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# “Intentional Acts Cannot Be Accidents” — A Critique of a Legal Error

James E. Scheuermann\*

## I. INTRODUCTION

It has rightly been said that “[t]here have been few insurance words that have provoked more controversy and litigation than the word ‘accident.’”<sup>1</sup> The debate on the meaning of “accident” as it appears in the insuring agreements of third-party liability policies is at least as old as Justice Cardozo’s classic insurance coverage opinion in *Messersmith v. American Fidelity Co.*,<sup>2</sup> published almost a century ago. For the past three decades this debate has taken the form of argument over whether the term “accident” as it appears in the insuring agreements of many liability policies requires that the act causing the complained-of injurious effects be accidental (that is, not intended or fortuitous) or whether the term requires only that the complained-of injurious effects be accidental. There is a vast sea of case law and scholarly commentary on this debate with no final resolution in sight.

In this article, I attempt to advance the debate through a critique of the principal rule of decision adopted by the school that holds that the term “accident” in the insuring agreements of occurrence- and accident-based liability policies requires that the act causing the complained-of injurious effects be fortuitous. The guiding rule adopted by this school is that intentional acts cannot be accidents. To state the rule more fully: If an insured intended to do an act that caused (or allegedly caused) harm to the interests of a third party, then the intentional nature of that act means that it

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1. 4-23 APPLEMAN ON INSURANCE LAW & PRACTICE ARCHIVE § 23.4, at 16 (2013).  
2. *Messersmith v. American Fidelity Co.*, 133 N.E. 432 (N.Y. Ct. App. 1921).

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cannot be an “accident” within the insuring agreement of an occurrence- or accident-based third-party liability policy, even if the insured did not expect or intend the injurious effects of which the third party complains. I shall refer to this rule as “the Maxim.” I argue that the Maxim is a fundamental legal error, and that courts should reject the Maxim as a general rule of decision in liability insurance coverage disputes. In place of the Maxim, I propose an alternative rule that leads to fairer resolution of liability insurance coverage disputes and a more sound insurance law jurisprudence. That rule is grounded in the language of the salient insuring agreements and a pluralistic theory of action that permits an act to be both intentional and accidental.

Nationwide, only a minority of courts has adopted the Maxim as a rule of decision in coverage actions. Nonetheless, it has been adopted by appellate courts in ten states, including the appellate courts of California, Georgia, Texas, and Washington, and has been employed as a rule of decision by numerous federal courts. Moreover, the Maxim has been applied in a wide range of coverage disputes, including those involving breach of contract, fraud, fraudulent inducement, copyright infringement, faulty workmanship, forgery, termination of employment, disability discrimination, intentional infliction of emotional distress, the giving of professional advice, libel, civil conspiracy, common horseplay and pranks, self-defense, assault, battery, false imprisonment, conversion, trespass, sexual assault, and refusal to remove a private nuisance. Further, the term “accident” in the insuring agreements at issue in these cases and at the heart of the Maxim is contained in tens of thousands of policies issued to policyholders over many decades. These policies include standard form Commercial General Liability policies, which are issued to commercial and not-for-profit enterprises, homeowner’s policies, automobile policies, employers’ liability policies, and premises liability policies.

Every participant in insurance coverage disputes in which the Maxim is or could be advanced has a real interest in rectifying this legal error. The interest of policyholders is clear: courts often employ this rule to deny coverage to which policyholders are entitled. Insurers also have an interest in correcting this error, at least in the long run, since that would result in greater predictability in risk assessment and policy pricing, and perhaps fewer coverage battles with policyholders. The judiciary as well has an interest in correcting this erroneous rule. Judicial application of this rule often has been *ad hoc* and grounded in unjustifiable assumptions, which creates an appearance of judicial arbitrariness and, in some instances, results-oriented jurisprudence.

