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When an individual sexually abuses a child, will the abuser’s homeowner’s liability insurance cover the injury to the child? The United States Court of Appeals for the Third Circuit recently addressed this issue when an insured sexually molested his thirteen-year-old niece and then requested that his insurance company pay for the child’s injuries. The Third Circuit denied his request and held that the insured must pay for the damage that he caused.

Homeowner’s liability policies generally provide coverage for “occurrences,” which are defined as accidents resulting in either bodily injury or property damage. These policies, however, usually deny coverage for highly probable or intentionally caused damages in an intentional injury exclusion clause. There are two ways that an insurance policy can ex-


2. Id. at 468 (holding that insurance company has neither duty to defend against nor duty to cover claims arising from intentional sexual abuse of child). For a complete discussion of the Wiley case, see infra notes 107-29 and accompanying text.


4. Appleman, supra note 3, § 4501.09 (defining “occurrence” as accident, otherwise policy could be used as license to “wreak havoc at will”); Couch & Anderson, supra note 3, § 44:285 (stating general wording of contemporary liability policy).

5. Appleman, supra note 3, § 4501.09 (stating type of damage contemporary liability policy does not cover).

6. Rigelhaupt, supra note 3, at 969-70 (stating courts’ name for part of liability policy excluding coverage for intentional acts).

(927)
clude coverage in these instances: 7 (1) through the actual definition of "occurrence" in the policy8 or (2) through the use of an exclusion clause.9

This Casebrief will discuss possible meanings of intentional injury exclusion clauses. Part II examines various interpretations of the intentional injury exclusion clause10 and specifically investigates the Pennsylvania courts' interpretation of these clauses.11 Part III explores the "inferred intent" theory of intentional injury exclusion clauses, which is applied in child molestation cases.12 Part III also analyzes Pennsylvania's adoption of the "inferred intent" approach.13 Finally, Part IV of this Casebrief discusses the possible expansion of the "inferred intent" approach to areas other than sexual abuse of children.14

II. BACKGROUND

This section of this Casebrief explores the various interpretations of intentional injury exclusion clauses.15 Part A presents the four main inter-

7. Id. Courts typically refer to a provision of a liability insurance policy as an "intentional injury exclusion clause" in three different situations. Id. In the first situation, the liability insurance policy defines "occurrence" in such a way that it excludes any expected or intended damage, thus the exclusion is actually contained within the definition of what is covered. Id. In the second type of policy, the policy defines "occurrence" as "an accident which results in bodily injury or property damage," and then also contains an exclusion clause for expected or intended injury on the part of the insured. Id. at 970. The third type of policy is where the court merely states that there is an "intentional injury exclusion clause" but fails to point to any particular policy language. Id. In the third situation, there may be no policy language, but the court may determine that there is an intentional injury exclusion clause. Id.

8. Id. When an insurance company attempts to exclude coverage through defining what it covers, then it defines "occurrence" as "an accident which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Id. (emphasis added).

9. Id. The second way in which an insurance company attempts to exclude coverage is through an exclusion clause. Id. In this situation, the insurance company defines "occurrence" as "an accident which results in bodily injury or property damage." Id. However, the policy also includes another clause which states that there is no coverage for "injury or damage caused intentionally by or at the direction of the insured;" this is an exclusion clause. Id.

10. For a complete background on courts' interpretation of intentional injury exclusion clauses, see infra notes 19-49 and accompanying text.

11. For a complete discussion of the Commonwealth of Pennsylvania's interpretation of intentional injury exclusion clauses in normal liability cases, see infra notes 50-69 and accompanying text.

12. For a complete discussion of the background of the "inferred intent" approach to intentional injury exclusion clauses, see infra notes 70-106.

13. For a complete discussion of the Commonwealth of Pennsylvania's "inferred intent" approach, see infra notes 107-44 and accompanying text.

14. For a complete discussion of other possible situations where courts will infer intent, see infra notes 145-54 and accompanying text.

15. For a complete discussion of interpretations of intentional injury exclusion clauses, see infra notes 19-69 and accompanying text.
A. The Four Interpretations of Intentional Injury Exclusion Clauses

A typical insurance liability policy provides coverage for an insured's accidents.\textsuperscript{19} Almost all liability policies, however, contain an exclusion for intentional or expected injuries,\textsuperscript{20} commonly referred to as an intentional injury exclusion clause.\textsuperscript{21} Unfortunately, state courts do not agree on the requirements for excluding coverage under these clauses.\textsuperscript{22} Courts use

\textsuperscript{16} For a complete discussion of the four main interpretations of intentional injury exclusion clauses, see \textit{infra} notes 19-39 and accompanying text.

\textsuperscript{17} For a complete discussion of the majority approach to these clauses, see \textit{infra} notes 40-49 and accompanying text.

\textsuperscript{18} For a complete discussion of the Commonwealth of Pennsylvania's approach to intentional injury exclusion clauses, see \textit{infra} notes 50-69 and accompanying text.

\textsuperscript{19} \textsc{Couch & Anderson, supra} note 3, \S 44.285. Generally, homeowner's liability policies cover "occurrences." \textit{Id.} An "occurrence" means an accident, including continuous or repeated exposure to conditions, which result in \textit{bodily injury or property damage}. \textit{Id.; see also Robert E. Keeton \& Alan I. Widiss, Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices} \S 5.4(d)(1) (student ed. 1988) (noting that basic definition of coverage states: "the insurer will pay damages for which an insured . . . becomes legally responsible because of an accident") (footnote omitted); Rigelhaupt, \textit{supra} note 3, at 971 (noting that current liability policies provide coverage for "occurrences" which are defined as "accident[s] which result[ ] in bodily injury or property damage").

\textsuperscript{20} Rigelhaupt, \textit{supra} note 3, at 971. There are two ways that an insurance policy can exclude coverage for highly probable or intentionally caused damage: (1) within the actual definition of coverage or (2) through the use of an exclusion clause. \textit{Id.} at 969-70. The first way to exclude coverage involves a liability policy where the policy defines "occurrence," for which there is coverage, in such a manner that it excludes expected or intended damage; thus the exclusion of expected or intended damage is within the actual definition of what is covered. \textit{Id.} An example of this would be "defining 'occurrence' in pertinent part as an accident which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." \textit{Id.} at 970. The second way for a homeowner's liability policy to exclude coverage is when there is a separate clause denying coverage for expected or intended injury on the part of the insured. \textit{Id.} at 970. An example of this type of exclusion clause is a policy that defines an occurrence as an event resulting in bodily injury or property damage, but later the policy contains a clause excluding "liability for injury or damage cause intentionally by or at the direction of the insured." \textit{Id.}

\textsuperscript{21} \textit{Id.} at 969 (noting that different courts have referred to such policy provisions as "intentional injury exclusion clauses"). This Casebrief will refer to these provisions as intentional injury exclusion clauses.

\textsuperscript{22} \textsc{Keeton \& Widiss, supra} note 19, \S 5.4(d)(2). Courts have held that liability insurance does not cover an insured when the individual intended the injury. \textit{Id.} The courts, however, have reached different conclusions regarding whether there is coverage when the insured asserts that although the action which caused the injury was intended, neither the specific injury nor any injury was intended.
several different approaches to determine whether coverage should be denied under an intentional injury exclusion clause. These four approaches include: (1) the "some type of harm" approach, (2) the "similar type of harm" approach, (3) the substantially certain approach, and (4) the tort approach.


23. Keeton & Widiss, supra note 19, § 5.4(d)(2); see, e.g., Robert B. Carter, Construction of "Expected or Intended Injury" Exclusions in North Carolina: N.C. Farm Bureau Mutual Insurance Co. v. Stox, 71 N.C. L. Rev. 2101 (1993) (discussing various judicial interpretations of definition of "intent" required for intentional injury exclusion clauses); Constance M. Alvey, Note, Intentional Injury Exclusion: American Family Mutual Insurance Co. v. Pacchetti, 60 UMKC L. Rev. 559, 561-62 (1992) (noting that there are three approaches to intentional injury exclusion clauses: purely subjective intent approach, natural and probable consequences approach and subjective approach that sometimes infers intent as matter of law); James E. Berger, Note, Liability Insurers Get a Fair Deal, 59 Mo. L. Rev. 209, 209-10 (1994) (stating that there are three approaches to determining if insured intended to injure); Asim K. Desai, From the Standpoint of the Insured: Insured's Loophole or Insurer's Noose, 23 Sw. U. L. Rev. 595, 604 (1994) (stating that there are three approaches to intentional injury exclusion clauses: subjective approach, objective approach and inferred intent approach); Wilcox, supra note 22, at 1523 (noting different approaches to determining intent for intentional injury exclusion clauses).

24. For a complete discussion of the "some type of harm approach" to interpreting intentional injury exclusion clauses, see infra notes 28-30 and accompanying text.

25. For a complete discussion of the "similar type of harm approach" to interpretation of intentional injury exclusion clauses, see infra notes 31-34 and accompanying text.

26. For a full discussion of the substantially certain approach to defining intent for intentional injury exclusion clauses, see infra notes 35-36 and accompanying text.

27. For a full discussion of the tort standard in interpreting the meaning of intentional injury exclusion clauses, see infra notes 57-59 and accompanying text. Several courts have adopted this approach. See, e.g., Continental W. Ins. Co. v. Toal, 244 N.W.2d 121 (Minn. 1976) (holding that tort law is relevant to extent it reflects intent); Argonaut Southwest Ins. Co. v. Maupin, 500 S.W.2d 633 (Tex. 1973) (applying tort doctrine of intent to intentional injury exclusion clauses); see also Lawler Mach. & Foundry Co. v. Pacific Indem. Ins. Co., 383 So. 2d 156, 158 (Ala. 1980) (finding that injury is "intended" or "expected" if insured consciously acted and resultant injuries are natural and probable consequences of such action); Casualty Reciprocal Exch. v. Thomas, 647 P.2d 1361, 1364 (Kan. Ct. App. 1982) (holding that there is presumption that insured intended "natural and probable consequences of his action"); Hins v. Heer, 259 N.W.2d 38, 40 (N.D. 1977) (noting that if act is intentional and results in injuries which are natural and probable consequences of act, then injuries are intentional).
1. "Some Type of Harm" Approach

The "some type of harm" approach allows the insurance company to deny coverage if the insured intended any harm at all, as long as the insured intended some type of harm.\(^{28}\) This approach does not take into consideration whether the harm which the insured intended is the actual harm that resulted.\(^{29}\) A majority of states have adopted this approach, allowing many insurance companies to deny coverage under an intentional injury exclusion clause if the insured intended some injury.\(^{30}\)

2. "Similar Type of Harm" Approach

The "similar type of harm" approach is narrower than the "some type of harm" approach, for it only allows the insurance company to deny coverage if the harm that the insured's actions caused was the same type of harm that the insured desired to occur.\(^{31}\) State courts apply two different

\(^{28}\) *Keeton & Widiss*, *supra* note 19, § 5.4(d)(2). One approach to interpreting intentional injury exclusion clauses is to determine if there was "a purpose to do 'some' harm." *Id.* This interpretation of intentional injury excludes coverage if the insured "intended any type of harm to any person." *Id.*

\(^{29}\) *Id.* (noting that this approach disregards whether insured intended type of harm that actually occurred).


