

FORTUITY VICTIMS AND THE COMPENSATION GAP: RE-ENVISIONING LIABILITY INSURANCE COVERAGE FOR INTENTIONAL AND CRIMINAL CONDUCT

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Insurance is based on the notion that only uncertain, or fortuitous, losses are insurable. There are systemic problems, however, with the consistency in which fortuity clauses are applied in the liability insurance context. Differing interpretive approaches and litigation distortions include the use of at least three interpretive perspectives and two substantive requirements to interpret the intentional act fortuity clause, and four interpretive perspectives to interpret the criminal act fortuity clause. These problems stem from the tension between the two purposes of liability insurance (wealth protection and victim compensation) coupled with a move from explanatory rhetoric about fortuity to explanatory rhetoric about morality.

This Article outlines the importance of balancing that tension and examines the problematic effects of these two ubiquitous fortuity clauses that remove coverage for policyholders and simultaneously deny access to compensatory funds for injured victims. The Article argues that intentional and criminal act fortuity clauses need to be more consistently interpreted to avoid a host of inefficient distortion effects that otherwise result from the introduction of moral concerns, and it concludes by offering possible solutions for redress for those accident victims that would still be left, though more predictably, in the liability insurance compensation gap.

I. INTRODUCTION

It surprises many that an accident victim who is hurt as a result of a wrongdoer's intentional or criminal actions often receives no compensation from a tort lawsuit. In fact, tort lawsuits are rarely brought for these kinds

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of injuries. The reason is because the wrongdoer's liability insurance policy typically excludes insurance coverage for losses arising from the wrongdoer policyholder's intentional or criminal actions. There is thus no money available for the victim's compensation. These are often the most morally disturbing kinds of injuries because, in most instances, the wrongdoer meant to harm the victim. It was no "accident." So why does liability insurance pay an injured accident victim when the policyholder causes an accident but not when the policyholder acts intentionally or criminally? More importantly, what if the policyholder acted intentionally or criminally and still caused an "accident?"

What if the policyholder did not mean to harm the victim? This can occur in a variety of ways. A policyholder could be playing a prank to scare a friend. The prank gets out of hand and the friend is injured. But the policyholder never means to harm the friend. Did the policyholder act "intentionally" and therefore there should be no liability insurance coverage available to him if the friend sues him for compensation? What if the policyholder's actions violate a criminal law and the policyholder is charged with a crime arising out of the prank behavior? Should there be no liability insurance coverage then? And what is the injured friend to do for compensation, without the policyholder's financial safety net of liability insurance to access?

This Article examines the problematic effects of two ubiquitous fortuity clauses in liability insurance: a clause which removes coverage for intentionally caused losses and one which removes coverage for losses arising from a policyholder's criminal acts. A fortuity clause is insurance policy language designed to remove coverage for non-fortuitous risks. The fortuity clause controls access to insurance coverage for a liability insurance policyholder while simultaneously controlling access to compensatory funds for the injured accident victim who sues the wrongdoer policyholder.

Intentional and criminal act fortuity clauses are interpreted in a highly inconsistent fashion by courts and litigators, making insurance cases hinging on the clauses costly and unpredictable to litigate. Litigants have also devised creative but costly litigation distortions as workarounds for avoiding the operation of these clauses. This, in turn, has resulted in a large group of injured accident victims who face a compensation gap as a result of courts' and litigants' inconsistent fortuity clause interpretation. The population of accident victims within the compensation gap is constantly expanding and contracting with the whims of varying fortuity clause interpretations. These accident victims are "fortuity victims." This makes finding a solution to this compensation gap doubly problematic for

this group of injured accident victims because it is difficult to categorize, at any one time, which victims will be left uncompensated. While liability insurance does not, and cannot, provide coverage for every loss, there is something slippery about the fact that identically-worded fortuity clauses are interpreted to have different effects in different cases, despite remarkably similar factual circumstances in those cases.

Interpreting fortuity clauses in the liability insurance context is unpredictably problematic because the interpretive exercise is affected by the tension between two co-existing purposes of liability insurance: wealth protection and accident compensation. These purposes often cancel each other out, leaving the injured accident victim without compensation – a serious collateral effect. At the same time, because these fortuity clauses target intentional and criminal conduct, there is incentive for improper and misleading introduction of moral concerns into the interpretation. The fortuity clause can morph into a morality clause, with a host of inefficient distortion effects. To avoid these problems, there should be a more consistent interpretive solution which firmly grounds the intentional and criminal act fortuity clauses in fortuity concepts, not morality concepts. This would go a long way to bettering the accident compensation system as a whole by removing the unpredictability about which fortuity victims are left in the compensation gap. Once that occurs, there can then be a more efficient accounting as to where certain societal losses will ultimately lie – with insurers, wrongdoers, or society's social safety net.

Part I of this Article explains how fortuity is fundamental to the insurance relationship. Insurance can only insure against uncertain risks. Part II explains how liability insurance operates within the tort system and introduces the tension between liability insurance's two often-competing purposes: a wealth protection vehicle for the policyholder and a vital and expected component of society's accident compensation web. In Part III, the Article focuses on two common liability insurance fortuity clauses, the intentional and criminal act fortuity clauses. The problems created by courts' and litigants' current interpretation of these fortuity clauses is dealt with in Part IV. Part V explains the causes of these problems, tracing how the historically moral nature of the clauses affects their interpretation in today's modern insurance world, which is focused on risk management, not morality. Part VI introduces an interpretive solution for the intentional and criminal act fortuity clauses. Part VII addresses some possibilities for redress for those accident victims still left in the liability insurance compensation gap after the solution is applied. Part VIII concludes with a reminder that better predictability and consistency in insurance coverage

results can be maintained if fortuity clauses remain grounded in fortuity, not morality.

II. INSURANCE AND FORTUITY

A standard tenet of insurance is that it is designed to protect a policyholder against losses that are fortuitous.² It is typically not economically sensible for insurers to offer protection for losses that are certain to happen.³ The insurance arrangement between insurer and policyholder depends on the insurer shouldering some potential risk that a future covered event may or may not occur. The insurer profits from the superior ability to better estimate the likelihood of a future payout-triggering occurrence and balance that risk with the amount of insurance premium charged to the policyholder who wishes her risk to be underwritten by the insurer. The premium paid is usually a fraction of the actual cost of a future expected loss. By pooling together multiple policyholders who wish similar risks underwritten, the insurer is able to ride the waves of random (or fortuitous) future payouts and, owing to the law of large numbers, profit from the fact that not everyone will experience a payout-triggering loss at once. The insurer is thus taking on two risks: (1) the risk of a future event occurring, which would trigger payout to a policyholder, and (2) the risk that not every policyholder in the risk pool will require a payout at once.

² JEFFREY W. STEMPEL, *STEMPEL ON INSURANCE CONTRACTS* 37–68 (3d ed. 2006); Kenneth S. Abraham, *Peril and Fortuity in Property and Liability Insurance*, 36 *TORT & INS. L.J.* 777, 777 (2001); James A. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 *SANTA CLARA L. REV.* 95, 96 (1990); George L. Priest, *Insurability and Punitive Damages*, 40 *ALA. L. REV.* 1009, 1020–25 (1989); *see also* *Aetna Cas. & Sur. Co. v. Dow Chem. Co.*, 10 F. Supp. 2d 771, 789 (E.D. Mich. 1998); *Gen. Housewares Corp. v. Nat’l Sur. Corp.*, 741 N.E.2d 408, 413 (Ind. Ct. App. 2000); *United Capitol Ins. Co. v. Hoodco, Inc.*, 974 S.W.2d 572, 576 (Mo. Ct. App. 1998); *Scottsdale Ins. Co. v. Travis*, 68 S.W.3d 72, 75 (Tex. Ct. App. 2001); *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 998 P.2d 856, 878–79 (Wash. 2000).

³ Indeed, some states have statutory prohibitions against insurance coverage for willful acts. *See* CAL. INS. CODE § 533 (West 2013) (“An insurer is not liable for a loss caused by the willful act of the insured; but he [the insurer] is not exonerated by the negligence of the insured, or of the insured’s agents or others.”).

The insurer's risk shouldering in exchange for a policyholder's premium breaks down as a commercially sensible arrangement if a policyholder attempts to have an insurer underwrite a risk that the policyholder knows he is certain to realize. In that case, there is no risk transfer at all. In exchange for a small fraction of the cost of the loss, the policyholder would be made whole because the insurer makes up the difference. No insurer could profit from that arrangement. To that end, insurance is based on the notion that insurable risks must be uncertain, or fortuitous, ones.

III. WHAT IS LIABILITY INSURANCE?

Most liability insurance policies marketed today provide a policyholder with coverage for a wide variety of loss-causing behavior. Standard liability insurance policies include homeowners' policies which protect the policyholder from liability for a broad spectrum of potential losses, commercial liability policies which provide protection against liability resulting from business operations, and automobile liability policies which protect drivers from legal liability for accidents that result from use of their vehicle. Liability insurance can be understood as a kind of "tort" insurance, or "behavior" insurance.⁴ If the policyholder does something (like a tort) that results in her being sued by another third party for losses she caused, liability insurance steps in to do two things. First, it provides for a legal defense for the policyholder. Second, if, as a result of the lawsuit, the policyholder is found legally liable to pay for the loss to a third party, the liability insurance policy provides funds to compensate that wronged third party, up to the financial limits of the policy. Liability insurance provides policyholders protection against paying for both property and personal injury damages to a third party. The focus in this Article is on personal injury cases where the policyholder has injured a third party victim. However, the same issues arise when policyholders become legally liable to pay for third party property damages. The compensatory gap issues are, however, markedly different (and arguably less compelling) in property loss instances. The injury is then not one of loss of life and limb, but of property. Society's web of accident compensation sources does not really attempt to address property losses in a holistic fashion.

⁴ Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957, 963 (2010).

A key notion for this Article is that, although the liability insurance policy is marketed and drafted by the insurer to protect the policyholder from legal liability to a third party, the financial payout from the liability insurance policy ultimately goes to the third party victim who suffered the loss at the hands of the policyholder. If John's negligence results in him injuring Mary and thus he is liable to pay for Mary's injury, John's liability insurer pays Mary compensation for her injury. This mechanism creates a tension as to the purpose of liability insurance itself. Is liability insurance to be merely a wealth protection mechanism for the insured policyholder, so that, in the event he is sued for some loss-causing behavior, he does not have to call upon his own assets (if any) to pay for the loss? Or is liability insurance instead to be the largest player in the broader societal web of accident compensation in that it often acts as the sole source of reparation for an injured victim?⁵ This tension becomes relevant when courts attempt to discern whether or not a policyholder has coverage under an insurance policy, because the effect of that decision is ultimately felt not only by the policyholder (and sometimes not at all, if the policyholder is impecunious), but by the wronged accident victim seeking redress. It is most stark when the victim suffers personal injuries and often has nowhere satisfactory to turn to for much-needed compensation.

The coverage provided by liability insurance policies is typically very broad.⁶ For example, the coverage clause in a liability insurance policy usually provides coverage for all damages or injury for which the policyholder becomes "legally obligated to pay." This breadth of coverage makes sense because there are a myriad of combinations of human behavior that could lead up to a policyholder's legal liability to pay for a third party's loss. To that end, because liability insurance provides such broad-spectrum coverage, insurers must rely on wording within the insurance policy to delineate what categories of behaviors or losses are not covered. Of course, insurers wish to exclude losses that result from non-fortuitous events because these events frustrate the fundamental nature of the insurance arrangement.⁷

⁵ See generally Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1 (2005).

⁶ See, e.g., *Klepper v. ACE American Ins. Co.*, 999 N.E.2d 86, 91 (Ind. Ct. App. 2013) ("[We] will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies." (internal quotation marks omitted)).