After a review of the insuring agreements at issue and the current debate as to the meaning of “accident” (in Section II), I shall focus my

critique of the Maxim on two bases that the courts often contend justify the rule. First, many courts find the justification for the Maxim in the meaning of the key insuring term “accident” and the fortuity requirement that is essential to insurance. In Section III.A, I argue that this view reflects a superficial interpretation of “accident” and of the fortuity requirement. The Maxim is not a direct implication of the definition of “accident.” The fortuity requirement, properly understood, does not require the adoption of the Maxim as a rule of decision and is consistent with the alternative view that an act can be both intentional and accidental at the same time. Second, as I discuss in Section III.B., courts often attempt to justify the Maxim through a theory of intentional action that assumes that an actor always exercises such complete control over his action that it completely conforms to his intention and no aspect of the act is a matter of chance or uncertainty — that is, there is nothing in the act that can be an accident. Thus, an act is either intentional or accidental, but never both at the same time. I am aware of no court or commentator that has attempted to justify this fundamental assumption. Yet as a general principle detached from any evidentiary predicate, it clearly needs justification. It is contrary to common language and experience and a jurisprudential and philosophical tradition stretching back to Aristotle. Broadly stated, the problem with this complete control assumption is not that it is never true, but rather that it is not true for all actions, and specifically, is not true for many actions that are the subjects of liability insurance coverage disputes.

The alternative, and better reasoned, view is that an act can have multiple properties. Those properties of the act that reflect the actor’s control over his act, such that the act conforms to his intention to that extent, allow us to describe the action as intentional, while those properties that reflect his lack of control, such that the act did not conform to his intent to some extent, allow us to describe the same act as an accident. Accordingly, if there is a proper evidentiary basis, an act can be truly described as both intentional and accidental. (I am intentionally grilling the hamburgers and accidentally burning them to a crisp — both in the very same act. I intend to clear timber on my property but accidentally clear timber on my neighbor’s property (because of a mistaken belief as to the location of the property line) — both in the very same act.) I discuss this alternative pluralistic theory of intentional action in Section III.B.2. In Section IV, I use coverage disputes in which the insured’s action did not completely conform to her intention, either because she acted intentionally but under a mistaken belief or because she improperly executed her intentional action, to further illustrate the fundamental problems with the Maxim and to demonstrate the merits of a pluralistic view of action in addressing insurance coverage disputes. I show in Section V how the

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alternative pluralistic theory of action I propose here is consistent with the fortuity requirement. Finally, in Section VI, I articulate an alternative to the Maxim and show its grounding in salient policy language and a pluralistic theory of action.

A word on method: for all that has been written about intentional acts by courts deciding insurance coverage disputes and by insurance law scholars and commentators, those discussions by and large have proceeded on the basis of broad generalizations about the nature of intentional action and little careful analysis of the concept as applied to insurance coverage issues. In this respect, insurance law stands in a position roughly analogous to antitrust and tort law in the 1970s, before the application of the concepts of microeconomic theory to these fields. Just as the application of microeconomic theory has revolutionized our thinking about these areas of law, insurance law stands to benefit from the application of philosophical theories of action and, in any event, if not these, of more rigorous analysis of the concept of intentional action. This article attempts to take a step in that direction, with appropriate sensitivity to the possibilities open to, and the constraints imposed on, any such theory by the policy language at issue and the insurance concept of fortuity.

## II. THE SALIENT INSURING AGREEMENTS AND THE FORTUITY DEBATE: ACTS AND EFFECTS

The insuring agreements of occurrence- and accident-based third-party liability policies typically provide coverage for bodily injury and property damage caused by an “occurrence” or an “accident.” This insuring language is commonly found in standard form Commercial General Liability (“CGL”) policies, homeowner’s policies, automobile policies, employer’s liability policies, and premises liability policies.<sup>3</sup>

