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COVERING UP THE "SINS OF THE FLESH" – THE "INS" AND "OUTS" OF COVERAGE AND RISK MANAGEMENT FOR SEXUALLY-BASED TORTS

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I. OVERVIEW:

This session will address current and emerging issues involving risk management and liability coverage for public entities in relation to sexually-based misconduct claims, including difference coverage issues for such misconduct under standardized insurance liability policies and memoranda of coverage ("MOC") issued by Joint Power Authorities ("JPAs").[1]

The goal of the session is to help participants better evaluate various coverages (both commercial insurance and JPA-based) available to public entities and employees for sexually-based tort liability, as well as implement "best practices" for the prevention, management and defense of claims of sexual misconduct.

In addition to discussion of the pertinent issues, the panel will discuss real world examples of useful risk management practices that have been implemented by JPAs and their members in relation to such risks.

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[1] Joint coverage provided to JPA pursuant to an MOC is not "insurance" *per se* because a self-insurer does not enter into a contract to indemnify a third party. (*See Fort Bragg Unified School Dist. v. Colonial American Casualty & Surety Co*. (2011) 194 Cal.App.4th 891, 904; *Orange County Water Dist. v. Ass'n of Cal. Water Etc. Auth.* (1977) 54 Cal.App.4th 772, 777; *Southgate Recreation & Park Dist. v. Cal. Ass'n for Park & Recreation Ins.* (2003) 106 Cal.App.4th 293, 297).

However, because many of the terms of MOC are derived from insurance policies, a number of cases interpreting MOCs has does no in reliance on principles of insurance law. (*See, e.g., City of South El Monte v. Southern Cal. Joint Powers Ins. Authority* (1995) 38 Cal.App.4th 1629, 1645-46 [interpreting meaning of "occurrence" by cases defining the term in insurance policies]; *City of Laguna Hills v. S. Cal. Joint Powers Ins. Auth.* (Cal. App. 2001) 2001 WL 1264549, *3 [relying on insurance case law to define meaning of "expected or intended" damages within a MOC].) Thus, it is likely that a California court interpreting the scope of coverage under a MOCs in relation to a sexual misconduct case would generally interpret such language as equivalent or nearly equivalent in scope as the same language in an insurance policy.

II. OUTSTANDING COVERAGE ISSUES RELATING TO SEXUALLY-BASED MISCONDUCT UNDER INSURANCE POLICIES AND MOCS

Sex-related insurance liability claims are not new. For decades, insurance companies (and now in some cases JPAs) have been fielding claims based on molestation, rape, sexual harassment, and the transmission of communicable diseases.

Historically, such claims have been framed as "bodily injury" claims, given the prevalence of "bodily injury" coverage under the most common forms of liability insurance (auto, homeowners and commercial general liability ["CGL"] policies). However, given the nature of these claims, they have led to substantive legal developments in certain areas of insurance law, particularly: (1) whether such claims fall within the "occurrence" or "accident" requirement in an insuring agreement; and/or (2) whether such claims are barred from coverage as a matter of public policy as expressed by Insurance Code §533 or otherwise.

However, newer trends in sex-related claims do not necessarily involve a physical touching which could implicate standardized "bodily injury" coverages. As a result, the realms coverage for "personal injury" and "employment practices liability" ("EPLI") should also be considered.

III. SEXUAL MISCONDUCT COVERAGE UNDER "OCCURRENCE" (ACCIDENT) COVERAGE FORMS

The insuring term "bodily injury" is often defined by most forms in terms of physical

injury and/or sickness.[2] Under such forms, "bodily injury" does not include emotional or mental injuries which are not coupled with physical injury. (*See Upsani v. State Farm General Ins. Co.* (2014) 227 Cal.App.4th 509, 521-522 ["The cases overwhelmingly hold that the phrase 'bodily injury, sickness or disease' is plain and unambiguous and that coverage under the bodily injury clause is limited to physical injury to the body and does not include nonphysical, emotional or mental harm."]; *AIM Ins. Co. v. Culcasi* (1991) 229 Cal.App.3d 209, 220 ["Given the clear and ordinary meaning of the word 'bodily,' we find the term 'bodily injury' unambiguous. It means physical injury and its consequences. It does not include emotional distress in the absence of physical injury."].)

As such, the standardized "bodily injury" requirement would not provide coverage for sexual misconduct which did not include or involve physical injury or contact to the victim (i.e. verbal sexual harassment, stalking, etc.)[3] However, other coverages which

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[2] *See, e.g.*, **Homeowners 3 - Special Form**, **HO 00 03 05 11** – "'Bodily injury' means bodily harm, sickness or disease, including required care, loss of services and death that results."

[3] One federal court decision held that emotional distress coupled with physical manifestations of emotional distress could satisfy the "bodily injury" definition. (*State Farm Fire & Cas. Co. v. Westchester Inv. Co.* (C.D.Cal. 1989) 721 F.Supp. 1165, 1167). However, subsequent California Court of Appeal decisions have not adopted this view, although they have avoided deciding it based on alternate grounds. (*See Stellar v. State Farm General Ins. Co.* (2007) 157 Cal.App.4th 1498, 1506-1507 [declining to decide the issue because the emotional distress injuries were not caused by an "occurrence"]; *American Internat. Bank v. Fidelity & Deposit Co.* (1996) 49 Cal.App.4th 1558, 1566 [declining to decide the issue where injuries arose from a non-covered economic loss].)

Moreover, the decision in *Upsani, supra,* emphasized that "emotional distress" injuries are not covered by standardized "bodily injury" coverages unless they flow from a covered loss. (*Id.*, 522 ["'Arguably, if the insured's conduct is otherwise covered by a [commercial general liability] policy, claims for emotional distress alone (unaccompanied by physical injury) should be covered.' And, as discussed in detail *ante*, the Upasanis' conduct was not otherwise covered by the State Farm policies, so Kulkarni's claims for emotional distress damages are not covered. 'Any damages flowing from noncovered

can be triggered without a "bodily injury" (i.e. "personal injury" and/or EPLI coverages) may apply.

Additionally, standardized language in homeowners and CGL liability policies restrict "bodily injury" coverage to injuries caused by an "occurrence," which is generally defined as an "accident."[4] Similarly, standardized auto liability forms provide liability coverage for "bodily injury" caused by an "accident."[5]

In California, the courts have repeatedly emphasized that the insuring term "accident" refers to the conduct of the insured for which liability is sought to be imposed – not on the insured's expectation of harm or injury. (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 304; *State Farm Gen. Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, 579; *Collin v. Am. Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 810; *Merced Mut. Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50;

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losses that may lead to emotional distress cannot be used to expand coverage where none was intended or bargained for by the parties.'"][citing Croskey et al., Cal. Practice Guide: Insurance Litigation (TRG 2013) ¶7:122.3, p. 7A–51 and *Waller v. Truck Ins. Exch., Inc*. (1995) 11 Cal.4th 1, 16].)

[4] *See, e.g.,* **CGL: CG 00 01 04 13 – "**'Occurrence'" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."; **Homeowners 3 - Special Form, HO 00 03 05 11 – "**'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: [¶] a. 'Bodily injury'; or [¶] b. 'Property damage'."

However, if the coverage form defines "occurrence" as "accident *or* event" or "accident *or* loss," then the "accident" coverage limitation would not apply. (*See United Pacific Ins. Co. v. The McGuire Co.* (1991) 229 Cal.App.3d 1560, 1567).

[5] *See, e.g.,* **Commercial Auto CA 00 01 12 93 –** "We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'."

Commercial Union Ins. Co. v. Superior Court (1987) 196 Cal.App.3d 1205, 1209; *Royal Globe Ins. Co. v. Superior Court* (1986) 181 Cal.App.3d 532, 537-538).

As a result, where the activity of the insured for which liability is sought to be imposed involves purposeful, deliberate conduct, there is no "accident," even if the consequences of the conduct are unexpected or unintended by the insured. (*Collin, supra,* 21 Cal.App.4th at 805; *Chatton v. Nat'l Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846; *see also Commercial Union, supra,* 196 Cal.App.3d at 1209; *Loyola Marymount Univ. v. Hartford Acc. & Indem. Co.* (1990) 219 Cal.App.3d 1217, 1224; *Dyer v. Northbrook Prop. & Cas. Ins. Co.* (1989) 210 Cal.App.3d 1540, 1547; *Modern Development Co. v. Navigators Ins. Co.* (2003) 111 Cal.App.4th 932, 943 [alleged failure to comply with antidiscrimination laws relating to access for the disabled did not allege an "accident"].)

