No. S236765

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

LIBERTY SURPLUS INSURANCE CORPORATION, ET AL.,

Plaintiffs and Respondents,

v.

LEDESMA AND MEYER CONSTRUCTION COMPANY, INC., ET AL.,

Defendants and Appellants.

After Order Certifying Question by the
U.S. Court of Appeals for the Ninth Circuit

APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND BRIEF *AMICUS CURIAE*

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APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to California Rules of Court, rule 8.520(f), proposed amicus, United Policyholders, hereby respectfully applies to this Court for leave to file the accompanying Brief of *Amicus Curiae* in Support of Defendants and Appellants Ledesma & Meyer Construction Company, Inc., et al. ("L&M") in the above-captioned case.[1]

United Policyholders ("UP") is a non-profit organization based in California that serves as a voice and information resource for insurance consumers in the 50 states. The organization is tax-exempt under Internal Revenue Code §501(c)(3). UP is funded by donations and grants and does not sell insurance or accept money from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help for victims of wildfires, floods, and other disasters); *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness); and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.uphelp.org.

UP monitors the insurance sales, claims and law sectors, conducts surveys and hears from a diverse range of individual and business policyholders throughout California on a regular basis. The

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[1] No party or counsel for any party authored any portion of the brief. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the *amicus curiae*, its members and its counsel made a monetary contribution intended to fund the preparation or submission of the brief. (California Rules of Court, rule 8.520(f)(4).)

organization interfaces with state regulators in its capacity as an official consumer representative in the National Association of Insurance Commissioners. UP provides topical information to courts via the submission of *amicus curiae* briefs in cases involving insurance principles that matter to people and businesses.

UP's consumer surveys recently assisted this Court in *Association of California Insurance Companies v. Jones* (2017) 2 Cal.5th 376, and this Court has adopted UP's arguments in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19 and *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815. UP has filed *amicus curiae* briefs in nearly 400 cases throughout the United States.

UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." (*Miller-Wahl Co. v. Commissioner of Labor & Indus.* (9th Cir. 1982) 694 F.2d 203, 204.) This is an appropriate role for *amicus curiae*. As commentators have stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." (Robert L. Stern et al., *Supreme Court Practice* (6th ed. 1986) 570-571 (citation omitted).)

UP is familiar with all the briefs that have been previously filed in this case. UP has experience with the legal issues of this case, and believes its experience in these issues will make its proposed brief of assistance to this Court in deciding the important certified question on which the Ninth Circuit sought guidance from this Court.

UP therefore respectfully requests leave to file the attached *amicus curiae* brief presenting additional authorities and discussion in support of Appellants' arguments.

DATE: May 10, 2017

Respectfully submitted,

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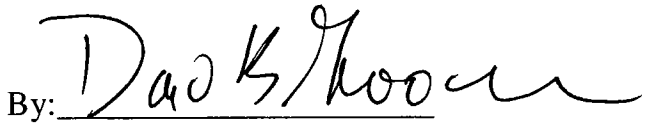
By: 

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

INTRODUCTION

California courts have long held that liability insurance covers an employer's vicarious liability not just for its employee's negligence, but also for the employee's intentional torts: "[N]either [the statutory exclusion for willful injuries in] Insurance Code section 533 nor related policy exclusions for intentionally caused injury or damage preclude a California insurer from indemnifying an employer held vicariously liable for an employee's willful acts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 305 fn.9 (citing *Arenson v. Nat. Automobile & Cas. Ins. Co.* (1955) 45 Cal.2d 81, 83-84).) Thus, in countless decisions over the years, California courts have allowed employers to obtain insurance to cover their vicarious liabilities for the intentional, willful acts and torts of their employees under standard commercial or comprehensive general liability ("CGL") insurance policies, which typically provide coverage for bodily injury or property damage caused by an "accident." The courts have ruled in favor of coverage even though the law ascribes the employee's intentional tort to the vicariously liable employer.

(1) Ignoring those cases—indeed, never mentioning them anywhere in its brief—Respondents Liberty Surplus Insurance Corporation and Liberty Insurance Underwriters ("Liberty") argue that this Court should reject coverage as a matter of law when an employer is found liable for a *lesser tort* than the employee's willful misconduct: where the conduct for which the employer is held liable is not that of the employee but the *employer's own negligence* in hiring, supervising or retaining its employee. Liberty says that a negligent supervision claim can never be an "accident" for purposes of CGL coverage if a negligently supervised employee committed an intentional act with the

intent or expectation of causing harm. That has never been the rule in California and this Court should reject Liberty's attempt to rewrite the CGL policies that Liberty and scores of other insurers have sold to California businesses and individual consumers.