⁷ See, e.g., *Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1047 (Colo. 2011) (finding intentional act exclusions necessary for insurers in setting rates and

IV. FORTUITY CLAUSES

Two categories of losses that are commonly excluded from standard liability insurance coverage are losses resulting from the intentional acts or from the criminal acts of the policyholder. These losses can be excluded using variously worded insurance clauses. These “fortuity clauses”⁸ are ultimately aimed at targeting behavior that undermines the risk-sharing relationship between insurer and policyholder. A fortuity clause delineates those certain categories of behavior that produce non-fortuitous, and thus uninsurable, losses. The fortuity clause most prevalent in liability insurance policies is an “intentional act” fortuity clause, which excludes from coverage those losses “either expected or intended from the standpoint of the insured.”⁹ Alternatively, the intentional act fortuity clause could be worded as to remove coverage for losses resulting from a policyholder’s intentional acts.¹⁰ Occasionally, the removal of coverage for intentional acts could be through reference to a definition contained in the liability policy’s coverage clause. Some liability policies provide coverage for legal liability resulting from an “occurrence,” which is then typically defined as an “accident.”¹¹ The policy then excludes intentionally caused

providing coverage and that the purpose of insurance is violated should policyholders be allowed to intentionally control losses).

⁸ See generally Erik S. Knutsen, *Fortuity Clauses in Liability Insurance: Solving Coverage Dilemmas for Intentional and Criminal Conduct*, 37 QUEEN’S L.J. 73 (2011).

⁹ See, e.g., *Capano Mgmt. Co. v. Transcon. Ins. Co.*, 78 F. Supp. 2d 320, 323 (D. Del. 1999) (noting that the “expected or intended” element of the exclusion is at issue); see also *Hirst v. Thieneman*, 2004-0750, p. 12 (La. App. 4 Cir. 5/18/05); 905 So. 2d 343, 351 (noting that the “expected or intended” exclusion is commonly referred to as the “intentional act” exclusion).

¹⁰ See, e.g., *Thomas v. Benchmark Ins. Co.*, 140 P.3d 438, 442 (Kan. Ct. App. 2006) (holding that an automobile liability policy excludes “damage or injury ‘caused intentionally’”); see also *Montgomery Mut. Ins. Co. v. Dyer*, 170 F. Supp. 2d 618, 621 (W.D. Va. 2001) (holding coverage is excluded if insured acted “with the intent to cause a loss”).

¹¹ See, e.g., *State Farm Fire & Cas. Co. v. Doe*, 946 P.2d 1333, 1335 (Idaho 1997) (holding that a homeowner’s liability policy provided coverage for “personal injury” caused by an “occurrence” (which is then defined as an “accident”) but finding an exclusion if policyholder acted with “intent to cause personal injury”); see also *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1262–63 (N.J. 1992) (finding that homeowners’ liability policy covered legal liability arising from an

losses. In this fashion, insurers fold an exclusion into the definition of words used in a coverage clause: “occurrence” or “accident.”

The second common fortuity clause is a “criminal act” fortuity clause which removes coverage for losses resulting from a policyholder’s criminal act,¹² “violation of a penal statute or ordinance,” or some criminal conduct.¹³

At first blush, losses resulting from criminal and intentional acts of the policyholder may appear to be among the most fortuity-frustrating kinds of behavior that an insurer would want to avoid insuring. A death resulting from a premeditated murder or a burned factory resulting from a premeditated arson hardly appear to be fortuitous events. Surely the policyholder has control over whether the loss transpires or not. But what about losses arising when the policyholder is criminally negligent while causing a loss such that she attracts a criminal charge for substandard behavior, like negligently handling a firearm and an accidental discharge harms a third party?¹⁴ Are those losses really “criminal” and thus non-fortuitous and uninsurable? Or what about losses arising from a prank where a policyholder intends to scare a third party and that third party gets injured? Does the “intentional act” fortuity clause oust coverage when the policyholder subjectively acts with intent to cause a loss, or is an objective or some hybrid standard to be used? For example, if a college student’s

occurrence (which is defined as an “accident”) and finding that coverage excluded that of “insureds whose conduct is intentionally-wrongful”).

¹² Cf. *Wilshire Ins. Co. v. S.A.*, 227 P.3d 504, 506 (Ariz. Ct. App. 2010); *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 325 (Minn. Ct. App. 2008).

¹³ See, e.g., *Wilderman v. Powers*, 956 A.2d 613, 616 (Conn. App. Ct. 2008) (finding no coverage when occurrence is the result of a “violation of a penal law or ordinance”); *State Farm Fire & Cas. Co. v. Condon*, 839 N.E.2d 464, 469 (Ohio Ct. App. 2005) (finding no coverage when occurrence is the result of a “willful violation of a penal statute.”); *Am. Family Mut. Ins. Co. v. Zavala*, 302 F. Supp. 2d 1108, 1124 (D. Ariz. 2003) (finding no coverage when an occurrence is the result of a “violation of any criminal law for which any insured is convicted[.]”).

¹⁴ See, e.g., *Allstate Ins. Co. v. Berube*, 854 A.2d 53, 54–55 (Conn. App. Ct. 2004) (taking a loaded, sawed-off rifle to bed with his wife and two-month-old daughter and unintentionally shooting his wife); *Auto Club Group Ins. Co. v. Booth*, 797 N.W.2d 695, 696–97 (Mich. App. 2010) (injuring another teen where firearm accidentally discharged); *Eichmanis v. Wawanesa Mut. Ins. Co.* (2007), 278 D.L.R. 4th 15, para. 9 (Can. Ont. C.A.) (playing with a firearm when it accidentally discharges, teen injures another teen).

friends pile toilet paper on the sleeping student and then light the paper on fire as a prank, but the student is injured, are those losses really “intentional” or “expected” and thus non-fortuitous and uninsurable?¹⁵

V. PROBLEMS: UNPREDICTABILITY AND COMPENSATION GAPS

The examples above highlight the two major problems with the ways the intentional and criminal act fortuity clauses are interpreted by courts, insurers, and policyholders attempting to solve insurance coverage disputes. The first problem is that past courts’ interpretations of the clauses have often led to unpredictable and inconsistent results. There are opposite case outcomes for similar cases featuring similarly worded fortuity clauses. For example, some courts have held that a policyholder’s act of self-defense which injures a third party is not covered behavior by a liability policy because the policyholder has intended to injure the victim.¹⁶ Other courts, however, have held that self-defense bars the application of an intentional acts fortuity clause.¹⁷ Some of these courts have also determined that coverage will be ousted for “unreasonable acts” of self-defense.¹⁸

Unpredictability is harmful for the insurer, the policyholder, and the wronged accident victim. If no one can tell, up front, when a fortuity clause in a liability insurance policy will or will not oust coverage for a loss, litigation can become protracted and expensive as each party attempts

¹⁵ See generally *Godonoaga v. Khatambakhsh* (2000), 188 D.L.R. 4th 706 (Can. Ont. C.A.) (concluding that fortuity clause did not exclude coverage for parents’ negligent actions in allowing children to commit intentional assault).

¹⁶ See, e.g., *L.A. Checker Cab Co-op., Inc. v. First Specialty Ins. Co.*, 112 Cal. Rptr. 3d 335, 337–38 (2010) (finding loss to be intentional, and thus excluded, where cab driver believed he had to defend himself and as such he shot passenger who provoked him).

¹⁷ See, e.g., *Vermont Mut. Ins. Co. v. Singleton*, 446 S.E.2d 417, 420–21 (S.C. 1994) (finding no intent to injure when policyholder defended himself in fist fight because he was only trying to protect himself); see also *Farmers & Mechanics Mut. Ins. Co. of W. Va. v. Cook*, 557 S.E.2d 801, 810 (W. Va. 2001) (finding loss resulting from self-defense “not expected or intended by the policyholder”).

¹⁸ See, e.g., *Auto Owners Ins. Co. v. Harrington*, 538 N.W.2d 106, 110 (Mich. Ct. App. 1995) (denying coverage where policyholder shot a man who acted in an aggressively frightening manner and who climbed the policyholder’s wall and finding policyholder did not act reasonably as the aggressor was unarmed and police were not called).

to stress a different interpretation of the same clause. Insurers are thus often unable to predict both their financial exposure on an individual basis for these types of losses and additionally their exposure over a large risk pool. Policyholders are often unable to predict what types of behavior will remove coverage for a loss, thus making it difficult for them to adjust their actions so they remain covered for potential legal liability. Wronged accident victims are unable to predictably expect compensation because the question is too often driven by an insurance lawsuit about the policyholder's liability insurance coverage. This has resulted in increased litigation costs for all parties involved and has prompted inefficient litigation workarounds that attempt to circumvent the unpredictable application of these clauses.

The second problem with interpreting fortuity clauses is that many courts are ignoring the fact that the wronged accident victim's expected compensation hangs in the balance in virtually every decision about fortuity clauses and insurance coverage. When these clauses are triggered and payment is denied to a policyholder, and thus to an injured victim, the compensatory gap left is not routinely addressed anywhere else in the patchwork web of sources comprising the accident compensation system.¹⁹ Those accident costs do not disappear simply because a policyholder is denied coverage. They must be absorbed elsewhere, and often in very inefficient ways. Therefore, any denial of liability insurance coverage needs to be done in a principled and measured fashion, carefully weighed against its effect on the wronged accident victim who likely will have few avenues to turn to for financial assistance. To that end, it becomes important to develop a better way to deal with fortuity clauses which produces predictable and fair results for policyholders, insurers, and accident victims.

A. UNPREDICTABILITY

Unpredictability breeds litigation. Many litigants disputing fortuity clause interpretations – insurers and policyholders alike – are incentivized to remain in litigation up to the appeals stage because of the possibility that they will obtain an interpretive finding favorable to them. This costly

¹⁹ See Ellen S. Pryor, *Part of the Whole: Tort Law's Compensatory Failures Through a Wider Lens*, 27 REV. LITIG. 307, 317–18 (2008); see also Erik S. Knutsen, *Five Things Wrong with Personal Injury Litigation (And What to Do About It!)*, 40 ADVOCATES Q. 492, 495–96 (2013).

unpredictability is exacerbated in the fortuity clause context in two ways: interpretive unpredictability and litigation distortion from costly workarounds.

1. Interpretive Unpredictability

- a. *Intentional Act Fortuity Clause*

Courts attempting to apply the intentional act fortuity clause to make coverage determinations have devised three very different ways of interpreting this clause, each with differing coverage results. This has occurred despite a major rewording of the standard clause in most commercial general liability policies in an attempt to address this very problem. Once worded as an “intentional acts” exclusion, the CGL fortuity clause now ousts coverage for losses “expected or intended” from the standpoint of the policyholder.²⁰

Some courts interpreting the intentional act fortuity clause utilize an objective interpretive perspective. This perspective removes liability insurance coverage if a reasonable policyholder should have known that damage or injury would result from her conduct.²¹ This perspective is problematic because it ousts coverage for behavior that some policyholders clearly expect would not lead to damage or injury (or they probably would not have behaved that way in the first place). A policyholder cannot adjust *ex ante* her behavior to avoid losing insurance coverage if she cannot reliably predict what behavior leads to coverage loss. In operation, the clause therefore removes coverage for some behavior that is risky and fortuitous but not subjectively intentional. Because liability insurance is

²⁰ See, e.g., Stempel, *supra* note 2, at 73; see also *infra* p. 14.

