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Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments—1900–1997

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INSURANCE CONTRACTS AND JUDICIAL DISCORD OVER WHETHER LIABILITY INSURERS MUST DEFEND INSUREDS' ALLEGEDLY INTENTIONAL AND IMMORAL CONDUCT: A HISTORICAL AND EMPIRICAL REVIEW OF FEDERAL AND STATE COURTS' DECLARATORY JUDGMENTS—1900-1997

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* Professor of Law, *Texas Tech University*; M.A. 1972, Ph.D. 1975, *University of North Carolina at Chapel Hill*; Postdoctoral Fellow 1977, *The Johns Hopkins University*; J.D. 1982, *The University of Texas at Austin.* I would like to thank the scores of legal academicians, senior scholars at various legal foundations, practicing attorneys, and statisticians who communicated with me over the *Internet (xewer@ttacs.ttu.edu)* and evaluated the merits of the arguments and statistical procedures outlined in this paper. To be sure, I have attempted to address all legitimate questions and tried to incorporate many priceless recommendations into the Article. Nevertheless, the views expressed as well as errors or omissions are mine alone.

> President Clinton and O.J. Simpson have one thing in common: Their umbrella insurance policies are helping to pay their enormous legal bills.... Simpson's insurer *is paying* some of the legal bills from his wrongful-death civil lawsuit. And Clinton's insurers *are paying* to defend him in the sexual-harassment lawsuit brought by Paula Jones, even though the policies don't cover sexual harassment.... Although these high-profile cases have created new interest in personal liability policies, they are by no means typical.
>
> Unlike Clinton and Simpson, most policyholders rarely get to pick a high-powered lawyer. In fact, they usually have no choice.... If you are sued, your insurance company... will decide if and when to settle [or defend] the case.[1]

INTRODUCTION

Each year in America, consumers, homeowners, small businesses, corporations, directors and officers, private individuals, professionals, private and public institutions, and associations spend an estimated $200 billion[2] purchasing third-party liability insurance[3] from property and casualty insurers. For some observers, this purchasing behavior is both astounding and highly irrational. Consider the following statistics: The "assets of property and casualty insurers were $675.1 bil-

1. Christine Dugas, *Insurance Can Help With Legal Bills*, USA TODAY, Feb. 17, 1997, at 2B; *see also* Pamela Yip, *Homeowners Test Limits of Policies*, HOUS. CHRON., Mar. 10, 1997, at D1 (noting that President Clinton and O.J. Simpson are atypical in their use of umbrella insurance policies to help pay enormous legal bills).

2. *See* THE AMERICAN INSURANCE ASSOCIATION OVERVIEW (visited Dec. 26, 1996) <http://www.aiadc.org/aiaover.htm> ("AIA member companies... manage more than $196 billion in assets and underwrite nearly $60 billion a year in direct written premiums, *representing more than 27 percent of the U.S. property/casualty industry's assets and more than 23 percent of the premium volume.*") (emphasis added).

3. Third-party liability insurance contracts are for "the benefit of the public as well as for the benefit of the named or additional insured." Jackson v. Donohue & Builders Transp., Inc., 193 S.E.2d 524, 529 (W. Va. 1995) (quoting Universal Underwriters Ins. Co. v. Taylor, 408 S.E.2d 358, 359 (W. Va. 1995)). The following types of insurance policies are included in this category: Accident, automobile, homeowners' insurance, comprehensive general liability ("CGL"), professional liability insurance—including medical malpractice and legal malpractice insurance—general business liability contracts, and directors and officers ("D&O") policies. *See generally* Scott M. Seaman & Charlene Kittredge, *Excess Liability Insurance: Law and Litigation*, 32 TORT & INS. L.J. 653, 654 (1987) (discussing various types of excess insurance policies available).

lion at the end of 1993, and [their] investments were $533 billion."[4] Yet, "[i]n 1993, claims from property and casualty insurers (including some industry expenses related to handling those claims) totaled $187.4 billion."[5] Quite simply, on an annualized basis, the overwhelming majority of consumers and businesses pay for "protection" that they rarely use. This finding raises two questions. First, why do insurance consumers spend such large, annual sums of money securing third-party coverage when the likelihood of their need to draw on the policy is so small? Clearly, the enactment and enforcement of compulsory liability insurance laws explain some of this behavior. Several states force residents to purchase third-party liability insurance if they own or operate motor vehicles within their jurisdictions.[6] In addition, many who purchase third-party insurance are adhering to commonly accepted business practices, preparing for the unknown, or simply responding to a low tolerance for risk.[7] There also is another reason: property and casualty insurers' highly successful marketing strategies[8] have convinced consumers to purchase liability

4. INSURANCE NEWS NETWORK, INSURANCE INDUSTRY ECONOMIC IMPACT—PREMIUMS, BENEFITS, INVESTMENTS LIFE AND PROPERTY & CASUALTY INSURERS (visited Sept. 24, 1998) <http://www.insure.com/impact.html>.

5. *Id.*

6. *See* ALASKA STAT. § 28.15.081 (Michie 1996); ARIZ. REV. STAT. § 20-1123.01 (1996); ARK. CODE ANN. § 21-9-303 (Michie 1996); CONN. GEN. STAT. ANN. § 38A (West 1996 & Supp. 1997); D.C. CODE ANN. § 5-1204.1 (1981); FLA. STAT. ANN. § 627.733 (West 1996); IDAHO CODE § 49-1212 (1996); 625 ILL. COMP. STAT. ANN. 5/7-601 (West 1996 & Supp. 1997); KAN. STAT. ANN. § 40-3104 (1996 & Supp. 1997); KY. REV. STAT. ANN. § 304.39-080 (Banks-Baldwin 1995); MD. CODE ANN., INS. § 12-305 (1996); MASS. GEN. LAWS ANN. ch. 90 § 1A (West 1996); MISS. CODE ANN. § 63-15-11 (1972); MO. ANN. STAT. § 105.1070 (West 1996); MONT. CODE ANN. § 61-6-144 (1997); NEV. REV. STAT. § 706.291 (1995); N.H. REV. STAT. ANN. § 264:19 (1993); N.M. STAT. ANN. § 66-5-224 (Michie 1978); N.D. CENT. CODE § 26.1-41-15 (1966); OHIO REV. CODE ANN. § 4509.01 (Anderson 1997 & Supp. 1997); OKLA. STAT. ANN. tit. 47, § 7-324 (West 1996 & Supp. 1998); R.I. GEN. LAWS § 31-47-1 (1956 & Supp. 1994); S.C. CODE ANN. § 56-9-10 (Law. Co-op 1976 & Supp. 1997); S.D. CODIFIED LAWS § 58-23 (Michie 1996 & Supp. 1997); TEX. TRANSP. CODE ANN. § 601.071 (West 1998); UTAH CODE ANN. § 31A-22-1303 (1953 & Supp. 1997); VA. CODE ANN. § 38.2-2205 (Michie 1950); W. VA. CODE § 6-12-1 (Michie 1996).

7. *See, e.g., Microtunneling*, TUNNELS & TUNNELING INT'L, Oct. 1, 1997, *available in* 1997 WL 14406330, at 3 (noting that high costs of unpredictable events cause tunneling contractors to buy third-party liability insurance).

8. *See, e.g.*, NATIONWIDE INSURANCE, NATIONWIDE WHAT'S NEW: STRONG 1995 PROPERTY CASUALTY RESULTS ANNOUNCED (visited Sept. 24, 1998) <http://www.nationwide.com/insurance/whatsnew/press_releases/property_casualty.html> (noting large growth in sale of property-casualty insurance policies due to continued policy growth, success in retaining customers, reduction in rates and aggressive cost management efforts); DPIC COMPANIES, DPIC: The Professional Liability Specialist of the Orion Capital Companies (visited Dec. 24, 1996) <http://www.dpic.com/orion-ac.html> ("DPIC Companies, Inc., the *professional liability* specialist of Orion, develops and *markets* insurance and loss prevention programs for accountants, architects, engineers, environmental consultants, and lawyers in North America.... Orion Capital Corporation has assets in excess of $2 billion. As of September 30, 1995, the Orion Capital Companies had a statutory policyholders' surplus of $520,709,000.") (emphasis added); *The Galtney Group, Inc.—Business Overview* (visited Dec. 24, 1996) <http://www.galtney.com/overview.html> ("The Galtney Group, Inc.... has expanded to include ... professional liability malpractice insurance brokerage operations ... and medical malpractice underwriting opera-

insurance, even where statistical evidence shows the need for such insurance is extremely low.

This, therefore, leads to the second and more compelling question: When third-party victims file claims or lawsuits against insureds, are property and casualty companies more likely to respond in a timely manner, settling the claims and/or providing quality legal defense? Or are they more likely to reject the claims, showing little concern for the victims' interests, and thereby force the insureds to defend themselves? Fairly recent findings reveal that although some carriers try to settle third-party claims,[9] an unacceptable number of liability companies simply refuse to settle or defend third-party suits.[10]

Consider, for example, the case of former football star, O.J. Simpson. A jury acquitted Simpson of criminal charges in the deaths of Nicole Brown Simpson and Ronald Goldman.[11] After the criminal trial, Nicole's and Ronald's families filed two wrongful-death suits against O.J. Simpson.[12] Shortly thereafter, the football star filed a claim under his general business liability policy, which he had purchased from CNA Financial Corporation ("CNA").[13] The liability insurer rejected the claim and informed Simpson that CNA would not defend him in the wrongful-death litigation.[14] However, reports are

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tions .... The Galtney Group placed over $150 million of premiums in 1994.... Total assets have reached $131 million with combined net worth of $39 million.").

9. *See* Steven B. Fillman, Note, *Braesch v. Union Insurance Co., 237 Neb. 44, 464 N.W. 2d 769 (1991): Policy Rationales of the Bad Faith Cause of Action and Implications to Non-Insurance Commercial Contracts*, 72 NEB. L. REV. 608, 610 (1993) (stating that in defense and settlement of third-party claims, insurance company owes insured duty of good faith); Cindie Keegan Mcmahon, Annotation, *Duty of Liability Insurer to Initiate Settlement Negotiations*, 51 A.L.R. 5th 701, § 2 (1997) (explaining the fiduciary duty that exists between insurers and the insureds and implying that carriers often honor their duty to defend and settle claims against insureds in good faith).

10. *See generally* William M. Shernoff & Sharon J. Arkin, *Insurance Law—Focusing on Insurance Bad Faith*, TRIAL, Dec. 1, 1996.

> In the 1950s, Americans put their trust in God, the president, and their insurance companies. But it gradually became apparent that insurance companies were sometimes more interested in protecting their pocketbooks than their insureds. The first area of disillusionment came in the context of liability policies. If an insurance company would not properly defend its insured or would not settle a liability action within policy limits, there was little or no risk for the insurer.

Id. at 19.

11. *See* William Claiborne, *From Cheers To Tears: Verdict Splits America*, WASH. POST, Oct. 4, 1995, at A1 ("In an emphatic conclusion to a case that transfixed the nation, a jury of 10 women and two men today acquitted O.J. Simpson of murder.").

12. *See Simpson Begins Depositions in Wrongful-death Suit*, STAR TRIB., Jan. 23, 1996, at 5A.

13. *See Insurance Co. Trashes OJ's Claim*, NEWSMAN (Mar. 5, 1996) <http://www.cybercomm.net/~cdonline/wwwboard/messages/15.html> (noting that policy would defray expenses in Simpson's wrongful-death suits).

14. *See id.* (stating that the policy did not cover the activity in the civil suit and therefore CNA had no duty to defend Simpson). Most umbrella liability policies, contrary to public perception, do not cover claims made as a result of adverse legal judgments. *See* Leslie Scism, *Not All Umbrella Policyholders Can Expect Presidential Service*, WALL ST. J., Feb. 13, 1996, at C1. The inaccuracy of public perception may be partly due to the current bankrolling of the President's

circulating which state that "most of Simpson's expenses in the wrongful-death lawsuit[s] are being paid by the underwriter of his homeowner's insurance policy."[15]

Therefore, consider another question: If you were a judge and Simpson sued CNA in your court for declaratory relief, would you rule in favor of Simpson or CNA? To repeat, the jury in the *criminal trial* decided that Simpson did not commit the intentional act of capital murder. More important, there is no assertion that Simpson failed to pay his annual premiums. Therefore, would you force the liability carrier to honor its contractual obligation and defend Simpson against civil claims? What legal standards or tests would you employ to ensure that your decision was reasonable, fair, and void of your prejudices, "moral outrage," or unsatisfied expectations?

Each year, thousands of consumers—homeowners, physicians, lawyers, business owners, directors and officers, clergy, managers, educators—as well as insurers petition state and federal courts for declaratory relief.[16] The simple question asked in these cases is: Do liability insurers have a duty to defend policyholders when third-party complainants only *allege* that insureds committed immoral or intentional acts?[17] Indeed, state and federal, trial and appellate judges decide this question on a regular basis; but their declarations are often perplexing and highly inconsistent.

More disturbing, evidence uncovered in this study suggests that some judges' duty-to-defend declarations are exceedingly biased. Put simply, statistical analyses[18] reveal that the gender, ethnicity, occupation or profession, marital status, age, residence, and geographic location of the insured, as well as of the third-party victim, play a majority role in determining whether insurers have a duty to defend policyholders' allegedly immoral or intentional conduct. These *vari-*

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defense in Paula Jones's sexual harassment suit by two insurance companies. *See id. But see Second Clinton Insurer to Stop Paying Bills From Jones's Lawsuit*, WALL ST. J., Sept. 29, 1997, at B10 (noting that the second of President Clinton's two personal-liability insurers planned to discontinue paying legal bills resulting from the Jones's sexual harassment lawsuit because it was no longer legally liable for defense costs under terms of its umbrella-liability policy which did not cover the main sexual harassment charge, but only ancillary charges that were subsequently dismissed).

15. *See Insurance Company Trashes O.J.'s Claim*, NEWSMAN (Mar. 5, 1996) <http://www.cybercom.net/~cdonline/wwwboard/messages/15.html>.

16. *See infra* notes 68-72 and accompanying text.

17. Intentional acts include, but are not limited to, the following allegations: Wrongful-death, molestation, rape, statutory rape, invasion of privacy, battery, assault, intentional infliction of emotional distress, trespass to land and chattel, conversion, fraud, intentional misrepresentation, intentional employment, age, racial, gender or religious discrimination under state and federal civil rights statutes and regulations, and intentional antitrust, securities, RICO, criminal and banking violations under state and federal statutes and regulations.

18. *See infra* notes 383-85 and accompanying text.

ables are producing another undesirable outcome: some very specific state and federal courts are more inclined to award declaratory relief only to the insured, while other tribunals are more likely to declare in favor of liability insurers.

For example, the Supreme Court of Tennessee recently upheld a trial court's decision that a national medical-malpractice insurer must defend a physician who allegedly molested and sexually assaulted a young, female patient during an examination.[19] On the other hand, the Supreme Court of South Carolina reversed a trial judge's ruling and declared that a South Carolina medical-malpractice carrier did not have to defend a dentist—"a specialist in oral and maxillofacial surgery"—who allegedly sexually assaulted three adult female patients.[20] In both cases, the third parties did not prove that the insureds actually committed the allegedly intentional acts.[21] The parties' complaints only presented allegations.[22] Yet, one professional liability insurer was forced to defend; the other was not.[23] Why? Did certain background variables influence the rulings?

Also consider allegations made against members of the legal profession. Clients often accuse attorneys of committing various immoral acts, intentional torts, and crimes. To be sure, prudent attorneys and law firms purchase liability insurance to help defend against such charges. But do trial judges compel these carriers to defend lawyers when clients only allege—rather than prove—that lawyers

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19. *See* St. Paul Fire & Marine Ins. Co. v. Torpoco, 879 S.W.2d 831, 833 (Tenn. 1994) (holding that insurance company must defend doctor because alleged molestation occurred during the course of providing professional services).

20. *See* South Carolina Med. Malpractice Liab. Ins. Joint Underwriting Ass'n v. Ferry, 354 S.E.2d 378, 380 (S.C. 1987) (holding that insurer's duty to defend is determined by the allegations set forth in a complaint against the insured); *see also* Prior v. South Carolina Med. Malpractice Liab. Ins. Joint Underwriting Ass'n, 407 S.E.2d 655, 656-57 (S.C. Ct. App. 1991) (declaring that professional liability insurer did not have to defend physician who allegedly sexually assaulted female patient "during an examination for birth control pills").

21. *See Torpoco*, 879 S.W.2d at 834 (noting that the issue of whether an insurance company has a duty to defend an insured turns on whether the alleged tortious conduct, if it occurred at all, "took place in the course of . . . the providing of professional services to the insured"); *Ferry*, 354 S.E.2d at 380 (noting that "no ultimate facts in support of" allegations of misconduct were set out).

22. *See Torpoco*, 879 S.W.2d at 832 (alleging that the defendant engaged in sexual acts with plaintiff, "taking advantage of her tender years, her lack of knowledge, and exploiting her trust in him as a doctor of medicine"); *Ferry*, 354 S.E.2d at 380 (complaining of intentional tort of taking indecent liberties of plaintiff's body, invading her privacy, and negligently and recklessly failing to exercise ordinary care in the administration of anesthesia and performance of a physical examination).

23. *See Torpoco*, 879 S.W.2d at 832 (holding that facts alleged in complaint against insured are, as a matter of law, sufficient to require insurer to defend insured); *Ferry*, 354 S.E.2d at 381 (holding that as set out in the original complaint, when a complaint alleges tortious conduct on the part of the insured and the policy explicitly exempts such conduct from coverage, the insurer has no duty to defend).

committed intentional acts? Once more, declarations are mixed. Judges in some jurisdictions order a defense, while judges in other venues do not. Note, however that this discrepancy exists even where disgruntled clients' allegations are identical or substantially the same.[24] And again, why?

Of course, there are other examples of inconsistent declarations involving insureds who are employed in different occupations and professions.[25] However, some final illustrations involving homeowners' insurance should highlight the extent and severity of the problems surrounding duty-to-defend declaratory judgments.

First, in *Fire Insurance Exchange v. Berray*,[26] an Anglo-American and a Mexican-American—the insured and the third-party victim, respectively—were drinking, playing pool, and gambling in a local pub.[27] Shortly thereafter, the two adult males exchanged words and the insured grabbed a .357 Magnum pistol and shot the victim.[28] The victim "sustained serious injuries."[29] The insured asked his homeowner's insurer to defend him in the civil suit. The insurer refused, stressing that the insured intentionally used the .357 Magnum.[30] The trial judge accepted the insurer's argument and awarded declaratory

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24. *Compare* Madden v. Continental Cas. Co., 922 S.W.2d 731, 734 (Ark. Ct. App. 1996) (declaring that professional liability insurer had no duty to defend attorneys accused of fraud, intentional misrepresentation, and attempted theft), *and* National Union Fire Ins. Co. v. Shane & Shane Co., 605 N.E.2d 1325, 1329-30 (Ohio Ct. App. 1992) (declaring that insurer had no duty to defend the lawyer accused of fraudulent conduct), *with* Conner v. Transamerica Ins. Co., 496 P.2d 770, 774 (Okla. 1972) (declaring that insurer must defend attorney charged with conspiracy to defraud client), *and* Morrissey v. Government Employees Ins. Co., 605 N.Y.S.2d 55, 55 (1993) (declaring that professional liability insurer must defend attorney accused of fraudulent conduct).

25. *Compare* Servants of the Paraclete, Inc. v. Great Am. Ins. Co., 866 F. Supp. 1560, 1583-84 (D.N.M. 1994) (declaring that liability insurer unjustifiably breached its duty to defend priest who allegedly sexually molested young boys), *and* Horace Mann Ins. Co. v. Barbara B., 846 P.2d 792, 794 (Cal. 1993) (declaring that professional liability insurer must defend junior high school teacher who was accused of sexually molesting and harassing 13-year-old female student), *and* Zurich-American Ins. Co. v. Atlantic Mut. Ins. Cos., 539 N.E.2d 1098, 1098 (N.Y. 1989) (declaring that liability insurer must defend church employees in suits arising out of alleged sexual abuse of day-care children), *with* Maryland Cas. Co. v. Havey, 887 F. Supp. 195, 197 (C.D. Ill. 1995) (declaring that liability insurers had no duty to defend priest who allegedly sexually molested several eleven- and twelve-year old boys), *and* Aetna Cas. & Sur. Co. v. Kelly, 889 F. Supp. 535, 543 (D.R.I. 1995) (declaring insurer had no duty to defend or indemnify in tort action brought by persons who claimed to have been assaulted by priests), *and* Houg v. State Farm Fire & Cas. Co., 481 N.W.2d 393, 397-98 (Minn. Ct. App. 1992) (declaring that professional liability carrier did not have to defend a Lutheran pastor who allegedly sexually abused a parishioner), *and* American & Foreign Ins. Co. v. Church Sch., 645 F. Supp. 628, 634 (E.D. Va. 1986) (declaring that professional liability insurer had no duty to defend a school teacher who allegedly squeezed buttocks of 11-year-old school girl in a sexual way).

26. 694 P.2d 191 (Ariz. 1984).

27. *See id.* at 192.

28. *See id.*

29. *Id.*

30. *See id.* at 193.

relief.[31] The Arizona Supreme Court, however, rejected the insurer's argument and reversed the ruling.[32]

The Nebraska Supreme Court, however, reached a very different conclusion in *State Farm Fire & Casualty Co. v. Victor.*[33] In this case, the homeowner and the third-party victim were neighbors.[34] After a party, the homeowner believed that the neighbor had stolen money from the homeowner's guests.[35] The insured then confronted the neighbor and shot him with a .357 Magnum pistol.[36] The neighbor died. A jury convicted the homeowner of manslaughter, and the decedent's estate then filed a civil suit against the homeowner.[37] The insurance company refused to defend the action, arguing that the insured intentionally used the weapon.[38] The trial judge and the Nebraska Supreme Court agreed that the insurer had no duty to defend an insured who intended to injure another.[39]

Finally, in *Auto-Owners Insurance Co. v. Todd,*[40] a father allegedly imprisoned and sexually assaulted his 17-year-old daughter.[41] The trial judge declared that the homeowner's insurer had a duty to defend the father.[42] The Minnesota Supreme Court disagreed.[43]

But this same Minnesota Supreme Court adopted a contrary view in *American National Fire Insurance Co. v. Estate of Fournelle.*[44] In that case, a father shot his two teenage sons in the head, killing them. The father then committed suicide.[45] The children's estate brought a wrongful-death suit against the father's estate, claiming that the kill-

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31. *See id.* (agreeing with insurer that the insured's "intentional act" relieved it from the "duty to defend").

32. *See id.* at 194 (rejecting the insurer's argument that aiming a loaded gun and pulling the trigger in and of itself is an "intentional act" within the meaning of the policy exclusion). *But see* Safeco Ins. Co. of Am. v. McKenna, 565 P.2d 1033, 1037 (N.M. 1977) (declaring that homeowner's insurer did not have to defend insured who allegedly criminally assaulted a Mexican-American). *See* Table 3, *infra* p. 1203 and the accompanying discussion (discussing importance of ethnicity).

33. 442 N.W.2d 880 (Neb. 1989).

34. *See id.* at 881.

35. *See id.*

36. *See id.* at 881-82.

37. *See id.*

38. *See id.* at 881.

39. *See id. But see* Northwestern Nat'l Cas. Co. v. Phalen, 597 P.2d 720, 728 (Mont. 1979) (declaring that homeowner's insurer had duty to defend insured who criminally assaulted a member of a racial minority).

40. 547 N.W.2d 696 (Minn. 1996).

41. *See id.* at 697.

42. *See id.* at 697-98.

43. *See id.* at 700 (holding that false imprisonment is limited to the overall intent of the crime and is therefore excluded from coverage under intentional bodily harm provision of the homeowner's policy).

44. 472 N.W.2d 292 (Minn. 1991).

45. *See id.* at 293.

ings were intentional.[46] The father's homeowner's insurer filed a declaratory judgment action, asserting it had no duty to defend the father's estate.[47] The trial judge agreed.[48] The Supreme Court of Minnesota reversed, however, ruling that the policy's exclusion clause[49] did not apply.[50]

There is a prevailing view among jurists and practitioners that a declaratory judgment action is an efficient, effective, and equitable method of helping litigants determine legal relations, rights, and obligations,[51] especially under liability insurance contracts.[52] It even has been argued that securing declaratory relief decreases the need to file multiple lawsuits to settle disputes involving legal rights.[53] But

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46. *See id.*

47. *See id.* at 292-94 (asserting that the severability clause of the household exclusion of a homeowner's insurance policy excludes coverage for a named insured's killing of two children).

48. *See id.* at 293 (agreeing that the severability clause of the policy "is immaterial to determination of [the] lawsuit where the exclusion, by its terms, applies to 'any insured'").

49. See *Fournelle*, 472 N.W.2d. at 293 (stating that "[f]irst, the policy contains what is commonly known as a 'household exclusion"). This exclusion provides:

> 2. Coverage E—Personal Liability, does not apply to: . . . f. bodily injury to you and any insured within the meaning of part a. or b. of Definition 3. 'insured'. The term 'You' is defined as follows: Throughout this policy, 'you' and 'your' refer to the 'named insured' shown in the Declarations and the spouse if a resident of the same household. . . . The following definition of 'insured' appears in Definition 3, parts a. and b. of the policy: 3. 'insured' means you and the following residents of your household: a. your relatives; b. any other person under the age of 21 who is in the care of any person named above. Finally, the policy also contains a severability clause, which states: 2. Severability of Insurance. This insurance applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence.

Id.

50. *See id.* at 295 (stating that "[t]he very purpose of the severability clause appears to provide separate coverage to the two named insureds").

51. *See, e.g.*, Geoffrey C. Cook, *Reconciling the First Amendment with the Individual's Reputation: The Declaratory Judgment as an Option For Libel Suits*, 93 DICK. L. REV. 265, 273 (1989) (noting that declaratory judgments provide plaintiffs with findings of truth and do so at greater speed than traditional damages suits); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809, 810 (1986) ("Even more so than in other civil actions, pecuniary awards are not the only form of recourse for defamation. A declaratory judgment approach offers a promising remedy for the parties and society."); Brian D. Shannon, *Declaratory Judgments Under the Texas Administrative Procedure and Texas Register Act: An Underutilized Weapon*, 41 BAYLOR L. REV. 601, 602 (1989) (arguing that use of declaratory judgments in connection with administrative actions is a valuable, underutilized legal tool).

52. *See, e.g.*, Dianne K. Ericsson, *Declaratory Judgment: Is it a Real or Illusory Solution?*, 23 TORT & INS. L.J. 161, 180 (1987) (arguing that the "use of a declaratory judgment action by an insurer may be beneficial if the insurer is anxious to have an early determination of its obligations under the contract" and encouraging insurers to "consider filing a declaratory judgment action to determine [their] rights and obligations"); George J. Schwinghammer, Jr., *Insurance Litigation in Florida: Declaratory Judgments and the Duty to Defend*, 50 U. MIAMI L. REV. 945, 946 (1996) (arguing that the "declaratory judgment action is one tool that insurers can use to determine which claims fall outside of coverage" and proposing "a method for using the declaratory judgment to allow the parties to determine their rights early in litigation, in order to maximize judicial efficiency" in state courts).

53. *See* 10B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2751, at 458 (3d ed. 1998) (stating that a declaratory judgment proceeding "helps avoid a multiplicity of

does statistical and historical evidence strongly support these assumptions? The short answer is no. Without doubt, a declaratory judgment action is not the most effective or efficient means to resolve disputes under liability insurance contracts, because "filing for declaratory judgment may result in two lawsuits and two jury trials."[54] This Article will present some compelling evidence arguing against the use of the declaratory judgment action to resolve duty-to-defend controversies in state and federal courts.

Part I presents a brief overview of federal and state declaratory judgment statutes and of the scope and purpose of liability (third-party) insurance contracts. Part II discusses the origin and scope of insurers' duty to defend and pay defense costs under liability contracts. A central question in this Article is: Must insurers defend insureds' allegedly immoral and intentional conduct? Another question is: What are the appropriate legal standards for determining whether there is a duty to defend? Part III addresses these difficult and complex changes. Part III also reports that both questions generate serious conflicts among state and federal courts.

Part IV discusses whether insurers must defend lawyers and physicians who have been accused of immoral conduct. Once more, this Article reports that federal and state courts are hopelessly divided on this issue. Parts V and VI examine whether homeowners' insurers have a duty to defend insureds against two extremely serious and widespread allegations—"sexual molestation" and "wrongful-death." Some courts declare that insurers must defend only if third-party victims are adults. A significant number of tribunals order a legal defense only if insureds and third-party victims are minors. Still other courts require a legal defense only where courts find "no intent to harm as a matter of law." Parts V and VI discuss the legal, as well as social implications of such diverse declaratory rulings.

Finally, Part VII presents an empirical analysis of federal and state courts' duty-to-defend declaratory judgments between 1900 and 1997. The evidence presented in this section supports the proposition that trial and appellate court declaratory rulings are highly prejudicial, inconsistent, and legally untenable. More important, evidence outlined in Part VII gives credence to the notion that fed-

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actions by affording an adequate, expedient, and inexpensive means for declaring in one action the rights and obligations of litigants").

54. *See* Donna Willis Darroch & Darren W. Penn, *Intervention, Interpleader and Defense and Indemnity Agreements*, BRIEF, Summer 1995, at 22 ("Whenever a coverage dispute arises between an insurer and its insured, the first idea that comes to mind about how to resolve the dispute usually is to file for declaratory judgment. A declaratory action is not the only—and frequently not the most efficient or effective—way to resolve the coverage dispute.").

eral and state judges are likely to order "national" liability insurers to provide a legal defense only if third-party victims and insureds have very specific socio-economic and geographic characteristics.

