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FORTUITY, INTENT, AND CAUSATION IN LIABILITY  
INSURANCE LAW

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## I. INTRODUCTION

It is widely held that fortuity – probability, contingency, risk – is essential to insurance.<sup>1</sup> Yet it is true with respect to the fortuity requirement, as in so many other areas of the law, that one does not have to travel far beyond the statement of a principle to be in the thick of fundamental and longstanding disputes as to its meaning and application.<sup>2</sup> Consider just a few examples. Leading scholars have said, in the context of liability insurance policies, that the fortuity requirement bars coverage “when an insured intentionally causes a loss”<sup>3</sup> or, equivalently, “[a] loss is not fortuitous . . . if it is caused intentionally” by the person whose interest is the basis of the insurance claim.<sup>4</sup> Yet liability policies provide coverage for many types of intentional torts (e.g., defamation, disparagement, and so on), and so limit the generality of this proposition. Further, the scope and meaning of the fortuity requirement in any coverage dispute is solely a function of policy

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<sup>1</sup>See, e.g., ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* § 5.4(d)(1), at 518 (1988) (“[I]nsurance should only be employed to transfer risks associated with fortuitous occurrences.”); Erik S. Knutsen, *Fortuity Clauses in Liability Insurance: Solving Coverage Dilemmas for Intentional and Criminal Conduct*, 37 *QUEEN’S L. J.* 73, 75 (2011) [hereinafter Knutsen, *Fortuity Clauses*] (“The basic premise behind insurance is that it only protects against fortuitous losses, not against losses that are certain to occur.”); Banks McDowell, *Causation in Contracts and Insurance*, 20 *CONN. L. REV.* 569, 588 (1988) (“A valid insurance contract can only cover risks which are fortuitous.”).

<sup>2</sup>One scholar has lamented that the fortuity requirement “has been so loosely applied that it has lost its innate helpfulness to courts and litigants.” Knutsen, *Fortuity Clauses*, *supra* note 1, at 75. This view has been echoed by other scholars and courts. See ROBERT H. JERRY II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* 418 (4th ed. 2007) (“[A]t a certain point the logic of the fortuity requirement begins to unravel at the edges.”); In re Feinstein, 326 N.E.2d 288, 293 (N.Y. 1975) (“[Fortuity has] always caused conceptual difficulties . . . . In this area it is easy to slip into metaphysical, even validly metaphysical, distinctions.”); Kenneth S. Abraham, *Peril and Fortuity in Property and Liability Insurance*, 36 *TORT & INS. L.J.* 777, 777 (2001) (arguing that the fortuity requirement “is far less self-evident than often is supposed”).

<sup>3</sup>KEETON & WIDISS, *supra* note 1, § 5.4(d)(2), at 520; *id.* § 5.4(d)(1), at 518; *accord*, e.g., Abraham, *supra* note 2, at 792–93 (establishing that the fortuity requirement bars coverage for “liability for intentionally caused loss”).

<sup>4</sup>KEETON & WIDISS, *supra* note 1, § 5.3(a), at 475; *see also id.* § 5.4(a), at 497, § 5.4(c), at 511 (discussing the perspective an appellate court takes when determining whether a loss is fortuitous).

language,<sup>5</sup> although judicially-created public policy limitations on coverage, purportedly derived from the fortuity requirement itself, represent a contrary view. Finally, we are instructed by some scholars that “[f]ortuity, or lack thereof, is primarily a matter of intent,”<sup>6</sup> and by other scholars that “fortuity itself is a causal notion” and courts must “face causation issues in *defining* fortuity.”<sup>7</sup>

In discussions of both first-party property and third-party liability policies, fortuity is typically contrasted with the actor’s control over the coverage-activating event, either the event that causes injurious effects or those effects themselves. In a nutshell, the contrast is between what is probabilistic or contingent and what is within the insured’s control and certain. The issue, then, is: what does it mean for an actor to have such control over the coverage-activating event that it defeats the imputation of fortuity to that event? Despite the widespread agreement that the insured’s control over the happening of the event that activates the insurer’s duties defeats an imputation of fortuity, there has been no extended analysis of this critical issue in the scholarly insurance law literature or in the caselaw.

In this article, I argue that under liability insurance policies, the idea of an actor’s control over the coverage-activating event that makes the happening of that event certain and not fortuitous requires a liability-insurance-specific concept of subjective intent that is materially different from the two tort-based concepts now commonly employed in liability insurance caselaw. A satisfactory answer to the control issue is one that is applicable without obvious errors in both “standard” or routine actions and in those actions that “misfire” or go awry. To satisfy that requirement, one needs to be able to give a causal explanation of an act in terms of the actor’s subjective intent. The concept of subjective intent that provides that causal explanation is one in which (1) the actor has effective physical control over his bodily movements (an action is distinct from a mere bodily movement such as a reflex motion or a jerk), (2) the actor acts for a freely chosen and desired purpose (and not under duress, compulsion, or the like), (3) the actor has correct beliefs about all

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<sup>5</sup> See generally Abraham, *supra* note 2 (arguing that in determining whether coverage exists under an insurance policy when fortuity is an issue, courts should apply the policy language).

<sup>6</sup> KEETON & WIDISS, *supra* note 1, § 5.3(a) at 475.

<sup>7</sup> McDowell, *supra* note 1, at 589, 593 (emphasis added).

or most of the material circumstances of his action, and (4) the actor's desires and beliefs cause and guide his action, such that he acts as he does because of those reasons. If and only if an act that (allegedly or actually) activates the insurer's duties is fully intentional in these four respects, then the actor had complete control over the act and it is not fortuitous in any respect. If one or more of these four components of a fully intentional act is absent, then the act is less than fully intentional, the actor lacked control over the act in that respect, and the act is fortuitous. In sum, I argue that "control" refers to the causal relation between the insured and the coverage-activating event (the act or its injurious effects), and that causal relation is established by the insured's subjective intent understood as consisting of the four elements set forth above. Judgments of fortuity, or of its absence, are a function of *both* subjective intent and causation.

Courts and scholars have not generally acknowledged that issues of intent or intentional action in insurance law in general, in first-party and third-party policies more particularly, or in the coverage questions posed by the language in any specific type of policy most particularly (e.g., in the language of occurrence- and accident-based liability policies) should be guided by a different concept of intent than is operative in other areas of the law, such as criminal or tort law.<sup>8</sup> The need for an insurance-specific concept of, or rules for analyzing issues of, intent is not even addressed in the current draft Restatement of the Law, Liability Insurance.<sup>9</sup> This is curious. This omission stands in marked contrast to the seven-decades-long development of the concept of intent in tort law<sup>10</sup> and the centuries-long development of *mens rea* in criminal law<sup>11</sup>.

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<sup>8</sup> For notable exceptions, see George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1029 (1989), and Kristin Wilcox, *Intentional Injury Exclusion Clauses – What Is Insurance Intent?* 32 WAYNE L. REV. 1523, 1533–36 (1986). See also, e.g., *Clemmer v. Hartford Ins. Co.*, 587 P.2d 1098, 1110 (Cal. 1978) (stating that an act that is intentional under traditional tort principles is not necessarily intentional under California Insurance Code section 533).

<sup>9</sup> See RESTATEMENT OF LIABILITY INSURANCE (Discussion Draft 2015). See, for example, PRINCIPLES OF LIABILITY INSURANCE (Tentative Draft No. 2, 2014), which lacks a discussion of intent.

<sup>10</sup> For a brief and instructive history of that development, see Anthony J. Sebok, *Purpose, Belief, and Recklessness: Pruning the Restatement (Third)'s Definition of Intent*, 54 VAND. L. REV. 1165, 1166–68 (2001).

<sup>11</sup> See Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635 (1993).

Moreover, legal scholars generally agree that the analysis of causation issues in insurance law should be guided by different rules than are operative in tort law.<sup>12</sup> In some areas of insurance, especially in liability insurance law, the concepts of intentional action and causation are tightly interwoven, so that insurance-specific analyses of causation might be expected to lead to insurance-specific analyses of intent. Finally, the fortuity requirement is unique to insurance law, and is not essential to tort or criminal law, and hence a concept of intent borrowed from either of those disciplines serves to answer satisfactorily insurance coverage issues only if it is consistent with or derives from the fortuity requirement.

Rather than an insurance-specific concept of intent, courts generally employ either one of two tort concepts of intent in resolving coverage disputes under liability insurance policies. In liability insurance caselaw, we often find that issues of intent are resolved through the unreflective application of section 8A of the *Restatement (Second) of Torts*, which defines “intent” as desire *or* belief, to wit, “the actor desires to cause consequences of his act, or . . . he believes that the consequences are substantially certain to result from it.”<sup>13</sup> The alternative to section 8A, which has no commonly-accepted name, also is borrowed from tort law, specifically from the law of negligence and proximate causation. There is a large body of liability insurance case law that holds that for an actor to have fortuity-defeating control, it is sufficient that his intentional act is the direct and sole cause of the injurious effects, and that the content of the actor’s subjective intent is irrelevant to the control analysis.<sup>14</sup> I shall

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<sup>12</sup> See, e.g., Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957, 968–72 (2010) [Knutsen, *Confusion About Causation*] (discussing the different purposes for causal inquiries in tort and insurance law); Peter Nash Swisher, *Insurance Causation Issues: The Legacy of Bird v. St. Paul Fire & Marine Ins. Co.*, 2 Nev. L.J. 351, 361–66 (2002) [hereinafter Swisher, *Insurance Causation Issues*] (noting the “growing body of case law and legal commentary” demonstrating the differences between legal causation issues in tort and insurance law, citing numerous articles); McDowell, *supra* note 1, at 575–77 (distinguishing causal concepts in tort and insurance law and stating “[o]ne must understand the purpose of the inquiry if one is to define ‘causation.’”). Justice Cardozo’s classic decision in *Bird v. St. Paul Fire & Marine Ins. Co.*, 120 N.E. 86 (N.Y. 1918), is the seminal case holding that issues of causation in insurance law are to be resolved not in terms of the tort concepts of causation, but in terms of the mutual intent or reasonable expectations of the parties to the insurance contract.

<sup>13</sup> RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965) [hereinafter, RESTATEMENT (SECOND)].

<sup>14</sup> See *infra* Parts IV through VI and the cases discussed therein.

refer to this view of intent as the Objective Intent Model or, simply, the Model. As articulated in this body of caselaw, when the Model is applicable, no aspect of the action or its effects is left to chance or is contingent, and therefore the action cannot be fortuitous.

The Model nominally includes the actor's subjective intent as an essential element. It holds that in acting intentionally an actor exercises such complete control over his action that the action completely conforms to his subjective intent and he thereby is the direct and sole cause of both his action and its effects. Nonetheless, when the insured's declared subjective intent does not comport with his action or its causation of injurious effects, the courts routinely deem that subjective intent to be irrelevant and thereby reduce the issue of intentionality to the causal relation between the act and the injuries complained of by the third party. At the same time, by treating the insured's subjective intent as irrelevant, courts reduce the fortuity requirement solely to one of causation, and more specifically, to one of the insured's act not being the direct and sole cause of the injuries because of the intervention of an "external" or "extrinsic" physical cause.<sup>15</sup> According to this case law, if an act is the direct and sole cause of injurious effects, then the act is deemed to be an (objectively) intentional act and not fortuitous.<sup>16</sup> If direct and sole causation is not present, the act is deemed to be fortuitous and not intentional (objectively, whatever the actor's actual intent).<sup>17</sup> Either the Objective Intent Model applies and there is no coverage, because the actor's intentional and complete control of his action is inconsistent with the fortuity requirement, or it does not apply due to the intervention of an "extrinsic" cause in the causal chain and the insured's act is unintentional and, hence, fortuitous.<sup>18</sup> Courts have applied the Model in a wide variety of coverage cases, including those involving sexual assault, discrimination, conversion, trespass, breach of contract, fraudulent inducement, self-defense, and common pranks that cause injury.<sup>19</sup>

In Part II, I flesh out non-controversial elements of the fortuity requirement that are independent of the control issue, the competing

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> *See id.*

<sup>19</sup> *See generally id.*

answers to the control issue that focus on intent and causation, and the debate as to the proper meaning of this requirement under occurrence- and accident-based liability policies. Specifically, as to the debate under occurrence- and accident-based liability policies, I distinguish the positions of those courts that hold that the act causing the injurious effects must be fortuitous and those that hold that only the injurious effects must be fortuitous. This debate only partially overlaps the intent-causation debate on the control issue and it is important that they not be conflated.

In Part III, I discuss why the definition of “intent” in section 8A of the *Restatement (Second)* does not satisfactorily address the control issue. This definition has been the subject of much criticism from tort law scholars and, accordingly, my critique of it here is relatively brief. The problems with the definition of “intent” in section 8A are not in any way alleviated by its transplantation to liability insurance coverage disputes. On the contrary, they are, at a minimum, no less fatal in this different legal environment.

Parts IV through VI are devoted to the discussion and critique of the Objective Intent Model. I argue that in making subjective intent an essential element of the Model and in deeming it irrelevant in application, the judicial employment of the Model is internally inconsistent and *ad hoc*. Moreover, in cases in which actions “misfire” or go awry due to an “internal” cause (such as mistaken belief or duress) or because the insured simply failed to execute his intention, the Model cannot answer the fortuity question it is designed to answer, namely, does the insured-actor have control over the insurance-activating event? The Model contemplates and deems relevant only one way in which an intentional action can “misfire” or go awry, namely, that in which an “external” or “extrinsic” physical cause results in effects other than those intended. I argue that it is arbitrary for the Model to not find relevant three other ways in which an act can “misfire” such that it is both intentional and accidental. When the insured allegedly trespasses on property adjacent to hers under the mistaken belief as to the location of the property line, or when a routine harmless prank causes serious injuries on one occasion, or when the insured converts property under a mistaken belief as to his legal rights, for example, these courts ignore the insured’s reasons for action (his subjective intent) and simply answer the question of control in terms of causation – was the act the direct and sole cause of the injuries? These courts invariably answer this question in the

affirmative and deny coverage to the insured. As we will see in Part VI, these decisions are irreparably flawed. The attempt to determine whether the insured-actor had control over the insurance-activating event by appeal solely to a causal relation between the act and its injurious effects is in error.

If my critiques of section 8A and the Objective Intent Model are correct, then we need an alternative concept of intent to address fortuity issues arising under liability policies, and specifically under occurrence- and accident-based liability policies, which are the focus of this article. In Part VII, I argue that only the four part concept of intent outlined above satisfactorily addresses the issue of control. This concept has its philosophical origins in and reflects Aristotle's concept of fully voluntary action. A fully voluntary action, as defined here, is the only type of action in which the actor has such complete or effective control over his action so that we can truly say that no part of it was contingent, a matter of chance, or accidental. The concept of intent necessary to and appropriate for liability insurance law, then, is that concept that allows us to answer the control issue at the heart of the fortuity requirement. If my analysis and arguments are correct, we will have advanced toward a sounder insurance law jurisprudence and the fairer resolution of many types of liability coverage disputes.

## II. THE FORTUITY REQUIREMENT

Fortuity is a perspective-laden concept, and each of its possible perspectives is more or less closely associated with a theoretical view of insurance.<sup>20</sup> In the liability insurance context, an event may be deemed fortuitous, or not, from the perspective of (a) the injured third party, (b) the insured, or (c) the insurer.<sup>21</sup>

The point of view of the injured third party typically results in a judgment that the fortuity requirement has been satisfied, since for the majority of victims their injuries and the events that caused them are matters of chance, probabilistic, and beyond their effective control.<sup>22</sup>

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<sup>20</sup> See KEETON & WIDISS, *supra* note 1, § 5.3(a) at 475.

<sup>21</sup> See generally *id.* at 475–76 (discussing the vantage point when assessing fortuity).

<sup>22</sup> See, e.g., *Vt. Mut. Ins. Co. v. Malcolm*, 517 A.2d 800, 802 (N.H. 1986) (Souter, J.); *JERRY II & RICHMOND*, *supra* note 2, at 415.



This perspective tends to reflect the view of liability insurance principally as a tort-compensation mechanism.<sup>23</sup>

In the remainder of this article, I do not consider the fortuity requirement from the point of view of the victim. That perspective implicates the large theoretical and policy issues at play in the debate as to whether liability insurance should be viewed principally as a tort-compensation scheme or as a private contractual arrangement and, in turn, whether these two views require different analyses of fortuity. It suffices here to attempt to get fortuity right from one of these perspectives, that of liability insurance as a private contractual arrangement.

### A. *Fortuity Within the Liability Insurance Contract*

The perspectives of the insured and insurer reflect their roles as parties to the insurance contract and the view of insurance as a private contractual relationship.<sup>24</sup> At the heart of the fortuity requirement so understood is the idea that, through the insurance contract the insured and insurer agree that, should a contingent event (within a class of identified contingent events) happen, the insurer agrees to bear all or some defined portion of the economic costs created by the happening of that event, costs which, but for the contract, the insured would bear. In

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<sup>23</sup> 4–23 APPLEMAN ARCHIVE ON INSURANCE LAW AND PRACTICE § 23.4 at 27–28 (Matthew Bender 2013) [hereinafter APPLEMAN ARCHIVE] (citing cases); JERRY II & RICHMOND, *supra* note 2, § 134[a] at 951–53; KEETON & WIDISS, *supra* note 1, § 5.4(c)(1) at 512, 512 n.6; *id.* § 5.4(c)(3) at 515, 517; *id.* § 5.4(d)(4) at 525–26; Craig Brown, “Accidental Loss” and Liability Insurance, 5 OTAGO L. REV. 523, 524 (1984) (“[R]ules of fortuity constitute part of what we call the ‘system’ of compensation.”); James A. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95, 97 (1990) (“[C]ompensation of the victim of the insured’s misconduct is ‘a basic policy of insurance law’”) [hereinafter Fischer, *Exclusion*].

<sup>24</sup> KEETON & WIDISS, *supra* note 1, § 5.3(a) at 475 (“Fortuity is generally, though not invariably, considered from the point of view of the person (usually the insured) whose interest is the basis of an insurance claim.”); *see id.* § 5.4(c) at 510–512; *see also, e.g.*, Bituminous Cas. Corp. v. Kenway Contracting, Inc., 240 S.W.3d 633, 639 (Ky. 2007) (deciding that “accident” is to be determined from the point of view of insured); Agoado Realty Corp. v. United Int’l Ins. Co., 733 N.E. 2d 213, 215 (N.Y. 2000) (same); Crook v. Ga. Farm Bur. Mut. Ins. Co., 428 S.E.2d 802, 803 (Ga. Ct. App. 1993) (same); Mass. Bay Ins. Co. v. Ferraiolo Const. Co., 584 A.2d 608, 610–11 (Me. 1990) (quoting Gray v. State, Dep’t of Highways, 191 So. 2d 802, 816 (La. 1966)) (deciding that whether an act is an ‘accident’ is to be ascertained from the intention of the parties to the contract).

more common parlance, by the insurance contract the insured transfers to the insurer the risk (and not the certainty) of the happening of an event that causes economic costs.

