Golden Gate University Law Review

Volume 18
Issue 3 *Women's Law Forum*

Article 3

January 1988

Litigating Incest Torts Under Homeowner's Insurance Policies

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COMMENT

LITIGATING INCEST TORTS UNDER HOMEOWNER'S INSURANCE POLICIES

I. INTRODUCTION

Incestuous child abuse is a problem of alarming proportions. A recent study involving 930 women from California's Bay Area indicated that sixteen per cent of the women who participated (one out of six) had been sexually abused by a relative before the age of eighteen.[1]

Many women[2] who have been the victims of incestuous abuse are bringing civil actions for damages against their abusers.[3] Such litigation can be an important source of redress for these women; it can both empower the victim and force the abuser to take responsibility for his actions.[4] In some cases these tort claims are being tendered to the alleged tortfeasors' homeowner's insurance carrier for defense and indemnity under the liability coverage provisions.[5] No California appellate court has

1. D. RUSSELL, THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN 10 (1986).

2. *See generally* D. FINKELHOR, CHILD SEXUAL ABUSE (1984). While there are men who are victims of incestuous abuse as well, most of the information available is about father-daughter incest and by far the great majority of victims are women. It is estimated that up to 97% of the incestuous assault cases involve a male perpetrator. S. BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST 5 (1978). *See also* D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 75 (1979), in which the author reports that almost all sexual abusers are men.

3. *See, e.g.*, Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U. L. REV. 609, 609-10 (1983).

4. *See, e.g.*, J. HERMAN, FATHER-DAUGHTER INCEST 169 (1981). The author notes that the conviction of an incest offender through the criminal justice system generally has a positive effect on the victim and the incestuous family. *See also*, *Tort Remedies*, *supra* note 3, at 617 n. 55 (reporting a telephone interview with S. BUTLER, author, CONSPIRACY OF SILENCE, in which the benefits of a civil proceeding are discussed).

5. None of these cases has reached the appellate court level in California, but there

addressed the issue of whether insurers are liable for coverage of incest torts under homeowner's policies. However, some cases have settled at the trial court level with the insurer paying part of the settlement.[6] This Comment will address insurers' liability for incest torts under standard homeowner's insurance policies. It primarily will examine potential liability in light of the intentional act and household exclusions which are typically contained in homeowner's policies.

II. BACKGROUND

The tort based on incestuous abuse is relatively new. The unique characteristics of incest[7] present significant challenges for victims seeking legal redress.

Women who choose to pursue legal action face two major obstacles. One is the possibility of a time-bar based on the statute of limitations;[8] another is the liability issue with respect to any homeowner's insurance contracts held by the alleged abuser. Both can best be understood by examining the effects of incest on the victim and the characteristics of the perpetrator.

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are some trial court cases where an alleged incestuous abuse offender is being sued under his homeowner's policy. *See, e.g.*, State Farm Fire & Cas. Co. v. Graff, No. 283832 (Superior Court of California, County of Contra Costa filed March 14, 1986). There are a number of out of state cases which have reached the appellate court level. *See, e.g.*, MacKinnon v. Hanover Ins. Co., 124 N.H. 456, 471 A.2d 1166 (1984); Rodriquez v. Williams, 107 Wash. 2d 381, 729 P.2d 627 (1986).

6. *See, e.g.*, Orman v. Orman, No. 266051 (Superior Court of California, County of Contra Costa filed Nov. 20, 1984); Hertz v. Symmons, No. 257623 (Superior Court of California, County of Contra Costa filed Mar. 23, 1984); Katz v. Birnberg, No. 324334 (Superior Court of California, County of Sacramento filed Nov. 29, 1984).

7. This Comment adopts the broad definition of incestuous assault proposed by S. BUTLER, *supra* note 2, at 4-5: "any manual, oral or genital sexual contact or other explicit sexual behavior that an adult family member imposes on a child, who is unable to alter or understand the adult's behavior because of his or her powerlessness in the family and early stage of psychological development." Assault under this definition is not limited to sexual intercourse but includes "any sexual activity or experience imposed on a child which results in emotional, physical or sexual trauma." *Id.* at 5.

8. *See* Comment, *supra* note 3, at 628-30 (arguing that victims of incestuous abuse should be permitted to plead the delayed discovery exception to the statute of limitations for personal injuries). *See also*, Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-term Damages*, 25 SANTA CLARA L. REV. 191 (1985); Comment, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L. J. 189 (1984).

A. Characteristics of Incest that Lead to Time-bar Problems

The incest victim may experience profound psychological problems.[9] In childhood these problems may be expressed as anxiety, hostility, low self-esteem and feelings of guilt, shame and inferiority.[10] Adult women often find themselves unable to form intimate relationships; they can suffer extreme isolation, sexual dysfunction and deep mistrust of men.[11] They frequently suffer from addictions to drugs or alcohol.[12] These injuries may or may not ever be linked to the abuse that caused them because of a "massive repression"[13] that often occurs in victims.[14] It is this "massive repression" of the memories of the incestuous abuse that causes statute of limitations problems. Commonly the victim of incestuous abuse does not recognize the harmful effects of the abuse until well after it has stopped.[15] In particular, children who suffered violent abuse or abuse in the very early childhood years may not even begin to remember the trauma they suffered until well into adulthood.[16] This process of discovering the harm may take a number of years.[17]

Once the injuries have been discovered, it often takes additional time, with the aid of professional psychological intervention, for the victim to transfer blame from herself to the perpetrator.[18] Because of the characteristic lengthy discovery process such women go through, it is very rare that an action can be brought within one year[19] of the date of the injury, the tradi-

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9. *See, e.g.*, D. Russell, The Secret Trauma: Incest In The Lives Of Girls And Women 386 (1986); S. Butler, *supra* note 2, at 5; J. Herman, *supra* note 4, at 29; D. Finkelhor, Child Sexual Abuse 188-99 (1984).

10. *See, e.g.*, J. Herman, *supra* note 4, at 30.

11. *Id.* at 31.

12. *Id.* at 99.

13. *See, e.g.*, D. Russell, *supra* note 1, at 34, 246.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 246.

18. *See* D. Finkelhor, Sexually Victimized Children 214 (1979).

19. Cal. Civ. Code § 340(3) (West 1982 & Supp. 1988) imposes a one year limitation for commencing actions that involve "[l]ibel, slander, assault, battery, false imprisonment, seduction, injury or death from wrongful act or neglect, forged or raised checks, injury to animals by feeder or veterinarian." Under Cal. Civ. Code § 352(a)(1) (West 1982 & Supp. 1988), the statute of limitations is tolled until a person entitled to bring

tional tort standard.

B. Characteristics of Incestuous Families

Any analysis of the insurance liability issues involved in civil actions based on incestuous abuse should take into consideration the characteristics of the incestuous family.