²¹ See, e.g., Blue Ridge Ins. Co. v. Puig, 64 F. Supp. 2d 514, 518–19 (D. Md. 1999) (finding no coverage because, even if policyholder subjectively did not intend injury when he kicked in a washroom stall door to deliver a “wake-up call” to the occupant, it was “reasonably expected” that door would hit and injure occupant); Scott v. Allstate Indem. Co., 417 F. Supp. 2d 929, 936 (N.D. Ohio 2006) (finding no coverage where policyholder held a match to a wet substance to see if it is flammable because it should be reasonably expected that fire would result); Auto-Owners Ins. Co. v. Moore, No. 266721, 2006 WL 891078, at *1, *2–*3 (Mich. Ct. App. Apr. 6, 2006) (finding no coverage when child lit a lighter near gasoline-soaked pants, even though intent was to light a fire near leg, because fire was natural, foreseeable, and anticipated consequence of actions).

supposed to provide coverage for fortuitous behavior, this is an incongruous result.²²

Some courts appear to apply a middle-ground hybrid interpretive perspective, where coverage is ousted when the policyholder intended some injury, but the resulting loss was greater than expected.²³ This perspective exhibits the same problem as the objective interpretive perspective but on a sliding scale. Once the policyholder's conduct is judged by objective reasonable standards, some fortuitous conduct will not be covered. Under the objective and hybrid perspectives, policyholder behavior will be over-deterred because coverage is dependent not on the policyholder's subjective and controllable intent, but on an objective, third party view of what conduct is reasonable. When that view differs from the policyholder's (which it does in nearly all of these cases, or a policyholder probably would not have behaved a certain way), a policyholder lacks predictable coverage information to assist in determining how to behave so as to remain within liability coverage protection. Furthermore, litigants in insurance coverage disputes will differ as to what types of conduct appear "reasonable" or not. This fuels the litigation.

Finally, some courts use a subjective interpretive perspective to hold that coverage is not ousted unless the policyholder actually expected or intended the loss.²⁴ This perspective offers the most predictable

²² ROBERT H. JERRY & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 460 (4th ed. 2007).

²³ See, e.g., *Canterberry v. Chamblee*, 41, 940, p. 6 (La. App. 2d Cir. 2/27/07); 953 So. 2d 900, 904 (finding no coverage where boy intended to fight even though he did not intend to break victim's nose); *Hatmaker v. Liberty Mut. Fire Ins. Co.*, 308 F. Supp. 2d 1308, 1315 (M.D. Fla. 2004) (finding no coverage where policyholder threw victim to ground and punched him in head, even though policyholder did not intend to cause any injuries); *Harleysville Ins. Cos. v. Garitta*, 785 A.2d 913, 923 (N.J. 2001) (finding no coverage where the policyholder stabbed victim twice and pled guilty to third-degree murder even though policyholder had not intended to cause death).

²⁴ See, e.g., *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 640 (Ky. 2007) (finding coverage where policyholder conducted a demolition and tore down entire residential structure instead of the intended carport because he did not subjectively intend damage to the entire residential structure); *Clayburn v. Nationwide Mut. Fire Ins. Co.*, 871 N.Y.S.2d 487, 488–89 (N.Y. App. Div. 2009) (finding that a policyholder who put victim in bear hug and fell through plate glass window was still covered because injuries were not subjectively intended); *Allstate Ins. Co. v. Sanders*, 495 F. Supp. 2d 1104, 1109 (D. Nev. 2007) (finding that intentional act fortuity clause did not bar coverage despite

approach to the intentional act fortuity clause because it is the only approach that removes coverage when a policyholder's behavior results in a non-fortuitous loss. A policyholder knows where she stands vis-à-vis coverage: if she intends the loss, coverage will not attach.

To complicate matters further, courts split further as to what must be intended by the policyholder: the intentional action alone²⁵ or both the intentional action and the resultant injury.²⁶ For example, even though a child may have intended to light a fire as a prank, if no damage was intended, liability for the resulting fire loss would be covered under the latter approach.²⁷ The problem with determining coverage based on the policyholder's actions is that most actions have some intentional component to them. These cases, therefore, tend to hyper-examine the conduct leading up to a loss to determine what intentional actions comprised the behavior. Proving intent is also fraught with difficulty because coverage often turns on circumstantial evidence or the credibility of the policyholder's testimony. This makes determining which of the policyholder's actions trigger a fortuity clause a question with an answer that is somewhat of a moving target.

b. *Criminal Act Fortuity Clause*

policyholder throwing a metal sign at someone during horseplay because policyholder did not subjectively intend to hit or injure victim).

²⁵ See, e.g., *Fontenot v. Duplechine*, 2004-424, pp. 6-7 (La. App. 3 Cir. 12/8/04); 891 So. 2d 41, 46-47 (finding no coverage when student struck classmate on the head with desktop, regardless of student's intent to injure); *Metro. Prop. & Cas. Ins. Co. v. Buckner*, 302 S.W.3d 288, 297 (Tenn. Ct. App. 2009) (finding no coverage where teens fired rifles at tractor-trailers on interstate, killing and injuring people, even though their intent was to damage trucks; their intent to discharge rifles was not enough to oust coverage).

²⁶ See, e.g., *State Farm Fire & Cas. Co. v. Weaver*, 585 F. Supp. 2d 722, 729 (D.S.C. 2008) (explaining that both the act that caused the loss and the results thereof must be intentional); *Lincoln Logan Mut. Ins. Co. v. Fornshell*, 722 N.E.2d 239, 242-43 (Ill. App. Ct. 1999) (explaining that both the act and the harm must be intended).

²⁷ See, e.g., *Vermont Mut. Ins. Co. v. Singleton*, 446 S.E.2d 417, 421 (S.C. 1994) (finding coverage where a teen, acting in self-defense, struck another teen but did not intend to cause extensive eye injuries); *Miller v. Fidelity-Phoenix Ins. Co.*, 231 S.E.2d 701, 75 (S.C. 1977) (coverage for ten-year-old boy who set fire to fire trucks was granted because he did not intend for the fire to burn down a home).

Courts attempting to apply the criminal act fortuity clause to make coverage determinations have devised two different ways of interpreting this clause, with correspondingly different coverage results. Some courts have held that any policyholder's criminal act causally related to the loss ousts liability insurance coverage, regardless of the policyholder's intent to cause the loss.²⁸ Still others have held that a policyholder committing a crime at the time of the loss will lose liability coverage, regardless as to whether the crime itself is causally involved in bringing about the loss²⁹ or whether there was even a criminal charge or conviction.³⁰ Other courts have held that, in order to oust coverage, a policyholder must have intended the loss brought about by the criminal act.³¹ This subjective approach best matches the criminal act fortuity clause's purpose as a clause targeted at removing coverage for non-fortuitous behavior. Otherwise, the clause risks being used as an unpredictable morality clause, as described more fully below.

c. Insurance Policy Interpretation Differences

State-by-state and even court-by-court differences in the basic insurance policy doctrinal tools employed to interpret fortuity clauses result in additional inconsistency in interpreting even identically-worded fortuity clauses. As insurance policies are contracts of adhesion, special

²⁸ See, e.g., *Progressive N. Ins. Co. v. McDonough*, 608 F.3d 388, 391–92 (8th Cir. 2010) (explaining that the criminal act fortuity clause does not require subjective intent to commit the crime); *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 325 (Minn. Ct. App. 2008) (explaining that no subjective intent is required to trigger criminal act fortuity clause where mentally ill boy stabbed his neighbor with a knife).

²⁹ See, e.g., *Progressive Cas. Ins. Co. v. K.S.*, 731 F. Supp. 2d 829, 836 (S.D. Ind. 2010) (denying coverage where a boy “moonied” an oncoming vehicle, distracting the driver and causing her to flip the car, as “moonining” is considered a crime).

³⁰ See, e.g., *Allstate Ins. Co. v. Berube*, 854 A.2d 53, 56 (Conn. App. Ct. 2004) (explaining that a policyholder who got into bed with a rifle and accidentally shot his wife could theoretically be charged with a crime because he risked injury of shooting the child who was also in bed with him).

³¹ See, e.g., *Allstate Ins. Co. v. Raynor*, 21 P.3d 707, 712 (Wash. 2001) (explaining that the criminal act fortuity clause does not apply to all acts technically classified as crimes but only to serious criminal conduct done with malicious intent).

policyholder-friendly rules have developed over time to assist in fairly applying meaning to insurance policy language.³² Many states employ a varied panoply of interpretive tools to help discern the meaning of insurance policy language. Some states utilize the reasonable expectations doctrine to varying degrees.³³ That doctrine holds that the reasonable expectations of the policyholder have some interpretive value in discerning the meaning of insurance policy language. Other states are far stricter constructionists of insurance policy language, and reasonable expectations do not come into play in their analyses. Some states also more regularly employ the doctrine of *contra proferentem* to construe ambiguous wording against the insurer drafter.

In some instances, state statutes³⁴ or state public policy³⁵ hold that liability insurance policies do not cover losses arising from a policyholders'

³² For a discussion of how special policyholder-friendly rules have developed over time, see, e.g., Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531 (1996); Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105 (2006); James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995 (1992); Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970); Peter Nash Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543 (1996); Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037 (1991).

³³ See generally, e.g., Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981); Jeffrey E. Thomas, *An Interdisciplinary Critique of the Reasonable Expectations Doctrine*, 5 CONN. INS. L.J. 295 (1998); Swisher, *Judicial Interpretations*, *supra* note 32; Swisher, *Judicial Rationales*, *supra* note 32.

³⁴ See, e.g., CAL. INS. CODE § 533 (West 2013) ("An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others").

³⁵ See, e.g., *Swan Consultants, Inc. v. Travelers Prop. Cas. Co.*, 360 F. Supp. 2d 582, 591 (S.D.N.Y. 2005) (finding that New York public policy prohibits insurance indemnification for intentionally-caused injuries); *Capitol Indem. Corp. v. Evolution, Inc.*, 293 F. Supp. 2d 1067, 1075 (D.N.D. 2003) (explaining that all insurance policy provisions that allow coverage for intentionally caused injuries are void by public policy); *State Farm Mut. Auto. Ins. Co. v. Montagna*, 874 A.2d 406, 408–09 (Me. 2005) (explaining that policies will not be interpreted to require an insurer to defend or indemnify an insured for the insured's own criminal acts); *Farmland Mut. Ins. Co. v. Scruggs*, 886 So.2d 714, 720 (Miss. 2004); *Merrimack*

own willful acts, even if there is no express fortuity clause in the policy itself. When courts construe fortuity clauses, these additional principles can confusingly overlap with the insurance policy interpretation exercise.

These differences in interpretive approaches have a costly litigation spillover effect because litigants often cannot predict how their own courts would interpret a clause. Indeed, while some courts take a literalist view about the applicability of the intentional and criminal act fortuity clauses, others are far more contextual and hold that these clauses may mean different things depending on the context and policyholder behavior being examined.

2. Litigation Distortions

There are obvious consistency problems with courts using three interpretive perspectives and two substantive requirements to interpret the intentional act fortuity clause and, at the same time, using four interpretive perspectives to interpret the criminal act fortuity clause. These problems are compounded by the workarounds invented by litigation counsel intended to circumvent some of the challenges with these fortuity clauses. The litigation workarounds produce further costly and unpredictable litigation distortions.

First, the practice of over or under-pleading a policyholder's conduct to attract or repel coverage at the pleadings stage of an action actually twists the litigation story in inefficient ways.³⁶ Policyholders are

Mut. Fire Ins. Co. v. Coppola, 690 A.2d 1059, 1065 (N.J. Super. Ct. App. Div. 1997) (explaining that the reasonable insurance contract between the parties excludes all intentional acts); Gearing v. Nationwide Ins. Co., 665 N.E.2d 1115, 1120 (Ohio 1996); Minn. Fire & Cas. Co. v. Greenfield, 855 A.2d 854, 866 (Pa. 2004) (explaining that public policy supports providing coverage for acts that were not intentional); American Family Mut. Ins. Grp. v. Kostaneski, 688 N.W.2d 410, 415 (S.D. 2004) (explaining that South Dakota public policy precludes extending coverage to an individual who intentionally harms others); Decorative Ctr. of Houston v. Emp'rs Cas. Co., 833 S.W.2d 257, 260 (Tex. Ct. App. 1992) (explaining that an insured cannot insure against his own intentional misconduct).