Based on these legal principles, California courts have held that an insured's act of intentionally engaging in sexual activity with another person cannot constitute an "accident." (*See, e.g., Mendez, supra,* 213 Cal.App.3d 41, 50 [alleged sexual assault could not constitute an "occurrence" because "[a]ll of the acts, the manner in which they were done, and the objective accomplished occurred exactly as appellant intended…."]; *Quan, supra,* 67 Cal.App.4th 583, 596 ["negligence-based" causes of action in relation to alleged sexual assault did not satisfy "occurrence" requirement because "'[n]egligent" or not, in this case the insured's conduct alleged to have given rise to claimant's injuries is necessarily non-accidental, not because any 'harm' was intended, but simply because the conduct could not be engaged in by 'accident.'…. Yet even if a jury was to find that the insured was mistaken in his belief as to whether the claimant 'consented' to the touching, embracing, kissing or sexual intercourse, there was still no additional happening

constituting an 'accident' which caused the injuries. The other party's consent, or the lack thereof, cannot change the nature of the insured's deliberate acts. "].)[6]

If the conduct of the party committing the sexual misconduct is not an "accident," then the "occurrence" requirement is not satisfied for the vicariously-liable insured. (*See Dyer v. Northbrook Property & Casualty Ins. Co.* (1989) 210 Cal.App.3d 1540, 1551 [rejecting argument that insured's liability for wrongful termination satisfied "occurrence" requirement where it was only liable under *respondeat superior* because where the coverage issue was the meaning of "occurrence," the "issue was not who the policy insured but what harmed it covered."]; *State Farm Fire & Casualty Co. v. Ezrin* (N.D.Cal. 1991) 764 F.Supp. 153, 156 ["occurrence" requirement under parents' homeowner's policy precluded coverage for non-consensual sexual assault by son at his college fraternity]; *Fire Ins. Exch. v. Altieri* (1991) 235 Cal.App.3d 1352, 1359 [coverage under parents' homeowner's policy precluded for intentional assault committed by their teenager against a schoolmate].)[7]

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[6] *See also Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880 [Insured's act of taking woman by wrist and pulling her to alcove in context of his sexual advances was not an "accident" since insured had full knowledge of all objective facts and only miscalculated woman's state of mind]; *Northland Insurance Company v. Briones* (2000) 81 Cal.App.4th 796, 806 [repeated sexual assaults do not constitute an "accident"]; *Panko Architects, Inc. v. St. Paul Fire and Marine Insurance Co.* (Not Published, N.D. Cal. 1996) 1996 W.L. 162968 [no duty to defend a sexual harassment suit because "conduct forming the basis of a sexual harassment claim cannot be accidental...."].

[7] However, some older California federal cases have held that negligent supervision of an employee for such acts may be an "accident." (*Westfield Ins. Co. v. TWT, Inc.* (N.D.Cal. 1989) 723 F.Supp. 492, 495 ["Negligent supervision could constitute an 'occurrence' under the policy language."]; *Fireman's Fund Ins. Co. v. National Bank for Cooperatives* (N.D.Cal.1994) 849 F.Supp. 1347, 1367– 1368 [Where arbitration award against insured was for negligent supervision as well as intentional conduct, coverage was triggered

However, if intentional sexual conduct combines with an outside, unforeseen event to cause injury – i.e. transmission of a communicable disease – this may satisfy the "occurrence" requirement. (*See State Farm Fire & Cas. Co. v. Eddy* (1990) 218 Cal.App.3d 958, 972 [claims that insured transmitted herpes virus to claimant could potentially satisfy "occurrence" requirement because "although he performed an intentional act in having intercourse with Greenstreet, the causal factor for the injury, his infection with the herpes virus and its transmission to Greenstreet, was unexpected, unforeseen, and independent of the intentional conduct."].)

Also, the tort of "negligent hiring/supervision" may satisfy the "occurrence" requirement in some cases. (*See Minkler v. Safeco Ins. Co. of Am.* (2010) 49 Cal.4th 315 [while not addressing "occurrence" issue, holding that parents' alleged negligent failure to prevent molestation by son was not "intentional" conduct for purposes of intentional act exclusion]; *see also Westfield Ins. Co. v. TWT, Inc.* (N.D.Cal. 1989) 723 F.Supp. 492, 495 [holding "[n]egligent supervision could constitute an 'occurrence' under the policy language."]; *Fireman's Fund Ins. Co. v. National Bank for Cooperatives* (N.D.Cal.1994) 849 F.Supp. 1347, 1367–68; *Keating v. National Union Fire Ins. Co.* (C.D.Cal.1990) 754 F.Supp. 1431, 1439–40 rev'd on other grounds 995 F.2d 154 (9th Cir.1993); *but see Farmer ex rel. Hansen v. Allstate Ins. Co.* (C.D.Cal. 2004) 311 F.Supp.2d 884, 893 [stating in *dicta* that negligence supervision did not constitute an "occurrence" in sexual molestation case because the negligent supervision did not cause injury but "only created the potential for Plaintiff's injuries"].)

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because insured's negligent supervision of employees who made false or misleading statements found to constitute an "accident" within the meaning of "occurrence."].)

IV. SEXUAL MISCONDUCT COVERAGE UNDER "PROPERTY DAMAGE" COVERAGE

"Oddball" Issue:

While standardized "property damage" coverage would not appear to have any application to sexual misconduct claims, one could argue it would theoretically apply to claims that an individual wrongfully obtained and/or redistributed sexually related materials without the claimant's consent (i.e. photos, "sex tapes," etc.) However, it is likely that standardized "property damage" coverage would not apply in such cases for two primary reasons.

Plaintiffs' claims in such situations is not for the monetary value of the stolen/misappropriated materials, but rather for emotional and financial losses caused by the misappropriation. Such strictly economic injuries do not constitute "property damage" under standardized forms. (*See, e.g., American Internat. Bank v. Fidelity & Deposit Co.* (1996) 49 Cal.App.4th 1558, 1572; *Ananda Church of Self-Realization v. Mass. Bay Ins. Co.* (2002) 95 Cal.App.4th 1273, 1284). Nor would the loss of any "artistic" value of such materials constitute "property damage." (*See Schaefer/Karpf Productions v. CNA Ins. Companies* (1998) 64 Cal.App.4th 1306, 1317-1318 [economic loss sustained by the producer of a children's program videotape when copies of the tape, including pornographic material, were inadvertently distributed to children and schools, did not constitute physical injury to, or loss of use of "tangible property" for insurance purposes].)

Similarly, "loss of use" "property damage" coverage would not apply to claims that such materials were improperly "converted" to the insured's use because "loss of use"

coverage applies to the rental costs of damaged or destroyed property, not the total loss of converted property. (*See Advanced Network, Inc. v. Peerless Ins. Co*. (2010) 190 Cal.App.4th 1054, 1062-64; *Collin v. American Empire Ins. Co*. (1994) 21 Cal.App.4th 787, 408-409).

V. SEXUAL MISCONDUCT COVERAGE UNDER "PERSONAL INJURY" COVERAGE FORMS

In addition to "bodily injury" and "property damage" coverages, several liability policies provided "personal injury" coverage for arising out of several enumerated tort or offenses.[8] Because the offenses are framed in generic terms, California courts have emphasized "they should be construed broadly to encompass all specific torts which reasonably could fall within the general category." (*Fibreboard Corp. v. Hartford Acc. & Indem. Co.* (1993) 16 Cal.App.4th 492, 515).

Generally speaking, there is no requirement that "personal injury" result from an accidental "occurrence" as is required for "bodily injury" coverage. (*General Acc. Ins. Co. v. West American Ins. Co.* (1996) 42 Cal.App.4th 95, 103). However, some customized forms may exist where the "personal injury" coverage does require that liability arise out of an accident or occurrence. (*Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 609-610). While some of the enumerated torts may survive the "occurrence" restriction, others have argued that imposing the "occurrence" limitation

[8] **CGL 0001 11 85** – defining "personal injury" to include: "a. False arrest, detention or imprisonment; b. Malicious prosecution; c. Wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies; d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organizations goods, products or services; or e. Oral or written publication of material that violates a person's right of privacy."

renders coverage illusory. (*See Delgado v. Interinsurance Exch. Of Auto. Club of Southern Calif.* (2009) 47 Cal.4th 302, 308). Nevertheless, even an insured's intentional torts may be covered under "personal injury" coverage. (*David Kleis, Inc. v. Superior Cour*t (1995) 37 Cal.App.4th 1035, 1047; *Mez. Industries, Inc. v. Pacific National Ins. Co.* (1999) 76 Cal.App.4th 856, 866).

The "personal injury" offenses most likely applicable in sexual misconduct situations are the "invasion of right to privacy" offenses. Under California law, there are four types of violations of the right of privacy that are actionable in tort. (*Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, 819; *Fibreboard Corp. v. Hartford Accident & Indem. Co.* (1993) 16 Cal.App.4th 492, 514). They are: (1) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (2)public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. Such offences may come into play in cases of stalking, sexual harassment and transmission/republication of sexually explicit materials (e.g. "sexting").

