done to the act authorized; (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant; (i) the extent of departure from the normal method of accomplishing an authorized result; and (j) whether or not the act is seriously criminal.[63]

The court determined that *Fruit* left the question of which acts fall within the scope of employment up to the jury, with the outcome dependent on the facts of each case.[64] The court then concluded that a jury looking at the facts in *Luth* and weighing the above factors might decide that the employee's commuting from work was within the scope of his employment, despite a widely accepted "going-and-coming" rule that places commuting time outside of the scope of employment.[65] Justice Connor criticized the majority, saying that "[t]he difficulty with the majority opinion is that it drastically increases the tort liability of employers without

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61. *Luth*, 507 P.2d at 764 n.14. See RESTATEMENT (SECOND) OF AGENCY § 228 (1958) for an identical list of factors. Note as significant, however, that the Second Restatement introduces factors (a)-(d) by stating that "[c]onduct of a servant is within the scope of employment if, but only if" each of the factors is satisfied, whereas the Alaska Supreme Court labels the factors as "indicative" that an employee's action is within the scope of employment.

62. RESTATEMENT (SECOND) OF AGENCY § 229 (1958).

63. 507 P.2d at 764 n.14. Again, the language is identical to that in the Restatement (Second) of Agency § 229 (1958).

64. 507 P.2d at 764.

65. *Id.* at 765-66.

providing any coherent or rationalizing principle by which to keep such liability within reasonably predictable bounds."[66]

In *Williams v. Alyeska Pipeline Service Co.*,[67] the Alaska Supreme Court considered whether an *intentional* tort might occur within the scope of one's duties, thus subjecting the master to respondeat superior liability.[68] The case involved a union steward who was alleged to have led an assault against Williams to settle a labor dispute.[69]

The court reiterated the factors identified in *Luth*, this time calling them useful "guidelines" in determining whether the assault occurred within the scope of the steward's duties.[70] The court reasoned that respondeat superior liability covers both negligent and intentional torts, if they occur within the scope of employment.[71]

The court held that because (1) the steward acted to resolve a perceived grievance of his members, (2) his acts occurred within authorized time and space limits, (3) his use of threats and force was not unexpectable given his position and (4) he was motivated, at least in part, by a desire to serve what he regarded as the purposes of his union,[72] he was acting within the scope of his duties, and thus respondeat superior liability might attach to the union.[73]

In light of these cases, the *Samaritan*[74] court announced that Alaska had adopted a "flexible, multi-factored test"[75] as an alternative to the "overly technical 'control' approach."[76] This multi-factored test is apparently that applied in *Luth* and *Williams*. Significantly though, *Samaritan* is the first case in which the court

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66. *Id.* at 770 (Connor, J., concurring in part and dissenting in part).

67. 650 P.2d 343 (Alaska 1982).

68. *See id.* at 348 n.9.

69. *Id.* at 345.

70. *Id.* at 349.

71. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 245 (1958)("A master is subject to liability for the intended tortious harm by a servant . . . by an act done in connection with the servant's employment, although the act was unauthorized, if the act was not unexpectable in view of the duties of the servant.")). *But cf.* Fruit v. Schreiner, 502 P.2d 133, 141 (Alaska 1972)(noting that "[t]he rule of respondeat superior . . . is limited to requiring an enterprise to bear the loss incurred as a result of the employee's *negligence*"(emphasis added)).

72. *Williams*, 650 P.2d at 350. In fact, the court noted that the steward could have had no personal motives for his actions. *Id.*

73. *Id.* at 350-51.

74. 791 P.2d 344 (Alaska 1990).

75. *Id.* at 346.

76. *Id.*

found that respondeat superior liability might be possible for an employee's sexual misconduct, even though sexual misconduct clearly is not motivated at all by any desire to serve the employer.[77]

Thus the court in *Samaritan* took advantage of the door that had been left open by its post-*Fruit* decisions but never used: that the benefit to the employer from the employee's activity is a *relevant* factor in determining liability, but it is not the sole determinant.[78] The employee's motivation to serve is merely one of several guidelines to be considered in determining whether respondeat superior liability is possible.[79]

Interestingly, though, the *Samaritan* court refused to rule that motivation to serve the employer was irrelevant. Rather, the court expanded the definition of "motivation to serve," determining that the "motivation to serve" test was satisfied when the "tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities."[80] In its attempt to justify its position, the *Samaritan* majority seems to confuse the meaning of section 228(2) of the Restatement (Second) of Agency[81] (and hence one of its own *Luth* factors[82]), which provides that the employee's act is not within the scope of employment if it is "different in kind from that authorized."[83] The majority reasons that because an employee "is rarely authorized to commit a tort, [to give the provision meaning, we] therefore construe this provision to mean only that the act which *leads to* the tortious behavior cannot be different in kind from acts the employee is authorized to perform in furtherance of the employer's enterprise."[84] What the majority ignores is that its interpretation essentially renders meaningless the

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77. *See* Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 350-54 (Alaska 1990) (Moore, J., dissenting). In his strong dissent, Justice Moore writes, "There is no reasonable interpretation under which [the therapist's] sexual misconduct possibly could benefit Samaritan." *Id.* at 350 (footnote omitted).