The fortuity requirement alone does not dictate what can and cannot be insurable under a liability policy. To consider just two common examples, fortuity alone does not dictate that there can be no coverage for intentionally caused losses and does not dictate that losses that have already occurred cannot be covered. Coverage for a wide range of intentional torts (defamation, disparagement, false imprisonment, wrongful termination, sexual harassment, to name a few)<sup>25</sup> and coverage for liability for losses that have already occurred and are known by the contracting parties to have occurred are consistent with, and not barred from coverage by, the fortuity requirement.<sup>26</sup> Such coverages reflect that coverage-activating events may be contingent in different respects and contracting parties may transfer the obligation to bear the economic costs not for a contingent event *simpliciter*, but rather for the contingencies of the fact, timing, manner, or extent of the event, or the amount of the resulting costs.<sup>27</sup> Whether the insured contingency is the event *simpliciter* or one of these aspects of it, the critical point is that it is (pre-contract formation) or will be (post-contract formation) beyond the effective control of either party to the insurance contract to cause unilaterally, or is believed by the parties to be beyond their effective control to cause unilaterally. The parties can agree to coverage for losses resulting from a narrow or wide range of contingent events and different types of contingencies, as long as the contract transfers *some* risk with respect to some identified events. (When extra-contractual public policy constraints exist, such as deterrence of injurious conduct, they are more accurately seen as creations of the courts or legislatures than following merely from the concept of fortuity.) Failure to appreciate that fortuity can refer to various aspects of a coverage-activating event, and not only

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<sup>25</sup> See, e.g., Christopher C. French, *Debunking the Myth that Insurance Coverage Is Not Available or Allowed for Intentional Torts or Damages*, 8 HASTINGS BUS. L.J. 65 (2012) (collecting intentional tort cases which have satisfied the fortuity requirement).

<sup>26</sup> See JERRY II & RICHMOND, *supra* note 2, at 419 (discussing retroactive insurance); *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913 (D. Nev. 1983) (addressing the classic case of the purchase of liability insurance after the happening of the bodily injuries; the extent of insured's liability was contingent on litigation).

<sup>27</sup> Knutsen, *Fortuity Clauses*, *supra* note 1, at 77, 106 (describing the three kinds of insurable uncertainties: factual, temporal, and extent); Priest, *supra* note 8, at 1020 (describing the fact of an event's happening and its timing as uncertain).

to the event *simpliciter*, is responsible, I submit, for the perception that “the logic of the fortuity requirement begins to unravel at the edges.”<sup>28</sup>

The commonly relied-upon definitions of “fortuitous event” incorporate this contract conception of fortuity. In New York’s insurance statute, for example, “fortuitous event” is defined as “any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party.”<sup>29</sup> As seen in this definition, fortuity (risk, contingency) is commonly contrasted with the control (certainty) of one of the parties to the contract, usually the control of the insured.<sup>30</sup> The insurer agrees to bear the economic costs of events within a defined class of events (or contingencies that define a class of events) whose happening is, for both it and the insured, probabilistic because they are not controlled by the insured.

The questions that have yet to be expressly addressed by any court or commentator, however, are: what does it mean to talk of the insured’s control over the coverage-activating event? Does control refer to the actor’s causal relation to his act (and/or its injurious effects) or to the causal relation between his act *qua* event and its injurious effects? What is the standard for determining when that control exists and when it does not? The remainder of this article attempts to answer these questions as they arise post-contract-formation.<sup>31</sup>

<sup>28</sup> JERRY II & RICHMOND, *supra* note 2, at 418.

<sup>29</sup> N.Y. INS. LAW § 1101(a)(2) (McKinney 2014). *See also* RESTATEMENT (FIRST) OF CONTRACTS § 291 cmt. a (AM LAW. INST. 1932).

<sup>30</sup> *See, e.g.*, *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 76 (Ky. 2010) (“[T]he issue of control is encompassed in the fortuity doctrine”); Jeffrey W. Stempel, *Law of Insurance Contract Disputes* § 1.05[a] at 1–33 (2d ed. 1999) (contrasting fortuitous losses with those within the control of the insured); Knutsen, *Fortuity Clauses*, *supra* note 1, at 77 (same); McDowell, *supra* note 1, at 588–89 (same); JERRY II & RICHMOND, *supra* note 2, at 459–460. *See also* *Univ. of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1282 (6th Cir. 1995) (contrasting fortuity with insured’s control in first-party coverage dispute).

<sup>31</sup> Pre-contract-formation, control principally refers to the insured’s control of the flow of information to the insurer regarding a loss that has happened or is in the process of happening. *See* Abraham, *supra* note 2, at 790–96; Diana S. Donaldson & Jennifer DuFault James, *The “Known Loss” Doctrine – Whose Knowledge and of What?*, 8 ENVTL. CLAIMS J. 43, 43–44 (1996); Richard L. Fruehauf, *The Cost of Knowledge: Making Sense of “Nonfortuity” Defenses in Environmental Liability Insurance Coverage Disputes*, 84 VA. L. REV. 107, 111–15 (1998); James E. Scheuermann, *“Intentional Acts Cannot Be Accidents” – A Critique of a Legal Error*, 12 HASTINGS BUS. L.J. 301, 315 (2016).

There are two principal answers to the question of the meaning of control post-contract-formation. The first answer looks to the causal relation between the insured's subjective intent and the insurance-activating event (usually, his own action or the injurious effects of that action). On this view, we must look to the content of the insured's intent such that fortuity is violated if and only if he intended to cause the coverage-activating event to happen by his act, and he in fact did so by successfully executing his intent. (This position, in turn, has a narrower and broader version, depending on the content given to the insured's subjective intent. See further discussion below in Part II Section A.1.) The second principal answer treats control solely as a matter of the causal relation between the actor's intentional act *qua* event and the resulting injurious effects independent of the content of the actor's subjective intent or reasons for action. On this view, mere causation between an intentional act and the coverage-activating event is sufficient to violate the fortuity requirement, whether or not the actor subjectively intended that the coverage-activating event happen.

Because the view of insurance as a private contractual relation means that the scope and meaning of the fortuity requirement in any particular coverage dispute will be solely a function of policy language,<sup>32</sup> there does not appear to be any reason in principle why a well-crafted liability policy could not reflect either of these positions. If that is correct, then my argument that the second answer, which is the answer adopted by courts applying the Objective Intent Model, is untenable, and that fortuity is intelligible only if understood as in the first answer (control exists when subjective intent causes the coverage-activating event to happen), is limited to the occurrence- and accident-based liability policies under consideration here. I submit that my arguments and conclusions regarding fortuity under these policies are generalizable to other types of liability policies commonly marketed and purchased in the United States, *mutatis mutandis*, but I do not argue for that conclusion in this article. I will now discuss each of these positions in turn.

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<sup>32</sup> See generally Abraham, *supra* note 2 (arguing that in determining whether coverage exists under an insurance policy when fortuity is an issue, courts should apply the policy language).

### 1. Control: Subjective Intent as a Cause

There is a large body of caselaw that looks to the relation between the insured's subjective intent and the coverage-activating event as the standard for determining when the requisite control is present so as to defeat a claim of fortuity. On this standard, control is deemed to exist when the insured subjectively intends to cause the coverage-activating event to happen, and he causes that event to happen as he intended. When the insured acts with the subjective intent to make the coverage-activating act happen and has complete control over his action and its circumstances that the act does happen as intended, then the act is not fortuitous (not an accident) and coverage is not forthcoming.<sup>33</sup> If the insured did not intend to make that act happen and it does happen, then its happening is fortuitous from his perspective since its happening is outside of his control.<sup>34</sup> We see this view implied by statements such as: "Fortuity, or lack thereof, is primarily a matter of intent."<sup>35</sup> This standard also is suggested by Professor Abraham's statement that fortuity requires that "the insurance policy not reward the insured for intentionally destroying the subject matter insured, or acting with knowledge that loss is substantially certain to occur."<sup>36</sup>

This subjective intent view of control can take a broader formulation, as it does when the insured's subjective intent incorporates not only the intent to do the coverage-activating act, but also to do it with the intent to activate the insurance coverage. We see this in Professor Knutsen's statement that

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<sup>33</sup> Erik S. Knutsen, *Fortuity Victims and the Compensation Gap: Re-envisioning Liability Insurance Coverage for Intentional and Criminal Conduct*, 21 CONN. INS. L.J. 209, 236 (2014) [Knutsen, *Fortuity Victims*] (making a similar point as to fortuitous losses).

<sup>34</sup> *See id.*

<sup>35</sup> KEETON & WIDISS, *supra* note 1, § 5.3(a) at 475. Keeton & Widiss continue with a *non sequitur*: "[t]herefore . . . in insurance law, as in tort law, questions about intent focus on the consequences, not the acts." *Id.* The conclusion does not follow immediately from a bare, unarticulated concept of intent, and in any event it is debatable, as evidenced by the fact that adherents to the view that "accident" (fortuity) in occurrence- and accident-based policies refers to the causative act and not its injurious effects would take it to be false. *See infra* Part II Section B. *Accord*, *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 74 (Ky. 2010).

<sup>36</sup> Abraham, *supra* note 2, at 791; *see id.* at 792. The statement is made in the context of first-party property insurance, but serves here to articulate one view of the role of intent in the fortuity requirement.

[i]f an insured purposely brings about a certain loss because the insured has the safety net of insurance, and if an insurer is banking on that loss as a chance event, the insured's behaviour frustrates the insurer's reliance on rational actor-based<sup>37</sup> fortuity for its actuarial calculation of the likelihood of risks materializing.

This broader formulation sets a high bar for violations of the fortuity requirement, since the requirement would be violated only if the insured had both the intent to do or cause a coverage-activating event and the further intent to exploit the insurance relationship in so acting. It is more useful, I submit, to view this broad formulation as combining the related and overlapping ideas of fortuity and moral hazard.<sup>38</sup>

To the extent that the insured intentionally and with the necessary control causes the coverage-activating event (*e.g.*, the insured's own act or its injurious effects) to happen, fortuity is not satisfied. The event is not probabilistic from both the insured's and insurer's perspectives because its happening is caused by the unilateral, intentional choice of one of the contracting parties. The insurer is able to create and rate a liability insurance risk pool only where the risks are probabilistic or believed to be such; probabilistic here means that when a self-interested, rational actor causes the coverage-activating event to happen, he does so as a matter of chance from *his* perspective (the event in *some* respect happens for and to him as well as to the injured third party), and that event is not something over which he exercises such effective control that we can say that *he* is its cause.<sup>39</sup> That notion of fortuity, however, does not include moral hazard.

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<sup>37</sup> Knutsen, *Fortuity Clauses*, *supra* note 1, at 78 n.9; *see id.* at 87 ("If the insured lacks the intent to bring about the harm that results from that particular crime or tort, the moral hazard envisioned by the fortuity clause is not present."). *Accord, e.g.*, JERRY II & RICHMOND, *supra* note 2, § 63C at 459–60.

<sup>38</sup> Professor Priest argues that an "action intended by the insured" should be defined as one that is uninsurable "because the loss is not probabilistic [not fortuitous] or because the loss is susceptible to insured moral hazard." Priest, *supra* note 8, at 1029–30. While I find his distinction between fortuity and moral hazard correct, for reasons I discuss in the text, the contention that intentional action should be defined in terms of either of these concepts is circular. To define intentional action as that which is not fortuitous is to say nothing useful about either concept. So, too, with moral hazard. *See infra* Parts IV through VI.

<sup>39</sup> *See* Knutsen, *Fortuity Clauses*, *supra* note 1, at 77; *see also* Priest, *supra* note 8, at 1019–28; *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 639 (Ky. 2007) (stating an accident "befalls an actor" and "does not result from . . . [an] intent on the part of the insured") (citation omitted).

Moral hazard, by definition, arises because insurance coverage has a tendency to reduce incentives to prevent a loss or minimize the cost of loss.<sup>40</sup> Moral hazard is realized when the insured-actor modifies his conduct or engages in an action because of the presence of insurance coverage, when the probability or certainty of insurance coverage is part of the actor's reason for acting, his subjective intent.<sup>41</sup> Either the insured-actor would not have acted as he did but for the coverage or, at least, would not have acted as he did if he did not know of the coverage. Moral hazard is realized when the insured acts opportunistically (intentionally) to exploit the insurance relationship, intentionally shifting costs to the insurer that the insured would otherwise bear as a result of his action.

In brief, if the insured-actor intentionally causes the insurance-activating event to occur, he violates the fortuity requirement, but he does not necessarily realize moral hazard. He realizes moral hazard only if he violates the fortuity requirement with the intent to exploit his insurance coverage. A violation of fortuity is necessary but not sufficient to realize moral hazard. The realization of moral hazard is sufficient to violate the fortuity requirement but not necessary. An insured-actor who violates the fortuity requirement (because he intends to do an act that activates the insurer's coverage obligations, but does not have the further intent to activate those obligations) has no less control (physical, mental, cognitive, and conative)<sup>42</sup> over his action than if he *also* had the latter intent. Consider a common bar room fight. The insured-actor who initiates the fight violates the fortuity requirement but it is unlikely that he is thinking about his homeowner's insurance coverage when he swings the first punch; he intended to hit his opponent and had the requisite control to do so, but in so acting, he did not necessarily intend to have his insurer bear the costs of his action. Because the intent necessary to moral hazard is not necessary to understand the fortuity requirement and the control issue, in the remainder of this article I will only be concerned with fortuity understood as distinct from moral hazard.

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<sup>40</sup> Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 239 (1996). See Abraham, *supra* note 2, at 789 (stating moral hazard is "the tendency of those that are insured to exercise less care to avoid loss . . .").

<sup>41</sup> See Baker, *supra* note 40, at 250–51.

<sup>42</sup> See *infra* Part IV Section A and Part VII.

## 2. Control: Causation Between the Act and Its Injurious Effects

The second answer to the question of the standard for determining when the requisite control is present is very close, or identical, to a tort standard of negligence and proximate causation between an act and its injurious effects. The insured-actor's actual subjective intent is irrelevant under this standard. This causal view of fortuity may be the view of Professor McDowell in stating, "[t]he distinction between those fortuitous risks that can be insured . . . and those that are excluded or uninsurable will almost always have to be *defined* in causation terms because fortuity itself is a causal notion. Only those events outside the causal control of the insured are fortuitous"<sup>43</sup> and "[t]he definitional requirement that valid insurance cover only fortuitous risks forces the court to face causation issues in *defining* fortuity."<sup>44</sup>

As we will see in Parts IV and VI below, courts applying the Objective Intent Model inconsistently adopt both the subjective intent view and the purely causal view of fortuity. The Model nominally takes the conformity of the insured's subjective intent and the action to be the standard for determining when control is present. Yet when the actor's subjective intent and the action performed do not conform to each other, courts apply the Model by holding, inconsistently, that subjective intent is irrelevant and that the causal relation between the act and the injurious effects (without the intervention or contribution of an "extrinsic" or "independent" cause) establishes the requisite control and the corresponding lack of fortuity. When the causative event is an intentional act, and the fortuity question arises under an occurrence- or accident-based liability policy, this view asks whether that intentional act *qua* event was the direct and sole cause of the injurious effects. If the causation question is answered in the affirmative, the act is deemed to be not an accident, not fortuitous; if the answer is negative, the act is deemed to be an accident, to be fortuitous. I will demonstrate this inconsistency and its implications through the analysis of case law examples in Parts IV and VI below.

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<sup>43</sup> McDowell, *supra* note 1 at 589.

<sup>44</sup> *Id.* at 593 (emphasis added).



### B. *The Fortuity Debate: Acts and Effects*

The insuring agreements of occurrence- and accident-based liability policies typically provide defense and indemnity coverage for the insured's liability to third parties because of the injurious effects caused by an "occurrence" or "accident." In the current standard-form Commercial General Liability policy, for example, the insuring agreement provides coverage for bodily injury and property damage "caused by an 'occurrence'" and defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."<sup>45</sup> The insuring agreement in these policies is activated when there is an actual or alleged causal relation between an accident (or occurrence) and the injury to the interests of a third party for which the insured is allegedly or actually liable.<sup>46</sup> Coverage issues can arise as to each element of this relation, *e.g.*, whether an intentional action can constitute an "accident"; whether the "accident" is a cause of the injurious effects under the operative causal standard; and whether the plaintiff's injuries constitute bodily injury, property damage, or some other covered loss.

In the caselaw and commentary on occurrence- or accident-based liability policies, there has been a decades-long debate over the meaning of "accident" in the insuring agreement of those policies. There is common ground in the proposition that "accident" implies fortuity in some sense.<sup>47</sup> Beyond that point of agreement, the "[t]he key interpretive question is what should be deemed 'accidental': the *act* or the *injuries* resulting from the act?"<sup>48</sup>

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<sup>45</sup> Susan J. Miller, *Commercial General Liability Coverage Form*, in MILLER'S STANDARD INS. POLICIES ANNOTATED, CGGL-1 (7th ed. 2015).

<sup>46</sup> Other requirements for the activation of the insuring agreement, such as the requirement that the injuries happen during the policy period, are not relevant to my analysis here.

<sup>47</sup> See, *e.g.*, *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 74 (Ky. 2010) ("Inherent in the plain meaning of 'accident' is the doctrine of fortuity."); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8 (Tex. 2007) ("An accident is generally understood to be a fortuitous, unexpected, and unintended event."); KEETON & WIDISS, *supra* note 1, § 5.3 at 475.