The Article concludes by encouraging litigants to weigh seriously the efficacy of asking courts to determine whether liability insurers must defend third-party suits involving intentional torts or allegations. To be sure, declaratory judgment actions clearly outline rights, relations, and obligations in every instance. But trial and appellate, state and federal judges often employ their own "moral" principles, questionable public policies, and personal biases, rather than sound legal principles, to declare whether liability insurers must defend consumers against third-party suits. Therefore, insureds and consumer activists should ask state legislatures to amend their respective insurance codes to read: *If a third-party victim accuses an insured of committing an intentional act, the liability insurance company must provide a complete legal defense and/or settle the claim in a timely manner. Neither the insured nor insurer may file a declaratory judgment action in state or Federal courts to determine whether the insurer has a duty to defend.*

I. A REVIEW OF DECLARATORY JUDGMENT ACTS AND THIRD-PARTY INSURANCE CONTRACTS

A. The Ostensible Purpose and Application of Declaratory Judgments in State and Federal Courts

1. The Uniform Declaratory Judgments Act of 1922

Seventy-five years ago, the National Conference of Commissioners on Uniform State Laws and the American Bar Association proposed the Uniform Declaratory Judgments Act.[55] The purpose of the Act was: (1) to afford state "[c]ourts . . . the power to declare rights, status, and other legal relations";[56] (2) to harmonize state laws with the laws of the various states regarding insurers' liability; and (3) to harmonize, as far as possible, [state laws] with federal laws and regulations on the subject of declaratory judgments."[57] Therefore, the hope was that any question of construction or validity arising under a contract of any insured could be determined and the rights, status, or other legal relation of any insured definitively established.[58] At this

55. *See* UNIF. DECLARATORY JUDGMENTS ACT, 12-12A U.L.A. 309 (1996 & Supp. 1998).
56. *Id.* § 1, 12 U.L.A. 313 (1996).
57. *Id.* § 15, 12A U.L.A. 586 (1996).
58. *See id.* § 2, 12A U.L.A. 3 (1996) (granting to any interested person the power to have construed their "rights, status, or other legal relations" arising under a written instrument).

time, nearly all states have adopted the Act[59] and two states have enacted substantially equivalent versions.[60]

Under the Uniform Declaratory Judgments Act, the trial judge has complete discretion to grant or deny declaratory relief under a liability insurance contract.[61] In addition, a state appellate court may not review a trial judge's declaratory judgment unless evidence establishes that the lower court abused its discretion.[62] Finally, several conditions must exist before a declaratory judgment action can proceed: (1) a justiciable controversy must be present; (2) the interests of the parties must be adverse; (3) the party seeking declaratory relief must have a legally protected interest in the controversy; and (4) the issues between the parties involved must be ripe for judicial determination.[63]

2. *The Federal Declaratory Judgments Act of 1934*

Congress enacted the Federal Declaratory Judgments Act in 1934.[64]

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59. *See* ALA. CODE §§ 6-6-220 to 6-6-232 (1935); ARIZ. REV. STAT. ANN. §§ 12-1831 to 12-1846 (West 1927); ARK. CODE ANN. §§ 16-111-101 to 16-111-111 (Michie 1953); COLO. REV. STAT. ANN. §§ 13-51-101 to 13-51-115 (West 1923); DEL. CODE ANN. tit. 10, §§ 6501-6513 (1981); FLA. STAT. ANN. §§ 86.011-86.111 (West 1943); GA. CODE ANN. §§ 9-4-1 to 9-4-10 (1945); IDAHO CODE §§ 10-1201 to 10-1217 (1933); 737 ILL. COMP. STAT. 5/2-701 (West 1945); IND. CODE ANN. §§ 34-4-10-1 to 34-4-10-16 (West 1927); IOWA CODE ANN. §§ 261 to 269 (West 1943); KAN. STAT. ANN. §§ 60-1701-16 (1994); LA. CODE CIV. PROC. ANN. arts. 1871-1883 (West 1948); ME. REV. STAT. ANN. tit. 33, §§ 5951-5963 (West 1941); MD. CODE ANN. CTS. & JUD. PROC. §§ 3-401 to 3-415 (1944); MASS. GEN. LAWS ANN. ch. 231A, §§ 1-9 (West 1945); MINN. STAT. ANN. §§ 555.01-555.16 (West 1933); MO. ANN. STAT. §§ 527.010-527.140 (West 1935); MONT. CODE ANN. §§ 27-8-101 to 27-8-313 (1935); NEB. REV. STAT. §§ 25-21,149 to 25-21,164 (1929); NEV. REV. STAT. §§ 30.010-30.160 (1929); N.J. STAT. ANN. §§ 2A:16-50 to 2A:16-62 (West 1924); N.M. STAT. ANN. §§ 44-6-1 to 44-6-15 (Michie 1975); N.C. GEN. STAT. §§ 1-253 to 1-267 (1931); N.D. CENT. CODE §§ 32-23-01 to 32-23-13 (1923); OHIO REV. CODE ANN. §§ 2721.01-2721.15 (Anderson 1933); OKLA. STAT. ANN. tit. 12, §§ 1651-1657 (West 1961); OR. REV. STAT. §§ 28.010-28.160 (1927); PA. CONS. STAT. ANN. §§ 7531-7541 (West 1923); P.R. LAWS ANN. tit. 32, § 59 (1931); R.I. GEN. LAWS §§ 9-30-1 to 9-30-16 (1959); S.C. CODE ANN. §§ 15-53-10 to 15-53-140 (Law Co-op 1948); S.D. CODIFIED LAWS §§ 21-24-1 to 21-24-16 (Michie 1925); TENN. CODE ANN. §§ 29-14-101 to 29-14-113 (1923); TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001-37.011 (West 1943); UTAH CODE ANN. §§ 78-33-1 to 78-33-13 (1951); VT. STAT. ANN. tit. 12, §§ 4711-4725 (1931); V.I. CODE ANN. tit. 5, §§ 1261-1272 (1957); VA. CODE ANN. §§ 8.01-184 to 8.01-191 (Michie 1922); WASH. REV. CODE ANN. §§ 7.24.010-7.24.144 (West 1935); W. VA. CODE §§ 55-13-1 to 55-13-16 (1941); WIS. STAT. ANN. § 806.04 (West 1927); WYO. STAT. ANN. §§ 1-37-101 to 1-37-115 (Michie 1923).

60. In 1921, California enacted its Declaratory Relief Act. New York Civil Practice Laws and Rules also permit declaratory judgments. But the following jurisdictions have not adopted the Uniform Declaratory Judgments Act of 1922: Alaska, California, Connecticut, Hawaii, Kentucky, Mississippi, New Hampshire, and New York.

61. *See* Missouri Property Ins. Placement Facility v. McRoberts, 598 S.W.2d 146, 148 (Mo. Ct. App. 1978) (concluding that trial courts have wide discretion to administer the Uniform Declaratory Judgments Act to provide relief from uncertainty).

62. *See* Huntsville Utility Dist. v. General Trust Co., 839 S.W.2d 397, 400 (Tenn. Ct. App. 1992) (holding that trial court's declaratory judgment should not be disturbed on appeal unless the trial court's declaration was arbitrary).

63. *See* Baird v. State, 574 P.2d 713, 715 (Utah 1978) (holding that the court lacked jurisdiction where four preconditions necessary to render declaratory judgment were absent).

64. 28 U.S.C. § 2201 (1994).

It states:

> In a case of actual controversy within its jurisdiction . . . any court in the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration . . . . Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.[65]

To be certain, federal judges have great discretion under this statute. But judges must weigh several important factors before granting or denying declaratory relief. Some relevant factors include: (1) whether declaratory judgment would settle the controversy, (2) whether declaratory action would clarify legal relations, (3) whether the use of a declaratory action would increase friction between federal and state courts, and (4) whether an alternative, more effective legal remedy exists.[66]

3. Conflicts over the purpose of declaratory judgments—legal, equitable, or declaratory relief?

The intended purpose of the Uniform Declaratory Judgments Act and of the Federal Declaratory Judgment Act is clear: to allow federal and state courts to determine interested parties' rights, obligations and relations under various contracts.[67] But we must ask: What are the actual substantive and procedural effects of declaratory judgments? Do they simply declare or define existing relations, rights, and obligations? Do they provide equitable relief for an immoral or an illegal act? Or do they create new and unintended legal obligations and rights?

Many jurists and commentators adopt the following view: "Declaratory judgments . . . do not presuppose a *legal wrong*, nor are they followed by *coercive relief* as they simply declare a right, duty, rela-

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65. *Id.*

66. *See* State Farm Mut. Auto. Ins. Co. v. Brewer, 778 F. Supp. 925, 928 (E.D. Ky. 1991) (citing Allstate Ins. Co. v. Mercier, 913 F.2d 273, 277 (6th Cir. 1990)). The Fifth Circuit has noted additional relevant factors:

> (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated, (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant, (3) whether the plaintiff engaged in forum shopping in bringing suit, (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist, (5) whether the federal court is a convenient forum for the parties and witnesses, (6) whether retaining the lawsuit in federal court would serve the purposes of judicial economy, . . . whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.

St. Paul Ins. Co. v. Trejo, 39 F.3d 585, 590 (5th Cir. 1994) (quoting Travelers Ins. Co. v. Louisiana Farm Bureau Fed'n, 996 F.2d 774, 778 (5th Cir. 1993)).

67. *See* 28 U.S.C. § 2201 (1994).

tion, immunity [or] disability."[68] Put differently, declaratory judgments only provide "an *authentic confirmation* of already existing [relations, rights and duties]."[69] But the evidence does not support this point of view.

First, declaratory judgments often try to correct legal wrongs by providing coercive relief. In fact, "declaratory relief is an equitable proceeding .... The *powers of a court . . . are as broad and extensive* as those exercised by such court in any ordinary suit in equity...."[70] Second, "declaratory relief... is as much legal as equitable.... Thus, in a proper case, a court has the *fullest liberty* in molding its decree to the necessities of the occasion."[71] Finally, "a cause of action for declaratory relief may properly embrace ... claims for ... consequential relief which might otherwise be regarded as separate causes of action, including equitable relief and damages."[72]

It is important to remember these latter observations, for they should help to explain why federal and state courts are so hopelessly divided over three broad issues: (1) whether liability insurers have a duty to defend insureds' allegedly immoral and intentional acts; (2) the origin of the duty to defend; and (3) the scope of that duty.

B. Brief Overview—Third-Party Insurance Contracts

1. Types of third-party insurance contracts—liability versus indemnity contracts

In most instances, insurance consumers purchase third-party insurance to help pay third-party victims' claims in the event of a loss of property, bodily injuries, or death. But some consumers purchase third-party insurance contracts—for example, automobile and homeowners' policies—to help pay their own personal expenses when they experience property damage or bodily injuries. More significantly, third-party insurance falls into two very broad categories—liability contracts and indemnity contracts.

Liability contracts[73] have several common features: (1) a coverage

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68. *See* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2751, at 570-71 (2d ed. 1983) (stating that a declaratory judgment proceeding "helps avoid multiplicity of actions by affording an adequate, expedient, and inexpensive means for declaring in one action the rights and obligations of the litigants").

69. *Id.* (emphasis added).

70. Adams v. Cook, 101 P.2d 484, 489 (Cal. 1940) (emphasis added) (citations omitted).

71. First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 237 N.E.2d 868, 870 (N.Y. 1968) (emphasis added).

72. City of Milwaukee v. Firemen's Relief Ass'n, 149 N.W.2d 589, 592-93 (Wis. 1967).

73. Some insurance liability contracts listed under this heading include various types of automobile, homeowners', legal-malpractice, medical-malpractice, professional-malpractice,

clause that outlines the types of risks the insurer is willing to assume; (2) a broad exclusion provision that highlights various types of risks or behaviors that the insurance company is unwilling to assume; (3) a narrower "intentional acts" provision stating that injuries or acts "expected or intended" from the insured's perspective are excluded; (4) a right-to-settle clause that gives the insurer the exclusive right to settle all third-party claims filed against the insured; (5) a duty-to-defend provision that compels the company to hire legal counsel for the insured and pay defense costs; and (6) a duty-to-pay clause that outlines the conditions under which the insurer will pay once liability has been established.[74]

A major purpose of liability insurance is to help shield the insured from having to pay damages to a third-party victim. In addition, "[u]nder a liability policy . . . the insurer's obligation to pay arises *as soon as* the insured incurs liability for [a] loss . . . ."[75] Under an indemnity contract, however, the insurer is only required to make whole the insured after he has sustained an actual loss after the insured has paid or been compelled to make a payment to a third-party claimant.[76] In comparison, an insurer incurs an obligation to the insured whereupon the insured has paid, or is obligated to pay a third-party claimant. Although both liability and indemnity insurance contracts exclude coverage for malicious, dishonest, and fraudulent conduct and for claims involving libel or slander,[77] indemnity agreements

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general-business, commercial general liability, renter's and multi-peril policies. *See* Leon E. Wynter, *Business & Race: Insurers Join the Effort to Tackle Discrimination*, WALL ST. J., Mar. 5, 1997, at B1 (reporting that so-called employee-practices liability insurance policies are spreading and, therefore, such development "may place insurers in the role of watchdog for corporate behavior").

74. *See* EMERIC FISCHER & PETER N. SWISHER, PRINCIPLES OF INSURANCE LAW app. F (2d ed. 1994); ALAN I. WIDISS, INSURANCE app. I (1st ed. 1989); KENNETH H. YORK ET AL., INSURANCE LAW app. F (3d ed. 1994).

75. Little v. MGIC Indem. Corp., 836 F.2d 789, 793 (3d Cir. 1987) (emphasis added).

76. Fight Against Coercive Tactics Network, Inc. v. Coregis Ins. Co., 926 F. Supp. 1426, 1432-33 (D. Colo. 1996); *see also MGIC Indem. Corp.*, 836 F.2d at 793 ("In general, under an indemnity policy the insurer is obligated only to reimburse the insured for covered loss that the insured himself has already paid.").

77. *See, e.g.*, JMF, Inc. v. Cincinnati Ins. Co., No. 5-90-64, 1991 WL 325570, *1, 2-3 (Ohio App. Oct. 16, 1991). The court stated:

> The policy provided indemnity to an insured for losses incurred due to employee theft, up to $10,000.00. . . . An exclusion to that provision declares that the insurance coverage is automatically 'deemed canceled as to any employee immediately upon discovery by the insured . . . of any fraudulent or dishonest act of such employee.

Id.; Schiff Assocs., Inc. v. Flack, 417 N.E.2d 84, 85 (N.Y. 1980). In this case, the court stated:

> The 'insuring agreement' clause of each policy provides that the insurer will pay 'all sums which the Assured shall become legally obligated to pay by reason of liability for any error, omission or negligent act committed, or alleged to have been committed by the Assured . . . while in the performance of services in the professional capacity of the Assured as: (a) Actuaries, (b) Employee Benefit Plan Consultants, and (c) Life Insurance Agents or Brokers.' Under the rubric 'exclusions', for which the policy states it

generally do not contain a duty-to-defend provision.[78] Therefore, with indemnity agreements, control of the legal defense resides exclusively with the policyholder and with the legal counsel chosen to defend the policyholder against the third-party allegations.

Insurers sell several types of so-called indemnity contracts: Professional indemnity plans, hospital indemnity insurance, workers compensation indemnity plans, excess employers indemnity policies, and industrial indemnity insurance.[79] Directors' and officers' policies ("D&O"), however, appear to be the most widely distributed and well-known type of indemnity contracts.[80]

2. Directors and officers contracts—indemnity or liability insurance?

"A D&O policy typically has two components: . . . [a] corporate reimbursement [component that] covers officers and directors when a company is named in a lawsuit. The other portion [—the executive-liability or the directors-and-officers-liability part—]covers the executives" when they are defendants in a suit.[81]

Generally, the executive-liability part states that the insurance

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would not indemnify the assured, are listed policyholder conduct (1) '(which is) [b]rought about by or contributed to by the dishonest (or) fraudulent . . . Act.'"); Greenberg & Covitz v. National Union Fire Ins. Co. of Pittsburgh, 711 A.2d 909, 912 (N.J. Super. Ct. 1998) (stating that "[e]xclusion (b) states that the[professional liability insurance] policy does not apply 'to any claim arising out of any dishonest, fraudulent or malicious act, error or omission of any insured, committed with actual dishonest, fraudulent, or malicious purpose or intent

Id.; Kentuckiana Sales, Inc. v. Security Ins. Company of New Haven, 394 S.W.2d 744, 745 (Ky. Ct. App. 1965). The court noted that:

> The basic question for decision is the proper interpretation of Exclusion, § 2 of the policy of indemnity, which is thus worded: "Exclusion, Section 2. This bond does not apply to loss, or to that part of any loss . . . which . . . is dependent upon an inventory computation or a profit and loss computation; provided, however, that this paragraph shall not apply to loss of money or other property which the insured can prove, through evidence wholly apart from such computations, is sustained by the insured through any fraudulent or dishonest act or acts committed by any one or more of the Employees."

Id.

78. *See, e.g.,* Julie J. Bisceglia, *Practical Aspects of Directors' and Officers' Liability Insurance—Allocating and Advancing Legal Fees and the Duty to Defend,* 32 U.C.L.A. L. REV. 690, 701-10 (1985) (describing the demand for directors' and officers' liability insurance and the problems created by an absence of a duty to defend).

79. This information came from the Internet after employing the AltaVista search engine and typing in the word "indemnity."

80. *Cf.* Timothy L. O'Brien, *Liability Premiums To Cover Directors, Officers Decline,* WALL ST. J., Dec. 9, 1996, at B8 (stating that "[p]remiums for directors-and-officers . . . insurance are going down, despite a rise in frequency and size of claims according to a survey by Watson Wyatt & Co. . . . The survey reports that 88% of its participants have some form of D&O insurance, with banks and utilities the biggest users.").

81. O'Brien, *supra* note 80. "The survey reports that 88% of its participants have some form of D&O insurance, with banks and utilities the biggest users. Among banks and utilities that responded, 97% . . . had D&O coverage. Construction and real-estate firms used D&O insurance the least, with only 71% having coverage."

company will pay on behalf of, or reimburse directors and officers for "loss" arising from allegedly "wrongful acts."[82] A "'wrongful act' generally means any error, misstatement, misleading statement, omission, neglect or breach of duty."[83]

Although most insurance consumers would call D&O policies "indemnity" insurance, many directors and officers policies are not true indemnity policies. In fact, federal and state courts are seriously divided over the central question: whether D&O policies are liability or indemnity contracts.[84]

Moreover, even where the word "indemnity" has appeared in the insurer's name, a question has arisen over whether the company has issued a genuine indemnity policy.

For example, MGIC Indemnity Corp. sells a D&O policy nationwide, describing it as an "indemnity-type policy."[85] Nevertheless, in *Okada v. MGIC Indemnity Corp.*,[86] the Ninth Circuit held that although the company "cryptically refer[s] to its policy as an 'indemnity-type policy' . . . the policy here is a liability policy."[87] The Court of Appeals for the Third Circuit adopted a similar view in *Little v. MGIC Indemnity Corp.*[88] But consider the plight of a liability carrier that also sells D&O policies across the country. In *Zaborac v. American Casualty Co.*,[89] the federal district court—although employing extremely imprecise language—decided that the D&O contract was an indemnity policy.[90] On the other hand, the Eighth Circuit Appellate Court

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82. *See Minet, Directors & Officers Liability* (visited Mar. 9, 1997) <http://www.minet-tech.com/prop_cas/dir_off.html> ("Directors & Officers Liability Insurance is essentially a two-part coverage. One part *pays on behalf of the insured company* for reimbursement due directors and officers as authorized by corporate bylaws and articles; the other part *pays on behalf of the directors and officers* directly.") (emphasis added).

83. *Id.*

84. *See infra* notes 85-92 and accompanying text.

85. *See Okada v. MGIC Indemnity Corp.*, 823 F.2d 276, 280 (9th Cir. 1986).

86. *Id.*

87. *Id.* at 280 (stating that if the policy is for liability rather than indemnity, payment for loss is not conditioned upon the payment of damages by the directors, thus assuring policyholders that they need not expend their funds to receive protection for liability); *see also* Gon v. First State Ins. Co., 871 F.2d 863, 867-68 (9th Cir. 1988) (concluding that the First State policy was a liability policy because the language in the policy "paralleled" that found in the *Okada* policy). Note, however, that in this case the court also stated that "there is no duty to defend under the terms of the First State policy." *Id.* This conclusion is unduly bewildering because liability policies generally have duty to defend provisions. *See supra* notes 75, 78 and accompanying text (contrasting liability and indemnity insurance contracts).

88. 836 F.2d 789, 793 (3d Cir. 1987) (stating "[t]he language of [the definitions] section . . . is entirely consistent with the characterization of the policy as a liability policy").

89. 663 F. Supp. 330 (C.D. Ill. 1987).

90. *See id.* at 332 (stating that the liability insurance policy requires only that the insurer indemnify its insured for losses incurred, including defense costs, thereby distinguishing it from a general liability policy where "the insurer *must defend an insured in addition to indemnifying him against liability*") (emphasis added).

reached a different conclusion in *McCuen v. American Casualty Co.*[91] The *McCuen* court said that the D&O policy was "clearly a liability policy, despite American Casualty's attempt to treat it as an indemnity policy."[92]

Determining whether a D&O policy is a "liability" or an "indemnity" contract is crucial, because the answer influences whether courts will force insurers to defend officers and directors who have been accused of committing immoral and intentional acts. But the way state and federal courts decide this question should cause alarm. Essentially, there is no evidence that courts are using a sound methodology or legal standard to determine the true character of D&O policies. Therefore, litigants and their attorneys should weigh this observation fairly carefully before asking courts for a declaration of the respective rights and obligation of the insurers and the insured.

II. THE INSURER'S DUTY TO DEFEND AND PAY UNDER THIRD-PARTY INSURANCE CONTRACTS

A. General Rules—The Origin of the Liability Insurer's Duty to Defend Against Third-Party Claims

Many large liability insurers sell the same insurance contract in every state. Moreover, each liability contract contains a duty-to-defend statement or clause.[93]

But determining whether and when liability carriers must defend insureds in the respective states is not easily discernible. Consider, for example, a fairly common occurrence. Each year, State Farm Insurance Co. sells thousands of homeowners contracts in every state of the union. A third-party victim from each state accuses a homeowner of either sexual molestation, wrongful-death, or spousal abuse. Fifty homeowners approach State Farm and ask for a legal defense. Should the insurer review the liability contract to determine whether it should commence a legal defense? Should the company examine the third-party complaint to find the answer? Or should the company file a declaratory judgment action? Sadly, but for good reasons, too many insurers elect to do the latter.[94]

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91. 946 F.2d 1401 (8th Cir. 1991).

92. *Id.* at 1401.

93. *See* ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW, § 9.1(b) (1988) (stating that "[l]iability insurance policies usually include provisions which state that the insurer will defend an insured against any suit alleging bodily injury and property damage resulting from an occurrence that is within the scope of the insurance coverage").

94. *See infra* note 380 and accompanying text.

Simply put, there is no universal rule. More disturbing from both the insureds' and the national insurers' perspectives, state supreme courts have adopted a wide variety of conflicting and overlapping tests to help determine whether the insurer must defend based on the liability.

For example, the Iowa Supreme Court and the Supreme Court of Pennsylvania have embraced the so-called "complaint-potentiality rule": The duty to defend arises only where the third-party victim's complaint suggests "potential liability" or when the complaint may "potentially come within" policy coverage.[95] The Arizona Supreme Court[96] and three other courts,[97] however, have chosen the "complaint-analysis of facts" rule: Generally, insurers must examine the *facts* outlined in the third-party complaint—rather than the third-party victims' allegations—to determine whether a defense is required.

At least thirteen state supreme courts instruct liability insurers to review their insurance policies rather than the third-party complaints.[98] But within this group, there are a variety of tests. For instance, the Supreme Courts of Michigan, Nevada, and Oklahoma have embraced the "policy-obligation rule," which requires the insurer to defend when the policy language *clearly* requires a defense.[99]

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95. *See* McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117, 119 (Iowa 1984) ("[An insurer's] duty to defend arises whenever there is a potential or possible liability to pay based on the facts at the outset of the case and is not dependent on the probable liability to pay based on the facts ascertained through trial."); Gedeon v. State Farm Mut. Auto. Ins. Co., 188 A.2d 320, 321-22 (Pa. 1963) ("[T]he obligation to defend arises whenever the complaint filed by the injured party may potentially come within the coverage of the policy.").

96. *See* Kepner v. Western Fire Ins. Co., 509 P.2d 222, 224 (Ariz. 1973) ("[T]he duty to defend should focus upon the facts rather than upon the allegations of the complaint which may or may not control the ultimate determination of liability.").

97. *See* Continental Ins. Co. v. United States Fidelity & Guar. Co., 528 P.2d 430, 435 (Alaska 1974) ("[T]he insurer must defend a suit where the complaint alleges facts that may be within the policy coverage or where such facts are known or reasonably ascertainable by the insurer."); Trisler v. Indiana Ins. Co., 575 N.E.2d 1021, 1023 (Ind. Ct. App. 1991) ("The insurer's duty to defend is determined from the allegations of the complaint coupled with those facts known to or ascertainable by the insurer after reasonable investigation."); Woodmen of the World Life Ins. Soc'y v. Peter Kiewit Sons' Co., 241 N.W.2d 674, 678 (Neb. 1976) (stating that "[a]n insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured") (quoting Hartford Accident & Indem. Co. v. Olson Bros., 188 N.W.2d 699, 702 (Neb. 1971)).

98. *See infra* notes 99-103 and accompanying text.

99. *See, e.g.*, Stockdale v. Jamison, 330 N.W.2d 389, 392 (Mich. 1982) ("The duty to defend . . . arises solely from the language of the insurance contract. A breach of that duty can be determined objectively, without reference to the good or bad faith of the insurer."); Home Sav. Ass'n v. Aetna Cas. & Sur. Co., 854 P.2d 851, 855 (Nev. 1993) ("An insurer obligated by contract to defend an insured owes the insured a continuing duty to defend, and this duty continues throughout the course of the litigation against the insured.");Deffenbaugh v. Hudson, 791 P.2d 84, 86 n.8 (Okla. 1990) ("When an insurance policy provides indemnity against liability, the insurer's duty to defend attaches immediately after the claim is made, and the insurer must thereafter act in the name and on behalf of the insured; the insurer's legal position vis-a-vis

In contrast, the New Mexico and South Dakota Supreme Courts have fashioned the "arguably within policy rule": Liability companies are required to defend when known, but unpleaded facts, bring a third-party claim *arguably* within the scope of the policy's coverage provision.[100] The Wisconsin and Idaho Supreme Courts have established a somewhat similar test—the "fairly debatable rule." It states that the duty to defend may or may not arise if there is doubt about the likelihood of recovery under the policy.[101]

Five state supreme courts have adopted a position that may be described as the "policy-potentiality rule."[102] For example, thirty-two years ago, the California Supreme Court outlined the test in *Gray v. Zurich Insurance Co.*[103] The court stated: "[T]he duty to defend should be fixed by the facts which the insurer learns from the complaint, the insured, or other sources. An insurer, therefore, bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy."[104] The Arkansas Supreme Court announced a closely related doctrine. It held that "the duty to defend arises where there is a *possibility* that the injury or damage may fall within the policy coverage."[105]

[sic] the injured party becomes *coextensive* with that of the insured.") (quoting Colie v. Arnett, 765 P.2d 1203, 1206-07 (Okla. 1988)).

100. *See* American Gen. Fire & Cas. Co. v. Progressive Cas. Co., 799 P.2d 1113, 1116 (N.M. 1990) ("The duty of an insurer to defend arises from the allegations on the face of the complaint or from the known but unpleaded factual basis of the claim that brings it arguably within the scope of coverage."); Hawkeye-Security Ins. Co. v. Clifford, 366 N.W.2d 489, 491 (S.D. 1985) ("[W]e adopt the view that if it is clear or arguably appears from the face of the pleadings in the action against the insured that the alleged claim, if true, falls within policy coverage, the insurer must defend.").

101. *See* Continental Cas. Co. v. Brady, 907 P.2d 807, 810 (Idaho 1995) ("An insurer seeking to establish that it has no duty to defend faces a difficult burden since, at this stage, any doubts as to coverage must be resolved in favor of the insured."); Elliott v. Donahue, 485 N.W.2d 403, 406 (Wis. 1992) (stating that "[a]n insurer does not breach its contractual duty to defend by denying coverage where the issue of coverage is fairly debatable as long as the insurer provides coverage and defense once coverage is established").

102. *See infra* notes 103-04 and accompanying text.

103. 419 P.2d 168 (Cal. 1966).

104. *Id.* at 177; *see also* Standard Oil Co. v. Hawaiian Ins. & Guar. Co., 654 P.2d 1345, 1349 (Haw. 1982) ("An insurer's duty to defend arises whenever there is a potential for indemnification liability of insurer to insured under the terms of the policy."); Spruill Motors, Inc. v. Universal Underwriters Ins. Co., 512 P.2d 403, 407 (Kan. 1973) (adopting the rule announced in Milliken v. Fidelity & Cas. Co., 338 F.2d 35 (10th Cir. 1964), holding that an insurer has a duty to defend if the facts brought to its attention or "any facts which could be reasonably discovered" give rise to a potential of liability under the policy); James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 279 (Ky. 1991) (holding that "insurer has a duty to defend if there is any allegation which potentially, possibly or might come within the coverage of the policy"); First Wyo. Bank, v. Continental Ins. Co., 860 P.2d 1064, 1075 (Wyo. 1993) (affirming "obligation to defend arises from the allegations in the complaint directed to the potentiality of covered liability") (citations omitted).

105. *See* Commercial Union Ins. Co. of Am. v. Henshall, 553 S.W.2d 274, 277 (Ark. 1977) (affirming circuit court's holding that under homeowner's policy, insurer had duty to defend but reversing judgment on duty to pay damages that may be recoverable by injured party until

Of course, the majority of state supreme courts compel liability insurers to examine the third-party victim's complaint as well as the insurance contract to determine whether a duty to defend exists.[106] In Texas, the doctrine is known as the "eight corners rule":

> This rule requires the trier of fact to examine . . . the allegations in the complaint and the insurance policy [to] determin[e] whether a duty to defend exists. The duty to defend is not affected by facts ascertained before suit . . . [or during] the process of litigation, or by the ultimate outcome of the suit.[107]

In Florida,[108] Illinois,[109] Minnesota,[110] New York,[111] Ohio,[112] Washington,[113] and several other jurisdictions,[114] the doctrine is termed the

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facts are developed at personal injury trial).

106. *See infra* notes 104-14 (discussing an insurer's duty to defend).

107. American Alliance Ins. v. Frito-Lay, Inc., 788 S.W.2d 152, 153-54 (Tex. Ct. App. 1990) (applying "eight corners" or "complaint allegation" rule).