78. Luth v. Rogers & Babler Constr. Co., 507 P.2d 761, 764 (Alaska 1973) (citing Gossett v. Simonson, 411 P.2d 277, 279 (Or. 1966)).

79. *Williams*, 650 P.2d at 349 n.10 (citing RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).

80. *Samaritan*, 791 P.2d at 348. *Cf.* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 70, at 506 & n.48 (5th ed. 1984 & Supp. 1988) (When the employee "acts from purely personal motives . . . in no way connected with the employer's interests, he is considered in the ordinary case to have departed from his employment, and the master is not liable."(footnote omitted)).

81. RESTATEMENT (SECOND) OF AGENCY § 228(2) (1958).

82. *See Luth*, 507 P.2d at 764.

83. RESTATEMENT (SECOND) OF AGENCY § 228(2) (1958).

84. *Samaritan*, 791 P.2d at 348 (emphasis added).

"different in kind" condition of the Restatement, while a perfectly consistent interpretation is readily apparent: respondeat superior liability is meant to apply to an employee's negligent acts[85] and those intentional acts that are not "different in kind," such as the court found in *Williams*. Justice Moore questions what the majority views as the authorized action giving rise to sexual misconduct and points out that "it is just false that [the therapist's] sexual misconduct arose out of psychotherapy."[86]

Justice Moore takes issue with the majority's statement "that it could reasonably be concluded that the resulting sexual conduct was 'incidental' to the therapy,"[87] claiming that even under the weakened "motivation to serve" test, "respondeat superior liability should not apply because therapist-patient sex is not 'reasonably incidental' to psychotherapy."[88] For Justice Moore, "[s]exual misconduct is not an improper method of carrying out the authority granted to a therapist; rather, it constitutes an intentional abuse of that authority for personal gratification."[89] Finally, in his dissent, Justice Moore considers the rationale for respondeat superior liability discussed in *Fruit* and referenced by the majority in *Samaritan*. The *Fruit* court stated that one of the rationales for respondeat superior was "to include in the costs of operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefitted

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85. The court seemed to suggest this in *Fruit*, noting that "[t]he rule of respondeat superior . . . is limited to requiring an enterprise to bear the loss incurred as a result of the employee's *negligence*." Fruit v. Schreiner, 502 P.2d 133, 141 (Alaska 1972) (emphasis added).

86. *Samaritan*, 791 P.2d at 352 (Moore, J., dissenting).

87. *Id.* at 348 (footnote omitted).

88. *Id.* at 350-51 (Moore, J., dissenting). Note that just six months after *St. Paul Fire*, the Alaska Supreme Court itself found that a gynecologist's sexual assault of a patient did *not* result from medical treatment. D.D. v. Ins. Co. of N. Am., 905 P.2d 1365, 1368 (Alaska 1995) (ruling that "[the gynecologist] did not injure [the victim] by treating her; he injured her during the time he was supposed to be treating her"). In so reasoning, the court found that the gynecologist's acts were "outside of the traditional scope of malpractice." *Id.* at 1370. In its dubious attempt to distinguish the case from *Samaritan*, the court noted only that a therapist's mishandling of the "transference phenomenon" *was* within the scope of malpractice. *Id.* at 1369. Interestingly, it was the finding that the assault here did *not* constitute medical malpractice that enabled the victim to pursue a claim under the building owner's insurance policy, which explicitly excluded claims arising out of medical treatment. *Id.* at 1366. Note that the court's decision in *D.D.* involved only the building owner's liability and not that of the assailant. It therefore leaves unanswered the question of how Alaska's own courts would view *St. Paul Fire*.

89. *Samaritan*, 791 P.2d at 354 (Moore, J., dissenting).

by the enterprise."[90] As Justice Moore points out, "[t]herapist-patient sex . . . is not an inevitable cost of mental health care. It is a cost imposed by therapists who intentionally disregard the standards of conduct of mental health professionals for personal sexual gratification."[91]

Following the *Samaritan* decision, the federal courts have interpreted Alaska's law on "scope of employment" issues in a variety of contexts not involving sexual misconduct. For example, in 1992, the United States District Court for the District of Alaska considered whether state officials who might not have complied with an Alaska statute regarding the taping of phone conversations were acting within the scope of their employment.[92] Although the case was decided under federal law, the court, after finding that the employees were acting within the scope of their employment, implied that it would have made the same ruling under Alaska law. In dicta, it referred to *Samaritan* and stated that "Alaska views scope of employment liberally."[93]

In *Coon v. Fey*,[94] the United States Court of Appeals for the Ninth Circuit considered an Alaska case in which an IRS agent allegedly prepared a false affidavit hoping to obtain information from a third party that would be relevant for the collection of Coon's delinquent taxes.[95] The court quoted some of the *Luth* factors and then stated that when "the alleged tortious conduct 'arises out of and is reasonably incidental to the employee's legitimate work activities, the 'motivation to serve' test will have been satisfied.'"[96] The court also noted that under Alaska's principles of respondeat superior, "an employer may be held liable for both the negligent and intentional torts of its employees."[97] Combining these rationales, the court found that the IRS agent was acting within the scope of his employment.[98]

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90. *Fruit*, 502 P.2d at 141.