<sup>48</sup> *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1263 (N.J. 1992). The positions of the partisans in the debate have been discussed in many treatises and articles. See, *e.g.*, F. Amendola, et. al., 15 C.J.S. *Insurance* § 1352 (2014); Fischer, *Exclusion*, *supra* note 23, at 108–10; Christopher C. French, *Construction Defects: Are They "Occurrences"?*, 47 GONZ. L. REV. 1, 20–41 (2011/2012); Knutsen, *Fortuity Clauses*, *supra* note 1, at 82–83 n.22; J. L. Rigelhaupt, *Construction and Application of Provision of Liability Insurance Policy Expressly*

There is a large body of caselaw, from eleven states and many federal courts,<sup>49</sup> that holds that “accident” requires that the act that causes injurious effects must be an accident, fortuitous, which these courts take to mean that the act cannot be intentional (the “Causative Acts” school). A classic statement of the Causative Acts school comes from a leading California Court of Appeals decision: “accident” refers to “an act which the insured does not intend to perform . . . .”<sup>50</sup> Again, “[a]n accident’ requires unintentional acts or conduct’ . . . . An accident occurs when the event leading to the injury was ‘unintended by the insured and a matter of fortuity.’”<sup>51</sup> Finally, “the term accident refers to [the insured’s] action and not whether unintended damages flowed from that act.”<sup>52</sup>

The alternative view is that the term “accident” in the insuring agreement *only* requires that the injurious effects be fortuitous; “accident,” in focusing on the fortuity of the loss, has a meaning identical or similar to the language that excludes losses that are “expected or intended from the standpoint of the insured”<sup>53</sup> (the “Injurious Effects Only” school). The position of the Injurious Effects Only school is captured succinctly in this statement from the New Jersey Supreme Court: “. . . the accidental nature of an occurrence is determined by

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*Excluding Injuries Intended or Expected by the Insured*, 31 A.L.R. 4th 957 (Thompson Reuters 1984).

<sup>49</sup> See *infra* notes 98–114 and accompanying text.

<sup>50</sup> *Collin v. Am. Empire Ins. Co.*, 26 Cal. Rptr. 2d 391, 403 (Cal. Ct. App. 1994). See also *id.* at 403 (“The overwhelming weight of California authority holds that the term ‘accident’ refers to the [nonintentional] nature of the act giving rise to liability, not to the insured’s intent to cause harm . . . .”); *id.* at 404 (“conscious and deliberate actions of an insured are never an ‘accident,’ irrespective of whether the insured intends for harm to result from those actions . . . .”); *Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. 273, 279 (Cal. Ct. App. 1989) (stating, “where the insured intended all of the acts that resulted in the victim’s injury, the event may not be deemed an “accident” merely because the insured did not intend to cause injury.”); *U.S. Fid. & Guar. Co. v. OmniBank*, 812 So. 2d 196, 200 (Miss. 2002); *Metropolitan Prop. & Cas. Co. v. Murphy*, 896 F. Supp. 645, 648 (E.D. Tex. 1995) (Texas law).

<sup>51</sup> *Lyons v. Fire Ins. Exch.*, 74 Cal. Rptr. 3d 649, 654–55 (Cal. Ct. App. 2008) (internal quotes omitted). Accord, e.g., *ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co.*, 53 Cal. Rptr. 3d 786, 799 (Cal. Ct. App. 2007) (stating, “[a]n ‘accident’ requires unintentional acts or conduct”); *Ray v. Valley Forge Ins. Co.*, 92 Cal. Rptr. 2d 473, 477 (Cal. Ct. App. 1999) (same).

<sup>52</sup> *Allstate Ins. Co. v. Moulton*, 464 So. 2d 507, 510 (Miss. 1985).

<sup>53</sup> The exclusion provides that “[t]his insurance does not apply to . . . ‘bodily injury’ or ‘property damage’ expected or intended from the standpoint of the insured.” Miller, *supra* note 45, at GL–4.

analyzing whether the alleged wrongdoer intended or expected to cause an injury. If not, then the resulting injury is ‘accidental,’ even if the act that caused the injury was intentional.”<sup>54</sup>

The debate between the intent-causation views on the fortuity requirement only partially overlaps the debate between the Causative Acts and Injurious Effects Only schools, and that overlap is a matter only of historical accident, not conceptual necessity. As we will see in detail in Part IV, proponents of the Causative Acts school uniformly have embraced the view that fortuity is solely a matter of causation and that the only relevant intent is “objective” intent, that is, was the act intentional or not, independent of the content of the insured-actor’s actual subjective intent. In turn, the majority view within the Injurious Effects Only school embraces the view that fortuity is a matter of subjective intent as that concept of intent is captured in section 8A. These associations are historical accidents. There is no principled reason why an advocate of the Causative Acts school could not embrace the view that fortuity is principally a function of subjective intent; indeed, as we will see in Part IV, some articulations of the Objective Intent Model do just that. Similarly, the minority interpretations of the “expected or intended” exclusion jettison subjective intent altogether and opt for some variation on objective intent (or expectation) as understood in tort law.<sup>55</sup> In the discussion that follows, I will draw on the caselaw to critique the two views of intent dominant in liability insurance law and to propose an alternative, more satisfactory concept of intent. I am not principally interested here in participating in the Causative Acts-Injurious Effects Only debate, though my views may have implications for that debate.

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<sup>54</sup> *Vorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1264 (N.J. 1992); *see also*, *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 639 (Ky. 2007); *White v. Smith*, 440 S.W. 2d 497, 508–09 (Mo. App. 1969); 1 NEW APPLEMAN INS. L. PRAC. GUIDE § 1.06[3] at 1–18 (L. Martinez, et al. ed. 2015) [hereinafter NEW APPLEMAN] (explaining that fortuity requirement asks “whether an insured intends to cause a specific resulting harm, or knew with substantial certainty its conduct would cause the resulting harm. If it did not, the resulting injury may be adjudged accidental, even if the act that caused the injury was intentional.”).

<sup>55</sup> *See, e.g.*, *Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 718–22 (Cal. Ct. App. 1996) (discussing the subjective and objective interpretations); French, *supra* note 25, at 76–78 (collecting cases on the majority and minority views); Fischer, *Exclusion*, *supra* note 23, at 127–28 (discussing the subjective and objective interpretations); 16–117 APPLEMAN ARCHIVE, *supra* note 23, § 117.4 (discussing cases).

### III. SECTION 8A OF THE *RESTATEMENT (SECOND)*

The view of intent most commonly expressly articulated in liability coverage cases is the definition of “intent” in section 8A of the *Restatement (Second)*, or one of its close cousins. Thus we often find courts in coverage cases quoting the language of section 8A, or some close variation thereof, in stating that “an act is intentional if the actor desires to cause the consequences of his act, or believes that the consequences are substantially certain to result from it.”<sup>56</sup>

This *Restatement (Second)* definition is problematic.<sup>57</sup> A not-insignificant problem with section 8A arises from its provision of two independent standards of intent – desire and belief – the satisfaction of either of which is sufficient for an attribution of intent.<sup>58</sup> This independence too easily leads to inconsistent judgments as to the actor’s intent with respect to one and the same act. In one commonly used example, the actor desires to hit a golf ball to the green (as the only way to win the game) but is substantially certain that he will fail to do so (because the green is too far away, because he is likely to slice the shot

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<sup>56</sup> See, e.g., *Am. Nat’l Fire Ins. Co. v. Schuss*, 607 A.2d 418, 422 (Conn. 1992) (using the section 8A definition, but not identifying it as such); *Lewis v. Allstate Ins. Co.*, 730 So. 2d 65, 68 (Miss. 1998) (using the section 8A definition of intent in interpreting expected or intended exclusion); *Jackson Cty. Hosp. v. Ala. Hosp. Ass’n Trust*, 652 So. 2d 233, 235 (Ala. 1994) (same); *Erie Ins. Exch. v. Muff*, 851 A.2d 919, 927–28 (Pa. Super. 2004) (same); *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 832 (Cal. Ct. App. 1993) (interpreting “willful” in California Insurance Code section 533 to mean “an act deliberately done for the express purpose of causing damage or intentionally performed with knowledge that damage is highly probable or substantially certain to result,” and stating that this definition is “supported” by section 8A); see also *Thomas v. Benchmark Ins. Co.*, 179 P.3d 421, 429–31 (Kan. 2008) (in a liability coverage case, adopting a modified version of the *Restatement (Second)* definition). Note that the *Thomas* case discusses section 8A notwithstanding the adoption of the materially similar definition of “intent” in section 1 of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2005) three years earlier. See also, e.g., *Lawellin v. Kemper Indep. Ins. Co.*, No. EDCV 14-00315-VAP, 2014 WL 6673462, at \*6 (C.D. Cal. 2014) (citing section 8A in coverage action for public nuisance). It appears that no coverage decision after 2005 cites section 1 of the *Restatement (Third)*.

<sup>57</sup> See generally Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1974); Sebok, *supra* note 10; Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061 (2006); Kenneth W. Simons, *Rethinking Mental States*, 72 BOS. U. L. REV. 463 (1992); J. FINNIS, *Intention in Tort Law in PHILOSOPHICAL FOUNDATIONS IN TORT LAW* 229 (D. G. Owen ed., Clarendon Press 1995).

<sup>58</sup> See FINNIS, *supra* note 57.

into a hazard, and so on).<sup>59</sup> Under section 8A, the actor intends both to hit the green and not to hit the green. He has inconsistent intentions. To sharpen the point with respect to the fortuity requirement particularly, if hitting the ball to the green activates the insurer's duties under the policy, and the actor did that and desired to do that, then his act is both not fortuitous (because he had effective control over his act) and fortuitous (because he believed other consequences, not hitting the green, were substantially certain to result). The problem of inconsistency is especially noteworthy in that it is not subject matter specific; it is common to any use of the definition.<sup>60</sup>

Many criticisms of section 8A have focused on the operation of the second prong in tort law cases involving repeated activities, such as a manufacturer's use of a machine to produce thousands of widgets.<sup>61</sup> Based on experience, the manufacturer believes that a certain number of injuries are substantially certain to result from the use of his widgets. This counts as intent to injure under section 8A, even though the manufacturer desires otherwise and had no knowledge of the precise number of victims over a given period of time, the identity of the victims, when they will be injured, the severity of the injuries, and so on.<sup>62</sup> Notwithstanding the belief prong of the definition, such cases typically are treated in tort law as cases of negligence or strict liability.<sup>63</sup>

The criticisms that have been leveled against section 8A in the tort context are no less cogent in the liability insurance law context.<sup>64</sup> With respect to liability insurance in particular, the definition is not satisfactory for four additional reasons. First, section 8A defines "intent" only with respect to the consequences of an act, not the causative act itself.<sup>65</sup> Adherents to the Causative Acts school, then, should find it of no utility at all in determining whether the actor had the requisite intent

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<sup>59</sup> *Id.* at 243; Sebok, *supra* note 10, at 1173.

<sup>60</sup> *See, e.g.,* James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1140 (2001); Sebok, *supra* note 10, at 1170, 1172–78.

<sup>61</sup> Henderson & Twerski, *supra* note 60.

<sup>62</sup> *Id.* at 1141–43; Sebok, *supra* note 10, at 1170–72.

<sup>63</sup> Additional difficulties with the application of this definition, especially problems of "double effect," in tort law contexts are well-known and we need not belabor them here. *See, e.g.,* FINNIS, *supra* note 57, at 235–36; Sebok, *supra* note 10, at 1171–72.

<sup>64</sup> *See generally* Sebok, *supra* note 10.

<sup>65</sup> *Id.* at 1182.

to do the causative act. Unless the views of the Causative Acts school are to be dismissed entirely out of hand as a misreading of the insuring agreements in occurrence- and accident-based policies, a view on which I express no opinion in this article, the inapplicability of section 8A to questions of the intentional nature of an act supports the contention that liability insurance is in need of its own concept of intent.

Moreover, although section 8A is most commonly used to interpret the exclusion for bodily injuries or property damage “either expected or intended from the standpoint of the insured,”<sup>66</sup> this legal definition departs from normal, ordinary usage, and hence is a poor rule for insurance contract interpretation. “Intent” as used in section 8A encompasses both the ordinary meaning of “intent” as purpose, desire, or design, as well as the ordinary meaning of “expect” as confidently believing or believing with some high degree of certainty. This broad definition of “intent” renders “expect” in the exclusionary language mere surplusage or redundant, contrary to standard rules of insurance contract construction.<sup>67</sup>

Third, section 8A has been rejected as a definition of intent in liability coverage cases because its second prong is “no different from the rule that a tortfeasor intends the natural and probable consequences of his acts,” and that rule has been “roundly rejected” in coverage cases because it would divest coverage for most, if not all, acts of negligence.<sup>68</sup>

Finally, for reasons I discuss in Part V Section A below, the desire or belief disjunction of this definition cannot satisfactorily answer the control issue at the heart of the fortuity requirement because it cannot satisfactorily address “misfire” cases. This is seen most clearly in “misfire” cases in which the desire is a product of compulsion or duress and in cases of action on mistaken belief.

If section 8A were uniquely well suited to address a particular, critical problem of intent in liability insurance law, it may be worth salvaging in some fashion. Similarly, if it was implied by the concept of

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<sup>66</sup> See Miller, *supra* note 45.

<sup>67</sup> See, e.g., *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 834–36 (Cal. Ct. App. 1993); Sebok, *supra* note 10, at 1174 n.18.

<sup>68</sup> *Ambassador Ins. Co. v. Montes*, 388 A.2d 603, 609 (N.J. 1978) (Pashman, J., concurring); *accord, e.g., Thomas v. Benchmark Ins. Co.*, 179 P.3d 421, 428 (Kan. 2008); *Poston v. U.S. Fid. & Guar Co.*, 320 N.W.2d 9, 13 (Wis. 1982); *Continental W. Ins. Co. v. Toal*, 244 N.W.2d 121, 125 (Minn. 1976).

fortuity or allowed consistent and “correct” answers to the control issue over a wide range of cases, we might make a serious attempt to patch it up and put it back into service. But it fails to meet either of these tests. Moreover, the definition is somewhat of an anomaly in recent American legal history, apparently having sprung in large measure from the mind of Dean William Prosser, the reporter for the *Restatement (Second)*, and not as the product of a large body of case law in tort.<sup>69</sup> It has no well-deserved conceptual or historical claim on our allegiance as a rule in liability insurance law.<sup>70</sup>

#### IV. THE OBJECTIVE INTENT MODEL

The alternative to section 8A in the liability insurance caselaw is the Objective Intent Model. As applied, the Objective Intent Model takes the content of the insured’s subjective intent to be irrelevant to answering the question whether the act was intentional or accidental.<sup>71</sup> When an intentional act is the direct and sole cause of the injurious effects, then the act is objectively intentional and not an accident, even if the actor had no subjective intent to cause those injurious effects.<sup>72</sup> Conversely, if the act is not the direct and sole cause of the injuries, as in cases of intervening or concurring causation, then the actor does not have complete control over the act, and the act does not fully conform to the actor’s (subjective) intent, so that the act is deemed to be not intentional and is an accident.<sup>73</sup> In short, the essential feature of the Objective Intent Model is that intent (or intentional action) is synonymous with direct and sole causation and fortuity is synonymous with the absence of direct and sole causation.<sup>74</sup> The insured’s actual, subjective intent may be credited as fact, and yet it does not serve as a rule of decision and is always trumped by this rule of objective intent when the two conflict.<sup>75</sup>

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<sup>69</sup> David J. Jung & David I. Levine, *Whence Knowledge Intent? Wither Knowledge Intent?*, 20 U.C. DAVIS L. REV. 551, 562 n.40 (1987). Interestingly, at the time of Jung and Levine’s article, section 8A was used more frequently to interpret the expected or intended exclusionary language in liability policies and in workers compensation cases than in tort cases. *Id.* at 570.

<sup>70</sup> *See Ambassador Ins. Co.*, 388 A.2d at 609.

<sup>71</sup> *See Merced Mut. Ins. Co. v. Mendez*, 216 Cal. Rptr. 273, 278 (Cal. Ct. App. 1989).

<sup>72</sup> *Id.*

<sup>73</sup> *See id.* at 279.

<sup>74</sup> *See id.* at 279–80.

<sup>75</sup> *Id.* at 280–81.

The courts have articulated three versions of the Model. In the California version of the Model, as stated in the leading California case adopting the Maxim, *Merced Mut. Ins. Co. v. Mendez*,<sup>76</sup> the insured's acts of sexual assault were deemed intentional and, hence, not an accident, because "[a]ll of the acts, the manner in which they were done, and the objective accomplished occurred exactly as [the insured] intended. No additional, unexpected, independent or unforeseen act occurred."<sup>77</sup> Most importantly, in this version, the insured's subjective intent is deemed to extend to his acts, the manner in which he did those acts, and the effects of those acts.<sup>78</sup> When the requisite conformity of the insured's subjective intent to any one of these three elements is missing, then the court should conclude that the insured does not have complete control over his act and it is not the direct and sole cause of the injurious effects.<sup>79</sup> In addition to the sexual assault coverage action in *Mendez*, the California version of the Model has been applied in coverage cases alleging physical injury and self-defense,<sup>80</sup> physical injury arising out of a prank gone wrong,<sup>81</sup> and numerous other cases.<sup>82</sup>

In the "Natural Result" version of the Model, the causation element is articulated in terms of the injurious effects being the "natural result" of the intentional act.<sup>83</sup> As stated in the leading and oft-quoted case,

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<sup>76</sup> *Id.* at 279.

<sup>77</sup> *Id.* at 280.

<sup>78</sup> *Id.*

<sup>79</sup> The extension of the insured's subjective intent to the effects of the act is inconsistent with the well-entrenched California rule that "accident" refers only to the insured's intent as to its acts and not the consequences of those acts. *See supra* text accompanying notes 50–51. The inconsistency has not troubled the California courts.

<sup>80</sup> *Delgado v. Interinsurance Exch. of the Auto. Club of S. Cal.*, 211 P.3d 1083, 1088 (Cal. 2009) (citing numerous cases and their interpretation of "occurrence" and "accident").

<sup>81</sup> *State Farm Gen. Ins. Co. v. Frake*, 128 Cal. Rptr. 3d 301, 310, 313 (Cal. Ct. App. 2011).

<sup>82</sup> *See, e.g., infra* text accompanying notes 98, 123, 158.