\(^{31}\) *Keeton & Widiss*, *supra* note 19, § 5.4(d)(2). A second approach limits the intentional injury exclusion definition of "intention" to injuries of the same
interpretations of this approach.\textsuperscript{32} The first interpretation is extremely restrictive and requires the consequence of the action to be the specific injury that the insured hoped to cause.\textsuperscript{38} The second interpretation of this approach is broader and requires only a similar injury to result, rather than the exact injury which the insured intended to occur.\textsuperscript{54}

3. The Substantially Certain Approach

The substantially certain approach expands the concept of intent to cause injury to include knowledge.\textsuperscript{35} The insurance company can deny coverage through the exclusion clause if the insured knew with substantial certainty that the harm would result from his or her actions.\textsuperscript{56}


32. KEETON & WIDISS, supra note 19, § 5.4(d)(2) (noting that coverage depends on whether insured intended type of injury, maybe even specific injury).

33. \textit{Id.} Some jurisdictions have required the action to result in the "specific injury" that the insured hoped to bring about. \textit{Id.; see also} Allstate Ins. Co. v. Sparks, 493 A.2d 1110 (Md. Ct. Spec. App. 1985) (requiring that insured intended precise injury that occurred to prove intent). Under this approach, it is more difficult for insurance companies to deny coverage as opposed to when they can deny coverage if the insured intended a similar type of harm. KEETON & WIDISS, supra note 19, § 5.4(d)(2). The jurisdictions which have adopted this approach reason that the insurance company should compensate the victim because the insurance company has the deep pockets. \textit{Id.}

Most jurisdictions, however, have rejected this argument. \textit{See, e.g.,} Butler, 548 P.2d at 939 (explicitly rejecting argument that insured must have specific intent to cause type of injury actually suffered); Home Ins. Co. v. Neilsen, 339 N.E.2d 240, 242 (Ind. Ct. App. 1975) (holding that exclusion applies if some harm was intended, not necessarily specific harm desired); Iowa Kemper Ins. Co. v. Stone, 269 N.W.2d 885, 887 (Minn. 1978) (noting that required intent is not "intent to cause the specific injury complained of"); State Farm Fire & Casualty Co. v. Muth, 207 N.W.2d 364, 366 (Neb. 1973) (refusing to adopt approach that insured must intend injury that actually occurred in order for court to find intent); Oakes v. State Farm Fire & Casualty Co., 349 A.2d 102, 104 (N.J. Super. Ct. App. Div. 1975) (rejecting that insured must intend "specific injury" that actually occurred for coverage to be denied), cert. denied, 358 A.2d 189 (N.J. 1976).

34. KEETON & WIDISS, supra note 19, § 5.4 (d)(2) (emphasis added).

35. \textit{Id.} This approach states that if the insured was substantially certain that the harm would occur, then the injury was expected or intended and there is no coverage. \textit{Id.} Under this approach, "knowledgeable intent," as well as "purposive intent," will preclude coverage. \textit{Id.}

36. \textit{Id.; see also} Wilcox, supra note 22, at 1592. The courts have established a two-prong test to determine subjective intent. \textit{Id.} The first prong defines intent as the insured's "actual, subjective desire." \textit{Id.} Alternatively, the second prong also allows the court to exclude coverage if the action was such that the harm was substantially certain to occur. \textit{Id.}
4. The Tort Approach

Finally, the tort approach excludes coverage if a reasonable person would consider the harm to be the natural and probable consequence of his or her action.37 Unlike the first three approaches, this approach constitutes an objective standard which disregards the insured's state of mind.38 This approach focuses on the reasonable person and what that person would have thought was likely to occur from the intended action.39

B. The Majority Approach: "Some Type of Harm"

The majority of states have determined that insurance companies may deny coverage if the insured intended "some type of harm."40 The majority approach is best described through its application in Butler v. Behaeghe41 and Iowa Kemper Insurance Co. v. Stone.42 In Butler, the Colorado Court of Appeals held that a court must determine that the insured specifically intended to cause some harm for coverage to be denied under an intentional injury exclusion clause, even if the actual resulting harm differed from the harm intended.43 The defendant in Butler caused permanent

37. Keeton & Widiss, supra note 19, § 4 (d)(2). Liability is excluded if the injury is the natural and probable consequence of the insured's action. Id. This approach determines what a reasonable person, not the insured, would expect to be the consequences of his or her actions. Id.; see also Griggs, supra note 22, at 536 (stating that tort doctrine approach focuses on intended action, not on intent to injure, and then, on natural and probable consequences of that action); Wilcox, supra note 22, at 1530-31.

38. Keeton & Widiss, supra note 19, § 5.4 (d)(2) (noting that this approach looks to viewpoint of reasonable person, not viewpoint of insured); see also Wilcox, supra note 22, at 1534 (stating that minority of courts have adopted objective standard which focuses on natural and probable consequences of insured's action).

39. Keeton & Widiss, supra note 19, § 5.4 (d)(2). The insurance company does not have to prove the subjective state of mind of the insured. Id. It need only prove that a reasonable person would have expected the harm that actually occurred to have resulted from the insured's action. Id.


The court in Elitzky analyzed the different interpretations of the word "intended" in the intentional injury exclusion clause. Id. The court determined that the majority approach was the "some kind of harm" approach: the insured intended the harm that actually resulted if the insured intended some type of bodily injury or damage. Id. (citing Pachucki v. Republic Ins. Co., 278 N.W.2d 898 (Wis. 1979)).


42. For a complete discussion of Iowa Kemper Ins. Co. v. Stone, 269 N.W.2d 885 (Minn. 1978), see infra notes 46-48 and accompanying text.

43. Butler, 548 P.2d at 938-39. The court stated that insurance companies avoid coverage as a result of an intentional injury exclusion clause only if the insured acted with the intent to cause some injury. Id. It did not matter that the character or the gravity of the resulting injury was different from the intended injury. Id. Therefore, the court denied coverage because some injury was intended. Id.
eye damage to the plaintiff when he hit the plaintiff with a steel pipe.\textsuperscript{44} The court denied coverage because the defendant intended some type of harm when he hit the plaintiff with a steel pipe.\textsuperscript{45} In \textit{Kemper}, the Supreme Court of Minnesota arrived at the same conclusion — that the insured must specifically intend to cause some harm in homeowner’s liability cases in order for coverage to be denied.\textsuperscript{46} The defendant in \textit{Kemper} hit the plaintiff in the head with a belt which caused the plaintiff to develop a permanent epileptic condition.\textsuperscript{47} The court held that while the defendant may not have intended such a severe injury, he undoubtedly intended some injury, and thus there was intent to harm.\textsuperscript{48} Both \textit{Butler} and \textit{Kemper} represent cases where the “some type of harm” approach was used by state courts.\textsuperscript{49}

\textbf{C. Pennsylvania’s Interpretation of Intentional Injury Exclusion Clauses}

While the majority of courts have adopted the “some kind of harm” approach,\textsuperscript{50} Pennsylvania has not.\textsuperscript{51} In \textit{United Services Automobile Ass’n v.}

\textsuperscript{44} Id. at 936. In \textit{Butler}, the plaintiff and the defendant became involved in a quarrel over their children. \textit{Id.} at 936. The defendant told the plaintiff to get off his property, but the plaintiff refused. \textit{Id.} Then, the defendant struck the plaintiff in the head with a steel pipe causing permanent eye impairment. \textit{Id.} At the time of this occurrence, the defendant was insured under a liability policy issued by Safeco Insurance Company of America (Safeco). \textit{Id.} at 935. Safeco denied coverage, because the defendant’s policy contained an intentional injury exclusion clause. \textit{Id.} at 935-37.

\textsuperscript{45} For a complete discussion of the holding in \textit{Butler}, see supra notes 43-45 and accompanying text.

\textsuperscript{46} \textit{Kemper}, 269 N.W.2d at 887. The court determined that the meaning of the intentional injury exclusion clause was well settled. \textit{Id.} An intent to act was not enough; the insured must also have intended some injury, even if the actual injury was of a different magnitude or nature than the injury originally intended. \textit{Id.}

\textsuperscript{47} \textit{Id.} at 886. The defendant, a 16-year-old boy, was out with several of his friends when they encountered the plaintiff. \textit{Id.} Plaintiff and defendant had fought several times before, and now decided to resolve their differences once and for all. \textit{Id.} Defendant struck the plaintiff on the temple with his belt. \textit{Id.} The injuries the plaintiff suffered from the blow caused the development of an epileptic condition. \textit{Id.} At the time of the fight, the defendant was covered under his father’s homeowner’s liability policy which contained an intentional injury exclusion clause. \textit{Id.}

\textsuperscript{48} \textit{Id.} at 887. The court compared this case to Pendergraft v. Commercial Standard Fire & Marine Co., 342 F.2d 427 (10th Cir. 1965). \textit{Kemper}, 269 N.W.2d at 887. In both cases, the defendants hit the plaintiff in the head and a more severe injury resulted than what the defendants had anticipated or intended. \textit{Id.} at 886-87. In \textit{Pendergraft}, the insured was denied coverage because the insured intended some type of injury. \textit{Id.} at 887. The \textit{Kemper} court adopted the same rule: coverage is denied if the insured intended to cause bodily injury. \textit{Id.}

\textsuperscript{49} For a complete discussion of the \textit{Butler} and \textit{Kemper} cases, see supra notes 40-49 and accompanying text.


\textsuperscript{51} \textit{Id.} at 989.
the Superior Court of Pennsylvania held that an intentional injury exclusion clause was applicable only if: (1) the insured intended to cause injury of the same general type as that which resulted or (2) the insured knew that such injury was substantially certain to occur. The court's standard combined the "similar type of harm" approach and the substantially certain approach.

In Elitzky, Judge Joseph C. Bruno had brought an action against the Elitzkys for malicious defamation and intentional infliction of emotional injury. The Elitzkys turned the action over to their homeowner's insurance company. Their policy contained an intentional injury exclusion clause under which the insurance company denied coverage. The trial


53. Id. at 989. The court held that an intentional injury exclusion clause excludes coverage only if the insured intended a similar type of injury to occur. Id. The court next described intent as knowing with substantial certainty that the consequence will occur. Id.

54. For a complete discussion of the "similar type of harm" approach, see supra notes 31-34 and the accompanying text.

55. For a full discussion of the substantially certain approach, see supra notes 35-36 and accompanying text.

56. Elitzky, 517 A.2d at 984. From September 9, 1980 until October 4, 1983, the Honorable Joseph C. Bruno, Judge of the Court of Common Pleas of Philadelphia County, presided over several cases in which Judy Elitzky was a litigant. Id. In his complaint, Judge Bruno alleged that during this time period, the Elitzkys wrote letters to him, another judge, the District Attorney of Philadelphia and the Attorney General of Pennsylvania. Id. These letters stated that Judge Bruno: was involved in a "behind the scenes arrangement to circumvent discovery," was believed by "federal officials" to be "a participant in the coverup of the criminal activity of trustees," was guilty of "judicial corruption," attempted to "fix" a case, and had an "improper relationship" with a party to a case and with the law firm of Wolf, Block, Schorr and Solis-Cohen. Id. Judge Bruno denied these allegations and sought compensatory damages for these alleged defamatory statements. Id. He alleged that the Elitzkys either knew that these statements were false or were reckless in failing to determine the truthfulness or falsity of the statements. Id. In the second part of his complaint, Judge Bruno also alleged that the defendants published these statements for the sole purpose of inflicting emotional distress on him. Id. In the third part of his complaint, Judge Bruno sought to recover punitive damages for the alleged "malicious, intentional and reckless conduct of [the] defendants." Id.