108. *See* National Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533, 535 (Fla. 1977) (stating that "insurer is under a duty to defend a suit against an insured only where the complaint alleges a state of facts within the coverage of the insurance policy").

109. *See* Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co., 655 N.E.2d 842, 847 (Ill. 1995). The court stated:

> Whether an insurer's duty to defend has arisen is determined by looking to the allegations in the underlying complaint and comparing these allegations to the policy provisions. . . . If the facts alleged in the underlying complaint fall within or even potentially within policy coverage, the insurer has a duty to defend its insured against the complaint.

Id.

110. *See* Republic Vanguard Ins. Co. v. Buehl, 204 N.W.2d 426, 429 (Minn. 1973).

> [A]n insurance company's duty to defend is contractual, to be determined by the allegations of the complaint against the insured and the indemnity coverage afforded by the policy. Where the allegations of a complaint state a cause of action within the terms of policy coverage, the insurance company must undertake to defend the insured.

Id.

111. *See* Goldberg v. Lumber Mut. Cas. Ins. Co., 77 N.E.2d 131, 133 (N.Y. 1948) ("[T]he insurance company's duty to defend . . . [arises] when it appear[s] from the allegations . . . that the injury [is] within coverage of the policy.").

112. *See* Socony-Vacuum Oil Co. v. Continental Cas. Co., 59 N.E.2d 199, 203 (Ohio 1945).

> The duty of an insurance company to defend an action brought against its insured is determined from the plaintiff's petition and, when that pleading on its face discloses a case within the coverage of the policy, the insurer is required to make defense regardless of its 'ultimate liability' to the insured.

Id.

113. *See* State Farm Gen. Ins. Co. v. Emerson, 687 P.2d 1139, 1145 (Wash. 1984) ("[T]he duty to defend hinges not on the insured's potential liability to the claimant, but rather on whether the complaint contains any factual allegations rendering the insurer liable to the insured under the policy.").

114. *See, e.g.*, Ladner & Co. v. Southern Guar. Ins. Co., 347 So. 2d 100, 103 (Ala. 1977) (finding duty to defend "when the allegations of the complaint show that the injury alleged is . . . within the coverage of the policy"); Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1089 (Colo. 1991) ("An insurer's duty to defend arises when the underlying complaint against the insurer alleges any facts that might fall within the coverage of the policy"); LaBonte v. Federal Mut. Ins. Co., 268 A.2d 663, 665 (Conn. 1970) ("[A] duty to defend an insured arises if the complaint states a cause of action which appears on its face to be within the terms of the policy coverage."); Continental Cas. Co. v. Alexis I. DuPont Sch. Dist., 317 A.2d

101, 103 (Del. 1974) ("In determining whether the third party's action against the insured states a claim covered by the policy, we must look to the allegations of the complaint.... The test is whether the complaint alleges a risk within the coverage of the policy."); American Continental Ins. Co. v. Pooya, 666 A.2d 1193, 1197 (D.C. 1995) (concluding that the complaint should be examined "to ascertain whether the allegations of the complaint state a cause of action within the policy coverage ... which gives rise to a duty to defend under the terms of the policy"); Great Am. Ins. Co. v. McKemie, 259 S.E.2d 39, 40-41 (Ga. 1979) (holding that even if the allegations in the complaint are groundless, the allegations are the focus when determining whether the insurer is obligated to provide a defense); American Home Assurance Co. v. Czarniecki, 230 So. 2d 253, 259 (La. 1970) ("Insurer's duty to defend suits brought against its insured is determined by the allegations of the injured plaintiff's petition, with the insurer being obligated to furnish a defense unless the petition unambiguously excludes coverage."); Lavoie v. Dorchester Mut. Fire Ins. Co., 560 A.2d 570, 570 (Me. 1989) (holding that insurer is required to defend if there is a "legal or factual basis that could be developed at trial"); Brohawn v. Transamerica Ins. Co., 347 A.2d 842, 850 (Md. 1975) ("If the plaintiffs in the tort suits allege a claim covered by the policy, the insurer has a duty to defend."); Commercial Cas. Ins. Co. v. Tri-state Transit Co., Inc., 1 So. 2d 221, 223 (Miss. 1941) ("The duty of the insurer to defend that suit is to be measured by the allegations of the declaration in that case...."); McAlear v. Saint Paul Ins. Cos., 493 P.2d 331, 334 (Mont. 1972) (holding that "if the complaint in the action brought against the insured upon its face alleges facts which come within the coverage of the liability policy, the insurer is obligated to assume the defense of the action"); Zipkin v. Freeman, 436 S.W.2d 753, 754 (Mo. 1969) ("Ordinarily the insurer's duty to defend is determined from the policy provisions and the allegations of the petition.") (citations omitted); White Mountain Constr. Co. v. Transamerica Ins. Co., 631 A.2d 907, 909 (N.H. 1993) ("[A]n insurer's obligation to defend its insured is determined by whether the cause of action against the insured alleges sufficient facts in the pleadings to bring it within the express terms of the policy, even though the suit may eventually be found to be without merit."); Voorhees v. Preferred Mut. Ins. Co., 607 A.2d 1255, 1259 (N.J. 1992) (deciding that "[w]hen [the language of the complaint and the policy] correspond, the duty to defend arises, irrespective of the claim's actual merit") (citations omitted); Waste Management, Inc. v. Peerless Ins. Co., 340 S.E.2d 374, 377 (N.C. 1986) ("When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable."); Kyllo v. Northland Chem. Co., 209 N.W.2d 629, 634 (N.D.1973) ("The general rule on a liability insurer's duty to defend its insured is that the insurer is under an obligation to defend only if it would be held bound to indemnify the insured in case the injured person prevailed upon the allegations of his complaint.") (citations omitted); Ferguson v. Birmingham Fire Ins. Co., 460 P.2d 342, 347 (Or. 1969) ("Thus, if a complaint contains two counts, one based upon willful conduct [which is excluded from coverage] and one based upon negligent conduct [which is not excluded], the insurer would have a duty to defend because of the allegation falling within policy coverage."); Grenga v. National Sur. Corp., 317 A.2d 433, 435-36 (R.I. 1974) ("If the allegations in the complaint fall within the risks covered against in the policy, the insurer is duty-bound to provide a defense for its insured regardless of whether the allegations are groundless, false, or fraudulent."); Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co., 265 S.E.2d 38, 40 (S.C. 1980) ("The insurer is under a duty to defend if the complaint alleges a state of facts within the policy's coverage."); First Nat'l Bank v. South Carolina Ins. Co., 341 S.W.2d 569, 570 (Tenn. 1960) (holding that an insurance carrier must look to the content of its policy and averments of pleading to determine its obligation) (citations omitted); State Farm Mut. Auto Ins. Co. v. Kay, 487 P.2d 852, 855 (Utah 1971) ("[W]here the facts alleged in a complaint against the insured support a recovery for an occurrence covered by the policy... it is the insurer's duty to defend unless relief is obtained by way of a declaratory judgment."); Commercial Ins. Co. v. Papandrea, 159 A.2d 333, 335 (Vt. 1960) (holding that "the duty of the insurance carrier to defend a claim is measured by the allegations upon which the claim is stated," and "[t]he provision in the policy requiring the insurer to defend the insured...."); Norman v. Insurance Co. of N. Am., 239 S.E.2d 902, 906 (Va. 1978) ("[The] insurance policy cast upon the defendant the duty to defend, initially at least, only if the suit against its insured stated a case covered by policy.") (citations omitted); Aetna Cas. & Sur. Co. v. Pitrolo, 342 S.E.2d 156, 160 (W. Va. 1986) ("As a general rule, an insurer's duty to defend is tested by whether the allegations in the plaintiff's complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy.").

"allegation of the complaint rule." Perhaps the Supreme Court of Massachusetts has stated the rule most intelligibly: "the initial duty of a liability insurer to defend third-party actions against the insured is decided by matching the third-party complaint with the policy provisions . . . . [I]f the allegations of the complaint . . . reasonably [fall under the coverage provisions], the insurer must undertake the defense."[115]

B. An Analysis of Specific Factors Triggering Liability Insurers' Obligation to Defend

Even if insurers know they must examine either the contract, complaint, or both documents to determine whether a defense is necessary, there is still another conflict-generating question: What specific act, incident, or behavior triggers the duty? Put another way: assuming an insurer knows a defense is required, does the insurer have discretion to commence the representation at will? Or may the insured compel the insurer to start the legal representation immediately, on a specific date, or upon occurrence of a specific event? Without doubt, this is a serious issue, because the majority of state supreme courts embrace the rule that liability insurers have the exclusive right to organize, commence, and control the legal defense.[116]

Although they have recognized insurers' right to control a defense, state and federal courts still have adopted some very broad, conflicting, and less-than-intelligible instructions that dictate when insurers should start spending money to protect insureds' interests. For example, a few courts have employed the "exposure rule" and held that the duty to defend is triggered when the initial exposure to an injury-causing condition takes place.[117] Conversely, some courts have applied the "manifestation rule," which suggests that where manifestation of an injury is delayed, coverage or the duty to defend is not triggered until third-party injuries or property damages become known to the victims.[118] Some additional tribunals have embraced

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115. Continental Cas. Co. v. Gilbane Bldg. Co., 461 N.E.2d 209, 212 (Mass. 1984).

116. *See, e.g.*, Hartford Accident & Indem. Co. v. Sherwood Brands, Inc., 680 A.2d 554, 564 (1996) ("Generally, the insurer has exclusive control over litigation against the insured, who must in turn surrender all control over the conduct of the defense to the insurer."); Ticor Title Ins. Co. v. Employers Ins., 48 Cal. Rptr. 2d 368, 373 (1995) ("As a general rule, under California law the primary insurer alone owes a duty to defend, with the corresponding right to control the defense.").

117. *See, e.g.*, Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1223 (6th Cir. 1980) (applying "exposure rule" which triggers coverage in any policy period in which exposure to cause of injury occurred); Porter v. American Optical Corp., 641 F.2d 1128, 1145 (5th Cir. 1981) (following the "exposure rule").

118. *See* Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 523 F. Supp. 110, 118 (D. Mass. 1981) (applying "pure" or "strict manifestation" rule which triggers coverage upon actual dis-

the "injury-in-fact rule." This rule states that coverage is triggered when actual property damage or a personal injury first occurs.[119] Still, other federal and state courts have adopted the so-called "multiple" or "triple-trigger" approach, which requires coverage under policies during a period of continuing exposure and manifestation.[120]

Of course, there is more confusion. Some courts ignore these rules altogether and conclude that the duty to defend is triggered: (1) "when there is a 'suit,' [although] . . . standard policies often fail to define 'suit'";[121] (2) when insureds exhibit "coincidental involvement in the underlying accidents";[122] (3) when "a suit . . . allege[s] an injury";[123] (4) "when a complaint is filed against the insured";[124] and (5) "when the injury takes place."[125] Clearly, these various rules are onerous and are sources of much conflict. However, there is one rule that is superior to the former and is fairly easy to follow: liability insurers must commence a legal defense when they first discover,

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covery of injury); *see also* Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 24 (1st Cir. 1982) (applying relaxed manifestation rule which triggers coverage in first policy period during which discovery of injury is possible).

119. *See* American Home Prods. Co. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1497 (S.D.N.Y. 1983) (applying injury-in-fact rule, which requires insured to "prove the cause of the occurrence (accident or exposure), the result (injury, sickness, or disease), and that the result (injury, sickness, or disease), and that the result occurred during the policy period"); Kief Farmers Coop. Elevator Co. v. Farmland Mut. Ins. Co., 534 N.W.2d 28, 33 (N.D. 1995) (stating that "[c]ourts have applied the 'injury-in-fact' rule, holding that where the manifestation of injury is delayed, liability insurance coverage is triggered when real personal injury or actual property damage first occurs"); *see also* Sentinel Ins. v. First Ins. Co., 875 P.2d 894, 917 (Haw. 1994) (explaining that injury-in-fact theory "diverges from the manifestation and exposure theories only when injury-in-fact is not simultaneous with manifestation or exposure").

120. *See* Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1046-47 (D.C. Cir. 1981) (applying the "multiple" or "triple-trigger" approach); Kief Farmers Coop., 534 N.W.2d at 33 (confirming that "[o]ther courts have applied the 'continuous exposure' rule [which holds] that where manifestation of injury is delayed, liability insurance coverage is triggered so that insurance policies in effect during different time periods from exposure to harm through manifestation of injury . . . all impose a duty to defend or indemnify").

121. Weyerhaeuser Co. v. Aetna Cas. & Sur. Co., 874 P.2d 142, 148 (Wash. 1994) (revealing that "[t]he case law across the country is split [over] what constitutes a 'suit' for purposes of the duty to defend"); *see also* Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co., 655 N.E.2d 842, 847 (Ill. 1995) ("Without a complaint, there is no 'suit.' And without a 'suit,' [the] duty to defend . . . is not triggered.").

122. Frankenmuth Mut. Ins. Co. v. Continental Ins. Co., 537 N.W.2d 879, 881 (Mich. 1995).

123. Select Design, Ltd. v. Union Mut. Fire Ins. Co., 674 A.2d 798, 800 (Vt. 1996).

124. Shunn Constr., Inc. v. Royal Ins. Co. of Am., 897 P.2d 89, 90 (Idaho 1995). *But see* Tri-State Co. v. Bollinger, 476 N.W.2d 697, 704 (S.D. 1991) ("[M]ere allegations of negligence in a transparent attempt to trigger insurance coverage by characterizing intentionally tortious conduct as negligent will not persuade [this] court to impose a duty to defend.") (citations omitted). *But cf.* Hawaiian Holiday Macdamia Co. v. Industrial Indem. Co., 872 P.2d 230, 235 (Haw. 1994) ("The . . . complaint did not allege claims sounding in negligence and therefore did not trigger [the] duty to defend.").

125. Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 52 Cal. Rptr. 2d 690, 699 (Cal. App. 1996) (stating that California case law has established that the operative even "triggering" coverage is the injury although the word "trigger" is not found in the CGL policies or the insurance code).

learn, or receive information indicating that insureds have injured a third-party.

C. *The Scope of Insurers' Duty to Defend Under Liability Contracts*

Again, the central focus of this Article is whether liability insurers have a duty to defend insureds' allegedly "immoral" and "intentional" acts under various circumstances. As will be discussed more thoroughly in Parts III through VII, this is a question of law to be decided by federal and state courts. But courts already have established some definitive rules governing the scope of a legal defense. They have embraced scope-of-defense rules without being concerned about whether third-party allegations involved negligent, immoral, intentional, or criminal acts.

First, if an insurer believes it has no duty to defend, the carrier may (1) defend the action with a reservation of rights;[126] (2) file a separate declaratory judgment action to determine its rights and obligation before trial;[127] (3) file a cross-complaint for declaratory relief in the underlying personal-injury action;[128] or (4) deny the request for a defense and promise to reimburse the insured if a court determines subsequently that a defense is required.[129] But there is consensus: "[t]he best approach is for the insurance company to defend under a reservation of rights."[130]

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126. *See* State Farm Mut. Auto. Ins. Co. v. Jacober, 514 P.2d 953, 958 (Cal. 1973); *see also* Restighini v. Hanagan, 18 N.E.2d 1007, 1008 (Mass. 1939) (holding that insurer "could, pending ascertainment of . . . its liability under the policy, take the usual measures in the defense of the actions without barring itself from subsequently withdrawing when it discovered that the contract . . . did not cover the [insured's claim]").

127. *See* Shell Oil Co. v. AC & S, Inc., 649 N.E.2d 946, 949 (Ill. App. Ct. 1995) (citing La Rotunda v. Royal Globe Ins. Co., 408 N.E.2d 928, 935 (Ill. App. Ct. 1980)); American Employer's Ins. Co. v. Crawford, 533 P.2d 1203, 1207 (N.M. 1975) (concluding that companies may sue for a declaratory judgment—before undertaking a defense—to determine their liability).

128. *See* R.J. Reynolds Co. v. California Ins. Guar. Ass'n, 235 Cal. App. 3d 595, 599 (Cal. Ct. App. 1991).

129. *See* Dykstra v. Foremost Ins. Co., 14 Cal. App. 4th 361, 364 (Cal. Ct. App. 1993) (allowing an insurer to deny a request for a defense when insurer agreed to reimburse the insured for attorney's fees if investigation demonstrated that the insured was actually covered); Waite v. Aetna Cas. & Sur. C.o., 467 P.2d 847, 851 (Wash. 1975) (holding that insurer may instruct insured to pay for his own defense and subsequently reimburse insured for defense cost if final judgment establishes company's liability).

130. Newhouse v. Citizens Sec. Mut. Ins. Co., 501 N.W.2d 1, 6 (Wis. 1993); *see also* Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1089 (Colo. 1991) (holding that insurer should provide defense for insured even if it believes it is under no obligation to do so, and seek reimbursement later if facts prove it to be correct); Trovillion v. United States Fidelity & Guar. Co., 474 N.E.2d 953, 956 (Ill. App. Ct. 1985) (stating that "[a]n insurer's duty to defend under a reservation of rights or to seek a declaratory judgment is not satisfied by simply refusing to participate in the litigation and waiting for the insured to institute litigation against the insurer to determine their respective rights and duties"). *But see* American Gen. Fire & Cas. Co. v. Progressive Cas. Co., 799 P.2d 1113, 1117 (N.M. 1990) ("[T]he insurer's unconditional defense of an action brought against its insured constitutes a waiver of the terms of the policy and

Second, in addition to fully informing the insured of the company's reservation-of-rights defense, an insurer also has "an enhanced obligation of good faith"[131] to defend the insured against third-party claims. To guarantee that an insured receives a "good-faith" defense, an insurer must: (1) take control of the litigation;[132] (2) "thoroughly investigate the cause of the insured's accident and the nature and severity of the [third-party victim's] injuries";[133] (3) "refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk";[134] (4) give equal consideration in all matters to the well being of its insured;[135] (5) defend an entire case even if some claims are not covered under the policy;[136] (6) hire a competent defense counsel;[137] and (7) provide a separate, independent counsel for each insured named in a third-party complaint.[138]

There is more. The insurer must also give the defense attorney sufficient funds to conduct the defense,[139] and stay abreast of the progress and status of the litigation.[140] In addition, the defense lawyer must "continue to represent the insured after settlement, if necessary . . . ."[141] Quite simply, if an insurer refuses to provide a "good

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an estoppel of the insurer to assert the defense of noncoverage.") (quoting Pendleton v. Pan Am. Fire & Cas. Co., 317 F.2d 96, 99 (10th Cir. 1963)).

131. *See* Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133, 1137-39 (Wash. 1986) (listing the specific criteria that must be fulfilled to meet the enhanced obligation).

132. *See* Waste Management Inc. v. International Surplus Lines Ins., 579 N.E.2d 322, 333 (Ill. 1991) (stating that "[w]here the insurer has the duty to defend, that duty includes the right to assume control of the litigation").

133. *Tank*, 715 P.2d at 1137; *see also* Safeco Ins. Co. of Am. v. Butler, 823 P.2d 499, 503 (Wash. 1992) (stating that one of the criteria of the insurer's enhanced obligation is to "thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries").

134. *Tank*, 715 P.2d at 1137.

135. *See* Perkoski v. Wilson, 92 A.2d 189, 191 (Pa. 1952) ("Good conscience and fair dealing [require] that the company pursue a course that [is] not advantageous to itself while disadvantageous of its policyholder.").

136. *See* Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531, 537 (8th Cir. 1970) ("[O]nce a complaint states one claim within the policy's coverage, the insurer has a duty to accept defense of the entire lawsuit even though other claims in the complaint fall outside of the policy's coverage."); Bituminous Ins. Cos. v. Pennsylvania Mfrs. Ass'n Ins. Co., 427 F. Supp. 539, 555 (E.D. Pa. 1976) (following the rule that where insurance contract obligates insurer to defend insured against one claim in complaint, insurer must also defend against claims which are not within coverage of policy).

137. *See* Travelers Ins. Co. v. Lesher, 231 Cal. Rptr. 791, 801 (Cal. Ct. App. 1986) (reiterating that insurer has duty "to hire competent defense counsel").

138. *See Bituminous*, 427 F. Supp. at 555 (concluding that where conflict existed between insureds' respective interests—both of whom insurer had a duty to defend—insurer must provide separate counsel); First Ins. Co., Inc. v. Minami, 665 P.2d 648, 654 (Haw. 1983) ("Where the interests of . . . codefendants do not coincide, the insurer is required to provide separate counsel by selecting independent outside counsel for each insured.").

139. *See* Merritt v. Reserve Ins. Co., 110 Cal. Rptr. 511, 527 (Cal. Ct. App. 1973).

140. *See id.*

141. *See, e.g.*, Maguire v. Ohio Cas. Ins. Co, 602 A.2d 893, 896 (Pa. Super. Ct. 1991) ("The

faith" defense, it does so at its own peril, for a liability insurer who decides not to defend its insured against third-party allegations is liable for the cost of the defense as well as for bad faith damages if a court later determines that the insurer had a duty to defend.[142]

Finally, this "enhanced obligation of good faith" rule also requires the insured's defense or trial counsel to act responsibly. Among other requirements, counsel must understand that she represents the insured's interests rather than the insurer's interests.[143] Therefore, she must fully disclose all conflicts of interests and material information[144] and manage the legal defense.[145] And if defense counsel cannot or refuses to provide a "good faith" defense, the insured may commence a legal-malpractice, "bad faith," or negligence action against the attorney and, where appropriate, against partners and the law firm.[146]

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exercise of good faith prevents an insurer from entering into a dubious release in order to quickly exhaust the limit of its liability to the insured."); *see also* Pareti v. Sentry Indem. Co., 536 So. 2d 417, 423 (La. 1988) ("An insurer which hastily enters a questionable settlement simply to avoid further defense obligations under the policy clearly is not acting in good faith and may be held liable for damages").

142. *See* Firestine v. Poverman, 388 F. Supp. 948, 950 (D. Conn. 1975). The court stated:

> If the insurer chooses not to defend, and if its insured is found liable, and if a court later finds that the insurer did have a duty to defend, the insurer will be liable to reimburse him for the cost of his defense and to pay the damages for which its insured was found liable, up to the policy limits, *whether or not* it might have had a good defense to the claim that it had a duty to indemnify.

Id. (emphasis in original). A Louisiana court reached a similar conclusion:

> La. R.S. 22:1220 imposes a good faith duty on insurers to adjust claims fairly and promptly, and to make a reasonable effort to settle claims. Breach of this duty makes the insurer liable for any damages sustained as a result of the breach. Additionally, the insurer can be liable for penalties. Recovery under the penalty provisions of La. R.S. 22:1220 extends to third parties in addition to the insured .... Third parties can recover penalties and attorney's fees based on an insurer's arbitrary and capricious failure to defend.

Credeur v. McCullough, 685 So. 2d 300, 303 (La. App. Ct. 1996).

143. *See* Van Dyke v. White, 349 P.2d 430, 436 (Wash. 1960) (noting that professional standards require a lawyer to be loyal to an insured/client).

144. The Washington Supreme Court identified three aspects to defense counsel's duty to full, continuous disclosure to the insured:

> First, potential conflicts of interests between insurer and insured must be fully disclosed and resolved in favor of the insured.... Second, all information relevant to the insured's defense, including a realistic and periodic assessment of the insured's chances to win or lose the pending lawsuit, must be communicated to the insured. Finally, all offers of settlement must be disclosed to the insured as those offers are presented.

Tank v. State Farm Fire & Cas., 715 P.2d 1133, 1137-38 (Wash. 1986).

145. *See* Merritt v. Reserve Ins. Co., 110 Cal. Rptr. 511, 527 (Cal. Ct. App. 1973) ("The conduct of the actual litigation, including the amount and extent of discovery, the interrogation, evaluation and selection of witnesses, the employment of experts, and the presentation of the defense in court, remains the responsibility of trial counsel.").

146. *See* Betts v. Allstate Ins. Co., 201 Cal. Rptr. 528, 544-46 (Cal. Ct. App. 1984) (finding that defense counsel and law firm failed to provide good faith defense by failing to disclose pertinent information, failing to protect insured's interests, manufacturing a false record, discouraging insured's attempt to assign her rights to third-party victim, and interfering with in-

D. The Scope of Insurers' Duty to Pay and Reimburse Defense Costs Under Liability and Indemnity Contracts

Without question, money is the major variable that fans the debate over whether an insurer must defend an insured's allegedly immoral and intentional acts. In fact, regardless of the types of third-party allegations, the amount of money allocated and spent for defense costs under either liability or indemnity contracts is a source of much controversy. The reason for the controversy is that, on the one hand, insurers think defense costs are excessive and undermine profits, while on the other hand, insureds assert that exorbitant premiums without adequate representation fly in the face of the very purpose of premiums—to cover litigation expenses.[147]

Are defense costs too expensive? The answer depends upon one's point of view. But some things are clear: "[i]n absolute terms, defense costs are increasing faster than indemnity costs, and in some lines [they] may now exceed indemnity."[148] Additionally, defense costs are often greater than the policy limits under both liability and indemnity contracts.[149] Moreover, the average cost of representing or indemnifying directors and officers under indemnity policies continues to rise annually.[150] Furthermore, the cost of defending insureds in certain types of cases can approach tens of millions of dollars a year.[151]

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dependent attorney's effort to represent insured).

147. *See* Louis Potter, *Insureds Should Be Informed of Defense Costs*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK BENEFITS MGMT., Oct. 7, 1991, at 2, *available in* 1991 WL 2889193 ("Whether viewed as lawyer clients or insurance company customers, insureds are getting something of value . . . when defense services are provided under a liability policy. *Further, they are paying for those services through the insurance premium mechanism.*") (emphasis added).

148. *Id.*

149. *See* Dave Lenckus, *CIGNA Argues for Reorganization*, BUS. INS., Dec. 4, 1995, at 1, *available in* 1995 WL 7497753 (reporting that evidence shows that "defense costs typically range between four and five times their policy limits").

150. *See Looking Back*, BUS. INS., Oct. 30, 1992, at 8, *available in* 1992 WL 9480423, ("The second annual D&O survey conducted by The Wyatt Co. reveals that . . . defense costs average $181,500, based on responses from *1,321 U.S. corporations.*") (emphasis added); Rodd Zolkos, BUS. INS., INS., Mar. 6, 1995, at 5, *available in* 1995 WL 7496863 ("[D]efense costs continue to represent a significant component of D&O losses, . . . with the average defense cost hitting $967,000 in 1994, a record high since Wyatt started doing the surveys in 1973. Defense costs averaged only about $750,000 in 1993.").

151. *See* Alfred G. Haggerty, *California Insurers Lose Challenge on Defense Cost*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., Dec. 13, 1993, at 2, *available in* 1993 WL 3029315 ("Defense costs . . . can run into the tens of millions of dollars a year in large environmental cases."); Harriet Chiang, *Setback for Insurers in Environmental Cases: High Court Rules on Who Must Pay for Trial Defense Expenses*, S.F. CHRON., Nov. 23, 1993, at A15 (stating that defense costs can be "the big-ticket item" and that in large environmental cases defense costs can be the primary expense.); *Trouble Ahead, ISO Chief Warns*, BUS. INS., Jan. 18, 1993, at 3, *available in* 1993 WL 7805193 ("Rising general liability defense costs . . . amounted to 39 cents per dollar of indemnity in 1991, compared with 12 cents in the late 1950s.").

It is generally accepted that an insurer's duty to defend under a liability insurance contract is distinct from and broader than the insurer's duty to pay defense costs under an indemnity contract.[152] The duty to defend carries with it a concomitant obligation to pay legal expenses as they are generated and billed. This means that insurers must spend hundreds of millions of dollars each year for various court costs,[153] travel, document productions and the fees of attorneys, experts and investigators. More significantly, these large sums of money must be spent before a trial even commences or before liability has been established.

What is the scope of the insurer's duty to pay under a directors' and officers' indemnity contract? Is there an obligation to pay expenses contemporaneously? Or may an insurer wait and pay expenses after the litigation is over? Unfortunately, there is serious disagreement among courts considering these questions. The courts of appeals and lower courts in the Third,[154] Fifth,[155] and Ninth[156] Circuits have ruled that indemnity insurers must reimburse defense costs contemporaneously or as they incur because that is when insureds are "legally obligated to pay."

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152. *See* Federal Deposit Ins. Corp. v. Booth, 824 F. Supp. 76, 80 (M.D. La. 1993) ("The duty to provide reimbursement for costs as they are incurred is separate from the duty to defend."); U.S. Fidelity & Guar. Co. v. Johnson Shoes, Inc., 461 A.2d 85, 87 (N.H. 1983) (holding that it is well-settled that duty of insurer to defend is not necessarily coextensive with its duty to pay); Guerdon Indus., Inc. v. Fidelity & Cas. Co., 123 N.W.2d 143, 147 (Mich. 1963) ("It is settled that the insurer's duty to defend the insured is measured by the allegation in plaintiff's pleading.") A Maryland case explains the difference in indemnity versus defense costs as follows:

> The duty to defend is broader than and different from the duty to pay. . . . Absent some special limiting provision in the policy, an insurer generally has a contractual duty to defend 'if there is a *potentiality* that the claim could be covered by the policy' . . . Unlike the duty to pay, which becomes fixed upon the rendition of a judgment (subject to increases for post-judgment interest and costs if it is not discharged promptly,) the duty to defend is necessarily a continuing one that commences upon notice of the claim and extends at least until a judgment is entered and all appeals from it have been resolved. The duty [to defend] thus arises at an earlier point than the duty to pay and may extend to a later time.

Luppino v. Vigilant Ins. Co., 677 A.2d 617, 622 (Md. Ct. Spec. App. 1995).

153. *See* Federal Deposit Insurance Corporation v. Booth, 824 F. Supp. 76, 80 (M.D. La. 1993) (stating that "[t]his [c]ourt, like the majority of courts facing this issue, finds that St. Paul is required to pay defense costs when they are incurred by the insured").

154. *See* Little v. MGIC Indem. Corp., 836 F.2d 789, 794 (3d Cir. 1987) (agreeing that the policy could be interpreted to impose a duty to pay an insured's defense cost due to ambiguities in the policy's language).

155. *See Booth*, 824 F. Supp. at 80 ("This [c]ourt, like the majority of courts facing this issue, finds that St. Paul is required to pay defense costs when they are incurred by the insured.").

