

Are Negligent Supervision Claims 'Occurrences'?

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The Ninth Circuit recently certified a question to the California Supreme Court that will clear up much confusion over insurance coverage for negligent hiring, retention and supervision claims. In 2010, the California Supreme Court had a chance to address the issue, but ducked it, because the parties did not address it.[1] But the court did cite to two cases suggesting that such claims were not covered. At the same time, several California courts of appeal have expressly ruled that such claims are covered.



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Now the issue is squarely presented to the California Supreme Court: “Whether there is an ‘occurrence’ under an employer’s commercial general liability policy when an injured third party brings claims against the employer for the negligent hiring, retention, and supervision of the employee who intentionally injured the third party.”[2]

The issue arises under standard form general liability insurance policies. The insuring agreement promises to pay “those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’... .” The “bodily injury” must be caused by an “occurrence.” And an “occurrence” is “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

Under a common fact scenario, an employer hires or retains some employee who does bad things to third parties — like sexual assault (as in the case of Ledesma), or race discrimination or fraud. The third party then sues not only the bad actor for the bad acts, but also the employer for having hired/retained/supervised the employee when the employer should have known better. Is the employer’s breach of duty an “occurrence,” that is, “an accident”? That is where courts divide.

The coverage issue first distinguishes between intentional conduct and negligent conduct on the part of the employer. Under the doctrine of respondeat superior, employers can be vicariously liable for the torts of their employees, when those torts are committed within the scope of employment.[3] An employee’s intentional tort can fall within the scope of employment even if the action that caused the injury was unauthorized by the employer. Courts will apply respondeat superior liability to employers when an employee’s misconduct was foreseeable, or “not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer’s business.”[4]

At issue, then, is whether respondeat superior activity constitutes an “occurrence,” or “an accident.” California courts have repeatedly defined “accident” as an “unexpected, unforeseen, or undersigned happening or consequence from either a known or unknown cause.”[5] An important component of this

definition is that an “accident” is viewed from the perspective of the insured who is seeking coverage.[6] Thus, no “accident” occurs if the insured acts with intent to injure and the intended injury results. But if the insured did not intend the acts or injury — which is what is alleged in a negligent supervision claim — then the injury is deemed to be caused “by accident,” even if someone else may have acted willfully.

For this reason, numerous courts have held that an innocent but vicariously liable employer may have coverage under a general liability policy for its vicarious liability arising from the uncovered, intentional acts of its employees.[7] The basis for such coverage comes from the many cases addressing coverage under section 533 of the California Insurance Code and in their finding that section 533 does not bar coverage when the insured is not personally at fault. Section 533 of the California Insurance Code provides: “An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others.” Many California cases have confirmed that section 533 does not preclude indemnification for vicarious liability.[8] Justice J. Walter Crosby explains why section 533 does not bar coverage for negligent supervision claims (and why negligent supervision claims should be covered under a general liability insurance policy):

The public policy underlying section 533 — to deny coverage for and thereby discourage commission of willful wrongs — is not implicated when an insurer indemnifies an “innocent” insured held liable for the willful wrong of another person: “The public policy against insurance for losses resulting from such [willful] acts is usually justified by the assumption that such acts would be encouraged, or at least not dissuaded, if insurance were available to shift the financial burden of the loss from the wrongdoer to the insurer. This policy, however, does not apply when the wrongdoer is not benefited, and an insured who is innocent of the wrongdoing receives the protection afforded by the contract of insurance.[9]

Several courts, however, have found that negligent supervision claims are not “occurrences” under general liability policies. In a case from the Northern District of California, the insured was charged with negligently hiring and supervising a cab driver who molested a child passenger. The court found that the negligent hiring was neither the cause of the injury nor the accident: “The hiring of [the molesting employee] merely created the potential for injury to [the claimant] but was not itself the cause of the injury.”[10] The court thus relied on a distinction that some courts have made “between the immediate circumstances which inflict bodily injury and the antecedent negligence which sets in motion a chain of events leading to that injury.”[11]

Such cases, however, would seem to invite a journey down endless rabbit holes. How can one distinguish between mere creation of a “potential for injury” and “the cause of the injury”? Isn’t the latter, in fact, caused by the existence of the former? How can an injury be caused without a potential for that injury in the first place? At what point does the potential become actual? In truth, these questions arise out of negligent supervision claims themselves, and rightly so. But as long as the law recognizes the existence of these claim, coverage law need not be drawn into the same issues. If an employer “negligently” hires/retains/supervises an employee, and the employee does something bad to some third party, then the hiring/retention/supervision should be regarded as “accidental,” and therefore an “occurrence.”

Whether the California Supreme Court agrees with this analysis remains to be seen. In any case, its decision, one way or the other, will likely have dramatic effect on whether such claims will be covered under general liability insurance policies.

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[1] *Minkler v. Safeco Insurance Co. of America*, 49 Cal.4th 315 (2010).

[2] *Liberty Surplus Ins. Corp. v. Ledesma*, No. 14-56120 (9th Cir. Aug. 22, 2016).

[3] *Lisa M. v. Henry Mayo Newhall Memorial Hospital*, 12 Cal.4th 291 (1995).

[4] *Rodgers v. Kemper Constr. Co.*, 50 Cal.App.3d 608, 618 (1975).

[5] *Gedde & Smith Inc. v. St. Paul Mercury Indem. Co.*, 51 Cal.2d 558, 563-64 (1959); see also *Delgado v. Interinsurance Exch. of Auto. Club of S. Cal.*, 47 Cal.4th 302, 308 (2009); *Hogan v. Midland National Insurance Co.*, 3 Cal.3d 553, 559 (1970).