57. Id. In November of 1979, the Elitzkys bought a homeowner's insurance policy from United Services Automobile Association (United). Id. This policy was in force at the time of the suit. Id. The defendants turned to United to defend and indemnify them. Id. at 984-85.

58. Id. at 984-85. The policy in question covered: "damages because of bodily injury and property damages." Id. However, coverage was "subject to the following exclusionary clause: '1.) Coverage E — Personal Liability and Coverage F — Medical Payments to others do not apply to bodily injury or property damage. a.) Which is expected or intended by the insured.' " Id. United disclaimed coverage. Id. at 985. In March of 1984, United brought a declaratory action alleging that it had neither the duty to defend nor indemnify the Elitzkys in the action brought by Judge Bruno. Id. The court stated that while Judge Bruno's causes of action were definitely "bodily injury" or "property damage," because these claims
court agreed that the insurance company had neither the duty to defend nor the duty to cover the claims arising from the damages. The defendants subsequently appealed, arguing that the trial court erred in determining that the insurance company had no duty to defend their claims.

The Superior Court of Pennsylvania noted that the duty to defend and indemnify is determined by whether the injuries alleged are covered by the policy. To ascertain whether the insureds have coverage, the court noted that it must interpret the language of the insurance policy, specifically the words “intended” and “expected” in the exclusion clause.

The Superior Court of Pennsylvania noted that other state courts have disagreed in their interpretation of the exclusion clause. The court

were based on intentional tort theories, they were excluded from coverage under the policy’s coverage exclusion. Id. The exclusion clause mandated denial of coverage because the damage or injury was intended or expected. Id.

59. Id. “[T]he court entered a decree that United [the insurance company] need not provide coverage . . . . [Then] the court concluded that United had no duty to defend the Elitzkys.” Id.

60. Id. The trial court held that United did not have a duty to defend, but refused to determine whether United had a duty to indemnify. Id. The trial court reasoned that the issue of indemnification was not yet ripe, because Judge Bruno had not proven his action. Id. The Elitzkys presented three issues for the Superior Court of Pennsylvania to review: (1) whether the trial court erred when it decided United had no duty to defend the Elitzkys; (2) whether the trial court erred when it failed to determine that United had a duty to indemnify the Elitzkys if Judge Bruno was successful in proving his action; and (3) whether the trial court erred when it granted United’s motion in limine. Id.

61. Id. The obligation to defend is based solely on the allegations in the underlying action. Id. (citing Cadwallader v. New Amsterdam Casualty Co., 152 A.2d 484 (Pa. 1959); Vale Chem. Co. v. Hartford Accident & Indem. Co., 490 A.2d 896 (Pa. Super. Ct. 1985), rev’d on other grounds, 516 A.2d 684 (Pa. 1986)). If the complaint alleges an injury that may be within the policy’s coverage, the company is obligated to defend until the company can prove that the claims are not covered. Id. (citing Vale, 490 A.2d at 900).

62. Id. To determine whether alleged injuries are covered, the court must determine exactly what is covered. Id. In Erie Insurance Exchange v. Transamerica Insurance Co., 507 A.2d 389, 392 (Pa. Super. Ct. 1986), rev’d on other grounds, 539 A.2d 1363 (Pa. 1987), the court summarized the four theories for interpreting insurance coverage: (1) words should be given their plain meaning; (2) ambiguous terms should be construed against the insurer (3) “a term ‘will be held ambiguous only if reasonably intelligent men on considering it in the context of the entire policy would honestly differ as to its meaning’”; and (4) the intent of the instrument must be determined by considering the entire document. Elitzky, 517 A.2d at 986.

63. Elitzky, 517 A.2d at 986 (“Resolution . . . hinges on interpretation of the words ‘intended’ and ‘expected’ as used in the Elitzkys’ insurance contract.”).

64. Id. The courts have been unable to reach one definite interpretation of the intentional injury exclusion clause. Id. While some courts declare that the clause is unambiguous, other courts have stated that the clause has more than one meaning. Id. Compare Transamerica Ins. Co. v. Thrift-Mart, Inc., 285 S.E.2d 566, 572 (Ga. Ct. App. 1981) (holding that exclusion clauses are clear) with Cowan v. Ins. Co. of N. Am., 318 N.E.2d 315, 329 (Ill. App. Ct. 1974) (holding that exclusion clauses are ambiguous).

The Superior Court of Pennsylvania remarked that the clause has been inter-
found that for the intentional injury exclusion clause to apply under Pennsylvania law, the insured must have intended to cause the "resultant harm," merely intending the act is insufficient.\textsuperscript{65} The court stated that "resultant harm" meant the harm that occurred must be the same general type of harm which was intended, thus adopting the "similar type of harm" approach.\textsuperscript{66} The court then noted that intent also existed if the insured intended to cause the consequences of his act or acted knowing that such consequences were substantially certain to result, thus also adopting the substantially certain approach.\textsuperscript{67}

interpreted in at least four different ways: the "some kind of harm" approach, the tort approach, the "specific injury that resulted" approach or the "similar type of harm" approach. Elitzky, 517 A.2d at 986-87. For a complete discussion of the "some type of harm" approach to interpretation of intentional injury exclusion clauses, see supra notes 28-30 and accompanying text. For a complete discussion of the tort approach to interpretation of intentional injury exclusion clauses, see supra notes 37-39 and accompanying text. For a complete discussion of the "specific injury that resulted" approach to interpretation of intentional injury exclusion clauses, see supra note 35 and accompanying text. For a complete discussion of the "similar type of harm" approach to interpretation of intentional injury exclusion clauses, see supra notes 31-34 and accompanying text.

\textsuperscript{65} Elitzky, 517 A.2d at 987. While exclusion clauses can be interpreted in several different ways, Pennsylvania courts have interpreted them to require the insured's intent to cause the same general type of harm that occurred. \textit{Id.; see also} Eisenman v. Hornberger, 264 A.2d 673 (Pa. 1970) (holding that in this situation there was no evidence that insured intended any kind of damages and insured must intend to produce damage similar to that which did occur).

\textsuperscript{66} Elitzky, 517 A.2d at 987-88. The Elitzky court adopted the "similar type of harm" approach after analyzing the Supreme Court of Pennsylvania approach in Eisenman. \textit{Id.} at 987.

While stealing liquor from the plaintiffs, the defendants in Eisenman lit several matches to see around the house. Eisenman, 264 A.2d at 673. One of the matches caused a fire which destroyed the entire house. \textit{Id.} at 674. The court in Eisenman stated that the issue was whether the defendants had intended the resulting property damage. \textit{Id.} The court held that the insurer must prove that the insured intended not only the act, but also the damage that occurred. \textit{Id.} The court then determined that there was no basis for determining that the defendants had intended any property damage when dropping the matches. \textit{Id.}

In Eisenman, the court determined that the defendants did not intend to cause any property damage; thus, it implied that if the defendants had intended some kind of property damage, there would have been intentional damage or injury. Elitzky, 517 A.2d at 987 (citing Eisenman v. Hornberger, 264 A.2d 673 (Pa. 1970)). Further, the Eisenman court noted that by the act of stealing the liquor, the defendants did intend the harm of stealing the liquor. \textit{Id.} at 987-88. As a result of the Eisenman decision, the court in Elitzky determined that Pennsylvania follows the "similar kind of harm" approach; the insured must intend the "same general type of harm" as that which [the insured] set out to inflict." \textit{Id.} at 988. For a complete discussion of the "similar type of harm" approach, see supra notes 31-34 and accompanying text.

\textsuperscript{67} Elitzky, 517 A.2d at 988-89. The court referred to its decision in Nationwide Mutual Insurance Co. v. Hassinger, 473 A.2d 171 (Pa. Super. Ct. 1984), stating that an insured intended injury if he knew with substantial certainty that the consequences were likely to result or he wanted to bring about the resultant harm. Elitzky, 517 A.2d at 989. The court's determination of the intentional injury clause combines two approaches: the "similar type of harm" approach and the substan-
In applying this interpretation of the exclusion clause to the homeowner’s liability policy in *Elitzky*, the Superior Court of Pennsylvania held that the exclusion clause only excluded damages of the same kind that were intended or were substantially certain to occur, not injuries that were the result of reckless acts.\(^68\) Because the injury to the judge could have been the result of reckless acts by the defendants, the court held that the complaint stated a cause of action that was within coverage.\(^69\)

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68. *Elitzky*, 517 A.2d at 989.

69. Id. The Honorable Joseph C. Bruno had alleged libel for which he could recover even if the Elitzkys were merely reckless, not intentional, in their disregard of the truth of their statements. *Id.* at 989-91. The court discussed the term “reckless,” as defined by the Restatement of Torts, and determined that recklessness would be within coverage of the Elitzky’s policy. *Id.* at 989-90.

The court, in applying the facts to determined law, held that United was required to defend the action, because the action could possibly be within coverage. *Id.* The court continued its analysis of the intentional injury exclusion clause to determine whether the word “expected” affected the meaning of the intentional injury exclusion clause. *Id.* at 991. The court held that the terms “expected” and “intentional” were synonymous, and thus “expected” did not affect the meaning of the intentional injury exclusion clause. *Id.* Insurance companies across the nation added the word “expected” to the intentional injury exclusion clause in order to exclude coverage for certain foreseeable results. *Id.* at 990.

Since the addition of the word “expected” to such policies, four different meanings of the word “expected” have evolved in the courts. *Id.* One approach holds that the terms “expected” and “intended” are indistinguishable and do not add or detract from each other. *Id.; see also* Grange Mut. Casualty Co. v. Thomas, 301 So. 2d 158 (Fla. Dist. Ct. App. 1974) (stating that there is no difference in meaning of intentional injury exclusion clause when term “expected” is added); Hanover Ins. Co. v. Newcomer, 585 S.W.2d 285, 288 (Mo. Ct. App. 1979) (refusing to adopt interpretation of “expected” which would add element of foreseeability to “intended”); Jones v. Norval, 279 N.W.2d 388, 391 (Neb. 1979) (referring to Minnesota case which held in relation to policy language that “there is no substantial distinction . . . between . . . ‘expected or intended’ and those injuries ‘caused intentionally’”); State v. Glens Falls Ins. Co., 404 A.2d 101, 104 (Vt. 1979) (finding “expected” to “practically equate with ‘intended’”); Poston v. United States Fidelity & Guar. Co., 320 N.W.2d 9, 12 (Wis. Ct. App. 1982) (noting that while it has not been conclusively established that “intended” and “expected” are “absolutely synonymous,” this state appears to have adopted Wisconsin’s approach under which there is “no substantial distinction in meaning” between terms). The second approach states that the injury is expected if the actor knew or should have known that there was a substantial probability that the injury would occur. *Elitzky*, 517 A.2d at 990; *see* City of Carter Lake v. Aetna Casualty & Sur. Co., 604 F.2d 1052, 1058-59 (8th Cir. 1979) (stating that “expected” in intentional injury exclusion clauses requires showing that “insured knew or should have known “that there was a substantial probability that certain consequences will result”). The third approach suggests that the term “expected” excludes coverage if the harm was more likely than not. *Elitzky*, 517 A.2d at 990; *see* C. Raymond Davis & Sons, Inc. v. Liberty Mut. Ins., 467 F. Supp. 17, 20 (E.D. Pa. 1979) (defining “expected” in intentional injury exclusion clauses to mean “more likely than not” to occur). The final definition of “expected” merely suggests that the term “expected” adds an element of conscious awareness. *Elitzky*, 517 A.2d at 990-91; *see* Bay State Ins. Co. v. Wilson, 451 N.E.2d 880, 883 (Ill. 1983) (stating that “expected” means reasonably anticipated and conscious awareness). For a complete discussion concerning the addi-
III. Theory of “Inferred Intent”

A. Background on the Development of the “Inferred Intent” Approach

Regardless of the approach courts take in determining the meaning of intent in intentional injury exclusion clauses, the majority of courts infer intent to harm when the act giving rise to the insurance claim is child sexual molestation. The “inferred intent” approach states that intent to cause injury or harm to the child will be inferred regardless of whether or not the insured says that he or she actually intended to harm the child.