Very little is known about the perpetrators in incestuous abuse cases.[20] Most of the information available about incestuous family systems is contained in studies of father-daughter incest.[21] Little information is available about incestuous abuse involving brothers, uncles or grandfathers.[22]

One researcher has suggested that incest occurs when certain preconditions are met.[23] First, the father's relationship with his wife has deteriorated to the point where he begins to take a sexual interest in his daughter whom he can manipulate to fulfill his sexual and emotional needs.[24] Second, the father's natural inhibitions against incest might be overcome by a setback in his career or, frequently, by alcohol.[25] He tells himself that he really loves his daughter and that no great harm will result from his sexual attention to her.[26] Additionally, the wife/mother does not provide appropriate protective support for her daughter, but rather is absent physically or emotionally.[27] Finally, the daughter's resistance to her father is not strong because she trusts him.[28] She likes the attention and affection she is getting even if she hates what he is doing to her.[29] She may keep silent about the abuse because she fears that the family will fall apart if she speaks.[30] Descriptions of the perpetrator range from that of a

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such an action reaches the age of majority.

20. D. Finkelhor, *supra* note 9, at 52.
21. *Id.* at 226.
22. *Id.* at 62, 227.
23. *Id.* at 63.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*

moralistic, authoritarian figure[31] to that of a timid and unassertive person with poor social skills.[32]

III. CIVIL ACTIONS BASED ON INCESTUOUS ABUSE

A. The Causes of Action

Practitioners representing incest victims may take a 'shotgun' approach in the complaint for damages, alleging all possible causes of action. A typical complaint might include the intentional torts of assault, battery and intentional infliction of emotional distress, as well as negligence and negligent infliction of emotional distress.[33] Some attorneys may add a cause of action against the victim's mother for negligent supervision. It may be alleged that the mother failed to provide protection or support for the victim of incest, even though she was fully aware of the facts.[34]

B. Time-Bar Based on the Statute of Limitations

Much attention in the area of tort claims based on incestuous abuse has focused on the problems presented by delayed discovery of both the injury and its cause.[35] Plaintiffs may rely on the argument that the one year statute of limitations should not begin to run until the plaintiff has discovered the relationship between the incestuous acts and her injuries.[36] This 'delayed discovery' argument is premised on the latent and often undiscoverable nature of incest injuries.[37] California recently en-

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31. *Id.* at 43.

32. *Id.*

33. *See, e.g.*, Bechtel v. Bechtel, No. 303518 (Superior Court of California, County of Contra Costa filed July 16, 1987).

34. *See generally* J. Herman, *supra* note 4. The author cautions, however, that "no degree of maternal absence or neglect constitutes an excuse for paternal incest, unless one accepts the idea that fathers are entitled to female services within their families, no matter what the circumstances." *Id.* at 49.

35. *See, e.g.*, Comment, *supra* note 3; Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-term Damages*, 25 Santa Clara L. Rev. 191 (1985); Comment, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 Harv. Women's L. J. 189 (1984).

36. *See* Comment, *supra* note 3, at 628-31; *see also* Comment, *California Code of Civil Procedure Section 340.5: The Discovery Rule Codified?* 13 Sw. U.L. Rev. 759 (1983) (providing a thorough history of the delayed discovery rule in California).

37. *See supra* notes 13-17 and accompanying text.

acted legislation to extend the statute of limitations for tort claims based on incestuous abuse to three years.[38] There promises to be continued litigation and definition of the law in this area.

One California court recently held that an incest victim could not take advantage of the delayed discovery doctrine if she had "discovered all of the facts essential to the cause of action" at the time the abuse occurred.[39] In that case, the plaintiff alleged that the sexual assaults were committed against her will, caused her great fear and that she had acceded to the defendant's acts because she felt that he intended to carry out his threats of harm.[40] The court stated that "[t]he immediate harm caused by the alleged assaults gave [her] a right to sue at that time."[41] Thus, it sustained a demurrer to the complaint which was based on the statute of limitations.[42]

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38. CAL. CIV. PROC. CODE § 340.1 (West 1982 & Supp. 1988) reads as follows:

> (a) In any civil action for injury or illness based upon lewd or lascivious acts with a child under the age of 14 years, fornication, sodomy, oral copulation, or penetration of genital or anal openings of another with a foreign object, in which this conduct is alleged to have occurred between a household or family member and a child where the act upon which the action is based occurred before the plaintiff attained the age of 18 years, the time for commencement of the action shall be three years.
>
> (b) "Injury or illness" as used in this section includes psychological injury or illness, whether or not accompanied by physical injury or illness.
>
> (c) "Household or family member" as used in this section includes a parent, stepparent, former stepparent, sibling, stepsibling, or any other person who regularly resided in the household at the time of the act, or who six months prior to the act regularly resided in the household.
>
> (d) Nothing in this bill is intended to preclude the courts from applying delayed discovery exceptions to the accrual of a cause of action for sexual molestation of a minor.
>
> (e) This section shall apply to both of the following:
>
> (1) Any action commenced on or after January 1, 1987, including any action which would be barred by application of the period of limitation applicable prior to January 1, 1987.
>
> (2) Any action commenced prior to January 1, 1987, and pending on January 1, 1987.

39. DeRose v. Carswell, 196 Cal. App. 3d 1011, 1017, 242 Cal. Rptr. 368, 371 (1987).

40. *Id.* at 1015, 242 Cal. Rptr. at 369.

41. *Id.* at 1017, 242 Cal. Rptr. at 371.

42. *Id.* A petition for review of the decision was denied by the California Supreme Court on March 11, 1988.

IV. INSURANCE COVERAGE ISSUES

A. Homeowner's Insurance Policies

Mortgage holders generally require homeowners to carry insurance against loss.[43] The typical homeowner's policy is a 'package' of risk coverages which includes "liability coverage for the insureds' liability arising out of the covered premises."[44] Under this liability coverage a policy holder is insured against any "occurrence", generally defined as "an accident, including continuous or repeated exposure to conditions."[45]

Insurers will defend the insured and pay for damages if a claim is made against an insured for bodily injury and property damage under the liability coverage of a policy.[46] However, such coverage usually excludes bodily injury or property damage "which is expected or intended by the insured."[47] Further, a policy typically includes all relative residents of the household as 'insureds' under the policy[48] and excludes medical coverage for injuries to those household members.[49]

This examination of insurance coverage for incest torts will

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43. *See* 2 R.C. Maxwell, California Real Estate Law and Practice, § 380.102[1], at 380-65 (May 1987)(noting that "[i]f a property owner has a mortgage or deed of trust on the property, the lender's approval of the [homeowner's] policy will probably be required").

44. 1 G. Couch, Cyclopedia of Insurance Law 2d § 1:61, at 152 (rev. ed. 1984).

45. 11 G. Couch, Cyclopedia of Insurance Law 2d § 44:285, at 437 (rev. ed. 1984).

46. *See* 1 G. Couch, *supra* note 44, at § 1:61, at 152. Typical language of such a policy reads:

> If a claim is made or a suit is brought against any insured for damages because of bodily injury or property damage to which this coverage applies, we will:
> a. pay up to our limit of liability for the damages for which the insured is legally liable; and
> b. provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages resulting from the occurrence equals our limit of liability.