A fundamental rule of California insurance law, enunciated in many decisions, including this Court's latest discussion of the issue, is that an "accident" is viewed *from the perspective of the insured who is seeking coverage*, not from the perspective of someone else. Thus the starting point for determining whether an accident has taken place is the conduct of the insured. If *the insured* did not intend the act that caused the injury, or did not intend the consequences that resulted from the act, the injury was caused "by accident" as that term is used in standard CGL policies, even if someone else may have acted willfully, with intent to harm. (*See Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 311 ("Under California law, the word 'accident' in the coverage clause of a liability policy refers to the conduct of the insured for which liability is sought to be imposed on the insured....This view is consistent with the purpose of liability insurance.") (citations omitted); *see also Arenson*, 45 Cal.2d at p. 84.) Thus, although the employee who committed a willful assault may not be entitled to coverage under his or her *own* CGL policy, the employer who bought insurance to protect itself from its own negligence would have coverage for its liability for negligent supervision of that employee. California's tort system is constructed on that basis.

(2) Liberty not only seeks to deprive California employers of insurance coverage for the torts of their employees, it also mounts a full scale assault on this Court's longstanding definition of "accident"—a definition that this Court held, just eight years ago, is incorporated by

law into every California CGL policy: "'an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause.'" (*Delgado,* 47 Cal.4th at 309, quoting *Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co.* (1959) 51 Cal.2d 558, 563-564.)

Under the express words of this definition, which has been the law in California for nearly 60 years, there is an accident if *either* a "happening" (the event or act) *or* a "consequence" (the result of the event or act) was unexpected, unforeseen or undesigned from the perspective of the insured. Liberty tries to read half of the Court's definition ("consequence") out of the CGL policy, arguing that if the person who inflicted the injury did so as the result of an intentional act, there can never be an "accident," regardless of whether the consequence of that conduct was unexpected or unforeseen by the insured.

Liberty's argument defies common sense: it would eliminate insurance coverage for the accidental consequences of a host of everyday intentional acts, like driving well above the speed limit (not knowing that a car is about to pull out of a driveway with no time for the speeding driver to stop) or striking a match (without knowing that there was a gas leak that will explode when ignited) or intentionally swinging a golf club (not knowing that someone is standing right behind the golfer). Of course, an ordinary, layperson insured—the person from whose perspective insurance policy language is construed—would understand that the unexpected and unintended consequences of these and countless other intentional acts are "accidents." Yet, if Liberty has its way, the Court would revolutionize insurance policies in California and deprive hundreds of thousands of

California businesses and individuals of insurance coverage for what everyone—apart from Liberty—knows full well is an accident.

(3) Liberty also argues that in determining whether an insured has CGL coverage for its liability arising from an injury to a third party, the Court can only consider the most immediate cause of the injury (here, the employee's assault, even though that act was not by the insured/employer). It argues that any earlier-in-time contributing cause (*e.g.*, the negligent supervision that allowed the assault to occur) is too "remote" or "attenuated" from the injury to serve as the source of insurance coverage. But Liberty's insurance policy does not say that. It nowhere limits the term "accident" to the event that is the "immediate" cause of the third party's injuries, and this Court "cannot read into the policy what [Liberty] has omitted" now that a claim has arisen. (*Safeco Ins. Co. of Am. v. Robert S.* (2001) 26 Cal.4th 758, 763.)

Moreover, adopting Liberty's argument would require this Court to disavow decades of California insurance coverage jurisprudence holding that courts must determine whether an accident took place based on the range of causes that are sufficiently connected to the injury "that the law is justified in imposing liability" on the insured. (*Delgado,* 47 Cal.4th at 315 (citation omitted).) L&M's negligent hiring and supervision is the "cause" at issue here for which L&M was liable to the injured party, and is precisely the type of cause that this Court has held sufficient to support CGL coverage.