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3. Homeowner’s and automobile liability policies generally track the “occurrence” or “accident” language of the CGL policy. S. J. MILLER, MILLER’S STANDARD INSURANCE POLICIES ANNOTATED 202 (6th ed. 2014) (in the standard form homeowner’s policy, “‘Occurrence’ means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in: a. ‘Bodily injury’; or ‘Property damage.’”) (citing ISO Form HO 00 03 05 11); *see, e.g.*, Allstate Ins. Co. v. Salahutdin, 815 F. Supp. 1309, 1310 (N.D. Cal. 1992) (homeowner’s policy provided coverage for bodily injury and property damage “arising from an accident”); MILLER, *supra* note 3, at 3 (in a standard form automobile liability policy, “[w]e will pay damages for ‘bodily injury’ or ‘property damage’ for which any ‘insured’ becomes legally responsible because of an auto accident”; “accident” is undefined) (citing ISO FORM PP 00 01 01 05); Grange Ins. Co. v. Brosseau, 776 P.2d 123, 124 (Wash. 1989) (en banc) (automobile policy). Other third-party liability policies, such as employer’s liability policies and premises liability policies, are also accident-based. *See, e.g.*, Lumbermens Mut. Cas. Co. v. S-W Indus., Inc., 39 F.3d 1324, 1333 (6th Cir. 1994) (employer’s liability policy provided coverage for damages “because of bodily injury by accident or disease.”); Ananda Church of Self-Realization v. Am. Int’l Surplus Line Ins. Co., No. C038514, 2003 WL 205126, at \*2 (Cal. Ct. App. 2003) (premises liability policy provided coverage for bodily injury

In the current CGL form issued by the Insurance Services Office, Inc. (“ISO”),<sup>4</sup> the insuring language provides that the insurer will pay for bodily injury or property damage “caused by an ‘occurrence.’” “Occurrence” is defined to mean “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”<sup>5</sup> None of the ISO occurrence-based policy forms contained or contain a definition of “accident.”

Case law is replete with statements that “accident” as found in liability policy insuring agreements means, implies, or is synonymous with fortuity.<sup>6</sup> It is blackletter California law, for example, that “[a]n accident occurs when the event leading to the injury was ‘unintended by the insured and a matter of fortuity.’”<sup>7</sup> Commentators tend to agree that “accident” as used in liability policies is synonymous with fortuity.<sup>8</sup> Beyond this agreement, however, there is substantial debate between and among policyholders, insurers, courts, and commentators on the issue of what must be fortuitous or “accidental” under CGL insuring language.

The principal line of demarcation in this debate is between (a) those who hold that the term “accident” in the insuring agreement only requires

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“resulting from an accident”).

4. ISO is an insurance industry organization that issues standard forms for many types of policies, including the CGL policy. *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 772 (1993).

5. MILLER, *supra* note 3, at GL-3 (citing ISO Form CG 00 01 04 13). ISO moved the exclusionary language that coverage is not available for bodily injury or property damage “expected or intended from the standpoint of the insured,” which was part of the definition of “occurrence” in the 1966 and 1973 ISO CGL forms, to the exclusions section in 1986. The exclusion provides that “[t]his insurance does not apply to . . . ‘bodily injury’ expected or intended from the standpoint of the insured.” *Id.* at GL-4 (citing ISO Form CG 00 01 04 13).

For a discussion of the salient history of the ISO CGL forms, see, e.g., 4 HOLMES’ APPLEMAN ON INSURANCE 2D § 23.4 at 521-26 (E. M. Holmes ed., 1998) [hereinafter HOLMES’ APPLEMAN]; James M. Fischer, *Accidental or Willful?: The California Insurance Conundrum*, 54 SANTA CLARA L. REV. 69, 73-76 (2014); *Am. Fam. Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 74 (Wis. 2004).

6. See, e.g., *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 898 (Pa. 2006) (“The key term in the ordinary definition of ‘accident’ is ‘unexpected.’ This implies a degree of fortuity . . . .”); *Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co.*, 774 N.E. 2d 687, 692 (N.Y. Ct. App. 2002) (“[T]he requirement of a fortuitous loss is a necessary element of insurance policies based on either an ‘accident’ or ‘occurrence.’”); *Reisig v. Union Ins. Co.*, 870 P.2d 1066, 1069-70 (Wyo. 1994) (“‘accident’ means ‘fortuitous circumstance, event . . . .’”); *McAllister v. Peerless Ins. Co.*, 474 A.2d 1033, 1036 (N.H. 1984) (“[F]ortuity [is] implied by reference to accident . . . .”). In turn, “fortuity” is sometimes defined in terms of “accident”: “an insurer will not pay for a loss unless the loss is ‘fortuitous,’ meaning that the loss must be accidental in some sense.” 1 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 1.05[2][a] at 1-40-1-41 (J. E. Thomas et al. eds., April 2015) [hereinafter, APPLEMAN LIBRARY EDITION]; see also *id.* at § 1.05[2][c] at 1-51.