Id. at § 1:61, at 178.

47. *Id.* at § 1:61, at 164.

48. *Id.* at § 1:61, at 153.

49. *Id.* at § 1:61, at 164.

focus on the exclusion for acts which are expected or intended by the insured and the exclusion for household members.

B. Possible Effect of Exclusions on Incest Tort Claims

When negligence is alleged in an incest tort claim the door opens to the possibility of coverage under the defendant's homeowner's insurance policy.[50] Insurers are likely to claim the insured is not covered because of the exclusion for intentional acts and/or the exclusion for injuries to household members.

Procedurally, insurers may dispute their duty to defend a claim in two different ways. An insurer may bring a motion for declaratory relief against the insured and the injured party to have the court declare whether the insurer is obligated to defend a suit against its insured and whether it will be liable for any judgment.[51] If the court finds that the insurer is not liable for coverage of the claim, the insurer will be relieved of any further duty to defend the action.[52] The critical consideration here is

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50. *See* 11 G. Couch, *supra* note 45, § 44:285, at 437. The author notes that "contemporary liability policies generally provide coverage on an occurrence basis" and "highly probable or intentionally caused damage" is generally excluded from the definition of an "occurrence".

51. 18 G. Couch, Cyclopedia of Insurance Law 2d § 74:117, at 624; § 74:150, at 664 (rev. ed. 1983). In California, a declaratory relief action is authorized by Cal. Civ. Proc. Code § 1060 (West 1980), which reads as follows:

> Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action in the superior court or file a cross-complaint in a pending action in the superior, municipal or justice court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

52. *See* Cal. Civ. Proc. Code § 1060 which authorizes a court to make a "binding declaration" of rights and duties.

that if the claim is no longer covered under an insurance policy, the likelihood of a recovery for damages may be reduced, depending on the personal resources of the defendant.

In the alternative, an insurer may choose to defend the action until a judgment is rendered and then bring an action for declaratory relief or wait for the insured to sue for satisfaction of the judgment.[53] Again, if the insurer succeeds, the plaintiff would have to rely on the defendant's personal resources for a satisfaction of the judgment.

C. Insurance Contract Interpretation

Courts generally apply the same principles to construe insurance contracts as govern the interpretation of all contracts.[54] These principles may offer plaintiffs the greatest hope of successfully arguing for coverage of injuries arising from incestuous abuse.

Clauses which limit liability and exclude coverage are strictly construed against the insurer and in favor of the insured.[55] Any ambiguities in the terms of a contract are construed against the insurer.[56] While a court will not force a construction which burdens an insurer with a risk it did not assume,[57] it will, when possible, interpret a policy in a way that protects the in-

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53. *See* 18 G. Couch, *supra* note 51, at § 74:149, at 661 (commenting that an action for declaratory relief is available to a liability insurer to determine its liability to one obtaining a judgment against the insured).

54. *See* 2 G. Couch, Cyclopedia of Insurance Law 2d § 15:1, at 114 (rev. ed. 1983).

55. *Id.* at § 15:48, at 283. *See, e.g.*, Paramount Properties Co. v. Transamerica Title Ins. Co., 1 Cal. 3d 562, 463 P.2d 746, 83 Cal. Rptr. 394 (1970) ("[P]rovisions relating to exclusions or exceptions from the performance of the basic, underlying obligation are construed strictly against the insurer and liberally in favor of the insured." *Id.* at 569, 463 P.2d at 750, 83 Cal. Rptr. at 398).

56. *Id.* at § 15:14, at 158-59. *See, e.g.*, Harabedian v. Zurich Ins. Co. 218 Cal. App. 2d 702, 707, 32 Cal. Rptr. 813, 816 (1963) (quoting Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 437-38, 296 P.2d 801, 809):

> If the insurer uses language that is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against, the amount of liability, or the person or persons protected, the language will be understood in its most inclusive sense for the benefit of the insured.

57. *Harabedian*, 218 Cal. App. 2d at 707, 32 Cal. Rptr. at 816.

sured.[58] Additionally, the interpretation of the policy is a question of law[59] and will not go before the jury unless its meaning is dependent on disputed facts.[60] Any exceptions to the basic coverage offered by the policy must be clearly stated so that the insured will have notice of their effect.[61]

The classic statement of California's judicial approach to insurance contract interpretation may be found in *Continental Casualty Company v. Phoenix Construction Company:*[62]

> It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer. If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against, the amount of liability, or the person or persons protected, the language will be understood in its most inclusive sense, for the benefit of the insured.[63]

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58. *Id.*

59. 2 G. COUCH, CYCLOPEDIA OF INSURANCE LAW 2D, at § 15:3, at 116 (rev. ed. 1984). *See, e.g.*, Continental Casualty Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 296 P.2d 801 (1956); Pepper Indus., Inc. v. Home Ins. Co., 67 Cal. App. 3d 1012, 134 Cal. Rptr. 904 (1977).

60. 1 G. COUCH, *supra* note 44, at § 15:3, at 120.

61. *See, e.g.*, Grey v. Zurich Ins. Co., 65 Cal. 2d 262, 269-70, 419 P.2d 168, 171-72, 54 Cal. Rptr. 104, 107-08 (1966).

62. 46 Cal. 2d 423, 296 P.2d 801 (1956).

63. *Id.* at 438-39, 296 P.2d at 809-10 (citations omitted). *See also* 13 APPLEMAN, INSURANCE LAW AND PRACTICE, § 7401 et seq. (1979); 2 G. COUCH, *supra* note 59, at § 15:7, at 341-47:

> Many courts have said that a contract of insurance couched in language chosen by the insurer is, if open to the construction contended for by the insured, to be construed most strongly, or strictly, against the insurer and liberally in favor of the contention of the insured. Ambiguous or doubtful language or terms, it is said, must be given the strongest interpretation against the insurer which they will reasonably bear, or, conversely, that the meaning of the words used that is most advantageous to the assured should be adopted, for the courts are not inclined to permit the insurer to take advantage of any ambiguity, especially when the plaintiff's cause is meri-

These settled principles must be applied in an analysis of any insurance contract coverage question. Language is critical to the court's interpretation of an exclusionary clause.

D. Occurrence Liability

A threshold question when analyzing insurance coverage of an injury is whether the acts which led to the injury constitute an "occurrence" under a given liability policy.[64] Historically, insurers sought to narrow the scope of coverage under liability policies to loss by "accidental means".[65] But courts have recognized that such an interpretation would afford very little coverage and would frustrate the reasonable expectations of the insureds.[66] Thus, they have broadly defined coverage to include occurrences which are unforeseen, unexpected, and out of the ordinary, either because they happened at all or because of the extent of the resultant damage.[67] An accident under this broader construction can be either a distinct event or a more slowly evolving process or exposure[68] and may include the unintended consequences of intentional acts.[69] One commentator has suggested that this liberal construction is justified by the public interest in carrying out the reasonable expectations of the insured.[70]

> torious and the defense is technical. A better statement is that if an insurance contract is so drawn as to be equivocal, uncertain, or ambiguous, and to require interpretation because fairly susceptible of two or more different, but sensible and reasonable constructions, the one will be adopted which, if consistent with the objects of the insurance, is most favorable to the insured.