"Personal injury" coverage for "defamation" claims would not apply to sexual harassment claims unless there are allegations that the harassing statements are "published" to third parties. (*See Shanahan v. State Farm General Ins. Co.* (2011) 193 Cal.App.4th 780, 787-789 [allegations that representatives of corporate client grabbed attorney and asked if attorney wanted him to "f*** [her] brains out" did not create any potential liability for "slander" because there were no allegations that a third party heard

the statement].)[9]

The term "humiliation" as used in a "personal injury" definition refers to humiliation suffered in connection with the other, specified "character and reputation" torts – invasion of privacy, defamation, etc. – and does not create separate coverage for allegations that a claimant felt "humiliated." (*See Am. Motorists Ins. Co. v. Allied-Sysco Food Servs., Inc*. (1993) 19 Cal.App.4th 1342, 1351 disapproved in part on other grounds by *Buss v. Superior Court* (1997) 16 Cal.4th 35 ["Interpreting the term 'humiliation' in this context, it is not reasonable to conclude that AMICO insured against humiliation damages in the abstract, but rather in relation to the class of torts in which it was placed—i.e., torts dealing with injuries to character and reputation."]; *Innovay, Inc. v. Hartford Cas. Ins. Co.* (2010) 2010 WL 2978632, at *5 [unpublished case holding no coverage for "humiliation" arising from non-covered fraud].)

Related Code sections which also may come into play in connection with "right of privacy" violations include:

The California Constitution as amended in 1972 provides constitutional protection for the right to privacy. (*Cal. Const. art. I, §1*). California courts have held that violations of the state constitutional right to privacy, both by private and public actors, are actionable. (*Hill v. Nat'l Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 20 ["In summary, the Privacy

[9] The *Shanahan* court also held that the insured's alleged harassing statements and action (i.e. grabbed" her "by the buttocks, made comments about [her] body, and lewdly suggested [she] engage in sexual intercourse with [him]") did not create any potential for an "occurrence" because the conduct was not "accidental." (*Id.*, 789). Nor did the alleged "grabbing" create any potential for "bodily injury" because there were no allegations of any resulting "actual physical injury." (*Id.*, 787).

Initiative in article I, section 1 of the California Constitution creates a right of action against private as well as government entities."].) A cause of action for violation of the state constitutional right to privacy is generally equivalent to the common-law cause of action for "intrusion" into one's private affairs. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 287-88; *Carter v. Cnty. of Los Angeles* (C.D.Cal. 2011) 770 F.Supp.2d 1042, 1052).

The California Privacy Act which makes it illegal for any person to intentionally record a confidential communication without the consent of all parties to the communication. (Cal. Penal Code §632(a)). However, liability under Penal Code §632(a) could implicate the "Criminal Act" exclusion. (*See, infra*).

Civil Code §1708.8 which imposes civil liability for "[p]hysical invasion of privacy by trespass in a manner offensive to a reasonable person with intent to photograph or record plaintiff engaging in personal or familial activities" or "[c]onstructive invasion of privacy by use of a 'visual or auditory enhancing device' to photograph or record plaintiff engaging in personal or familial activities under circumstances in which plaintiff had a reasonable expectation of privacy." Liability under §1708.8 extends to anyone who induced or caused the actor's paparazzi-like activities and to the first publisher or seller of the material obtained through such activities. (*See LensCrafters, Inc. v. Liberty Mutual Fire Ins. Co.* (Not Published, N.D.Cal. 2005) 2005 U.S.Dist.LEXIS 47185, 2005 WL 146896, at *10]; *Gauntlett v. Ill. Union Ins. Co.* (Not Published, N.D.Cal. 2012) 2012 U.S.Dist.LEXIS 131086).

Civil Harassment under C.C.P. §527.6, which was "enacted to protect the individual's

right to pursue safety, happiness and privacy as guaranteed by the California Constitution." (*Brekke v. Wills* (2005) 125 Cal.App.4th 1400, 1412). The statute has been applied to sexual misconduct which would cause a reasonable person to suffer substantial emotional distress. (*Id.* [§527.6 applied to a series of letters written by a boyfriend of a teenage girl and intended to be discovered by her mother, including threats of harm to the mother, vile language and inappropriate sexual references to the daughter, coupled with other behaviors intended to undermine mother's parental control].) However, §527.6 only authorizes injunctive relief to prevent future harm, such that a §527.6 claim would not implicate coverage under a form limiting coverage to "damages." (*See Cutler-Orosi Unified School District v. Tulare School Dist.* (1994) 31 Cal.App.4th 617, 630 [holding that suit seeking injunction did not seek "damages"].)

VI. SEXUAL MISCONDUCT COVERAGE UNDER EPLI COVERAGE FORMS

EPLI coverage is generally written to provide coverage for enumerated "wrongful employment practices" directed against former, existing and prospective employees. For example, the wrongful "employment practices" enumerated by the ISO CGL EPLI endorsement include "harassment, coercion, humiliation or discrimination" based on the employee's "marital status, medical condition, gender, age, physical appearance, … pregnancy, sexual orientation or preference; or any other protected class or characteristic established by any federal, state or local statues, rules or regulations" as well as "personal injury" arising from such wrongful "employment practices."[10]

One of the primary issues with EPLI coverage in relation to sexual misconduct claims is

[10] *See* **EP 70 01 04 04 09.**

whether the claims necessarily involve "intentional" conduct such that coverage would be excluded under the "Intentional Act" exclusion[11] and/or Insurance Code §533. Courts addressing the issue have held that the injury from certain sexual harassment claims are not necessarily "intentional" where there is evidence that the victim may have consented to the treatment. (*See Markel Am. Ins. Co. v. G.L. Anderson Ins. Servs., Inc.* (E.D.Cal. 2010) 715 F.Supp.2d 1068, 1078-79 ["With respect to Cole's harassment claim, defendants present evidence that Anderson believed the conduct at issue was welcome. Specifically, Cole engaged in much of the conduct complained of and referred to herself as a 'bitch' and 'whore' prior to Anderson's use of those terms…. Accordingly, the court cannot conclude as a matter of law that defendants intentionally or willfully harassed … Cole."]; *see also Richard A. Lesser v. State Farm Fire & Cas. Co.* (C.D.Cal. 1996) 1996 WL 339854, *7-8 [unpublished case holding that sexual harassment claim was not necessarily intentional where insured presented evidence that he believed the relationship was consensual]; *David Kleis, Inc. v. Superior Court* (1995) 37 Cal.App.4th 1035, 1050 ["a claim of sexual misconduct may give rise to a potential defense of consent or mistaken belief in the right to engage in the conduct, thus negating any intent to sexually harass or discriminate against the victim. The fact that the victim construed the activity as sexual misconduct, and filed a claim on that basis, does not preclude a jury from finding that no sexual harassment took place"].)

Additionally, even with respect to claims of sexual harassment and discrimination claims

[11] To avoid the issue of "illusory" coverage, some coverage forms specifically will write the "intentional act" exclusion so that it *does not* apply to EPLI coverage. (*See* A. Wilson & M. Maslowski, "EPLI and Intentional Act Exclusions," *Tortsource* (ABA Spring 2001) (located at http://www.frostbrowntodd.com/resources-1337.html [last viewed 1/16/15].)

involving intentional conduct, Insurance Code §533 only bars indemnification for such claims and not a defense against such claims. (*See Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 507-08 [notwithstanding fact that malicious prosecution was a necessarily "willful" act under §533 such that indemnification was barred as a matter of law, insurer's express promise to provide "personal injury" liability coverage for malicious prosecution required insurer to provide defense coverage against such claims].) Therefore, even though EPLI coverage forms list various "wrongful employment practices" which are necessarily "willful" and for which there can be no indemnity coverage as a matter of California public policy, the contractual promise to provide such coverage would require the party promising to provide EPLI coverage to defend against such claims.[12]

VII. POTENTIALLY APPLICABLE COVERAGE EXCLUSIONS

A. The "Intentional Act" Exclusion

Most policy forms and MOUs include an exclusion for "expected or intended" injuries.[13] Under California law, injuries are "expected or intended" if the insured subjectively

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[12] Consistent with this indemnity limitation, many EPLI coverages are written on a "burning limits" basis (i.e. amounts spent on the defense reduce the applicable liability indemnification limit). As a result, EPLI coverage can be seen as primarily intended to provide defense coverage, rather than indemnity coverage. On the other hand, EPLI policies frequently include a self-insured retention or deductible so that defense expenses incurred in connection with employee "nuisance" claims will not be borne by the insurer. (*See* S. Gironda, "An Overview Of Employment Practices Liability Insurance And Practical Considerations From A Plaintiff's Perspective," pp.4-5 (at www.american bar.org [last visited 1/16/15].)