91. *Samaritan*, 791 P.2d at 354 (Moore, J., dissenting).

92. United States v. Cheely, 814 F. Supp. 1430, 1439-43 (D. Alaska 1992).

93. *Id.* at 1443 n.14 (citing *Samaritan*, 791 P.2d at 346-50).

94. 29 F.3d 631, 1994 WL 283620 (9th Cir. (Alaska)) (unpublished disposition). Note that unpublished dispositions are not precedential. 9TH CIR. R. 36-3 ("Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent . . . .").

95. *Id.* at **1.

96. *Id.* (quoting *Samaritan*, 791 P.2d at 348).

97. *Id.* at **2 (citing Williams v. Alyeska Pipeline Serv. Co., 650 P.2d 343, 348-49 (Alaska 1982)).

98. *Id.*

In 1995, the Ninth Circuit considered another Alaska case involving alleged torts by IRS employees.[99] The court found the employee's acts unquestionably within the scope of their employment and the appeal to be frivolous,[100] but not before noting that in determining whether an act is within the scope of employment, the court should look to three nonexclusive factors: (1) whether the conduct is of the kind the employee is employed to perform; (2) whether the conduct occurs substantially within the authorized time and space limits; and (3) whether the conduct is actuated, at least in part, by a purpose to serve the employer.[101]

The last Alaska case relevant to the *St. Paul Fire* decision is actually a pre-*Samaritan* case from the United States District Court for the District of Alaska, *Allstate Insurance Co. v. Roelfs*.[102] In this case, which in many ways is the most similar to *St. Paul Fire*, Allstate sought a declaratory judgment that it was "not liable to defend or indemnify the Roelfs against any claims filed by" the parent of two girls who were sexually abused in the Roelfs household.[103] The Roelfs' homeowners insurance policy contained an exclusion for "bodily injury . . . intentionally caused by an insured person."[104] The Roelfs stipulated that their son had "willfully and intentionally committed various acts of sexual assault and molestation . . . ."[105]

The court acknowledged that the "Alaska Supreme Court has yet to interpret an intentional act exclusion"[106] and that "when interpreting an insurance policy Alaska looks to case law from other jurisdictions construing similar provisions."[107] The court then examined cases from various jurisdictions and drew several conclusions about what Alaska law would have been had the Alaska Supreme Court considered the issue: (1) Alaska would infer intent to cause injury from sexual assault as a matter of

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99. Rowen v. Elliott, 52 F.3d 334, 1995 WL 230347 (9th Cir. (Alaska)) (unpublished disposition).

100. *Id.* at **1-**2.

101. *Id.* at **1 (citing *Samaritan*, 791 P.2d at 347). These are the same factors the court mentioned in Coon v. Fey, 29 F.3d 631, 1994 WL 283620 at **1 (9th Cir. (Alaska)) (unpublished disposition).

102. 698 F. Supp. 815 (D. Alaska 1987).

103. *Id.* at 816.

104. *Id.* at 817 (internal reference omitted).

105. *Id.* at 816 (internal reference omitted).

106. *Id.* at 820.

107. *Id.* (citing Stordahl v. Government Employees Ins. Co., 564 P.2d 63, 66 (Alaska 1977)).

law;[108] (2) this conclusion comported "with the purpose of the intentional acts exclusion clause, which is to 'prevent extending to the insured a license to commit wanton and malicious acts'";[109] (3) while a general rule is that "insurance contracts are construed liberally against the insurer and doubtful language is resolved in favor of the insured, [the] rule does not necessarily apply . . . when the party urging a particular construction is not a party to the contract";[110] and (4) "most people would 'cringe' at the notion that an insurance policy would provide coverage for bodily injury caused by sexual assault . . . ."[111] Based on these conclusions, the court granted Allstate's motion.[112]

This then, at the time that *St. Paul Fire & Marine Insurance Co. v. F.H.* came before the district court, was the legal landscape in Alaska regarding the determination of whether a certain activity fell within the scope of one's employment. Although the Alaska state courts had significantly elaborated on the ability to find liability for intentional acts and on the definition of "motivation to serve," and although in the wake of *Samaritan*, the federal courts had consistently cited it and applied its criteria, *Roelfs* was still good law, and there was still enough question as to the state of Alaska law for the district court to attempt certification of several issues to the Alaska Supreme Court.[113] However, the Alaska Supreme Court declined to respond, and the district court followed *Roelfs*.[114] This result seemed contrary to the widening breadth of "scope of employment" evidenced by *Samaritan*, but *St. Paul Fire* was, after all, not a case of respondeat superior, but rather an insurance case.