64. *See, e.g.*, 14 G. Couch, *supra* note 45, § 44:285, at 437.

65. R. Keeton, Insurance Law: Basic Text, § 5.4(e), at 302 (1971).

66. *Id.* at § 5.4(e), at 304. *See also* Burr v. Commercial Travelers Mut. Acc. Ass'n, 295 N.Y. 294, 67 N.E.2d 248 (1946) (rejecting the distinction between accidental means and accidental results and allowing coverage in a case where the insured died trying to dig his car out of a snow-filled ditch). In *Burr*, a strict construction of the phrase "accidental means" would have denied coverage because the insured's exertions while shovelling snow were not accidental and could be inferred to have contributed to his death. *See* R. Keeton, *supra* note 63, at 304 n.7.

67. R. Keeton, *supra* note 65, at 300. The author cites the 1966 Revision of the Standardized Liability Policy language which defines "occurrence" as an "accident, including injurious exposure to conditions." He suggests that the language was intended to broaden coverage, particularly with respect to a continuing condition as distinguished from a sudden event.

68. *Id.*

69. 11 G. Couch, *supra* note 45, at § 44:289, at 449.

70. R. Keeton, *supra* note 65, at § 5.4(e), at 304. The author states that:

There is at least an indication that some courts would like to throw back the clocks to that more restrictive time when construing policy coverage of sexual abuse cases. In one recent case, *Vermont Mutual Insurance Company v. Malcolm*,[71] a New Hampshire court refused to accept the argument that sexual assault by an insured could be considered an "occurrence" for purposes of determining coverage under a homeowner's policy.[72] In *Malcolm*, the court had to interpret a policy which defined an "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy term, in bodily injury."[73] The court acknowledged that the term "occurrence" under the language of the policy was more inclusive than "accident",[74] but insisted that an insured's intentional act could not be an "occurrence" when it was so inherently injurious that it could not be performed without causing the resulting injury.[75]

In *Malcolm*, the underlying civil action alleged repeated sexual assaults by the defendent against an eleven-year-old boy during one weekend.[76] The court found the alleged assaults inherently injurious, apparently because they fit into "the most se-

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> [D]espite their theoretical basis of interpreting the manifested intention of the contracting parties, the courts have, to serve a public interest, imposed a very considerable judicial restriction upon the freedom of contract. This restriction can be justified on the grounds that literal enforcement of the provisions on accidental means would afford such minimal coverage as to be patently disproportionate to the premiums paid and that there would be little occasion for buying insurance of such narrow scope, thus providing only against a risk defined in a bizarre way that would never be conceived by one stating his insurance needs. These considerations support the conclusion that literal enforcement would be inconsistent with reasonable expectations of insureds.

Id.

71. 128 N.H. 521, 517 A.2d 800 (1986).

72. *Id. See also* Western Nat'l Assur. Co. v. Hecker, 43 Wash. App. 816, 719 P.2d 954 (1986) (holding that an alleged negligent act of forcible anal intercourse was not a covered "occurrence" or "accident" under a policy); Rodriquez v. Williams, 107 Wash.2d 381, 729 P.2d 627, 629 (1986) (noting that "[w]ere this an "accidental occurrence" policy, we would simply deny that coverage existed under the policy because the act of committing incest could not be described as an accidental occurrence". *Id.* at 384, 729 P.2d at 629).

73. *Malcolm*, 128 N.H. at 523, 517 A.2d at 802.

74. *Id.*

75. *Id.*

76. *Id.* at 522, 517 A.2d at 801.

rious of sex offenses" under the state's criminal statutes.[77] The court concluded its analysis by noting that "[i]f the insured did not intend to inflict the injury on the victim by his intentional act, and the act was not so inherently injurious that the injury was certain to follow from it, the act as a contributing cause of injury would be regarded as accidental and an "occurrence".[78]

In its analysis the *Malcolm* court seemed to abandon the settled rules of contract interpretation and substitute tort law concepts instead.[79] It imposed a foreseeability factor into the definition of "accidental" under the policy.[80] The court was careful however, to distinguish its holding from those in which the language of the policy referred to the injury as being neither expected nor intended "from the standpoint of the insured".[81] It is unclear what the court would have ruled if such language, common to many policies, had been at issue.

The California courts have not considered the issue of whether incestuous abuse may be an "occurrence" for purposes of insurance coverage under a homeowner's policy. However, a long line of authority suggests that the term "accidental" is given a broad construction in California and that "any event which takes place without the foresight or expectation of the person acted upon or effected by the event"[82] will be considered an occurrence for purposes of liability insurance coverage.[83]

Courts have placed some limits on what may be considered occurrences under liability policies; however, these exceptions seem to be limited to cases where intentional torts are alleged in the underlying complaint.[84]

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77. *Id.* at 525, 517 A.2d at 803.

78. *Id.*

79. *See supra* notes 54-62 and accompanying text.

80. *Malcolm*, 128 N.H. at 523, 517 A.2d at 802.

81. *Id.* at 526, 517 A.2d at 803.

82. Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co., 51 Cal. 2d 558, 563, 334 P.2d 881, 884 (1959).

83. *Id. See also* Economy Lumber Co. of Oakland, Inc. v. Insurance Co. of North America, 157 Cal. App. 3d 641, 204 Cal. Rptr. 135 (1984).

84. *See, e.g.*, Royal Globe Ins. Co. v. Whitaker, 181 Cal. App. 3d 532, 226 Cal. Rptr. 435 (1986) (where the complaint alleged fraud and the court held that Royal Globe was not obligated to defend its insured since all of the evidence indicated that the builder intentionally made a promise that he did not intend to keep); Commercial Union Ins. Co. v. Superior Court, 196 Cal. App. 3d 1205, 242 Cal. Rptr. 454 (1987) (where the complaint

Litigators should be cautioned that allegations of intentional torts in an incestuous abuse case may lead to insurance coverage problems in this area.

E. Intentional Acts Exclusion

Most liability insurance contracts include exclusions for intentional acts committed by the insured.[85] It is important to note that courts employ the rules of contract construction, not the principles of substantive law, to interpret the meaning of 'intent' when trying to determine whether the harm inflicted is covered by the defendant's policy.[86] Thus, an injury might be covered under an insurance policy where an insured either intends to inflict a minor impact or has no intention of harm at all and the resultant harm is much greater than what was intended.[87] Under tort law principles however, the tortfeasor would have to "take the frail plaintiff" as found for purposes of liability.[88]

Courts take one of three approaches in trying to decide whether an act committed by the insured was the kind of act excluded by the insurance policy.[89] Many courts apply an objective standard of analysis, asking what results an ordinary person would expect from the act at issue without regard to subjective intent.[90] Under this standard, once the injurious act is found to be intentional, there is no coverage if objectively the injury could be expected by the act.[91] The standard is defended by such courts on the ground that public policy demands that an

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alleged wrongful termination and the court held that such an intentional act was not accidental as a matter of law).