³⁶ Tom Baker, *Liability Insurance at the Tort-Crime Boundary*, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE* 66, 69 (David M. Engel & Michael McCann eds., 2009); Ellen S. Pryor, *The Stories We Tell: Intentional Harms and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721, 1723 (1997); Rick Swedloff, *Uncompensated Torts*, 28 GA. ST. U.L. REV. 721, 742-44 (2012);

incentivized to under-plead their case as one involving negligent, not intentional or criminal, conduct in order to ensure that there will be liability insurance coverage for the loss. At the same time, insurers are incentivized to over-plead that the policyholder's behavior is particularly intentional or criminal, and anti-social and dangerous, in an attempt to avoid covering a particular loss. In doing so, litigation counsel may strain and stretch the facts to a near-unsupportable point in order to craft the litigation story away from or towards intentional or criminal conduct. This leads to inefficiencies in the fact-finding discovery process as parties spend expensive time attempting to mold the nature of the policyholder's conduct not because they actually want the truth but because they want it to either be, or not be, a certain category of behavior important only for insurance coverage purposes.

Second, creative lawyers for injured accident victims have attempted to get around the operation of a fortuity clause by focusing instead on viable alternative litigation targets through doctrinal innovations such as vicarious liability or claims for negligent supervision.³⁷ If a policyholder's intentional or criminal behavior may trigger a fortuity clause and thereby leave an accident victim without compensation, the victim's lawyer could instead target another category of policyholder who may have some secondary responsibility for the victim's injury and who may be covered by liability insurance. A common example is the use of vicarious liability to access insurance coverage from another policyholder's liability policy. Often, these are institutional policyholders with supervisory responsibilities over the policyholder who more directly caused the victim harm. For example, a victim of a sexual assault would typically sue the perpetrator but, to seek liability insurance coverage, may also sue the perpetrator's employer in negligence for failing to supervise the employee.³⁸ Also, parents and supervisory adults can be sued for negligently supervising children in their care when children injure others through intentional or criminal conduct. When third parties like supervisory or vicariously liable institutions or parents are injected into the litigation fray for coverage-seeking purposes only, this can often add

Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 123–29 (2001).

³⁷ Swedloff, *supra* note 36, at 742; Wriggins, *supra* note 36, at 164.

³⁸ See, e.g., Jeffrey P. Klenk, *Emerging Coverage Issues in Employment Practices Liability Insurance: The Industry Perspective on Recent Developments*, 21 W. NEW ENG. L. REV. 323, 323–27 (1999).

unnecessary delay, complication, and expense to a lawsuit. However, accident victims are often forced to bring in these additional parties to ensure access to at least some compensation through liability insurance.

Third, fortuity clauses affect settlement dynamics in significant ways. In order to preserve insurance coverage, both policyholders and accident victims have greater incentives to settle a case rather than litigate. For example, an accident victim may be involved in litigation exhibiting multiple causes of action. Such a victim may be incentivized to avoid a judgment on the merits regarding any policyholder intentional or criminal conduct that might thereby trigger a fortuity clause and thus exclude liability insurance coverage. A policyholder is incentivized to settle to preserve personal assets (although the control of the litigation is often through the insurer's appointed counsel, the policyholder is obliged to cooperate in the litigation). The policyholder would want to neither admit nor deny liability regarding an intentional or criminal act in order to maintain coverage.

Finally, fortuity clause interpretation can fall into common doctrinal pitfalls about insurance causation, creating further unpredictability as courts and litigants take different interpretive positions about the same fortuity clauses. To trigger a fortuity clause, the policyholder's behavior should be causative of the loss. The "expected or intended" intentional act fortuity clause specifically assumes this in its wording. Other intentional act fortuity clauses oust coverage for loss or damage "resulting from," "arising out of," or "caused by" an intentional act of the policyholder. Criminal act fortuity clauses also use that similar linguistic construction where coverage is ousted if the loss or damage is "resulting from," "arising out of," or "caused by" a criminal act of the policyholder.

If the loss is caused by some other behavior but the policyholder's intentional or criminal actions occurs somewhere in the factual matrix, coverage should not be removed. Insurance causation issues in liability insurance can get misleadingly confused with tort principles of causation.³⁹ This can prompt courts to produce inconsistent coverage decisions about fortuity clauses. The question should not be "the policyholder acted intentionally or criminally and the loss occurred." The question should instead be "was the policyholder's intentional or criminal action one that brought about the loss." However, it is very tempting for courts and litigants to wade into concepts of causal fault and blameworthiness,

³⁹ Knutsen, *supra* note 4, at 968–70.

particularly because the conduct being considered is intentional or criminal and courts are used to sorting those questions using fault-based and crime-based language. Insurer litigants may be incentivized to bend insurance causation principles with criminal and fault-based causation concepts to get a coverage denial. This merely detracts from the very specific insurance policy interpretation issue about whether the fortuity clause applies or not, given the role of certain behavior in bringing about a certain loss.

Differing interpretive approaches and litigation distortions are the two major sources of unpredictability leading to the problematic nature of these fortuity clauses. While the interpretive unpredictability is inherent in the design and wording of the clause itself and the applicable legal rules around interpreting policy language, the litigation distortions have expanded in nature over time. Greater certainty in dealing with fortuity clauses would go a long way to saving money for insurers setting insurance premiums and funding coverage litigation. It would also save policyholders money as there would be less coverage litigation about the ambiguous nature of fortuity clauses. The by-product of this is that accident victims' compensatory needs hang in the balance. They may have to wait until the coverage questions are sorted out. They may also, often unpredictably, lose out on compensation one might expect would be a sensible commercial result if a particular loss triggers a particular liability insurance policy.

B. THE COMPENSATORY GAP

Victims of intentional act torts and crimes, or “fortuity victims,” are often seriously injured and have dire compensatory needs.⁴⁰ These are the victims of assaults, attempted murders, and sexual assaults. The compensatory gap left by the varying and unpredictable approaches to fortuity clauses expands and contracts because of the unpredictability involved in interpreting the clauses. Streamline the interpretive process and one could better control which types of victims would be facing a compensatory gap, all with an eye to designing a system to sensibly address such gaps.⁴¹ As a result, much fortuity clause insurance coverage litigation

⁴⁰ Swedloff, *supra* note 36, at 739, 741–44 (detailing the compelling need for compensation for this particular subset of accident victims).

⁴¹ *Id.* at 724–27 (generating solutions for serious gaps in intentional tort victims' ability to recover damages in the face of fortuity clauses); Wriggins, *supra* note 36, at 152–57 (exploring solutions for victims of domestic violence torts who

would also drop away. Many fortuity victims find themselves in that compensation gap because they were unlucky enough to be injured by a policyholder whose coverage was later denied by an insurer or court interpreting a fortuity clause in one way or another. The problem is that other victims in similar circumstances may not meet the same fate, depending on a given insurer or court's approach to interpreting the fortuity clause at issue. This is a very costly and profound problem because it is difficult to recognize and define solutions for a constantly fluctuating group of people with real compensatory needs in society. It is also difficult for insurers trying to set risk-based premiums for risk pools when the potential payout mutates. It is difficult for policyholders trying to evaluate liability insurance coverage purchases. A good start to addressing these problems caused by this mutating compensatory gap is to ensure that fortuity clauses are interpreted in predictable fashions so that one can discern who is in the gap and how big it really is.

If liability insurance proceeds are denied fortuity victims as a result of the operation of a fortuity clause, where do those injury costs go? There are few other avenues of recourse left. The policyholder is likely unable to provide compensatory assistance in a personal fashion.⁴² Very few people carry first party disability insurance.⁴³ Most may carry health insurance for the out-of-pocket expenses from physical injuries. There may be recourse for the fortuity victim through government-run victims' compensation funds, but these are often limited in nature.⁴⁴ Most fortuity victims, however, are left to "lump it."⁴⁵ That means that the social cost of absorbing their injury-related expenses is off-loaded from the at-fault tortfeasor to employer workplace accommodations and to primarily state-funded programs for the needy: Medicare, Medicaid, welfare, and other

are presently not compensated because of the operation of fortuity clauses in their attackers' liability insurance policies).

⁴² Stephen Giles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006) (detailing how most tortfeasors in lawsuits would be unable to satisfy a tort judgment from their personal assets).

⁴³ See, e.g., Jerry & Richmond, *supra* note 22, at 482-83.

⁴⁴ Swedloff, *supra* note 36, at 726 (noting the limited nature of government-run criminal injuries compensation schemes).

⁴⁵ See, e.g., Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 547 (1981) (describing the strategy of not pursuing a claim and writing it off to "experience").

state disability programs.⁴⁶ The fact remains that the current web of modern accident compensation relies heavily on privately available liability insurance. There are just not sufficient mechanisms to provide effective compensation for fortuity victims who unpredictably fall through the cracks solely because they cannot access a policyholder's liability insurance due to some conduct on the part of the policyholder, which itself is fortuitous when viewed from some interpretive perspectives. So, having a smaller and more predictably identifiable group of uncompensated fortuity victims would take the burden off of the other, inadequate socialized compensation mechanisms. This would shift some of the burden to insurers who may have taken a premium for underwriting a risk that will never materialize simply because of a fluxious interpretation of a fortuity clause in the wake of actual fortuitous behavior on the part of the policyholder. What it would leave would be those whose losses are the result of truly non-fortuitous circumstances, which best suits the true purpose of liability insurance in the first place.

VI. THE CAUSE OF THE PROBLEMS

The reason that there are palpable and systemic inconsistencies with how these fortuity clauses are applied in a liability insurance context stems from two linked, dynamic notions: the tensions between the two purposes of liability insurance (wealth protection and victim compensation) coupled with a move from explanatory rhetoric about fortuity to explanatory rhetoric about morality.

A. THE TENSION BETWEEN WEALTH PROTECTION AND ACCIDENT COMPENSATION

The tension between two perceived purposes for liability insurance is at the root of the uncertainty in interpreting fortuity clauses. Solving this tension – or at least recognizing it and balancing it appropriately in context – would go a long way toward streamlining the interpretive process, keeping litigation costs down, and reducing the mutating compensation gap.

⁴⁶ Pryor, *supra* note 19, at 309–10 (demonstrating how the cost of tort law's occasional failure to compensate accident victims is borne elsewhere in society, in an inefficient manner).

Liability insurance is different than other types of insurance in that it is third party insurance. That difference is at the heart of the tension between the two purposes for this kind of insurance. Unlike property, life, and long-term disability insurance (all of which are first party insurance products), the proceeds of any triggered liability insurance go to pay some injured third party for a loss resulting from the policyholder's behavior. Private market liability insurance comprises the largest and most prevalent compensatory source for injured accident victims.⁴⁷ Liability insurance is the backbone of the tort system. Tort suits would not be brought if not for available liability insurance.⁴⁸ Society has organized itself around there being a private insurance safety blanket for much of today's risky conduct, from driving to owning a business or a home.⁴⁹ So liability insurance serves an important and expected societal accident compensation goal.

However, these are not the reasons why liability insurance is designed and marketed by insurers, or purchased by policyholders. Liability insurance is bought and sold as a risk transfer product to protect the assets of a policyholder in the event that policyholder becomes legally liable to pay for another's loss. This wealth protection purpose is very different from the broader compensatory purpose that liability insurance serves in society. Insurance as wealth protection focuses on the concerns of the policyholder who purchased the insurance product. Insurance as accident compensation focuses on the concerns of the injured accident victim in society (or, more broadly, on the concerns of society for compensating accident victims). One can be fairly certain that most policyholders do not purchase liability insurance out of altruistic concern for the well-being of some future accident victim who is a complete stranger. At most, that effect is a secondary offshoot of the insurance purchase. Yet, of course, most policyholders would wish and expect that anyone or any entity who injures them would carry sufficient liability insurance so that appropriate compensation would be forthcoming to that

⁴⁷ See Baker, *supra* note 5, at 4–6 (arguing that liability insurance has become “a de facto element of tort liability”).

⁴⁸ *Id.* at 4; Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 275 (2001) (detailing how tort suits are typically not brought unless there are valid, collectible insurance proceeds available); Adam F. Scales, *Following Form: Corporate Succession and Liability Insurance*, 60 DEPAUL L. REV. 573, 614 (2011) (noting that tort and insurance exist in “complementarity”).