156. *See* Gon v. First State Ins. Co., 871 F.2d 863, 868 (9th Cir. 1989) (noting that an insurer must pay legal expenses as they are incurred, because an insured is obligated to pay such expenses as soon as they are rendered); Okada v. MGIC Indem. Corp., 823 F.2d 276, 279, 282 (9th Cir. 1986) (affirming the district court's holding that insurer had to pay defense costs as they became due); *see also* Mt. Hawley Ins. Co. v. Federal Sav. & Loan Ins. Corp., 695 F. Supp. 469, 476 (C.D. Cal. 1987) (following Okada holding that insurer must pay defense costs as they are incurred).

Other courts, however, disagree. Courts in the Second[157] and Seventh[158] Circuits, for example, assert that indemnity contracts give insurers the option to advance funds contemporaneously to cover defense costs, although the practice is not mandatory. Some courts, however, argue against contemporaneous payments because if courts force insurers to advance defense costs before resolving the underlying third-party action, "insurers inevitably would pay some losses that are not covered by [the] policy [and] [i]nsurers would be prejudiced by such a result, even if the insureds were required to reimburse the insurers . . . ."[159]

There is more discouraging news which has generated serious conflicts within the Sixth,[160] Eighth,[161] Tenth,[162] and Eleventh[163] Circuits.

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157. *See* Kenai Corp. v. National Union Fire Ins. Co., 136 B.R. 59, 63-64 (S.D.N.Y. 1992). The Court held that despite:

> the absence of an option clause in this case, there are strong independent reasons for finding that the insurer has no duty to advance defense costs . . . . In light of the plain meaning of the terms of the D&O policy [the Court] rejects . . . conclusion that the policy requires National Union to make contemporaneous interim advances of defense expenses, finding that no such advances are necessary.

Id.

158. *See* Zaborac v. American Cas. Co., 663 F. Supp. 330, 334 (C.D. Ill. 1987) (finding that insurer's partial advance payments of defense costs did not obligate insurer to continue such payments and holding that insurer had the "option, but not the obligation, to advance defense costs as they are incurred").

159. *Kenai Corp.*, 136 B.R. at 64. While some courts have compelled insurers to defend all claims in a suit, even if some are not covered by the policy, the situation is different in indemnity cases:

> Unlike duty to defend policies under liability contracts, which require the insurer to defend claims even if they are only arguably entitled to coverage, policies requiring the insurer to reimburse damages and defense costs [involving] wrongful acts entitle the insured to cost only when the underlying claims are covered by the policy.

Id. at 63.

160. *Compare* Federal Sav. & Loan Ins. Corp. v. Burdette, 718 F. Supp. 649, 661 (E.D. Tenn. 1989) (citing contract clause that gave insurer option to advance money for defense but holding that insurer "must pay the defense costs of the officers and directors when they become legally obligated to pay them (when the defense services are rendered and a bill for payment is submitted) provided the other provisions of § 5(c) are complied with"), *with* Enzweiler v. Fidelity & Deposit Co., No. CIV.A. 89-99, 1986 WL 20444, at *1-2 (E.D. Ky. 1986) (citing contract clause that gave insurer the option to advance money for defense and concluding "that the insurance company may elect . . . to wait the outcome of the underlying litigation against an insured before advancing any payments").

161. *Compare* McCuen v. American Cas. Co., 946 F.2d 1401, 1407 (8th Cir. 1991) (interpreting contract's loss and expenses clauses and concluding "that the policy obligated the insurer to pay the cost of defense as the insureds incurred them."), *with* American Cas. Co. v. FDIC, 677 F. Supp. 600, 606 (N.D. Iowa 1987) (interpreting contract's option and loss clauses and concluding that former clause "merely provides American Casualty with the discretion to advance defense expenses, but it does not require [it]").

162. *Compare* Fight Against Coercive Tactics Network, Inc. v. Coregis Ins. Co., 926 F. Supp. 1426, 1434 (D. Colo. 1996) (construing "the ambiguity against the insurer and find[ing] the [p]olicy create[d] a legal obligation . . . to pay defense legal expenses when they [were]incurred and fees when they [were] billed"), *with* Bank of Commerce & Trust Co. v. National Union Fire Ins. Co., 651 F. Supp. 474, 476 (N.D. Okla. 1986) (refusing to compel insurer to pay insured's defense costs until underlying court determined that such costs were losses under indemnity contract).

In these jurisdictions, some appellate and lower courts force indemnity insurers to pay defense costs contemporaneously, while other courts allow insurers to wait until the final disposition of the underlying third-party action. The persistence of these intra- and inter-jurisdictional disputes demonstrate that neither state supreme courts nor the U.S. Supreme Court is prepared to address this matter in a serious and definitive manner.

III. DECLARATORY JUDGMENTS—THE EMPLOYMENT OF "LEGAL" AND "EQUITABLE" DOCTRINES TO INTERPRET INSURANCE CONTRACTS

Thus far, there is a significant amount of information about important ancillary issues which help fuel the debate over whether insurers must defend insureds' allegedly "immoral" and "intentional" conduct. And as mentioned before, some courts compel insurers to defend such allegations and others do not. However, it is difficult to understand federal and state courts' inconsistent and often bewildering duty-to-defend declarations without a clear understanding of the various doctrines or strategies that judges employ to help clarify rights, obligations and relations under insurance contracts.

A. The Employment of "Legal" Doctrines to Define Rights and Obligations

Generally, the interpretation of the language in an insurance contract is a question of law.[164] Therefore, state and federal courts employ a number of legal doctrines to help determine whether they should award declaratory relief. More important, depending upon temporal factors and the circumstances surrounding a controversy, state and federal courts may use a combination of these doctrines to determine rights and obligations under liability and indemnity contracts.

For instance, some courts use so-called rules of contract construction to decide whether to award declaratory relief.[165] Under this approach, courts view liability and indemnity policies as negotiated instruments and evaluate and interpret them the same as all

163. *Compare* National Union Fire Ins. Co. v. Brown, 787 F. Supp. 1424, 1434 (S.D. Fla. 1991) ("A plain reading of the insuring clause and the definition of 'loss' . . . leads to the conclusion that defense costs in the . . . D&O [p]olicy are payable at the time the directors and officers incur them, not at some future time."), *with* Luther v. Fidelity & Deposit Co., 679 F. Supp. 1092, 1093 (S.D. Fla. 1986) (interpreting contract's option clause and concluding that insurer may advance expenses including attorney's fees to insured but insurer "is not obligated to do so . . . prior to final disposition of any claim").

164. *See* Town of Londonderry v. New Hampshire Mun. Ass'n Property Liab. Ins. Trust, Inc., 667 A.2d 1024, 1025 (N.H. 1995) (stating that courts should interpret the meaning of language in insurance policies as a question of law).

165. *See infra* notes 166-68.

contracts.[166] Here, courts assume that insureds and insurers have equal bargaining positions and the legal competence to negotiate the terms of a contract.[167] Notably, courts employing this approach merely examine the disputed language in the policy and try to determine insureds' and insurers' intent.[168] Courts embracing this perspective refusal to construe the contract narrowly in order to impose liability.

At other times, courts employ the doctrine of *contra proferentem.* This theory states that ambiguities in contractual agreements should be strictly construed against the author of the contract's language, regardless of the parties' relative bargaining powers.[169] The Texas Supreme Court, for instance, has occasionally employed this perspective and concluded that policies with ambiguous or inconsistent language that reasonably could be construed more than one way, should be strictly construed against the insurer.[170]

A number of courts use the "doctrine of plain meaning" to help uncover rights, relations, and obligations under liability insurance contracts. For example, one court stated that "insurers are free to limit coverage to meet their needs; however, all exceptions, limitations, and exclusions must be plainly expressed . . . [and] any doubts will be construed against the contract drafter."[171] The Illinois Supreme Court stated this rule another way: "[A]n insurance policy . . . is to be read as any other contract, that is, according to the plain and ordinary meaning of its terms."[172] The Texas Supreme Court adopted

166. *See* Barnett v. Aetna Life Ins. Co., 723 S.W.2d 663, 665 (Tex. 1987) (noting that courts have considered insurance policies to be contracts and have applied the same rules of construction as applied to contracts in general).

167. *See id.* at 665-66 (explaining that both parties' interpretation of ambiguity in a contract can be reasonable).

168. *See id.* at 666 (noting that the language and terms of an insurance policy, although usually chosen by the insurer, can be reasonably construed differently by the insured).

169. *See* Anderson v. Vrahnos, 500 N.E.2d 110, 113 (Ill. App. Ct. 1986) (commenting that "[w]here an insurance policy is ambiguous, it will be construed in favor of the insured and against the insurer who drafted the policy").

170. *See* Gonzalez v. Mission Am. Ins. Co., 795 S.W.2d 734, 737 (Tex. 1990) (holding that ambiguous or inconsistent insurance policy provisions with more than one reasonable interpretation should be construed to afford coverage); Puckett v. United States Fire Ins. Co., 678 S.W.2d 936, 938 (Tex. 1984) (finding that strict construction of insurance policies to favor insured party avoids exclusion of coverage, unless the insurer's interpretations of the term at issue is the only reasonable view); Ramsey v. Maryland Am. Gen. Ins. Co., 533 S.W.2d 344, 349 (Tex. 1976) (noting that strict construction of insurance policies in favor of insured is a well-settled issue).

171. Allstate Ins. Co. v. United Farm Bureau Mut. Ins. Co., 618 N.E.2d 31, 33 (Ind. Ct. App. 1993); *see also* Sharp v. Indiana Union Mut. Ins. Co., 526 N.E.2d 237, 239 (Ind. Ct. App. 1988) (stating that contract language must be given its plain meaning if contract is clear and unambiguous).

172. Dora Township v. Indiana Ins. Co., 400 N.E.2d 921, 922 (Ill. 1980); *see also* Houston Petroleum v. Highlands Ins., 830 S.W.2d 153, 155 (Tex. App. Houston [1st Dist.] 1990, writ de-

a similar view, finding that courts have a duty to give the words used their obvious meaning when the words are not ambiguous.[173]

Federal and state courts also utilize the "doctrine of reasonable expectation" to help resolve declaratory judgment disputes.[174] This doctrine has been stated many ways. To illustrate, the West Virginia Supreme Court stated: "[T]he doctrine of reasonable expectations [means] that 'the objectively reasonable expectations of applicants and intended beneficiaries . . . will be honored even though painstaking study of the policy provisions would have negated those expectations.'"[175] And the Oklahoma Supreme Court stated: "[I]f the insurer or its agent creates a reasonable expectation of coverage in the insured which is not supported by policy language, the expectation will prevail over the language of the policy."[176]

Finally, some courts apply the "doctrine of adhesion" to help declare rights and obligations under liability and indemnity contracts. Generally, consumers of goods and services are offered standardized forms called adhesion contracts on a "take it or leave it basis."[177] Although insurance policies are contractual in nature, adhesion contracts are created between parties who are not equally situated.[178] Moreover, it is important to remember that the "adhesion contract" doctrine is a defense to the enforceability of a contract.[179] Consequently, courts are more likely to apply this legal theory only when they discover clearly unequal bargaining powers among insureds and

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nied) (stating that "[l]anguage in insurance provisions is only ambiguous if the court is uncertain as to which of two or more meanings was intended").

173. *See Puckett*, 678 S.W.2d at 938 (holding that a court must give effect to the plain meaning of the policy language).

174. *See infra* notes 175-76.

175. National Mut. Ins. Co. v. McMahon & Sons, Inc., 356 S.E.2d 488, 495 (W. Va. 1987) (quoting Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970)).

176. Max True Plastering Co. v. United States Fidelity and Guar. Co., 912 P.2d 861, 864 (Okla. 1996).

177. Jones v. Equitable Life Assurance Soc'y, 400 N.W.2d 648, 650 (Mich. Ct. App. 1986) (holding that the plaintiffs did not have adhesion contracts because they themselves negotiated the contract—it was not a standardized form).

178. *See* Meier v. New Jersey Life Ins. Co., 503 A.2d 862, 869 (N.J. 1986) (noting that courts apply the doctrine of adhesion because insurance companies are in a much stronger bargaining position than the individual seeking an insurance policy). Courts have often construed contracts found to be adhesion contracts in favor of the party with less bargaining power, namely the insured party. *See* Barabin v. AIG Hawaii Ins. Co., Inc., 921 P.2d 732, 737 (Haw. 1996) (stating that "[b]ecause insurance contracts are contracts of adhesion, they must be construed liberally in favor of the insured and all ambiguities resolved against the insurer . . . ."); Finstad v. Steiger Tractor, Inc., 301 N.W.2d 392, 398 (N.D. 1981) (finding that ambiguous language is to be strictly construed against the insurer because insurance policies are adhesion contracts).

179. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 382-88 (4th ed. 1998).

insurers.[180]

Duty-to-defend litigants should always ask: (1) what is the "true" test for determining an insured's "reasonable expectation"?,[181] and (2) what is the definition of "ambiguity"?[182] In addition, some courts embrace the rule that words and phrases in an insurance contract must be given their "plain meaning." Therefore, litigants also should ask: whose "plain meaning"—the insureds', the insurers' or the federal and state judges? Trial and appellate courts have not answered these critical questions, either definitively or satisfactorily, and it appears they never will. A careful examination of some enlightened research provides sufficient support for this assertion.

B. The Employment of "Equitable" or "Moral" Doctrines to Define Rights and Obligations

Again, the following is worth repeating: standard liability and indemnity insurance policies are legally binding and enforceable agreements. They are contracts, and consequently, one would expect courts of law to use only "general rules of contract construction" to decipher insurers' and insureds' rights and obligations. This rarely occurs. Federal and state courts also use a number of other "legal principles" to help resolve contractual disputes. More important, duty-to-defend litigants also should know that courts are increasingly using so-called "equitable doctrines" to decide whether to award declaratory relief.[183]

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180. *See Meier*, 503 A.2d at 869 (observing that "[c]ourts apply the adhesion doctrine because of the unequal bargaining power of the parties" and noting that "insurance companies possess all the expertise and unilaterally prepare the varied and complex insurance policies").

181. *See* Peter Nash Swisher, *Judicial Interpretation of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543, 552-53, 581 (1996) (reporting that courts have been unable to outline the specific factors which constitute "reasonable expectation" and "plain meaning"); Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 823-24 (1990). In his article, Professor Henderson notes that:

> [The doctrine] has become the subject of considerable comment in the legal literature. Some commentators have applauded this development . . . whereas it has been greeted with stern criticism in other quarters. Still others . . . have noted that . . . the principle provide[s] little guidance in the way of doctrinal content . . . . [E]ven after two decades, there . . . seems to exist a great deal of uncertainty [about] the doctrinal content . . . . In short, questions remain [about] whether the principle has developed into a full-fledged doctrine which can be applied in a predictable and evenhanded manner . . . .

Id. (footnotes omitted).

182. *See* Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter*, 30 GA. L. REV. 171, 178 (1995) (stating that "[d]iscussions of the ambiguity rule often have been marred by a failure to describe the rule precisely . . . . The first and most important ambiguity within the ambiguity rule relates, ironically, to the definition of 'ambiguity'").

183. See *infra* notes 184-88.

Theoretically, equity and common law are divergent bodies of jurisprudence,[184] but most jurisdictions readily reject the distinction between the two.[185] On the other hand, there are venues that consider an action for declaratory relief as an "equitable action."[186] Consequently, judges in these latter jurisdictions apply the equitable defense of "unclean hands"[187] or the defense of *in pari delicto*[188] to justify

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184. *See* Gilles v. Department of Human Resources Dev., 521 P.2d 110, 116 (Cal. 1974) (arguing that an "equity and good conscience" standard is broad and requires trier of fact to base ruling on precepts of justice and morality rather than strict adherence to established rules of notice); *see also* BLACK'S LAW DICTIONARY 484 (5th ed. 1979) ("[U]nder equity, justice [is] administered according to fairness as contrasted with the strictly formulated rules of common law. It is based on a system of rules and principles which originated in England . . . and which were based on what was fair in a particular situation.").

185. *See e.g.*, City of Pomona v. Employers' Surplus Lines Ins. Co., 5 Cal. Rptr. 2d 910, 918 (Cal. App. 1992) (commenting that law-equity distinction has effectively been abandoned in California); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1216 (Ill. 1992). In *Outboard*, the court stated:

> That it is of little consequence whether the remedy is in the form of legal or equitable relief is especially true in the context of the broad protective purposes of a CGL insurance policy. Such a policy would be of little utility in protecting its purchaser if its coverage rises or falls upon . . . whether the underlying complaint prayed for legal or equitable relief.

Id.

186. *See, e.g.*, First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 237 N.E.2d 868, 870 (N.Y. 1968) ("As Professor Borchard has noted, 'declaratory relief is *sui generis* and is as much legal as equitable."); Culbertson v. Cizek, 37 Cal. Rptr. 548, 553 (1964) ("An action brought under section 1060 of the Code of Civil Procedure for declaratory relief is an equitable proceeding and the powers of a court . . . are as broad and as extensive as those exercised by such court in any ordinary suit in equity."); *see also* FLA. STAT. ANN. § 86.111 (West 1996) ("The existence of another adequate remedy does not preclude a judgment for declaratory relief . . . . The court has power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as an action in chancery.").

187. *See* Hocker v. New Hampshire Ins. Co., 922 F.2d 1476, 1486 (10th Cir. 1991) (noting that "unclean hands" doctrine is a fundamental principle of equity); Long v. Kemper Life Ins. Co., 553 N.E.2d 439, 441 (Ill. App. 1990) (stating that "unclean hands" doctrine applies when party seeking equity has committed misconduct, fraud or acts of bad faith toward the other party and prohibits the party seeking equitable relief from profiting from his own wrongdoing); Rushville Nat'l Bank of Rushville v. State Life Ins. Co., 1 N.E.2d 445, 450 (Ind. 1936) (reaffirming the principle that a wrongdoer cannot estop an injured party bringing an action for redress because the party seeking equity must demonstrate that he has unclean hands); Tytel v. Massachusetts Mut. Life Ins. Co., No. 903, 1995 WL 551268, *4-5 (Md. App. 1995) (per curiam) (stating "[t]he doctrine of unclean hands precludes equitable relief to 'those guilty of unlawful or inequitable conduct pertaining to the matter in which relief is sought.' . . . 'What is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the rights he now asserts'"); Associated East Mortgage Co. v. Young, 394 A.2d 899, 907 (N.J. Super. Ct. Ch. Div. 1978) (referencing the "unclean hands doctrine" and refusing relief to plaintiff whose conduct violated court's idea of good conscience, goodwill and other equitable principles).

188. *See* Pinter v. Dahl, 486 U.S. 622, 632 (1988). In *Pinter*, the court stated:

> The equitable defense of *in pari delicto*, which literally means "in equal fault," is rooted in the common-law notion that plaintiff's recovery may be barred by his own wrongful conduct . . . . Contemporary courts have expanded the defense's application to situations more closely analogous to those encompassed by the "unclean hands" doctrine, where the plaintiff has participated "in some of the same sort of wrongdoing."

Id. (quoting Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 138 (1968)). *But see* Tarasi v. Pittsburgh Nat'l Bank, 555 F.2d 1152, 1156-57 (3d Cir. 1977) (observing that *in pari*

favorable or adverse declaratory judgments. More disturbing, some courts often cite poorly defined moral principles to decide whether to grant declaratory relief in cases involving various insurance-related controversies.[189]

For example, in *Hartogs v. Employer's Mutual Liability Insurance Co.*,[190] the court held that it would not compel the insurer to defend a psychiatrist who allegedly sexually molested his patient.[191] According to the court, to hold otherwise would be an endorsement of immorality.[192] A Georgia appellate court adopted a similar position in *National Enterprises, Inc. v.* Davis[193] where it stated: "A contract will not be construed so as to authorize one of the parties to take advantage of his wrong."[194] And, as early as 1933, the Alabama Supreme Court stated in *Fidelity-Phoenix Fire Ins. Co. v. Murphy*:[195]

> There can be no valid insurance coverage which will protect or indemnify the insured or indemnitee against a loss which he may purposely and willfully create, or which may arise from his immoral, fraudulent, or felonious conduct. Such an express contract of insurance or indemnity is void as against public policy.[196]

But another court has held that when deciding whether an insurer

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delicto is a common law doctrine created to preclude wrongdoers from profiting from their wrongs and bars guilty parties from receiving damages when their losses were substantially created due to activities the law forbade them to engage in); Mark Georg Strauch, *Rule 10b-5—Application of the In Pari Delicto Defense In Suits Brought Against Securities Brokers by Customers Who Have Traded on Inside Information*, 37 VAND. L. REV. 557, 562 (1984). Strauch states:

> Courts recognize four situations in which they will not allow defendants to hide behind the *in pari delicto* defense: (1) the defendant used fraud or duress to induce plaintiff to participate in the illegal act; (2) the plaintiff is in the class of people the law seeks to protect by making the activity illegal; (3) the plaintiff did not know that the activity was illegal or participated in an independent wrong; and, (4) the denial of relief . . . would be unjust or against public policy.

Id.

189. *See infra* notes 190-98 and accompanying text.

190. 391 N.Y.S.2d 962 (1977).

191. *See id.* at 965 (noting that plaintiff's actions were beyond the intended scope of his malpractice policy).

192. *See id.*; (stating that court will not enforce illicit behavior on public policy grounds). The court explained that:

> There are . . . situations in which [c]ourts as a matter of public policy refuse to allow themselves to be used to enforce illicit or immoral or unconscionable purposes . . . . [This court], as public policy, holds here that it will not afford this [insured] resort to the processes of the [c]ourt. To hold otherwise would be to indemnify immorality. . . .

Id.

193. 231 S.E.2d 490 (Ga. App. Ct. 1976).

194. *Id.* at 491.

195. 146 So. 387 (Ala. 1933).

196. *See id.* at 390; *see also* Industrial Sugars v. Standard Accident Ins. Co., 338 F.2d 673, 676 (7th Cir. 1964) ("A contract of insurance to indemnify a person for damages resulting from his own intentional misconduct is void as against public policy and the courts will not construe a contract to provide such coverage.").

should defend an insured in a third-party action, a court is "not required to find that the [insured's] alleged activities were immoral, illegal or against public policy . . . ."[197] At that stage of the litigation, the insured "has not been adjudicated a wrongdoer."[198] Instead, a court need only decide whether "the allegations are sufficient to bring the suit within the ambit of the contract to require the insurer to defend."[199] Also the New Jersey Supreme Court declared that if an insured does not have the mental capacity "to understand the moral character . . . the general nature, consequences and effect" of his conduct, an insurer must honor its contractual obligations.[200]

At this point it is important to ask whether it is proper for courts to award declaratory relief—under any circumstances—on the basis of whether an insured's conduct was "moral" or "immoral." If the answer is yes, there is an additional question: Should courts use an objective or a subjective test to determine whether the underlying conduct was moral or immoral? Or should courts simply rule that the conduct was moral or immoral *as a matter of law*? Frankly, these questions have generated little concern among practicing attorneys. But concern is warranted, for, as the discussions in Parts IV through VI will reveal, federal and state courts often conclude as a matter of law that the third-party allegations involved immoral conduct and rule against the insured. Far too many courts engage in such absurdity and deny declaratory relief. Moreover, an unacceptable number of federal and state courts rarely force insurers to prove that insureds committed immoral acts, committed an intentional act or came to court with unclean hands.

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197. St. Paul Fire & Marine Ins. Co., 296 S.E.2d 126, 128 (Ga. App. Ct. 1982).

198. *Id.*

199. *Id.*

200. Ruvolo v. American Cas. Co., 189 A.2d 204, 208 (N.J. 1963); *see also* Life Ins. Co. v. Terry, 82 U.S. 580, 591 (1872). In *Terry*, the Court stated that:

> If the death is caused by the voluntary act of the assured . . . when his reasoning faculties are so far impaired that he is not able to understand the moral character . . . of the act he is about to commit . . . such death is not within the contemplation of the parties to the contract, and the insurer is liable.

Id. at 591.

IV. DECLARATORY JUDGMENTS—PROFESSIONAL LIABILITY INSURERS' DUTY TO DEFEND LAWYERS' AND PHYSICIANS' ALLEGEDLY INTENTIONAL CONDUCT

A. Conflicts Over Whether Insurers Must Defend Lawyers Where Clients' Allegations or Claims Fall Within Both the Coverage and Exclusion Clauses

The typical coverage provision in a legal-malpractice policy explains that insurer will "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages . . . *arising out of the performance of professional services* for others in the insured's capacity as a lawyer."[201] The policy's exclusions clause usually states, "[t]his [p]olicy [d]oes [n]ot [a]pply . . . to any dishonest, fraudulent, criminal or malicious act or omission of the insured, any partner or employee."[202] Arguably, the scope of protection under the coverage provision is rather broad, while under the exclusion section it is narrow and specific.

Consequently, in recent years, these provisions have generated a very spirited debate, as well as poorly reasoned decisions within and among federal courts of appeals, over whether insurers must defend lawyers if disgruntled clients' allegations involve both "covered" and "excluded" claims. To illustrate, in *Battisti v. Continental Casualty Co.*,[203] a client filed a mixed-claims lawsuit against his lawyer. The client alleged that the attorney failed to construct, execute, and deliver a certain will[204] in breach of an expressed warranty, and perpetrated

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201. *See, e.g.*, Jensen v. Snellings, 841 F.2d 600, 611 (5th Cir. 1988). In *Jensen*, the following insuring agreements are presented:

> COVERAGE A - Individual Coverage:
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> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of any act or omission of the insured, or of any other person for whose acts or omissions the insured is legally responsible, and arising out of the performance of professional services for others in the insured's capacity as a lawyer . . . .
>
> COVERAGE B - Partnership Coverage:
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> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of any act or omission of the insured, or of any other person for whose acts or omissions the insured is legally responsible, and arising out of the performance of professional services for others in the insured's capacity as a lawyer provided one or more claims arising out of the same professional services are made (1) jointly or severally against two or more members of the partnership insured hereunder or against any member and such partnership, (2) against the partnership or (3) against the insured solely because he is a member of the partnership insured hereunder.

Id.

202. Brooks, Tarton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co., 832 F.2d 1358, 1363 (5th Cir. 1987).

203. 406 F.2d 1318 (5th Cir. 1969).

204. *See id.* at 1319-20 (explaining that client expected attorney to prepare wife's will in

fraud and deceit upon the client.[205] The attorney asked his insurer to defend the action.[206] The insurer said it had no duty to defend,[207] and the Court of Appeals for the Fifth Circuit agreed.[208] Conveniently ignoring that the breach-of-warranty claim was a *covered* act under the policy, the court held that "the pleading alleged facts of an *over-all scheme*... that was grossly 'dishonest,' 'fraudulent,' and 'malicious.'"[209]

In contrast to its earlier opinion in *Battisti*, the Fifth Circuit later reached a very different and arguably, disingenuous conclusion in *Jensen v. Snellings*,[210] where clients also filed a mixed-claims—"excluded" and "covered"—lawsuit against a law firm and its attorneys.[211] Disgruntled clients alleged that the attorneys violated federal and state RICO and securities statutes, and breached their fiduciary and contractual duties.[212] Citing *Battisti*, the insurer refused to defend the attorneys and firm,[213] arguing that the insureds' over-all scheme was "*fraudulent or grossly dishonest.*"[214] The Fifth Circuit, however, refused to conduct an "over-all scheme" analysis as it did in *Battisti*.[215] Instead, the court cited the doctrine of *contra proferentem* and ordered the insurer to defend the lawyers.[216] The court stated that

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such a way that he would be beneficiary of her entire estate).

205. *See id.* at 1319 (seeking relief for an "'over-all fraudulent scheme'").

206. *See id.* at 1321 (disagreeing with attorney's contention that actions fell within negligence or malpractice standards of the insurer, thus compelling insurer to defend).

207. *See id.* at 1320 (reporting that the insurer argued that "the policy expressly excluded coverage for suits alleging 'an dishonest, fraudulent, criminal or malicious act or omission'").

208. *See id.* at 1321 (holding that allegations of facts contained within exclusion provision of insurance policy justified insurer's refusal to defend lawsuit).

209. *Id.* (emphasis added) ("[The insured] argues that certain of his alleged acts... fall short of the culpability required in the exclusion clause. Such acts, he says, are more in the nature of negligence or malpractice, and thus within coverage of the policy. With this we definitely cannot agree.").

210. 841 F.2d 600 (5th Cir. 1988).

211. *See id.* at 615 (concluding not all of the plaintiff's allegations fell within exclusion provision of malpractice insurance policy).

212. *See id.* at 604. The court also explained that "[i]n addition to fraud and dishonesty, the Jensens' complaint also alleges, against Snellings and the Firm separately, claims that do not rise to the level of fraud, and are thus outside the policy exclusion." *Id.* at 615.

213. *See id.* at 614 (arguing that attorneys' alleged conduct was also imputable to the firm and therefore insurer's duty to defend applied to neither).

214. *Id.*

215. *See id.* at 615 (stating that "[w]hile the alleged acts in *Battisti*, if true, were all clearly fraudulent, dishonest or criminal, the same cannot be said for the allegations in the instant case"). But common sense and a careful reading of the case reveals that all acts were not *clearly* fraudulent or criminal. Instead the underlying lawsuit involved mixed claims, both covered and excluded acts. *See Battisti*, 406 F.2d at 1319-21 (setting forth facts regarding attorney's problematic preparation of documents, including a will, and indicating defendant believed some of his alleged acts were covered by malpractice insurance policy).

216. *See Jensen*, 841 F.2d at 615 (concluding that because not all allegations fell clearly within the policy provision excluding coverage, the complaint "does not 'unambiguously exclude coverage'") (quoting American Home Assurance Co. v. Czarniecki, 230 So. 2d 253, 259 (La. 1969)).