Remarkably, in making its arguments, Liberty says nothing about *Lisa M.* and the other vicarious liability cases; ignores *Delgado's* direction to focus on the cause of the injury that was the basis for the insured's tort liability; suggests that only one negligent supervision case found CGL coverage when there are many; invokes "trigger of

coverage" cases that, in fact, are contrary to Liberty's theory in this appeal; and relied, in convincing the federal district court to support its position, on *L.A. Checker Cab v. First Specialty Ins. Co.* (2010) 184 Cal.App.4th 767, which this Court had previously *depublished.*[1]

(4) In short, Liberty's position is not only inconsistent with the language of its standard form CGL policy, it also effectively asks the Court to reject or disapprove at least four longstanding lines of cases emanating from this Court's decisions: (1) those holding that an employer or other insured who did not personally engage in the intentionally harmful act can have CGL coverage for the intentionally harmful act of an employee; (2) those holding that there is an accident when there are *either* unintended happenings *or* unintended consequences; (3) those holding that whether something is an accident must be viewed from the perspective of *the insured* and the insured's own conduct; and (4) those holding that insurance coverage is determined not by considering one so-called "immediate" (or closest in time) cause of the injury but by evaluating the causes that serve as the basis for imposition of liability on the insured.

United Policyholders therefore asks this Court to answer the Ninth Circuit's certified question in the affirmative and reaffirm that there can be an "occurrence" under CGL policies that define "occurrence" to include an "accident" when an insured employer faces liability to third persons based on the employer's negligent hiring, supervision or retention of an employee, even if the employee's conduct was an intentional tort. United Policyholders also asks the Court to resolve the confusion and conflicting decisions of the California Courts of Appeal as to what is an "occurrence" or an

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[1] *Amicus* United Policyholders, represented by this firm, submitted the request for depublication that this Court granted.

"accident" by reaffirming its prior decisions adopting the *Geddes/Delgado* definition of "accident," and clarifying that there is an "accident" when, from the perspective of the insured seeking CGL coverage for its own liabilities, the "happening" (or conduct) *or* the "consequence" (or result) of the "happening" was unexpected, unforeseen, or undesigned.

ARGUMENT

I. THIS COURT ESTABLISHED THE DEFINITION OF "ACCIDENT" IN CGL POLICIES DECADES AGO, AND CONFIRMED IN 2009 THAT THIS DEFINITION IS INCORPORATED BY LAW INTO ALL CGL POLICIES

CGL policies, like the Liberty policies at issue in this appeal, generally cover bodily injury and property damage "caused by an occurrence." Such policies, as here, typically define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (ER 267-268, 289.) The key word is "accident," which the policies do not define. But this Court definitively interpreted that term in the context of CGL policies nearly sixty years ago.

In *Geddes*, 51 Cal.2d at pp. 563-564, the Court surveyed possible definitions of "accident" and, for purposes of CGL policies that cover "accidents," adopted the following definition: "Accident, as a source and cause of damage to property, within the terms of an accident policy, is an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause." This definition has stood the test of time. Just eight years ago, this Court reaffirmed that the quoted *Geddes* definition is still the law of California, holding that this definition is incorporated by law into all liability insurance policies covering "accidents" (at least where the policy does not define the term):

> In the context of liability insurance, an accident is "an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause." (*Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co.* (1959) 51 Cal.2d 558, 563-564 [334 P.2d 881] (*Geddes*); accord, *Hogan v. Midland National Ins. Co.* (1970) 3 Cal.3d 553, 559 [91 Cal.Rptr. 153, 476 P.2d 825].) "This common law construction of the term 'accident' becomes part of the policy and precludes any assertion that the term is ambiguous." (*Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 810 [26 Cal.Rptr.2d 391]; *see Bartlome v. State Farm Fire & Casualty Co.* (1989) 208 Cal.App.3d 1235, 1239 [256 Cal.Rptr. 719].)

(*Delgado*, 47 Cal.4th at p. 308.) Thus, for purposes of the certified question that this Court agreed to decide, the *Geddes/Delgado* definition of "accident" should be the starting place.

Specifically, under this Court's precedent: (A) because the definition of "accident" is framed in the disjunctive, an "accident" takes place if *either* the act *or* its consequences was unexpected, unforeseen, or undesigned; (B) whether the act or its consequences was unexpected, unforeseen, or undesigned is viewed from the perspective of *the insured*, not from that of a third party; and (C) the act or consequences that are relevant to whether an "accident" has taken place are those that form the basis for the imposition of liability on the insured, not the conduct for which a third party might be held liable. Liberty's argument misunderstands all three of these rules.