<sup>83</sup> *See, e.g., GATX Leasing Corp. v. Nat'l Union Fire Ins. Co.*, 64 F.3d 1112, 1117 (7th Cir. 1995) (Texas law) (holding that "when harm to property is caused by the intentional act of one party, it cannot be characterized as 'accidental' . . . even if the insured allowed the intentional act only through its negligence"); *Armstrong v. Sec. Ins. Grp.*, 288 So. 2d 134, 136 (Ala. 1973) (stating that an assault and battery cannot be deemed an accident if it is "committed by or at the direction of the Insured"); *Foxley & Co. v. U.S. Fid. & Guar. Co.*, 277 N.W.2d 686, 688 (Neb. 1979) (citing *Thomason v. U.S. Fid. & Guar. Co.*, 248 F.2d 417, 419 (5th Cir. 1957)) (holding "that a policy undertaking to pay damages because of injury to or destruction of property caused by accident does not cover damages caused by the trespass of the policyholder upon the land of another when the damage is the natural result of the intentional act of the



“[w]here acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen and unintended.”<sup>84</sup> Unlike the California version, here the insured’s subjective intent is expressly confined to her act, and does not extend to its injurious effects, which may be subjectively “unexpected, unforeseen and unintended” by the insured.<sup>85</sup> With this limited scope for subjective intent, this version of the Model is closest to the view of the Causative Acts school that the only relevant subjective intent is as to the actor’s act and not as to its injurious effects. For this reason, this version most clearly illustrates the fundamental error in the Model. The Natural Result version effectively imports an objective, reasonable-actor standard of intent into the Model with respect to the effects of the act. The idea is that if an actor exercises complete (or at least sufficiently effective) control over her act such that it conforms to her subjective intent, she will be deemed to have intended all of those injurious effects that a reasonable actor in her position would have known to be the “natural result” of her intentional act.<sup>86</sup> This version of the Model has been applied in coverage disputes over trespass and property damage,<sup>87</sup> bodily injury arising from a shooting,<sup>88</sup> and theft and conversion,<sup>89</sup> among others.<sup>90</sup>

Finally, in the third version of the Model, which has been embraced by the Mississippi Supreme Court and, accordingly, which I shall refer to

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policyholder”); *Argonaut Sw. Ins. Co. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973) (identifying defendants’ trespass as voluntary and intentional even though they trespassed by mistake).

<sup>84</sup> *Thomason*, 248 F.2d at 417, 419. *Accord, e.g., Foxley*, 277 N.W.2d at 688 (quoting *Thomason*, 248 F.2d at 419); *Armstrong*, 288 So. 2d at 136 (same); *Argonaut Sw. Ins. Co.*, 500 S.W.2d at 635 (same); *GATX Leasing Corp.*, 64 F.3d at 1117 (quoting *Thomason*, 248 F.2d at 419) (applying Texas law). The rubric of “natural and probable consequences” is also found in certain “objective” interpretations of the “expected or intended” exclusionary language, and in those cases the courts similarly find that the insured’s subjective intent is irrelevant. *See, e.g., Steinmetz v. Nat’l Am. Ins. Co.*, 589 P.2d 911, 914 (Ariz. 1978) (“[I]f the injury results from the natural and probable consequences of the intentional act, the subjective intent of the actor is simply immaterial—the exclusion applies.”).

<sup>85</sup> *Thomason*, 248 F.2d at 419.

<sup>86</sup> *See id.*

<sup>87</sup> *See, e.g., id.* at 419; *Foxley*, 277 N.W.2d at 687.

<sup>88</sup> *See Armstrong*, 288 So. 2d at 136.

<sup>89</sup> *See GATX Leasing Corp. v. Nat’l Union Fire Ins. Co.*, 64 F.3d 1112, 1116 (7th Cir. 1995) (Texas law).

<sup>90</sup> *See supra* text accompanying note 84.

as the Mississippi version, in determining whether the insured's act was intentional and not an accident, "[t]he only relevant consideration is whether . . . the chain of events leading to the injuries complained of was set in motion and followed by a course consciously devised and controlled by [the insured] without the unexpected intervention of any third person or extrinsic force."<sup>91</sup> When the actor subjectively intends ("consciously devised by") to initiate ("set in motion") a chain of causation and maintains complete control of the chain of events, without the intervention of an "extrinsic" cause outside of her control, then the act is not an accident and it and all of the subsequent events in the causal chain are the direct and sole cause of the resulting injurious effects. The Mississippi Supreme Court has suggested that this version of the Model is not materially different from the Natural Result version.<sup>92</sup> The injuries complained of by the underlying plaintiffs in *Allstate Ins. Co. v. Moulton*,<sup>93</sup> the leading Mississippi case, "were the natural consequence of" the insured's act and were "the likely (and actual) effect of those acts [and] . . . well within the [insured's] foresight and anticipation."<sup>94</sup> The Mississippi version has been applied to coverage cases involving malicious prosecution,<sup>95</sup> fraud, breach of fiduciary duty, and other claims

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<sup>91</sup> *Allstate Ins. Co. v. Moulton*, 464 So. 2d 507, 509 (Miss. 1985). *Accord* *Red Ball Leasing, Inc. v. Hartford Acc. & Indem. Co.*, 915 F.2d 306, 310 (7th Cir. 1990) (Indiana law); *U.S. Fid. & Guar. Co. v. OmniBank*, 812 So. 2d 196, 200 (Miss. 2002) (quoting *Allstate Ins. Co.*, 464 So. 2d at 509).

<sup>92</sup> *Allstate Ins. Co.*, 464 So. 2d at 509 ("An accident is anything that happens or is the result of that which is unanticipated . . . but it does not mean the natural and ordinary consequences of a negligent act.").

<sup>93</sup> In the underlying claim, Ms. Moulton complained that Mr. Walls stole her dog. *Allstate Ins. Co.*, 464 So. 2d at 508. When the charges were dropped against him, Mr. Walls sued Ms. Moulton for malicious prosecution. *Id.* Subsequently, Ms. Moulton filed another complaint against Allstate Insurance Company, which refused to defend her against Mr. Walls' malicious prosecution claim. *Id.*

<sup>94</sup> *Id.* at 509. The Mississippi Supreme Court held the malicious prosecution is not an "accident" as prescribed under Ms. Moulton's insurance policy, and thus released Allstate Insurance Company from their claimed responsibility to defend Ms. Moulton from the malicious prosecution charge brought against her. *See id.* at 509–10. The Court reasoned that a malicious prosecution claim was a natural and foreseeable consequence of Ms. Moulton's decision to file a baseless claim against Mr. Walls. *See id.* *Accord* *OmniBank*, 812 So. 2d at 201 (stating that "a claim resulting from intentional conduct which causes foreseeable harm is not covered" by the disputed insurance policy).

<sup>95</sup> *See Allstate Ins. Co.*, 464 So. 2d at 507.

relating to force-placed automobile insurance,<sup>96</sup> and conversion and trespass.<sup>97</sup>

The Model is succinctly summarized in the rule of decision, embraced by the Causative Acts school, that intentional acts cannot be accidents. More completely, the rule is: because intentional acts, characterized without regard to the insured's intent as to the injurious effects of the acts, cannot be accidents, such acts are not within the insuring agreements of occurrence- or accident-based liability policies and coverage is not available for them. This rule, which I refer to as the Maxim, is a minority rule nationwide. Nonetheless, it is entrenched in many California liability insurance coverage actions,<sup>98</sup> and is found in appellate decisions from ten other states, including: Alabama,<sup>99</sup> Georgia,<sup>100</sup> Mississippi,<sup>101</sup> Montana,<sup>102</sup> Nebraska,<sup>103</sup> Nevada,<sup>104</sup> Pennsylvania,<sup>105</sup> Texas,<sup>106</sup> Washington,<sup>107</sup> Wisconsin,<sup>108</sup> Wyoming,<sup>109</sup>

<sup>96</sup> See *OmniBank*, 812 So. 2d at 198.

<sup>97</sup> See *Red Ball Leasing, Inc. v. Hartford Accident & Indem. Co.*, 915 F.2d 306, 308 (7th Cir. 1990).

<sup>98</sup> See, e.g., *Delgado v. Interinsurance Exch. of the Auto. Club of S. Cal.*, 211 P.3d 1083, 1088–90 (Cal. 2009) (self-defense); *State Farm Gen. Ins. Co. v. Frake*, 128 Cal. Rptr. 3d 301, 303, 310 (Cal. Ct. App. 2011) (horseplay resulting in bodily injury); *Collin v. Am. Empire Ins. Co.*, 26 Cal. Rptr. 2d 391, 403 (Cal. Ct. App. 1994) (conversion); *Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. 273, 278, 280 (Cal. Ct. App. 1989) (sexual assault); *Dyer v. Northbrook Prop. & Cas. Ins. Co.*, 259 Cal. Rptr. 298, 299, 303 (Cal. Ct. App. 1989) (employment termination); *Commercial Union Ins. Co. v. Super. Ct. (Walker)*, 242 Cal. Rptr. 454, 454 (Cal. Ct. App. 1987) (same); *Royal Globe Ins. Co. v. Whitaker*, 226 Cal. Rptr. 435, 435, 437–38 (Cal. Ct. App. 1986) (fraudulent inducement and breach of contract); *St. Paul Fire & Marine Ins. Co. v. Super. Ct. (City of Yuba)*, 208 Cal. Rptr. 5, 6–7 (Cal. Ct. App. 1984) (employment termination); see also James M. Fischer, *Accidental or Willful?: The California Insurance Law Conundrum*, 54 SANTA CLARA L. REV. 69, 106, 114 (2014) [hereinafter Fischer, *Accidental or Willful*].

<sup>99</sup> See *Armstrong v. Security Ins. Grp.*, 288 So. 2d 134, 136 (Ala. 1973).

<sup>100</sup> See, e.g., *Rucker v. Columbia Nat'l Ins. Co.*, 705 S.E.2d 270, 273 (Ga. Ct. App. 2010); *O'Dell v. St. Paul Fire & Marine Ins. Co.*, 478 S.E.2d 418, 420 (Ga. Ct. App. 1996).

<sup>101</sup> See, e.g., *U.S. Fid. & Guar. Co. v. OmniBank*, 812 So. 2d 196, 200 (Miss. 2002); *Allstate Ins. Co. v. Moulton*, 464 So. 2d 507, 509–10 (Miss. 1985).

<sup>102</sup> See, e.g., *Blair v. Mid-Continent Cas. Co.*, 167 P.3d 888, 891 (Mont. 2007).

<sup>103</sup> See, e.g., *Farr v. Designer Phosphate & Premix Int'l, Inc.* 570 N.W.2d 320, 325 (Neb. 1997); *Foxley & Co. v. U.S. Fid. & Guar. Co.*, 277 N.W.2d 686, 688 (Neb. 1979).

<sup>104</sup> See, e.g., *Beckwith v. State Farm Fire & Cas. Co.*, 83 P.3d 275, 276–77 (Nev. 2004); *Mallin v. Farmers Ins. Exch.*, 839 P.2d 105, 106, 109 (Nev. 1992).

<sup>105</sup> See, e.g., *Gene & Harvey Builders, Inc., v. Pa. Mfrs. Ass'n Ins. Co.*, 517 A.2d 910, 913 (Pa. 1986).

and in federal court caselaw interpreting policies under various states' insurance laws.<sup>110</sup> Moreover, the Maxim is a rule of long duration. It has been embraced by California appellate courts for more than three decades,<sup>111</sup> has been employed by courts in other jurisdictions for decades before that,<sup>112</sup> and is a direct descendant of the position taken in the debate under first-party accident policies that "accident" refers to "accidental means" rather than "accidental results," a debate that began in the mid-19th century.<sup>113</sup>

Courts that have adopted the Maxim typically reason as follows: (1) the requirement in the insuring agreement of a liability policy that injuries to the interests of a third party be caused by an "accident" is to be analyzed in terms of the insured's intent or lack of intent to commit the act giving rise to liability; (2) an intentional act (described irrespective of the insured's intent as to injurious effects) is not an "accident" (the Maxim); (3) the insuring agreement covers only "accidents"; therefore, (4) there is no coverage for intentional acts; unless (5) there is an "external" or "extrinsic" (additional, unexpected, independent, or unforeseen) happening that produces the injurious effects

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<sup>106</sup> See, e.g., *Argonaut Sw. Ins. Co. v. Maupin* 500 S.W.2d 633, 635 (Tex. 1973); *Drew v. Tex. Farm Bur. Mut. Ins. Co.*, No. 05-13-01619-CV, 2014 WL 7476481, at \*5 (Tex. Ct. App. 2014); *Devoe v. Great Am. Ins., Co.* 50 S.W.3d 567, 571-72 (Tex. App. 2001).

<sup>107</sup> See, e.g., *Grange Ins. Co. v. Brosseau*, 776 P.2d 123, 124, 127 (Wash. 1989) (en banc).

<sup>108</sup> See, e.g., *Stuart v. Weisflogs Showroom Gallery, Inc.*, 753 N.W.2d 448, 456-59 (Wis. 2008); *Everson v. Lorenz*, 695 N.W.2d 298, 304-05 (Wis. 2005).

<sup>109</sup> See, e.g., *Reisig v. Union Ins. Co.*, 870 P.2d 1066, 1069-70 (Wyo. 1994).

<sup>110</sup> See generally *Thomason v. U.S. Fed. & Guar. Co.*, 248 F.2d 417, 419 (5th Cir. 1957) (Alabama law); *Morton v. Safeco Ins. Co.*, 905 F.2d 1208, 1211 (9th Cir. 1990) (California law); *SCI Liquidating Corp. v. Hartford Fire Ins. Co.*, 181 F.3d 1210, 1216-17 (11th Cir. 1999) (Georgia law); *CRC Scrap Metal Recycling, LLC v. Hartford Cas. Ins. Co.*, No. 7:12-146-HMH, 2012 WL 4903661, at \*3-\*5 (D.S.C. Oct. 15, 2012) (South Carolina law); *St. Paul Fire & Marine Ins. Co. v. McBrayer*, 801 F.2d 1012, 1013-14 (8th Cir. 1986) (South Dakota law); *GATX Leasing Corp. v. Nat'l Union Fire Ins. Co.*, 64 F.3d 1112, 1117 (7th Cir. 1995) (Texas law).

<sup>111</sup> See *Commercial Union Ins. Co. v. Super. Ct. (Walker)*, 242 Cal. Rptr. 454, 454 (Cal. Ct. App. 1987); *Royal Globe Ins. Co. v. Whitaker*, 226 Cal. Rptr. 435, 435, 437-38 (Cal. Ct. App. 1986); *St. Paul Fire & Marine Ins. Co. v. Super. Ct. (City of Yuba)*, 208 Cal. Rptr. 5, 6-7 (Cal. Ct. App. 1984).

<sup>112</sup> See, e.g., *Thomason*, 248 F.2d at 419.

<sup>113</sup> See generally Adam F. Scales, *Man, God, and the Serboman Bog: The Evolution of Accidental Death Ins.*, 86 IOWA L. REV. 173, 208 (2000); Fischer, *Accidental or Willful*, *supra* note 98, at 87-89; *Thomason*, 248 F.2d at 421.

(the “Causation Exception” to the Maxim); in which case (6) the intentional act can be described as an accident; and, therefore, (7) the act is within the insuring agreement.<sup>114</sup> The Maxim and the Causation Exception are stated succinctly in this oft-quoted sentence: “[a]n accident . . . is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage.”<sup>115</sup> Whether a court is reasoning on the basis of the Maxim and Causation Exception or one of the three versions of the Model, the point is the same: an intentional act plus direct and sole causation is equated with lack of fortuity, and conversely, when direct and sole causation is absent due to an intervening or concurring “extrinsic” or “external” cause, the intentional act may be deemed an accident.

## V. TWO GENERAL FAILURES OF THE MODEL: “MISFIRES” AND COVERAGE-RELEVANT ACT DESCRIPTIONS

Before considering the problems of the Model as applied in the caselaw, it is useful to discuss two general criticisms to which it is subject. The first criticism is that the Model arbitrarily restricts the types of causes that can result in an actor’s not having effective control over her actions. Closely related to that problem, in applying the Model, the courts are insufficiently attentive to the need to attribute only coverage-relevant descriptions to acts, and to do so without equivocation. After presenting these two general criticisms, I will apply them to specific cases in Part VI. While the discussion in Section A below is directed to acts that “misfire” independent of the actor’s intent as to effects, it is an easy step to apply the same analysis to “misfires” as to an actor’s intent to cause particular effects. Accordingly, I shall not complicate the critique by also addressing “misfires” as to intended effects.

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<sup>114</sup> The most succinct and clear articulation of this argument is found in *Collin v. American Empire Insurance Co.*, 26 Cal. Rptr. 2d 391, 402–04 (Cal. Ct. App. 1994). The *Collin* decision was endorsed by the California Supreme Court in *Delgado v. Interinsurance Exchange of the Automobile Club of Southern California*, 211 P.3d 1083, 1088 (Cal. 2009), and has been followed by many other California appellate decisions. See, e.g., *Ray v. Valley Forge Ins. Co.*, 92 Cal. Rptr. 2d 473, 477 (Cal. Ct. App. 1999); *Fire Ins. Exch. v. Super. Ct. (Bourguignon)*, 104 Cal. Rptr. 3d 534, 537–38 (Cal. Ct. App. 2010).

<sup>115</sup> *Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. at 279 (internal quotations and citations omitted). *Accord*, e.g., *State Farm Gen. Ins. Co. v. Frake*, 128 Cal. Rptr. 3d 301, 310 (Cal. Ct. App. 2011) (same); *Collin*, 26 Cal. Rptr. 2d at 404 (same, quoting Mendez); *Grange Ins. Co. v. Brosseau*, 776 P.2d 123, 127 (Wash. 1989) (en banc) (same).

*A. Acts that “Misfire”*

As a generic description of the relation between an actor’s subjective intent and his act, for many types of actions the Objective Intent Model is satisfactory. It is hard to see how we could make our way through life if it were not. You intend to eat a bowl of cereal for breakfast and you control your actions to accomplish this end, without the input of any other causes. An automobile manufacturer intends to design a car that gets an average fuel efficiency of 30 mpg, and it coordinates the actions of its employees to successfully accomplish this goal as intended. The examples are limitless.

Yet even if we assume that the Model in some sense accurately describes what we do in many of our intentional actions, in those cases in which it does not and the coverage issue is whether the fortuity requirement in the insuring agreement has been satisfied, why should it serve as a rule of decision? Its champions have yet to answer that question. It should not.

Often our actions go awry, they “misfire.” Even *assuming* that misfires infrequently occur, it is surely the case that a large number of liability insurance coverage cases arise because an insured’s action “misfires.” In many liability coverage disputes, the insured-actor contends that he did not intend his action or its effects as they in fact happened, or as the injured victim describes them in his complaint, because he lacked control of his action, or some material aspect of it, or its effects (“Yes, I intended to cut down 100 acres of timber. . .”; “Yes, our company intended to use component X in our product, but we (mistakenly) believed we were making the product safer by using X, not less safe . . .”).