⁴⁹ Wriggins, *supra* note 36, at 150 (noting the prevalence of insurance in society).

policyholder victim. The accident compensation purpose of liability insurance thus raises an interesting collective action concern. The accident compensation purpose is the reason why injured accident victims hope others have purchased liability insurance yet the wealth protection purpose is the reason why the policyholder actually purchases the insurance. The focus changes from victim to policyholder as one examines these two purposes of liability insurance.

Liability insurance is therefore a very strange market product: it is something we think we buy to help us protect our wealth but it additionally helps someone else as well. This is all the more strange when one adds the fact that most policyholders would not be able to pay for a tort judgment out of their own personal assets in any event.⁵⁰ The result of a tort suit against most uninsured people would be either no tort suit at all or bankruptcy. So there is, quite literally, often little to no wealth to protect. Yet, at the same time, those with modest assets to protect may actually value the wealth protection aspect of insurance even more than a wealthy policyholder, simply because the loss of their modest assets would mean financial destitution. Policyholders' subjective value of the wealth protection aspect of insurance therefore is mediated by the value placed on that policyholder's wealth.

However, this tension between the two purposes of liability insurance informs much of the interpretive process when courts are faced with having to interpret fortuity clauses. In that context, can these two purposes of liability insurance co-exist, or are they mutually exclusive? As will be shown, both purposes need to be balanced against each other, but in the liability insurance context, the actual effect of the wealth protection purpose on those with modest assets to protect can be less significant in most instances whereas the effect of the accident compensation purpose on a severely injured victim is certainly tangible, but is left to hang in the balance. Surprisingly, this is often forgotten in the shift from fortuity to morality clause as will next be described. The wealth protection purpose controls the rhetoric at the expense of the accident victim's – and ultimately society's – compensatory needs.

B. FROM FORTUITY CLAUSE TO MORALITY CLAUSE

Having dynamic tension between the two purposes of liability insurance creates opportunities for using different explanatory rhetoric

⁵⁰ See, e.g., Giles, *supra* note 42, at 606; Baker, *supra* note 5, at 7.

about what fortuity clauses are supposed to be doing. This creates much of the unprincipled inefficiencies and unfairness as noted above in the previous Part. Quite simply, courts can get mired in misleading rhetoric. Litigants in an insurance dispute (especially insurers) are incentivized to use this competing rhetoric to their advantage. The rhetoric goes something like this: do fortuity clauses ensure that insurers only indemnify for fortuitous losses? Or instead do fortuity clauses provide a mechanism for punishment and deterrence by ensuring that wrongdoing policyholders are deprived of the wealth protection benefit of liability insurance? The answer depends on how one views what liability insurance is supposed to be doing: protecting a policyholder's wealth or acting as a source of compensation for an injured accident victim.

1. The Move from Morality to Fortuity

To explain how a fortuity clause can be rhetorically mutated into a "morality" clause,⁵¹ one needs to understand the origins of the choice of language for fortuity clauses in liability insurance. Historically, insurance has had a societal challenge: it has had to separate itself from gambling, once seen as an immoral act.⁵² It is not difficult to understand, even with today's sensibilities, that profiting by guessing on whether or not some terrible disaster will befall a policyholder can be an activity tinged with moral undertones. One only has to think about life insurance, a product that essentially hedges a bet on when the policyholder will die, to see the moral implications and concerns – all the more so if a policyholder or some wrongdoer attempts to tip the scales of chance by controlling the risk of an outcome actually occurring.

The term "moral hazard" as understood today in insurance law is used to describe the situation whereby the presence of insurance reduces incentives to minimize losses because the losses will be insured.⁵³ But originally, in the nineteenth century, "moral hazard" was about a financial concern to insurers that was simultaneously a full-fledged moral concern to a society not used to the concept of insurance. The "moral" hazard was about altering the odds of the insurance arrangement so as to make a

⁵¹ Knutsen, *supra* note 8, at 103–11 (fortuity clauses shift to morality clauses).

⁵² Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 244–49 (1996) (describing the genesis of the insurance concept of moral hazard).

⁵³ *Id.* at 242.

chance loss a certain loss.⁵⁴ Purchasing fire property insurance and then burning down one's own house to get the insurance proceeds is the classic example.

At the time, the insurance market consisted largely of maritime, fire and property insurance, not liability insurance.⁵⁵ Insurance was bought and sold purely as a wealth protection product. There was no need to consider victim compensation because there was no market for liability insurance. There did not yet exist the societal web of compensatory structures designed to address accident victims' needs. Insurance was not expected to provide injury compensation.

Specific to concerns about insurance and morality was the longstanding legal notion that a criminal should not be able to profit from his crime.⁵⁶ This "public policy" rule holds, for example, that a murderer should not be able to obtain the proceeds of life insurance from the policyholder he murdered if he was also the beneficiary of the policy. Behavior such as willful arson to one's own home to cash in on insurance proceeds would be deemed "immoral" by society, illegal by the courts, as well as unprofitable to insurers. Policyholders tinkering with those odds were a particularly "moral" hazard for (mostly fire) insurers of the nineteenth century because those insurers were struggling with a public relations image problem set squarely in morality concerns. By removing the "moral" hazards from insurance, insurers could create a more profitable enterprise and, at the same time, a more socially palatable form of institutional risk transfer.

To an insurer concerned about insuring only risky, not certain, losses, it was important to remove coverage for losses intentionally and thus certainly brought about by a policyholder's conduct. This, in turn, would solve not only the very practical commercial efficacy concerns of the insurer, but also the concerns about insurance violating the public policy rule and the concerns about insurance incentivizing loss-causing behavior. In law, there are two categories of behavior that involve policyholders' intentional conduct: intentional torts and criminal behavior.

⁵⁴ KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11* (2008) (detailing the rise of liability insurance in the marketplace and its role in society).

⁵⁵ Baker, *supra* note 52, at 240.

⁵⁶ See generally, e.g., Mary Coate McNeely, *Illegality as a Factor in Liability Insurance*, 41 COLUM. L. REV. 26 (1941) (explaining how illegality is a mediating concept in early insurance law).

To remove the incentive for policyholders to bring about certain losses, any insurance policy would therefore have to target that kind of intentional or criminal behavior, which would either violate the public policy rule or result in policyholders obtaining coverage for losses they intentionally caused. The intentional act fortuity clause was written to remove insurance coverage for intentional torts. A criminal acts fortuity clause would ensure that certain losses arising from criminal conduct would also be removed from coverage.

Excluding from insurance coverage losses arising from a policyholder's criminal conduct had a three-fold effect. First, criminal law by nature typically assumes an element of intent or *mens rea*: one has to intend to do the crime in order to be convicted.⁵⁷ At the time of the clause's genesis, the criminal law was far less complex and nuanced than it is today, with fewer regulatory offences or fluctuating states of intent that could be considered criminal. This original batch of largely specific intent-based crimes served up a ready-made category of intentional conduct which is precisely the type of conduct targeted by the very moral hazard concerns of insurers of the day. Second, the clause contractually enshrined the public policy rule that criminals could not profit from their crimes through insurance proceeds. Finally, removing from coverage losses brought about by criminal behavior served the additional purpose of again separating the insurance business from the moral concerns about policyholders seeking to profit from their crimes. The criminal act fortuity clause appeared to target wrongful behavior that people naturally do not like. If crime made up a category of behavior which society did not condone, and if crime happened to be the same type of behavior that was also non-fortuitous and thus uninsurable, this appeared to be the perfect exclusion. The clause thus deters criminals and those intent on causing harm from using insurance to reap ill-gotten gains. It also punishes those same bad actors because their insurance coverage – the very benefit for which they paid – is removed based on their conduct. To the insurance-shy audience of the time, this second message undoubtedly played better than the first. They could rest assured that insurance was not incentivizing crime.

The intentional act and criminal act fortuity clauses then found their way into a burgeoning liability insurance market many years later. The early years of the liability insurance market existed without the societal expectation that liability insurance would be the backbone of the accident

⁵⁷ For those crimes that have a specific intent element like murder, assault, and arson.

compensation system.⁵⁸ People whose injuries were not compensated by liability insurance proceeds were largely expected to “lump it.” Liability insurance was marketed and constructed much as property insurance: as a wealth protection mechanism for a policyholder concerned about having to pay for potential legal liability (and, as a byproduct, was a source of compensation for the accident victim). Because liability insurance provides coverage for a policyholder’s legal liability, it stands to reason that, if the legal liability was brought about by a loss a policyholder intentionally caused, the policyholder’s conduct resulting in the intentional loss is a moral hazard and should be excluded from coverage. The intentional act fortuity clause therefore performs that same moral hazard gatekeeping function it would in a property policy. The same could be said for the effect of the criminal act fortuity clause in liability insurance policies except it additionally maintained the function of underscoring that criminals could not enjoy wealth protection from legal liability arising from crimes they committed. The crimes targeted were those specific intent crimes of the day like murder and arson. Criminal law was, as has been mentioned, far simpler than the laundry list of crimes comprising most penal codes today.

Another way to separate the insurance business from the moral undertones of gambling on the happenstance (or not) of another’s disaster, and the fear that some would consciously influence events in order to bring about an insured loss, was to shift the language of discourse about insurance from morality to fortuity. Concepts of risk can then be discussed in essentially amoral terms. At some point in time, the insurance industry shifted its public identity from being a business concerned about separating itself from immoral gambling to being a business offering wealth protection through risk exchange.⁵⁹ Perhaps this occurred over time as insurance proliferated and people became used to seeing insurance operate without many nefarious moral hazard concerns being realized. Perhaps instead it was a concerted industry effort to further separate insurance from morality and thus sanitize the business of insurance as it entered into regular commerce. Regardless, insurance became less about moral public image and more about risk and fortuity. Liability insurance proliferated and became the backbone of the accident compensation system. The criminal law became far more complex beyond mere specific intent crimes. The concept of moral hazard shed its “moral” roots and became aimed

⁵⁸ ABRAHAM, *supra* note 54.

⁵⁹ Baker, *supra* note 52, at 258–59.

instead at an insurer's concern for incentivizing overly risky behavior due to the presence of available insurance. Yet, the intentional act and criminal act fortuity clauses originally aimed at not only insurer profitability and fortuity concerns, but morality concerns as well, remained in liability insurance policies. The attempt to get morality out of insurance was largely successful, except for the potential throwback effect of these fortuity clauses.

However, a partially successful fortuity story could be told using these clauses, giving them the appearance that they still operated as intended in the new world of fortuity. It is true that intentionally caused losses are borne of the very fortuity-frustrating behavior that wreaks havoc with the insurance arrangement. But unless what is excluded from coverage is actually only behavior that turns a fortuitous event into a certain event, the fortuity clause is doing something else. Herein lies the problem, and the source of the inconsistency in the court decisions construing fortuity clauses in insurance coverage disputes. The only behavior in a liability insurance context that takes a fortuitous event and makes it a certain event is that behavior in which the policyholder engages with the specific and subjective intent to bring about the realized loss. If the policyholder did not intend the specific type of loss, the loss is still fortuitous to the policyholder. Therefore, removing liability insurance coverage for behavior that results in an unintended loss does not influence the policyholder's behavior and is done at the expense of the accident victim awaiting compensation. The moral hazard problem, in fortuity terms, is not affected.

2. The Move from Fortuity Back to Morality

However, the moral trappings of the intentional act and criminal act fortuity clauses remain. In fact, liability insurers are incentivized to hearken back to the moral bases of these clauses because they are compelling (if misleading) platforms for arguing for policyholders' coverage denial.⁶⁰ In this regard, the fortuity clauses can frequently

⁶⁰ See, e.g., JAY FEINMAN, *DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON'T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT* (2010) (canvassing the variety of tactics insurers are incentivized to undertake in denying claims); Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 TEX. L. REV. 1395, 1410–11 (1993) (exploring the way in which insurers weave the narrative in claims denials);

transform into morality clauses in an insurance coverage dispute.⁶¹ The conversation shifts from one about fortuity and risk transfer concepts to one about morality involving how denying insurance coverage produces desirable social effects of punishment and deterrence. At the same time, and via the same dynamic, the notion of liability insurance as accident victim compensation source is eclipsed by a return to an exclusive notion of liability insurance as wealth protection for the policyholder. These two planes of discourse converge to warp judicial analysis about insurance coverage and produce inconsistent and troubling results because no purposes of insurance are actually fulfilled in the end result: not victim compensation or wealth protection nor fortuity or punishment concerns. The rhetoric just does not work.