85. *See supra* note 44 and accompanying text.

86. R. Keeton, Insurance Law: Basic Text, § 5.4(b) (1971).

87. *Id.*

88. *Id.*

89. Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 ALR 4th 957, 973 (1984).

90. *See, e.g.*, Mutual Serv. Cas. Ins. Co. v. McGehee, 711 P.2d 826, 828 (Mont. 1985) ("Where, as here, an assailant aggressively and intentionally strikes another in the face, it is irrelevant for the purposes of this insurance exclusion that the assailant causes an injury different in character or magnitude from the harm he subjectively intended."); Unigard Mut. Ins. Co. v. Spokane Sch. Dist. 81, 20 Wash. App. 261, 579 P.2d 1015 (1978).

91. *McGehee*, 711 P.2d at 828.

insured should not be indemnified against his or her own wrongdoing.[92] However, other courts attack the objective standard on the basis that "virtually no intentional act would ever be covered"[93] using such an analysis.[94]

Other jurisdictions use a subjective test: Did the insured intend or expect the action taken to result in injury?[95] In implementing this standard courts rely on the plain language of the policy.[96] In other words, if the insured did not subjectively expect or intend the injury, the intentional act exclusion is inapplicable, regardless of the reasonableness of the expectation or intention.[97]

The New Hampshire Supreme Court employed a subjective test to interpret an insurance policy where the plaintiff was alleging an incest tort in *MacKinnon v. Hanover Insurance Company*.[98] In *MacKinnon*, the defendant stepfather allegedly sexually abused his six-year-old stepdaughter.[99] He brought an action for declaratory relief against his insurance carrier to determine coverage under his homeowner's policy.[100] The complaint stated causes of action for battery and negligent infliction of emotional distress.[101] The policy excluded "bodily injury . . . which is expected or intended by the insured."[102] The court held that the exclusion referred to the defendant's *actual* expectation or intention.[103]

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92. *Id. See also* 7A APPLEMAN, INSURANCE LAW AND PRACTICE, § 4492:01, at 21 (1979).

93. *See, e.g.*, Rodriguez v. Williams, 107 Wash.2d 381, 729 P.2d 627 (1986). The court noted that "[i]ntentional acts which result in injury generally can be expected to result in injury." *Id.* at 386, 729 P.2d at 630.

94. *Id.*

95. *See, e.g.*, MacKinnon v. Hanover Ins. Co. 124 N.H. 456, 471 A.2d 1166 (1984); Alabama Farm Bur. Mut. Cas. Ins. Co. v. Dyer, 454 So.2d 921 (Ala. 1984) (wrongful death case in which the subjective intent of the policyholder was considered to be crucial).

96. *MacKinnon*, 124 N.H. at 457, 471 A.2d at 1167. Here, the court stated that "[t]here is no indication that 'bodily injury . . . expected or intended by the insured' refers to anything other than actual expectation or intention, as to the bodily injury, in the mind of the insured at the time he took the action allegedly resulting in injury." *Id.*

97. *Id.*

98. 124 N.H. 456, 471 A.2d 1166 (1984).

99. *Id.* at 457, 471 A.2d at 1167.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

> The meaning of the language is plain and the common meaning of the language governs. There is no indication that 'bodily injury . . . expected or intended by the insured' refers to anything other than actual expectation or intention, as to the bodily injury, in the mind of the insured at the time he took the action allegedly resulting in injury.[104]

The court remanded the action back to the Superior Court to determine the defendant's intent as to the claimed injuries.[105]

Finally, there are recent cases in which the court infers intent as a matter of law when sexual abuse is involved.[106] In these decisions an intent to harm is inferred even in the absence of subjective intent where the court decides that harm is inherent in the nature of the act.[107] Courts sometimes justify this inference on the basis that the legislature has made the act a crime.[108]

In *Rodriquez v. Williams*,[109] the Supreme Court of Washington held that an insured intended harm as a matter of law when he committed incest and thus there was no coverage under his homeowner's policy because of the intentional act exclusionary clause.[110] The actual subjective intent of the insured was irrelevant in this court's analysis,[111] as was the fact that the scope of the injuries might have been much greater or different from injuries which objectively might have been expected.[112]

The *MacKinnon* court rejected the approach which infers intent as a matter of law principally because it violates "the usual rules of construction in cases of insurance contracts by in-

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104. *Id.* (citations omitted).

105. *Id.* at 458, 471 A.2d at 1169.

106. *See, e.g.*, Rodriguez v. Williams, 107 Wash. 2d 381, 729 P.2d 627 (1986); Transamerica Ins. Group v. Meere, 143 Ariz. 351, 694 P.2d 181 (1984); State Farm Fire & Cas. Co. v. Williams, 355 N.W.2d 421 (Minn. 1984); Illinois Farmers Ins. Co. v. Judith G., 379 N.W.2d 638 (Minn. 1986); Fireman's Fund Ins. Co. v. Hill, 314 N.W.2d 834 (Minn. 1982).

107. *Rodriguez*, 107 Wash. 2d at 387, 729 P.2d at 630.

108. *Id.*

109. 107 Wash. 2d 381, 729 P.2d 627 (1986).

110. *Id.*

111. *Id.* at 387, 729 P.2d at 630.

112. *Id.*

jecting concepts of substantive tort law into the process."[113] According to that court, the insurer could have expressly excluded coverage of acts that were certain to produce injury in the language of its policy, but had not done so.[114]

In *Zordan By and Through Zordan v. Page*,[115] a Florida court followed the *MacKinnon* court's reasoning, holding that coverage would not be excluded under an intentional injury exclusion clause where the insured allegedly sexually fondled a child.[116] The court held that the exclusionary clause was inapplicable unless the insured acted with specific intent to cause injuries.[117] The court rejected the reasoning of many jurisdictions which hold that intent may be inferred as a matter of law in cases involving sexual abuse.[118] It acknowledged that while "one may have a first, visceral reaction which is strongly adverse to any conclusion that a person who engages in sexual fondling of a child may be covered by liability insurance,"[119] it would fail in its judicial responsibility if it allowed such a reaction to govern its decision.[120] The *Zordan* court accepted the *MacKinnon* court's argument that intent should not be inferred where the insurer could have expressly provided for an exclusion.[121] It additionally argued that "doubtful insurance coverage questions must be resolved against the insurer."[122]

This reasoning was reiterated by an Alabama federal district court in *State Auto Mutual Insurance Company v. McIntyre*.[123] That court found insurance coverage for injuries resulting from the 'non-violent' sexual abuse of his granddaughter by the insured, notwithstanding an exclusion for injuries intended or expected by the insured.[124] The *McIntyre* court noted that "the presumption in tort and criminal law that a person intends the natural and probable consequences of his or her intentional