"[i]n analyzing the pleadings, . . . [we must] liberally construe the allegations . . . and resolv[e] any ambiguity in favor of finding a duty to defend. Strict construction against the insurer is *especially appropriate when interpreting exclusionary clauses* in insurance policies."[217]

In contrast, *Donnelly v. Transportation Insurance Co.*[218] and *Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Insurance Co.*[219] provide an excellent illustration of inter-circuit confusion over whether national insurance companies must defend legal malpractice suits involving allegedly excluded and covered claims.[220] First, *Donnelly* and *Brooks* were filed in the Fourth and Fifth Circuits, respectively.[221] Second, in *Donnelly*, the aggrieved client, who filed the underlying suit, accused the attorney of improperly retaining funds, selling the client's securities without authorization, and misrepresentation.[222] The client who filed the underlying lawsuit in *Brooks* alleged that her attorney committed the following violations: breach of the confidential relationship between client and attorney, breach of trust, breach of the attorney-client privilege, fraud, duress, undue influence, and deceptive trade practices.[223] Clearly, the claims outlined in each complaint were mixed, involving malpractice, negligence, and intentional acts. More important, "[w]ith no significant deviation, the insurance policy before the court in *Donnelly* was the same one . . . before [the court in *Brooks*]."[224] And the insurers' argument in both cases were identical: the exclusion provision relieved the insurer of the obligations to provide a legal defense.[225] In *Donnelly*, the Fourth Circuit cited the doctrine of *contra proferentem*, decided that the exclusion clause was unclear, and ordered the insurer to defend

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217. Jensen v. Snelling, 841 F.2d 600, 615 (5th Cir. 1988) (emphasis added) (citation omitted).

218. 589 F.2d 761 (4th Cir. 1978).

219. 832 F.2d 1358 (5th Cir. 1987).

220. *See Donnelly*, 589 F.2d at 763-66 (setting forth claims of an attorney's alleged unauthorized sale of securities, receipt of funds through misrepresentation and improper retention of funds for which attorney sought defense from insurance policy); *Brooks*, 832 F.2d at 1363-77 (discussing insurance policy language, relevant law, and providing analysis of whether insurer owed plaintiff a duty to defend under the policy).

221. *See Donnelly*, 589 F.2d at 761; *Brooks*, 832 F.2d at 1358.

222. *See Donnelly*, 589 F.2d at 764 (seeking additional punitive damages on claims of unauthorized sale of securities and misrepresentation).

223. *See Brooks*, 832 F.2d at 1359 (holding that the defendant insurance company breached terms of the plaintiff's insurance policy).

224. *Id.* at 1365. In Brooks, the exclusion clause stated: "This Policy Does Not Apply: (a) to any dishonest, fraudulent, criminal or malicious act or omission of the Insured, any partner or employee." *Id.* at 1363.

225. *See id.* at 1360 (explaining that insurers found allegations in petition to involve fraud, dishonesty, criminal or malicious acts); *Donnelly*, 589 F.2d at 768 (noting that insurers relied on the holding in *Battisti* to deny coverage).

the lawyer.[226] In *Brooks,* however, the Court of Appeals for the Fifth Circuit ordered the insurer to provide coverage.[227] In fact, this latter court stated emphatically:

> Whatever the validity of the Fourth Circuit's opinion as it construes the law of the District of Columbia, we do not believe that its result can ultimately be squared with either the express terms of the policy or Texas law. Consequently, we decline to adopt the Fourth Circuit's reasoning in Donnelly, and conclude that the insurance policy in issue is unambiguous.[228]

Bluntly put, the Fifth Circuit's conclusion and its assertion that the District of Columbia's and Texas' laws cannot be harmonized is misplaced. Why? For years, the rule in the District of Columbia has been clear: "[if a] complaint alleges a liability not within the coverage of the policy, the insurance company is not required to defend. [I]n case of doubt such doubt ought to be resolved in the insured's favor."[229] In addition, the Fifth Circuit tells us in *Brooks*:

> [In Texas, it] "is a fundamental rule of law that insurance policies are contracts and as such are controlled by *rules of construction* which are applicable to contracts generally." Usually, *the first question* faced in contract interpretation is whether the contract terms in dispute are ambiguous .... [And] [t]he test for determining whether a contract is ambiguous is whether, after applying established rules of construction, the contract is *reasonably susceptible to more than one meaning.*[230]

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226. *See Donnelly,* 589 F.2d at 768-69. In explaining its holding, the court stated:

> In the first place, it is to be noted that the policy makes no express reference to the insurance company being excused from defending suits in which dishonest, fraudulent, criminal or malicious acts are alleged .... [Moreover,] there are no ... reasons why an innocent person, charged with such acts, should not have the benefit of a defense. *Policy language, susceptible of more than one interpretation, is construed, if reasonably possible, to provide coverage.* In *Conner v. Transamerica Insurance Co.,* 496 P.2d 770 (Okla. 1972), ... [the court] held that plaintiff's liability insurance carrier owed him the duty of a defense. *Conner* is an even stronger case for the insurance company than the case at bar, and we cannot improve on the [law] of that case ... which we apply here: "In interpreting the language of an ambiguous contract of insurance, defining the scope of the insurer's liability, words of inclusion are liberally construed in favor of the insured and *words of exclusion are strictly construed against the insurer.*"

Id. at 768 (emphasis added). In addition, the Fourth Circuit stated that "[i]f any of the three charges made against Donnelly in the [underlying] suit could *arguably fall* within the [policy's coverage provision], insurer owed Donnelly the duty to defend all charges." *Id.* at 766 (emphasis added). *See also* Jefferson-Pilot Fire & Cas. Co. v. Boothe, Prichard & Dudley, 638 F.2d 670, 675 (4th Cir. 1980) (restating doctrine of *contra proferentem* and concluding that insurer had duty to defend a law firm against underlying malpractice suit because client's "complaint alleged acts which, if proved, would have *arguably triggered coverage* and which did not automatically fall into the exclusionary clause ....") (emphasis added).

227. *See Brooks,* 832 F.2d at 1366 (stating that the insurance policy is unambiguous).

228. *Id.*

229. Boyle v. National Cas. Co. 84 A.2d 614, 615-16 (D.C. 1951).

230. *Brooks,* 832 F.2d at 1364 (emphasis added) (citations omitted).

To be sure, the district court in *Brooks* found ambiguity in the contract.[231] Furthermore, the Texas Supreme Court, like the District of Columbia Court of Appeals consistently has held that in general, any ambiguity in an insurance contract is construed against the insurer.[232] At the same time, the Fifth Circuit said in *Jensen v. Snellings*: "In analyzing the pleadings, [we must] liberally construe the allegations . . . and resolv[e] any ambiguity in favor of finding a duty to defend."[233]

Given the inconsistency of the federal courts, duty-to-defend litigants would be wise to avoid their jurisdictions. Should such litigants insist on petitioning the Fifth or other Federal Circuit Courts for declaratory relief, however, they should be prepared for the possibility of an indefensible decision like the Fifth Circuit's decision in *Brooks*.

B. *Conflicts Over Whether Lawyers' Allegedly Intentional Activities "Arise Out of Professional Services"*

Once more, the typical exclusion provision appearing in legal-malpractice contracts reads as follows: this policy does not apply to any "intentional acts"—reckless, deceitful, fraudulent, dishonest, malicious or criminal act or omission—of any insured, partner or employee.[234] The standard coverage clause typically reads as follows: the

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231. *See id.* at 1367. The court stated that:

> [T]he district court evaluated the allegations in the six petitions . . . filed against the Lawyers [sic]. According to the [district] court, "all of the petitions alleged the same basic claims . . . ." The exclusion provision . . . however, excluded only "dishonest, fraudulent, criminal or malicious acts." As the court read the allegations, . . . two claims were not "clearly beyond the coverage of [the lawyers'] policy." Consequently, the court held that "even if the exclusionary language did pertain to [the insurer's] duty to defend, not all of the claims . . . [fell] under the listed exclusion." Therefore, [the insurer] has a duty to defend and summary judgment for the Lawyers [sic] was appropriate.

Id.

232. *See, e.g.*, National Union Fire Ins. Co. v. Hudson Energy Co., 811 S.W.2d 552, 555 (Tex. 1991) (holding that ambiguous clauses are construed against insurer); Barnett v. Aetna Life Ins. Co., 723 S.W.2d 663, 666 (Tex. 1987) (holding that, generally, any ambiguity in an insurance contract is construed against the insurer); Puckett v. United States Fire Ins. Co., 678 S.W.2d 936, 938 (Tex. 1984) (holding that only when there is one reasonable construction of the term in question is there any favor to the insurer); Republic Nat'l Life Ins. Co. v. Spillars, 368 S.W.2d 92, 94 (Tex. 1963) ("As a general rule, contracts of insurance are to be strictly construed in favor of the insured. . . .").

233. 841 F.2d 600, 615 (5th Cir. 1988) (citations omitted).

234. *See generally Brooks*, 832 F.2d 1358, 1363 (demonstrating a general exclusion provision in an insurance policy, which courts have held to be both ambiguous and unambiguous). *Compare* National Union Fire Ins. Co. v. Shane & Shane Co., 605 N.E.2d 1325, 1329 (Ohio Ct. App. 1992) (holding that if the language does not state the coverage, then no coverage exists), *with* Donnelly v. Transportation Ins. Co., 589 F.2d 761, 768 (4th Cir. 1978) (stating that "[p]olicy language, susceptible of more than one interpretation, is construed, if reasonably possible, to provide coverage"), *and* Continental Cas. Co. v. Cole, 809 F.2d 891, 895 (D.C. Cir. 1987) ("Any doubt as to whether the cause of action falls within the terms of the policy must be resolved in the insured's favor.").

insurer *agrees to pay* on behalf of the insured *all sums* that the insured shall become legally obligated to pay *as money damages* because of any claim or claims made against the insured *arising out of the performance of professional services* in the insured's capacity as a lawyer.[235]

Clearly, the coverage clause is a promise-to-pay-damages rather than a promise-to-defend provision. Yet, over the years this clause has generated much tension and litigation between legal-malpractice insurers and their insureds.[236] Moreover, the heart of this debate has little, if anything, to do with when or whether the insurer should satisfy the agreement and *pay money damages.* Instead, the debate centers on which clause is superior—the coverage or the exclusion clause.

Lawyers argue that professional liability insurers must always provide a legal defense when an unsatisfied client files a third-party suit. Why? According to lawyers, their disgruntled clients' allegations—whether the claims concern intentional or unintentional acts—always "arise out of" or are associated with the lawyers' discharging some professional service. On the other hand, malpractice insurers argue that the language in the exclusion clause is superior and there is no duty to defend when a client alleges that an attorney has committed an intentional act.[237]

Over the years, federal and state courts have tried to resolve this major conflict with little success, especially among cases where clients have accused attorneys and law firms of committing a variety of intentional acts that were unquestionably excluded under the terms of the policy. For example, in *Cadwallader v. New Amsterdam Casualty Co.*,[238] *Donnelly v. Transportation Insurance Co.*[239] and *Jensen v. Snellings*,[240] clients accused their respective attorneys of committing an assortment

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235. *See generally* Toms v. Lawyers Mut. Liab. Ins., 408 S.E.2d 206, 208 (N.C. Ct. App. 1991) (describing a policy that covered damages resulting from certain professional services); Hofing v. CNA Ins. Co., 588 A.2d 864, 867 (N.J. Super. Ct. App. Div. 1991) (reporting a portion of the professional liability coverage part of the plaintiffs' policy); Cadwallader v. New Amsterdam Cas. Co., 152 A.2d 484, 485 n.1 (Pa. 1959) (describing a portion of a standard policy coverage).

236. *See, e.g.*, L & S Roofing Supply Co., Inc. v. St. Paul Fires & Marine Ins. Co., 521 So. 2d 1298, 1304 n.1 (Ala. 1987) (listing cases that support proposition that where there is a reservation of rights, the insured is entitled to defense counsel of its choice whose fees the insurer is required to pay).

237. *See infra* notes 238-41 and 248-49 and accompanying text.

238. 152 A.2d 484, 485 n.4, 489 (Pa. 1959) (discussing causes of action involving breach of contract and conspiracy against an insurance provision that excluded coverage for "dishonest, fraudulent, criminal or malicious act or omission").

239. 589 F.2d 761, 763-64 (4th Cir. 1978) (involving claims and unauthorized sale of securities, misrepresentation, and improper retention of client funds).

240. 841 F.2d 600, 614-15 (5th Cir. 1988) (explaining that while claims of fraud and dishonesty fell under exclusion, client's additional claims of failure to supervise employees, providing faulty tax advice, and inaccurate figures on profitability of investments did not).

of intentional acts that were clearly excluded under the respective policies. Citing the exclusion clauses, the insurers argued that they had no duty to defend the attorneys.[241]

The Supreme Court of Pennsylvania[242] and the Courts of Appeal for the Fourth[243] and Fifth[244] Circuits disagreed. Each court held that the lawyers' allegedly intentional conduct—deceit, fraud, deceptive practices, dishonest acts, and federal RICO violations—arose from the performance of professional services and therefore, was covered under the respective policies.[245] The Courts of Appeals for the Sixth[246] and D.C.[247] Circuits also have reached similar conclusions. But on several occasions, state and federal courts in the Third[248] and

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241. *See Cadwallader*, 152 A.2d at 488 (stating that defendant argued cause of action was based on facts outside scope of policy); *Donnelley*, 589 F.2d at 764 (stating that insurer denied coverage for defense despite agreement to defend); *Jensen*, 841 F.2d at 604.

242. *See Cadwallader*, 152 A.2d at 487. In *Cadwallader*, the court stated:

> It is of course clear that if there [is] any ambiguity in the contract of insurance it must be resolved in favor of the insured since it was the insurer who wrote the contract .... [Therefore,] [i]t cannot seriously be contended that the breach did not arise out of the "performance of professional services."

Id.

243. *See Donnelly*, 589 F.2d at 768 ("[I]t is to be noted that the policy makes no express reference to the insurance company being excused from defending suits in which dishonest, fraudulent, criminal or malicious acts are alleged .... Policy language, susceptible of more than one interpretation, is construed, if reasonably possible, to provide coverage.").

244. *See Jensen*, 841 F.2d at 614 ("Resolving any doubt in favor of the insureds, we conclude that some of the acts and omissions with which Snellings is charged arose 'out of the performance of professional services for others in the insured's capacity as a lawyer.'") (citation omitted).

245. *See supra* notes 198, 238, 239 (describing policy language and holdings of cases).

246. *See* Home Ins. Co. v. Bullard, 850 F.2d 692, (6th Cir. 1988). The court stated:

> [N]ot every act of a lawyer constitutes the rendering of professional services within the meaning of an insurance policy.... [T]o be considered a professional service, the conduct must arise out of the insured's performance of his specialized vocation or profession .... To be covered, the liability must arise out of the special risks inherent in the practice of the profession. At least one act of which Bullard and Hayes is accused, i.e., *the refusal to split fees* in the agreed-upon manner, arose because of the rendering of professional services to clients, i.e., an act required by the policy to merit coverage.

Id. (emphasis added) (citation omitted). But another case originating in the Sixth Circuit reached a different conclusion. In *National Union Fire Insurance Co. v. Shane & Shane*, 605 N.E.2d 1325 (Ohio Ct. App. 1992), the complaint alleged that the plaintiff contracted with a law firm, who was currently the defendant, to agree to pay the firm twenty-five percent of any money collected on his behalf. *See id.* at 1325. The court refused to hold that a "fee dispute is the same as rendering professional services." *Id.* at 1329. Instead, the court ruled that under the insurance policy's terms, the fee dispute between the parties "was neither part of the coverage nor contemplated by the parties." *Id.*

247. *See* Continental Cas. Co. v. Cole, 809 F.2d 891 (D.C. Cir. 1987). In *Continental*, the policy in question was limited to damages stemming from the lawyers' performance of services as a lawyer where the lawyer committed an "'error, negligent omission or negligent act'." *Id.* at 895. The court held that mere allegations of malice by a third party, were not enough to justify the insurer's refusal to defend. *See id.* at 897.

248. *See* Hoffing v. CNA Ins. Co., 588 A.2d 864 (N.J. Super. Ct. App. Div. 1991). In *Hoffing*, the client charged that the lawyer not only violated standards of professional conduct, but also standards regarding attorney's fees as outlined by the New Jersey courts. *See id.* at 866. The

Ninth[249] Circuits have refused to declare that lawyers' allegedly intentional acts arose out of the rendering of professional services.

What explains these inconsistent holdings? Why do some federal and state judges declare that lawyers' intentional acts arise out of the "performance of professional services," while others do not? Arguably, judges who decide that legal-malpractice policies cover lawyers' intentional acts are more likely to invoke legal doctrines of reasonable expectation, adhesion, or *contra proferentem.* On the other hand, judges, who declare that "professional services" do not include intentional acts, are more likely to invoke the doctrine of plain meaning and general rules of contract construction. A careful study of the cases mentioned above gives some support to this conclusion. But an examination of the medical-malpractice cases outlined in the next section, reveals that some courts include intentional acts in the definition of "professional services."

C. *Conflicts Over Whether Medical Professionals' Allegedly Intentional Activities "Arise Out of Professional Services"*

Like most responsible and prudent attorneys, health-care professionals—including dentists, gynecologists, physicians, psychiatrists, psychologists, therapists, and medical technicians—spend millions of dollars purchasing medical-malpractice insurance from state, regional, and national liability insurers. For example, the St. Paul Fire

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lawyer's insurance policy stated that a wrongful act included any "'negligent act, error or omission in: A rendering of or failure to render, professional services.'" *Id.* at 867. The policy in question also contained an exclusion clause which stated that the insurer would "not defend or pay . . . for any fine, penalty or claim for return of fees . . . ." *Id.* Finding that the insured's allegations fell within the scope of the exclusion, the court determined that the insurer was not obligated to defend the lawyer. *Id.* at 868-69. While the court explained that "[a]n insured's reasonable expectations are circumscribed by genuine ambiguities and misleading terms and conditions of insurance contracts," it affirmed that in this case the exclusion was clear and there was "no ambiguity or misleading terms and conditions . . . ." *Id.* at 868; *see also* Harad v. Aetna Cas. & Sur. Co., 839 F.2d 979, 980-81, 985 (3d Cir. 1988) (holding that claims involving malicious prosecution conspiracy and misrepresentation were excluded under policy and therefore did not arise out of rendering of professional services).

249. *See* Johnson v. First State Ins. Co., 33 Cal. Rptr. 2d 163 (Cal. App. Ct. 1994). The court stated:

> There is no objectively reasonable expectation that the insuring clause would cover [attorney] Johnson for damages caused by a conspiracy action brought by Johnson on his own behalf . . . . Here, Johnson was not required to sue [client] Rollins as part of his defense of the malpractice action brought by third parties . . . . Johnson brought the conspiracy action on his own behalf. The connection, if any, between the rendering of professional services to others and the malicious action is too remote to give rise to an objectively reasonable expectation of coverage under the policy.

Id. at 165-66; *see also* Krasner v. Professional Prototype Ins. Co.Ltd., 983 F.2d 1076, 1076 (9th Cir. 1993) (ruling that attorney sued by third parties for alleged intentional and fraudulent conduct was not covered under defendant's policy because said policy unambiguously excluded coverage for such conduct and because when an attorney acts fraudulently he "is not acting in his capacity as an attorney").

& Marine Insurance Company, the largest medical-liability company in the nation, sells and renews thousands of medical-malpractice policies each year.[250] The language appearing in St. Paul's medical-liability contracts is very similar to that appearing in legal-malpractice policies. Typically, the coverage provision states: "This agreement provides protection against professional liability claims which might be brought against you in your practice as a physician or surgeon .... Your professional liability protection covers you for damages *resulting from ... [y]our providing or withholding of professional services.*"[251]

But consider St. Paul's legal plight. For at least thirty years, St. Paul—as well as its insureds—has asked state and federal courts to decide whether St. Paul must defend doctors, dentists, psychiatrists, and other medical professionals who allegedly seduced, battered, sexually assaulted, molested or sodomized their patients.[252] As expected, St. Paul's defense has been consistent: these intentional injuries do not "arise out of" or "result from rendering professional services."[253] The medical-liability carrier, however, has not prevailed in every case, even though the third-party patients' allegations involved allegedly intentional acts excluded by St. Paul's insurance contracts.[254]

Unlike cases involving legal malpractice, state courts have either refused or failed to employ various legal doctrines to help determine whether "deviant" physicians and medical technicians are "rendering professional services." Instead, these tribunals have permitted some

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250. *See* St. Paul Fire and Marine Insurance Company, St. Paul Medical Services (visited March 1, 1998) (<http://www.stpaul.com/stpaulmedicalservices/index.htm) ("St. Paul Medical Services is the nation's largest underwriter of medical liability insurance .... A 60-year history of customizing products to meet new customer[s'] needs puts St. Paul Medical Services in an excellent position to maintain market leadership ....").

251. Hirst v. St. Paul Fire & Marine Ins. Co., 683 P.2d 440, 443 (Idaho Ct. App. 1984) (emphasis added); *see also* Smith v. St. Paul Fire & Marine Ins. Co., 353 N.W.2d 130, 132 (Minn. 1984) ("The 'plain english [sic] professional insurance' policy provides: Your professional liability protection covers you for damages *resulting from ... [y]our providing or withholding of professional services.*") (emphasis added); Marx v. Hartford Accident & Indem. Co., 157 N.W.2d 870, 871 (Neb. 1968).

> [T]he carrier agrees [to] pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury *arising out of:* (a) malpractice, error or mistake of the insured, or of a person for whose acts or omissions the insured is legally responsible ... *in rendering or failing to render professional services* .... (alteration in original).

Id. (emphasis added).

252. *See supra* notes 248-51 and accompanying text (discussing cases where for various reasons an attorney's behavior fell outside the scope of protection under his or her malpractice insurance).

253. *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Asbury, 720 P.2d 540, 541 (Ariz. Ct. App. 1986).

254. *See, e.g., id.* at 540 (holding that physician's sexual assaults were covered by insurance contract).

generalized notion of public policy to influence whether some insurers, for instance, the St. Paul Insurance Company, must defend their insureds in cases involving sexual assault.[255]

Perhaps more egregiously, both state and federal courts often allow, arguably, impermissible factors to influence their declarations. Consider the following question: Should medical professionals' specialties influence whether courts decide that the seduction, molestation, and sexual assault of female and adolescent patients is "rendering professional services"? Or stated another way: Should the legal community be alarmed if courts conclude that surgeons who sexually assault and sodomize patients are "rendering professional services," but obstetricians who commit such acts are not? Of course, the answer to the first question is no; and the answer to the second question is yes. However, a careful review of courts' declaratory rulings involving the St. Paul Insurance Company and other carriers reveals a disturbing pattern.

A number of state and federal courts have ruled that St. Paul and other insurers have no duty to defend dentists who allegedly sexually assaulted and abused patients during office visits. Why? The dentists' assaults and abuses were not a part of, or did not occur, while "rendering professional services."[256] On the other hand, state and federal courts have held that St. Paul must defend some psychiatrists,

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255. *Compare* St. Paul Fire & Marine Ins. Co. v. Asbury, 720 P.2d 540, 541-42 (Ariz. Ct. App. 1986) (ordering the company to defend because the sexual conduct "was committed in the course of and as an inseparable part of the professional services" rendered, and because "the public policy of Arizona favors protecting the interests of injured parties"), *and* Vigilant Ins. Co. v. Kambly, 319 N.W.2d 382, 385 (Mich. App. Ct. 1981) (ordering insurance company to pay doctor's malpractice claims for sexual abuse because the case lacked "public policy considerations . . . which [would] prohibit the insurability of criminal or intentional tortious conduct" and payment would compensate the innocent victim for her injuries, not the insured), *with* St. Paul Ins. Co. v. Cromeans, 771 F. Supp. 349, 352 (N.D. Ala. 1991) (refusing to order the company to indemnify because all contracts insuring against damage from intentional conduct—whether professional or otherwise—are void as against public policy in Alabama), *and* Rivera v. Nevada Med. Liab. Ins. Co., 814 P.2d 71, 72, 74 (Nev. 1991) (rejecting the gynecologist's argument that "the need to compensate the victim should make the criminal and sexual act exclusions . . . void as a matter or public policy" and finding that doctor's insurance company had no obligation to pay for victim's injuries).

256. *See, e.g.*, Roe v. Federal Ins. Co., 587 N.E.2d 214, 218 (Mass. 1992) (holding that a dentist's sexual assault of a patient in his office did not occur in rendering "professional services" within the scope of his liability insurance); Niedzielski v. St. Paul Fire & Marine Ins. Co., 589 A.2d 130, 133 (N.H. 1991) (holding that a dentist who sexually assaulted a child in his office before filling her tooth was not covered by his insurance policy because "[r]easonable persons would not define 'professional services' as including either sexual contact or assault between a dentist and his patient"); South Carolina Med. Malpractice Liab. Ins. Joint Underwriting Ass'n v. Ferry, 354 S.E.2d 378, 381 (S.C. 1987) (denying indemnification under malpractice insurance to a dentist who sexually assaulted his patient); Standard Fire Ins. Co. v. Blakeslee, 771 P.2d 1172, 1177 (Wash. 1989) (holding that professional liability insurance did not cover injuries to a patient who was drugged and sexually abused by her dentist because the harm was not caused in rendering professional services).

who allegedly mishandled the "transference phenomenon" and sexually assaulted patients, because what occurred resulted from the "rendering of professional services."[257]

Still other judges have forced the St. Paul Insurance Company to defend a gynecologist and a dentist who intentionally sexually abused and manipulated patients' genitalia during routine gynecological and dental examinations.[258] From the judges' perspective, legal defenses were warranted because these professionals' tortious acts were "intertwined with and inseparable from the services provided."[259] Other federal and state courts held, however, that St. Paul had no duty to defend physicians and a medical technician who allegedly sexually assaulted patients.[260] Why? The assaults did not constitute

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257. *See* Vigilant Ins. Co. v. Employers Ins., 626 F. Supp. 262, 266 (S.D.N.Y. 1986) (holding that the insurer must defend the psychiatrist's sexual acts with his patient because, due to the transfer phenomenon, such acts are sufficiently related to professional services covered by the policy); *see also* St. Paul Fire & Marine Ins. Co. v. Love, 459 N.W.2d 698, 702 (Minn. 1990) (finding a duty to defend when sexual relations between psychiatrist and patient arise from a mishandling of the transfer phenomenon because such conduct is sufficiently related to professional services covered by the policy); Aetna Life & Cas. Co. v. McCabe, 556 F. Supp. 1342, 1351 (E.D. Pa. 1983) (finding that the medical-malpractice insurer must defend because the psychiatrist's intentional acts arose from his professional services); St. Paul Fire & Marine Ins. Co. v. Mitchell, 296 S.E.2d 126, 127 (Ga. Ct. App. 1982) (finding that the insurer must defend the insured because the insured psychiatrist's alleged mishandling of the transference phenomenon, which resulted in sexual relations with the client, stemmed from the rendering of professional services); Zipkin v. Freeman, 436 S.W.2d 753, 761 (Mo. 1968) (en banc) (finding that the insurer must defend because the psychiatrist's mishandling of the transference phenomenon and sexual assault resulted from the rendering of professional services).

258. *See Asbury*, 720 P.2d at 542 (holding that a gynecologist who intentionally and improperly manipulated patients' genitalia during routine gynecological examinations was covered by his professional liability insurance because his tortious acts were "intertwined with and inseparable from the services provided"); St. Paul Fire & Marine Ins. Co. v. Shernow, 610 A.2d 1281, 1285-86 (Conn. 1992) (holding that a dentist who over-gassed and sexually assaulted a patient in the dentist's chair was covered by his malpractice insurance because the dentist's medically negligent procedure was "inextricably intertwined and inseparable from [his] intentional conduct"). *But see Rivera*, 814 P.2d at 73 (holding that a gynecologist who intentionally and improperly sodomized his patient during a routine gynecological examination was not covered by his professional liability insurance because insured's policy specifically excluded misconduct).

259. *Asbury*, 720 P.2d at 542.

260. *See Cromeans*, 771 F. Supp. at 352-53 (denying indemnification or duty to defend under malpractice policy covering professional services to a physician for his sexual abuse of two female patients, noting that all contracts insuring against damage from intentional misconduct are void as against public policy under applicable Alabama law); Hirst v. St. Paul Fire & Marine Ins. Co., 683 P.2d 440, 444 (Idaho Ct. App. 1984) (concluding that physician who drugged and sexually assaulted young male patient in his office during examination of hand injury was not covered by his professional liability insurance because assault did not constitute professional services); Standlee v. St. Paul Fire & Marine Ins. Co., 693 P.2d 1101, 1102 (Idaho Ct. App. 1984) (concluding that physician who sexually assaulted young male patient in hospital during physical examination was not covered by his professional liability insurance because assault did not constitute professional services); St. Paul Fire & Marine Ins. Co. v. Quintana, 419 N.W.2d 60, 63 (Mich. Ct. App. 1988) (holding that the sexual assault of female patient by an EEG technician was not professional services covered by professional liability insurance); Smith v. St. Paul Fire & Marine Ins. Co., 353 N.W.2d 130, 132 (Minn. 1984) (holding that malpractice insurance did not cover liability of an insured physician who sexually assaulted several young male patients since physician's acts were not part of medical treatment); New Mexico Physi-

professional services. Again, should an insured's professional status influence whether courts order St. Paul or other medical-malpractice carriers to defend? Probably not.

V. DECLARATORY JUDGMENTS: HOMEOWNERS INSURERS' DUTY TO DEFEND INSUREDS AGAINST THIRD-PARTY WRONGFUL-DEATH CLAIMS

Earlier, this Article reported that CNA, one of O.J. Simpson's liability carriers, refused to defend him in the wrongful-death civil trial.[261] Although a criminal jury acquitted Simpson of first-degree murder charges, CNA insisted that Simpson murdered Nicole Simpson and Ronald Goldman, and told Simpson that his liability contract did not cover his intentional, criminal conduct.[262] Again, this poses the following question: If you were the judge and Simpson filed a petition for declaratory relief in your court, would you have forced CNA to defend him in the wrongful-death suit? If you decided not to order a legal defense, how would you justify your decision? After all, the petit criminal jury determined that Simpson did not kill Ronald and Nicole, *intentionally or otherwise.*

Relatives of third-party victims, however, commonly file wrongful-death actions against homeowners who were either charged with or convicted of first and second-degree murder or of involuntary[263] and voluntary[264] manslaughter. And fairly often homeowners ask their insurers for a legal defense. Homeowners insurers' response is somewhat predictable; they ask federal and state judges for declaratory relief. During these proceedings, insurers argue that they have no duty to defend homeowners charged with and found guilty of committing murder or manslaughter.[265]

More specifically, insurers maintain that criminal charges, convictions, and guilty pleas conclusively establish that a homeowner had the requisite intent to harm a third party, which absolves insurers from having to defend wrongful-death actions in civil courts. To be

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cians Mut. Liab. Co. v. LaMure, 860 P.2d 734, 737-38, 742 (N.M. 1993) (finding that the physician's sexual assault of a male patient did not constitute "rendering professional services" within the coverage provision of the policy).