1. Origin of “Inferred Intent”

The “inferred intent” approach initially developed in Minnesota state courts. The Supreme Court of Minnesota introduced the theory of “inferred intent” in Caspersen v. Webber, when the defendant, a restaurant customer, shoved the hatchet girl into the door of the hatchet room. The court analyzed the defendant’s insurance liability policy which contained an exclusion for intentionally caused injury. The court held that,
in accordance with the policy, the insured must have the intent to cause bodily injury. However, the court then stated that the intentional injury exclusion clause might still apply if the "nature or character of the act" suggested that intent should be inferred as a matter of law. The court rejected the defendant's argument that assault and battery were acts for which the court should infer intent. While the Supreme Court of Minnesota did not specify what actions would justify "inferred intent," the court did establish that there could be some actions for which a court could infer intent.

In Fireman's Fund Insurance Co. v. Hill, the Supreme Court of Minnesota finally defined an act, child molestation, where the courts will infer intent as a matter of law. The defendant in Hill sexually assaulted a child and then claimed protection under his homeowner's insurance policy. The defendant's policy provided coverage for bodily injury and property damage, but specifically excluded coverage for injury "expected" or "intended." The court, referring to Caspersen, said that harm is "ex-

77. Id. The court said that unless the resulting injury is intended, the exclusion clause is inapplicable. Id.
78. Id. The court referred to a statement in the American Law Reports which says: it is the harm itself that must be intended before the exclusion will apply. There is, however, some authority for the proposition that such a clause will operate to relieve a liability insurer of its duty to indemnify . . . where the nature or character of the act is such that an intent to cause harm is thereby inferred as a matter of law. Id. (quoting W.E. Merritt III, Annotation, Liability Insurance: Specific Exclusion of Liability for Injury Intentionally Caused by Insured, 2 A.L.R. 3d 1238, 1241 (1965)).
79. Id. at 390. If the intent was inferred, the insurance company would not have been liable under the policy. Id. The jury determined, as a finding of fact, that Webber did not intend to harm Janet Caspersen. Id. The court held that there was coverage under the liability policy. Id.
80. Id. (stating that nature of some actions might be such that intent could be inferred, but not giving examples of such acts).
81. Fireman's Fund Ins. Co. v. Hill, 314 N.W.2d 834 (Minn. 1982). In Hill, Fireman's Fund Insurance Company brought a declaratory judgment action to determine whether charges for child molestation by the insured, Hill, were within policy coverage. Id. The court held that the defendant's act of sexual molestation was excluded from coverage under the intentional injury exclusion clause of his liability policy. Id. at 835.
82. Id. at 835 (stating that "nature of Hill's conduct was such that an intention to inflict injury can be inferred").
83. Id. at 834-35. The defendant, James Hill, and his wife were foster parents for approximately 10 children from 1973 to 1983. Id. Prior to 1976, a former foster child's parent alleged that James Hill had sexually molested his child while the child was in Hill's care. Id. The Welfare Department had placed another foster child, a young boy, with the Hills, and James Hill molested this boy also. Id. The State filed criminal actions against James Hill, and the boy and his parents subsequently filed an assault proceeding against James Hill. Id. at 835. At the time of the assault, James Hill owned a homeowner's liability policy issued by Fireman's Fund Insurance Company. Id. at 834-35.
84. Id. at 835. The terms of the policy established that Fireman had to pay for any damages that resulted from an "occurrence." Id. The policy then defined "occurrence" as an "accident which results in bodily injury or property damage."
pected" or "intended" if the nature or character of the act is such that
intent to inflict injury can be inferred as a matter of law. Thus, even
though the defendant claimed that he did not intend to harm the child, the
Supreme Court of Minnesota inferred intent to inflict injury from the
nature of the crime: sexual assault of a minor.

2. Rationale for Inferring Intent in Child Molestation Cases

A majority of state courts have adopted the "inferred intent" rule in
child sexual molestation cases, and thus, most insurance companies have
neither a duty to defend nor a duty to indemnify in such cases. While

Id. Finally, the policy contained an exclusion for "bodily injury or property dam-
geage which is either expected or intended from the standpoint of the insured." Id.

85. Id. The Supreme Court of Minnesota stated that for the insurer to be able
to exclude coverage under the exclusion clause, the insured must have intended
injury of the same general kind. Id. The court then stated that it was insufficient
for the insured to intend the act in order to come within the exclusion, that "[t]he
be excluded from coverage, a person must have specifically intended to cause
injury, although intent to injure will be found even if the actual injury is different in
kind or more severe than that intended." Id.; see Iowa Kemper Ins. Co. v. Stone,
269 N.W.2d 885 (Minn. 1978) (holding that intentional injury exclusion clause
excluded coverage for actions if insured intended some kind of harm). However,
the court also referred to Casperson's "inferred intent" theory. Hill, 314 N.W.2d at
can be inferred as matter of law). For a further discussion of Casperson, see supra
notes 73-80 and accompanying text.

86. Hill, 314 N.W.2d at 835. James Hill stated that he was socially and emo-
tionally immature and had not intended to harm the boy. Id.

87. Id. The court held that "the nature of Hill's conduct was such that an
intent to inflict injury can be inferred as a matter of law." Id. The facts show that
Hill knew that the Welfare Department would disapprove of his actions and view
them as detrimental to the child. Id. The court stated that "[t]hese facts give rise
to an inference of intent." Id.

1988) (stating that "majority of jurisdictions deciding these questions hold that
there is neither a duty to defend nor to pay" for sexual misconduct of insured).

In Leeper, the Supreme Court of Appeals of West Virginia adopted the "in-
ferr ed intent" theory for intentional injury exclusions. Id. at 587. In Leeper, a West
Virginia student sued his teacher for sexually abusing him. Id. at 582-88. Leeper,
the teacher, facilitated an "abnormal" relationship with a student, Brian, by becom-
ing more like a "friend" or "surrogate parent." Id. He also made sexual advances
and sexually abused Brian. Id. After criminal proceedings were finished, Brian's
parents filed suit for "intentional, willful, wanton, and negligent acts . . . in sexual
contacts with Brian and in seducing and enticing him." Id. The defendant at-
tempted to turn the lawsuit over to his insurance company, the Horace Mann In-
surance Company, but the policy contained an intentional injury exclusion clause.
Id. at 585. Thus, the Horace Mann Insurance Company filed a declaratory judg-
ment action claiming that it had no duty to defend or provide coverage because of
the exclusion. Id.

The Supreme Court of Appeals of West Virginia then had to determine
whether an insured who had sexual contact with a child is covered under his liabil-
ity insurance when the policy contains an intentional injury exclusion clause. Id.
at 584. The Leeper court noted that a split in jurisdictions had developed regarding
this issue. Id. The court determined that the majority of jurisdictions have denied
the duty to defend and the duty to indemnify as a result of the inferred intent rule.
most states usually apply a subjective standard to interpret intentional injury exclusion clauses, the same states apply an objective test to interpret these same clauses in child sexual molestation cases.\(^8\) This objective standard allows courts to infer intent to injure as a matter of law in cases where the insured engaged in some type of sexual misconduct.\(^9\)

State courts use an "inferred intent" approach to interpret intentional injury exclusion clauses for several reasons.\(^1\) Some courts infer intent to injure in sexual misconduct cases because the nature of the act is inherently injurious.\(^2\) A majority of the courts, however, infer intent to injure

\(^8\) *Leeber*, 376 S.E.2d at 584-85. The court in *Leeber* noted a trend in the majority of jurisdictions to apply an objective test in evaluating the meaning of intentional exclusion clauses in sexual misconduct cases. *Id.*; see American States Ins. Co. v. Borbor, 826 F.2d 888, 895 (9th Cir. 1987) (applying California law stating that "an insurer may not contract to indemnify an insured against the civil consequences of the insured's willful criminal acts"); State Farm Fire & Casualty Co. v. Huie, 666 F. Supp. 1402, 1404 (N.D. Cal. 1987) (noting that defendant's actions were such that construed in terms of liability there was intent to injure), aff'd, State Farm Fire & Casualty Co. v. Bomke, 849 F.2d 1218 (9th Cir. 1988); Allstate Ins. Co. v. Thomas, 684 F. Supp. 1056, 1060 (W.D. Okla. 1988) (noting that sexual abuse of child is of such nature that intent to inflict injury can be inferred); CNA Ins. Co. v. McGinnis, 666 S.W.2d 689, 691 (Ark. 1984) (finding intent to injure even though defendant stated that he did not intend to injure); McCullough v. Central Fla. YMCA, 523 So. 2d 1208, 1208-09 (Fla. Dist. Ct. App. 1988) (stating that "[r]egardless of the molester's subjective speculation, expectation, or intent to cause or not to cause bodily injury to a molested child, an intentional act of child molestation of a criminal character is not an accident"); Altena v. United Fire & Casualty Co., 422 N.W.2d 485, 491 (Iowa 1988) (stating that district court was correct to infer intent to injure victim as a result of insured engaging in sexual acts with victim); Harpy v. Nationwide Mut. Fire Ins. Co., 545 A.2d 718, 722 (Md. Ct. Spec. App. 1988) (holding that defining having sex with child who was 13 years old and younger at time of occurrences as "anything but intentional injury is ridiculous"); Estate of Lehmann v. Metzger, 355 N.W.2d 421, 424 (Minn. 1984) (noting that intent will be inferred in sexual misconduct cases); Vermont Mut. Ins. Co. v. Malcolm, 517 A.2d 800, 802 (N.H. 1986) (noting that when determining meaning of "accidental," insured's act is not accidental if insured intended to cause resultant injury or act is "so inherently injurious that it cannot be performed without causing the resulting injury"), modified, Providence Mut. Fire Ins. Co. v. Scanlon, 638 A.2d 1246 (N.H. 1994); Rodriguez by Brennan v. Williams, 729 P.2d 627, 630 (Wash. 1986) (noting that "intent to injure, while normally a subjective determination . . . should be inferred in sex abuse cases").