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108. *Id.* (citing, e.g., Linebaugh v. Berdish, 144 Mich. App. 750, 376 N.W.2d 400, 405 (1985) (inferring intent to injure from a male's sexual assault of a fourteen-year-old girl); Horace Mann Ins. Co. v. Independent Sch. Dist., 355 N.W.2d 413, 416 (Minn. 1984) (inferring intent to cause bodily injury as a matter of law from a teacher's sexual contacts with a student); Grange Ins. Ass'n v. Authier, 725 P.2d 642, 644 (Wash. Ct. App. 1986) (dicta) (inferring intent to harm a minor from sexual assault as a matter of law)).

109. *Id.* at 820-21 (quoting Farmers Ins. Exch. v. Sipple, 255 N.W.2d 373, 375 (Minn. 1977)).

110. *Id.* at 817 (citing Starry v. Horace Mann Ins. Co., 649 P.2d 937, 939 (Alaska 1982); Flexi-van Leasing Inc. v. Aetna Cas. & Sur. Co., 822 F.2d 854, 856 (9th Cir. 1987)).

111. *Id.* at 818.

112. *Id.* at 822.

113. St. Paul Fire & Marine Ins. Co. v. F.H., No. A90-042 Civ. (D. Alaska July 13, 1993).

114. *Id.*

Despite the similarities between respondeat superior liability and an insurer's liability,[115] it is worth noting that they are not the same. Consider, for example, the Ninth Circuit's statement that "[u]nder the vicarious liability exception to *the general rule that intentional acts are not covered by insurance policies*, an insured may receive coverage for the intentional acts of its agent when the insured is vicariously as opposed to directly liable."[116]

B. The Law in Other States

"Most courts have found sexual molestation to be intentional and excluded from insurance coverage as a matter of law."[117] Most of the states specifically excluding intentional sexual acts from insurance coverage have relied on judicial interpretation of public policy, while others have codified the exclusion.

Those states in which the courts have determined that insurance for sexual abuse is contrary to public policy fall into two groups. The first group finds sexual abuse uninsurable per se, without specifically addressing the insurability of intentional acts generally.[118] The second group notes that insurance for *any* intentional act is contrary to public policy, including sexual abuse.[119]

In the first group, for example, a federal district court in Alabama stated that Alabama's "public policy demands the result" that sexual abuse not be covered by insurance.[120] It summarized Alabama's vision of public policy by stating that "[a]ny other result subsidizes the episodes of child sexual abuse of which its victims

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115. Consider *Williams* and *Samaritan*, for example, as respondeat superior cases and *St. Paul Fire* as an insurance case. Note that all three cases involve shifting the liability for an intentional tort from the perpetrator of the tort to someone else, whether an employer or an insurer.

116. Northern Ins. Co. v. Drake, 915 F.2d 1581, 1990 WL 142502, **1 (9th Cir.(Cal.)) (unpublished disposition)(emphasis added).

117. Commercial Union Ins. Cos. v. Sky, Inc., 810 F. Supp. 249, 253 (W.D. Ark. 1992) (citations omitted).

118. *See* National Union Fire Ins. Co. v. Gates, 530 N.W.2d 223, 227 (Minn. Ct. App. 1995); Horace Mann Ins. Co. v. Fore, 785 F. Supp. 947 (M.D. Ala. 1992); Allstate Ins. Co. v. Jarvis, 393 S.E.2d 489 (Ga. Ct. App. 1990); *see also* St. Paul Ins. Co. v. Cromeans, 771 F. Supp. 349, 352-53 (N.D. Ala. 1991) (noting that all contracts insuring against damage from sexual misconduct are void as against public policy).

119. *See* American Home Assurance Co. v. Cohen, 881 P.2d 1001 (Wash. 1994); Atlantic Employers Ins. Co. v. Chartwell Manor Sch., 655 A.2d 954 (N.J. Super. Ct. App. Div. 1995); State Farm Mut. Auto. Ins. Co. v. Martin, 660 A.2d 66 (Pa. Super. Ct. 1995).

120. Horace Mann Ins. Co. v. Fore, 785 F. Supp. 947, 956 (M.D. Ala. 1992).

complain . . . ."[121] The court added its view of the argument that sexual abuse could occur in the line of a teacher's duties, stating that it was "obvious that sexual abuse is not an activity concerned with education . . . ."[122]

Georgia looks at child molestation as "one of those acts which is 'so extreme that public policy does not permit [it] to be insured.'"[123] Minnesota views sexual and physical abuse as acts that "are not covered as a matter of public policy."[124]

The second group includes states such as New Jersey, which believes that "[i]ntentional acts of the insured are normally not covered by insurance policies as a matter of public policy."[125] Pennsylvania agrees that "it is against the public policy of this Commonwealth to provide insurance coverage for intentional acts."[126] In Washington, there is a general rule that "it is against public policy to insure against liability arising from the intentional infliction of injury on the person of another."[127]

States in each group have considered whether to require evidence of intent to cause harm in child sexual abuse cases or allow intent to be inferred. A Wisconsin district court pointed out that of the fifteen other states that had considered the issue, fourteen had adopted the "inferred intent" approach as early as 1989.[128] To these states may be added Alaska,[129] Arizona,[130] Illinois,[131] Kansas,[132] Kentucky,[133] Louisiana,[134] Maine,[135]

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121. *Id.*

122. *Id.* at 948 (citations omitted).