Actions can misfire in at least four different ways. Sometimes actions misfire because an “external” cause intervenes or concurs to frustrate the successful accomplishment of the actor’s intention. I intend to drive safely to work, yet I drive my car into a tree to avoid a deer that has darted into traffic. A car manufacturer’s intention to produce cars that average 30 mpg may be frustrated because of an error in software purchased from a third-party vendor. Courts that embrace the Model accept that these sorts of “external” or “extrinsic” intervening or concurrent causes thwart the actor’s complete control over his action and prevent him from being the direct and sole cause of the injurious

effects.<sup>116</sup> They conclude that when such causation is satisfied the act can be deemed an accident.<sup>117</sup>

Courts adopting the Model deny that an intentional action also may misfire due to a cause “internal” to the act, or deem such “internal” causes to be irrelevant to the fortuity analysis.<sup>118</sup> In doing so, they effectively declare that the Model is the only Model of intentional action and fortuity applicable to the resolution of occurrence- and accident-based liability coverage disputes. This is a mistake. An action may misfire due to any of three “internal” causes and when they do, they are in a meaningful respect fortuitous. It is arbitrary to deem “internal” causation not relevant to the resolution of fortuity disputes.

In the first type, improper execution misfires, a mental or physical act does not conform to the actor’s subjective intent; his subjective intent does not provide a causal explanation of this action, and the “internal” cause may or may not be known or discoverable.<sup>119</sup> I may (intentionally) add a column of numbers (a mental act) and reach the wrong total, and if you were to ask me why, I may say, “I don’t know; I just made a mistake,” or I may respond, “I transposed the numbers in the fifth row.”<sup>120</sup> Similarly, misreading a sign and misinterpreting an order are examples of intentional (mental) acts that are types of improper execution misfires.<sup>121</sup> I intend to read the sign correctly and to interpret the order correctly. But I do not do so, and the “internal” cause of the improper execution may or may not be known or knowable.<sup>122</sup> In one California case, the insured was engaged in an argument with another party-goer next to a swimming pool. The insured picked up the victim and intended to throw him into the middle of the pool; the victim fell

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<sup>116</sup> See, e.g., *Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. 273, 279 (Cal. Ct. App. 1989).

<sup>117</sup> See *supra* text accompanying notes 91, 114–15.

<sup>118</sup> See, e.g., *Lyons v. Fire Ins. Exch.*, 74 Cal. Rptr. 3d 649, 656–57 (Cal. Ct. App. 2008) (holding that mistaken belief in victim’s consent did not make intentional false imprisonment an accident); *Modern Devel. Co. v. Navigators Ins. Co.*, 4 Cal. Rptr. 3d 528, 535 (Cal. Ct. App. 2003) (mistake of fact does not “transform” intentional employment termination into an accident); *Capital City Ins. Co. v. Forks Timber Co.*, No. CV 511–039, 2012 WL 3757555, at \*6 (S.D. Ga. Aug. 28, 2012) (applying Georgia law and holding that the insured’s mistaken belief that there were no legal encumbrances on timber it intentionally cut and harvested did not allow the insured’s intentional act to be described as an accident).

<sup>119</sup> See, e.g., *Lyons*, 74 Cal. Rptr. 3d at 656.

<sup>120</sup> DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* 46 (Oxford Univ. Press 1980).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

short, landed on the pool stairs, and sustained serious injury.<sup>123</sup> The case may be read as an instance of improper execution: the insured did not use the amount of force necessary to throw the victim into the middle of the pool.<sup>124</sup> Other common examples of improper execution are a slip of the tongue, the musician's playing a wrong note, failing a test, and muffing lines on stage.<sup>125</sup>

In a second type of misfire, the "internal" cause is a mistaken belief or lack of belief; the cognitive component of intentionality is outside of the actor's control because it is false.<sup>126</sup> A car manufacturer may fail to produce cars that reach its fuel efficiency goal of an average of 30 mpg because its own engineers mistakenly believed that their fuel efficiency target was 25 mpg and designed only to reach that goal. Or, an insured is intentionally driving safely to work. As he approaches an intersection, a stop sign directs him to stop. Yet he does not stop because he mistakenly believes that there is no stop sign applicable to him. Note how natural it is for him to say of driving through the intersection, "it was an accident," whether his act has injurious effects or not. The insured's act of driving is also an intentional act, but he did not have complete, or even sufficiently effective, control of his action. But for his mistaken belief, he would have obeyed the stop sign and not have hit the other car, and his mistaken belief is outside of his control (since he cannot intend to be mistaken, or believe X and at the same time believe X is false). Courts adopting the Model commonly concede that an actor's subjective intent, including his beliefs about his action and its material circumstances, can be a cause of his act,<sup>127</sup> and yet fail to see that this exposes a serious limitation of the Model. In cases of mistaken or absent belief, where

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<sup>123</sup> State Farm Fire & Cas. Co. v. Super. Ct. (*Wright*), 78 Cal. Rptr. 3d 828, 830 (Cal. Ct. App. 2008).

<sup>124</sup> *Id.* at 836 ("[T]he act directly responsible for Wright's injury, throwing too softly so as to miss the water, was an *unforeseen or undesigned happening or consequence* and was thus fortuitous.").

<sup>125</sup> See JOEL FEINBERG, *Action and Responsibility in THE PHILOSOPHY OF ACTION* 96 (A. R. White ed., Oxford Univ. Press 1968).

<sup>126</sup> See e.g., *Lyons v. Fire Ins. Exch.*, 74 Cal. Rptr. 3d 649, 654-56 (Cal. Ct. App. 2008).

<sup>127</sup> See, e.g., *Thomason v. U.S. Fid. & Guar. Co.*, 248 F.2d 417, 419 (5th Cir. 1957) ("The trespass was the result of a mistaken and erroneous belief of the employee . . . .") ("[[P]roperty] damages [sic] caused by a mistake or error."); *Argonaut Sw. Ins. Co. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973) (stating that in a coverage action for trespass, the property damage was "caused by mistake or error as to the ownership of the property . . . .").



belief or lack of belief has causal efficacy, the insured-actor lacked control over a material element of his action.<sup>128</sup>

In the third type of “internally caused” misfire, those of action under compulsion or duress, the conative component of intentionality is outside of the actor’s control because the actor is acting for a purpose that is not freely chosen or not one that he would have wanted or desired to pursue but for the presence of circumstances that leave him no better or other realistic option.<sup>129</sup> Handing over one’s wallet in response to the robber’s command, “your money or your life,” is one example of an act under duress or compulsion.<sup>130</sup> Jettisoning supplies from a ship in a storm to preserve the vessel and those onboard is another.<sup>131</sup> Acts of self-defense are a third example (“I didn’t want to hit him, but when he attacked me I had no other choice”).<sup>132</sup> Because misfires involving action under duress or compulsion are not necessary for my argument on the connection between fortuity and subjective intent, I will discuss them only in passing.

If proponents of the Model were able to provide a consistent and sound analysis of the fortuity question for the three types of misfires due to “internal” causes, that would weigh heavily in favor of adopting the Model for all types of liability coverage disputes over the fortuity question. We will see in Part VI below, however, that the caselaw does not yield such a consistent and sound analysis.<sup>133</sup> Accordingly, it is a mistake to deem irrelevant to the fortuity analysis the three types of “internal” causation that lead to misfires, while taking the lack of any “extrinsic” physical causes to be dispositive of the question of the actor’s control over his action. In misfire cases not involving “extrinsic” physical causes, the causal connection between an act and its injurious effects is not sufficient to answer the control question at the heart of the fortuity requirement.

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<sup>128</sup> See, e.g., *Modern Devel. Co. v. Navigators Ins. Co.*, 4 Cal. Rptr. 3d 528, 535 (Cal. Ct. App. 2003).

<sup>129</sup> H. L. A. HART & A. M. HONORÉ, *CAUSATION IN THE LAW*, 38, 133–34 (Oxford Univ. Press 1978); ALAN GEWIRTH, *REASON AND MORALITY*, 31–37 (Univ. Chicago Press 1978).

<sup>130</sup> GEWIRTH, *supra* note 129, at 32.

<sup>131</sup> ARISTOTLE, *NICOMACHEAN ETHICS* 30 (T. Irwin, trans., Hackett Publishing Co. 2d ed. 1999).

<sup>132</sup> Acts done from extreme passion or emotion (e.g., a fit of rage) may be a fourth example.

<sup>133</sup> See, e.g., *State Farm Gen. Ins. Co. v. Frake*, 128 Cal. Rptr. 3d 301 (Cal. Ct. App. 2011).

The caselaw adopting the Model recognizes only two classes of actions, namely, (1) those in which the Model applies and the actor is the direct and sole cause of the injuries and (2) those in which it does not apply because an “extrinsic” event intervenes or concurs with the intentional act, such that the actor lacks complete control, and the extrinsic event and the intentional act jointly cause the injuries.<sup>134</sup> This caselaw does not recognize another class of actions that are part of our common experience, namely, (3) those in which an actor acts intentionally, but lacks control over some aspect of his action, and the act is the direct and sole cause of injurious effects.<sup>135</sup> Actions that misfire due to causes “internal” to the act fall into this third class of actions. As we will see further in Part VI, the courts that apply the Objective Intent Model to coverage disputes arising out of this third class of actions are forced to engage in *ad hoc* and arbitrary parsing of the facts and misguided reasoning on intentional action and causation.

### *B. Coverage-relevant Act Descriptions*

We will see in Part VI that in applying the Objective Intent Model the courts repeatedly equivocate on their descriptions of the insured’s act. On the one hand, they employ general descriptions of the act to satisfy the causation requirement between the act and the injurious effects, but do not include sufficient information to address the fortuity (control) requirement.<sup>136</sup> On the other hand, they describe the act with sufficient specificity to allow a judgment as to fortuity, but those descriptions show that the insured’s act so described was not the cause of the injuries complained of by recipients of the insured’s act.<sup>137</sup> The frequency with which the courts engage in this logical fallacy (of equivocation) reflects a systemic inattention to the need for act descriptions to be consistent and coverage-relevant. In this Section, I discuss the problem of and need for coverage-relevant act descriptions in general, before we see its implications in the caselaw.

Philosophers of action and legal scholars have long recognized that a single act can have innumerable descriptions, no one or group of which

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<sup>134</sup> See *supra* Part IV.

<sup>135</sup> *Frake*, 128 Cal. Rptr. 3d at 304.

<sup>136</sup> See *Merced Mut. Ins. Co. v. Mendez*, 216 Cal. Rptr. 273, 280–81 (Cal. Ct. App. 1989).

<sup>137</sup> See *Armstrong v. Sec. Ins. Grp.*, 288 So. 2d 134, 136 (Ala. 1973).

can count as authoritative.<sup>138</sup> For example, my action may be described as “driving my car,” “driving my fuel-efficient hybrid,” “driving in excess of the speed limit,” “commuting to work,” “causing a wreck,” “damaging property of a third party with my car,” and so on.<sup>139</sup> There is no one “correct” or “authoritative” description of an act for all purposes, contexts, or perspectives.<sup>140</sup>

All acts, by definition, are intentional.<sup>141</sup> More accurately, all acts are intentional only under some description.<sup>142</sup> I may be intentionally “driving my car” but not intentionally “driving my car beyond the speed limit,” even though both descriptions truly refer to the very same act. The question, “what do you think you are doing?” asks for a description of the act under which it is intentional (“driving to the baseball game”). The question, “did you want to do (or know you are doing) X (*e.g.*, driving 20 miles per hour over the speed limit)?” asks the actor whether his act under that description is also intentional. If the answer to that question is “no,” then that description of the act may be true, but the act is not intentional under that description. In some circumstances, the question, “why did you do *that*?” asks for an explanation of a blunder, *e.g.*, delivering a package to the wrong address. The response might be, “I didn’t mean to,” or “it was a mistake (there are two Maple Streets in

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<sup>138</sup> See, *e.g.*, G.E.M. ANSCOMBE, *INTENTION*, 11–12 (Cornell Univ. 1976); DAVIDSON, *supra* note 120, at 4–5, 58–59; FEINBERG, *supra* note 125, at 8, 11 (“There is . . . no incompatibility in describing something at one time as the consequences of an act, but at another time as part of the act.”); HART & A. M. HONORÉ, *supra* note 129, at 42 (“[T]he ‘universe’ is not a box with a finite number of objects in it each describable in a finite number of ways”).

<sup>139</sup> See ANSCOMBE, *supra* note 138, at 11 (discussing the many descriptions of sawing a plank); DAVIDSON, *supra* note 120, at 58–59.

<sup>140</sup> In contrast, in tort law, one traditional view holds that an act is solely an intentional bodily movement. See, *e.g.*, O. W. HOLMES, JR., *THE COMMON LAW* 91 (1881) (“An act is always a voluntary muscular contraction, and nothing else. The chain of physical sequences which it sets in motion or directs to the plaintiff’s harm is no part of it, and very generally a long train of such sequences intervenes.”); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* § 8 (5th ed., West 1984) (an act is “a voluntary contraction of the muscles, and nothing more”); *RESTATEMENT (SECOND)*, *supra* note 13, § 2. For reasons discussed immediately below, in the absence of a rare fact pattern, this view is a non-starter in insurance law. The description of an act in this fashion would not be coverage-relevant in virtually all cases.

<sup>141</sup> See ARISTOTLE, *supra* note 131, at 32–33.

<sup>142</sup> See ANSCOMBE, *supra* note 138, at 11–12 for further discussion of the points made in this paragraph.

this town),” or “it was an accident.” The actor intended the act described as “delivering the package,” but he did not intend the act described as “delivering the package to the wrong address.”

For purposes of reaching judgments as to whether an act is within the insuring agreement of an occurrence- or accident-based liability policy, and specifically, whether it is an “accident,” it is necessary to attribute a coverage-relevant description to the action.<sup>143</sup> Painting with a broad brush, judgments about liability insurance coverage essentially involve establishing a relation between the terms of the policy and the actions of the insured (or an actor or event for which the insured may be held liable).<sup>144</sup> Actions *qua* events that happen in the world do not necessarily have any verbal or linguistic properties.<sup>145</sup> There is no essential verbal or linguistic property of the event that is my driving a car, just as there is no verbal or linguistic property of events that are not actions, such as a tree growing or the earth rotating. Accordingly, a necessary task in a coverage determination is to attribute to an action a verbal component (a description) so that the action can be related to the terms of the insuring agreement in such a way that one can reason (through a syllogism) from those contractual terms and the act-under-that-description to a judgment of coverage or not.<sup>146</sup> A coverage-relevant

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<sup>143</sup> See NEW APPLEMAN, *supra* note 54, §§ 1.07[2], 1.09[1].

<sup>144</sup> Throughout this article, I assume that the relevant causative acts are those of the insured. This is an oversimplification, albeit a useful one for expository purposes. “Accident” is not limited to the insured’s acts and can refer to any acts or events for which the insured is allegedly or actually liable. See ALLAN D. WINDT, *INSURANCE CLAIMS AND DISPUTES*, § 11.3 (Thomson Reuters 2013) (stating that “occurrence” encompasses both actions by the insured and “any event that causes injury/damage during the policy period.”); *Aetna Cas. & Sur. Co. v. Freyer*, 411 N.E.2d 1157, 1159 (Ill. App. Ct. 1980) (stating that the occurrence definition “eliminates the need for an exact finding as to the cause of damages so long as they are neither expected nor intended from the standpoint of the insured.”).

<sup>145</sup> The exception to this is speech acts. See generally J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson & Marina Sbisa eds., Harvard Univ. Press 1975) (discussing the difference between descriptive statements and performative utterances). We can ignore this qualification in what follows.

<sup>146</sup> “[A]ny assessment, whether legal, moral, or of some other kind, of an act depends on the description of the act, which, in turn, depends on how much is assigned to the act and how much to its circumstances, consequences, etc.” FEINBERG, *supra* note 125, at 12. See P. J. FITZGERALD, *THE PHILOSOPHY OF ACTION* 127 (A.R. White, ed. Oxford Univ. Press 1968) (“[A]fter the factual dispute has been settled [e.g., A was holding a box of matches next to the burning haystack], there then arises what may be called the verbal dispute, the problem of classifying [*i.e.*, describing] the defendant’s conduct.”). In a liability coverage dispute, the act descriptions in the claimant’s complaint provide one set of possibly coverage-relevant act

act description is one that truly describes the (undescribed) act in terms that are found in the insuring agreement, or which can be readily translated into terms found in the insuring agreement, if any, such that a judgment as to coverage can be made. Specifically, the language of occurrence- or accident-based insuring agreements provides that a coverage-relevant act description is one that refers to those actual or alleged properties or aspects of the act, if any, by virtue of which (1) the act is an accident (fortuitous) and (2) that accidental act is the cause of the injuries for which the third party seeks a remedy (e.g., Smith’s act-under-this-description is an accident and is a cause of the bodily injury complained of).

In many cases in which courts employ the Model we see references to “the act itself” or “the nature of the act.” “Our courts have repeatedly held that ‘the term “accident” does not apply to an act’s consequences, but instead applies to the act itself.’”<sup>147</sup> “[I]t is well established in California that the term ‘accident’ refers to the nature of the act giving rise to liability; not to the insured’s intent to cause harm.”<sup>148</sup> In this insurance coverage context, it is an error to think of an act as a “given,” as having a self-evident “nature.” What constitutes “the act itself” and its proper description depends on the purpose for which we ask the question and need to make a judgment.<sup>149</sup> Here, our purpose is to reach a judgment as to coverage, or the lack of coverage, by relating an undescribed act to the accident-cause-injury terms of the insuring agreement of an occurrence- or accident-based liability policy.<sup>150</sup> That can be done only after the act is given a description.

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descriptions. They are not always dispositive, however, since coverage determinations are not necessarily dependent on the vagaries of the claimant’s pleadings. *See, e.g.,* *Montrose Chem. Corp. v. Super. Ct. (Canadian Universal Ins. Co.)*, 861 P.2d 1153, 1158 (Cal. 1993) (“[T]he third party plaintiff cannot be the arbiter of coverage.”); *Northland Ins. Co. v. Briones*, 97 Cal. Rptr. 2d 127, 131 (Cal. Ct. App. 2000) (“[T]he third party plaintiff cannot be the arbiter of coverage.”).