[13] **CGL: CG 00 01 04 13** – "This insurance does not apply to: a. Expected or Intended Injury [¶] 'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured. This exclusion does not apply to 'bodily injury' resulting from the use of reasonable force to protect persons or property."

expects or intends injury to occur. (*Shell Oil v. Winterthur Swiss* (1993) 12 Cal.App.4th 715, 747; *Armstrong World Indus. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1, 69 [subjective test for application of "expected or intended" exclusion to asbestos-related bodily injury claims]; *Zelda, Inc. v. Northland Ins. Co.* (1997) 56 Cal.App.4th 1252, 1261 ["Thus, injuries that are planned or believed to be substantially certain by the insured are 'intended' or 'expected."].)

For duty to defend purposes, California cases generally will apply an "intentional act" exclusion to preclude all potential coverage only in situations where the insured's acts (either as alleged or proven in another proceeding) were such that some harm was necessarily intended or expected by the insured as a matter of law. (*See, e.g., ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 147 Cal.App.4th 137, 155 [intentional act exclusion eliminated duty to defend advertising injury involving the sending of junk faxes because "[t]he sender of a fax necessarily anticipates and intends the consequence that printing the faxed document will use the recipient's ink and paper and will cause the recipient's loss of use of the fax machine during transmission. The exclusion for intentional property damage therefore forecloses coverage, because the fax recipient's loss is 'expected or intended from the standpoint of the insured."]; *Castro v. Allstate Ins. Co*. (S.D.Cal. 1994) 855 F.Supp. 1152, 1155 [exclusion precluding coverage for intentional or expected injuries by "any insured" eliminated duty to defend parents for negligent supervision in case involving criminal homicide]; *see also Gray v. Zurich Ins. Co*. (1966) 65 Cal.2d 263, 277 [intentional act exclusion did not eliminate defense duty where there is a reasonable probability that the complaint could be amended to allege injury caused by non-intentional, injurious conduct].)

A provision excluding coverage for intentional injuries by "the insured" applies to acts by the insured person seeking coverage under the policy, rather than acts by other persons who may also be covered under the policy (e.g., family members, employers, etc.). Thus, so long as the insured person seeking coverage was not personally at fault, he or she is entitled to indemnification against vicarious liability for injuries committed by other insureds. (*Arenson v. National Auto. & Cas. Ins. Co*. (1955) 45 Cal.2d 81, 84; *American States Ins. Co. v. Borbor by Borbor* (9th Cir. 1987) 826 F.2d 888, 894). The same result applies to an exclusion excluding coverage for intentional injuries by "an" insured or "any" insured if the policy also has a standardized "separation of insureds" provision. (*Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 325).

Note: However, exclusions using the terms "an insured" or "any insured" can still preclude coverage for other "innocent co-insureds" if they exclude coverage for an entire "category of risk," (i.e. "liability arising from 'an' or 'any' insured's ownership or operation of an airplane, car, or boat), or for claims by one insured against another person insured under the same policy.") (*Minkler, supra*, 49 Cal.4th 315, 329 fn.5).

"Intentional act" exclusions categorically exclude coverage for sexual misconduct claims – such as sexual molestation, sexual assault and intentional sexual harassment – which have been held to involve necessarily intentional injuries. (*Northland Ins. Co. v. Briones* (2000) 81 Cal.App.4th 796, 811; *Aetna Cas. & Sur. Co. v. Superior Court* (1993) 19 Cal.App.4th 320, 331; *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1609-10).

Conversely, "intentional act" exclusions do not eliminate the defense duty with respect to

sexually transmitted disease claims where there is a factual possibility that the insured did not actually intend or expect to transmit a disease to his or her sexual partner(s). (*See Eddy, supra,* 218 Cal.App.3d 958, 971-72; *Peters v. Firemen's Ins. Co*. (1998) 67 Cal.App.4th 808, 813 n.3; *Aetna Cas. & Sur. Co. v. Sheft* (C.D.Cal. 1990) 756 F.Supp. 449, 451-52).

B. The "Sexual Molestation" Exclusion

In an apparent abundance of caution, many HO carriers are including in their policies exclusions for injuries "arising out of" "any [] sexual activity or conduct" and/or "sexual molestation, corporal punishment or physical or mental abuse."

Generally speaking, these exclusions are interpreted as "category of risk" exclusions[14] and excluded coverage for vicarious liability for sexual misconduct. (*See Farmers ex rel. Hansen v. Allstate Ins. Co.* (C.D.Cal. 2004) 311 F.Supp.2d 884, 895 [sexual molestation exclusion in HO policy barring coverage for any injuries "arising out of sexual molestation" by "an insured person" precluded coverage for the insured day care provider whose negligent supervision allowed her insured husband to molest a child]; *Berkeley Unified School Dist. v. United Nat. Ins. Co.* (Not Published, Cal.App. 2002) 2002 W.L. 180258 [sexual misconduct exclusion precluded coverage for school district for negligent retention and supervision of teacher who sexually molested students because "not only excluded coverage for [the teacher's] conduct, but for any claim arising from [the teacher's] conduct, irrespective of the legal theory asserted against the School District. As

[14] Again, a "category of risk" exclusion removes coverage for injuries arising out of an entire category of conduct (i.e. use of a boat) or certain types of claims (i.e. intra-family torts). As a result, "category of risk" exclusion would apply to remove coverage for such risks with respect to all insureds under the policy.

all of the claims arose directly or indirectly from [the teacher's] acts of sexual molestation, they were excluded."].)

However, if the alleged sexual misconduct is unproven and there is a potential that the insured could be held liable only for "negligent touching," the exclusion will not eliminate all potential coverage for duty to defend purposes. (*See, e.g., Quigley v. Travelers Prop. & Cas. Ins. Co.* (E.D.Cal. 2009) 630 F.Supp.2d 1204, 1221-1222 [sexual molestation exclusion did not eliminate defense duty in an action asserting claims for, *inter alia*, battery and sexual battery regarding insured's alleged touching of his step-granddaughter's private areas. The insured maintained that, while he intended to and did apply baby powder and a topical antibiotic ointment, he did not intend to cause harm when he provided such "first aid," even though it "unexpectedly" resulted in an infection, and no acts of molestation had been proven or admitted]; *see also Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1085 ["We note, too, that if facts known to the insurer suggest a possibility that what plaintiff alleges to be sexual molestation may be found to be merely a negligent touching, then there is potential coverage and consequently a duty to defend."][citing *State Farm Fire and Cas. Co. v. Nycum* (9th Cir.1991) 943 F.2d 1100]).

Many cases involve injuries causes by a course of conduct involving both direct sexual misconduct (i.e. molestation, assault) and related acts which do not necessarily rise to the level of direct sexual misconduct (i.e. unwanted touching, public comments, inappropriate looking, etc.) In such cases where the insured is sued for both the direct sexual misconduct and related "negligent" acts, the exclusion will eliminate coverage for the "negligent" acts if they are "inextricably intertwined" with the sexual misconduct.

(*See Horace Mann, supra*, 4 Cal.4th 1076, 1085 ["The gravamen of each of the so-called 'parasexual' actions—'[a]llowing Barbara B[.] to sit on his lap in front of other students,' '[k]issing Barbara B[.] on the forehead in front of other students,' '[h]ugging Barbara B[.] in front of other students,' '[p]utting his arm around Barbara B [.] in front of other students'—was its commission in front of other students. Horace Mann has not shown that any of those public acts were inherently harmful or amounted to sexual molestation, so as to come within *J.C. Penney's* bar to indemnity. The possibility of a duty to indemnify remains because the alleged acts arose from Lee's interaction with students in the course of his educational activities….In many cases the plaintiff's allegations of molestation and other misconduct may be inseparably intertwined (e.g., when the molestation allegedly was carried on in secret, without any distinct injury to the plaintiff's social relations)."]; *Marie Y. v. Gen. Star Indem. Co.* (2003) 110 Cal.App.4th 928, 957 ["where harm is alleged to result from negligent conduct which is 'so intertwined with [intentional and willful wrongdoing] as to be inseparable [from the wrongdoing]' the alleged negligence does not give rise to an insurer's duty to indemnify"][citing *Coit Drapery*, *supra,* 14 Cal.App.4th 1595, 1605]; *Quigley*, *supra,* 630 F.Supp.2d 1204, 1221-1222 [applying *Horace Mann* "inexplicably intertwined" analysis to sexual molestation exclusion].)