113. *MacKinnon*, 124 N.H. at 458, 471 A.2d at 1168.
114. *Id.*
115. 500 So.2d 608 (Fla.App.2 Dist. 1986).
116. *Id.*
117. *Id.* at 609-10.
118. *Id.* at 611.
119. *Id.* at 613.
120. *Id.*
121. *Id.*
122. *Id.*
123. 652 F. Supp. 1177 (N.D. Ala. 1987).
124. *Id.* at 1177.

acts has no application to the interpretation of the terms. . . . The policy terms 'expected or intended injury' cannot be equated with 'foreseeable injury'."[125]

According to the *McIntyre* court, the key to reaching a correct legal result was the recognition and application of the state's "settled principles governing the construction and application of insurance policies."[126] It used a "purely subjective standard"[127] and placed the burden squarely on the insurer to establish that the insured expected or intended the injury.[128]

Many states have passed statutory restrictions on the use of exclusionary clauses by an insurer.[129] Under California's statute, an act by the insured must be 'wilful' in order for the insurer to take advantage of the exclusion.[130] The insurer must establish that its insured committed the wrongful acts with a specific intent to cause harm or a "preconceived design to inflict injury."[131] Under this standard, the insured's subjective intent, rather than the physical nature of the acts committed, determines whether the insured's policy covers the act at issue.[132] Thus, California courts support the view that the insured must have intended the act as well as some kind of bodily injury in order for the intentional injury exclusion clause to apply. This is particularly promising for women bringing suit for incest torts since studies tell us that the incest tortfeasor does not generally intend to harm his victim.[133]

There has not been an appellate court decision in California dealing with the exclusion of intentional acts from coverage under homeowner's policies in the specific context of incest.

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125. *Id.* at 1187.

126. *Id.* at 1194.

127. *Id.* at 1187.

128. *Id.* at 1195.

129. *See, e.g.*, CAL. INS. CODE § 533 (West 1972 & Supp. 1988): "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others."

130. *Id.*

131. Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 887, 587 P.2d 1098, 1110, 151 Cal. Rptr. 285, 297 (1978).

132. *See, e.g.*, Allstate Ins. Co. v. Overton, 160 Cal. App. 3d 843, 849-50, 206 Cal. Rptr. 823, 827-28 (1984); Congregation of Rodef Sholom v. American Motorist Ins. Co., 91 Cal. App. 3d 690, 695-98, 154 Cal. Rptr. 348, 350-52 (1979).

133. *See supra* note 24 and accompanying text.

However, California decisions interpreting the intentional act exclusion clauses suggest that courts use a subjective approach, and construe the clauses strictly against the insurer.[134]

The seminal California decision in this area, *Clemmer v. Hartford Insurance Company*,[135] was an action by holders of a wrongful death judgment against an insured who had been convicted of second degree murder for the decedent's death.[136] The trial court held that the heirs could litigate the issue of the insured's mental state at the time of the shooting even though he had been found guilty in a criminal proceeding.[137] The jury found that the insured had not had the intent required to exclude this act from coverage, and thus, the insurance company was liable for damages to the heirs.[138] The California Supreme Court affirmed, holding that the trial court had properly imposed upon the insurer the burden of proving that the insured had committed a wilful act.[139] The court noted that there was a "clear line of authority"[140] in California to the effect that an act which is intentional or wilful under "traditional tort principles"[141] must be done with a "preconceived design to inflict injury"[142] in order to exonerate an insurer from providing coverage.[143]

In *Allstate Insurance Co. v. Overton*,[144] a California appellate court rejected the argument that an insured's criminal conviction for battery established his mental state for purposes of insurance coverage. The plaintiff in the underlying action al-

134. *See, e.g.*, Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 587 P.2d 1098, 151 Cal. Rptr. 285 (1978); Congregation of Rodef Sholom v. American Motorist Ins. Co., 91 Cal. App. 3d 690, 154 Cal. Rptr. 348 (1979); Peterson v. Superior Court, 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982) (fact that an insured might be liable for punitive damages for conduct evidencing a conscious disregard for the rights and safety of others held not to preclude his insurer's obligation to indemnify him for compensatory damages if his conduct did not rise to the level of an intent to cause injury); Allstate Ins. Co. v. Overton, 160 Cal. App. 3d 843, 206 Cal. Rptr. 823 (1984).

135. 22 Cal. 3d 865, 587 P.2d 1098, 151 Cal. Rptr. 285 (1978).

136. *Id.*

137. *Id.* at 887, 587 P.2d at 1110, 151 Cal. Rptr. at 297.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. 160 Cal. App. 3d 843, 206 Cal. Rptr. 823 (1984).

leged that the insured had struck him in the face.[145] The court was unwilling to infer intent for purposes of insurance coverage because a judgment of conviction for battery does not necessarily determine intent to injure.[146] In California, the wilfulness element of the crime of battery can be satisfied by showing an intent to do the act, it does not require an intent to injure.[147] According to the court, an insurer in California must show a specific intent to injure in order to take advantage of an intentional act exclusionary clause.[148]

In *Congregation of Rodef Sholom of Marin v. American Motorists Insurance Company*,[149] a sixteen-year-old boy set fire to a wastebasket in his classroom at the Rodef Sholom synagogue causing property damage.[150] The synagogue sued the boy and his parents for damages and got a judgment.[151] The synagogue then brought an action seeking coverage under the family's homeowner's policy.[152] The court held that there was coverage under the policy.[153] It noted that "it is the intent to cause damage beyond the point of origin of the fire which is the intent that makes the exclusion applicable."[154] It rejected the notion that an insurer would be exonerated from coverage where an act is intentional within the meaning of "traditional tort principles"[155] without a finding of a "preconceived design to inflict injury".[156] The court stated that "the public's strong interest in the compensation of victims reinforces the well settled principle that such exclusionary clauses should be interpreted as narrowly as possible."[157]

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145. *Id.* at 847, 206 Cal. Rptr. at 825.
146. *Id.* at 849, 206 Cal. Rptr. at 827.
147. CAL. PENAL CODE § 7(1) (West 1970 & Supp. 1988) reads:

> The word 'willfully', when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

148. *Overton*, 160 Cal. App. 3d at 849, 206 Cal. Rptr. at 827.
149. 91 Cal. App. 3d 690, 154 Cal. Rptr. 348 (1979).
150. *Id.*
151. *Id.* at 693, 154 Cal. Rptr. at 349.
152. *Id.*
153. *Id.* at 698, 154 Cal. Rptr. at 352.
154. *Id.* at 695, 154 Cal. Rptr. at 350.
155. *Id.*
156. *Id.* at 696, 154 Cal. Rptr. at 351.
157. *Id.*

The one California appellate court decision which has considered insurance coverage in the context of sexual molestation stands in stark contrast to the above noted line of decisions. In *Allstate Insurance Co. v. Kim W.*,[158] an insurer filed a declaratory relief action seeking a declaration that a homeowner's policy issued to the insured provided no coverage for sexual assaults by the insured against the minor plaintiff in the underlying action.[159] The homeowners' policy at issue contained a clause excluding coverage for "bodily injury or property damage intentionally caused by an insured person."[160] When he answered the complaint, the insured admitted that he had violated the penal code statute prohibiting sexual and physical abuse of a minor.[161] The court concluded that a violation of the penal code section constituted a wilful act as a matter of law[162] and affirmed a grant of summary judgment for the insurer.[163]