<sup>147</sup> *State Farm Gen. Ins. Co. v. Frake*, 128 Cal. Rptr. 3d 301, 309 (Cal. Ct. App. 2011) (citing *Shell Oil Co. v. Winterthur Swiss Ins. Co.* 15 Cal. Rptr. 2d 815 (Cal. Ct. App. 1993)).

<sup>148</sup> *Fire Ins. Exch. v. Super. Ct. (Bouguignon)*, 104 Cal. Rptr. 3d 534, 537–38 (Cal. Ct. App. 2010); *accord, e.g., Lyons v. Fire Ins. Exch.*, 74 Cal. Rptr. 3d 649, 656 (Cal. Ct. App. 2008) (“the nature of the insured’s conduct”); *Allstate Ins. Co. v. Salahutdin*, 815 F. Supp. 1309, 1311 (N.D. Cal. 1992) (“the nature of the act itself”).

<sup>149</sup> This insight has a long pedigree in the law. JOHN W. SALMOND, *JURISPRUDENCE* § 128 (2d ed. 1907) (“An act has no *natural* boundaries, any more than an event or a place has. Its limits must be artificially defined for the purpose in hand for the time being.”).

<sup>150</sup> *See* NEW APPLEMAN, *supra* note 54, §§ 1.07[2], 1.09[1].

Attention to the need to attribute a coverage-relevant description to an act is critical in acts that misfire, since those acts can be described as both intentional (“I intended to drive safely to work”; “My company intended to build a safer product when we substituted component X for component Y”) and unintentional or accidental due to improper execution, a mistaken belief, or compulsion or duress (“I unintentionally ran the red light because I failed to see the stop sign (and I don’t know why”); “We were mistaken in believing that component X would make our product safer, and so we unintentionally made the product less safe than we would have had we used component Y”).

We can now turn to the errors that arise when the courts that adopt the Model are inattentive to the various ways actions can misfire and the need for consistent attribution of coverage-relevant act descriptions.

## VI. THE OBJECTIVE INTENT MODEL: INCONSISTENCY, EQUIVOCATION, AND IRRELEVANCE

In this Part, I analyze the three versions of the Objective Intent Model and show how each of them is unsatisfactory. The principal problem with each version of the Model is its inconsistent treatment of subjective intent. The essential requirement of the Model is that the actor exercises such complete control over his action that it comports with his subjective intent. Yet in those cases in which that requirement is not satisfied, the courts deem the actor’s subjective intent to be irrelevant, generically describe the action in such a way as to exclude the beliefs that are part of the actor’s subjective intent, and nonetheless apply the Maxim as a rule of decision to deny coverage. As an integral step in this chain of inconsistent reasoning, the courts equivocate on their descriptions of the insured’s act and equivocate as to causation itself. Finally, the descriptions of the insured’s act that are employed to establish causation are not coverage-relevant since they do not contain enough information to determine if the fortuity requirement is satisfied. The result of these errors is coverage analyses and coverage determinations that are inconsistent, *ad hoc*, and arbitrary.

### A. *The California Version of the Model*

Recall that in California law, the Objective Intent Model is stated as: “[a]ll of the acts, the manner in which they were done, and the objective accomplished occurred exactly as [the insured] intended. No

additional, unexpected, independent or unforeseen act occurred.”<sup>151</sup> In this version, the insured-actor’s acts, the manner in which they were done, and their injurious effects completely comport with his subjective intent so that there is a direct and uninterrupted causal connection from that intent to the injurious effects.<sup>152</sup> The Maxim, the rule that intentional acts cannot be accidents, is intended to capture this idea of the actor’s intentional and complete control and the corresponding lack of fortuity in the act and its effects.<sup>153</sup> And yet there are any number of cases applying California law in which the courts employ the Maxim to deny coverage, but the Objective Intent Model is not applicable because the act (or “all of the acts”), its “manner,” or the “objective accomplished” did not happen as the insured subjectively intended. We turn now to a consideration of two of those cases.

In *Allstate Insurance Co. v. Salahutdin*,<sup>154</sup> the insured and her neighbors were engaged in a boundary dispute. In the course of the dispute the neighbors had a fence builder affix a guide string to Mrs. Salahutdin’s address pole. Mrs. Salahutdin removed the string, believing it was encroaching on her land. The neighbors sued for intentional infliction of emotional distress and trespass. Mrs. Salahutdin’s insurer denied coverage on the grounds that her removal of the string was an intentional act and, hence, not an accident.<sup>155</sup> The Court accepted as true that the insured did not intend the acts for which the underlying plaintiff sought to impose liability (*i.e.*, intentional infliction of emotional distress and trespass) and, moreover, that she did not intend the injuries complained of by the plaintiff.<sup>156</sup> The Court, however, applied the Maxim to deny coverage, reasoning:

[T]he intentional act of Mrs. Salahutdin in removing the string remains the “crucial act” in the present case. Mrs. Salahutdin intended her action. She claims that she didn’t intend to trespass because she thought it was her land. But, that doesn’t change the fact that the damage was the result of a deliberate and intentional act. Her motive or rationale for acting in this

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<sup>151</sup> See *Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. 273, 280 (Cal. Ct. App. 1989).

<sup>152</sup> *Id.*

<sup>153</sup> See, e.g., *id.* at 278.

<sup>154</sup> 815 F. Supp. 1309 (N.D. Cal. 1992).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

manner is irrelevant. Her action cannot be considered accidental merely because she did not intend to harm the [neighbors].<sup>157</sup>

In short, the complete conformity of the act and its effects with the insured's subjective intent is the essential requirement for the application of the Maxim, but when that subjective intent (stated in the negative as, "she didn't intend . . .," and misleadingly referred to as her "motive or rationale"), credited as true, conflicts with the facts of the act being a direct and sole cause of the injury complained of, it is deemed "irrelevant."<sup>158</sup> Fortuity is thus inconsistently reduced to a question of the insured's act being a direct and sole cause of the resulting injuries and, as we will see, equivocation as to the coverage-relevant act and causation.<sup>159</sup>

The Court's mistakes begin with its coverage-irrelevant description of the insured's act. The Court tells us that "removing the string remains the 'crucial act' in the present case."<sup>160</sup> But "removing the string [from a post]" *simpliciter* is not the act that the underlying plaintiff could (or did) claim a causal connection to her injuries. Without more, "removing the string [from a post]" is not itself trespass, and is not itself a cause of trespass, and is not itself, and is not itself a cause of, the intentional infliction of emotional distress. Actors "remove strings from poles" routinely without that act constituting or causing trespass or emotional

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<sup>157</sup> *Id.* at 1312; see also *id.* at 1311 (citing, *inter alia*, *Merced Mut. Ins. Co. v. Mendez*, 261 Cal Rptr. 273, 279 (Cal. Ct. App. 1989), "where the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an 'accident' merely because the insured did not intend the injury.").

<sup>158</sup> For other California cases adopting the Maxim, applying the Model, and deeming the insured's subjective intent irrelevant, see, for example, *Lawellin v. Kemper Indep. Ins. Co.*, No. EDCV 14-00315-VAP (DTBx), 2014 WL 6673462, at \*16 (C.D. Cal. 2014) (stating that in a public nuisance coverage action, the insured's "subjective intent is irrelevant . . . [and] the focus is on [the insured's] conduct, viewed objectively."); *Fire Ins. Exch. v. Super. Ct. (Bourguignon)*, 104 Cal. Rptr. 3d 534, 537 (Cal. Ct. App. 2010) (stating "[t]he insured's subjective intent is irrelevant" in coverage action relating to property boundary dispute); *Lyons v. Fire Ins. Exch.*, 74 Cal. Rptr. 3d 649, 656 (Cal. Ct. App. 2008) (stating that "accident" does not refer to the actor's "state of mind" in coverage action for assault, battery, and false imprisonment); *Collin v. Am. Empire Ins. Co.*, 26 Cal. Rptr. 2d 391, 407 (Cal. Ct. App. 1994) (stating that insured's subjective intent is irrelevant in conversion coverage action); *Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. 273, 280 (Cal. Ct. App. 1989) (explaining that because insured's act was "calculated and deliberate," it was not an accident, "whatever the motivation").

<sup>159</sup> *Salahudin*, 815 F. Supp. at 1312.

<sup>160</sup> *Id.*



distress (think of surveyors, stone masons, or children playing a game). So the Court's description of the act does not permit the act to be described as a cause of the injuries for which the third party seeks a remedy and, hence, is not relevant to the coverage analysis.<sup>161</sup>

Moreover, the generic description of her act as "removing the string" is not sufficient to determine whether the act was within the insured's control in all respects, which is to say that the description is inadequate to determine if the Model applies or if the fortuity requirement is satisfied. By dismissing the insured's subjective intent (her "motive or rationale"), including her beliefs regarding the circumstances that form part of that intent ("she thought it was her pole"), the Court is able to describe her act generically as an intentional act ("removing the string").<sup>162</sup> But that generic statement of her intent, while true, does not explain her action, and even more clearly, it does not give a causal explanation of her action, or address the issue whether she exercised such control as to defeat an imputation of fortuity to her act. We only know the answer to that question if we know the explanation for her act in terms of her reasons for action, including her beliefs about her act and its circumstances. The Court elsewhere offers a materially different statement of her subjective intent, *viz.*, "Mrs. Salahutdin intended to remove the string from *her* address pole."<sup>163</sup> This provides part of an explanation of her act—she believed the string was encroaching on her property. Moreover, that statement shows that her subjective intent did not comport with what she (allegedly or actually) did, namely, trespassed on her neighbor's property, and also implies that she did not intend to do the act that activated the insurer's duties under the policy (since preventing encroachments on one's own property are coverage-neutral). With that more complete statement of her subjective intent, we can conclude that her act was an accident, fortuitous, because she lacked cognitive control over facts material to the act, because she acted with a mistaken belief as to a material fact.

In brief, either (1) the Court's generic statement of the insured's act and subjective intent (she intended to "remove the string [from the

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<sup>161</sup> I assume that causal statements imply some sort of regularity or general, empirical correlation between the event deemed to be the cause and its effects. This is how causation is treated in other areas of law, such as torts and criminal law. See HART & HONORÉ, *supra* note 129, at 29. It is also how causation is treated in the other two versions of the Model.

<sup>162</sup> *Salahutdin*, 815 F. Supp. at 1312.

<sup>163</sup> *Id.* at 1313 (emphasis added).

pole]”) is not coverage-relevant (a) because it does not tell us whether she intended her act under a description that activated the insurer’s duties (trespass, infliction of emotional distress), and hence it is not sufficient to determine whether she violated the fortuity requirement, and, moreover, (b) because it does not show or imply the causal relation between the act and the alleged injuries, or (2) the Court’s statement of her act and subjective intent contains sufficient information to (begin to) explain her action (she intended to “remove the string from her address pole”) and to show that she did not violate the fortuity requirement because she intended her act under a description (enforcing one’s property rights or the like) that did not activate the insurer’s duties. In the former case, the statement of subjective intent is not sufficient to apply the California version of the Model or the Maxim, because there is not enough information (her belief about ownership of the pole) to determine if the fortuity requirement has been satisfied or violated. In the latter case, the statement of subjective intent includes that information and the Court should not have applied the Objective Intent Model or the Maxim to deny coverage.

In a second California case, the insured’s subjective intent did not comport with his action and its effects not because of a mistaken belief, but rather, apparently, because of the improper execution (mistake in performance) of the act itself.<sup>164</sup> In *State Farm Gen. Ins. Co. v. Frake*, the insured and his friends routinely engaged in horseplay in which they would strike each other in the groin; on one such occasion, Frake struck the claimant, King, in his testicles and caused serious injury.<sup>165</sup> The Court adopted the Maxim and found no coverage, reasoning that Frake admitted that “he intended to strike King in the groin area . . . King suffered injuries as a direct result of the strike [here was not] unexpected, independent, and unforeseen happening in the causal chain . . . [and] King’s injuries were the direct and immediate result of an intended . . . event.”<sup>166</sup> In short, an intentional act plus direct and sole causation is conclusive that the act was not an “accident.”<sup>167</sup> Accordingly, the Court concluded, “[t]he mere fact that Frake did not intend to injure King does not transform his intentional conduct into an accident.”<sup>168</sup>

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<sup>164</sup> *State Farm Gen. Ins. Co. v. Frake*, 128 Cal. Rptr. 3d 301, 303 (Cal. Ct. App. 2011).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 310 (internal quotations omitted).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

Yet it is inconsistent for the Court to credit Frake's claim that he did not intend to injure King and at the same time implicitly adopt the California version of the Model, which requires that "the objective accomplished occurred exactly as [the insured] intended."<sup>169</sup> If the insured did not intend the harm that resulted, which the Court credits as true, then the Model is inapplicable, because, according to the Model, there would have had to be an "additional, unexpected, independent, and unforeseen happening" in the causal chain to bring about that injurious result.<sup>170</sup> Maybe *Frake's* victim moved slightly to the left or was completely caught off guard (unlike on previous occasions). Indeed, Frake attempted to make just this argument, very roughly, by arguing that his hitting King in the testicles was "an intervening act of fortuity."<sup>171</sup> It is inconsistent, then, for the Court both to take the insured's subjective intent not to injure as true and to apply the California version of the Model on these facts.

My critique of the reasoning in *Frake*, which relies heavily on the California version of the Model extending subjective intent to cover injurious effects, may be viewed as an easy "win." After all, that extension of the Model is clearly inconsistent with the premise of the Causative Acts school that we are to look for fortuity in the causative act itself and not in the presence or absence of intent as to injurious effects.<sup>172</sup>

The errors in the Court's reasoning in *Frake* are not limited to its inconsistent treatment of intent with respect to injurious effects. Here, as in *Salahudin*, a significant error comes in the Court's arbitrary act descriptions and their insufficiency to establish the requisite causation and fortuity. The Court refers to Frake's act and his subjective intent in two ways: (a) Frake admitted that "he intended to strike King in the groin area" and (b) "Frake did not specifically intend to strike King in the testicles."<sup>173</sup> The Court then states that "there is no dispute that King suffered injuries as a direct result of the strike."<sup>174</sup> But describing the act

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<sup>169</sup> *Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. 273, 280 (Cal. Ct. App. 1989).

<sup>170</sup> *Id.* at 279.

<sup>171</sup> *Frake*, 128 Cal. Rptr. 3d at 314 n.5.

<sup>172</sup> *See supra* Part II Section B.

<sup>173</sup> *Frake*, 128 Cal. Rptr. 3d. at 310 n.5.

<sup>174</sup> *Id.* at 310.

as “strick[ing] in the groin area”<sup>175</sup> is not sufficient to establish the requisite causation, since an actor can strike another in the groin area without injuring the other’s testicles, as Frake and his friends had done on many prior occasions. So that generic description of Frake’s action is not coverage-relevant because it cannot establish causation. The act description that is coverage-relevant – “strick[ing] King in the testicles”<sup>176</sup> – establishes the direct causal relation to the complained-of injuries, but also establishes the fortuitous nature of the act, since Frake did not intend *that* act (his act under that description). The California version of the Model does not apply, then, because the act and the manner in which it happened, did not conform to the insured’s subjective intent, independent of any questions of intent as to the injurious effects. Moreover, *Frake* exhibits the same equivocation in the descriptions attributed to the act and the related issue of causation, and the inconsistency in applying the Model in the face of undisputed evidence of subjective intent, as seen in *Salahutdin*.

The further response to the objection is that the problems with the California version of the Model are not eliminated if the scope of subjective intent does not extend to injurious effects. The preceding discussion of *Frake* demonstrates that, at least with respect to the facts of that case. To establish the point more generally, we now turn to the analysis of the Natural Result version, which expressly does not extend subjective intent to effects.

### B. The Natural Result Version of the Model

Because the Natural Result version of the Model expressly incorporates subjective intent only as to the act (the act is “voluntary and intentional”) and does not require that the act’s effects comport with the actor’s subjective intent, it may escape some of the preceding criticism of *Frake*’s application of the California version and express a “purer” version of the Model as a rule of objective intent. Even so interpreted, however, the Natural Result version is untenable.

The leading Natural Result case is *Thomason v. United States Fidelity and Guaranty Co.*<sup>177</sup> In *Thomason*, the United States Court of

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 310 n.5.

<sup>177</sup> 248 F.2d 417 (5th Cir. 1957).

Appeals for the Fifth Circuit considered whether, under Alabama law, there was liability insurance coverage for property damage “caused by accident” when the insured’s employee, a bulldozer operator, mistakenly cleared a parcel of land on a golf course owned by a country club adjacent to the land the insured had been contracted to clear.<sup>178</sup> The Fifth Circuit acknowledged that the trespass and damage to the adjacent property “was the result of a mistaken and erroneous belief of the employee[.]”<sup>179</sup> and yet adopted the Maxim to deny coverage.

To see exactly where the Court’s reasoning goes wrong, it is useful to distinguish clearly its several statements as to the relevant causative act and causation.

(1)“The damage was caused by a trespass upon the property of the Country Club by an employee of the [insured] . . .”<sup>180</sup>

(2)“The trespass was the result of a mistake and erroneous belief of the employee as to where he was to go [to clear the land] . . .”<sup>181</sup>

(3)“Where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen and unintended.”<sup>182</sup>

(4)“There was no insurance . . . for [property] damages caused by mistake or error.”<sup>183</sup>

(5)“The cause of the injury was not an accident within the meaning of this policy.”<sup>184</sup>

Consider statements (1) and (3) in conjunction. In (1), the causative act is described as a trespass. In (3), the causative act must be a “voluntary and intentional act.” But by (2), the insured’s employee did not intentionally trespass. He intentionally cleared the land on the golf course under a mistaken belief that he (and his employer) had a legal right to do so. That is not to intentionally trespass. The insured’s agent’s intentional act, then, did not cause or “naturally result” in the property damage, where that act is described to reflect the mistaken belief that makes the act fortuitous. The Court avoids this conclusion only by

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<sup>178</sup> *See id.* at 418–19.

<sup>179</sup> *Id.* at 419.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

equivocating on the proper description of the causative act. In (1), that causative act is described as trespass, but *that* act was not intended by the insured (as established by (2)).<sup>185</sup> Yet (3) requires that there be an intentional act that naturally results in the injury, and while that cannot be the trespass, to apply the rule stated in (3), the Court must effectively assume that it is the trespass.