For example, a policyholder is showing to his friend a firearm he believes is unloaded. The policyholder slips and the gun accidentally discharges and injures the friend.⁶² The policyholder did not intend to harm the victim but nonetheless is charged with criminal negligence causing bodily harm. The criminal act fortuity clause ousts coverage for legal liability for a loss resulting from a “criminal act” of the policyholder. On its face, this has been categorized as a criminal event – the policyholder was charged with a crime. However, he did not intend to commit the crime. He did not intend to harm the friend. The main element of criminal negligence is the negligence standard – the marked departure from reasonable conduct in society. There is no specific intent required to prove this crime. It is a “negligence-based” crime targeting risky conduct.

How, then, does an insurer argue that the legal liability resulting from this loss is excluded by the criminal act fortuity clause? More specifically, based on the wording of that clause, how can an insurer articulate the reasoning behind why a policyholder’s loss should not be covered? This is an important point, because the result may be a denial of vital compensation to the injured friend. An insurer could of course argue that the policyholder committed a criminal act and this policy ousts coverage for criminal acts, so there is no coverage, regardless as to the nature of the crime. That is a literalist argument and it meets some success

Baker, *supra* note 36 (describing how moral considerations affect interpretation of the criminal act fortuity clause).

⁶¹ Knutsen, *supra* note 8, at 103.

⁶² Similar to what occurred in the Ontario case of *Eichmanis v. Wawanesa Mutual Insurance Co.* (2007), 278 D.L.R. 4th 15 (Can. Ont. C.A.), except that the case involved thirteen- and fifteen-year-old boys.

in some courts.⁶³ However, again, the result is dire: the injured victim is left with nothing and the wealth protection aspect of insurance is not realized for the policyholder. Many courts (though not all), operating in a pro-coverage insurance law environment, are compelled to look further to satisfy themselves that this is indeed the result intended by this clause and this insurance policy.⁶⁴

A fortuity-based argument falls short. The loss was fortuitous to the policyholder. The policyholder did not intend for the firearm to discharge. He did not intend the specific harm to his friend. Indeed, he did not intend any harm to occur at all. He thought the gun was unloaded. So it is not possible to argue that the criminal act fortuity clause here is designed to circumvent fortuity-frustrating behavior by removing from coverage those losses that are certain. The loss was fortuitous. The policyholder could not have adjusted his gun-showing behavior to have *ex ante* avoided it. Furthermore, liability insurance is broad-spectrum tort or behavior insurance, and perhaps this is just the sort of fortuitous behavior the policy is expected to cover. So, under fortuity reasoning, this is the type of loss that liability insurance should cover – behavior courting some risk of loss.

An insurer who then cannot make a compelling argument on fortuity grounds for ousting coverage via the criminal act fortuity clause often is then incentivized to return to the original moral basis for the clause. In doing so, insurers move from contract law principles to tort to criminal

⁶³ See, e.g., *Wilderman v. Powers*, 956 A.2d 613 (Conn. App. Ct. 2008) (denying coverage for liability for neighbor's alleged psychological injuries when insured peeping tom photographed naked neighbor and was sued because his conduct was criminal in nature); *Auto Club Grp. Ins. Co. v. Booth*, 797 N.W.2d 695 (Mich. Ct. App. 2010) (denying coverage for accidental shooting when drunk held gun against tenant's wrist, even though he did not intend the gun to discharge); *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320 (Minn. Ct. App. 2008) (holding that youth's attack of neighbor was a "criminal act," regardless of intent of youth to harm neighbor); *Gruninger v. Nationwide Mut. Ins. Co.*, 905 N.Y.S. 2d 391 (N.Y. App. Div. 2010) (denying coverage when insured accidentally shot other hunter); *Progressive N. Ins. Co. v. McDonough*, 608 F.3d 388 (8th Cir. 2010) (interpreting plain language of criminal act exclusion as having no intent requirement so insured's intent irrelevant at time of accident).

⁶⁴ See, e.g., *Allstate Ins. Co. v. Zuk*, 574 N.E.2d 1035 (N.Y. 1991) (discussing whether accidental shooting while cleaning gun was an accident that could "reasonably be expected to result" from a "criminal act," despite insured's guilty plea to crime of recklessly causing death).

law, all in the context of an insurance policy interpretation issue that is typically and rightfully dealt with on contract-based insurance law principles alone. Shifting legal spheres allows the insurer greater leeway to argue for the applicability of the fortuity clause while all the time moving up the moral ladder in persuasiveness. Additionally, insurers shift the focus of discussion from the injured accident victim to the wrongdoer policyholder to those also in the insurance risk pool to society as a whole.

Coverage should be denied the policyholder here, the moral argument goes, because we want to hold the wrongdoer accountable for his actions. By denying the policyholder the wealth protection aspect of the insurance, the policyholder will have to pay for the loss himself, unaided by insurance. This is a return to classic corrective justice reasoning from tort law involving redress between wrongdoer and victim,⁶⁵ except the victim here appears to be the insurer and not the accident victim. As has been mentioned, there is little possibility that the policyholder ever benefits in today's standard tort litigation settings because most do not have sufficient personal wealth to satisfy a tort judgment against them.⁶⁶ Furthermore, an insurer is also incentivized to argue that policyholders who behave in socially unacceptable ways are not deserving of liability insurance protection because this type of socially unacceptable conduct is not the sort that well-intentioned, premium-paying policyholders would want to support through payment out of their own risk pooled insurance funds.⁶⁷ This shifts the focus again from the policyholder to the perceived desires of other allegedly upstanding policyholders in the risk pool. Other policyholders would not want to subsidize a loss brought about by a careless, gun-toting person who had the poor judgment to point the firearm at his friend. The shift is a decidedly moral one, designed to appeal to a collective sense of moral conduct judgment on the part of a group not present in the lawsuit – other policyholders. The sense is that reasonable policyholders would not behave like that, and therefore would not want their hard-earned premium dollars to go towards indemnifying for conduct they would deem unfit to insure. Finally, insurers are incentivized to argue

⁶⁵ See, e.g., John C. P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 926 (2010); Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 410–13 (1989); see generally, e.g., JULES L. COLEMAN, RISKS AND WRONGS (1992); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

⁶⁶ Giles, *supra* note 42, at 606; Baker, *supra* note 48, at 291–92.

⁶⁷ Baker, *supra* note 36, at 75; Knutsen, *supra* note 8, at 105.

that coverage should be denied in these instances because we want to deter this kind of behavior from happening again.⁶⁸ People should not point guns at other people. The wrongdoer policyholder needs to be punished in order to achieve this deterrence goal, so the benefit of liability insurance should be denied to him. These wrongdoer policyholders are, as Baker dubs them, the “moral monsters.”⁶⁹ This shifts the argument to criminal law principles of punishment and deterrence. The target of the argument is now not the accident victim, the policyholder or other policyholders but instead society as a whole. The policyholder needs punishment so that this kind of bad act does not happen again. The removal of wealth protection via insurance will accomplish that important societal goal. But can it really?

3. Problems with the Moves

There are many structural problems with this shift from fortuity clause to morality clause. First, it produces incoherent and inconsistent judicial decisions because some courts rely on fortuity-based arguments to determine insurance coverage, while others are swayed by the moral arguments, and still others a little of both. The reasoning patterns are different. The underlying assumptions for the reasoning are different. But the cause of much inconsistency is this very vacillation from fortuity to morality, from policyholder to insurer to society, and from the purpose of victim compensation to the purpose of wealth protection. There are just too many exclusive structural axes to shift and combine in the analysis when the whole exercise is supposed to be about determining the presence or absence of liability insurance coverage based on principles of insurance policy interpretation.

Second, the argument takes the moral origins of the fortuity clause and reverses them to apparently indicate that insurance can now do something that it actually is not designed to do at all. At one time, the insurance industry strove to separate its business from anything to do with morality. That was the industry’s reason to shift to the discourse about fortuity and risk. That was the reason why the fortuity clauses were inserted into the early policies. Yet here, in the present, the insurance industry is incentivized to again return to morality but this time in a completely different way: insurer as morality crusader. Instead of resiling from the idea that insurance is a potential mechanism for immorality to

⁶⁸ Baker, *supra* note 36, at 77 (calling this the “moral monster” argument).

⁶⁹ *Id.*

occur, the denial of insurance (now apparently a social good) is presented as a mechanism to provide socially desirable, moral benefits, like deterrence and punishment of criminals or bad actors.

Insurance as presently constituted cannot achieve punishment and deterrence goals for a variety of reasons. Most policyholders are unable to personally satisfy a tort judgment from their finances, so the ability to mete out punishment by denying liability insurance coverage would frequently be impossible.⁷⁰ Even with a financially capable policyholder, the threat of losing liability insurance protection pales in comparison to the threats possible under civil or criminal law for the same conduct.⁷¹ For example, few criminals would say they were deterred from the crime due to fears of losing liability insurance coverage. If fears of going to jail or of harming others do not deter the conduct, how can liability coverage concerns do the same? Finally, few would condone insurers acting as quasi-public intermediaries for states in doling out some kind of social punishment.⁷² Insurance law, based as it is largely on contract law principles, contains none of the standard liberty-protecting safeguards found in criminal law. Selling insurance policies to the public does not make insurers some sort of deputized private attorneys general who provide a contractually premised social vehicle through which anti-social behavior can be corrected. Despite

⁷⁰ Giles, *supra* note 42, at 606.

⁷¹ Malcolm Clarke, *Insurance: The Proximate Cause in English Law*, 40 CAMBRIDGE L.J. 284, 302 (1981) (denying insurance coverage is an insignificant behavioral deterrent); Knutsen, *supra* note 8, at 109–10.

⁷² See TOM BAKER & KYLE D. LOGUE, *INSURANCE LAW AND POLICY: CASES, MATERIALS, AND PROBLEMS* 505 (2003), in reference to a pre-publication form of Jonathan Simon's book, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007). Baker and Logue note that there is an increasing gap between insured and uninsured conduct, which is the direct result of crime being defined as more than just intentional conduct. Not offering coverage for losses from criminal conduct sort of "deputizes" insurers "to serve as private law enforcement agencies empowered to mete out the 'punishment' of refusing insurance benefits without having to comply with the procedural requirements and protections that govern public law enforcement." *See id.* at 198–200 (noting that "one-strike insurance exclusions," like the criminal act fortuity clause, hit the middle class hardest as they rely on homeowners and commercial liability policies for a compensatory source; using crime as a category for insurability can result in a ghettoizing effect on policyholders by disproportionately affecting certain policyholders who are more likely to engage in criminal behavior, from drug use to misdemeanors and beyond).

all of this, and most importantly, the fact remains that there is a competing expectation for the insurance proceeds beyond that of the policyholder. The accident victim's compensation hangs in the balance of whatever moral considerations are weighed, making whatever punishment leveled on a policyholder felt, instead, by the victim herself, for it is the victim who is the ultimate recipient of the insurance indemnity.

As the example about the policyholder's accidental firearms discharge shows, insurers often cannot support both a fortuity-based and a morality-based argument at the same time because one explanation for coverage denial cancels out the other. If the morality-based argument is misleading and inaccurate, as it most assuredly is, then that leaves the insurer with only fortuity-based arguments to buttress fortuity clause coverage denials. And that is probably the way it should be. The focus would remain on simple actuarial risk management principles and not on slippery moral concerns. The focus would also remain on the policyholder's conduct and whether or not the loss is certain or fortuitous, as opposed to some perceived social engineering wishes of an insurer, other policyholders in the risk pool, or society as a whole.