Kim W. portends to be the decision that insurance companies will rely upon when the issue of intentional act exclusions in the context of incest reaches California's high court. It is important to note however, that the court in *Kim W.* did *not* hold that intent can be inferred as a matter of law in sexual abuse cases. Rather, it reasoned that the wording of the penal code statute indicated the legislature's determination that at least some harm was inherent in such conduct.[164] The court therefore concluded that an intent to cause some harm could be inferred as a matter of law from the insured's admission that he violated the statute.[165] In Florida, the *Zordan* court distinguished its holding from that in *Kim W.*, noting that the public policy applicable to criminal law is not always automatically applicable in a civil action.[166]

To infer intent as a matter of law when there is an admission to acts of sexual abuse would conflict squarely with the long line of California cases holding that an insured's state of mind or

158. 160 Cal. App. 3d 326, 206 Cal. Rptr. 609 (1984).
159. *Id.*
160. *Id.* at 329, 206 Cal. Rptr. at 611.
161. *Id.* at 330, 206 Cal. Rptr. at 611 (referring to CAL. PENAL CODE § 288).
162. *Id.* at 333, 206 Cal. Rptr. at 613.
163. *Id.* at 335, 206 Cal. Rptr. at 615.
164. *Id.* at 332, 206 Cal. Rptr. at 613.
165. *Id.*
166. Zordan *ex rel.* Zordan v. Page, 500 So. 608, 610 (Fla. App. 2 Dist. 1986).

intent, rather than the nature of his acts, determines coverage.[167] This subjective standard relies on a very careful analysis of the facts on a case by case basis.

Further, to infer intent as a matter of law in sexual abuse cases would be contrary to traditional principles of insurance contract interpretation.[168] A principled interpretation of a policy which excludes coverage of "bodily injury . . . expected or intended by the insured" begins by looking at the "common meaning of the language."[169] The *MacKinnon* court had no trouble finding that the language referred to "actual expectation or intention."[170]

Another argument used by opponents of the subjective standard is that public policy dictates that an insured should not be indemnified against liability for the consequences of his own wrongdoing.[171] But, as the *Rodef Sholom* court found, public policy also dictates that victims should be compensated.[172]

While the facts in many instances of incestuous abuse might give rise to an inference of intent, the intent to injure is not there in most instances.[173] One of the reasons that this kind of sexual abuse is so psychologically harmful to a child is *because* it is not done with an intent to injure.[174] If the intent to injure was present, it would be easier for a child to identify the behavior as wrong and to resist it.[175] Most often however, incestuous abuse is combined with and confused with parental love.[176] When the insured does not intend to injure the child, insurance coverage should be available for any resultant injuries if the language of a policy allows coverage under traditional principles of insurance contract construction.[177]

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167. *See, e.g., supra* notes 133-60 and accompanying text.
168. *See supra* notes 54-62 and accompanying text.
169. *See MacKinnon*, 124 N.H. at 457, 471 A.2d at 1167, citing Baker v. McCarthy, 122 N.H. 171, 175, 443 A.2d 138, 140 (1982).
170. *MacKinnon*, 124 N.H. at 457, 471 A.2d at 1167.
171. *Id.* at 458, 471 A.2d at 1168.
172. *See Rodef Sholom*, 91 Cal. App. 3d at 697, 154 Cal. Rptr. at 352.
173. *See* note 24 and accompanying text.
174. *Id.*
175. *Id.*
176. *Id.*
177. *See* notes 54-62 and accompanying text.

F. Household Exclusion/Time of Occurrence

Homeowners' insurance policies generally do not afford coverage of injuries to residents of the household.[178] However, courts generally will interpret policy terminology to extend coverage whenever possible.[179] The use of a broad or narrow construction will depend on which interpretation of the facts, if reasonable, will provide coverage.[180]

A well-settled general rule places the time of an occurrence within the meaning of a liability policy to be the time when the damage occurred, not the time that the wrongful act was committed.[181] The manifestation of injury from incestuous abuse

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178. A typical household exclusion in a homeowner's policy reads:

> We will pay the necessary medical expenses incurred or medically ascertained within three years from the date of an accident causing bodily injury. Medical expenses means reasonable charges for medical, surgical, x-ray, dental, ambulance, hospital, professional nursing, prosthetic devices and funeral services. This coverage does not apply to you or regular residents of your household other than residence employees.

See 1 G. Couch, *supra* note 44, at § 1:61, at 164.

179. Cal-Farm Ins. Co. v. Boisseranc, 151 Cal. App. 2d 775, 312 P.2d 401 (1957) "[W]e start the problem of interpretation with the rule that the policy must be construed so as to give James the benefit of any reasonable interpretation that may bring him within its coverage." *Id.* at 781, 312 P.2d at 404.

180. *See, e.g.*, Hardware Mut. Cas. Co. v. Home Indem. Co. 241 Cal. App. 2d 303, 308, 50 Cal. Rptr. 508, 511-12 (1966); Allstate Ins. Co. v. Smith, 9 Cal. App. 3d 898, 902, 88 Cal. Rptr. 593, 596 (1970). *See also* Northwestern Nat'l Cas. Co. v. Davis, 90 Cal. App. 3d 782, 784-85, 153 Cal. Rptr. 556, 558 (1979). In *Davis*, the court relied on Cal. Gov't Code § 244, which deals with the interpretation of residence. That code section reads in pertinent part:

> In determining the place of residency the following rules shall be observed:
> . . .
> (b) there can only be one residence;
> (c) a residence cannot be lost until another is gained;
> (d) the residence of the parent with whom an unmarried minor child maintains his or her place of abode is the residence of such unmarried minor child.
> (e) the residence of an unmarried minor who has a parent living cannot be changed by his or her own act;
> (f) the residence can be changed only by the union of act and intent.

Cal. Gov't Code § 244 (West 1980).

181. Schrillo v. Hartford Acc. & Indem. Co. (formerly Highlands Ins. Co v. Schrillo

typically involves a continuous and progressive process that extends over many years.[182] In California, some courts have taken the position that, where the facts reveal a progressive development and accumulation of injuries over time, the time of "occurrence" triggering coverage is the whole period of time during which the injuries thus progressively develop and occur.[183] This "continuing injury" doctrine is particularly appropriate for judicial analysis of insurance coverage of incest torts under a household exclusion clause.

It is important however, not to confuse the "continuing injury" doctrine with the "delayed discovery" doctrine.[184] Courts have held that the delayed discovery of an injury does not affect the time of the occurrence of an injury for purposes of determining the applicable policy period for coverage.[185] Thus, a claimant must be able to allege a continuing and progressive injury in order to take advantage of the doctrine; delayed discovery is insufficient in and of itself.