The Court may attempt to avoid this equivocation by stating that the intentional act that satisfies (3) is the insured's "intentionally clearing the land of the golf course,"<sup>186</sup> or some similar act, which the insured mistakenly, and hence not intentionally, did. This move is unsuccessful because it misstates the insured's intention and it simply shifts the equivocation away from the act in question to the causal relation. Property damage is not the "natural result" of an act of "intentionally clearing the land [of the golf course]." "Intentionally clearing the land" can have many possible "natural results" not all of which count as property damage, *e.g.*, it may improve the property if the country club wants to widen its fairways or eliminate a dog leg. More generally, when the insured's act is described in terms in which it was fortuitous (and intentional) for the actor, it does not satisfy the "natural result" causation rule of (3).

These equivocations are embedded in the Court's reasoning even before one asks about the implications of statements (2) and (4)—where the cause of the trespass, and hence the property damage, is the employee's mistaken belief as to which land he was to clear.<sup>187</sup> Because it is impossible to intend to be mistaken or to believe that one's belief is false, why isn't the insured's mistaken belief sufficient to be the accident (or part of the accident), the causal event, that brings the insured's act within the insuring agreement? The *Thomason* Court concedes the causal efficacy of the mistaken belief on the trespass (premise (2) above), and yet is simply conclusory in declaring (premise (4)) that "[t]here was no insurance against liability for damages *caused by mistake or error*."<sup>188</sup> This refusal to countenance an "internal" cause such as mistaken belief, especially undisputed mistaken belief, as sufficient to render an insured's intentional act an accident can only be explained by the Court's being in

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<sup>185</sup> *Id.*

<sup>186</sup> *See generally id.* at 418 (describing the actions of the insured).

<sup>187</sup> *See id.*

<sup>188</sup> *Id.* at 419 (emphasis added).

the vice-like grip of the Objective Intent Model and its limitation of causal events that may satisfy the fortuity requirement to “external” or “extrinsic” physical, and not mental, causes.<sup>189</sup>

The reasoning in *Thomason* and its progeny<sup>190</sup> cannot answer the question whether the insured had control over the act that activated the insurer’s duties. Once the insured’s subjective intent, including his reasons for action, is eliminated from the description of the act that purportedly “naturally results”<sup>191</sup> in the injuries and that activated the insurer’s duties, there is no way to determine whether that act was within the control of the actor (whether he intended to do it) or whether it misfired in some respect (*e.g.*, mistaken belief) and hence was fortuitous for him. Once the insured’s mistaken belief is built into or implied by the description of the causative act, the fortuity question can be answered (affirmatively), and the Model does not apply because the actor’s subjective intent did not comport with the act that he (allegedly or actually) did and that activated the insurer’s duties.

### C. *The Mississippi Version of the Model*

The judicial application of the Mississippi version of the Model leads to the same inconsistency and *ad hoc* jurisprudence as do the other two versions. Within the course of one short paragraph the Mississippi Supreme Court in *Allstate Ins. Co. v. Moulton* inconsistently holds (1) that the insured’s actual intent (“subjective state of mind”) is irrelevant to the fortuity analysis, and (2) that the “only relevant consideration” is

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<sup>189</sup> The dissent in *Thomason* rejects the majority’s analysis in terms close to my critique here. “[T]he fact that an injury is caused by an intentional act does not preclude it from being caused by accident if *in that act* something unforeseen, unusual and unexpected occurs which produces the result.” *Id.* at 420–21 (Rives, J., dissenting) (emphasis added) (internal quotations omitted). The “something unforeseen, unusual and unexpected” in the act to which the dissenting judge pointed was the bulldozer operator’s mistaken belief as to the location of the property line. *Id.* (internal quotations omitted). And, as in cases of mistaken belief misfires, the coverage-relevant act description is one that incorporates or implies the mistaken belief: the operator “did not intend to trespass upon the Club’s land . . . [and] did not intentionally destroy trees and bushes (property) belonging to the Club . . . .” *Id.* at 421 (emphasis added). Accordingly, “the injury to or destruction of the Club’s property was caused by accident.” *Id.*

<sup>190</sup> The flaws in *Thomason* are also found in its many progenies, including the often-cited case from the Texas Supreme Court, *Argonaut Southwest Insurance Co. v. Maupin*. 500 S.W.2d 633 (Tex. 1973).

<sup>191</sup> *Id.* at 635.

whether the Model applies, that is, whether “the chain of events leading to the injuries complained of was . . . *consciously devised and controlled* by [the insured] without the unexpected intervention of any third person or extrinsic force.”<sup>192</sup> Similarly, in the often-quoted case from the United States Court of Appeals for the Seventh Circuit, *Red Ball Leasing, Inc. v. Hartford Accident and Indem. Co.*,<sup>193</sup> the Court rejected the insured’s argument that its conversion of trucks was accidental because it acted on the mistaken belief that it had the legal right to possess the trucks, and inconsistently relied on the Model to hold that the insured’s “volitional act” of repossession was not an accident.<sup>194</sup> Like the other two versions of the Model, by deeming the insured’s subjective intent irrelevant, the Mississippi version effectively makes the causal relationship between the act and its effects the standard for determining fortuity, and conflates that causal relation with the insured’s control over his own act. We need not further discuss the errors in these cases; they replicate the very same errors in the other two versions of the Model.

#### *D. General Critique of the Three Versions of the Model*

The foregoing critique illustrates that in applying the Model the courts are effectively attempting to answer the fortuity question by treating the issues of intent and causation as they commonly are treated in negligence tort law.<sup>195</sup> In negligence, an act is viewed as an intervention in a normal, passive set of circumstances or course of affairs and is sufficient to cause harm to the interests of another without the cooperation or assistance of the acts of another or any “external,” extrinsic, or independent events. The content of the actor’s subjective intent is irrelevant to the issue whether he breached a duty of care and whether his act caused the harm for which the remedy is sought. For purposes of assigning responsibility, the question instead is whether the actor’s action creates or fails to avoid objectively unreasonable risks of foreseeable harm to others. Issues of causation in negligence cases often are treated under the rubric of proximate causation, where the plaintiff’s harm “must have been the direct (as opposed to the indirect or remote) and foreseeable . . . consequence of the defendant’s acts in a causal chain

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<sup>192</sup> Allstate Ins. Co. v. Moulton, 464 So. 2d 507, 509 (Miss. 1985) (emphasis added).

<sup>193</sup> 915 F.2d 306 (7th Cir. 1990) (Indiana law).

<sup>194</sup> *Id.* at 309–11.

<sup>195</sup> DAN B. DOBBS, THE LAW OF TORTS § 117, at 277–79 (2000); HART & HONORÉ, *supra* note 129, at 2, 5, 26–27, 123–29.



of events, unbroken by any intervening, superseding cause.”<sup>196</sup> These negligence standards of objective intent and causation neatly summarize the principal features of the Objective Intent Model as applied by the courts.

The central fault with this reduction of fortuity to negligence and tort proximate causation is that it tells us nothing about whether the insured-actor exercised the requisite control over her action that defeats the imputation of fortuity to that action. Once the content of the actor’s subjective intent is deemed irrelevant, we cannot know if, in acting intentionally, she had the requisite control over her action, the manner of its happening, or (in California) its effects, so that we can say that the happening of the coverage-activating act was or was not probabilistic from her perspective. Without reference to her subjective intent we cannot know if the action misfired due to one or more of the three types of “internal” causes discussed earlier.<sup>197</sup>

As to the causal relation between the act and its consequences, courts embracing the Model are correct that we often view subjective intent to be irrelevant. In tort law, if we are looking for the cause of a man’s death and determine that it is the insured’s act of poisoning, we typically would not call the insured’s subjective intent in acting the cause of the *death*.<sup>198</sup> We trace causation *to* the act, and not back through it to the actor’s intent. Whether the insured subjectively intended to poison the victim, or did so under a mistaken belief (“this white powder is sugar”), or did so as a result of duress or compulsion, *his act (qua event)* was the cause of the death. The discovery of the insured’s subjective intent or reasons for action adds nothing to our understanding of the abnormal event, the death, which initially puzzled us and that called for a

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<sup>196</sup> Peter Nash Swisher, *Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal Causation “Riddles,”* 43 TORT TRIAL & INS. PRAC. L.J. 1, 12 (2007) (citing, *inter alia*, KEETON ET AL., *supra* note 140, § 42, at 272–300) [hereinafter Swisher, *Causation Requirements*]. Accord DOBBS, *supra* note 195, § 186, at 461 (stating that an act is a proximate cause of an injury when “in a continuous sequence, uninterrupted by an efficient or independent intervening cause[,]” it produces the injury).

<sup>197</sup> If one accepts Professor Knutsen’s view that fortuity and moral hazard are virtually identical, see *supra* note 33 and accompanying text, then the failings of the Model to answer the fortuity question are even more pronounced, since the irrelevance of subjective intent in the application of the Model also makes it impossible to determine whether the actor intended to exploit the insurance relationship. Knutsen, *Fortuity Victims*, *supra* note 33.

<sup>198</sup> HART & HONORÉ, *supra* note 129, at 40. See *id.* at 39–41 for both the example and discussion in this paragraph.

causal explanation. Yet if we want to know whether the insured exercised such control over his act of poisoning that he violated the fortuity requirement, we need to determine those reasons for his action, his subjective intent, that provide a causal explanation of *his action*. The causal explanation has to reach back *through* the act to the insured's subjective intent.

The upshot of the discussion of fortuity and the critique of the Objective Intent Model case law is that in taking “extrinsic” physical causes to be the only way an intentional act can misfire, the courts cannot adequately or consistently answer the issue of the insured's control when an action misfires due to one of the three types of “internal” causes. Hence, the Model, as summarized in the Maxim, is not a satisfactory rule for deciding coverage cases in which such misfires are at issue. Correcting the problems with the Model is not, however, only a matter of broadening the types of causes that may cause an action to misfire (that is, to include the “internal” causes of lack of physical or mental control (as in improper execution), mistaken belief, or duress or compulsion). The temptation to go down that path must be resisted because it simply replicates the inaccurate either-or view of intentional action summarized in the Maxim – that is, the view that an action is either intentional as described by the Model or it is not (because it misfires in one of the *four* ways discussed). The broader point of the discussion of misfires is that when an action misfires, it is *both* intentional and accidental. The actor can have control over some aspects of his action and not others, and hence, the intentional and the accidental (fortuitous) do not represent a binary (either-or) opposition.

The discussion of the preceding Parts allows us to formulate the constraint that the fortuity requirement imposes on what counts as a satisfactory liability insurance-specific concept of intent: it must allow us to determine whether the insured had effective control over the action<sup>199</sup> that the third party complains of and that (allegedly or actually) activates the insurer's duties under the policy.<sup>200</sup> “Effective control” refers to the actor's cognitive, conative, and physical or mental control over the action: cognitive (having correct beliefs about the material circumstances of the act, and not acting under mistaken or absent belief);

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<sup>199</sup> Proponents of the Model focus the fortuity inquiry on the causative act, and, accordingly, this discussion is so limited here. See *supra* Part II Section B.

<sup>200</sup> See *id.*

conative (the actor's choice is not forced and not made under duress or compulsion); and physical or mental (the physical or mental act conforms to the actor's intent such that that intent provides a causal explanation of the act, and the act is not one of improper execution due to "internal" or "external" causes). I now discuss a concept of intent that can satisfy this fortuity constraint.

## VII. SUBJECTIVE INTENT AND THE FORTUITY REQUIREMENT

If the preceding analysis and critique are correct, then neither section 8A nor the Objective Intent Model articulate a satisfactory liability-insurance-specific concept of intent and, in turn, neither can satisfactorily answer the control issue at the heart of the fortuity requirement. Accordingly, the fortuity requirement stands in need of a liability-insurance-specific concept of intent that avoids the many problems of section 8A and the Model.

I submit that an alternative model of intentional action, which we can call the Voluntary Act Model, better solves the control issue than these two commonly employed tort concepts of intent, has none of the other flaws associated with them and, hence, it is better able to reach sound resolutions of liability coverage disputes when the issue centers on the fortuity requirement. The Voluntary Act Model of intentional action is similar to that of section 8A in the taking desire (or some similar conative attitude)<sup>201</sup> to be an essential element of intentional action. It is also generically similar to section 8A in taking belief as an essential element. It differs from section 8A with respect to the belief element, however, in substantially loosening the scope of the beliefs that are part of an intentional action. It also differs from section 8A in making the relation between desires and beliefs conjunctive and not disjunctive.

The Voluntary Act Model is a theory of the subjective intent of actors, where intent includes the actor's reasons for action and those reasons are unforced (free) and informed. On this view, all actions by definition are intentional,<sup>202</sup> and, more precisely, intentional under some

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<sup>201</sup> See *infra* text accompanying note 250.

<sup>202</sup> See, e.g., *Thomas v. Benchmark Ins. Co.*, 179 P.3d 421, 425 (Kan. 2008) ("In a certain sense, all acts are intentional, save perhaps for involuntary muscle spasms.") (quoting Mark W. Dykes, *Occurrences, Accidents, and Expectations: A Primer of These (and Some Other) Insurance-Law Concepts*, 2003 UTAH L. REV. 831, 846–47 (2003)); *Messersmith v. Am. Fid. Co.*, 133 N.E. 432, 433 (N.Y. 1921) ("Every act, if we exclude, as we must, gestures or

description.<sup>203</sup> To say that an action is fully intentional, generally means that the actor (1) has effective physical control over his bodily movements (an action is distinct from a mere bodily movement such as a reflex motion, a jerk, or a fall down a flight of stairs), (2) acts for a freely chosen and desired purpose (and not under duress, compulsion, or the like), (3) has correct beliefs about all or most of the material circumstances of his action, and (4) his desires and beliefs cause and guide his action, he acts as he does because of those reasons.<sup>204</sup>

This view of fully intentional action is closer to the traditional notion of fully voluntary action – action proceeding from free and informed choice – than it is to certain modern and narrower notions of intent, which treat intent as wholly consisting of the actor’s wants and beliefs, regardless whether they are the product of duress, compulsion, mistaken perception, or the like.<sup>205</sup> To illustrate the narrower want-belief view of intent, if a car manufacturer were asked why it is now using brass rather than steel for its automobiles, it may reply, “because we want our cars to be more fuel efficient and we believe that brass allows us to achieve this goal.” As a general matter, when we know the actor’s

movements that are automatic or instinctive, is [intentional] when viewed in isolation and irrespective of its consequences. An act *ex vi termini* imports the exercise of volition.”) (Cardozo, J.); ANSCOMBE, *supra* note 138, at 12–13; DAVIDSON, *supra* note 120, at 43–45; Knutsen, *Fortuity Clauses*, *supra* note 1, at 86–90 (discussing how any action requires some levels of intent); see also KEETON ET AL, *supra* note 140, § 8, at 34–35 (“[I]t is tautological to speak of a ‘voluntary act,’ and self-contradictory to speak of an ‘involuntary act,’ since every act is voluntary.”); accord *J.C. Penney Cas. Ins. Co. v. M.K.*, 804 P.2d 689, 694 n.11 (Cal. 1991) (quoting and adopting this language from KEETON ET AL, *supra* note 140). On this view, intentional omissions are actions; “anything an agent does intentionally [is] an action, including intentional omissions.” DAVIDSON, *supra* note 120, at 4–5 n.2.

<sup>203</sup> See *supra* notes 138–42.

<sup>204</sup> See, e.g., GEWIRTH, *supra* note 129, at 27, 31–42, 219; ANSCOMBE, *supra* note 138, at 13–14; FINNIS, *supra* note 57, at 229–230, 247; HART & HONORÉ, *supra* note 129, at 38–39, 129 n.1 (stating that voluntary action is “free, deliberate, and informed”); DAVIDSON, *supra* note 120, at 43. On the distinction between mere bodily movements and intentional action in particular, see, for example, *Thomas v. Benchmark Insurance Co.*, 179 P.3d 421, 425 (Kan. 2008) (“In a certain sense, all acts are intentional, save perhaps for involuntary muscle spasms.”) (quoting Dykes, *supra* note 202, at 846–47). Tort law similarly distinguishes the “involuntary [unintended] muscular movement of a sleeping or otherwise incapacitated person” from an act. KEETON ET AL, *supra* note 140, § 8, at 34–35; RESTATEMENT (SECOND), *supra* note 13, § 2 (same). Criminal law also recognizes the distinction. MODEL PENAL CODE § 2.01 (AM. LAW. INST. 2001).

<sup>205</sup> See DAVIDSON, *supra* note 120. Professor Davidson’s essays are the seminal modern works advancing the want-belief view of intention.

wants and beliefs, we know (or can know) the actor's reasons for his act, and that is to have a causal explanation for his act – he did X *because* he believed Y and desired Z. This narrower view of intent, however, (a) says nothing about whether the actor's wants are freely chosen or the product of duress or compulsion (*e.g.*, a statute that requires that cars be fuel efficient to a very high standard on pain of criminal penalties), (b) says nothing about whether its beliefs are informed in the sense of being true (*e.g.*, brass may make the cars less fuel efficient), and (c) cannot address those cases in which the actor's wants and beliefs do not provide a causal explanation of the action because the act (mental or physical) is improperly executed. Accordingly, the narrower want-belief view of intent does not satisfy the condition of the fortuity requirement that our liability-insurance-specific concept of intent allow us to determine whether the actor had effective control over the act.

The four characteristics of a fully intentional action set forth above jointly are necessary and sufficient for an actor to have full and effective control over her action. They reflect her physical control over her body,<sup>206</sup> her conative control of her purposes (she acts for purposes freely chosen because they reflect her wants or desires), her cognitive control over her beliefs (she has correct beliefs about the material circumstances of her action that allow her to do the act and to achieve her desired purposes), and that her wants and beliefs are the cause of and guide her action.<sup>207</sup> When all four of those characteristics of intentional action are present, we can attribute that action to *her* in her capacity as a free and rational actor. The fully intentional (or fully voluntary) action is one that “has its origin in the [actor] himself.”<sup>208</sup> An actor's act is not fully intentional – and is an accident, fortuitous, in some respect – when one or more of these characteristics is not present. In those cases, the action has misfired in one of the ways discussed in Part V Section A or in some

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<sup>206</sup> In the case of mental acts, the actor needs control over her mental acts, *e.g.*, doing addition, interpreting a sign.

<sup>207</sup> Compare this view of a fully intentional (fully voluntary) act with the definition of “act” in the *Restatement (Second)*, where “it is not necessary that [the actor's] will operate freely and without pressure from outside circumstances. Indeed, the fact that the pressure is irresistible in the sense that it is one which reasonable men cannot be expected to resist, does not prevent [the will's] manifestation from being an act, although it may make the act excusable.” *RESTATEMENT (SECOND)*, *supra* note 13, § 2, at cmt. b.