However, if the "related" negligence acts are all "directed towards the goal of sexual intimacy," they are "inseparably intertwined" with the direct sexual misconduct and can be excluded from coverage by the "sexual molestation" exclusion. (*See Briones*, *supra*, 81 Cal.App.4th 796, 809 [distinguishing *Horace Mann* and explaining "[t]he few remaining allegations of negligence fall within the general category of child molestation.

These include allegations that Mr. Briones (1) 'negligently caused their relationship to become far more intense than that of teacher-student ...'; (2) 'negligently interfered with the familial relationship" and "negligently interfered with the rights of [the parents] to the care, custody, and companionship of their daughter by spending time with and negligently engaging in sexual intercourse with Plaintiff CONNIE [L.] ...'; (3) negligently touched private areas while giving karate lessons; (4) negligently performed a breast examination; (5) showed affection and being flirtatious in front of her fellow students; and (6) inundated her with letters 'in an effort to discuss their relationship and the status thereof.' Thus, all of these activities, even if they are considered not to be intentional conduct, are still sexual misconduct, i.e., they were all directed towards the goal of sexual intimacy…. Under the policy in *Horace Mann*, there was a possibility of liability for other misconduct not amounting to sexual molestation. Under the policy here, there was no such possibility because the policy terms were significantly different:…Since all of the conduct alleged in the complaint falls within the general category of sexual misconduct, the insurance company had no duty to either indemnify or defend the teacher from the effects of either his willful, intentional misconduct (Ins.Code, § 533) or his negligent or reckless conduct because '[t]his exclusion applies whether damages arise from an insured's act or failure to act.'"].)

C. <u>The "Assault And Battery" Exclusion</u>

Again in an abundance of caution, many coverage forms include policy exclusions for "assault and battery."[15]

[15] *See, e.g.,* CGL Endorsement no. QBCG-0161 "This insurance does not apply to: Assault and Battery 'Bodily injury', 'property damage' or 'personal and advertising

As written, such exclusions are "category of risk" exclusions which: (1) apply to all insureds under the policy whether or not a vicariously liable insured was involved in the alleged assault; and (2) preclude coverage for derivative claims (i.e. negligent supervision or retention). (*See, e.g., Century Transit Systems, Inc. v. American Empire Surplus Lines Insurance Company* (1996) 42 Cal.App.4th 121, 128 [explaining exclusion "places the focus not upon an insured's conduct or intent, but rather upon the *type of event* in which a plaintiff has sustained an injury" with the result that "a suit based on assault and battery is excluded *no matter who commits it.* It is the happening of the event which compels application of the exclusion."][emphasis added]; *Zelda, Inc. v. Northland Ins. Co.* (1997) 56 Cal.App.4th 1252, 1260-1260 [exclusion for bodily injury "arising out of assault or battery, or out of any act or omission in connection with the prevention or suppression of an assault and battery" precluded coverage for claim that the corporate employer of the alleged assailant negligently hired, trained and supervised him because the exclusion "by its plain language, covers injury or damage arising when someone (not necessarily an insured) commits an act of assault or battery, or is in the course of committing an assault and battery."].)

Because the exclusion categorically applies to the risk of "assault and battery," it precludes coverage for claims arising out of "assault and battery" by third persons,

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injury' arising from the following: (1) assault and battery or any actor or omission in connection with the prevention or suppression of such acts; or (2) harmful or offensive contact between or among two or more persons; or (3) apprehension of harmful or offensive contact between or amount two or more persons; or (4) threats by words or deeds. [¶] This exclusion applies regardless of the degree of culpability or intent and without regard to: (1) whether the acts are alleged to be by or at the instruction or at the direct of the insured, his officers, employees, agents or servants… (2) the alleged failure of the insure or his officers, employees, agents or servants in the hiring, supervision, retention or control of any person….; (3) the alleged failure of the insured or his officers, employees, agents or servants to attempt to prevent, bar or halt any such conduct…."

whether or not those third persons are insureds. (*See Mount Vernon Fire Ins. Corp. v. Oxnard Hospitality Enter., Inc*., 219 Cal.App.4th 876, 881-882 [nightclub patron's attack on insured's employee fell within scope of exclusion].) The exclusion also applies even if there is no direct "body to body contact" involved. (*Id.* [act in throwing flammable liquid on nightclub employee and lighting it on fire constituted a "battery" within scope of exclusion].; *Century Transit, supra,* 42 Cal.App.4th 121, 130 [exclusion applied to claim that employee had struck demonstrators with flashlight].)

D. The "Criminal Act" Exclusion

Many liability policies contain an exclusion to preclude coverage for an insured's "criminal" acts.[16] California cases construing "criminal act" exclusions have found they apply to all injuries flowing from acts which violate the penal code, regardless of the intent of the criminal actor. (*See, e.g., 20th Century Ins. Co. v. Schurtz* (2011) 92 Cal.App.4th 1188, 1196-1197; *Nationwide Mut. Ins. Co. v. Holton* (N.D.Cal. 2006) 2006 U.S.Dist.LEXIS 5254, *16-21; *Allstate Ins. Co. v. Talbot* (N.D.Cal. 1988) 690 F.Supp. 886, 889-890).

While "criminal act" exclusions function as "category of risk" exclusions, they require proof that the complained-of actions were necessarily criminal, with the result that they require proof of a criminal conviction to eliminate coverage. (*Schurtz, supra,* 92 Cal.App.4th 1188, 1196-1197 [*nolo conterndere* plea to felony shooting established application of "criminal act" exclusion as a matter of law]; *20th Century Ins. Co. v.*

[16] **CG 00 01 1188 –** "This insurance does not apply to: … criminal acts committed or directed by the insured."

Stewart (1998) 63 Cal.App.4th 1333, 1338-39 [guilty plea to manslaughter established application of "criminal" act exclusion].)

While not a policy exclusion *per se*, Insurance Code §533.5 states that "[n]o policy of insurance shall provide, or be construed to provide": (1) "any coverage or indemnity for the payment of any fine, penalty, or restitution in any criminal action or proceeding"; (2) "any duty to defend … any claim in any criminal action or proceeding"; and that (3) "[a]ny provision in a policy of insurance which is in violation [these] subdivision[s] is contrary to public policy and void." However, §533.5 has been held not to apply to federal criminal actions. (*See Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1389-90; *Bodell v. Walbrook Ins. Co*. (9th Cir. 1997) 119 F.3d 1411, 1415-16).

E. The "Communicable Disease" Exclusion

An increasing area of sexually related tort claims involved the transmission of sexually communicable diseases. In California, a person who unknowingly contracts a sexually transmitted disease may maintain a an action for damages against one who either negligently or through deceit infects her with the disease. (*Kathleen K. v. Robert B.* (1984) 150 Cal.App.3d 992; *see also Doe v. Roe* (1990) 218 Cal.App.3d 1538, 1545 ["A reasonable person should know that if he/she has a contagious, sexually transmissible disease like genital herpes, the disease is likely to be communicated through sexual contact. Thus people suffering from genital herpes generally have a duty either to avoid sexual contact with uninfected persons or, at least to warn potential sex partners that they

have herpes before sexual contact occurs."].)[17]

In an apparent abundance of caution, insurers are increasingly adding exclusions precluding coverage for injury resulting from the "communication" or "transmission" of "illness, sickness or disease."

While there does not yet appear to be a published California case applying such an exclusion, one California case has noted in *dicta* that such exclusions are permissible, enforceable and consistent with California public policy. (*See Eddy*, *supra*, 218 Cal.App.3d 958, 972).

Courts in other jurisdictions have treated such exclusions as "category of risk" exclusions which preclude coverage for claims arising out of sexually transmitted diseases through (otherwise) consensual sexual intercourse. (*See, e.g., Clarke v. State Farm Florida Ins.* (Fla. Dist. Ct. App. 2012) 123 So.3d 583; *Plaza v. Gen. Assur. Co*. (N.Y.App.Div. 1997) 244 A.D.2d 238, 238-39, 664 N.Y.S.2d 444, 444; *Lambi v. Am. Family Mut. Ins. Co*. (8th

[17] Additionally, California Health & Safety Code §120290 states that "any person afflicted with any contagious, infectious, or communicable disease who willfully exposes himself or herself to another person, and any person who willfully exposes another person afflicted with the disease to someone else, is guilty of a misdemeanor."

Similarly, Health & Safety Code §120600 provides that "[a]ny person…who exposes any person to or infects any person with any venereal disease; or any person infected with a venereal disease in an infectious state who knows of the condition and who marries or has sexual intercourse, is guilty of a misdemeanor."

With respect to HIV, California Health & Safety Code § 120291(a) states that "[a]ny person who exposes another to the human immunodeficiency virus (HIV) by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV-positive status, and acts with the specific intent to infect the other person with HIV, is guilty of a felony punishable by imprisonment in the state prison for three, five, or eight years."