[6] *Minkler v. Safeco Insurance Co.*, 49 Cal.4th 315 (2010), citing *Merced Mut. Insurance Co. v. Mendez*, 213 Cal.App.3d 41, 50 (1989) (“an ‘accident’ exists when any aspect in the causal series of events leading to the injury or damage was unintended by the insured”); *Delgado*, supra, 47 Cal.4th at 304 (“Under California law, the word ‘accident’ in the coverage clause of liability policy refers to the conduct of the insured for which liability is sought to be imposed on the insured”); *Quan v. Truck Ins. Exch.*, 67 Cal.App.4th 583, 596 (1998), citing *Collin v. American Empire Insurance Co.*, 21 Cal.App.4th 787, 804 (1994) (“Under California law, the term [accident] refers to the nature of the insured’s conduct”); *Armstrong World Indus. Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal.App.4th 1, 70 (1996) (“the purpose of third party liability insurance is to protect the insured against injuries to third parties neither expected nor intended by the insured”).

[7] See *State Farm. v. Westchester Investment*, 721 F. Supp. 1165 (C.D. Cal. 1989) (negligent supervision of property managers who committed race discrimination was coverable); *Westfield Insurance Co. v. TWT*, 723 F.Supp. 492 (N.D. Cal. 1989) (negligent supervision of the financial dealings in a failed savings and loan association was coverable); *Keating v. National Union*, 754 F.Supp. 1431 (C.D. Cal. 1990), rev’d on other grounds, 995 F.2d 154 (9th Cir. 1990) (negligent supervision of employees who made false statements to investors can be a covered “occurrence”); *Firemen’s Fund v. Nat’l Bank for Cooperatives*, 849 F.Supp. 1347, 1368 (N.D. Cal. 1994) (negligent supervision of personnel who misrepresented inventory certificates was coverable).

[8] See, e.g., *Downey Venture v. LMI Insurance Co.*, 66 Cal.App.4th 478, 513 (1998) (“Where a principal is held vicariously liable for an agent’s act of malicious prosecution, section 533 poses no obstacle to indemnifying the principal”); *Lisa M*, supra, 12 Cal.4th at 305, n.9 (“Neither Insurance Code section 533 nor related policy exclusions for intentionally caused injury or damage preclude a California insurer from indemnifying an employer held vicariously liable for an employee’s willful acts”); *Arenson*, supra, 45 Cal.2d at 84 (“Section 533 of the Insurance Code ... has no application to a situation where the plaintiff is not personally at fault”); *Melugin v. Zurich Canada*, 50 Cal.App.4th 658, 666 (1996) (“section 533 would not necessarily bar coverage to Canada Life for its own strict liability as a result of [its employee]

Melugin's wrongful acts"); *Fireman's Fund Insurance Co. v. City of Turlock*, 170 Cal.App.3d at 1001 ("indemnification for City's liability for the verdict and judgment on the fraud cause of action [against City's agent] is not precluded by Insurance Code Section 533"); *American States Insurance Co. v. Borbor by Borbor*, 826 F.2d 888, 894 (9th Cir. 1987) (section 533 bars insurer from indemnifying first partner who committed willful acts, but not second partner, who was vicariously liable for those acts); *Dart Indus. Inc. v. Liberty Mut. Insurance Co.*, 484 F.2d 1295, 1297 (9th Cir. 1973) ("There is also a public policy and established business practice to permit persons including corporation to purchase insurance to indemnify them against damages which might be imposed for not only tortious acts of agents or employees, but also willful acts of the agents or employees, for which vicarious liability may be imposed ... [Absent a] showing that the corporation by some form of informal action had indicated prior approval or later acquiescence, section 533 did not constitute a legal defense"); *Nuffer v. Insurance Co. of N. Am.*, 236 Cal.App.2d 349, 356 (1965) ("The general rule codified in Insurance Code section 533 specifically does not foreclose recovery by an insured upon a fire insurance policy for a loss caused by arson of the insured's agent, and the courts of many jurisdictions ... have asserted as a general rule the right of such an insured to recover for such a loss").

[9] *Downey Venture*, supra, 66 Cal.App.4th at 513, citing *Barbor by Barbor*, supra, 826 F.2d at 895; see also *Dart Indus.*, supra, 484 F.2d at 1298, citing *Hendrix v. Employers Mut. Liab. Insurance Co.*, 98 F.Supp. 84, 87 (E.D.S.C. 1951) (indemnity for the intentional torts of an employee or agent "is not contrary to public policy because the insured in such a case is guilty of no wrong-doing, but simply has the misfortune to be legally responsible for the wrong-doing of another"), rev'd on other grounds, 199 F.2d 53 (4th Cir. 1952).

[10] *American Empire Surplus Lines v. Bay Area Cab Lease*, 756 F.Supp. 1287 (N.D. Cal. 1991),

[11] See also *Ananda Church of Self-Realization v. State Farm* (Cal. App., Jan. 31, 2003) (church sued for sexual harassment, employment discrimination and negligent supervision); *Farmers ex rel. Hansen v. Allstate*, 311 F.Supp.2d 884 (C.D. Cal. 2004), aff'd, 171 Fed.Appx. 111 (2006) (molestation case); *L.A. Checker Cab Co-op v. First Specialty*, 186 Cal.App.4th 767 (2010), ordered not to be officially published (Oct. 27, 2010) (no "occurrence" to support claim for negligent supervision of a cab driver who intentionally shot a passenger).