261. *See supra* notes 13-14 and accompanying text (noting that insurance company refused to defend Mr. Simpson because his general business insurance policy did not cover the activity that led to his civil suit).

262. *See supra* notes 13-14 (discussing the position of Mr. Simpson's insurer, CNA).

263. *See, e.g.*, North Carolina v. Honeycutt, 108 S.E.2d 485, 486 (N.C. 1959) (defining involuntary manslaughter as unintentional killing of person without malice).

264. *See, e.g.*, State v. Baldwin, 68 S.E. 148, 151 (N.C. 1910) (defining voluntary manslaughter as intentional killing of a person without malice).

265. *See, e.g.*, St. Paul Fire & Marine Ins. Co., 476 F.2d 583, 585 (4th Cir. 1973); Aetna Cas. & Ser. Co. v. Jones, 596 A.2d 414, 416-20 (Conn. 1991); Allstate Ins. Co. v. Zuk, 571 N.Y.S.2d 429, 430 (N.Y. 1991).

sure, both insurers and insured have spent a considerable amount of money and exploited judicial resources litigating the intent to harm issue. Regrettably, courts have not been able to develop an intelligible procedure or methodology that helps litigants determine whether a homeowner has the necessary intent to injure. Instead, for nearly thirty years, courts have delivered imprecise and convoluted declarations that have generated more confusion than guidance.

A. *Conflicts Over Whether Collateral Estoppel Prevents Relitigating "Intent" in Wrongful-Death Suits*

The exclusion provision in a standard homeowners insurance policy states in relevant part:

> We will pay all sums arising from the same loss which an insured person becomes legally obligated to pay as damages because of bodily injury or property damage covered by this part of the policy.... We do not cover any bodily injury or property damage which may reasonably be expected to result from the *intentional*... *acts* of an insured person or which is in fact *intended* by an insured person.[266]

Fairly often, homeowners insurers cite this intent language to justify their decision not to defend insureds in wrongful-death actions. In particular, insurers argue that the intent to cause bodily injury, which precludes coverage under a homeowners' policy, and the intent to kill, as defined in a capital-murder or manslaughter trial, are identical. Or, stated another way, insurance companies argue that collateral estoppel[267] prevents parties from relitigating the issue of in-

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266. Buczkowski v. Allstate Ins. Co., 526 N.W.2d 589, 594 n.9 (Mich. 1994) (emphasis added); *see also* Cary v. Allstate Ins. Co., 922 P.2d 1335, 1337 (Wash. 1996). In *Cary*, the court stated that:

> We do not cover bodily injury or property damage resulting from ... [a]n act or omission committed by an insured person while insane or while lacking the mental capacity to control his or her conduct or while unable to form any intent to cause bodily injury or property damage. This exclusion applies only if a reasonable person would expect some bodily injury or property damage to result from the act or omission. We do not cover bodily injury or property damage resulting from ... [a] criminal act or omission.

Id.

267. *See* Sysco Food Servs. v. Trapnell, 890 S.W.2d 796, 801 (Tex. 1994). The court in *Sysco* held:

> [The] party seeking to assert the affirmative defense of collateral estoppel must establish that (1) facts to be litigated in the second action were fully and fairly litigated in the first action; (2) that those facts were essential to the judgment in the first action; and (3) that the parties were cast as adversaries in the first action.

Id.; *see also* Butzer v. Allstate Ins. Co., 567 N.W.2d 534, 536-37 (Minn. Ct. App. 1997). The court in *Butzer* stated that:

> To invoke collateral estoppel, a party must establish (1) that both the present and prior action presented the "identical" issue, (2) that the prior adjudication was "a final

tent. Therefore, they argue that there is no duty to defend homeowners in wrongful-death suits.[268]

Do federal and state courts support insurers' arguments? Or do courts order insurers to defend insureds who allegedly committed intentional acts?[269] As mentioned earlier, courts are divided over this issue,[270] and the source of the conflict centers on whether homeowners were convicted or pleaded guilty during the criminal proceedings. Several courts have ruled that even if a homeowner pleads guilty to capital offenses, an insurer still must defend the homeowner in the wrongful-death suit.[271] Why? The Fourth Circuit's explanation is worth repeating here: "[A] plea of guilty [should] . . . be considered . . . no more than an admission which may be explained rather than a conclusive statement which is binding when there has been no initial litigation of the [intent issue]."[272] But the Fourth Circuit also ruled that a guilty plea prevents parties from relitigating the issue of intent[273] and that insurers have no duty to defend wrongful-death claims.[274]

Other courts also have held that a guilty plea precludes insurers

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judgment on the merits," (3) that the estopped party was a party, or in privity with a party, in the prior adjudication, and (4) that the estopped party received "a full and fair opportunity to be heard" on the merits.

Id.; *see also* Van Dyke v. Boswell, O'Toole, Davis & Pickering, 697 S.W.2d 381, 384 (Tex. 1985) (finding issue preclusion or collateral estoppel bars relitigating identical facts or laws which were actually litigated and essential to a judgment in prior suit).

268. *See generally supra* note 265 (citing *Zuk*, *St. Paul*, and *Aetna*).

269. *See supra* notes 176-84 (discussing cases where court has supported insurer in refusing to defend insured because insured's behavior was immoral or otherwise wrong).

270. *See infra* notes 271-78 and accompanying text.

271. *See, e.g.*, Aetna Cas. & Sur. Co. v. Niziolek, 481 N.E.2d 1356, 1364 (Mass. 1985) (holding that the taking of a guilty plea is not equivalent to adjudication on the merits and thus, the defendant is not estopped from relitigating the issue in civil trial); Prudential Property & Cas. Ins. Co. v. Kollar, 578 A.2d 1238, 1240-41 (N.J. Super. Ct. App. Div. 1990) (holding that a plea of guilty to aggravated arson does not establish that defendant intended to cause the specific property damage because a plea does not constitute "full and fair litigation of the issues"); Safeco Ins. Co. of Am. v. McGrath, 708 P.2d 657, 660 (Wash. 1985) (concluding that criminal conviction based on an "*Alford*-type guilty plea" to second degree assault would not preclude the defendant in a civil suit from relitigating the issue of intent because the defendant had not had a "full and fair opportunity to litigate the issues" in the criminal case).

272. St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583, 586 (4th Cir. 1973).

273. *See* Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521, 522 (4th Cir. 1962) (holding that the insurer did not have to defend the action because the "defense in wrongful-death suit was that death was not intentional and policy excluded coverage for death inflicted intentionally").

274. *See id.* at 525. In *Stout*, the defendant was indicted for murder and ultimately entered a plea of guilty to manslaughter. The court then described the insurance company's situation:

> [T]o compel [the insurer] to defend plaintiff would place [the insurer] in an impossible situation, that is, it would urge in defense of the wrongful-death suit that plaintiff was free of conduct resulting in negligent or intentional injury while contending at the same time that the policy did not cover occurrence because death was intentionally caused.

Id. at 523-25.

from defending homeowners.[275] Some tribunals have ruled that only a jury conviction can prevent parties from relitigating whether the insured had the requisite intent.[276] But the Court of Appeals for the Ninth Circuit adopted an even stricter position. In *United States v. Bejar-Matrecios*,[277] the Ninth Circuit held that, as a general rule, "the doctrine of [issue preclusion] applies equally whether the previous criminal conviction was based on a jury verdict or a guilty plea."[278] Clearly, the majority of these holdings are anti-consumer. This Article suggests ways to help homeowners correct such injustice.

B. Conflicts Over Whether the "Intent to Act" or the "Intent to Injure" Determines Insurers' Duty to Defend in Wrongful-Death Suits

National insurance companies also argue that they have no duty to defend a homeowner convicted of murder or manslaughter, because a conviction proves that the insured "*intended the act*" that caused the third-party victim's death.[279] On the other hand, homeowners stress that insurers must defend if they cannot prove that a homeowner *in-*

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275. *See, e.g.*, Ideal Mut. Ins. Co. v. Winker, 319 N.W.2d 289, 296-97 (Iowa 1982) (holding that a guilty plea entered in criminal prosecution precludes convicted party from relitigating issue of criminality in subsequent declaratory action brought against him by insurer to construe exclusionary provision of policy); State Mut. Ins. Co. v. Bragg, 589 A.2d 35, 38 (Me. 1991) (finding argument that unilateral action in pleading guilty should not preclude victims from pursuing negligence remedy "unpersuasive" and relieving insurer of duty to defend); State Farm Fire & Cas. Co. v. Johnson, 466 N.W.2d 287, 289 (Mich. 1990) (holding a "plea of guilty dispels any triable factual issue regarding [defendant's] intent or expectation to cause injury" and finding insurer had no duty to defend); Drexel Burnham Lambert Group, Inc. v. Vigilant Ins. Co., 595 N.Y.S.2d 999, 1008-10 (1993) (finding that a guilty plea, for purposes of collateral estoppel, is equivalent to conviction and that insurer had no duty to indemnify insured in subsequent civil suit); State *ex rel.* Leach v. Schlaegel, 447 S.E.2d 1, 4 (W. Va. 1994) (holding that a guilty plea to battery estops defendant from denying that very action in subsequent civil action).

276. *See, e.g.*, Aetna Cas. & Sur. Co. v. Jones, 596 A.2d 414, 422 (Conn. 1991) ("In order for collateral estoppel to be applicable, the meaning of the term 'intent,' as that word is used in the insurance policy, must necessarily be included in the definition of intent applied by the jury in [the] criminal trial."). *But see* State Farm Fire & Cas. Co. v. King, 851 F.2d 1369, 1372 n.4 (11th Cir. 1988) ("The district court correctly recognized that the state criminal jury's rejection of the intentional murder count did not foreclose a finding that King either intended or expected bodily injury as understood by the insurance policy."). *Compare* In re Liquidation of Nassau Ins. Co., 577 N.E.2d 1039, 1040 (N.Y. 1991) (concluding that "the criminal finding of intent [was] conclusive, for purposes of determining whether . . . injuries and death [were] excluded from coverage under the . . . policy"), *and* D'Arata v. New York Cent. Mut. Life Ins. Co., 564 N.E.2d 634, 638 (N.Y. 1990) (stating that jury's finding of intention in the criminal case was "sufficient . . . to establish the requisite element of intent in the action on the insurance policy so as to make the policy exclusion [for intentional acts] effective"), *with* Allstate Ins. Co. v. Zuk, 574 N.E.2d 1035, 1038 (N.Y. 1991) (stating that "Allstate should not be permitted to use collateral estoppel to deprive the Zuks of their only opportunity to determine the effect, if any, of the conviction with its distinctively defined elements on the applicability of the exclusion clause").

277. 618 F.2d 81 (9th Cir. 1980).

278. *Bejar-Matrecios*, 618 F.2d at 83.

279. *See infra* notes 281-92 and accompanying text.

tended both the act and the results of the act (harm).[280] What do federal and state courts say? Not surprisingly, the rulings are mixed.

The Court of Appeals of New York, for example, has supported homeowners' positions. In *Allstate Insurance Co. v. Zuk,*[281] the homeowners' son, William Zuk, shot and killed his friend, Michael Smith, when Zuk's gun accidentally discharged.[282] Zuk was charged with second degree manslaughter and was convicted after he pleaded guilty to recklessly causing his friend's death.[283] Zuk was insured under his parents' homeowner's policy; but Allstate refused to defend him in the subsequent wrongful-death action.[284] "Allstate argue[d] that Zuk's second degree manslaughter conviction establishe[d] *as a matter of law* that Zuk reasonably expected that his acts would cause Smith's death."[285] The New York Court of Appeals disagreed and held that "[a] person may engage in behavior that involves a calculated risk without expecting—no less reasonably—that an accident will occur. Such behavior, which may be reckless for criminal responsibility purposes, does not necessarily mean that the actor reasonably expected the accident to result."[286]

The Supreme Court of Ohio also has supported homeowners' claims. In *Nationwide Insurance Co. v. Estate of Kollstedt,*[287] local authorities arrested and convicted Kollstedt after he shot and killed Robert Hatmaker.[288] At the time of the shooting, Kollstedt was suffering from degenerative dementia and was insured under a homeowner's policy.[289] Nationwide, however, refused to defend Kollstedt in the wrongful-death action, arguing that the policy's exclusion provision refused to cover physical injury that the insured expected or intended.[290] Kollstedt countered by arguing that his dementia prevented him from intending either the act, the shooting, or the subsequent death.[291] The Ohio Supreme Court agreed and ordered the company to defend the homeowner.[292]

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280. *See id.*
281. 574 N.E.2d 1035 (N.Y. 1991).
282. *See id.* at 1036.
283. *See id.*
284. *See id.*
285. *Id.* at 1038.
286. *Id.* (observing that Smith's death actually resulted from Zuk's shotgun accidentally discharging while being cleaned, which does not establish as a matter of law that Zuk reasonably expected Smith's death to result from his actions).
287. 646 N.E.2d 816 (Ohio 1995).
288. *See id.* at 817.
289. *See id.* at 816-17.
290. *See id.* at 817.
291. *See id.* at 818 (reporting that an expert stated that Kollstedt's mental state prevented him from planning or premeditating an action in a purposeful manner).
292. *See id.* at 819 (holding that provision in liability insurance policy excluding coverage to

In both *Zuk* and *Kollstedt*, the insured homeowners were guilty of killing third-party victims, and both supreme courts ordered the respective insurers to provide a civil defense. Now consider the plight of the homeowner in *Cooperative Fire Insurance Ass'n v. Bizon*.[293] Robert Bizon shot and killed James Ashcroft, a suspected burglar who was attempting to steal liquor from Bizon's home garage.[294] A criminal jury acquitted Robert Bizon of involuntary manslaughter.[295] Nevertheless, the insurer refused to defend Bizon in the wrongful-death action, claiming that the shooting was excluded by the homeowner's policy as an intentional act.[296] Both the trial court and the Vermont Supreme Court agreed and ruled there was no duty to defend.[297] The trial court stated that the exclusion clause applied "if Bizon fired the gun at Ashcroft with the intention of hitting him with the bullet," but added that it would be immaterial if Bizon intended to wound but not kill Ashcroft.[298] Other lower courts also have reached a similar conclusion, although for a different reason.[299]

Consider for a moment the court's analysis in *Cooperative Fire Insurance Ass'n v. Bizon*, where the Vermont Supreme Court used the doctrine of ambiguity to help determine whether a legal defense was required.[300] The court stated: "An insurance policy must be interpreted according to its terms and the evident intent of the parties as expressed in the policy language."[301] The court also held that

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insured when insured expected or intended to cause bodily injury or property damage, did not apply under circumstances where insured was mentally incapable of committing an intentional act); *see also* Michigan Millers Ins. Co. v. Anspach, 672 N.E.2d 1042, 1048-49 (Ohio App. Ct. 1996) (concluding that Michigan Millers did not meet its burden of proving that bodily injury or death could be reasonably expected given the actual conduct of the Anspach brothers or to show that they actually intended the resulting injuries for the exclusion provision to apply).

293. 693 A.2d 722 (Vt. 1997).

294. *See id.* at 724.

295. *See id.*

296. *See id.* The policy stated in pertinent part: "We will defend a suit seeking damages if the suits resulted from bodily injury . . . not excluded under this coverage . . . . This policy does not apply to liability which results directly or indirectly from . . . an intentional act of an insured or an act done as the direction of an insured . . . ." *Id.*

297. *See id.* at 729 (stating that "[w]e find no clear error was committed by the trial court in ruling that Cooperative Fire has no duty to defend or indemnify Bizon in the wrongful-death suit brought by defendant").

298. *See id.* at 727 (noting that Bizon did fire the gun with intent to hit Ashcroft).

299. *See generally* Ziebart Int'l Corp. v. CNA Ins. Cos., 78 F.3d 245, 247-51 (6th Cir. 1996) (holding that the insurer had a duty to defend the employer on appeal and that the intentional torts exclusion did not apply); American Nat'l Fire Ins. Co. v. Cordie, 478 N.W.2d 531, 532-34 (Minn. Ct. App. 1991) (affirming summary judgment for insured and stating that an intentional act exclusion is inapplicable when the insured's mental illness precludes him from controlling his actions); Safeco Ins. Co. of America v. Yon, 796 P.2d 1040, 1041-44 (Idaho Ct. App. 1990) (stating that murder conviction resulted in finding that intentional harm and barring the heir's right to raise the issue of intent at a civil trial).

300. *See Bizon*, 693 A.2d at 727.

301. *Id.* (citing Select Design, Ltd. v. Union Mut. Fire Ins. Co., 674 A.2d 798, 800 (Vt.

any ambiguity in an insurance contract must be interpreted in favor of the policyholder and that reasonable contract constructions by the trial court would be sustained.[302]

But some courts have cited neither the doctrine of ambiguity nor the doctrines of reasonable expectation, adhesion, *contra proferentem*, or plain meaning to help determine whether respective exclusion provisions will block the obligation to provide a legal defense in a civil case. For example, a careful reading of opinions from Arkansas,[303] Idaho,[304] Michigan,[305] Minnesota,[306] and Missouri[307] Courts of Appeals reveals that these courts have declared that an insurer has no duty to defend a homeowner in a wrongful-death suit where a court concludes as a matter of law that the insured intended to commit the act that caused a death. Of course, the New York Court of Appeals rejected this very argument in *Allstate Insurance Co. v. Zuk*.[308]

1996)).

302. *See id.*

303. *See* Fireman's Ins. Co. v. Smith, 683 S.W.2d 234, 237-38 (Ark. Ct. App. 1985). In *Smith*, the court stated:

> There were no eyewitnesses to the killing. Roane's testimony that he intentionally fired the pistol to repel what he believe to be an assault with a deadly weapon is undisputed. *The intent to inflict injury can be inferred from the very character of the act.* Any reasonable person would expect or intend serious injury to be inflicted by shooting another at point blank range with a .38 caliber pistol. Reasonable minds could not conclude otherwise .... Roane's testimony is not extraordinary, improbable or surprising .... It would establish every fact required to denude him of insurance coverage in the wrongful-death claim.

Id. (emphasis added).

304. *See, e.g.*, Safeco Ins. Co. of America v. Yon, 796 P.2d 1040, 1044 n.2 (Idaho Ct. App. 1990). In *Yon*, the court concluded:

> [T]he jury in the criminal trial necessarily had to determine that Yon intended to cause the injury to Bussell when he pulled the trigger. We also *infer as a matter of law* that the natural and probable consequences of Yon's conduct were to produce the death of Bussell.

Id. (emphasis added).

305. *See* Aetna Cas. & Sur. Co., v. Sprague, 415 N.W.2d 230, 231 (Mich. Ct. App. 1987). The court in *Sprague* stated that:

> [W]e [have] held that a conviction of aggravated assault could be used to show that the insured intended to injure his victim ... [and] that a plea of guilty to second-degree murder *conclusively established* that the insured expected death or serious bodily harm to result from his actions .... Sprague was convicted of first-degree murder, a necessary element of which it is *the specific intent to kill.* This established that Sprague intended or at least expected that Wayne would die.

Id. (emphasis added).

306. *See* Auto-Owners Ins. Co. v. Smith, 376 N.W.2d 506, 510 (Minn. Ct. App. 1985) (finding that defendant's conduct was so remorseless as to constitute intent to inflict bodily injury).

307. *See* Aetna Cas. & Sur. Co. v. Bollig, 878 S.W.2d 837, 840 (Mo. Ct. App. 1994) (determining that "*absolute proof is not required .... Logic and common sense indicate that on these facts it is more probable than not* that [defendant] intentionally shot the [victim].") (emphasis added).

308. *See* Allstate Ins. Co. v. Zuk, 574 N.E.2d 1035, 1038 (N.Y. 1991). In *Zuk*, the court found:

> [T]he accidental discharge of the shotgun Zuk was cleaning actually resulted in Smith's death, and that his conviction for manslaughter ... require[d] the result of

VI. CAPRICIOUS DECLARATORY JUDGMENTS INVOLVING WHETHER HOMEOWNERS' INSURERS HAVE A DUTY TO DEFEND SEXUAL-MOLESTATION CIVIL SUITS

Fairly often, homeowners ask their insurers for a legal defense in suits where third-party victims accuse them or their offspring of sexually molesting minors.[309] The insurers usually deny the claims and refuse to defend, citing exclusion clauses and claiming that the insureds intended to sexually molest a young child or teenager.[310] Shortly thereafter, these insurers rush to federal or state courts to ask judges to declare *as a matter of law* that the insureds intended to harm the third-party victims.[311]

Without doubt, state and federal courts are hopelessly divided over whether the intent to harm should be inferred *as a matter of law* in sexual-molestation cases.[312] Still, litigators who file duty-to-defend cases and ask courts for declaratory relief need to know that whether they prevail has little, if anything, to do with the judges' interpretation of the insurance contract. In other words, in cases involving sexual molestation, courts spend very little effort attempting to determine whether an insured's reasonable expectations were satisfied, whether the contract language is ambiguous, or whether the language in the exclusion clause is "unconscionable."[313]

Instead, judges readily draw upon moral and ethical principles, as well as psychiatric and psychological theories to determine whether insurers should defend homeowners against sexual-molestation suits.[314] The next two sections will reveal that this willingness to employ moral, medical or psychological models rather than legal principles has generated an exceedingly large body of unduly strained, incredibly unsound, and highly irreconcilable rulings.

> death as an element of the crime, do not establish as a matter of law that Zuk reasonably expected Smith's death to result from his actions .... Here ... Allstate chose to incorporate into its exclusion ... clause a standard not found in the Penal Law—reasonably expected to result—without further defining those terms. It is not possible or appropriate to decide, as a matter or law, ... whether Smith's death could "reasonably be expected to result" from Zuk's actions.

Id.

309. *See infra* notes 331, 345, 366 (discussing cases concerning insurance liability for homeowners' sexual misconduct).

310. *See infra* notes 312-15 and accompanying text.

311. *See id.*

312. *Compare* Landis v. Allstate Ins. Co., 546 So. 2d 1051, 1053 (Fla. 1989) (inferring intent to harm), *with* Allstate Ins. Co. v. Jack. S, 709 F. Supp. 963, 966 (D. Nev. 1989) (refusing to infer intent to harm for young offender).

313. *See infra* notes 316-18.

314. *See id.*

A. Conflicts Over Whether Adults' "Intent to Harm" Minors May Be Inferred As a Matter of Law

To begin, consider the plight of the homeowners in *Landis v. Allstate Insurance Co.*[315] In that case, Illeana and Frank Fuster operated a licensed child-care facility in their home.[316] Several parents whose children attended the facility claimed that the Fusters sexually battered their children.[317] After discovering the allegation, Allstate—the Fusters' homeowner insurer—dashed off to court to determine its rights and obligations under the contract. There, the insurer argued that the Fusters intended to harm the children as a matter of law; and consequently, it had no duty to defend.[318]

The trial court accepted Allstate's argument.[319] The Florida Supreme Court affirmed, stating that it defied logic "[t]o state that a child molester intends anything but harm and long-term emotional anguish to the child . . . ."[320] But the Supreme Court reached its conclusion without soliciting, reviewing, or receiving any expert testimony from a child psychologist or pediatrician. The majority of justices simply assumed the role of a child psychologist and used a psychiatric model to declare legal rights and obligations under the insurance contract.[321]

Employing a psychiatric or mental-health model to uncover contractual rights and responsibilities under a homeowner's policy, without receiving input from qualified mental-health professionals, is highly irresponsible and suspect. Nevertheless, this has not prevented other courts from adopting the inferred-intent rule and using such extra legal models to determine whether liability insurers must defend adults who allegedly abused or molested minors.[322]

For example, two years after *Landis*, the California Supreme Court decided *J.C. Penney Casualty Insurance Co. v. M.K.*[323] In *J.C. Penney*, a five-year old girl told her mother that an adult male had sexually molested her.[324] The suspect, a homeowner and neighbor who had often baby sat the little girl, pleaded guilty to "willfully committing lewd or

315. 546 So. 2d 1051 (Fla. 1989).
316. *See id.* at 1052.
317. *See id.*
318. *See id.* at 1053.
319. *See id.* at 1052.
320. *Id.* at 1053 (emphasis added).
321. *See id.* (rejecting the argument that insured's diminished capacity made specific intent to harm impossible insofar as "some form of harm inheres in and inevitably flow from the proscribed behavior") (citation omitted).
322. *See infra* notes 317-27 (discussing cases wherein courts have deferred to logic, reason or common sense to infer intent to harm in absence of corroborating psychological assessments).
323. 804 P.2d 689 (Cal. 1991).
324. *See id.* at 690.

lascivious acts with a child under the age of fourteen years . . . ."[325] Shortly thereafter, J.C. Penney went to court and asked the judge to declare that the insured intended to injure the child as a matter of law; therefore, it had no duty to defend.[326]

The homeowner responded by arguing "that even an intentional and wrongful act is not excluded from coverage unless the insured acted with a preconceived design to inflict."[327] The insured also argued that psychiatric testimony showed that molesters often did not intend to harm the child, despite the depravity of their acts, and that the molestation is often a misguided attempt to display love and affection.[328] In response, the California Supreme Court assumed the role of a child psychologist, declared there was no coverage as a matter of law,[329] and stated: "We are reluctant to venture into uncertain territory still being explored by psychiatrists . . . . [But] testimony, psychiatric or otherwise, that no harm was intended flies 'in the face of all reason, common sense, and experience.'"[330]

The California Supreme Court also recognized that many jurisdictions have embraced the inferred-intent psychiatric model in cases where insurers refuse to defend alleged adult molesters.[331] Associate Justice Broussard, the lone dissenter, observed: "[T]he clear line of authority in [California cases states] that even an act which is 'intentional' or 'willful' within the meaning of traditional tort principle will not exonerate the insurer from liability . . . unless it is done with a 'preconceived design to inflict injury.'"[332] Furthermore, Asso-

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325. *Id.*
326. *See id.* at 691.
327. *Id.* at 693.
328. *See id.*
329. *See id.* at 693 (concluding there is no coverage as a matter of law because a rational person could not reasonably believe that "sexual fondling, penetration, and oral copulation of a five-year old child are nothing more that acts of tender mercy").
330. *Id.* at 700.
331. *See* Allstate Ins. Co. v. Patterson, 904 F. Supp. 1270, 1280-81 n.10 (D. Utah 1995) (listing jurisdictions which have adopted the inferred-intent rule and concluding that "sexual molestation of a minor by an adult falls within [a] category of cases . . . in which the resulting injury is so likely to follow the conduct that the insured will not be [able] to deny any intent to injure"); Gearing v. Nationwide Ins. Co., 665 N.E.2d 1115, 1120 (Ohio 1996) (concluding as a matter of law that an adult's acts of sexual molestation of a minor do not constitute "occurrences" for purposes of determining liability); State Farm Fire & Cas. Co. v. Davis, 612 So. 2d 458, 463-64 nn.4-5 (Ala. 1993) (adopting inferred-intent rule and listing majority of other jurisdictions that have adopted the rule in adult versus minor cases); J.E.M. v. Fidelity & Cas. Co., 928 S.W.2d 668, 674-75 n.3 (Tex. Ct. App. - Houston [1st Dist.] 1996, no writ) (concluding that the act of sexual molestation constitutes an injury and finding an intent to injure as a matter of law); State Mutual Ins. Co. v. Russell, 462 N.W.2d 785, 787-88 (Mich. App. 1990) (finding intent to harm as a matter of law and observing that homeowner's characterization of his acts as impulsive and caused by an illness to be unpersuasive).
332. *J.C. Penney*, 804 P.2d at 700 (citing California Supreme Court's ruling in *Clemmer v. Hartford Insurance Co.*, 587 P.2d 1098 (Cal. 1978)).

ciate Justice Broussard observed that, according to undisputed expert testimony, the child molester may have intended no harm and sharply criticized the majority for practicing psychiatry without a license.[333]

Some courts, however, have refused to declare as a matter of law that the intent to molest is the same as the intent to harm in situations involving adults and minors. For instance, in *Loveridge v. Chartier*,[334] forty-four year old Chartier engaged in multiple acts of consensual sex with a fifteen-year-old female.[335] Chartier was never criminally charged,[336] but the minor sued Chartier after he infected her with the herpes simplex virus.[337]

Chartier's insurer, State Farm Insurance Company, refused to defend him, claiming that the insured intended to injure the minor as a matter of law.[338] The Wisconsin Supreme Court rejected State Farm's argument and declared: "This court will not create an exclusion where one does not exist . . . . Therefore, we . . . cannot infer that an adult insured intended to injure or harm a sixteen- or seventeen-year-old as a matter of law when the insured engaged in consensual sexual contact with the [minor]."[339]

A similar outcome occurred in *Teti v. Huron Insurance Co.*[340] In that action, a sixteen-year-old female had sex with a Philadelphia high-school teacher and later claimed the teacher molested her.[341] The insured asked his insurance company to defend him in the civil suit.[342] The homeowner insurer refused, however, claiming that the insurance contract excluded "injuries or damages which [were] 'expected or intended by the insured.'"[343] More specifically, Huron claimed that it had no duty to defend Teti because, as a matter of law, he intended to harm the minor.[344] After reviewing Pennsylvania law, the district judge declared that the rule of inferred intent to harm was inapplicable because the minor was legally capable of consenting to intercourse with Teti.[345]

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333. *See id.* at 700 (stating that majority was doing a "terrible job" of practicing psychiatry).
334. 468 N.W.2d 146 (Wis. 1991).
335. *See id.* at 148.
336. *See id.* at 148 (observing that Chartier did not make any threats, promises, or misrepresentations to induce Loveridge to engage in the acts).
337. *See id.*
338. *See id.* at 149.
339. *Id.* at 154.
340. 914 F. Supp. 1132 (E.D. Pa. 1996).
341. *See id.*
342. *See id.*
343. *Id.* at 1133.
344. *See id.*
345. *See id.* at 1140. It is important to note, however, that the district court still did not or-

B. *Conflicts Over Whether Minors' "Intent to Harm" Minors May Be Inferred As* a Matter of Law

Often, a toddler or a minor claims that another child or teenager sexually abused him. The parents of the alleged victim file a civil action for damages. The alleged juvenile molester's parents ask their homeowners insurer to defend the action. The insurer's response, however, is predictable. The company asserts that the policy does not cover intentional acts.[346] In addition, the insurer asks a court to declare, as a matter of law, that a minor or teenager intends to harm whenever that child molests another minor, thereby relinquishing the insurer's duty to defend.[347] On the other hand, homeowners as well as third-party victims assert that the insurer must settle the claim or defend the action.[348]

A careful review of these types of claims reveals that federal and state courts invariably deliver inconsistent declarations about whether a minor intended to harm another minor when the former forced the latter to engage in a sexual act. Although one might expect courts to apply various legal doctrines to resolve these controversies, this rarely happens. Instead, the propensity of both federal and state judges[349] to practice psychiatry regularly influences whether they order insurers to defend minors accused of sexual molestation. Correspondingly, the law in this area is unnecessarily mixed, even when the controversies involve the same insurer and identical homeowners policies.