But the shift from fortuity to morality also forces the conversation away from one about insurance as accident victim compensation source. There is no morality story to tell there about coverage denial. In fact, the moral thing to do may well be to ensure that compensation is somehow available for the victim in some fashion or another, as long as the loss was realized fortuitously. Turning a fortuity clause into a morality clause, however, prevents that consideration because the morality story is squarely focused on the purpose of insurance as a wealth protection mechanism for policyholders. Keeping the analysis grounded in fortuity discourse is most compatible with an approach that at least does not lose sight of the fact that it is the accident victim's compensation hanging in the balance.

Is it possible to have an insurance story about the applicability of fortuity clauses where the discourse is grounded in neutral fortuity concerns, not morality concerns, and that still is compatible with both notions of insurance as wealth protection and insurance as victim compensation source? Perhaps. The key would be to ensure that, whenever concerns about one purpose of liability insurance are driving the interpretive analysis, those concerns do not unsettlingly trump concerns of the other purpose. The purposes do not have to compete but can be complementary. This is only possible by avoiding morality discourse and keeping the insurance analysis grounded in fortuity discourse.

For example, take the case about the policyholder negligently injuring his friend with the firearm. Whether or not his liability insurance

coverage should be ousted by his “criminal act” can be assessed using fortuity discourse. His actions and the loss were entirely fortuitous. What he did may have been careless, but it did not transform the shooting from possibility to certainty. To that end, coverage should be maintained, despite his criminal charge. Fortuity was not frustrated here. This was still a chance loss. This was, in other words, not a “criminal act” for insurance purposes resulting in a certain loss, even though the conduct may have triggered the criminal law for state sanction purposes. By the same token, depriving the injured accident victim of his compensation also weighs against denying insurance coverage for anything but a non-fortuitous loss.

So, if the same policyholder intentionally murdered his friend with the firearm, the situation would be different. Here, his actions purposely changed the loss from a possibility to a certainty. The policyholder had complete control as to whether or not that loss would be brought about. He knew the gun was loaded. Fortuity would be frustrated and the insurance arrangement breaks down. This is the very risk that the fortuity clause targets. It is the very thing insurance does not insure. While the injured accident victim would lose his source of compensation, insurance based on fortuitous risk transfer is not the vehicle best tuned to provide that compensation. One must look elsewhere at another compensatory solution for those injured victims who are harmed by losses that were made certain to occur at the hands of the policyholder.

VII. SOLUTIONS: SUBJECTIVE INTERPRETIVE PERSPECTIVE

At present, the most sensible solution to interpreting the applicability of either the intentional act fortuity clause or the criminal act fortuity clause is to only deny coverage when fortuity is truly frustrated – when a loss has been made certain to occur by the purposeful conduct of a policyholder. Otherwise, the clauses get bogged down in discourse about morality and about the rightful purpose of liability insurance itself. Insurance coverage decisions will then be more streamlined. It will be clearer to insurers, policyholders and third party accident victims that private liability insurance is presently designed to “pay the prankster but not the arsonist, and the risky fool but not the premeditated murderer.”⁷³ Such a practice will go a long way to closing the compensatory gap for injured accident victims so that the only accident victims left in it are those who miss out on compensation from a policyholder’s liability insurance

⁷³ Knutsen, *supra* note 8, at 115.

because that policyholder acted to make a loss a certainty. For that smaller group, another compensation solution needs to be devised, layered on top of the existing liability insurance scheme.

It makes sense to interpret the criminal act fortuity clause as one that ousts liability insurance coverage for only specific-intent crimes where the policyholder had the intent to bring about certain loss. To do otherwise is to doom the insurance interpretation analysis to a quagmire of morally muddy analytics. The simple, literal answer to the question “when does the clause apply?” provides a troubling practical answer if coverage is ousted for any loss arising from some related criminal act of the policyholder. Courts have struggled with “what” criminal acts count as “criminal acts.”⁷⁴ Does a charge for speeding oust liability coverage? What about negligence-based crimes or regulatory offences? In the face of broad-based coverage for legal liability, a blanket exclusion for “anything catching the attention of the criminal law” can leave uninsured a wide variety of loss-causing behavior, to the surprise of many policyholders (and probably a few insurers) *ex post*. That leaves many accident victims in an unpredictable situation, with no source of compensation despite suffering a loss fortuitous to the policyholder. Policyholders cannot adjust their behavior accordingly, as they are unable to predict what behavior is covered and what is not.

That interpretive approach, however, does not comport with a literal reading of the criminal act fortuity clause. Is the criminal act fortuity clause essentially doing the same job as the intentional act fortuity clause, rendering it superfluous? One explanation for interpreting the clause in an expansive fashion is simple rigid contract law: the insurer put those words in and, as insurance is a contract, the policyholder accepted those conditions when she purchased the policy and is now bound by them. Some courts have buttressed coverage denial using this contractual argument.⁷⁵ This, however, ignores the fact that there is increasing

⁷⁴ See, e.g., *Horace Mann Ins. Co. v. Drury*, 445 S.E.2d 272, 273–74 (Ga. Ct. App. 1994) (including the illegal use or possession of firecrackers as a “crime”); *Harris v. Dunn*, 45,619, p. 6–7 (La. App. 2 Cir. 9/22/10); 48 So. 3d 367, 372 (stating that there was coverage for a policyholder, who struck a person who was getting back into a vehicle, despite guilty plea to misdemeanor battery offense); *Herbert v. Talbot*, 26, 009 (La. App. 2 Cir. 9/21/94); 643 So. 2d 323 (indicating that policyholder’s cruelty to youth does not oust coverage).

⁷⁵ See, e.g., *Progressive N. Ins. Co. v. McDonough*, 608 F.3d 388, 391 (8th Cir. 2010) (explaining that the plain language of criminal act exclusion had no intent requirement, so policyholder’s intent irrelevant at time of accident); *Allstate*

evidence that insurance – especially liability insurance – is much more than a simple contract.⁷⁶ At the very least, hinging on this contractual decision is access to compensation for the injured accident victim. There is little room for such considerations in a literalist contractual interpretation of the criminal act fortuity clause. That makes it problematic as an analytical approach. By not at least addressing some potential purpose as to why the clause is in the policy, the accident victim's compensation becomes the automatic sacrifice. In an insurance law environment with pro-coverage interpretive tools like *contra proferentem* and reasonable expectations, many courts struggle against this literalist interpretation (perhaps for good reason).

One possible explanation for the clause beyond a simplistic “these are what the words say,” as held by some courts, is that insurers mean to exclude from coverage any losses arising from criminal conduct because those losses are a riskier category than some other category of behavior.⁷⁷ Insurers are free to determine which risks they will underwrite and which they will not. That is a market-based decision on the part of an insurer. However, second-guessing what an insurer “wants” to do, without evidence of an insurer's drafting and underwriting intent, meets with some skepticism when the injured accident victim's compensation is the collateral at stake in such a “guess.” As has been explained above, today's policyholders are often unable to *ex ante* predict what behavior will lead to a criminal charge, except for those obvious traditional, specific intent-based crimes like murder, assault, or arson. So if it is the insurer's intention to exclude from coverage any and all losses arising out of a policyholder's

Ins. Co. v. Peasley, 932 P.2d 1244, 1249 (Wash. 1997) (holding that a criminal acts exclusion ousts coverage for reckless endangerment crime from accidental shooting, regardless of policyholder's intent; “this court must enforce the Policy as written”).

⁷⁶ See generally, e.g., Erik S. Knutsen, *Auto Insurance as Social Contract: Solving Automobile Insurance Coverage Disputes Through a Public Regulatory Framework*, 48 ALBERTA L. REV. 715 (2011); Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389 (2007); Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 MCGEORGE L. REV. 203 (2010); Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489 (2010).

⁷⁷ See, e.g., Allstate Ins. Co. v. Berube, 854 A.2d 53, 57 (Conn. App. Ct. 2004) (holding that an accidental gun discharge while getting into bed with loaded sawed-off rifle was a “criminal act”, even though determined to be an accident, because act risked injury to child in bed).

criminal actions, regardless of the policyholder's subjective intent to bring about the loss, that intention, in today's modern world, has to be based on something other than a moral concern for crime prevention, which, as mentioned above, this clause cannot effectively accomplish in any event.

This explanation for the clause's interpretation also ignores the fact that the very coverage offered is for legal liability arising from risky behavior: negligence. There is no evidence that all behavior branded as "criminal" after the behavior occurs is any more or less costly to insure, as a category of behavior, than any negligent behavior. It is not the type of exclusion that deals with an *ex ante* palpable effect on risk simply because the behavior is often categorized by the state as "criminal" after it occurs. This is different than exclusions in a homeowner's liability policy for running a commercial business like a hair salon in the home without telling the insurer, thereby increasing the risk of loss by having more traffic in and out of the house and operating equipment not normally found in all homes. This is arguably different than other traditional exclusions for property insurance coverage like excluding losses arising from pollution or water damage or earthquake. By contrast, those specific property insurance losses are the sort that are inherently more financially risky to insure because the losses, if realized, are more expensive and might have the potential to affect multiple policyholders at once, across multiple lines of insurance products.⁷⁸ Such is not the case with a loss resulting from a criminal act.

In addition, whether or not a certain type of conduct is criminal or not has no bearing on whether or not losses are arising in non-fortuitous ways. Penal statutes are not written with an eye to what behavior actually realizes a certain loss but rather are conduct based, not results based. Crime is about something different than the presence or absence of insurable losses. Insurers have no control over what crimes are included or not in penal statutes. Furthermore, what is considered "criminal" behavior is ever-changing over time. At the time an insurer drafts an insurance policy, behavior not considered criminal may, in the future, be deemed criminal. A few decades ago, who could have predicted the crimes associated with the internet and identity theft? Nowadays there are criminal investigations and prosecutions against teenagers for hacking into

⁷⁸ Michelle E. Boardman, *Known Unknowns: The Illusion of Terrorism Insurance*, 93 GEO. L.J. 783, 784 (2004) (warning of "clash events" which affect multiple policyholders across multiple lines of insurance).

websites for fun or for cyber-bullying a classmate, despite the intent sometimes being to “tease.”

So if the clause is ineffective at deterring crime and if it is essentially no riskier to insure losses arising from criminal acts as a distinct category of *ex ante* behavior than those arising from negligent acts in terms of size or frequency of losses, and if, in fact, the very behavior targeted by the clause is a mutating continuum of behavior as the criminal law changes over time, then why are insurers not providing coverage for losses arising from criminal acts? Could it be that, as many courts note, crime is uninsurable?⁷⁹

This, too, does not bear out in reality. Only a subsection of crime is conceptually uninsurable: those losses intentionally brought about by a criminal policyholder. Other losses arising from criminal behavior are fortuitous and insurable, as long as the policyholder did not intend to bring about the loss. In fact, there are many instances in insurance where crimes of one nature or another are insured and insurers still profit. One example is property insurance for theft. Another is coverage for a legal defense in a director’s and officer’s liability policy if the director or officer faces a criminal charge. Some liability insurance policies insure policyholders against awards of punitive damages. Still others provide liability coverage for vicarious liability for an employee’s intentional actions, including assault and sexual assault. Liability insurers are still able to underwrite these risks and turn a profit in the insurance business.

The only available rationale for the criminal act fortuity clause is that it enshrines the public policy notion – still relevant today – that insurance will not be used by a criminal to profit from his crime.⁸⁰ It also assists in an evidentiary fashion by ousting coverage for specific-intent crimes so that tortious intent need not be proven by the insurer seeking to remove coverage. The work has already been done in the criminal case. So the clause acts as a sort of doctrinal shortcut to proving the necessary

⁷⁹ See, e.g., *Minn. Fire & Cas. Co. v. Greenfield*, 855 A.2d 854, 866 (Pa. 2004) (maintaining that insurance policy was not designed to protect a drug dealer, so no coverage existed when a houseguest died of a heroin overdose); *Am. Family Mut. Ins. Group v. Kostaneski*, 688 N.W.2d 410, 415 (S.D. 2004) (insuring intentional wrongdoers is against state public policy, so criminal exclusion is valid); *Unified W. Grocers, Inc. v. Twin City Fire Ins. Co.*, 371 F. Supp. 2d 1234, 1243 (D. Haw. 2005) (holding that one cannot insure restitution of an “ill-gotten gain” under California law), *rev’d*, 457 F.3d 1106 (9th Cir. 2006).