The continuing injury doctrine is best exemplified by the California appellate court decision in *California Union Ins. Co. v. Landmark Ins. Co.*.[186] That case involved a dispute between successive insurers as to which should indemnify the insured for property damages that occurred over a two-year period.[187] According to the undisputed facts, improper subgrading during construction of a swimming pool caused cracks to develop in the pool shell leading to underground leakage from the pool which resulted in soil slippage.[188] Ultimately, certain structures on the property were damaged.[189] Landmark was the insurer during the initial construction and occurrence of property damage.[190] It paid for repairs without knowing about the underlying causes,

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Co.), 181 Cal. App. 3d 766, 773, 226 Cal. Rptr. 717, 720 (1986).

182. *See supra* notes 13-19 and accompanying text.

183. *See* California Union Ins. Co. v. Landmark Ins. Co., 145 Cal. App. 3d 462, 474-78, 193 Cal. Rptr. 461, 468-71 (1983).

184. *See supra* notes 35-38 and accompanying text.

185. *See, e.g.*, Tijsseling v. General Acc., Fire & Life Assur. Corp., 55 Cal. App. 3d 623, 127 Cal. Rptr. 681 (1976).

186. 145 Cal. App. 3d 462, 193 Cal. Rptr. 461 (1983).

187. *Id.*

188. *Id.* at 467, 193 Cal. Rptr. at 463.

189. Id.

190. *Id.*

which continued to cause damage over time.[191] Subsequently, during California Union's policy term, new property damage occurred and the underlying causes were discovered.[192]

Landmark argued that it should not have to pay for any of the property damage that occurred after its policy term had ended.[193] California Union responded that, because the injuries which occurred during its policy term were a continuation of injuries that had actually incepted and been caused during Landmark's term, all the damages should be Landmark's responsibility.[194] Paradoxically, both sides argued that the general rule fixing the time of "occurrence" as the time of actual injury or damage supported its position.[195]

The court concluded that this general principle was inapposite given the facts before it.[196] It found that during the entire period of time at issue "the damage was accumulating and becoming progressively more severe."[197] The court resolved the situation by regarding the entire time period during which the injuries progressively developed as the time of "occurrence" triggering coverage, thus holding each insurer jointly and severally liable for all of the damages.[198]

The court in *California Union* relied on two products liability cases involving the manufacturers of asbestos products, *Insurance Company of North America v. Forty-Eight Insulations, Inc.*[199] and *Keene Corporation v. Insurance Company of North America.*[200] In *Forty-Eight Insulations*, the Sixth Circuit reasoned that cumulative diseases such as asbestosis are different from ordinary accidents or diseases and thus must be treated differently by the judiciary.[201] It noted that the theory of liability in asbestos cases is that the continuous exposure to asbestos

191. *Id.*
192. *Id.*
193. *Id.* at 468, 193 Cal. Rptr. at 465.
194. *Id.*
195. *Id.* at 470, 193 Cal. Rptr. at 465.
196. *Id.*
197. *Id.* at 473, 193 Cal. Rptr. at 467.
198. *Id.* at 473-78, 193 Cal. Rptr. at 467-71.
199. 633 F.2d 1212 (6th Cir. 1980).
200. 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied* 455 U.S. 1007 (1982).
201. *Forty-Eight Insulations*, 633 F.2d at 1219.

particles allowed asbestosis to progress to the point where it caused injury or death.[202] The court reasoned that "the contracting parties would expect coverage to parallel the theory of liability."[203] In holding that insurers would be liable for coverage of asbestos claims from the time of exposure to the disease, to and including its manifestation, the court stated that it was bound to "broadly construe the policies to promote coverage."[204]

In *Keene*, the District of Columbia Circuit Court of Appeals held that coverage of asbestosis was not limited to the time the disease manifested itself, but was triggered by inhalation of asbestosis particles, the subsequent development of the disease and its manifestation.[205] In so holding, the court noted its obligation to construe coverage under the policies with the objective of giving effect to the policies' dominant purpose of indemnity.[206] It acknowledged that the particular terms of the insurance policies were ambiguous as applied to such a slowly evolving disease, but that ambiguities must be resolved in favor of the insured.[207]

The *Keene* court's "multiple trigger" theory in which the injury is understood to have "occurred" at exposure, manifestation, and the period of latency was recently adopted by a California court in asbestos related litigation.[208] The California Superior Court tentatively ruled that because asbestosis has been demonstrated to be a disease in which bodily injury occurs in a continuing and progressive manner over time, the time period of the occurrence of injury triggering coverage consists of the whole time period during which the disease develops, beginning with the time of exposure and continuing until death or a claim is filed.[209]

Analogies can easily be drawn between the asbestos cases,

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202. *Id.*
203. *Id.*
204. *Id.* at 1219, 1223.
205. *Keene*, 667 F.2d at 1245.
206. *Id.* at 1041.
207. *Id.*
208. Asbestosis Insurance Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (Superior Court of California, County of San Francisco tentative ruling May 29, 1987).
209. *Id.* at 43-45.

California Union, and many cases involving incestuous abuse torts. An insured's wrongful conduct causes deep-seated and hidden injuries to the victim which develop and multiply over time, causing the progressive occurrence of many specific injuries.[210] Under the "continuing injury" theory the victim of an incest tort may not be covered for the period of time she resides in the insured's household, but would be covered for the time after she moves out during which her injuries continue to develop and accumulate. Applying the reasoning of the *California Union* court, all insurers from the inception of the injuries throughout their progressive development would be jointly and severally liable for liability coverage.

It must be recognized however, that the use of this continuing injury doctrine would preclude a claim of multiple occurrences based on incestuous abuse occurring over many years. A claim of multiple occurrences could potentially result in a much higher recovery, while reliance on a single occurrence limits recovery to the policy's "per occurrence" limits.[211]

V. CONCLUSION

Torts based on incestuous abuse present special problems to the litigator because of the unique characteristics of incest. One of the biggest problems is the tendency of some courts to infuse substantive tort law into the interpretation of insurance contracts when coverage questions involve sexual abuse. Principles of contract interpretation require courts to construe questionable coverage in favor of the insured. Under these principles, incest torts should be covered by homeowner's insurance policies when the injury was neither expected nor intended by the insured, unless the insurer has expressly stated otherwise in the language of the contract.

The injuries related to incestuous abuse develop very slowly over time and in that way are similar to asbestosis. The "multiple trigger" analysis used by some courts when determining as-

210. *See supra* notes 13-19 and accompanying text.

211. *See, e.g., California Union*, 145 Cal. App. 3d at 473, 193 Cal. Rptr. at 468 (holding that the continuing injury to the insured's property constituted one occurrence for purposes of insurance coverage).

bestosis insurance coverage issues is appropriate to use when analyzing coverage of incest torts as well. Such an analysis would allow a victim of incestuous abuse who resided in the insured's household during a portion of the evolution of the injury to claim coverage of the injury for the period of time after she is no longer a member of the household.

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The author is particularly indebted to attorney Mary Williams for her ideas, encouragement, assistance and constructive criticism.