Cir. 2013) 498 F. App'x 655, 656).

At the same time, courts in the Third Circuit have found a "sexually transmitted disease" exclusion potentially "ambiguous" and inapplicable to personal injuries which did not have a direct, causal connection to the sexual transmission of a communicable disease. (*12th St. Gym, Inc. v. Gen. Star Indem. Co.* (3d Cir. 1996) 93 F.3d 1158, 1167 [exclusion did not apply to claims that gym member was wrongfully barred from gym entry after AIDS diagnosis]; *12th St. Gym, Inc. v. Gen. Star Indem. Co*. (E.D.Pa. 1997) 980 F.Supp. 796, 803 [same].)

F. Potential Application Of Public Policy Coverage Restrictions In Relation To Insurance Policies And/Or MOCs

Insurance Code §533 provides that an insurer is not liable for a loss caused by the "willful" act of the insured. Section 533 is deemed to be a "part of every insurance contract and is equivalent to an exclusionary clause in the contract itself." (*Allstate Ins. Co. v. Overton* (1984) 160 Cal.App.3d 843, 849; *United States Fid. & Guar. Co. v. American Employers Ins. Co.* (1984) 159 Cal.App.3d 277, 283-284; *Evans v. Pacific Indemnity Co.* (1975) 49 Cal.App.3d 537, 540).

For an act to be "willful" within the meaning of §533, the California Supreme Court has held that it must be an act that is intentional and "inherently harmful." (*J.C. Penney Cas. Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009). Under this standard, "inherently harmful" sexual misconduct – (i.e. sexual molestation, sexual harassment, sexual assault, sexual battery) is excluded from coverage by operation of §533 (*Id.*, [sexual molestation coverage precluded under §533 despite lack of intended harm]; *Coit Drapery, supra*, 14 Cal.App.4th 1595).

§533 would apply to preclude indemnification for "para-sexual" conduct which is "inextricably intertwined" with "willful[,]" "inherently harmful" conduct. (*See Horace Mann, supra,* 4 Cal.4th 1076, 1085; *Marie Y, supra,* 110 Cal.App.4th 928, 957; *Coit Drapery, supra,* 14 Cal.App.4th 1595, 1605).

While it is often discussed as an "implied policy exclusion," §533 only precludes indemnity coverage and does not preclude defense coverage in connection with "willful," "inherently harmful" conduct. (*See Republic Indem. Co. v. Superior Court* (1990) 224 Cal.App.3d 492, 498; *Ohio Cas. Ins. Co. v. Hubbard* (1984) 162 Cal.App.3d 939, 946-47).

Also, §533 does not apply to preclude coverage for insureds held vicariously liable for the "willful" conduct of other parties. (*Fireman's Fund Ins. Co. v. City of Turlock* (1985) 170 Cal.App.3d 988, 1001 *disapproved of on other grounds by Vandenberg v. Superior Court* (1999) 21 Cal.4th 815; *California State Auto. Assn. Inter-Ins. Bureau v. Carter* (1985) 164 Cal.App.3d 257, 263).

Strictly speaking, §533 does not apply to coverage under a MOC because they are not insurance policies. (*Fort Bragg, supra*, 194 Cal.App.4th 891, 904; *Orange County Water Dist., supra,* 54 Cal.App.4th 772, 777; *Southgate Recreation, supra,* 106 Cal.App.4th 293, 297). At the same time, §533 reflects a general "public policy" to preclude coverage for "willful" acts. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18; *J.C. Penney Ins. Co. v. M. K.* (1991) 52 Cal.3d 1009, 1020; *Tomerlin v. Canadian Indem. Co.* (1964) 61 Cal.2d 638, 648). Thus, there is a strong argument that an MOC cannot

provide coverage for injuries arising out of "willful" acts.[18]

VIII. COVERAGE ISSUES REGARDING VEHICLE INSURERS: SEX IN CARS AND BOATS – ARE THEY "USING" THE VEHICLE?

Historically, vehicle liability insurers have been able to stay out of the fray when it comes to sex-related claims, even where the sexual misconduct takes place in or around the vehicle.

California Insurance Code §11580.1 regulating the mandatory content of "automobile liability insurance" defines such coverage, in relevant part, as "liability arising out of the ownership, maintenance, or use" of a motor vehicle. California courts have fashioned a variety of tests to determine when an activity "arises out of the use" of an automobile:

Some courts hold that "[t]he resulting injury must be a 'natural and reasonable incident or consequence of the [use of the vehicle] for the purposes shown in the declaration." (*Harbor Ins. Co. v. Employers' Surplus Lines Ins. Co.* (1972) 26 Cal.App.3d 559, 567;

[18] Additionally, on its face Civil Code §1668 would appear to invalidate coverage for "willful injury" under a MOC. ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or *willful injury* to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.") (emphasis added). However, it is questionable whether §1668 would apply to coverage under a MOC because despite its language, California courts have determined that it does not apply to contractual indemnity agreements. (*See, e.g., Farnham v. Superior Court* (1997) 60 Cal.App.4th 69, 74; *John E. Branagh & Sons v. Witcosky* (1996) 242 Cal.App.2d 835, 838.)

Under California Civil Code §2773, "[a]n agreement to indemnify a person against an act thereafter to be done, is void, if the act be known by such person at the time of doing it to be unlawful." However, for §2773 to preclude coverage under a MOC, it may be required to show that the party seeking indemnity had actual knowledge that they were committing an unlawful act. (*See 20th Century Ins. Co. v. Stewart* (1998) 63 Cal.App.4th 1333, 1336-1337; *Eddy, supra*, 218 Cal.App.3d 958, 967-968). As a result, Civil Code §2773 would not apply to preclude coverage for all "willful injuries" under a MOC.

see also Truck Ins. Co. v. Webb (1967) 256 Cal.App.2d 140, 145).

Several courts have required that use of a vehicle be a "predominating cause," "material element," or "substantial factor" in the injury. (*See Interinsurance Exch. v. Macias* (1981) 116 Cal.App.3d 935, 938). However, courts in other insurance contexts have only required a "minimal causal connection" between the "use" of the auto and the injuries. (*See State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 100 n.7 [holding that "the 'use' of an automobile need not amount to a 'proximate cause' of the accident for coverage to follow" but "[s]ome minimal causal connection between the vehicle and an accident is, however, required."]; *see also State Farm Mut. Auto. Ins. Co. v. Davis* (9th Cir. 1991) 937 F.2d 1415, 1419 n.3 ["When the *Partridge* court said a use of an automobile need not be a proximate cause in order to require coverage as long as it was a minimal cause, we understand it to mean that the causal nexus need not be substantial."].)

Finally, some courts have phrased the test in the negative, finding that an injury does not arise from the "use" of an automobile when the injury is "an independent act or intervening cause, wholly disassociated from, independent of and remote from the use of the vehicle." (*Aetna Cas. & Sur. Co. v. Safeco Ins. Co.* (1980) 103 Cal.App.3d 694, 700; *Dillon v. Hartford Acc. & Indem. Co.* (1974) 38 Cal.App.3d 335, 343).[19]

[19] However, an accident does not have to involve physical contact between the covered vehicle and another vehicle, person or other piece of property. (*See United Steel Corp. v. Transport Indem. Co.* (1966) 241 Cal.App.3d 461, 467 ["the fact that the insured vehicle was exerting no physical force upon the instrumentality which was the immediate cause of the injury, and was not itself in physical contact with the decedent or his truck is neither decisive of nor fatal to the plaintiff's claim of coverage…It is sufficient that the use was 'connected with the accident or the creation of a condition that caused the accident.'"].)