\(^9\) *Leeber*, 376 S.E.2d at 585 (noting that intent will be inferred in sexual misconduct cases).

\(^1\) *Id.* at 584-87 (noting that different courts have applied the inferred intent rule in interpreting intentional injury exclusion clauses for different reasons).

\(^2\) Allstate Ins. Co. v. Mugavero, 589 N.E.2d 365, 370 (N.Y. 1992) (holding that harm was inherent). The defendant in *Mugavero* committed acts of sodomy and sexual abuse on a six-year-old girl and a nine-year-old boy while his wife was baby sitting them. *Id.* at 366-67. When the defendant and his wife were sued, they attempted to turn the defense and liability for their damages over to their homeowner's liability insurance company, but Allstate brought a declaratory judgment action claiming that there was no coverage. *Id.* at 367. The policy in dispute con-
because of state prohibitions of sexual conduct between adults and minors. By criminalizing the conduct, states warn insureds that there is an understanding that such actions can only result in harm. Courts also note that it is not within an insured’s "reasonable expectations" that the insured will be covered for sexual molestation of children when the insured purchases an insurance policy. Finally, some courts adhere to the

93. Mueller, supra note 70, at 358. The fact that states have overwhelmingly prohibited sexual interaction between minors and adults has led a majority of jurisdictions to conclude that such contact can be inferred to be harmful to the child. Id.

94. Id. A majority of jurisdictions have held that making such contact criminal means not only that the action is inherently harmful, but also that society as a whole has determined that intent to act is intent to harm in the molestation of a child. Id.; see, e.g., Smith, 907 F.2d at 902 (stating that who violates Nevada Revised Statute § 201.230 by engaging in lewd acts with children under age of 14 cannot claim he or she intended act of molestation without also intending harm); M.K., 804 P.2d at 698 (agreeing that child molestation in violation of Penal Code constitutes wilful act within Insurance Code); Allstate Ins. Co. v. Troestrup, 789 P.2d 415, 419 (Colo. 1990) (noting that criminal statute makes implicit resulting harm from child molestation).

95. Leeber, 376 S.E.2d at 586-87. The idea that coverage for sexual abuse of minors is not within an insured’s "reasonable expectations" stems from the doctrine of reasonable expectations. Id. The doctrine of reasonable expectations, a method of interpreting insurance policies, states that the reasonable expectations of the insured and the insured’s beneficiaries will be honored, even if, upon review of the actual policy, the language of the policy would have negated these expectations. National Mut. Ins. Co. v. McMahon & Sons, Inc., 356 S.E.2d 488, 495-96 (W. Va. 1987).

The Supreme Court of Appeals of West Virginia, in Leeber, stated that an insured cannot reasonably be expected by the insurance company to defend and pay for the sexual misconduct of the insured, regardless of the language of the intentional injury exclusion clause. Leeber, 376 S.E.2d 581, 587; see Rodriguez by Brennan v. Williams, 713 P.2d 135, 137-38 (Wash. Ct. App.) (noting that average homeowner purchasing liability insurance would be appalled at idea that he or she was
theory that child molestation is a criminal act, and it is against public policy to allow insurance to cover criminal or intentional acts.\footnote{96}

3. \textit{Rationale Against Inferring Intent in Child Molestation Cases}

Rather than applying the theory of "inferrable intent," a small minority of states require a showing of actual intent to cause harm, a subjective standard of intent, even in sexual molestation of children cases.\footnote{97} These courts adopted this subjective standard because it provides another source of recovery for the victims: the insurance company.\footnote{98} Courts following the majority approach, however, criticize this minority approach for two reasons. First, the minority approach is impossible to prove because an individual will rarely admit that he or she intended harm. Thus by forcing purchasing coverage for damages or injuries resulting from his or her sexual abuse of a child and that no insured would want to share that risk with any other homeowner), \textit{aff’d en banc}, 729 P.2d 627 (Wash. 1986). \textit{See generally} Roger C. Henderson, \textit{The Doctrine of Reasonable Expectations in Insurance Law After Two Decades}, 51 \textit{Ohio St. L.J.} 823 (1990) (analyzing origin and development of doctrine of reasonable expectations over last 20 years); Paula L. Harrington, \textit{Note, The Duty to Defend in California After Montrose Chemical Corporation v. Superior Court: Is the California Supreme Court Protecting Policyholders or Encouraging Litigation and the Early Settlement of Unworthy Claims?}, 31 \textit{Cal. W. L. Rev.} 165, 181 (1994) (stating that if insurance contract is ambiguous, then contract must be interpreted to reflect insured’s reasonable expectations); Scott B. Krider, \textit{The Reconstruction of Insurance Contracts Under the Doctrine of Reasonable Expectations}, 18 \textit{J. Marshall L. Rev.} 155 (1984) (developing doctrine of reasonable expectations and explaining its impact on insurance contracts).

\footnote{96} Hensley v. Erie Ins. Co., 283 S.E.2d 227, 230 (W. Va. 1981). In \textit{Hensley}, the defendant, highly intoxicated, drove his vehicle on the wrong side of the road and collided head-on with the plaintiffs. \textit{Id.} at 228. The defendant’s liability insurance contained an exclusion for damage or injury that the defendant intentionally caused. \textit{Id.} In trying to determine whether public policy precluded an insurance company from covering punitive damages, the court noted that the majority of jurisdictions have determined that it is against public policy to allow insurance coverage for an intentional tort. \textit{Id.} at 228-29.

\footnote{97} Leeber, 376 S.E.2d at 586. A small number of courts apply a “strictly subjective” test, even in sexual misconduct cases. \textit{Id.}; \textit{see e.g.}, State Auto. Mut. Ins. Co. v. McIntyre, 652 F. Supp. 1177 (N.D. Ala. 1987) (requiring subjective intent to harm before insurance coverage denied); Zordan v. Page, 500 So. 2d 608, 609-10 (Fla. Dist. Ct. App. 1986) (same); MacKinnon v. Hanover Ins. Co., 471 A.2d 1166 (N.H. 1984) (declining to “inject concepts of substantive tort law” and noting that insured must intend injury). Subjective intent refers to actual intent to cause the specific injury suffered. \textit{Leeber}, 376 S.E.2d at 586. However, since the \textit{Leeber} decision, states who were predicted by federal courts to adopt the subjective approach have changed to the majority view. State Farm Fire and Casualty Co. v. Davis, 612 So. 2d 458 (Ala. 1993) (rejecting inferred intent); Shearer v. Central Florida YMCA, 546 So. 2d 1050, 1051 (Fla. 1989) (disapproving majority opinion of inferred intent).

\footnote{98} \textit{Leeber}, 376 S.E.2d at 586. By requiring a subjective standard, the insurance company is not relieved of responsibility to defend and cover under the intentional injury exclusion clause until they have proven actual intent to harm. \textit{Id.} Thus, the justification for the minority’s approach is that it provides another source of compensation for the victim, the insurance company who cannot prove actual intent to harm. \textit{Id.}
someone to prove the subjective intent of the insured, courts make it impossible to establish the insured’s guilt. Second, several jurisdictions simply repeat that it is against public policy to allow an individual to insure himself or herself against one’s own intended acts of harm.

4. Further Refinement of the “Inferred Intent” Approach

In 1988, the Wisconsin Court of Appeals refined “inferred intent” by developing a standard to determine when it was appropriate to infer intent. In K.A.G. by Carson v. Stanford, the court interpreted an intentional injury exclusion clause in a child sexual molestation case to exclude coverage for the insured. The court held that when faced with an intentional injury exclusion clause, it will infer intent to injure only if: (1) the insured acts intentionally and (2) the injury is substantially certain to occur. The court concluded that sexual molestation is an intentional

99. Id. Critics of the minority approach have focused their arguments on its impracticality. Id. To require a completely subjective test would almost always make the insurance company liable under an intentional injury exclusion clause, unless the insured admitted that he intended to harm the victim. Id. “‘Human nature augers against any viable expectation of such admissions.’” Id. (quoting Truck Ins. Exch. v. Pickering, 642 S.W.2d 113, 116 (Mo. Ct. App. 1982)); see Western Nat’l Assurance Co. v. Hecker, 719 P.2d 954, 960 (Wash. Ct. App. 1986) ( remarking on “logically untenable” approach of subjective intent to cause specific injury).

100. Leiber, 376 S.E.2d at 586. Although the minority’s approach would provide the victim with a deeper pocket from which to recover, the court remarked that courts could “spread the risk” of any intentional tort by applying the inferred intent approach to other torts. Id. However, this court and the majority of other courts have concluded that public policy is against people benefitting from their wrongdoing, and thus it would be against public policy to “spread the risk” of the intentional torts. Id. For a further discussion of this public policy rationale, see supra note 96 and accompanying text.


102. 434 N.W.2d 790, 792 (Wis. Ct. App. 1988), review denied, 439 N.W.2d 142 (Wis. 1989).

103. Id. at 793-94. The defendant owned and operated a mobile home park where the plaintiff and her parents resided. Id. at 791. The plaintiff, a six-year-old girl, frequently visited the defendant and his wife. Id. The defendant sexually molested the plaintiff, perhaps more than once. Id. The plaintiff and her parents filed suit for the injuries that resulted from the conduct. Id. At the time of the molestation, the defendant first held a policy issued by Heritage Mutual Insurance Company, and then a policy issued by General Casualty Company. Id. at n.1. Both policies contained an intentional injury exclusion clause which excluded liability for injury or damage that resulted from expected or intentional injury. Id. at 792. After devising a two-part test, the court came to the conclusion that sexual abuse of a child is so likely to result in injury that intent will be inferred. Id. at 793-94.

104. Id. at 792. The two requirements are: (1) the action of the insured must be intentional and (2) the conduct must be substantially certain to result in injury. Id. The court further cautioned that this narrow rule was only to be applied if the degree of certainty that the conduct would result in injury is so great that it justifies inferring intent to injure as a matter of law. Id.
act from which injury is substantially certain to result, and thus intent may be inferred.\textsuperscript{105} \textit{Stanford} defined a test for when it is appropriate to infer intent for states which adopt the "inferred intent" approach.\textsuperscript{106}

B. \textit{Pennsylvania's Adoption of the "Inferred Intent" Approach}

In \textit{Wiley v. State Farm Fire & Casualty Co.},\textsuperscript{107} the United States Court of Appeals for the Third Circuit predicted that Pennsylvania would adopt the "inferred intent" approach to intentional injury exclusion clauses when the insured sexually molests a child.\textsuperscript{108} In \textit{Wiley}, the defendant sexually molested his niece.\textsuperscript{109} The defendant attempted to tender the suit over to his insurance company, State Farm Fire & Casualty Company (State Farm).\textsuperscript{110} The plaintiffs and the defendant agreed to the filing of a declaratory judgment action against State Farm to determine State Farm's responsibility under the policy.\textsuperscript{111} The defendant's policy contained an exclusion for "intended" or "expected" injuries.\textsuperscript{112} Because the Supreme Court of Pennsylvania had not yet addressed the specific issue of whether an insured had coverage for child molestation under the insured's homeowner's liability insurance policy which contained an intentional injury exclusion clause, the court based its decision on the meaning of the intentional injury exclusion clause in the policy as interpreted by the federal court.