A. An Accident Occurs Where *Either* The Act Of The Insured *Or* The Consequences Of The Insured's Act Were Unintentional

Under the established definition of "accident" that is "part of the policy," an accident has taken place if there was an unexpected, unforeseen, or undesigned "happening" ***or*** an unexpected, unforeseen, or undesigned "consequence" of a happening, even if the happening itself was intentional. (*Delgado*, 47 Cal.4th at p. 308.) Liberty looks

only at the "happening" and not the "consequences." But the express words of the definition leave no room for an argument that both the happening ***and*** the consequence of the happening must be unexpected and unintended, nor do they leave room for an argument that only the "happening" (the event or act) is relevant to whether an "accident" occurred, as that would improperly read the "consequence" language out of the definition. (*Cf. Insurance Co. of N. Am. v. Sam Harris Constr.* (1978) 22 Cal.3d 409, 411 (when an insurance policy provision is in the disjunctive, the Court applies the portion of the provision that supports coverage).)

A "happening," in lay terms (which is how insurance policies must be interpreted, *see E.M.M.I. Inc. v. Zurich Am. Ins. Co.* (2004) 32 Cal.4th 465, 471), is a broad term that simply means an "an occurrence or event." (*Random House Dict. of the English Language* (1966), p. 644.) A "consequence," again in lay terms, is the "effect, result or outcome of something occurring earlier." (*Id.* at p. 312.) Because this Court has held that *both prongs* are part of the definition of "accident" and apply in the alternative—using "or"—a court must consider both prongs of the definition.

Using this appeal as an example to illustrate how the two prongs would apply, L&M's negligent hiring, retention, and supervision of its employee Hecht was a "happening"; and Hecht's molestation of the student was the unfortunate "consequence" of L&M's negligent hiring, retention, and supervision of Hecht. Thus, under the Court's longstanding definition of "accident," as long as one prong of the definition—the "happening" or the "consequence"—was unexpected, unforeseen, or undesigned (*e.g.*, if L&M *negligently* failed to supervise Hecht properly, or if L&M acted *negligently* in hiring Hecht, or if the injury was unintended by L&M), those "happenings" or

"consequences" would comprise an "accident." (*See Safeco Ins. Co. of America v. Robert S.*, 26 Cal.4th at p. 765 (holding, with respect to a homeowner's liability policy covering "accidents": "Because the term 'accident' is more comprehensive than the term 'negligence' and thus includes negligence ..., Safeco's homeowners policy promised coverage for liability resulting from the insured's negligent acts.") (citation omitted).)

In the underlying proceeding, the arbitration panel imposed liability on L&M solely for negligent hiring, retention, and supervision (4 AER 54), not for an intentional tort. Negligence is precisely the type of conduct that fits within this Court's longstanding definition of "accident," so L&M should have coverage.

But even setting aside L&M's negligent "acts" of hiring, retention, and supervision, the unintended and unforeseen "consequence" of those acts, *i.e.*, Hecht's misconduct, is also an "accident" because "accident" is viewed from the perspective of the insured, L&M, and there is no evidence that L&M intended, or even expected, Hecht to commit an intentional tort. As is discussed next, Liberty's sole focus on the conduct of Hecht is inconsistent with established California law.

B. An Accident Must Be Evaluated From The Perspective Of The Insured, Not Another Actor

In *Delgado*, this Court followed decades of California precedent holding that whether an event or its consequences are an "accident" must be evaluated from the perspective of the insured, not from the perspective of the injured victim or some other actor in the chain of events that led to the injury. (*Delgado*, 47 Cal.4th at p. 311.)

In *Delgado*, the insured, Reid, intentionally assaulted the victim, Delgado, intending to injure him. Delgado settled with Reid, obtaining

an assignment of Reid's rights against Reid's insurer. Delgado then sued Reid's insurer, arguing that his claims against Reid were covered by Reid's CGL policy because the injuries were an "accident" from his perspective as the victim, even if there was no accident from the insured's perspective.