⁸⁰ See *Minn. Fire & Cas. Co.*, 855 A.2d at 869; *Am. Family Mut. Ins. Group*, 688 N.W.2d at 415; *Unified W. Grocers, Inc.*, 371 F. Supp. 2d at 1243.

intent required in making coverage determinations. As long as the policyholder is not profiting from a crime, or intentionally causing a loss that is the result of a crime, the clause's purpose is upheld.

If the purpose of insurance is seen as a wealth protection product only, this public policy notion of the clause fits with more modern fortuity concerns. The only way a policyholder insured by liability insurance could ever "profit" from his crimes (here, "profit" meaning enjoying the wealth protection aspect of the insurance) would be if he brought about a certain loss. So a bar brawler picks a fight and slugs another patron because he knows that if he injures that patron and is sued, at least his liability insurer will cover the losses. If, however, the policyholder did not commit a crime with intent to cause the insured loss, there is no way the policyholder could "profit." The act of profiting itself requires some implicit intent that the policyholder aims to profit from his actions.

There is, of course, a valid argument that the liability insurance policyholder could never "profit" from the insurance proceeds because the insurance proceeds go to the third party accident victim, not the policyholder. Because the wealth protection purpose of insurance can compete with the compensation function of insurance in the liability insurance context, the public policy rationale for the criminal act fortuity clause is weakened. The historical nature of the clause, arising out of moral and public policy concerns, does not port well into the modern liability insurance landscape. It functions, as has been shown, as a very nearly always unbalanced concept whereby so much law and policy mash together and the result of which is very often a compensation gap for an injured accident victim.

The simplest solution to fairly and predictably balance concerns with the compensation gap while still maintaining efficacy of fortuity clauses as written is to interpret fortuity clauses as clauses that are triggered by fortuity concerns which frustrate the insurance relationship. To do anything else is to introduce unpredictability in the form of morality-based mutable legal concepts from tort and criminal law into an insurance interpretation exercise. To that end, the intentional act fortuity clause should be interpreted so as to remove coverage for a loss only when the policyholder subjectively intends to bring about the harm that was caused by the intentional act. Similarly, the criminal act fortuity clause should only oust coverage for a loss when a policyholder subjectively intends the harm that was caused by the criminal act. Otherwise, coverage would be removed for fortuitous losses at the expense of an injured accident victim's compensatory needs. By interpreting these clauses as requiring a subjective causative element, the exercise restricts coverage removal to

only those instances where the policyholder could actually subjectively have altered behavior to avoid the loss, thereby ensuring maximum effectiveness for moral hazard insurance concerns. Otherwise, the deterrent effect (if any) of the clause is ineffective and over-broad. This sort of approach would prevent fortuity clauses from inefficiently morphing into morality clauses. It would also more fairly balance the wealth protection aspect of insurance with the compensatory needs of accident victims while still not doing violence to the current language of the respective clauses. Litigation and insurance costs would be saved as a result. The compensation gap for fortuity victims would significantly narrow to predictably include only those harmed by specific-intent crimes or subjective intentional conduct on the part of the policyholder. While this still would leave some victims without compensation, it would at least provide a fixed category of people so that a sensible social solution could then be crafted, if necessary.

VIII. ADDRESSING THE COMPENSATION GAP

To address the remaining compensatory gap, it would be necessary to go further than what can be done by interpreting the presently worded insurance policies through a lens of fortuity. One must examine the web of accident compensation as it is presently constituted and perhaps reform it. There may well be reason to do this, as the injured victims comprising this particular gap would be those who were injured as a result of particularly extreme intentional or criminal actions on the part of the policyholder: the victims of assaults, attempted murders, actual murders and sexual assaults.⁸¹ This group of victims would likely exhibit particularly catastrophic and troubling injuries that, under tort, would typically be deserving of a significant level of compensation. As Rick Swedloff and Jennifer Wriggins point out, to ignore these victims in the compensatory gap is not only expensive, but doing so impinges on collective social conscience as well. A few solutions exist.

One solution would be to incentivize insurers to market an add-on portion for a variety of liability insurance policies specifically designed to pay the policyholder in the event she is injured by another party and cannot

⁸¹ See, e.g., Wriggins, *supra* note 36 (stating the need to view compensatory issues with the perspective of the injured party, not just the view of the perpetrator); Swedloff, *supra* note 36 (documenting the challenging compensatory issues with fortuity victims).

collect from that party's liability insurance because of the operation of a fortuity clause in that other party's policy. The add-on "fortuity clause insurance" could function similar to uninsured automobile motorist coverage, as an extra endorsement or rider on automobile, homeowners, personal, professional, or commercial liability insurance. For an additional premium, the policyholder could claim compensation from her own liability insurance policy if she found herself without compensation due to an inability to trigger a tortfeasor's liability insurance because of the conduct of the tortfeasor wrongdoer who harmed her.⁸² The risk of being found in the compensation gap due to the operation of a fortuity clause could be unbundled and sold as a separate insurance add-on.⁸³ While the payout under this type of insurance add-on may not be small when it occurs, it is certainly a very proscribed situation far less likely to occur than a standard automobile accident or any mishap that triggers homeowners insurance. In fact, its instance of trigger might be quite rare, comparatively. There may be a real market in this add-on, to the benefit of insurers, because people have a somewhat irrational fear of being harmed by crime. If offered at a modest price, most policyholders might well purchase it.

Of course, this solution only benefits those who are covered by liability insurance in the first place. While the group would be obviously large and include all drivers and homeowners, some particularly vulnerable members of society are simply not covered by any liability insurance. These are most often the poor, the unemployed, or those who lose liability insurance coverage for another reason (like failing to pay their premiums). For those, another solution would have to be invented if they, too, are to exit the compensatory gap left by the unpredictable application of fortuity clauses.

There are two potential solutions to address the needs of this still smaller group of uncompensated accident victims who are not themselves covered by liability insurance and who did not purchase the first party fortuity clause insurance add-on. In the face of a triggered fortuity clause, liability insurers could be legislatively forced to provide compensation to

⁸² Similar to Rick Swedloff's "uninsured assailant" insurance, except not a mandatory form of insurance. Swedloff, *supra* note 36, at 759–60.

⁸³ See Lee Anne Fennell, *Unbundling Risk*, 60 DUKE L.J. 1285 (2011) (advocating for more creative ways of unbundling traditional risk packages by unbundling the risk in innovative units).

the victims of criminal and intentional conduct.⁸⁴ In exchange, insurers would be allowed to subrogate against their own policyholders in an attempt to recoup their losses from the actual wrongdoer. This provides at least some credence to the operation of the fortuity clause. However, the actual success of that subrogation exercise is speculative. If we know that most policyholders do not have sufficient personal assets to cover a civil judgment, why would insurer subrogation against an insured produce any better results? There would be substantial collection costs on the part of insurers, for somewhat sketchy proceeds as a result of the exercise.

Another solution to assist uninsured individuals who are left with no compensation as a result of a policyholder's triggered fortuity clause is for the government to create a new socialized compensation mechanism for these victims – a “Victims of Intentional Harm” program. Some government body would operate a program that steps in to compensate those left in the gaps created by fortuity clauses. The program would be funded by a small levy on the sale of every liability insurance policy. This is essentially the same as insurers providing add-on fortuity clause insurance except mandated in a socialized fashion. It would be paid for by all policyholders but would be accessed by those who could not access some other compensation source (i.e. those who did not have add-on fortuity clause insurance). If the private market add-on fortuity clause insurance failed in that it was not purchased by sufficient policyholders, this may be a workable alternative to that solution as well. The government body could also be given the right to subrogate against a wrongdoer, if any assets were attainable. Of course, there would be administrative costs to the program and the difficulty of determining the price of the levy on the sale of liability insurance policies. But one would expect the cost of operation to be at a minimum due to the limited amount of victims who would have to resort to the fund, especially if there were some reasonable limits on compensation provided by the fund.

Finally, a more fundamental solution to fortuity clauses would be to legislatively outlaw fortuity clauses in liability insurance. This step places the compensatory purpose of insurance squarely at the forefront, well ahead of the wealth protection purpose. It enshrines private insurance as a fundamental part of the accident compensation system. However, it

⁸⁴ Similar to, but broader than, Jennifer Wiggins' proposed Domestic Violence Torts Insurance Plan, which she proposes should be tacked onto automobile liability insurance in order to provide compensation for a wide cross-section of victims of domestic violence. *See* Wiggins, *supra* note 36.

also passes the costs of paying for non-fortuitous losses onto all liability insurance policyholders. Providing coverage for losses certain to occur appears counter to standard insurance risk fundamentals and, frankly, insurance profitability.

But such a move is not impossible.⁸⁵ Indeed, in Canada, the decision was made to disallow fortuity clauses in automobile liability insurance, such that any act of automobile use, no matter how criminal or intentional, results in compensation for the accident victim via the wrongdoer's liability insurance policy.⁸⁶ The result has been that the costs of these allegedly certain losses are spread amongst the risk pool of insured drivers. While premiums may have increased as a result, automobile insurance is not catastrophically unaffordable in that country. The policy move was to favor victim compensation over wealth protection or even fortuity concepts in the auto accident sphere. Driving was considered a dangerous activity and the driving public would have to self-fund a source of victim compensation within a liability insurance market.

The real question here is this: if such was the thinking for the victims of automobile insurance accidents, why is there not similar thinking going on for the victims of crimes and other intentional acts? Is the move from auto victim to assault victim really so fundamentally different that the former is more deserving of a compensation scheme whereas the latter is not? Or is it simply because it is more administratively easy to create a compensation scheme with a pool of risk-creators like automobile drivers who would be more comfortable to pay into such a scheme for the privilege of operating a dangerous motor vehicle? If that is the case, then why is auto accident risk creation different than any other risk creation behavior covered by homeowners or commercial liability insurance policies?

IX. CONCLUSION

Keeping fortuity clauses firmly grounded in fortuity-based thinking would help to restrict whatever compensation gap does exist for fortuity

⁸⁵ And, in fact, in the automobile context especially, a number of American courts have alluded to the importance of compensating third-party accident victims as a reason for allowing coverage despite the insured's intentional conduct. *See, e.g.,* *Salamon v. Progressive Classic Ins. Co.*, 841 A.2d 858 (Md. 2004); *Proformance Ins. Co. v. Jones*, 887 A.2d 146 (N.J. 2005); *Tapp v. Perciful*, 120 P.3d 480 (Okla. 2005).

⁸⁶ *See, e.g.,* Knutsen, *supra* note 8, at 80.

victims injured by fortuitous losses. That means that the intentional act and criminal act fortuity clauses require a subjective interpretation. Morality needs to be taken out of the equation. That would also save significant litigation costs in the solving of fortuity clause insurance coverage disputes. Those fortuity victims still left in the compensation gap would be a smaller, more predictable group to be expected in keeping with the principle of fortuity in insurance. But the situation is no less tragic. In a society which relies so heavily on private, market-based insurance as the main compensatory source for accident victims, it is surprising that, of all victims, these fortuity victims frequently have the least options for compensation. Some other solution for them is required.

Such a solution, or indeed any solutions proposed in this final section, would require not only insurer buy-in, but serious political buy-in as well. They are social solutions to a social problem. Such change is never easy. Staid institutions would have to change. But it is important to keep in mind that the genesis of these fortuity clauses in the first place was a concern over social problems. These clauses designed to circumvent morality problems associated with insurance products are now themselves causing other morality problems in the form of unfairly and unpredictably leaving a serious and expensive compensation gap in society for a sub-set of injured accident victims. Perhaps then the argument that insurers need to be part of the social solution is a reasonable one. It is a social move that will require a shift in thinking from the purpose of insurance as wealth protection to that of victim compensation. This Article has outlined the importance of balancing that tension. Perhaps that shift is not as difficult to make in today's society as it was when liability insurance first surfaced.