\textsuperscript{105} \textit{Id.} at 792-93. While the court did not define all of the actions that would fall within this rule, they did determine that sexual molestation of a minor fits within the rule. \textit{Id.} at 793. The court stated that the more likely the harm is to result from the action, the more likely intent to harm will be inferred. \textit{Id.} The court gave the example of firing a gun into a crowded room and stated that in such a situation intent may be inferred. \textit{Id.}

\textsuperscript{106} For a more complete discussion of the \textit{Stanford} approach, see \textit{supra} notes 101-05 and accompanying text.

\textsuperscript{107} \textit{Wiley v. State Farm Fire & Casualty Co.}, 995 F.2d 457 (3d Cir. 1993) (predicting Pennsylvania law pertaining to standard of intent).

\textsuperscript{108} For a detailed discussion of the majority rule of "inferred intent" in child molestation cases, see \textit{supra} notes 70-106 and accompanying text.

\textsuperscript{109} \textit{Id.} at 458-59. Floyd sexually molested his 13-year-old niece in the summer of 1986. \textit{Id.} at 459. He was criminally prosecuted and pleaded guilty to indecent assault and corrupting the morals of a minor. \textit{Id.} at 458. Dennis and Elanie Wiley, the girl's parents, then filed suit to recover for their daughter's personal injuries. \textit{Id.}

\textsuperscript{110} \textit{Id.} Floyd turned the action over to State Farm Fire and Casualty Company (State Farm), because he had previously obtained a homeowner's liability policy from them. \textit{Id.} at 458. Although State Farm began to defend Floyd, they reserved the right to deny coverage based on the meaning on the intentional injury exclusion clause in Floyd's policy. \textit{Id.} at 458-59.

\textsuperscript{111} \textit{Id.} Eventually, Floyd and his niece's parents filed a declaratory judgment action against State Farm to determine if State Farm had the duty to defend and cover Floyd. \textit{Id.} at 459.

\textsuperscript{112} \textit{Id.} at 458 n.1. The policy provided coverage for damages for bodily injury or property damage, but specifically excluded coverage for "bodily injury or property damage which is expected or intended by an insured." \textit{Id.} The court also noted that the meaning of this exact clause was the "sole issue" of the lawsuit. \textit{Id.} at 458.
clusion clause, the Third Circuit had to predict how Pennsylvania courts would interpret the policy and the exclusion.\textsuperscript{119}

First, the Third Circuit examined Pennsylvania law on intentional injury exclusion clauses generally.\textsuperscript{114} The Third Circuit noted that in \textit{Elitzky}, the Superior Court of Pennsylvania applied a subjective standard of intent to the intentional injury exclusion clause, thus excluding coverage only if the injuries that occurred were of "the same general type which the insured intended to cause."\textsuperscript{115} The court then noted that while this is a common standard in normal liability insurance cases, it is the extreme minority approach in sexual molestation of minors liability cases.\textsuperscript{116}

Next, the court looked to district court interpretations of Pennsylvania law.\textsuperscript{117} The Third Circuit indicated that the United States District Court for the Western District of Pennsylvania previously predicted the adoption of the "inferred intent" theory by Pennsylvania for homeowner's liability cases involving the sexual molestation of a child in \textit{Foremost Insurance Co. v. Weetman}.\textsuperscript{118} The Third Circuit was convinced by the district

\begin{itemize}
\item \textbf{113.} \textit{Id.} at 459. A federal court which has diversity jurisdiction must determine substantive state law and then apply it. \textit{Id.} (citing Robertson v. Allied Signal, Inc. 914 F.2d 360, 378 (3d Cir. 1990)). The Third Circuit noted that the Supreme Court of Pennsylvania had not addressed the exact issue that was raised in this case. \textit{Id.} The issue was which approach to "intent" was to be applied in interpreting intentional injury exclusion clauses of liability policies when the insured intentionally sexually molested a child. \textit{Id.} The Third Circuit remarked that there were four items that it could consider in predicting how a Pennsylvania court would resolve this issue: (1) Supreme Court of Pennsylvania decisions in similar areas; (2) Pennsylvania intermediate courts' decisions; (3) federal appellate and district court determinations of Pennsylvania state law; and (4) other jurisdictions' decisions on the same issue. \textit{Id.} at 459-60 (citing Gruber v. Owens-Illinois Inc., 899 F.2d 1366, 1369-70 (3d Cir. 1990)).

\item \textbf{114.} \textit{Id.} at 460. The Third Circuit, after a brief introduction as to what the "inferred intent" rule was, turned to Pennsylvania law regarding liability insurance and intentional injury exclusion clauses. \textit{Id.} For a more complete discussion of inferred intent, see \textit{supra} notes 70-106 and accompanying text.

\item \textbf{115.} \textit{Id.} For a complete discussion of the \textit{Elitzky} case, see \textit{supra} notes 50-69 and accompanying text. For a complete discussion of the "similar type of harm" approach to interpretation of the intentional injury exclusion clause, see \textit{supra} 31-34 and accompanying text.

\item \textbf{116.} \textit{Id.} at 461. The Third Circuit noted that the subjective standard in the interpretation of the intentional injury exclusion clause is "not uncommon." \textit{Id.} (citing Continental W. Ins. Co. v. Toal, 244 N.W.2d 121, 124-25 (Minn. 1976)). The district court in this case, however, observed that in intentional sexual molestation cases, a subjective standard of intent is a minority approach. \textit{Id.} For a full discussion of the minority approach to cases involving the sexual molestation of children — homeowner's liability cases, see \textit{supra} notes 97-100 and accompanying text.

\item \textbf{117.} \textit{Wiley}, 995 F.2d at 460. The third of four factors for determining Pennsylvania state law is to look at district court interpretations of state law. \textit{Id.} For a listing of all four factors, see \textit{supra} note 113.

\item \textbf{118.} \textit{Id.} at 461 (citing Foremost Ins. Co. v. Weetman, 726 F. Supp. 618, 621-22 (W.D. Pa. 1989), \textit{aff'd}, 904 F.2d 694 (3d Cir. 1990)). In the fall of 1985, J. Robert Weetman sexually abused two young boys. \textit{Weetman}, 726 F. Supp. at 619. The parents of the boys filed suit against Weetman. \textit{Id.} At the time of the occurrence,
court's rationale that: (1) a majority of state courts adopted "inferred intent" and (2) many courts which originally adopted the minority approach had since switched to the "inferred intent" approach.119

The Wiley court outlined three possible approaches to determine if the insured intended to cause harm: (1) whether there was intent to cause some type of injury;120 (2) whether a reasonable person would have expected or intended injury to occur;121 and (3) whether intent could be inferred from the act.122 The Third Circuit then discussed when the "in-

Weetman had two homeowner's liability policies: one for his mobile home where the incidents of abuse actually occurred and one for his permanent residence. Id. Both policies contained intentional injury exclusion clauses which denied coverage for injuries that were "expected or intended." Id. Both insurance companies, Foremost Insurance Company and Donegal Insurance Company, alleged that child molestation as a matter of law is conduct where harm is "expected or intended," and thus neither insurance policy covered the children's injuries. Id. The children's parents, however, argued that there was an issue of fact as to whether Weetman intended to harm their children. Id.

The district court noted that in the general interpretation of intentional injury exclusion clauses, Pennsylvania has held that the insured must intend the same kind of harm that resulted in order for the intentional injury exclusion clause to apply. Id. at 620 (citing United Servs. Auto. Ass'n v. Elitzky, 517 A.2d 982, 989 (Pa. Super. Ct. 1986), alloc. denied, 528 A.2d 957 (Pa. 1987)). The district court later commented that a majority of jurisdictions that have had liability cases involving the sexual abuse of a child have "inferred intent." Weetman, 726 F. Supp. at 620. Further, even in the jurisdictions where the minority approach of subjective intent was adopted, there has been a shift to the majority approach of "inferred intent." Id. at 621 (citing to State Farm Fire & Casualty Co. v. Estate of Jenner, 874 F.2d 604 (9th Cir. 1989) which rejected State Farm Fire & Casualty Co. v. Estate of Jenner, 856 F.2d 1359 (9th Cir. 1988) which rejected "inferred intent"); Vermont Mut. Ins. Co. v. Malcolm, 517 A.2d 800 (N.H. 1986) (rejecting MacKinnon v. Hanover Ins. Co., 471 A.2d 1166 (N.J. 1984) (holding that insured's subjective intent was relevant in case of sexual molestation of child)).

Finally, the district court did not adopt the minority approach merely because it would provide a deeper pocket from which to compensate the victim. Weetman, 726 F. Supp. at 622. Instead, the district court held that sexual molestation of children is inherently injurious, and thus harm should be inferred as a matter of law. Id.


120. For a complete discussion of the "some type of injury" approach to determining whether the insured intended to cause the injury, see supra notes 28-30 and accompanying text.

121. For a complete discussion of the objective or reasonable person approach to determining if the insured intended to cause injury, see supra notes 37-39 and accompanying text.

122. Wiley, 995 F.2d at 462. The Third Circuit referred to the Minnesota approach of analyzing the nature or character of the act in inferring intent as a matter of law. Id. (citing Allstate Ins. Co. v. Roelfs, 698 F. Supp. 815, 819-20 (D. Alaska
ferred intent" approach would be appropriate, relying heavily on K.A.G. by Carson v. Stanford.\textsuperscript{123} The Stanford court and other courts adopting this view held that the "inferred intent" approach is only applicable if the action was intentional and the injury was substantially certain to occur.\textsuperscript{124}

Reflecting on other courts' explanations for embracing the "inferred intent" approach, the Third Circuit examined the theory that harm is inherent in the sexual molestation of children, and thus intent should be inferred.\textsuperscript{125} The Third Circuit then noted that the states which adopted the "inferred intent" approach are usually states which prohibit sexual contact between adults and children. Through these prohibitions, state legislatures gave the public notice that such contact would injure children.\textsuperscript{126} The Third Circuit also acknowledged that an average person buying a homeowner's liability policy would not expect coverage for sexual molestation of minors.\textsuperscript{127} Finally the court recognized that the minority approach is illogical.\textsuperscript{128} Thé Third Circuit, in a very narrow holding, declared that Pennsylvania would adopt the "inferred intent" rule in liability insurance cases when the insured intentionally sexually molested a child.\textsuperscript{129}

The Third Circuit next faced the issue of how expansive Pennsylvania's "inferred intent" approach should be, especially in relation to sexual misconduct between two adults.\textsuperscript{130} In Aetna Life & Casualty Co. v. 1987) (discussing "Minnesota approach"). For a complete discussion of the Minnesota approach, see supra notes 72-87 and accompanying text.

123. Wiley, 995 F.2d at 464-65. For a complete discussion of the Stanford case, see supra notes 101-06 and accompanying text.


125. Wiley, 995 F.2d at 462-63. The Third Circuit recognized that the situation in Mugavero was almost identical to the issue that it was determining. Id. In Mugavero, the court concluded that the harm could not be separated from the act of sexual abuse, for it was inherent. Id. For a complete discussion of the analysis of Mugavero, see supra note 92 and accompanying text. The California courts have also declared that "[t]he act is the harm." Id. (quoting J.C. Penney Casualty Ins. Co. v. M.K., 804 P.2d 689 (Cal.), cert. denied, 502 U.S. 902 (1991)).