To help illustrate this point, review only those cases in which Allstate Insurance Company, a large national carrier, petitioned courts for declaratory relief. In *Allstate Insurance Co. v. Patterson*,[350] Brenda Patterson—the mother of two children between the ages of five and eight-years-old, Jens and Martin Dietz—sued Beverlee McLaughlin and Clifford and Lila Forney, the parents of boys who were between twelve and sixteen years old.[351] The latter boys were accused of sexu-

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der the insurer to defend Teti. Citing some generalized public policy of Pennsylvania, the judge stated: "[A]n insurance contract is void and unenforceable as contrary to a defined and dominant Pennsylvania public policy, when it provides for the defense and indemnification of a public school teacher of claims that the teacher had sexual intercourse with a sixteen year-old student." *Id.* at 1142.

346. *See infra* notes 344-54, 361-62, 368 and accompanying text (discussing cases where insurers have argued that a juvenile molester's intentional acts were not covered by their policies).

347. *Id.*

348. *See infra* notes 353, 362, 369 and accompanying text (discussing cases wherein homeowners have asserted that the insurer must defend the action).

349. *See infra* notes 350-58.

350. 904 F. Supp. 1270 (D. Utah 1995).

351. *See id.* at 1272.

ally molesting the former.[352] McLaughlin and the Forneys asked Allstate, their homeowner insurer, to defend the civil action.[353] Allstate refused, arguing that their homeowner policy excluded intentional acts.[354] To garner support for its position, the insurer petitioned the court for declaratory relief, claiming that, as a matter of law, the McLaughlin and Forney boys intended to harm their victims during the sexual assault.[355]

The district court judge refused to endorse Allstate's assertion.[356] Adopting the role of a psychiatrist, the judge stated that not all sexual contact is inherently harmful because of the age and status of the victim.[357] The judge further stated that "if the age of the victim is relevant, then arguably the age of the perpetrator should also be relevant . . . [and,] if a child cannot fully appreciate the consequences of sexual activity, that is reason not to hold the child perpetrator to the same standard as an adult . . . ."[358]

Based on this reasoning, the judge declined to rule as a matter of law. Therefore, Allstate had to defend the McLaughlin and Forney boys.[359]

A similar result appears in *Allstate Insurance Co. v. Jack. S.*[360] In that controversy, the parents of a three-year-old boy claimed that the child's baby sitter, a fourteen-year-old girl, sexually abused the toddler.[361] The sitter's parents asked Allstate to defend their daughter in the civil suit.[362] Allstate refused, claiming that the sitter's conduct was intentional and therefore, was excluded from coverage under the homeowners' policy.[363] Allstate asked the court to resolve the dispute and to find an intent to harm as a matter of law.[364]

Although the district judge said he was "not prepared to delve into the psychological understanding of a fourteen-year-old girl and make

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352. *See id.* (detailing various charges made against defendants).
353. *See id.* at 1272-73.
354. *See id.* at 1273.
355. *See id.* at 1277 (noting Allstate's argument that sexual molestation is an intentional act which cannot be accidental).
356. *See id.* at 1289.
357. *See id.* at 1282.
358. *Id.* The court in *Patterson* concluded that "the Utah Supreme Court would not automatically infer an intent to harm in the case of a minor who sexually assault[ed] other minors but would look at all the surrounding facts and circumstances, including the parties' ages, the nature of their relationship and their past experience." *Id.* at 1284.
359. *See id.* at 1285.
360. 709 F. Supp. 963 (D. Nev. 1989).
361. *See id.* at 964.
362. *See id.* at 965.
363. *See id.*
364. *See id.*

a determination of her intent as a matter of law,"[365] that is precisely what he did. The judge weighed and compared some generalized notion of adults' and minors' intellectual capacities and concluded that although a court could find as a matter of law that an adult intended to harm a child, such an assumption could not properly be inferred to a child.[366]

As expected, some courts have refused to force Allstate to defend minors who allegedly molested other children. But these tribunals also have used a psychiatric or psychological paradigm to decide whether the child perpetrator intended to harm as a matter or law, even though they claim otherwise. For example, in *Allstate Insurance Co. v. Bailey*,[367] a fifteen-year-old, Manuel Zayas, initiated and engaged four-year-old James M. Bailey, Jr. in a variety of sexual acts.[368] Both the toddler's parent and Zayas claimed that Allstate, the perpetrator's insurer, had a duty to defend the underlying suit.[369]

Allstate disagreed and asked the court for declaratory relief.[370] The insurer asserted that young Zayas' sexual acts were designed to harm the child as a matter of law and were therefore excluded under the policy.[371] The court supported Allstate's point of view and stated, "Manuel Zayas's age or status as a minor, at the time of the alleged improper fondling of [the child], does not influence this court's decision."[372] Yet, later in the ruling, the court assumed the role of a psychologist and repeated what the Florida Supreme Court stated in *Landis v. Allstate Insurance Co.*:[373]

> "To state that a child molester intends anything but harm and long-term emotional anguish to the child defies logic." . . . [T]he alleged physical and emotional injuries to James M. Bailey Jr. are exactly the type that could reasonably be expected to result from the

365. *Id.* at 968.

366. *See id.* at 966; *see also* Fire Ins. Exch. v. Diehl, 545 N.W.2d 602, 607-08 (Mich. 1996). The court in Diehl stated:

> We agree that courts should infer the intent to injure where an adult sexually assaults a child. However, we conclude that the intent to injure should not be inferred as a matter of law where a child is the assailant . . . . Children, as a group, do not have the capability to understand the consequences of their sexual acts.

Id.; *see also* Pawtucket Mut. Ins. Co. v. LeBrecht, 190 A.2d 420, 423 (N.H. 1963) (refusing to find that child intended to harm as a matter of law).

367. 723 F. Supp. 665 (M.D. Fla. 1989).

368. *See id.* at 666.

369. *See id.* at 667 (noting that both Zaya's and Bailey's parents argue that Allstate coverage could only be excluded under the intentional injury exclusion if Zayas had a specific intent to injure).

370. *See id.*

371. *See id.*

372. *Id.* at 668.

373. 546 So. 2d 1051 (Fla. 1989).

intentional . . . acts by an insured person . . . .[374]

In a similar case, *Allstate Insurance Co. v. Steele*,[375] James O'Hara's stepsister claimed that he raped her.[376] At the time of the alleged injury, James O'Hara and the stepsister were sixteen and twelve years old, respectively.[377] Once more, Allstate refused to defend the underlying civil action and petitioned the court for held for Allstate.[378] The Federal District Court of Minnesota held for Allstate, holding that the rape was a knowing and wrongful act.[379] Thus, the court concluded that James O'Hara intended to cause the injury as a matter of law.[380]

VII. A CASE STUDY: AN EMPIRICAL REVIEW OF FEDERAL AND STATE COURTS' DUTY-TO-DEFEND DECLARATORY JUDGMENTS—1900-1997

This Article has reported that state and federal judges employ principles of contracts, as well as the doctrines of reasonable expectation, plain meaning, adhesion, and *contra proferentem* to determine whether or when liability contracts require insurers to defend insureds. In addition, there are a significant number of judges who use the equitable doctrines of unclean hands and *in pari delicto*, as well as principles of morality, to determine whether a defense is required. However, the employment of various equitable, legal, and moral principles has produced declaratory judgments that are exceedingly strained, legally and rationally indefensible, unjust, and poorly reasoned. In addition, the application of these particular theories has generated an excessive number of conflicting rulings involving national carriers and created a checkered pattern of declaratory relief in cases where third-party victims' allegations and injuries are identical or substantially similar.

At this point, there is another issue. When deciding whether to award declaratory relief, judges often and appropriately consider

374. *Bailey*, 723 F. Supp. at 669 (quoting *Landis*, 546 So. 2d at 1053).
375. 885 F. Supp. 189 (D. Minn. 1995).
376. *See id.* at 190.
377. *See id.*
378. *See id.* at 191.
379. *See id.* at 192 ("This was a knowing and wrongful act; it is not an act which lacked intuition or design.").
380. *See id.*; *see also* Allstate Ins. Co. v. Roelfs, 698 F. Supp. 815, 821 (D. Alaska 1987) (concluding that sexual-abuse claims were not covered by Allstate homeowner's policy because those claims were intentionally caused); Cuervo v. Cincinnati Ins. Co., 665 N.E.2d 1121, 1122 (Ohio 1196) (concluding that as a matter of law the insurer had no duty to defend a sixteen-year-old minor who allegedly sexually molested two children between the ages of six and eight); Illinois Farmers Ins. Co. v. Judith G., 379 N.W.2d 638, 642 (Minn. Ct. App. 1986) (concluding that insurer was not obligated to defend or indemnify a minor who sexually molested other minors).

various doctrines, examine numerous facts, and weigh a number of factors to reach a just conclusion. Certainly, a methodology that includes all or a combinations of these activities is an indispensable part of judging. But, when deciding whether liability insurers must provide a defense in cases involving intentional torts, do state and federal judges, knowingly or unknowingly, allow *specific factors* to influence their rulings on a regular basis? Or stated another way, can one accurately predict whether courts will award declaratory relief to insureds or insurers on the basis of third-party victims' ethnicity or gender, types of liability contracts that the insureds purchased, or types of third-party victim claims? Unfortunately, the findings outlined below suggest it is possible.

Also, should insurers' and the insureds' ability to secure declaratory relief in state supreme courts depend on whether those courts are located in the eastern, western, or northern regions of the country? Should the award of declaratory relief depend exclusively on whether insureds, for example, file duty-to-defend actions against national carriers in the Fifth, Sixth, and Eighth Circuits? By all reasonable measures, these types of variables should not have any predictable influence on whether one receives declaratory relief in duty-to-defend cases. Yet, a careful review of statistical findings outlined and discussed below strongly suggests that such factors do influence federal and state judges' decisions.

A. Data Source, Sampling Procedures, and Background Attributes of Insurers and Insureds

To support the proposition that federal and state judges are wittingly or unwittingly allowing irrelevant factors to influence their decisions to award or not award declaratory relief, the study tried to uncover every reported federal and state duty-to-defend case in which either the insurer or the insured asked the court for declaratory relief. Both *WESTLAW* and *LEXIS* computer retrieval systems were used, and the search produced 107 district court (federal and state), 270 federal appellate court, and 107 state supreme court cases that were decided between 1900 and 1997.[381] Therefore, the findings reported in this part are based on the statistical analysis of 547 reported federal and state declaratory judgments.[382]

381. Search of LEXIS, Genfed Library, COURTS File (Mar. 12, 1996); search of WESTLAW, ALLSTATES, ALLUDES, MIN-CS, CTA, and DCT databases (Mar. 16, 1996).

382. *See* Willy E. Rice, An Empirical Review of Federal and State Courts' Duty-to-Defend Declaratory Judgments Between 1900-1997 (1997) (unpublished manuscript) (on file with author). All databases, statistical procedures, and outputs, associated with this analysis are on file with the author.

TABLE 1. DECLARATORY JUDGMENTS ACTIONS: SOME SELECTED DEMOGRAPHIC CHARACTERISTICS OF LITIGANTS WHO PETITIONED STATE AND FEDERAL COURTS TO DECLARE WHETHER LIABILITY INSURERS HAVE A DUTY TO DEFEND POLICYHOLDERS WHO INTENTIONALLY INJURE THIRD PARTIES (N = 547)

Demographic Characteristics	State & Federal District Courts (N = 107)	Federal Appellate Courts (N = 270)	State Supreme Courts (N = 170)
	(Percent)	(Percent)	(Percent)
Types of Insurance:			
Automobile	14.0	13.3	10.6
Business	8.4	10.4	9.4
Homeowners	21.5*	10.0	26.5*
Liability (CGL)	47.7*	54.1*	46.5
Malpractice	1.0	5.9	2.9
Other	7.4	6.7	4.1
Region of Country:			
East	19.0	12.2	14.0
Midwest	25.2	25.2*	26.0
South	11.2	23.0	19.0
Southwest	8.4	19.3	1.2
West	31.0*	19.0	31.2
Circuits:			
First	6.5	.7	1.2
Second	6.5	5.6	7.6
Third	5.6	5.2	1.2
Fourth	9.3	4.8	8.2
Fifth	4.7	20.7*	1.2
Sixth	8.4	6.3	5.3
Seventh	5.6	10.4*	2.4
Eighth	13.1	11.1	15.9
Ninth	20.6*	14.4	24.7*
Tenth	14.0	9.6	9.4
Eleventh	3.7	10.0	12.4
Federal	1.9	1.1	.6
Declaratory-Judgment Actions—Types of Complainants:			
Assignees	1.9	.7	1.2
Banks	.9	6.3	2.9
Corporations	24.3	30.4*	18.8
Employers	—	1.5	4.1
Estates	5.6	1.9	3.5
Insured Individuals	34.6*	20.7	38.8*
Professionals	4.7	11.1	10.0
Small Businesses	7.5	6.3	10.0
Governments	3.7	3.7	5.9
Grounds for Disposing Actions in District Courts			
Merit	100.0	96.3	98.2
Procedural	—	3.7	1.8
Grounds for Disposing Actions in Federal Appellate Courts			
Merit	—	95.2	—
Procedural	—	4.8	—

Table 1 (continued)

Demographic Characteristics	State & Federal District Courts (N = 107)	Federal Appellate Courts (N = 270)	State Supreme Courts (N = 170)
Grounds for Disposing Actions in State Supreme Courts			
Merit	—	—	95.3
Procedural	—	—	4.7
Disposition of Actions in District Courts From Complainants' View:			
Favorable Outcome	36.4	38.9	42.4*
Unfavorable Outcome	63.6*	61.1*	57.6
Disposition of Actions in Federal Appellate Courts From Complainants' View:			
Favorable Outcome	—	43.0	—
Unfavorable Outcome	—	57.0	—
Disposition of Actions in State Supreme Courts From Complainants' View:			
Favorable Outcome	—	—	47.1
Unfavorable Outcome	—	—	52.9

Levels of Statistical Significance for Chi Square test: *$p < .05$

Table 1 outlines the litigants' most relevant demographic characteristics. First, the left column, labeled *State and Federal District Courts (N =107),* reports information on insureds and insurers who sought declaratory relief only in a federal or a state district court. The middle column, entitled *Federal Appellate Courts (N = 270),* presents data on federal litigants who decided to appeal adverse federal district court rulings to one of the twelve federal courts of appeals. And the right column, labeled *State Supreme Courts (N =170),* highlights the attributes of state court litigants who decided to appeal unfavorable district and appellate court rulings to various state supreme courts.

Perhaps the most salient finding appears near the bottom half of the table. Among all three groups of cases, state and federal district courts, federal appellate courts, and state supreme courts, the party seeking declaratory relief is less likely to receive "that relief initially" in a district court. The percentages of cases with unfavorable outcomes from the complainants' view for the three columns are 63.6%, 61.1% and 57.6%, respectively. Among cases decided by a state supreme court, however, complainants were significantly more likely to have received declaratory relief initially in a state district court. The reported percentages are 42.4% versus 36.4% and 38.9%.

Also, among cases disposed of in federal courts of appeals, the majority, 57.0%, of those petitioning those courts for declaratory relief did not prevail. Similarly, the majority, 52.9%, of complainants asking state supreme courts for declaratory relief were not successful. Later, this Article will examine and discuss a number of key variables to determine how they influence courts' decisions to award or deny declaratory relief in duty-to-defend cases.[383]

A review of the factors listed in the top half of Table 1 reveals some interesting, and potentially meaningful, patterns. Consider the variable *Types of Insurance.* Among federal appellate court cases, 54.1% of the declaratory actions involved conflicts over the meaning of words and phrases appearing in Comprehensive General Liability ("CGL") contracts. Conversely, among the complaints ultimately resolved in district courts (state and federal) or state supreme courts, a significant number involved conflicts over the language appearing in homeowners' insurance contracts. The respective percentages are 21.5% and 26.5%. Nearly an equal number of actions in each group centered on the terms and conditions outlined in automobile insurance contracts. The reported percentages are 14.0%, 13.3%, and

383. *See infra* Part VII.B (surveying cases containing various factors considered by courts in deciding whether to award declaratory relief).

10.6%, respectively.

Table 1 also lists some relevant percentages by types of federal circuits. Complainants who commenced actions in a tribunal located in the Fifth Circuit were more likely to obtain declaratory relief in federal courts of appeals, 20.7%, than in either state district or supreme courts. On the other hand, complainants who filed action in a forum in the Ninth Circuit were more likely to secure ultimate relief in district courts (state and federal) or in state supreme courts, 20.6% and 24.7%, respectively. In addition, complainants who originated actions in the Seventh Circuit were more likely to achieve final relief 10.4% of the time in the Court of Appeals for the Seventh Circuit, 5.6% in district courts, and 2.4% in the supreme courts located in that circuit.

Types of Complaints is the final interesting variable highlighted in Table 1. The reported percentages reveal that insured individuals are more likely to secure final relief in both district courts (state and federal) and state supreme courts—34.6% and 38.8%, respectively—than in federal courts of appeals (20.7%). But, corporations or corporate complainants are more likely to obtain ultimate declaratory relief in federal courts of appeals than in district courts or state supreme courts. The respective percentages are 30.4%, 24.3%, and 18.8%. Finally, a slightly greater number of professional complainants were able to secure a final declaratory judgment in federal appellate and state supreme courts, rather than in state or federal district courts. The percentages are 11.1%, 10.0%, and 4.7%, respectively.

TABLE 2. UNDERLYING THIRD-PARTY ACTIONS: SOME SELECTED DEMOGRAPHIC CHARACTERISTICS OF THIRD-PARTY COMPLAINANTS WHO SUED INSUREDS IN STATE AND FEDERAL COURTS (N = 547)

Demographic Characteristics	State & Federal District Courts (N = 107)	Federal Appellate Courts (N = 270)	State Supreme Courts (N = 170)
	(Percent)	(Percent)	(Percent)
Underlying Lawsuits—			
Third Parties' Ethnicity			
African-Americans	7.5	4.8	1.2
Anglo-Americans	64.5	64.4	77.1
Mexican-Americans	—	1.1	1.0
Other	5.6	3.0	1.8
Non-Humans	22.4	26.7	19.0
Underlying Lawsuits—			
Third Parties' Gender			
Female, Only	17.8	18.5	20.6
Male, Only	44.9	41.1	51.8*
Both	23.4*	23.0*	18.8
Non-Human	14.0	17.0*	8.8
Underlying Lawsuits—			
Third Parties' Status			
Agents	1.0	1.1	1.0
Consumers	8.4	18.9*	11.2
Contractors	1.0	1.0	1.8
Corporations	11.2	11.1	5.3
Employees	15.9	15.2	8.2
Federal Government	3.7	5.2	4.1
Innocent Bystanders	25.2	22.6	28.2
Invitees	4.7	5.2	6.5
Landowners	17.8	10.4	11.8
Municipalities	1.0	2.2	2.4
Professionals	4.7	3.0	4.1
Relatives	6.5	7.4	5.3
Social Guests	9.3	10.0	8.8
Students & Pupils	5.6	.4	4.1
Tenants	1.0	4.1	2.4
Underlying Lawsuits—			
Third-Party Common-Law Claims			
Battery	18.7*	7.8	22.9*
Conversion	10.3	7.0	4.1
Fraud	14.0*	13.7*	8.2
Mental Distress	9.3	4.4	7.1
Misrepresentation	1.0	2.6	4.1
Rape	1.9	1.5	1.2
Sexual Molestation	7.5	4.4	5.3
Trespass to Land	9.3	10.4	5.9
Underlying Lawsuits—			
Third-Party Statutory Claims			
Crimes—Felonies	11.2	7.8	21.2*
Sexual Harassment	1.0	1.5	1.0
Wrongful Death	19.6	37.4*	24.7

Levels of Statistical Significance for Chi Square test: *p < .05

Table 2 outlines some demographic characteristics of third-party victims who alleged that insureds—*e.g.*, lawyers, doctors, homeowners, corporations, officers and directors, members of the clergy, small-business owners, and educators —intentionally subjected them to physical and mental abuse.

Third-Party Victims' Ethnicity is the first variable illustrated in Table 2. Of course, it is important to point out that among the three categories of cases, nearly a fourth of all third-party victims identified as plaintiffs in the underlying complaints or lawsuits were either agencies, associations, businesses, corporations, government agencies, organizations, partnerships, or similar legal entities. These were labeled "non-human."[384] The percentages for the three groups of cases are 22.4%, 26.7%, and 19.0%, respectively.

On the other hand, among "humans," the majority of third-party victims who were listed as plaintiffs in the underlying suits or complaints were Anglo-Americans. Their percentages within the three categories are 64.5%, 64.4%, and 77.1%, respectively. Conversely, African-Americans were named as third-party victims or plaintiffs in less than ten percent of the underlying suits among the declaratory judgment actions ultimately decided in the district courts (both state and federal), the federal appellate courts and the state supreme courts. The reported percentages are 7.5%, 4.8%, and 1.2%, respectively. The remaining percentages reveal that Mexican-Americans and other ethnic groups also comprised less than ten percent of third-party plaintiffs or victims in the underlying suits.

Table 2 also illustrates the distribution of third-party victims' legal status across the three court categories. First, a significant number of the victims were "innocent bystanders"—25.2%, 22.6%, and 28.2%, respectively. Also, within the three groups, a fair number of "landowners"—17.8%, 10.4%, and 11.8%—and "social guests"—9.3%, 10.0%, and 8.8%—are listed as third-party victims.

A greater percentage of "consumers," however, are listed as victims among the federal appellate court cases than among either district

384. In Table 2, a comparison of the "non-human" categories listed under "*Third-Party Complainants' Ethnicity*" and "*Third-Party Complainants' Gender,* "reveals an apparent discrepancy. *See supra* p. 1200. Under the ethnicity variable, more "non-human" appear than under the gender variable. Simply put, in some situations the underlying lawsuit or complaint listed the corporation, association, agency, or partnership as plaintiff; but it also clearly identified the gender of the individuals who were allegedly injured by the insured's intentional acts. Correspondingly, if the gender of the employee, agent, officer, director, or parishioner was known, the case was placed in one of the following categories: "*female, only,*" "*male, only,*" *or* "*both.*" The same methodology was used to construct the ethnicity variable. However, the ethnicity of the victim was identified less often. Therefore, under "*Third-Party Complainants' Ethnicity*" a greater number of cases appear in the "non-human" category.

court (state and federal) or state supreme court cases. The respective percentages are 18.9%, 8.4%, and 11.2%. On the other hand, nearly twice as many "employees" are listed as third-party victims among district court (state and federal) cases and federal appellate court cases, than among state supreme court cases—15.9%, 15.2%, and 8.2%, respectively. And, the same pattern occurs across the three groups where the third-party complainants are "corporations"—11.2%, 11.1%, and 5.3%, respectively.

As previously mentioned, declaratory relief was ultimately awarded or denied in either a district court (state or federal), a federal court of appeals, or a state supreme court. But, underlying each action for declaratory relief, there was a common law or statutory action against the insured. The last two factors outlined in Table 2 are *Types of Third-Party Common Law Claims* and *Types of Third-Party Statutory Claims.* These are the various claims which were alleged in the underlying lawsuits.

Among the third-party victims' common law claims, there are a few interesting patterns. A greater percentage of "battery" claims appear in the district court and state supreme court underlying suits, 18.7% and 22.9%, respectively. But, among district court and federal appellate court underlying suits, slightly more "fraud" claims appear, 14.0%, and 13.7%, respectively. Slightly more "trespass to land" claims appear in those courts as well. The respective percentages are 9.3% and 10.4%.

Finally, "wrongful-death" was the predominant, underlying statutory claim across the three groups of cases, 19.6%, 37.4%, and 24.7%, respectively. A group-by-group comparison, however, reveals that nearly twice as many "crime-related" underlying claims appear among state supreme court cases than among either district court (federal and state) or federal appellate court cases. The respective percentages are 21.2% versus 11.2% and 7.8%.

Once again, does type of insurance contract, type of complainant or insured, region of country, type of federal circuit, third-party victims' ethnicity and gender, and type of third-party common-law and statutory claim truly influence whether courts grant or deny declaratory relief? To answer this question, this Article examines the statistical relationships between some of these variables and judicial outcomes in the sections appearing below.

B. Bivariate Analysis of the Factors Influencing Whether Courts Award Declaratory Relief in Duty-to-Defend Cases

Table 3 illustrates the relationship between insureds receiving de-

claratory relief in the federal courts of appeals and each of the following variables: Types of insurance contracts, third-party victims' ethnicity and third-party victims' legal status.

TABLE 3. DECLARATORY JUDGMENTS—THE DISPOSITION OF DUTY-TO-DEFEND ACTIONS IN FEDERAL COURTS OF APPEALS BY SELECTED DEMOGRAPHIC CHARACTERISTICS OF LITIGANTS (N = 270)

Selected Demographic Characteristics	Subcategories	Disposition of Declaratory Judgment Actions From Insureds' Perspectives		Number of Cases	Chi Square Value (Degrees of Freedom)
		Favorable	Unfavorable		
		Percent	Percent		
Insureds' Insurance Contracts	Officers & Directors	60.7	39.3	(N = 28)	20.1434*** (df = 5)
	Malpractice Insurance	68.8	31.2	(N = 16)	
	Homeowners' Insurance	14.8	85.2	(N = 27)	
	Liability Insurance	39.0	61.0	(N = 146)	
	Automobile Insurance	50.0	50.0	(N = 36)	
	Other	52.9	47.1	(N = 17)	
Underlying Suit: Third-Party Victims' Ethnicity	Anglo-Americans	42.5	57.5	(N = 174)	8.6577** (df = 2)
	African-Americans†	12.5	87.5	(N = 16)	
	Non-Human Victims	50.0	50.0	(N = 80)	
Underlying Suits: Third-Party Victims' Legal Status	Adults	43.4	56.6	(n = 189)	6.0368** (df = 1)
	Minors	19.2	80.8	(n = 26)	

† In four underlying lawsuits, third-party victims were Mexican-Americans.
Levels of statistical significance:
*** $p \leq .001$
** $p \leq .01$

Simply stated, the first statistically significant[385] Chi square value—20.1434—strongly indicates that federal appellate court judges knowingly or unknowingly allow types of contractual agreements to influence whether the insureds receive a favorable or unfavorable declaratory judgment in duty-to-defend cases. For example, a person insured under officers & directors and professional malpractice insurance contracts was significantly more likely to receive declaratory relief. The observed percentages are 60.7% and 68.8%, respectively. Individuals who purchased homeowners' and CGL contracts, however, were significantly less likely to receive a favorable declaratory judgment, 85.2% and 61%, respectively.

Second, the effect of third-party victims' ethnicity on the disposition of declaratory judgment actions in the federal appellate courts is both surprising and statistically significant. Generally, insureds were less likely to receive declaratory relief if the victims in the underlying suits were either Anglo-Americans or African-Americans. The percentages are 57.5% and 87.5%, respectively. But, the converse of this is quite unsettling: insureds were three times more likely to secure favorable declaratory judgments in duty-to-defend cases if the third-party victims were Anglo-Americans rather than African or Mexican-Americans, 42.5% versus 12.5%.

In light of this latter revelation, is there anything within the doctrines of reasonable expectation, plain meaning, adhesion, and *contra proferentem*, or anything associated with the equitable doctrines of unclean hands and *in pari delicto* that would lead to an expectation of such a statistically significant ethnicity effect? Emphatically, the answer is no.

Table 3 also suggests that the third-party victims' legal status influences whether federal appellate court judges award declaratory relief. To be sure, insureds are less likely to receive a favorable declaratory judgment when the underlying victim was an adult or minor, 56.6% and 80.0%, respectively. But, when appellate court judges awarded relief, they were twice as likely to do so when third-party victims were adults rather than minors, 43.4% versus 19.2%. Again, should such a discrepancy be expected among the federal courts of appeals?

Table 4 presents statistically significant relationships between two demographic variables and insureds' likelihood of receiving declaratory relief in state supreme courts.

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385. *See generally* Willy E. Rice, *Judicial Enforcement of Fair Housing Laws: An Analysis of Some Unexamined Problems that the Fair Housing Amendments Act of 1983 Would Eliminate*, 27 HOW. L.J. 227, 253-55 & nn.161-62 (1984) (outlining a simple procedure to calculate a Chi-square statistic and presenting a brief explanation of a "statistically significant" relationship).

TABLE 4. DECLARATORY JUDGMENTS—THE DISPOSITION OF DUTY-TO-DEFEND ACTIONS IN STATE SUPREME COURTS BY SELECTED DEMOGRAPHIC CHARACTERISTICS OF LITIGANTS (N = 170)

Selected Demographic Characteristics	Subcategories	Disposition of Declaratory Judgment Actions From Insureds' Perspectives		Number of Cases	Chi Square Value (Degrees of Freedom)
		Favorable	Unfavorable		
		Percent	Percent		
Underlying Suits: Types of Third-Party Victims	Consumers	31.6	68.4	(N = 19)	8.9185*** (df = 3)
	Innocent Bystanders	44.7	55.3	(N = 47)	
	Social Guests	80.0	20.0	(N = 15)	
	Other	46.1	53.9	(N = 89)	
Underlying Suits: Third-Party Victims' Claims	"Battery"	54.2	45.8	(N = 24)	12.8013** (df = 4)
	"Wrongful Death"	66.7	33.3	(N = 42)	
	"Criminal Assault"	28.1	71.9	(N = 32)	
	"Molestation"	50.0	50.0	(N = 4)	
	Other Allegations	41.2	58.8	(N = 68)	

Levels of statistical significance:
*** $p \leq .001$
** $p \leq .01$

First, the percentages show that state supreme courts wittingly or unwittingly permit third-party victims' legal status to affect whether they affirm or reverse lower courts' decisions to award or deny declaratory relief in duty-to-defend cases. For instance, statistics show that when third-party victims are "social guests," supreme courts are significantly more likely (80.0%) to declare that insurers must defend insureds accused of committing some intentional act. On the other hand, when third-party victims are "consumers," "innocent bystanders," or others, supreme courts are significantly less likely to order liability insurance carriers to defend the underlying intentional tort actions. The unfavorable percentages are 68.4%, 55.3%, and 53.9%, respectively.