Rejecting that argument, this Court confirmed that the focus is on *the insured's* conduct:

> Under California law, the word "accident" in the coverage clause of a liability policy refers to the conduct *of the insured* for which liability is sought to be imposed on the insured. (*Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 596 [79 Cal.Rptr.2d 134]; *Collin v. American Empire Ins. Co.*, supra, 21 Cal.App.4th at p. 804.) This view is consistent with the purpose of liability insurance. Generally, liability insurance is a contract between the insured and the insurance company to provide the insured, in return for the payment of premiums, protection against liability for risks that are within the scope of the policy's coverage.

(*Ibid.* (emphasis added).) In so holding, the Court rejected the argument that whether an accident took place is "to be determined from the perspective of the injured party *independent of the insured's intention*" (*id.* at p. 309 (emphasis added)), again confirming that CGL coverage must be determined from the insured's perspective and intentions, not someone else's perspective and intentions. (*See also, e.g., Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 596 ("Under California law, the term [accident] refers to the nature of the insured's conduct") (citation omitted).)

This Court again evaluated coverage based on the *insured's* conduct in *Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, which, like the present appeal, involved an insured's liability for negligent supervision of another person who had committed an

intentional tort. The issue in *Minkler* was whether the exclusions in the insurance policy applied to every insured or just the insured seeking coverage.[2] The insurer—sensibly—did not even try to dispute that the conduct of the insured who faced negligent supervision liability was an accident, and this Court therefore did not address the issue, instead directing the reader to *Delgado* to determine the standard for whether an accident had taken place. (*Id.* at p. 322 & fn.3.) Thus, in its most recent decision in a case involving a claim of negligent supervision of someone who had committed an intentional tort, this Court cited to *Delgado*, which held that the relevant conduct is that of the insured who is seeking insurance coverage.

In sum, in determining whether negligent hiring, retention, and supervision is an "accident," the Court focuses on the perspective of the insured, here, L&M the employer, rather than on the non-insured Hecht's perspective. Liberty's arguments to the contrary cannot be squared with this Court's precedent.

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[2] *Minkler* addressed a "severability clause," which treated each insured under the policy as if it had its own separate insurance policy when applying exclusionary language barring coverage for "an insured" or "the insured." That distinction is irrelevant to the "occurrence" definition in the Liberty policy, which does not use the word "insured" in addressing whether an "accident" has taken place. In fact, in *Delgado*, the claimant argued that since prior versions of the definition of "occurrence" had included exclusionary language that barred coverage for bodily injury or property damage that was expected or intended from the standpoint of the insured, the current version of the "occurrence" definition should not be construed with the insured's standpoint in mind—an argument that this Court had no trouble rejecting, based on long-standing California precedent assessing "accident" from the perspective of the insured. (*Delgado*, 47 Cal.4th at pp. 310-311.)

C. Whether An Accident Occurred Turns On The Specific Conduct Of The Insured That Gave Rise To The Insured's Underlying Liability

In determining whether an accident has taken place, the relevant conduct of the insured is the specific act or omission of the insured for which the injured party sought to hold the insured liable in the underlying tort case. It is worth quoting *Delgado* again: "Under California law, the word 'accident' in the coverage clause of a liability policy refers to *the conduct of the insured for which liability is sought to be imposed on the insured.*" (*Delgado*, 49 Cal.4th at p. 311 (emphasis added).) In other words, if the basis for the insured's liability to a third party is negligent hiring and supervision, a court must focus whether the negligent hiring and supervision was accidental.

When, as here, the insured's negligent hiring and supervision is the sole basis for the insured's liability, the coverage question is relatively straightforward because that conduct easily fits within the definition of "accident": the hiring and supervision was a negligent "happening" (the insured did not intend to hire, retain and supervise Hecht in a way that allowed Hecht to assault a student), and it also led to an unexpected, unforeseen "consequence" from L&M's perspective, *i.e.*, Hecht's tort.

II. THE POLICY LANGUAGE AND THIS COURT'S PRIOR DECISIONS PRECLUDE LIBERTY'S LYNCHPIN ARGUMENTS

A. Neither The Insurance Policy's Language Nor Existing Law Supports Liberty's Attempt To Focus Solely On The "Immediate" Cause Of The Injury

Liberty argues that in determining whether the insured's liability arose from an "accident," a court must look *only* at the "immediate" (*i.e.*, closest in time) cause of the injuries to the third party who sued