126. Id. at 464. For a complete discussion of the rationale that state proscription of sexual relations of minors with adults allows the courts to infer intent to injure, see supra note 95 and accompanying text.

127. Id. For a complete discussion of the doctrine of reasonable expectations and the connection to "inferred intent," see supra note 95 and accompanying text.

128. Id. For a complete discussion of the minority approach and its faults, see supra notes 97-100 and accompanying text.

129. Id. The Third Circuit declared that the sexual assault of a child is an act of such nature or character where harm is inherent. Id. at 464-65. Then, the court held that in liability insurance cases where the insured sexually molests a child, the court may infer intent to injure by the insured. Id.

130. Aetna Life & Casualty Co. v. Barthelemy, 33 F.3d 189, 191 (3d Cir. 1994). The court determined that the issue in Barthelemy was "whether, under the facts presented, this is a general liability insurance case in which the court must consider the insured's subjective intent to harm, or whether it is another 'exceptional'
Barthelemy, the Third Circuit addressed a situation where a female college student sued another college student for battery, negligent or reckless conduct, and reckless infliction of emotional distress resulting from sexual relations between the two.\textsuperscript{131} The defendant’s insurance company argued that Pennsylvania would expand its “inferred intent” approach to include sexual misconduct between adults.\textsuperscript{132} If the court inferred intent to injure in this sexual misconduct case, then the insurance company would not have to defend the insured or pay for any damages he caused, because the intentional injury exclusion clause would exclude such conduct. The Third Circuit, in Barthelemy, rejected this argument and held that the district court “erred in applying the ‘inferred intent’ rule” in this case.\textsuperscript{133}

The Third Circuit began its analysis by remarking that Wiley applied the “inferred intent” approach to “exceptional” cases of child sexual abuse.\textsuperscript{134} Wiley set forth a narrow rule stating that the “inferred intent” standard applied only when the act was intentional and the degree of certainty of injury was sufficiently significant to justify inferring intent.\textsuperscript{135}

case in which the court may infer the insured’s intent to harm as a matter of law.” Id. at 192.

\textsuperscript{131} Id. at 190. Ms. McSparran, at the time of this incident, was a 19-year-old student at Penn State University. Id. She was an inexperienced drinker and a virgin. Id. Mr. Barthelemy, also a student at Penn State University, was a disc jockey for the campus radio station. Id. He was 18 years old at the time of the incident. Id. Ms. McSparran won a compact disc from Barthelemy’s radio show, and he promised her another disc if she stayed until the end of the show and helped him take his music back to his dorm. Id. Once back in his room, they each had two rum and cokes, and then Barthelemy told McSparran that she could have another disc if she did four shots of rum. Id. He then convinced her that rum was no different than beer and would not affect her at all. Id. McSparran did the four shots, became ill and drunk, at which time Barthelemy had sexual intercourse with her. Id.

Ms. McSparran filed suit against Barthelemy alleging that he was guilty of battery, negligent or reckless conduct, and reckless infliction of emotional distress as a result of their sexual relations. Id. Barthelemy stated that the sexual intercourse was a consensual act, and Ms. McSparran, except for the claim of battery, did not state that Barthelemy used force or violence. Id. At the time of this incident, Barthelemy was covered under his parents’ homeowner’s liability policy which contained an intentional exclusion clause stating: the policy coverage did “not apply to bodily injury or property damage . . . which [was] expected or intended.” Id. at 191.

\textsuperscript{132} Id. at 190. Aetna Life and Casualty argued that as a result of Wiley, Pennsylvania would adopt an expansion of intent in this case also. Id.

\textsuperscript{133} Id. at 194 (holding that district court erred in expanding “inferred intent” rule to Barthelemy case).

\textsuperscript{134} Id. at 191. Barthelemy stated that Elitsky established that the approach to intentional injury exclusion clauses was that the insured must intend to cause harm, a subjective approach. Id. at 191-92. When the case concerns the sexual abuse of a child, however, the court does not require subjective intent, but allows the court to infer intent from the nature of the act. Id. (noting Wiley v. State Farm Fire & Casualty Co., 995 F.2d 457, 460 (3d Cir. 1993)).

\textsuperscript{135} For a complete discussion of the narrow rule established in Wiley and its application of Stanford, see supra notes 107-29 and accompanying text.
The court in Wiley repeatedly cautioned that in cases other than sexual abuse of a child Pennsylvania adopted the subjective intent standard. 136

The Third Circuit compared Barthelemy and Wiley and found that these two cases were more dissimilar than similar; thus, the Third Circuit refused to extend the "inferred intent" approach to Barthelemy. 137 Furthermore, the Third Circuit stated that the district court drew improper conclusions when analogizing Barthelemy to Wiley. 138 First, the district court declared that because sexual assault was a crime, like the sexual molestation of a child, the "inferred intent" approach should be extended because no reasonable person expected coverage under one's homeowner's liability insurance for criminal activity. 139 The Third Circuit rejected this analogy, for two reasons: (1) there was no crime in the Barthelemy case and (2) Wiley focused on the inherently injurious act of sexual molestation, not on crimes in general. 140 Second, the Third Circuit noted that the rationale for the Wiley decision was the widespread acceptance of the harm which sexual activity caused for a child, regardless of the adult's subjective intent, noting specifically the "tender age" of the

136. Barthelemy, 33 F.3d at 192. For a complete discussion of Pennsylvania's general approach to intentional injury exclusion clauses, see supra notes 50-69 and accompanying text.

137. Id. at 193. The Third Circuit noted that in applying the reasoning behind Wiley, the dissimilarities between Wiley and Barthelemy were numerous, while the similarities were few. Id. The Third Circuit compared and contrasted the two cases on the basis that analogies are an important aspect of legal argument. Id. The court set forth indicia that could be used to determine if the cases were alike or not. Id. The first criteria was the number of cases that have been analyzed, the more cases the more reliable. Id. Second, the cases must be analyzed in terms of positive resemblances and negative resemblances. Id. And finally, the relevance of the positive resemblances must be determined. Id.

138. Id. at 192.

139. Aetna Life & Casualty Co. v. Barthelemy, 836 F. Supp. 231, 236 (M.D. Pa. 1993). The district court noted that sexual assault, whether of an adult or of a child, was a crime. Id. at 237. Further, the court explained that a reasonable person does not expect to obtain coverage for criminal activities when he or she purchases a homeowner's liability policy. Id. For a complete discussion of the reasonable expectation approach, see supra note 95 and accompanying text.

140. Barthelemy, 33 F.3d at 192. The Third Circuit determined that the district court expanded the "inferred intent" approach too far. Id. First, there was no crime in Barthelemy. The plaintiff alleged battery and negligent infliction of emotional distress which are both torts, not crimes. Id. The district court inappropriately analogized this situation to rape, but there was no claim of rape. Id. (citing Barthelemy, 836 F. Supp. at 232). Secondly, the Third Circuit in Wiley focused solely on a particular crime, sexual molestation of children, not crime in general. Id. In fact, Wiley recognized that the Superior Court of Pennsylvania had already determined that subjective intent was the appropriate standard when the defendant had pled guilty to a crime. Wiley v. State Farm Fire & Casualty Co., 995 F.2d 457, 466-67 (3d Cir. 1999) (citing Sudham v. Millvale Sportsmen's Club, 618 A.2d 945 (Pa. 1992), alloc. denied, 637 A.2d 290 (Pa. 1993)). Therefore, it is inappropriate to apply the "inferred intent" approach to all cases where the insured committed a crime. Id.
victim at the time of the incident. In Barthelemy, both individuals were over eighteen, and consequently there was no “tender age” concern. The Third Circuit held that the dissimilarities between Wiley and Barthelemy significantly outweighed any similarities between the two cases and held that Pennsylvania would not extend the “inferred intent” approach to Barthelemy. As a result, the Third Circuit held that the insurance company failed to prove that the intentional injury exclusion clause applied, for it did not prove the insured’s subjective state of mind.

IV. Conclusion

The Third Circuit predicted that Pennsylvania will adopt the “inferred intent” approach to interpreting intentional injury exclusion clauses in child sexual molestation cases. Most states implementing “inferred intent” pointed to the inherently injurious nature of the act as the hallmark for applying the “inferred intent” standard. The Third Circuit stated when it applied “inferred intent” in Wiley that “harm to children in child molestation cases is inherent in the very act of sexual assault committed on a child, regardless of the motivation for or nature of such assault, and that the resulting injuries are, as a matter of law, intentional.” The question remains, however, what actions, if any, besides the sexual molestation of children, fit within this rule. Crimes such as rape or firing a gun into a crowd appear to be inherently injurious intentional acts that are substantially certain to cause injury.

141. Barthelemy, 33 F.3d at 193. Wiley adopted the “inferred intent” approach to child molestation liability cases because of a recognition of society’s determination that a child will be harmed regardless of the intent of the insured. Id. (citing to Wiley, 995 F.2d at 464). Many jurisdictions which have adopted the “inferred intent” approach in this situation have focused on the sexual abuse of a child, one who is unable to consent because of young age. Id.

142. Id. For a complete discussion of the facts of Barthelemy, see supra notes 131-32 and accompanying text.

143. Id. at 193. In summarizing the difference between the two cases, the Third Circuit first remarked that Barthelemy was not a child molestation case which is the exception for which Wiley predicted the use of “inferred intent.” Id. Second, unlike Wiley, a crime was not alleged, only a tort action. Id. Finally, there was no involvement of children who need special protection. Id. Therefore, the Third Circuit held that Pennsylvania would apply the rule of general liability in this case. Id.

144. Id. at 194.

145. For a complete discussion of Pennsylvania’s “inferred intent” approach, see supra notes 107-44 and accompanying text.

146. For a complete discussion of the inherently injurious nature of sexual molestation of children as a rationale for inferring intent, see supra note 92 and accompanying text.


148. For a complete discussion of California’s expansion of “inferred intent” to actions other than the sexual molestation of children, see infra notes 150-53.

149. For a more complete description of the Stanford approach to “inferred intent”, see infra notes 101-06 and accompanying text.
Currently, however only California openly extends the "inferred intent" approach to situations other than sexual abuse of children.\(^{150}\) California applies the "inferred intent" approach to such acts as wrongfully

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The Supreme Court of California then held that child molestation is inherently injurious, and the insured should not be covered for that intentional act because intent will be inferred. *M.K.*, 804 P.2d at 689. In *M.K.*, the court held that the insured who sexually molested a child was not covered under his homeowner's liability insurance policy, regardless of whether or not he subjectively intended to harm the child. *Id.* at 700. The insured often baby-sat for M.K., until M.K. told her mother that the insured sexually molested her. *Id.* at 690. The insured was charged and pled guilty to committing lewd acts with a child. *Id.* He was sentenced to prison for six years. *Id.*

At the time that the insured sexually molested M.K., he owned a homeowner's liability policy issued by J.C. Penney Casualty Insurance Company (J.C. Penney). *Id.* This policy contained an intentional injury exclusion clause. *Id.* at 690-91. J.C. Penney also referred to California's Insurance Code § 533 which provided that the "insurer is not liable for a loss caused by the willful act of the insured." *Id.* At the time of the criminal trial, J.C. Penney represented the insured, but reserved the right to deny coverage under the intentional injury exclusion clause. *Id.* at 691.