123. Allstate Ins. Co. v. Jarvis, 393 S.E.2d 489, 490 (Ga. Ct. App. 1990)(citing State Farm Fire & Cas. Co. v. Huie, 666 F. Supp. 1402, 1405 (N.D. Cal. 1987)).

124. National Union Fire Ins. Co. v. Gates, 530 N.W.2d 223, 227 (Minn. Ct. App. 1995)(citation omitted).

125. Atlantic Employers Ins. Co. v. Chartwell Manor Sch., 655 A.2d 954, 957 (N.J. Super. Ct. App. Div. 1995).

126. State Farm Mut. Auto. Ins. Co. v. Martin, 660 A.2d 66, 68 (Pa. Super. Ct. 1995) (citation omitted).

127. American Home Assurance Co. v. Cohen, 881 P.2d 1001, 1005 (Wash. 1994) (citation omitted).

128. Whitt v. DeLeu, 707 F. Supp. 1011, 1014 & n.4 (W.D. Wis. 1989)(listing Arkansas, California, Colorado, Florida, Georgia, Iowa, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, Oklahoma, Washington, [Wisconsin] and West Virginia).

129. *See* Allstate Ins. Co. v. Roelfs, 698 F. Supp. 815, 820 (D. Alaska 1987).

130. *See* State v. Hamilton, 868 P.2d 986, 990 (Ariz. Ct. App. 1993).

131. *See* State Farm Fire & Cas. Co. v. Watters, 644 N.E.2d 492, 496-97 (Ill. App. Ct. 1994), *appeal denied*, 649 N.E.2d 425 (Ill. 1995).

132. *See* Troy v. Allstate Ins. Co., 789 F. Supp. 1134, 1136 (D. Kan. 1992).

133. *See* Goldsmith v. Physicians Ins. Co., 890 S.W.2d 644, 645 (Ky. Ct. App. 1994).

Missouri,[136] Nevada,[137] New Jersey,[138] New York,[139] North Carolina,[140] Ohio,[141] Oregon,[142] Pennsylvania,[143] South Dakota[144] and Texas.[145]

Thus, in these states, even in the absence of a stated public policy against insuring for sexual abuse or intentional acts generally, an insurer can usually avoid liability for a claim arising out of sexual abuse merely by incorporating a standard intentional acts exclusion into the insurance policy. The abuser's intent will be inferred. Note, however, that this question is not dispositive in *St. Paul Fire* because the Ninth Circuit Court of Appeals held that the policy covered intentional acts.[146] When a policy covers intentional acts, it is not important whether the sexual abuser has actual subjective intent to cause harm or has intent inferred by the court.

California is representative of the states that have addressed insurability of intentional acts by statute. The California Court of Appeals has stated that the California Insurance Code "reflects the 'fundamental public policy of denying coverage for willful wrongs.'"[147] California courts have said that Section 533 of the

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134. *See* Belsom v. Bravo, 658 So. 2d 1304, 1306 (La. Ct. App.), *reconsideration denied*, 659 So. 2d 737 (La. 1995).

135. *See* Perreault v. Maine Bonding & Cas. Co., 568 A.2d 1100, 1101 (Me. 1990).

136. *See* State Farm Fire & Cas. Co. v. D.T.S., 867 S.W.2d 642, 645 (Mo. Ct. App. 1993).

137. *See* State Farm Fire Ins. Co. v. Grover, No. CV-S-87-659, LDG, 1990 WL 208908, at *2 (D. Nev. Dec. 15, 1990).

138. *See* Atlantic Employers Ins. Co. v. Tots & Toddlers Pre-School Day Care Ctr., Inc., 571 A.2d 300, 304 (N.J. Super. Ct. App. Div. 1990).

139. *See* Allstate Ins. Co. v. Mugavero, 589 N.E.2d 365, 369 (N.Y. 1992).

140. *See* Nationwide Mut. Ins. Co. v. Abernethy, 445 S.E.2d 618, 620 (N.C. Ct. App. 1994).

141. *See* Ozog v. Nationwide Ins. Co., Nos. 66421, 66428, 1994 WL 631200, at *3 (Ohio Ct. App. Nov. 10, 1994).

142. *See* American Cas. Co. v. A.D., 885 P.2d 726, 729 (Or. Ct. App. 1994).

143. *See* Nationwide Mut. Fire Ins. Co. v. Craig, No. CIV.A. 95-0503, 1995 WL 672397, at *3 (E.D. Pa. Nov. 9, 1995).

144. *See* American Family Mut. Ins. Co. v. Purdy, 483 N.W.2d 197, 201 (S.D.), *cert. denied*, 506 U.S. 870 (1992).

145. *See* State Farm Fire & Cas. Co. v. Gandy, 880 S.W.2d 129, 140 (Tex. Crim. App. 1994), *rev'd on other grounds*, 925 S.W.2d 696 (Tex. 1996).