Based on these standards, sexual assaults committed in or around a vehicle have been found not to arise out of the "use" of the vehicle. (*See, e.g., American Nat. Prop. & Cas. Co. v. Julie R.* (1999) 76 Cal.App.4th 134, 139 [rape did not arise out of "use" of car even though insured parked car next to chain link fence to prevent the victim's escape because "use" of the vehicle was not the "predominating cause" of the injury]; *R. A. Stuchbery & Others Syndicate 1096 v. Redland Ins. Co*. (2007) 154 Cal.App.4th 796 [shuttle service vehicle who, instead of driving the victim to a teen shelter as requested, drove her to his apartment where he raped her did not "use" vehicle in the attack because the vehicle was merely used to transport victim to the site of the attack]; *Peters v. Fireman's Ins. Co. of Newark* (1998) 67 Cal.App.4th 808, 810 [a boat was not "used" to transmit the herpes virus when the particular act allegedly resulting in the transmission occurred on the insured's yacht].[20])

The court in *Julie R.* theorized that a sexual assault could potentially arise out of the "use" of a vehicle if the vehicle were used to transport the victim "to a remote location or

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[20] The *Peters* court left little to the imagination regarding its view regarding what it would have required for a herpes infection to have "arisen" out of the use of a boat. (*Id.*, 813 and fn. 2 ["Appellant is not claiming that his yacht plunged into a wave trough, causing him to stumble and fall, mouth open, onto Susan L.'s vagina. Rather, the yacht merely provided a situs—along with appellant's house and Susan L.'s house—wherein appellant executed his plan to engage in a variety of 'very free sexual activities' with Susan L. This is not the type of boat 'use' contemplated by appellant's yacht policy…. Appellant does, however, hypothesize that the disease may have been transmitted if 'he helped steady [Susan L.] on the rocky boat' or if the amorous couple hit an ocean swell causing them to fall and a herpes infection on his finger caused a herpes infection on her finger which was then somehow transferred to her vagina. Apart from its absurdity, appellant's speculation is unsupported by the record. There is no proof that appellant ever steadied Susan L. on the boat, and certainly not by grabbing her crotch. Moreover, there is no proof that either appellant or Susan had open herpes lesions on their hands. Appellant is simply fabricating outlandish theories. Appellant cannot establish a potential for coverage unless there are some colorable facts supporting his theories."].)

to a place where he had prepared equipment to restrain" the victim such that "use of the car would have contributed to the potential that [the insured] would be successful in his attack." (*Id.*, 141). However, it does not appear that any California cases have applied such a theory. (*See Stuchbery, supra*, 154 Cal.App.4th 796, 803 [use of shuttle to transport victim to insured's apartment did not constitute "use" of vehicle because the shuttle "was merely used to transport the victim to the locale of the rape. Her injury resulted from Downer's conduct and his intent to rape the plaintiff in his apartment, not from the 'use' of the shuttle."].)

IX. "AN OUNCE OF PREVENTION" – MANAGING RISKS OF SEXUAL MISCONDUCT

A. Employer Potential Direct Liability For Negligent Hiring/Retention

"California case law recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee. Liability is based upon the facts that the employer knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054). "Liability for negligent hiring ... is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees." *Phillips v. TLC Plumbing, Inc*. (2009) 172 Cal.App.4th 1133, 1139 [citing *Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339].)

Strictly speaking, "negligent hiring/retention" is a form of direct liability, *not* vicarious liability. (*Phillips, supra*, 172 Cal.App.4th 1133, 1139-40; *Delfino v. Agilent*

Technologies, Inc. (2006) 145 Cal.App.4th 790, 815).

However, to be actionable in the context of sexual misconduct claims, there must be allegations/evidence that the employer knew or had reason to know that the employee would likely commit acts of sexual misconduct against third persons. (*Compare Capital Cities, supra,* 50 Cal.App.4th 1038, 1054 [allegations that employer knew employee "personally used 'serious mind-altering drugs' does not equate with knowledge that he would surreptitiously use drugs to place a prospective employee into a situation of helplessness before violently assaulting him."] *with Garcia ex rel. Marin v. Clovis Unified Sch. Dist*. (E.D.Cal. 2009) 2009 WL 2982900 [middle school student stated a cause of action against a school district for negligent hiring/retention of a teacher who allegedly picked her up by the buttocks and shook her, hit her on the buttocks with a sign and leered at her where district was allegedly award of prior incidents of inappropriate behavior by same teacher towards same student and other students].) Generally speaking, negligent hiring/retention claims do not apply to claims by co-employees because they are usually barred by worker's compensation exclusivity. (*See Bragg v. E. Bay Reg'l Park Dist.* (N.D.Cal. 2003) 2003 WL 23119278, at *7 [explaining that when negligent supervision or retention "is asserted by one employee against her co-workers and her employer, it is barred by the worker's compensation exclusivity doctrine."]; *Vuillemainroy v. Am. Rock & Asphalt, Inc.* (1999) 70 Cal.App.4th 1280, 1286 ["to accept plaintiffs' position that a death caused by an employer's criminal negligence is beyond the compensation bargain would invite the wholesale labeling of workplace fatalities as manslaughter to circumvent the workers' compensation system. Even while fashioning limited exceptions to the rule of exclusivity, the Supreme Court has consistently

cautioned against opening such a Pandora's box."].)

B. Employer's Potential Direct Liability For Invasion Of Employees' Privacy Rights

An employer's installation of a hidden video camera in an enclosed semi-private office space could violate the employees' right to privacy, even though the employees were never taped. In *Hernandez v. Hillsides, Inc*. (2009) 47 Cal.4th 272, the court discerned a legislative policy, suggested by statutes such as Penal Code §647(j)(1), and Civil Code §1708.8(a), against covert monitoring and recording that intrudes or threatens to intrude upon visual privacy. (*See also Richards v. Cnty. of Los Angeles* (C.D.Cal. 2011) 775 F.Supp.2d 1176 [dispatchers employed by county department of public works had legally protected privacy interest in dispatch room which supported employees' claim that department's covert videotaping of them in dispatch room violated their privacy rights under California Constitution given that employees engaged in grooming and other personal acts in dispatch room].)

C. Employer Potential Direct Liability For Sexual Harassment

Under both Federal and California law, employers are strictly liable for sexual harassment by supervisors. (*See Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 491; *see also State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1040-41 [discussing both California and federal law].)

While strict liability for supervisor harassment is not strictly based on agency/vicarious liability principles, an employer is not strictly liable "resulting from a completely private relationship unconnected with the employment and not occurring at the workplace or during normal working hours." (*State Dep't, supra,* 31 Cal.4th 1026, 1041 n.3).

However, such "instances" are considered "rare." (*Id.*; *see also Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1424 [triable fact issue whether alleged harassment resulted from completely private relationship].)

If the harassment is not by a supervisor, the employer is only directly liable on a negligence standard. (i.e. the employer knew or should have known about the harassment but failed to take reasonable steps to correct it). (*State Dep't, supra,* 31 Cal.4th 1026, 1041).

Similarly, Employers are directly liable for failing to implement procedures that would prevent sexual harassment and discrimination. (*Bradley v. California Dept. of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1612, 1630).

Also, employers are directly liable for sexual harassment if they "ratified" the conduct. (*Coit Drapery, supra,* 14 Cal.App.4th at 1609).

D. Government Employer Vicarious Liability For Sexual Misconduct – Is The Sexual Misconduct Within The Employee's "Scope Of Employment"?

Generally speaking, sexually harassing conduct is not considered within the scope of an employee's employment because there is not a "causal link" between the sexual harassment and the employment. (*Farmers Ins. Grp. v. Cnty. of Santa Clara* (1995) 11 Cal. 4th 992, 1007-08; *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.* (1995) 12 Cal. 4th 291, 301).

Note: there is a narrow exception where sexual misconduct by a government employee may be within the scope of employment, but it requires that the employee: (1) had the

legal authority to detain other persons; and (2) the employee sexually assaulted persons while within his or her custody. (*See Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 214-17). This exception generally applies to law enforcement officers, but has not been extended to school employees who assault students during school hours. (*See, e.g., John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 449; *Alma W. v. Oakland Unified Sch. Dist.* (1981) 123 Cal.App.3d 133, 139-40).

As a result, in cases involving harassing conduct by governmental employees, where the harassing conduct falls outside the scope of employment, public funds cannot be used to indemnify the harassing employee. (*Santa Clara, supra,* 11 Cal.4th 992, 1019-20).

The governmental employer can defend the employee under a reservation of rights and avoid indemnity liability "until it is established that the injury arose out of an act or omission occurring within the scope of his or her employment as an employee of the public entity…." (Gov. Code §825(a)). Moreover, the governmental employer's decision to defend certain employees against sexual harassment claims is not an "appropriate factor for determining scope of employment." (*Santa Clara, supra,* 11 Cal.4th 992, 1018).

Vicarious liability for sexual misconduct is a particular issue for government employers because, by operations of Government Code §§825, 825.4 and 996.4 governmental employers are required to provide a requested defense and indemnity with respect to "any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity[.]"

Note: this defense/indemnity obligation can be satisfied through "*any* insurance

policy[,]" including the employee's personal liability policy. (*See Govt. Employees Ins. Co. v. Gibraltar Cas. Co.* (1986) 184 Cal.App.3d 163, 167 [italics in original].) However, this situation will usually only arise in auto liability situations because standardized auto coverages provide coverage for "[a]ny other person or organization for his or its liability because of the acts or omissions of any insured." (*Id.*, 171; *Younker v. County of San Diego* (1991) 233 Cal.App.3d 1324, 1328-29; *Oxnard Union High Sch. v. Teachers Ins. Co.* (1971) 20 Cal.App.3d 842, 844-45).