J.C. Penney brought a declaratory judgment action in May of 1987. *Id.* The insured testified that while he intended to do the act and knew that the act was wrong, he did not intend to harm the child. *Id.* M.K. argued that an intentional act is not excluded from coverage unless there is also an intent to inflict harm. *Id.* at 693. The court held that there is no coverage as a matter of law. *Id.*

The court determined that § 533 of the California Insurance Code is an implied intentional injury exclusion clause. *Id.* at 694. The court then noted that "[t]he very essence of child molestation is the gratification of sexual desire. The act is harm." *Id.* at 695. The court rejected the argument of M.K.'s expert psychiatrist who told the court that the child molester is attempting to show affection to the child, not harm him or her. *Id.* at 700. The court held that it was irrelevant that the insured did not actually intend to cause the child harm; liability coverage for insured's sexual molestation of a child was excluded. *Id.*

Next, the California state courts expanded the concept of inherent harm to other actions. For a detailed discussion of California's expanded approach to "inferred intent," see *infra* notes 151-53.
hitting a victim, and wrongfull termination of an

151. Fire Ins. Exch. v. Altieri, 1 Cal. Rptr. 2d 360 (Ct. App. 1991). In Altieri, the California Court of Appeals for the Sixth District held that the subjective intent of the insured to injure was irrelevant to the determination of the meaning of the intentional injury exclusion clause when the defendant intentionally and wrongfully hit the victim. Id. at 361. The defendant accepted an offer for a ride home from school from two fellow students. Id. at 362. While stopped at a stoplight, the defendant and his classmates began a verbal disagreement with another student, Story. Id. The light changed, and the boys continued on their journey, but the defendant, still angry, asked the driver to turn the car around so that he could beat up Story. Id. The defendant and one of his classmates then placed a bet on who could hit Story first. Id. The defendant walked out of the car, and hit Story in the mouth. Id. The fellow classmate then hit Story so hard that he was knocked to the ground. Id. The defendant was stunned that they had hurt Story so badly. Id. At trial he testified that he did not intend to harm Story. Id. Fire Insurance Exchange brought a declaratory judgment action alleging that it was not obligated to defend or cover damages under the defendant’s parents’ liability insurance. Id. at 362.

The Altieri case involved the interpretation of a section of the insurance code, not an insurance policy. Id. at 363 n.5. The California Insurance Code states: “an insurer is not liable for loss caused by the willful act of the insured;” somewhat similar words to the intentional injury exclusion clause. Cal. Ins. Code § 533 (West 1993). The court interpreted this clause to imply an intentional injury exclusion clause in every liability policy. Altieri, 1 Cal. Rptr. 2d at 363 (citing M.K., 804 P.2d at 689). The California courts interpreted the code section to mean that when an act is inherently harmful, there is no requirement of intent to harm, only intent to act, thereby inferring intent to harm. Id. at 364. The court noted that when harm is inherent in the act, then intent to harm is relevant only to determine intent to commit the act. Id. In such situations, the emphasis should not be on the intent to injure, but on the harmful nature of the act. Id. at 364-65.


In Coit, the California Court of Appeals for the First District held that an insured could not shift to the insurance company the cost of defending and the damages resulting from the insured’s sexual harassment of an employee. Coit, 18 Cal. Rptr. 2d at 695. The court stated that sexual harassment was intentionally harmful, regardless of subjective intent. Id. The court reached this conclusion because of California’s Insurance Code which states that the insurer is not liable for any willful act of the insured. Id. at 698. This part of the insurance code has been interpreted as an intentional injury exclusion clause. Id. For a detailed description of § 533 of the California Insurance Code, see supra note 150 and accompanying text.

In Coit, Ms. Linda Seahorn sued Coit Drapery Cleaners, Dr. Kearns, and Ms. Parks for sexual harassment, wrongful termination, breach of public policy, intentional infliction of emotional distress, invasion of privacy, fraud, battery and sought punitive damages. Id. at 696. In 1987, Ms. Seahorn interviewed for a position as a telephone dispatcher for Coit Drapery Cleaners. Id. at 695. Rather than ask about her skills relating to the job, Dr. Louis J. Kearns, the President and Chairman of the Board of Coit, asked Ms. Seahorn if she would be willing to sleep with prospective clients, if she would sleep with him on business trips, and if she had a boyfriend. Id. Ms. Seahorn, concerned about this type of questioning, asked another em-
employee. It remains unlikely, however, that Pennsylvania will expand

employee, Ms. Park, whether this was normal. \textit{Id.} at 695-96. Ms. Park told Ms. Seahorn not to worry, that while Dr. Kearns had a reputation as a "dirty old man," he was really harmless. \textit{Id.} at 696. And yet, evidence disclosed at trial revealed that Dr. Kearns had a reputation of harassing women and forcing them to make themselves available to him in exchange for the promise to be promoted or stay employed. \textit{Id.} at 695.

After Ms. Seahorn accepted employment, Dr. Kearns allegedly propositioned Ms. Seahorn numerous times. \textit{Id.} at 696. He asked her what kind of underwear she wore; he tried to get her to play strip poker with him; he even attempted, with the assistance of Ms. Park, to get her to join him in a hot-tub. \textit{Id.} Finally, Dr. Kearns asked Ms. Seahorn to meet him in his office during business hours. \textit{Id.} He asked Ms. Seahorn for a hug, and then a more passionate hug. \textit{Id.} At this point, Dr. Kearns forced Ms. Seahorn into the bathroom, put her hand in his pants, and tried to reach into her underwear. \textit{Id.} He pulled her to the floor and demanded sex, but Ms. Seahorn refused and left. \textit{Id.} Almost immediately, Ms. Seahorn was fired due to "adverse economic conditions." \textit{Id.} However, the same economic conditions existed at the time she was fired as existed at the time she was hired. \textit{Id.} As a result of Dr. Kearns's actions, Ms. Seahorn suffered lost wages, psychiatric problems, depression, chemical dependency and suicidal thoughts. \textit{Id.}

Coit Drapery attempted to turn the suit over to Sequoia Insurance Company from whom it had previously purchased a liability policy. \textit{Id.} Sequoia refused to defend Coit or pay for resultant damages because the action of sexual harassment was intended or expected, and thus excluded from coverage under § 533 of the Insurance Code, which is an implied intentional injury exclusion clause. \textit{Id.} at 696-98. For a detailed description of the analysis of California's Insurance Code, see \textit{supra} note 150 and accompanying text.

The court remarked that "California law and applicable precedents do not allow the re-characterization of such clearly intentional and willful sexual misconduct as merely negligent or non-willful, so as to trigger insurance coverage." \textit{Id.} at 697. The court in \textit{Coit} noted that in \textit{M.K.}, the court had held that sexually molesting a child was a willful act, and thus barred coverage of the insured under § 533 of California's Insurance Code. \textit{Id.} The court cited several other cases all of which supported the principle that an insurance company would not be liable for the willful and intentional actions of the insured as a result of the implied intentional injury exclusion clause. \textit{Id.} (citing Studley v. Benicia Unified Sch. Dist., 281 Cal. Rptr. 631 (1991); \textit{Altieri}, 1 Cal. Rptr. 2d at 360; B & E Convalescent Ctr. v. State Compensation Ins. Fund, 9 Cal. Rptr. 2d 894 (1992)). The court then noted that none of these cases involved sexual harassment, but determined that § 533 would also preclude an insured from recovering from an insurance company in relation to intentional sexual harassment. \textit{Id.} at 698. In denying coverage to the insured, the court analogized sexual harassment to the sexual molestation of a child and concluded: "[s]ection 533 precludes coverage in this case because [the wrongful act] is always intentional, it is always wrongful, and it is always harmful." \textit{Id.} at 705 (quoting \textit{M.K.}, 804 P.2d at 689).

153. \textit{B & E Convalescent Ctr.}, 9 Cal. Rptr. 2d at 894. In \textit{B & E Convalescent}, the Court of Appeals for the Second District of California found that an insured who intentionally and wrongfully terminated an employee was not covered under its liability policy because intent to injure could be inferred because wrongful termination is inherently injurious. \textit{Id.} at 907-10. Ms. Bryson was employed as an administrator at the B & E Convalescent Center from 1977 until 1984. \textit{Id.} at 897. During her employment, Ms. Bryson refused to fire current employees and replace them with individuals of Filipino national origin. \textit{Id.} Ms. Bryson alleged that her employer wanted to make these changes in employees because he thought that the Filipino employees would not vote for the union. \textit{Id.} Ms. Bryson was fired in November of 1984, and later brought an action for wrongful termination, when she was replaced by a younger Filipino man. \textit{Id.} at 897-98. Bryson settled with B & E Convalescent Center who then attempted to recover from its liability insurer. \textit{Id.} at
its version of "inferred intent." Pennsylvania focuses on the inherent harm of certain actions, but limits the approach to the "exceptional" case of sexual molestation of children.154

Karen M. Houk

On appeal, B & E Convalescent Center alleged that § 533 of the Insurance Code did not apply. Id. at 900. B & E Convalescent Center argued that for the intentional injury exclusion clause implied in § 533 to apply, the insured must have intent to harm. Id. The court remarked that the purpose of § 533 was to prevent coverage of intentional torts, reflecting the public policy argument that an insured should not be able to recover for actions that he or she intended. Id. at 904. B & E Convalescent Center analogized to the Clemmer v. Hartford Ins. Co., 587 P.2d 1098 (Cal. 1978) and Republic Idem. Ins. Co. v. Superior Court, 273 Cal. Rptr. 331 (Ct. App. 1990) which both held that there must be subjective intent to harm. Id. at 905-06 (citing Clemmer v. Hartford Ins. Co., 587 P.2d 1098 (Cal. 1978) (holding that under § 533, insured must have "preconceived design to inflict injury"); Republic Indem. Ins. Co. v. Superior Court, 273 Cal. Rptr. 331 (Ct. App. 1990) (holding that under § 533 insured must have intent to act and intent to harm)). However, the court in B & E Convalescent remarked that these decisions had been clarified and undermined by the Supreme Court of California's decision in M.K. that a preconceived intention to harm is not necessary if the harm is inherent in the act. Id. While the Supreme Court of California had limited its holding in M.K. to sexual molestation of children, other courts have since expanded the idea of inherent harm to actions other than sexual molestation of children. B & E Convalescent Ctr., 9 Cal. Rptr. 2d at 906 (citing Altieri, 1 Cal. Rptr. 2d at 360).

The California Court of Appeals for the Second Circuit then determined that wrongful termination was an act that was inherently harmful. Id. at 907. The court remarked that if an individual was terminated against policy set in anti-discrimination statutes, the termination was inherently harmful. Id. The court also found that the loss of a job is both financially and psychologically harmful. Id. Furthermore, when the loss of employment is the result of discrimination for age, sex, race or nationality, it is even more devastating. Id. Therefore, it would be improper to come to any conclusion except that an insured is not obligated to cover the intentional act of wrongful termination because it is inherently injurious. Id. at 908.

154. For a complete discussion of Wiley, see supra notes 107-29 and accompanying text.