146. *St. Paul Fire*, 55 F.3d at 1425.

147. Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co., 18 Cal. Rptr. 2d 692, 704 (Cal. Ct. App. 1993) (quoting J.C. Penney Cas. Ins. Co. v. M.K., 804 P.2d 689, 694 n.8 (Cal. 1991)). Section 533 of the California Insurance Code (West 1994) provides in part that "[a]n insurer is not liable for a loss caused by the wilful [sic] act of the insured; but he is not exonerated by the negligence of the insured, or

Insurance Code is "an implied exclusionary clause which by statute is to be read into all insurance policies."[148]

On the other hand, several states have found that allowing insurance for intentional acts, sometimes even sexual misconduct, does not violate public policy. In Tennessee, for example, it is not against public policy for an insurer to cover a doctor's sexual molestation of his patient.[149] The courts in New Mexico have "refused to extend the public policy prohibiting insurance coverage for intentionally produced injuries to unintended consequences of intentional acts"[150] (refusing to infer the abuser's intent to harm the victim).

The courts in Illinois still seem to be struggling with the issue, for although Illinois courts have found a public policy forbidding insurance coverage for sexual abuse of a child,[151] the Illinois Supreme Court "decline[d] to adopt the public policy against insuring for damages resulting from intentional misconduct" in a case involving a retaliatory discharge.[152]

Indiana's courts have ruled that the reasons for the public policy against allowing insurance for intentional acts do not exist when (1) the insured was not induced to engage in the unlawful conduct by reliance on insurability, (2) allowing insurance coverage would not induce future similar unlawful conduct, (3) it does not appear that the insurance was obtained in contemplation of violation of the law, (4) coverage does not allow the wrongdoer unjustly to benefit from his wrong and (5) it is not the insured who will benefit, but the innocent victim.[153] Where these five factors

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of the insured's agents or others." *See also* N. D. Cent. Code § 26.1-32-04 (1995) ("An insurer is not liable for a loss caused by the willful act of the insured, but the insurer is not exonerated by the negligence of the insured or of the insured's agents or others.").

148. United States Fidelity & Guar. Co. v. American Employers' Ins. Co., 205 Cal. Rptr. 460, 464 (Cal. Ct. App. 1984).

149. St. Paul Fire & Marine Ins. Co. v. Torpoco, 879 S.W.2d 831, 835 (Tenn. 1994) (stating that a stronger public policy than not insuring intentional acts is the policy "that ambiguities in insurance policies are to be construed against the drafter of the policy").

150. Baker v. Armstrong, 744 P.2d 170, 172 (N.M. 1987).

151. *See, e.g.*, State Farm Fire & Cas. Co. v. Watters, 644 N.E.2d 492 (Ill. App. Ct. 1994).

152. Dixon Distrib. Co. v. Hanover Ins. Co., 641 N.E.2d 395, 401 (Ill. 1994).

153. Collins v. Covenant Mut. Ins. Co., 604 N.E.2d 1190, 1197 (Ind. Ct. App. 1992) (citing Vigilant Ins. Co. v. Kimbly, 319 N.W.2d 382, 385 (Mich. Ct. App. 1982)), *vacated on procedural grounds*, 644 N.E.2d 116 (Ind. 1994).

are satisfied, insurance for intentional acts is consistent with public policy.[154]

IV. APPRAISAL OF THE NINTH CIRCUIT'S DECISION IN *ST. PAUL FIRE*

As the Ninth Circuit is quick to point out, St. Paul Fire & Marine Insurance Co. marketed the professional liability policy to Big Brothers as a child molestation policy.[155] The Ninth Circuit noted that under Alaska law, it must consider both the language of the policy and any representations made in selling it.[156] The insurance company's agent, Jack Kirby made the following representations in a memorandum:

> Most of you are aware of the growing number of lawsuits alleging child molesting being brought against the Big Brother/Big Sister agencies and their officers and directors . . . .
>
> Professional liability insurance with general liability insurance is the only certain method of insuring against child molesting claims. *Regardless of how the suit is filed and what allegations are made, the combination of those two policies will ensure proper coverage.*
>
> The insureds in the general liability and professional liability policy are: 1. The agency. 2. The officers and directors. 3. The employees of the agency. 4. The Big Brother/Big Sister volunteer, but they are not covered for illegal acts. The other insureds *do* have coverage for illegal acts.[157]

The first paragraph of this memo clearly points out that Kirby and Big Brothers were thinking about child molestation claims at the time of contracting. The second paragraph again discusses child molestation claims and at least strongly implies that such claims will be covered under the policy. The third paragraph clearly suggests that the executive director has coverage for illegal acts. The Ninth Circuit correctly noted that a lay person would have expected coverage for criminal acts including child sexual abuse.[158] Moreover, Alaska law requires that an insurance contract be given the

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154. *Id.*

155. St. Paul Fire & Marine Ins. Co. v. F.H.; K.W., 55 F.3d 1420, 1422-23 (9th Cir.), *cert. denied*, 116 S. Ct. 674 (1995).