E. Employer Affirmative Defense – The "Avoidable Consequences" Doctrine

Under this doctrine, the victim will not be awarded damages for harassment which could have been avoided if the victim had taken "reasonable effort" to avoid the harmful conduct. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1043). As a result, the employer can avoid liability if it can prove: (1) it "took reasonable steps to prevent and correct workplace sexual harassment"; (2) the victim "unreasonably failed to use the preventive and corrective measures that the employer provided" and (3) "reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered." (*Id.*, 1044).

The defense, if proven, does not eliminate all liability for damages. Rather it eliminates liability for " only those damages, that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment." (*Id.*, 1045).

As a result, the "avoidable consequences" doctrine make a primary focus of sexual

harassment litigation on facts "tending to show that the employer took [or did not take] effective steps 'to encourage victims to come forward with complaints of unwelcome sexual conduct and to respond effectively to their complaints.'" (*Id.*, 1045-56 [citing Grossman, "The First Bite Is Free: Employer Liability for Sexual Harassment" (2000) 61 U.Pitt. L.Rev. 671, 696].)

F. Potential Employer Immunity For Improper Cyber-Behavior Of Employees

The Communications Decency Act ("CDA") was enacted in 1996 with the goal of controlling the exposure of minors to indecent material over the Internet. An important purpose of the CDA was to encourage internet service providers to self-regulate the dissemination of offensive material over their services. However, a second objective was to avoid the chilling effect upon internet free speech that would be occasioned by the imposition of tort liability upon companies that do not create potentially harmful messages, but are simply intermediaries for their delivery. (*Aeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 331).

It has been held that an employer that provides its employees with Internet access through the company's internal computer system is among the class of parties potentially immune under the CDA. (*See, e.g., Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 805 [internet threats transmitted by employee from computer supplied by employer were "information provided by another information content provider" within meaning of CDA immunity provision]; *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684, 692–693 [rejecting contention that library was not immune under CDA for child's downloading of sexually explicit material on city library computers because of its

governmental entity status].)

X. WHEN THE CLAIM LANDS – BEST PRACTICES (CLAIMS REPORTING / DOCUMENTATION / ETC.)

A. Pre-Litigation Practices

1. Periodic Coverage Reviews

Useful to determine which coverage(s) may be needed (e.g. EPLI, special coverage forms for certain public entities).

Useful to help determine/plan which coverage(s) will apply first to certain types of claims.

Note: as a general matter, coverage under an insurance form should be primary to coverage provided by an MOC which is not "insurance" and which is functionally equivalent to "self-coverage." (Gov. Code §990.8(c); *Schools Excess Liability Fund v. Westchester Fire Ins. Co.* (2004) 117 Cal.App.4th 1275, 1285-86). However, certain insurance policy forms providing specialized coverage for certain public entities (i.e. "law enforcement" coverage) may be written to be inapplicable in the event the claim falls within the coverage provided by a JPA. Therefore, a review of coverage should attempt to initially determine which coverage(s) would respond first to which types of claims.

Discussions during application process may allow insured to identify practices useful to further minimize/manage risks.

2. Sexual Harassment Complaint Procedures/Training

Useful both for: (1) discouraging harassment /hostile work environment claims in the first

instance; (2) can provide documented, exculpatory evidence useful to prove: (a) lack of employer negligence and/or hostile work environment; and (b) "avoidable consequences" defense.

Also, published guidelines for employee use of internet/computer services (i.e. restrictions on "NSFW" content, proper use of employer-provided smartphones) may also provide evidence of employer non-negligence with respect to "scope of employment" and/or "hostile work environment" issues, etc.

3. Pre-Litigation Claims Documentation/Document Retention

Potentially useful to develop exculpatory evidence with respect to potential negligence issues and "avoidable consequences" affirmative defenses.

Potentially useful to provide evidence for public entities with respect to whether claims were timely submitted to Victim Compensation and Government Claims Board prior to litigation. (*See* Gov. Code §§810 *et seq*).

May be required to establish applicable coverage period for insurance forms providing coverage on a "claims made and reported" basis (i.e. EPLI).

May also be required to comply with e-discovery/document retention practices if claim goes to litigation.

Note: e-document retention duties may apply prior to the filing of suit where the employer is aware of the "potential" for litigation. (*See, e.g. Zubulake v. UBS Warbrg LLC* (S.D.N.Y 2003) 220 F.R.D. 212, 216-18 ["Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in

place a 'litigation hold' to ensure preservation of relevant documents." [citing *Fujitsu Ltd. v. Federal Express Corp.* (2d Cir. 2001) 247 F.3d 423, 436].)

B. Post-Litigation Issues

1. Potential Joint Defense Of Public Employees Under Reservation Of Rights. (Gov. Code §825(a)). Potential "Independent Counsel" Issues

Under California law, a defending insurer who reserves the right to deny indemnity based on a "conflict of interest" in the defense. (Civ. Code §2860). This can be an issue in the event the insurer asserts an "intentional act" exclusion and/or §533 as a defense, because the issue of the insured's "intentionality" is often at issue in sexual misconduct cases. (*See Long v. Century Indem. Co*. (2008) 163 Cal. App. 4th 1460, 1471; *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc*. (1984) 162 Cal.App.3d 358).

However, a defense by a JPA under a MOC in the same situation should not require independent counsel because the JPA is not an "insurer," even if there is a conflict of interest between the employee and the defending public entity employer. (Gov. Code §§995, 995.2(a)(3); *City of Huntington Beach v. The Petersen Law Firm* (2002) 95 Cal.App.4th 562, 568; *DeGrassi v. City of Glendora* (9th Cir. 2000) 207 F.3d 636, 643.

Note: At the same time, the JPA may not be able to assign the same defense counsel to multiple codefendants who have filed opposing claims against each other (i.e. indemnity claims) because that would put defense counsel on "both sides" of the same case. (*O'Morrow v. Borad* (1946) 27 Cal.2d 794, 800-801).

2. Potential Settlement/Indemnity Issues

Hypothetical I:

Supervisory employee sued for sexual misconduct (harassment) but still employed by public entity at time suit was filed because allegations had not been proven (although evidence supporting claim looks pretty strong.)

Proposed Solution:

Joint defense provided to both public entity and to supervisor under reservation of rights. (Gov. Code §825(a));

"Avoidable consequences" mitigation defense asserted/litigated on behalf of public entity;

Private settlement communications between public entity and supervisor about supervisor need to "contribute" to settlement based on supervisor's individual liability exposure;

Joint settlement with claimant which included: (1) monetary contribution funded by public entity; (2) supervisor resigning and waiving all wrongful termination claims as his "contribution" to the settlement; and (3) public entity releasing all indemnity/reimbursement rights against supervisor.

Hypothetical II:

Two separate employees sued supervisor and public entity for harassment. Based on investigation, public entity fired supervisor who, in turn: (1) sued public entity for wrongful termination; and (2) sued the two claimants for slander.

Issues:

From a "top of the trees" view, there is a conflict of interest between the public entity and

the supervisor given that the wrongful termination claim creates an interest for the public entity to show that there were sufficient grounds for termination. So, a joint defense may not be permissible or advisable. (*O'Morrow*, *supra*, 27 Cal.2d 794, 800-801).

Moreover, while not necessarily required by law, if the supervisor requests a defense against the harassment claims, the public entity may wish to consider offering to pay some costs associated with independent counsel to preserve all of its claims and defenses against the supervisor.

In such a situation, the public entity would have no obligation to pay costs associated with prosecuting the supervisor's affirmative slander. Consequently, the public entity should consider either: (1) entering an agreement sharing legal costs with the supervisor based on a predetermined basis (*e.g.* 70% - public entity; 30% - supervisor); or (2) carefully scrutinize counsel invoices and refuse to pay costs attributable to prosecution of affirmative claims.

As with Hypothetical I, any settlement should contemplate: (1) some contribution by the supervisor for his or her liability exposure to the claimants; and (2) resolution of the wrongful termination claim. Thus, the goal should be a "global" settlement of all related claims which may involve: (1) monetary payment on behalf of the public entity for the harassment claims; and (2) dismissal of the wrongful termination and slander claims by the supervisor as his or her settlement "contribution."

Under this type of settlement, the potential exposure of the claimants to the slander claims may be useful to partially offset the settlement value of the original harassment claims. However, and at the same time, an insurer or JPA may not be able to take

advantage of the offset as a credit towards indemnity if there is not language to that effect in the policy or MOC. (*See Jess v. Herrmann* (1979) 26 Cal.3d 131, 138-40 [mandatory setoff rule for opposing parties' respective judgments did not apply in automobile accident case involving two insured drivers because it would "diminish[] both injured parties' actual recovery and accord[] both insurance companies a corresponding fortuitous windfall at their insureds' expense."].)