Unexpectedly, various types of third-party claims also influence whether state supreme courts grant or deny declaratory relief. In Table 4, findings reveal that supreme courts are significantly more likely to order a legal defense if third-party victims filed a "battery" or a "wrongful-death" action against the insureds, 54.2% and 66.7%, respectively. But, if claims in the underlying suits involve "criminal assault" or some other intentional act, supreme courts are markedly less likely to force insurers to defend policyholders. The unfavorable percentages are 71.9% and 58.8%, respectively.

Without doubt, third-party claims and third parties' legal status produced some surprising effects on whether state supreme courts awarded or denied declaratory relief. Therefore, it is important to examine the influence of these two variables from another perspective to determine whether these effects were truly meaningful or simply statistical anomalies. In particular, the study combined both federal appellate and supreme court cases, and then assessed the combined effects of third-party claims and legal status on disposition.

TABLE 5. DECLARATORY JUDGMENTS—THE DISPOSITION OF DUTY-TO-DEFEND ACTIONS IN BOTH FEDERAL APPELLATE COURTS AND STATE SUPREME COURTS BY THIRD-PARTY HUMAN VICTIMS' LEGAL STATUS, CONTROLLING FOR THE INFLUENCE OF INSUREDS' VARIOUS INTENTIONAL ACTS (N = 135)

Disposition of Declaratory-Judgment Actions in State Supreme Courts and in Federal Appellate Courts From the Insureds' Viewpoint	Third-Party Victims' Claim: Common-Law & Statutory "Assault & Battery"		Third-Party Victims' Claim: Common-Law & Statutory "Sexual Molestation"		Third-Party Victims' Claim: Common-Law & Statutory "Criminal Assault"	
	Third-Party Adult Victims (N = 63)	Third-Party Minor Victims (N = 5)	Third-Party Adult Victims (N = 3)	Third-Party Minor Victims (N = 18)	Third-Party Adult Victims (N = 32)	Third-Party Minor Victims (N = 14)
	Percent	Percent	Percent	Percent	Percent	Percent
Favorable	52.4	60.0	66.7	16.7	46.9	7.1
Unfavorable	47.6	40.0	33.3	83.3	53.1	92.9
	Chi-Square = .10794 Degree of Freedom = 1 (Not statistically significant)		Chi-Square = 3.5437 Degree of Freedom = 1 ($p < .05$)		Chi-Square = 6.7776 Degree of Freedom = 1 ($p < .001$)	

Table 5 highlights the relationship between the likelihood of federal and state courts' awarding declaratory relief and third-party victims' legal status, while controlling for, removing, or minimizing the influence of third-party victims' claims. The findings are somewhat revealing and statistically significant. First, consider only the cases in which the third-party victims filed common law and statutory assault & battery claims in the underlying suits: among those cases, there is no significant relationship between the likelihood of state and federal judges' awarding declaratory relief and the legal status of third-party victims. In other words, knowing that the victim in the underlying suit was an adult or a minor had no statistically significant bearing on courts' decisions to award or deny declarative relief.

The converse is true, however, among cases where third-party victims filed common law and statutory sexual molestation claims in the underlying lawsuits. The reported percentages, 66.7% and 33.3% respectively, strongly suggest that supreme courts and federal courts of appeals are much more likely to force insurers to defend insureds when the victims of the alleged sexual molestation are adults rather than minors.

Finally, among cases where third-party victims filed common-law and statutory criminal assault claims, a similar pattern also appears. Both state supreme courts and federal appellate courts are significantly less likely to compel liability insurers to defend insureds if minors allege that they were the victims of a criminal assault—92.9%. On the other hand, courts are more likely to force insured to defend insureds when the alleged victims are adults—46.9%.

C. Two-Stage Multivariate Probit Analysis of Factors Influencing Federal and State Courts' Award of Declaratory Relief

An interpretation of the statistically significant relationships reported in Tables 3-5 could lead one to conclude the following: systematic bias permeates federal appellate court and state supreme court declaratory judgments. Justices permit litigants' demographic characteristics, such as insureds' and third-party victims' ethnicity, and gender, to determine whether they will affirm or reverse lower courts' declarations in duty-to-defend cases. To be sure, presenting such an unsophisticated interpretation of the reported findings would be unwarranted. More important, without knowing considerably more, such a conclusion would be highly incorrect.

What else is there to know? First, these findings are based on reported federal appellate court and state supreme court cases, which appeared in various reporters and were retrieved from two electronic

databases. Would the findings be the same among unreported cases? Second, among reported cases, some insureds and insurers accepted state and federal district courts' adverse declarations and decided not to appeal those rulings. But others, however, refused to accept district courts' adverse judgments and decided to obtain further relief in either a federal appellate court or in a state supreme court.

So, the question is, are insureds and insurers who decided to appeal an adverse ruling significantly different from those who decided not to appeal? This question concerns a fairly common phenomenon called "selectivity bias."[386] It is uncertain whether such bias is absent, even where random sampling was used to select cases for the database. Therefore, a test or a procedure is required to help estimate the presence and effect of self-selection bias in federal-appellate and state-supreme courts' awards of declaratory relief in duty-to-defend cases. There is also a methodology that helps to evaluate the concurrent and multiple effects of several factors on whether courts order liability insurers to provide a legal defense. The procedure that would help to accomplish these ends is called multivariate probit analysis.[387]

Table 6 illustrates the results of a multivariate analysis among federal courts of appeals cases.

386. The potential problems associated with "selectivity bias," especially in data secured from reported judicial decisions, has been written on extensively. *See, e.g.*, Geoffrey L. Gillis & Stephen J. Spurr, *The Value of Life in Tort Litigation: The Advent of the Economic Approach*, 75 MICH. B.J. 540, 541-42 (1996) (pointing out the problems associated with "selectivity bias" and with the statistical models designed to test and remove this source of bias); Jeffrey M. Jakubiak, *Maintaining Air Safety at Less Cost: A Plan For Replacing FAA Safety Regulations with Strict Liability*, 6 CORNELL J.L. & PUB. POL'Y 421, 434 (1997) (discussing problem of "selectivity bias" and tort-law litigation); Willy E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders And Insurers in Federal and State Courts, 1950-1995*, 33 SAN DIEGO L. REV. 583, 693 n.438 (1996) (discussing the issue of "selectivity bias"). Daniel A. Powers & Christopher G. Ellison, *Interracial Contact and Black Racial Attitudes: The Contact Hypothesis and Selectivity Bias*, 74 SOCIAL FORCES 205 (1995) (discussing potential effect of selectivity bias on interracial contact and racial attitudes).

387. *See* Willy E. Rice, *Judicial and Administrative Enforcement of Title VI, Title IX, and Section 504: A Pre- and Post-Grove City Analysis*, 5 REV. LITIG. 219, 286-88 nn.406-09 (1986) (discussing statistical procedure, a multivariate probit statistical analysis, and the computer program called *HOTZTRAN* that was employed to test for "selectivity bias" and to compute "simultaneous" coefficients).

TABLE 6. INSURERS' DUTY TO DEFEND INSUREDS' INTENTIONAL ACTS: THE INFLUENCE OF SELECTED PREDICTOR VARIABLES ON LITIGANTS' DECISIONS TO INITIATE DECLARATORY-JUDGMENT ACTIONS AND ON THE DISPOSITION OF THOSE ACTIONS IN FEDERAL COURTS OF APPEALS, 1950-1997

	Decision to Initiate a Cause of Action in Federal Courts of Appeals (N = 377)		Disposition of Declaratory-Judgment Actions Among Third-Party Female Victims (N = 73)		Disposition of Declaratory-Judgment Actions Among Insureds Who Resided in the Eighth Circuit (N = 76)	
Selected Predictor Variables	Probit Coefficients (Standard Errors)	Absolute Values of t-Statistics	Probit Coefficients (Standard Errors)	Absolute Values of t-Statistics	Probit Coefficients (Standard Errors)	Absolute Values of t-Statistics
"Duty-to-Defend" Plaintiffs:						
Corporations	0.3183	2.4822	0.5969	1.6533	0.1999	.5969
	(0.1282)		(0.3610)		(0.3350)	
Professionals	0.1793	1.1449	0.4948	.6210	–0.0945	.1261
	(0.1566)		(0.7967)		(0.7497)	
Third-Party Victims:						
Consumers	0.3652	3.1613	–1.1963	1.0336	–0.6168	.5270
	0.1155		(1.1573)		(0.8545)	
Employees	0.2997	2.6658	–1.4933	1.5173	–0.5714	1.1384
	(0.1117)		(0.9841)		(0.5019)	
Innocent Bystanders	0.0045	.0477	–0.7509	2.0285	0.0152	.0372
	(0.0955)		(0.3701)		(0.4077)	
Landowners	–0.1676	1.3366	3.1815	3.6201**	0.1930	.2853
	(0.1254)		(0.8788)		(0.6766)	
Third-Party Victims' Claims:						
"Fraud"	–0.0321	.1887	–0.0254	.3397	–2.1268	4.7024***
	(0.1704)		(0.7481)		(0.4522)	
"Wrongful Death"	0.3228	2.8798	–0.4387	.4327	–0.6842	1.0693
	(0.1704)		(0.7481)		(0.6398)	
Lambda Term (Test for Selectivity Bias)	—	—	–5.1280	.9275	–3.3053	1.2526
			(5.5283)		(2.6387)	
CONSTANT	0.0873	1.2331	3.1808	.7792	2.0660	1.0871
	(0.0654)		(4.0822)		(1.9004)	

Levels of statistical significance: *** $p < .001$ ** $p < .05$

First, the information appearing under *Decision to Initiate a Cause of Action in Federal Courts of Appeals* is not very significant from a legal perspective. Quite simply, some of the litigants (N = 377), decided to go to federal courts while others did not. The probit coefficients and t-statistics, therefore, indicate whether the corresponding background variables (predictors) had any meaningful impact on the decision to seek declaratory relief in federal courts. And, of course, they did not, given that none of those t-statistics were statistically significant.

But the findings appearing under the heading entitled, *Disposition of Declaratory-Judgment Actions Among Third-Party Female Victims,* are relevant. First, the Lambda coefficient—5.1280 is not statistically significant. This suggests the absence of any meaningful selectivity bias in this sample of cases. Second, only one statistically significant probit coefficient, 3.1815, appears within this group. Considering that the coefficient is positive, it conveys the following: federal appellate courts are markedly more likely to force insurers to defend insureds when third-party victims are female landowners.

Of course, there is another important finding in Table 6 under the heading, *Disposition of Declaratory-Judgment Actions Among Insureds Who Resided in the Eighth Circuit.* The statistically significant and negative -2.1268 probit coefficient indicates that the Court of Appeals for the Eighth Circuit is significantly less likely to order insurers to defend insureds where third-party victims accused insureds of committing some fraudulent act.

Finding that these revelations are not statistical quirks, once again, should these types of variables influence federal appellate court judges' decision to grant or deny any declaratory relief? Should they have a bearing on whether federal courts of appeals order national liability carriers to defend insureds? Probably not.

Because the findings among federal court cases are so compelling, additional tests were conducted to determine whether identical or similar multivariate effects materialized among state supreme court cases.

TABLE 7. INSURERS' DUTY TO DEFEND INSUREDS' INTENTIONAL ACTS: THE INFLUENCE OF SELECTED PREDICTOR VARIABLES ON LITIGANTS' DECISIONS TO INITIATE DECLARATORY-JUDGMENT ACTIONS AND ON THE DISPOSITION OF THOSE ACTIONS IN STATE SUPREME COURTS, 1950-1997 (N = 547)

	Decision to Initiate a Cause of Action in State Supreme Courts (N = 547)		Disposition of Declaratory-Judgment Actions Among Cases Where Third-Party Victims Were "Strangers" (N = 148)		Disposition of Declaratory-Judgment Actions in Supreme Courts Located in the East (N = 67)		Disposition of Declaratory-Judgment Actions in Supreme Courts Located in the Eighth Circuit (N = 78)	
Predictor Variables	Probit Coefficients (Standard Errors)	Absolute Values of t-Statistics	Probit Coefficients (Standard Errors)	Absolute Values of t-Statistics	Probit Coefficients (Standard Errors)	Absolute Values of t-Statistics	Probit Coefficients (Standard Errors)	Absolute Values of t-Statistics
Third-Party Victims:								
Anglo-Americans	0.0858	.2124	0.1676	.6174	0.1634	.3102	0.4013	.9060
	(0.4039)		(.2715)		(.5267)		(0.4429)	
Females	–0.0570	.5342	–0.7660	.2837	0.8681	1.5532	0.1477	.3359
	(0.1067)		(.2699)		(.5588)		(0.4399)	
Social Guests	0.0326	.4530	*1.9295*	*4.1785***	0.7186	.9108	0.6793	1.1184
	(0.0719)		(0.4617)		(.7890)		(0.6073)	
Third-Party Claims:								
"Battery"	0.0480	.4020	0.0195	.0488	*–2.7449*	*3.9922***	–0.3601	.7145
	(0.1194)		(0.3994)		(0.6875)		(0.5039)	
"Wrongful Death"	–0.0765	.8373	0.3126	.9735	5.1579	.8278	*–2.4891*	*5.0077****
	(0.0914)		(0.3211)		(6.2306)		(0.4143)	
Insurance Contracts:								
Homeowners'	0.0492	.7750	–0.1410	.4094	0.7513	1.1256	0.0536	.0936
	(0.0635)		(0.3445)		(0.6674)		(0.5732)	
Liability	0.6751	5.4091****	–0.0950	.3161	–0.0088		–0.0037	.0104
	(0.1248)		(0.3007)		(0.5185)		(0.3594)	
Grounds for Disposing Action in Trial Court	–0.8678	156.0547****	–0.6145	–1.4363	0.4360	.5417	–0.1352	.2685
	(0.0055)		(0.4278)		(0.8048)		(0.5035)	
Lambda Term (Test for Selectivity Bias)	—	—	0.4031	.41617	–3.1659	1.0536	–0.6884	.5508
			(0.9687)		(3.0047)		(1.2498)	
CONSTANT	4.3728	14.9897****	0.4343	.9175	–0.7945	.8228	–0.2448	.3857
	(0.2917)		(0.4733)		(0.9656)		(0.6348)	

Levels of statistical significance: **** $p < .0001$ *** $p < .001$ ** $p < .01$

These results are presented in Table 7. First, consider the coefficients illustrated under the heading labeled, *Disposition of Declaratory Judgment Actions Among Cases Where Third-Party Victims Were Strangers.* The Lambda coefficient, .4031, is not statistically significant, suggesting the absence of selectivity bias. But the positive probit coefficient, 1.9295, is statistically meaningful. It suggests the following: state supreme courts are substantially more likely to order insurance carriers to defend insureds, when third-party victims, who are social guests as well as strangers,[388] accuse insureds of committing intentional acts.

Another significant finding is located under the heading entitled, *Disposition of Declaratory Judgment Actions in Supreme Courts Located in the East.* The Lambda coefficient (-3.1659) is not significant, suggesting once more the absence of any meaningful selectivity bias in this sample of cases. The negative -2.7449 probit coefficient, however, is statistically significant and rather revealing. "Eastern courts" include the supreme tribunals in Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. The negative coefficient reveals that these courts are considerably less likely to force liability carriers to defend if third-party victims alleged that the insureds committed a battery.

Finally, the remaining significant statistic in Table 7 appears under the category labeled, *Disposition of Declaratory Judgment Actions in Supreme Courts Located in the Eighth Circuit.* Again, the Lambda coefficient (-0.6884) is not statistically meaningful. But, the negative probit coefficient (-2.4891) associated with the wrongful-death category is statistically important. This coefficient indicates that state supreme courts located within the region of the Eighth Circuit are considerably less likely to force insurers to defend the insured if third-party victims file wrongful-death actions against the insured.

At first glance, this latter finding looks suspect, given that this presentation concerns injuries allegedly caused by insureds' intentional and immoral acts rather than by insureds' negligent acts. But the essence of a wrongful-death action is that it is a civil action. In states located in the Eighth Circuit,[389] as well as other states,[390] wrong-

388. At first glance, one might conclude that little is added to an analysis or discussion viewing a third-party victim from the perspective of a "social guest" as well as a "stranger." But legally, the two labels or descriptions are not synonymous. A careful comparison of the respective definitions should make the point. *Compare* BLACK'S LAW DICTIONARY 1390 (6th ed. 1990) (defining a social guest as a "person who goes onto the property of another for companionship, diversion and enjoyment of hospitality"), *with* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1162 (10th ed. 1993) (defining a stranger as "one not privy or party to an act, contract, or title; one that interferes without right").

389. The full text of Eighth Circuit states' wrongful-death statutes can be found in each

ful-death actions generally must proceed under a theory of negligence. On the other hand, in many underlying criminal actions, the insureds would have been only charged with, or found not guilty of, committing first- or second-degree murder or manslaughter, which are "intentional" acts. This explains in part why wrongful-death has been included as a "predictor" in this analysis.

But, as reported above, the supreme tribunals within the Eighth Circuit are substantially less likely to order insurance companies to defend insureds even though there has been no finding of criminality in the underlying suits. Are there legal principles which would predict this result? Is this a just result? Is this finding congruent with the sound social policy underlying the evolution of third-party liability insurance? The answer to each questions is an emphatic no.

CONCLUSION

This Article is designed to reach several audiences: (1) plaintiffs' lawyers who commence duty-to-defend actions on behalf of insureds; (2) defense counsels who try to protect the interests insurers' and insurance investors' interests by petitioning courts for declaratory relief; (3) state and federal judges who decide whether property and casualty companies and professional liability insurers must defend insureds in underlying lawsuits; and (4) state legislators and insurance commissioners who either review or approve the terms and conditions appearing in the coverage, duty-to-defend, and exclusion clauses in liability insurance contracts.

First, all parties listed above should remember the public policy behind the evolution of liability contracts: Liability insurance is third-party insurance. Lawyers, doctors, homeowners, small businesses, officers and directors, corporations, associations, partnerships, churches, universities, enterprises, and other organizations and professionals purchase this type of insurance for the benefit of third-party victims. All too often, federal and state judges, insurers, and defense counsels either dismiss, reject, or overlook this fundamental

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state's code. *See* ARK. CODE ANN. § 16-62-102 (MICHIE 1987); IOWA CODE ANN. § 633.336 (WEST 1997); MINN. STAT. ANN. § 573.02 (WEST 1996); MO. ANN. STAT. § 537.080 (WEST 1997); NEB. REV. ST. § 30-809 (1943); N.D. CENT. CODE §§ 32-03.2-04 (1997); S.D. CODIFIED LAWS § 21-5-1 (MICHIE 1968).

390. Wrongful-death statutes can be found in most state codes. *See* CONN. GEN. STAT. ANN. § 52-225a (West 1997); DEL. CODE ANN. tit. 10, § 3704 (1997); D.C. CODE ANN. § 12-310 (1981); ME. REV. STAT. ANN. tit 18-A, § 2-804 (WEST 1997); MD. CODE ANN. CTS. & JUD. PROC. § 3-902 (1997); MASS. GEN. LAWS ANN. ch. 229 § 2 (WEST 1997); N.H. REV. STAT. ANN. § 556:12 (1997); N.J. STAT. ANN. § 2A:15-97 (WEST 1997); N.Y. EST. POWERS & TRUST LAW § 5-4.1 (McKinney 1997); 42 PA. CON. STAT. ANN. § 8301 (WEST 1997); R.I. GEN. LAWS § 3-14-8 (1956); VT. STAT. ANN. tit. 14, § 1491 (1997).

fact, especially when insureds and insurers start debating whether liability carriers must defend against an underlying third-party claim.

It also would be extremely instructive if all parties remember what a Michigan appellate court wrote in *Vigilant Insurance Co. v. Kambly*:[391]

> Initially, it is unlikely that [an] insured [is] induced to engage in . . . unlawful conduct by reliance upon the insurability of any claims arising therefrom or that allowing insurance coverage . . . would induce . . . similar unlawful conduct. . . . [C]overage does not allow the wrongdoer unjustly to benefit from his wrong. It is not the insured who will benefit, but the innocent victim who will be provided compensation for her injuries.[392]

The second point is directed to federal and state judges who decide duty-to-defend controversies. Fairly recently, in *Transport Insurance Co. v. Faircloth*[393] the Texas Supreme Court correctly observed:

> An insured's interests are adverse to third-party claimants. . . . For policy reasons, we do not require insurance companies to perform duties for third-party claimants that are "coextensive and conflicting" with the duties they owe their insureds . . . . Owing such duties to third parties would "necessarily compromise the duties the insurer owes to its insured."[394]

Other supreme courts also have adopted this position.[395]

But this latter public policy need not prevent insurers from defending underlying suits where third parties have only alleged that insureds committed an intentional act. When federal and state judges refuse to order a legal defense, their declarations do not protect insureds from third parties. Rather, those declarations only protect insurance companies' and investors' interests; they do not protect the insureds' interests. Stated another way, when courts refuse to order a legal defense, money is saved. Who benefits? Insurers and insurance investors.

Furthermore, a careful analysis shows that unsuccessful insureds lose twice. First, they receive no benefits from the billions of dollars they pay to secure insurance coverage. Second, and more egregious, they must spend additional money to defend themselves, where third-

391. 319 N.W.2d 382 (Mich. Ct. App. 1981).
392. *Id.* at 385.
393. 898 S.W.2d 269 (Tex. 1995).
394. *Id.* at 279 (citations omitted).
395. *See, e.g.*, Moradi-Shalal v. Fireman's Fund Ins. Co., 758 P.2d 58, 74 (Cal. 1988) ("Insurance is initially obtained for the protection of the insured, and the insurer's primary duty is to protect the interests of its own insured."); *Beck v. Farmers Ins. Exchange*, 701 P.2d 795, 799 (Utah 1985) ("The insured is wholly dependent upon the insurer to see that, in dealing with claims by third parties, the insured's best interests are protected. In addition, when dealing with third parties, the insurer acts as an agent for the insured with respect to the disputed claim.").

party claimants have only alleged that the insureds committed some intentional act. By any reasonable measure, the courts' failure to order a defense creates an unjust, financial windfall for insurance companies and their investors. In addition, judges must never forget that the greater majority of insureds can only purchase adhesion contracts, which effectively prevent them from defining, redefining, deleting, or negotiating the meaning of terms like "duty to defend," and "intentional acts."

To repeat an earlier point, it is fundamentally unfair to force insureds to defend themselves where there has been no finding of intentional conduct in an underlying suit. In every instance, judges should compel liability insurers to defend homeowners, small business owners, doctors, lawyers, psychiatrists, minors, and other insureds, unless insurers present clear and convincing evidence that insureds had either subjective[396] or criminal[397] intent to harm a third party. And, to ensure fairness, a jury, rather than a judge should determine whether the insureds possessed the requisite intent.

The third point also is directed to state and federal judges who declare that liability insurers have no duty to defend actions involving allegedly intentional acts. As reported earlier, federal and state judges are overwhelmingly less likely to order insurers to defend insureds if the third-party victims are African- or Mexican-Americans, consumers, and young children. The same is true where third-party victims accuse the insured of committing criminal assault.[398] On the other hand, judges are more inclined to order a legal defense if third-party victims are social guests or if victims commence wrongful-

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396. *See, e.g.*, Alabama Farm Bureau Mut. Cas. Ins. Co. v. Dyer, 454 So. 2d 921, 925 (Ala. 1984) ("Under [the] subjective test, an injury is 'intended from the standpoint of the insured' if the insured possessed the specific intent to cause bodily injury to another...."); Auto-Owners Ins. Co. v. Churchman, 489 N.W.2d 431, 434 (Mich. 1992) ("The policy language..., 'expected or intended by an insured person,' is unambiguous and requires a subjective intent...."); Grange Ins. Co. v. Brosseau, 776 P.2d 123, 131 (Wash. 1989) ("[U]nder the wording of the policy, the intent to injure is a subjective determination.").

397. *See, e.g.*, Aetna Cas. & Sur. Co. v. Jones, 596 A.2d 414, 422 (Conn. 1991) (concluding that "[o]ne could not logically find that the necessary criminal intent was present but that the intent that operates to exclude coverage under the insurance policy was not [present]"); Safeco Ins. Co. of America v. Yon, 796 P.2d 1040, 1042-43 (Idaho Ct. App. 1990). In *Yon*, the court found that:

> [T]he elements necessary for the prosecution to prove the crime of murder in the second degree are: (a) an unlawful killing, (b) the intent to kill, and (c) malice.... The appellants contend that this 'subjective intent' analysis—when interpreting intentional conduct exclusion clauses in insurance contracts—is distinct from the issue of intent decided in the second degree murder trial. In this context, we disagree.

Id.

398. *See* Tables 3-5, *supra* pp. 1203-07 (illustrating the relationship between declaratory relief and the ethnic, age, and legal status of the victim).

death actions.[399]

These findings constitute prima facie evidence that courts are either consciously or unconsciously allowing their less-than-positive attitudes about certain classes of victims to influence their rulings. It suggests that judges who do not order a legal defense believe that insureds must be punished for their intentional conduct,[400] or that insureds should be dissuaded from committing additional criminal or intentional acts.[401]

Federal and state judges also must ensure that their preconceived notions about the social or economic worth of African- and Mexican-Americans, or other ethnic minorities, do not influence whether they compel insurers to defend policyholders. Furthermore, courts universally and properly condemn insureds who conclusively molest young children. Yet, too many courts cut off the very source of financial support that could be used to help young victims. Simply put, if judges truly want to help third-party victims, they should force liability insurers to defend their policyholders.

The significance of this admonishment should be obvious: All third-party victims, regardless of their ethnicity, legal, professional, or socioeconomic status, are significantly more likely to receive some compensation if courts force insurance companies to defend underlying actions that involve insureds' allegedly intentional conduct. Of course, this outcome is likely even if a jury did not decide the merits of the underlying lawsuit. And the explanation is not difficult. Settlements are more common where insurers adhere to their contractual obligation and provide a legal defense.[402]

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399. *See id.* (citing statistic that state supreme courts are 80% more likely to declare that insurers must defend the insured when the victim is a social guest and 66.7% more likely to order a defense in wrongful-death actions).

400. *See* State Farm Fire & Cas. Co. v. Davis, 612 So. 2d 458, 465 (Ala. 1993). In *Davis*, the court stated that:

> The Davises argue that . . . a holding of no coverage may militate against the compensation of the actual victims of assaults . . . . [Although] compensating the victims of such abuse [is laudable], we recognize that a vast majority of courts has correctly "determined that this benefit is outweighed by the effect of allowing sexual offenders to escape [liability]." Additional support for our holding derives from "the desire to place moral liability with the same precision with which we would place economic liability.

Id.

401. *See, e.g., Gearing v. Nationwide Ins. Co.*, 665 N.E.2d 1115, 1119 (Ohio 1996) ("[R]equiring an insurer to indemnify an insured who has engaged in sexual abuse of a child 'subsidizes the episodes of child sexual abuse of which its victims complain, at the ultimate expense of other insureds to who the added costs of indemnifying child molesters will be passed.'").

402. *Cf.* Christine Dugas, *Insurance Can Help With Legal Bills*, USA TODAY, Feb. 17, 1997, at 2B (discussing that most claims under umbrella policies settle out of court). In her article, Christine Dugas stated that:

The final point is addressed to state legislators and to plaintiffs' and defense lawyers. Without doubt, liability insurance policies are adhesion contracts. Although national and regional carriers supply the language—words and phrases, terms, conditions, exclusions, and definitions—appearing in those contracts, state legislatures approve the language and ultimately decide whether insurers can sell the contracts to consumers. Undeniably, terms like "duty to defend," "bodily injuries," and "intentional acts expected from the insured's position" are causing both insureds and insurers to petition federal and state courts for declaratory relief. It appears that this process will continue unless state legislatures and insurance commissioners act to clarify these terms.

In this country, there is a universal policy that an innocent third-party victim should not bear the burden of another's negligence or intentional act. Therefore, to help pay the cost of returning an innocent third party to her position before victimization, society forces or encourages physicians, lawyers, small businesses, corporations, homeowners, and other consumers to purchase liability insurance. Presently, an unacceptably large number of victims are not compensated for their injuries. Many of these victims are ethnic minorities, women, sexually abused children, patients, and clients. But state legislatures can correct the problem by forcing insurers to defend their insured whenever a third party files a claim, alleging that she was the victim of insured's negligence or intentional conduct.

To repeat an often quoted rule: The duty to defend is broader than the duty to pay a judgment, if the insured is found liable for third-party injuries.[403]

Therefore, state legislatures should compel insurers to defend policyholders whenever third parties allege that they were victimized intentionally. If legislatures do not act, insurers will continue to petition state and federal courts for declaratory relief. As we have discovered, an unacceptably large number of courts will continue to de-

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> [U]mbrella insurance policies . . . , sometimes called excess liability policies, provide coverage for money a policyholder is obligated to pay because of bodily injury or property damage caused to another person . . . . The vast majority of umbrella policy claims involve automobile accidents. And most are settled out of court, insurance industry expects say.

Id.

403. *See, e.g.*, Belmer v. Nationwide Mutual Ins. Co., 599 N.Y.S.2d 427, 429 (Super. Ct. 1993) (stating that "[t]he duty to defend arises out of and is governed by the allegations in the complaint . . . and is greater than the duty to pay."); Tudor Ins. Co. v. Township of Stowe, 697 A.2d 1010, 1020 (Penn. Sup. Ct. 1997) (stating that "[t]he duty to defend is separate from and greater than the duty to indemnify"); West American Ins. Co. v. Silverman, 378 So. 2d 28, 29 (Fla. Dist. Ct. of App. 1979) (stating that "[t]he duty to defend is often said to be greater than the eventual duty to pay under applicable coverage").

clare incorrectly that liability insurers have no duty to defend insureds, even where there has been no finding that insureds intentionally injured third-party victims.