156. *Id.* at 1423 (stating that because "a policyholder's reasonable expectations of coverage are to control, . . . [a]n insurer will in fact be bound by its representations to the extent that they form, with the policy itself, the expectations of a reasonable policyholder") (quoting INA Life Ins. Co. v. Brundin, 533 P.2d 236, 242 (Alaska 1975).

157. *Id.* at 1422-23 (first emphasis added).

158. *Id.* at 1423.

meaning a lay person would have expected.[159] As the Ninth Circuit points out, "employees are explicitly not excluded from coverage for illegal acts, and it is clear that sexual abuse was the illegal act . . . in contemplation of the parties."[160]

The policy itself, without Kirby's memo, also can be called ambiguous. The policy stated in part:

> The named insured shall include any individual or organization named in this coverage summary. It also includes any partner, executive officer, director, stockholder or employee working for you within the scope of their duties. There is no coverage for the individual Big Brother and Big Sister if the event is in violation of any federal, state, or local law. This specific exclusion of violations of law does not apply to other insureds named in this agreement.[161]

The last sentence again seemingly suggests that the executive director is insured for any illegal acts he might commit. What exactly is the "specific exclusion of violations of law"? When considered in light of the sentence before it, the language begins to take on a different meaning. This previous sentence states that there is "no coverage for the individual Big Brother and Big Sister if the event is in violation of law." This would seem to suggest that the "specific exclusion" is only for actions taken by an individual Big Brother or Big Sister. Combining this with the last clause that the "specific exclusion" does not apply to directors would suggest only that the directors *are* covered for actions taken by the individual Big Brother or Big Sister.

This construction means that the last sentence of the quoted portion of the policy would not specifically insure the directors for illegal acts, but also that there is no exclusion for such acts. Thus the whole issue of coverage for illegal acts by a director would collapse down to the second sentence, that directors are covered when "working for [Big Brothers] within the scope of their duties." This is essentially the construction that St. Paul Fire & Marine Insurance Co. urged on the court,[162] but it is not the construction that the court of appeals used.[163]

The Ninth Circuit points out that "the most that could be said is that the policy terms were ambiguous,"[164] and this would

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159. Serradell v. Hartford Accident & Indem. Co., 843 P.2d 639, 641 (Alaska 1992).

160. *St. Paul Fire*, 55 F.3d at 1423.

161. Reply Brief of Appellants at 9, St. Paul Fire & Marine Ins. Co. v. F.H., 55 F.3d 1420 (9th Cir. 1995) (No. 93-35746).

162. *St. Paul Fire*, 55 F.3d at 1422.

163. *Id.*

164. *Id.* at 1423.

generally suggest that the policy should be construed against the insurer.[165] However, as the district court pointed out in *Allstate Insurance Co. v. Roelfs*,[166] this rule "does not necessarily apply . . . when the party urging a particular construction is not a party to the contract,"[167] as is the case in *St. Paul Fire*.

The Ninth Circuit looked at a landscape in which Alaska law on the issues of sexual misconduct and actions within the scope of employment was just beginning to take shape. However, there were a great number of cases outside Alaska that might have been persuasive.

A California Court of Appeals found in a similar case that "as a matter of law sexual abuse is unrelated to a teacher's employment and hence not within the coverage provided by the policy."[168] The Massachusetts Supreme Judicial Court dealing with the same issue noted that sexually abusive acts "were not of the kind [a school employee] was employed to perform" and "were not motivated [even in] part by a purpose to serve the employer."[169] These out-of-state cases aside, the issue of whether McQuade was operating within the scope of his employment collided with *Samaritan*[170] and *Cheely*,[171] which still stood in the way of *St. Paul Fire*.

Although public policy arguments are often somewhat nebulous, since it is always possible to find policies on both sides of an issue, in a case like *St. Paul Fire* they beg to be considered. The two main arguments relevant here are the following: (1) to hold insurance companies financially liable for the intentional acts of their insureds is to give a license to the insureds to engage in

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165. *See, e.g.*, D.D. v. Ins. Co. of N. Am., 905 P.2d 1365, 1368 (Alaska 1995) (stating that "where a clause in an insurance policy is ambiguous in the sense that it is reasonably susceptible to more than one interpretation, the court accepts that interpretation which most favors the insured.")(quoting Bering Straight Sch. Dist. v. R.L.I. Ins. Co., 873 P.2d 1292, 1295 (Alaska 1994)).

166. 698 F. Supp. 815 (D. Alaska 1987).

167. *Id.* at 817.

168. Horace Mann Ins. Co. v. Analisa N., 263 Cal. Rptr. 61, 61 (Cal. Ct. App. 1989).

169. Worcester Ins. Co. v. Fells Acres Day Sch., Inc., 558 N.E.2d 958, 967 (Mass. 1990).

170. 791 P.2d 344 (Alaska 1990) (holding that respondeat superior liability could exist for an employee's sexual misconduct).