<sup>208</sup> *ARISTOTLE*, *supra* note 131, at 32–33.

similar fashion.<sup>209</sup> Accordingly, this concept of intentional action satisfies the fortuity requirement set forth at the end of Part VI.<sup>210</sup> It allows the parties and a court to determine if the actor had or lacked effective control over the coverage-activating act.

On the Voluntary Act Model, intent includes both wants<sup>211</sup> and beliefs, although we often express our intent only in terms of one of these elements, with the other understood implicitly. If John is asked, “why did you buy a ticket to the symphony on Saturday?” it is sufficient for him to answer, “Because I want to hear Debussy,” it being implied that he also believed that the orchestra was going to play Debussy on Saturday, that he had no conflicting engagements, and so on. Conversely, often we can infer desire from a statement of belief.<sup>212</sup> John may answer, “because I believe Debussy is on the program,” his desire to hear the symphony play Debussy being inferred. Without knowing both desires and beliefs, however, we cannot explain John’s action or impute an intent to his conduct. If he did not believe that Debussy was on Saturday’s program, he might still have wanted to hear Debussy, but that want alone would not explain his action; his buying the ticket must have been done with a different desired end (*e.g.*, to relax on Saturday night or as a favor for a friend).<sup>213</sup> The Voluntary Act Model, then, differs in this respect, among others, from the either-want-or-belief view of intent found in coverage in section 8A. It also differs from a view of intent as consisting solely of desires.<sup>214</sup> That view does not have sufficient explanatory power. It cannot adequately answer the fortuity question in, for example, instances of misfires due to mistaken belief.

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<sup>209</sup> In the terms used in Part V Section B above, if and only if an actor has control in all four respects over the act that (allegedly or actually) activates the insurer’s duties, then that act is not fortuitous in any respect, and there will be no description of the act that brings it within the term “accident” of the insuring agreement of an occurrence- or accident-based liability policy. If an actor lacks control in one or more respects, then it is fortuitous in that respect and there will be a description of her act that reflects that it is an accident.

<sup>210</sup> See *supra* text accompanying notes 199–200.

<sup>211</sup> “Want” or “desire” here is meant to be broad, to include any “pro-attitude” toward, or favorable valuing of, some goal or end; it does not refer only to wanting to satisfy a bodily need (“I desire chocolate”) or an emotional need (“I want the love of my children”). See GEWIRTH, *supra* note 129, at 39–41; DAVIDSON, *supra* note 120, at 3–4.

<sup>212</sup> DAVIDSON, *supra* note 120, at 3–8.

<sup>213</sup> *Id.*

<sup>214</sup> See, *e.g.*, *Ambassador Ins. Co. v. Montes*, 388 A.2d 603, 609–10 (N.J. 1978) (Pashman, J., concurring) (discussing desire as the “proper standard of intent in liability insurance cases.”).

The Voluntary Act Model also differs from section 8A with respect to the scope of belief. In the Voluntary Act Model, belief encompasses all of those beliefs that are necessary to explain why the actor did the act. It includes beliefs about the act being a means to his desired end, beliefs about the material circumstances of the act, beliefs about the nature of the end (whose interests it may affect, if any), and so on. It may also include, but importantly, is not limited to, a belief that certain consequences are substantially certain to follow from his act (as in section 8A). In *Salahutdin*, for example, the insured's belief that the pole was on her property and her belief that she was not trespassing partially explain her action (and moreover, do so in terms that imply that she did not intend to do the act that activated the insurer's duties). They are not the same as a belief that she may or may not have had as to the act being an effective means to her desired end (preventing a trespass on her property) or to any particular consequences that were substantially certain to follow from her act, and, *a fortiori*, as to any particular injurious consequences.<sup>215</sup>

The discussion of misfires (Part V Section A above) reveals that wants (desires) and beliefs can reflect the actor's freely chosen and considered reasons for action or they can be the product of misjudgments, mistakes of fact, compulsion, or duress. The question posed by the fortuity requirement—did the actor have control over the coverage-activating act?—asks whether we can conclude (or not) that the act was *his*, originated with *his* choice, and was not something that more or less happened for or to him. To answer that question, we need to know that the actor's wants and beliefs are the product of his free and informed choice. And, if they are, then his act is fully *his*. "It is when a person controls his behavior by [his] unforced choices based on his own informed reasons that his action is fully voluntary . . . ."<sup>216</sup> Misfires in which the conative component—the want or desire—does not reflect the actor's free and unforced choice are fortuitous for the actor because the act is not within his effective control in that respect. Cases of misfires due to mistaken belief are those in which the actor's cognitive reason for action is not correctly informed, and so his act is outside of his control in that respect.<sup>217</sup> Similarly for misfires due to improper execution due to

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<sup>215</sup> *Allstate Ins. Co. v. Salahutdin*, 815 F. Supp. 1309, 1312–13 (N.D. Cal. 1992). See *supra* Part VI Section A.

<sup>216</sup> GEWIRTH, *supra* note 129, at 37.

<sup>217</sup> *Id.* at 134, 141.

“internal” or “extrinsic” causes, known or unknown; here the actor’s wants or beliefs may be unforced and informed, but he does not control his conduct by them; they are not the cause of what he does.

The Voluntary Act Model has its intellectual roots in Aristotelian pluralism and, in the law specifically, in the works of 20th-century legal scholars. In this intellectual tradition, actions are not fully voluntary when either effective control over bodily movements, freely chosen purposes, and correct relevant beliefs is missing entirely or to some degree. Aristotle calls these sorts of actions “mixed,” because they have elements of the intentional and the unintended.<sup>218</sup> He specifically identifies actions brought about by force or compulsion and ignorance of the circumstances of one’s action as “involuntary.”<sup>219</sup> Thus in the case of John’s act of buying a symphony ticket, John may intentionally buy a symphony ticket but unintentionally (or accidentally) buy a ticket to the Bach concert, since he mistakenly believed that Debussy, and not Bach, was on Saturday’s program. When we consider intentional action from this perspective of fully voluntary actions and “mixed” actions, an action can have multiple properties which, in many cases, permit us to truly describe the action as both intentional in one respect, and non-intentional (or accidental) in another respect. In terms I used earlier (Part V Section A above), acts can be less than fully intentional (but still intentional in some respect) when they misfire due to “extrinsic” physical causes, improper execution (due to known or unknown “internal” causes), mistaken or absent belief, or duress or compulsion. As suggested, this pluralistic view of action points to the need for due care in the description of the actor’s act. To say that an act is intentional does not allow one to draw the inference that it therefore is not fortuitous (as in the Maxim), if it can also be said of that act that it is also unintentional (or accidental) in some respect.

Aristotelian act pluralism has been a mainstream view in Anglo-American jurisprudence for more than a century. In his early 20<sup>th</sup>-century classic, *Jurisprudence*, John W. Salmond distinguished acts that are “wholly unintentional” (when “no part of it is the outcome of any conscious purpose or design”), “wholly intentional” (when “every part of

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<sup>218</sup> ARISTOTLE, *supra* note 131, at 30.

<sup>219</sup> *Id.* at 32–33. See SALMOND, *supra* note 149, § 133 (“A wrong [in tort] is [wholly] intentional only when the intention extends to all the elements of the wrong, and therefore to its circumstances no less than to its origin and its consequences.”); accord HART & HONORÉ, *supra* note 129, at 38–39, 130–34.



it corresponds to the precedent idea of it”), and “in part intentional and in part unintentional” (when “the idea and the fact, the will and the deed, the design and the issue, may be only partially coincident”).<sup>220</sup> Similarly, Hart and Honoré draw upon common speech and legal tradition to find actions “not fully voluntary” when a wide-range of circumstances, including those discussed in this article earlier as types of misfires, are present.<sup>221</sup>

In speaking of intent, we sometimes use the term to refer to the actor’s description of his own action, at other times to his reasons for his action, and sometimes to both.<sup>222</sup> “What did you think you were doing?” or “What did you intend to do?” ask the actor to describe his action in terms that made the action intelligible or reasonable to him (“I thought I was manufacturing (I intended to manufacture) a safer product”). When the actor’s statement of his intention does not expressly or implicitly answer the fortuity question, it can usually be amended to include his reasons for his action by asking “why?” The fortuity inquiry ends when we obtain an expression of his intention that includes those reasons for his action—his wants and beliefs—that allow us to answer the question whether the actor fully intentionally (fully voluntarily) activated the insurer’s duties under the policy.<sup>223</sup> When the action misfires in one of the four ways previously discussed, he lacks control in one or more respect and the act is, from both the insured’s and insurer’s points of view, fortuitous, an accident.<sup>224</sup> Note that when the actor’s full and *true* statement of his intention (that which includes or implies his reasons for action) is not compatible with the coverage-activating action as described

<sup>220</sup> SALMOND, *supra* note 149, § 133.

<sup>221</sup> HART & HONORÉ, *supra* note 129, at 38, 133–44.

<sup>222</sup> See generally DAVIDSON, *supra* note 120, at 83–88; FINNIS, *supra* note 57, at 237, 239 (noting “the role of [intentions] in identifying what act is being done”).

<sup>223</sup> The relation between an actor’s intentions and her reasons for action—whether they are identical or not—is the subject of much philosophical debate. Compare DAVIDSON, *supra* note 120, at 3–19 (Actions, Reasons, and Causes), with DAVIDSON, *supra* note 120, at 83–102 (Intending), and George Wilson & Sam Shpall, *Action*, STAN. ENCYCLOPEDIA OF PHIL., Winter 2016, at 1, <https://leibniz.stanford.edu/friends/preview/action/>. Here, I follow Hart and Honoré’s view that in the law we are not solving philosophical problems, but instead are looking for standards that express our ordinary experience, our “common sense principles.” HART & HONORÉ, *supra* note 129, at 24.

<sup>224</sup> More accurately, in the case of a misfire due to an “extrinsic” physical cause, it is more natural to view the effects as accidental, not the act, since the act is still intentional and the “extrinsic” causes join with the act to produce unintended effects.

by the third party claimant, that in most cases will establish that the action was fortuitous. Mrs. Salahutdin, for example, intended to enforce her property rights or intended to remove the string from the pole on her property (and not to commit the trespass alleged).<sup>225</sup> Frake intended to harmlessly strike his friend in the groin (and not to strike him in his testicles).<sup>226</sup>

When the happening of an “accident” is at issue under an occurrence- or accident-based liability policy, the actor’s reasons for action that we are particularly interested in are those that are part of or implied by a coverage-relevant description of the act, that is, one that allows the parties to the contract and the court to determine if there is a description of the act under which it is an accident and a cause of the injuries complained of. Any of the actor’s wants or beliefs that reflect that the action misfired in one of the ways discussed earlier (Part V Section A above), should satisfy this requirement in all cases.

Issues of intent in the law easily lead to a host of questions and views on the relation of intent and concepts such as motive and volition.<sup>227</sup> The view I am advancing attempts to sidestep that briar patch by treating the question of the actor’s intent in terms of act descriptions and the insured-actor’s reasons for action. This view of intentional action allows us to answer the fortuity question without a host of fine conceptual distinctions between intent and other states of mind that are fodder for unproductive judicial forays into what are essentially philosophical disputes.

In sum, the Voluntary Act Model (1) satisfies the constraint imposed by the fortuity requirement; (2) can answer the fortuity question for a wide variety of types of actions that are the subject of liability coverage disputes, especially the four types of misfires; and (3) is not subject to the criticisms of the two alternative theories (section 8A and the Objective Intent Model). Accordingly, I submit that it can serve as the liability-insurance-specific concept of intentional action. Note that while my discussion of this concept of intent has been framed principally in terms of actions, it is also applicable to the consequences of actions. If an act is fully voluntary, *i.e.*, it satisfies each of the four elements of this

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<sup>225</sup> Allstate Ins. Co. v. Salahutdin, 815 F. Supp. 1309, 1312 (N.D. Cal. 1992).

<sup>226</sup> State Farm Gen. Ins. Co. v. Frake, 128 Cal. Rptr. 3d 301, 304 (Cal. Ct. App. 2011).

<sup>227</sup> See, *e.g.*, DOBBS, *supra* note 195, at 75 (distinguishing motive and intent); Henderson & Twerski, *supra* note 60, at 1137 (distinguishing volition and intent).

model, then the consequences of the action will be those intended by the actor in situations where normal causal sequences occur. In other words, the freely chosen and desired purpose for which an actor acts will be those which in fact he causes, assuming normal causality. If normal causal sequences do not occur, *e.g.*, if there is an unexpected intervening or concurring cause, then the act will have misfired due to that “extrinsic” cause and the actor’s causation of the resulting injurious effects will not have been fully voluntary. (This, I submit, is the point the Objective Intent Model, especially in the California version, attempts to capture.) We can always test whether the actor’s causation of the effects is fully voluntary or not by redescribing the action to include those effects (“Smith’s causing damage to Jones’s car”) and asking of Smith whether those effects were his desired purpose. Assuming Smith’s veracity, if he answers “no” then his act was not fully voluntary, he did not intend his action under that (true) description.

It might be objected that the Voluntary Act Model, even if theoretically more satisfactory than the two tort alternatives, turns every issue of intent and fortuity into an issue of fact, and thereby sacrifices the benefits of the bright line rules embodied in section 8A and the Objective Intent Model.<sup>228</sup> I submit that the objection misses the mark.

To begin, by its express terms section 8A requires a factual inquiry into the actor’s subjective desires and beliefs. (That subjectivity is the principal point of distinction between intentional torts and negligence, the latter of which is guided by the objectively reasonable person standard.) The Voluntary Act Model also requires a factual inquiry, but not one materially different, since the object of the inquiry in both cases is to draw inferences as to the actor’s desires and beliefs based on all admissible evidence. Section 8A is no more of a bright line rule than the Voluntary Act Model. Similarly, the issues of causation at the core of the Objective Intent Model are typically treated as case-specific matters of fact, and not as subject to bright line rules.<sup>229</sup> Moreover, whatever the purported “bright line” benefits of section 8A and the Objective Intent Model, they must be weighed against the manifest substantial costs in reaching the “wrong” answers in many types of coverage actions in

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<sup>228</sup> See *supra* Parts III–IV.

<sup>229</sup> See, *e.g.*, *Merced Mut. Ins. Co. v. Mendez*, 216 Cal. Rptr. 273, 279–280 (Cal. Ct. App. 1989).

which the fortuity of the coverage-activating event is at issue, as discussed in the preceding sections of this article.<sup>230</sup>

The common fault of both section 8A and the Model is that they sever the necessary connection between desires and beliefs in intentional action, and reject the necessity of *both* of those elements of intent in a causal explanation of an action.<sup>231</sup> The Voluntary Act Model, in requiring both desire and a rationally-related belief (*e.g.*, that act x is the best means to accomplish the desired end), and that both desire and belief causally explain an action, delimits the universe of actions to which we can impute to the actor fortuity-defeating control more narrowly than either section 8A or the Objective Intent Model. When credible evidence of either desire or belief is absent or inadmissible, or when the alleged desire and belief conflict (“nobody would do x if he really believed y”), or when desire and belief are known but do not provide a causal explanation of the action (as in cases of improper execution), then the courts have three options. The first option is to infer intent as a matter of law. In certain types of cases (*e.g.*, sexual assault and sexual molestation), courts commonly hold the insured’s act to be inherently harmful to the victim notwithstanding the insured’s protestations that he had no desire to injure and/or that he did not believe that his act would injure.<sup>232</sup> When the court infers intent as a matter of law, then it is rejecting—on evidentiary grounds (the insured’s testimony as to his desires or beliefs is not credible), as a matter of public policy, or as a judicially-created rule of insurance law—subjective intent as claimed by the insured as a rule of decision. In adopting a rule of objective inferred intent it would also find a corresponding lack of fortuity. A second option is for the court to find a lack of capacity on the facts presented. In that event, no concept of subjective intent would apply and fortuity would be satisfied.<sup>233</sup> Finally, as a third option, the court could infer desire from evidence of belief, or infer belief from evidence of desire.<sup>234</sup> In such cases, fortuity-defeating subjective intent

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<sup>230</sup> See also Sebok, *supra* note 10, at 1166–68.

<sup>231</sup> See *supra* Parts III–IV.

<sup>232</sup> See, *e.g.*, *Fireman’s Fund Ins. Co. v. Hill*, 314 N.W.2d 834 (Minn. 1982); *CNA Ins. Co. v. McGinnis*, 666 S.W.2d 689 (Ark. 1984); *Rodriguez v. Williams*, 729 P.2d 627 (Wash. 1986).

<sup>233</sup> See generally *supra* Part II.

<sup>234</sup> Recall that section 8A does not contemplate that desire allows an inference of belief, and conversely. The two prongs of section 8A provide independent bases to impute intent.

will be found, or not, depending on the facts presented and how they are interpreted (*e.g.*, are only coverage-relevant act descriptions employed).

The point is that the Voluntary Act Model provides us with the framework for analyzing when fortuity-defeating control is present. It answers the control question at the heart of the fortuity requirement. It also provides us with the starting point for the development of a body of rules to govern those types of cases in which one or more of the required desire, belief, or causation elements is not indisputably present and yet there is at least an initial hesitation to conclude that control is lacking and the fortuity requirement has been satisfied. I submit that a principal benefit of the Voluntary Act Model is that, if applied, it would generate more “correct” coverage analyses and outcomes than either of the two tort-based alternatives, and it provides courts with a concept of subjective intent from which exceptions can be developed on a principled basis should such exceptions be deemed necessary.

### VIII. CONCLUSION

The fortuity requirement requires a liability-insurance-specific concept of intent that allows us to determine whether the insured had effective control over the action or other coverage-activating event that the third party complains of and that (allegedly or actually) activates the insurer’s duties under the policy. To satisfy this requirement, a concept of intent must (a) embody the desires (wants) and beliefs on which the insured acted, (b) take into account whether those desires are the subject of duress or compulsion and whether the beliefs are correct, and (c) take into account whether these reasons provide a causal explanation of the actor’s act. The Voluntary Act Model satisfies this requirement. This concept addresses the control issue satisfactorily in a wide range of cases, including those in which the insured contends that her action was an accident because it misfired in some respect. The established alternative views of intentional action—section 8A and the Objective Intent Model—are unsatisfactory for many reasons, not the least of which is that they often lead to *ad hoc* and inconsistent coverage analyses. They ought to be rejected as viable concepts of intent in liability coverage disputes.