171. 814 F. Supp. 1430 (D. Alaska 1992) (holding that Alaska interprets scope of employment broadly).

those acts, and (2) to do otherwise is to deny compensation to innocent victims.[172]

One commentator, George L. Priest, considers the basic premises underlying insurance, concluding that "[s]exual abuse of children is not the form of probabilistic loss for which the insurance function is appropriate."[173] Essentially, insurance is designed to cover risk.[174] The concept of risk becomes somewhat vacuous in the context of intentional acts.[175] Priest also considers "judicial efforts to force coverage of uninsurable risks of this nature [to be] short-sighted, reducing the effective insurance levels."[176]

A federal court in Kansas believes that "the expansion of insurance coverage to protect the insured from damages arising out of the sexual molestation of children is beyond the realm of public policy."[177] In a California case, a concurring opinion agrees, reasoning that "a teacher should not be rewarded with insurance coverage for a wholly unprofessional course of conduct arising out of his sexual molestation of a student."[178] These sentiments capture both the supposed deterrent effect and a punitive effect.

The deterrent effect is supposed to arise because an individual without an insurance policy will be less likely to engage in an intentional tort like sexual molestation if the individual's own assets, rather than an insurance company's, might be at risk. The punitive effect is based on the same rationale. If an individual engages in willful malfeasance, that individual should risk a greater personal loss. This actually amounts to a non-enrichment argument in some circumstances, for instance when an individual sets fire to his own home to collect insurance proceeds. Such an individual should be excluded from collecting. Of course, "public policy

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172. *See, e.g.*, Gary L. Fontana & Anthony J. Barron, *Insurance Coverage for Intentional Acts*, *in* INSURANCE CLAIMS AND COVERAGE LITIGATION 1993, at 3-4 (PLI Order No. A4-4415, 1993) ("In some instances, a plaintiff's only source of recovery may be the defendant's insurer. . . . However, if insurance is allowed even for intentional acts, those who engage in intentional wrongful conduct will escape from liability for the damages they cause and the deterrent function of tort law will be sacrificed.").

173. George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L. J. 1521, 1572 n.198 (1987).

174. In the insurance context, risk may be defined as "the chance of loss." WEBSTER'S NEW WORLD DICTIONARY 1159 (3d College ed. 1988).

175. An intentional act would seem to involve a certainty, rather than a chance.

176. Priest, *supra* note 173, at 1572 n.198.

177. Troy v. Allstate Ins. Co., 789 F. Supp. 1134, 1136 (D. Kansas 1992).

178. Horace Mann Ins. Co. v. Barbara B., 4 Cal. Rptr. 2d 351, 357 (Cal. Ct. App. 1992)(Sills, P.J., concurring), *rev'd on other grounds*, 846 P.2d 792 (Cal. 1993).

considerations that preclude insurance coverage for self-inflicted injury lose a great deal of their force in the context of insurance for tortious liability to innocent third parties."[179] Even in cases that at first glance do not appear to involve enrichment from one's own tortious acts, however, the question remains: Do we wish to protect the tortfeasor's own assets by allowing insurance for such acts?

V. CONCLUSION

Cases such as *St. Paul Fire* raise numerous issues. Insurance companies base their premiums on the extent of coverage in the policies, and as the Nevada Supreme Court noted, "[t]he average law-abiding professional would not desire to pay more so that the policy would cover their own criminal or intentionally tortious conduct."[180] The court did not ask, however, if the average law-abiding professional might be philanthropic enough to pay a higher premium to compensate the innocent victims of heinous acts. In any case, if tort liability is expanded because of the intentional acts of certain individuals, it remains true that everyone's liability is increased in the form of higher insurance premiums and reduced availability of insurance.

Alaska's law on the issue of insurability for an individual's intentional acts of sexual abuse remains unsettled, for Alaska's own courts have not met the issue head-on. Nevertheless, those seeking guidance must now turn to the decision of the Ninth Circuit and acknowledge that sexual abuser insurance currently exists in Alaska. An individual may protect his own assets from his victims by purchasing the appropriate type of insurance.[181]

This policy is abhorrent and should be eradicated when Alaska's own courts consider the issue. There exist alternatives to the straight tort system, such as the establishment of a victim's compensation fund to offset the damages to victims who are unable to recover from their abusers. Such a fund might be financed by imposing a fee on the sale of insurance policies, for example. This fee would be imposed in lieu of the increase in insurance premiums or the reduced availability of insurance that naturally follows from the expansion of the insurance companies' liability following the

179. U.S. Fire Ins. Co. v. Beltmann N. Am. Co., Inc., 695 F. Supp. 941, 948 (N.D. Ill. 1988), *rev'd on other grounds*, 883 F.2d 564 (7th Cir. 1989).

180. Rivera v. Nevada Medical Liab. Ins. Co., 814 P.2d 71, 74 (Nev. 1991).

181. Because sexual abuse remains illegal, the individual would still face the criminal justice system, albeit with the higher burden of proof placed on the state.

Ninth Circuit's decision.[182] Unlike the insurance "solution," however, the fund would not insulate the abuser from personal liability. Alaska's courts must not allow the Ninth Circuit's decision to remain the law of Alaska.

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182. The imposition of such a fee, of course, would also be partially passed along to consumers in the form of higher premiums.