7. See, e.g., *Lyons v. Fire Ins. Exch.*, 74 Cal. Rptr. 3d 649, 655 (Cal. Ct. App. 2008) (quoting *Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. 273, 279 (Cal. Ct. App. 1989)).

8. See, e.g., Erik S. Knutsen, *Fortuity Clauses in Liability Insurance: Solving Coverage Dilemmas for Intentional and Criminal Conduct*, 37 QUEEN’S L.J. 73, 83 n. 22 (2011) (“‘accidents’ . . . are necessarily fortuitous events”); Fischer, *supra* note 5, at 72 (“It is fundamental to insurance that coverage is extended to accidental or fortuitous losses.”).

that the injurious effects must be fortuitous; “accident,” in focusing on the fortuity of the loss, has a meaning identical or similar to the exclusionary language for losses that are “expected or intended from the standpoint of the insured” (the “Injurious Effects Only” school) and (b) those who hold that “accident” requires that the act that causes a third party’s injuries must be fortuitous, independent of any fortuity requirement as to the effects of that act (the “Causative Acts” school). The New Jersey Supreme Court framed the debate succinctly: “The key interpretive question is what should be deemed ‘accidental’: the *act* or the *injuries* resulting from the act?”<sup>9</sup>

It is useful to flesh out the positions of these two schools a bit more fully. The Injurious Effects Only school is represented in these examples:

- In a coverage action arising out of the destruction of part of a house by an employee of the insured, the Supreme Court of Kentucky held: “[A]n accident ‘denotes something that does not result from a plan, design, or intent on the part of the insured. The damage to the [claimant’s] property was unexpected and unintended by the insured.’ It was not the plan, design, or intent of the insured. Therefore, the fortuity requirement in the definition of accident is satisfied.”<sup>10</sup>

- In a coverage action arising out of the insured’s public statements, which allegedly caused emotional distress to the claimant, the New Jersey Supreme Court reaffirmed that state’s long-standing rule that: “the accidental nature of an occurrence is determined by 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>11</sup>

- “In the liability context, the [fortuity] examination is 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 judged accidental, even if the act that caused the injury was intentional.”<sup>12</sup>

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9. *Vorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1263 (N.J. 1992). For discussions of the positions in this debate, see, e.g., R. KEETON & A.I. WIDISS, *INSURANCE LAW* § 5.4(d) (2d ed. 1988); 3 *NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE* § 30.07[4] (L. Martinez et al. eds., 2014) (discussing the debate) [hereinafter *APPLEMAN PRACTICE GUIDE*]; 9A *COUCH ON INSURANCE* 3d §§ 126:27, 126:30 (S. Plitt et al. eds., 2014) (discussing the debate and citing numerous cases); 9A *COUCH ON INSURANCE* 3d § 129:3 (discussing the debate and citing numerous cases).

10. *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 639 (Ky. 2007) (citation omitted).

11. *Vorhees*, 607 A.2d at 1264.

12. *APPLEMAN PRACTICE GUIDE*, *supra* note 9, § 1.06[3] at 1–18.

The alternative view of the Causative Acts school is reflected in statements such as:

- “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 the injury.”<sup>13</sup>
- “the term “accident” refers to the insured’s intent to commit the act giving rise to liability, as opposed to his or her intent to cause the consequences of that act . . . .”<sup>14</sup>
- “accident” as used in the insuring agreement refers “to [the insured’s] action, and not to whatever unintended damages flowed from that act.”<sup>15</sup>
- the conduct of a “peeping Tom” “is, on its face, intentional. It is not accidental conduct and would not constitute an occurrence under the policy. Voluntary and intentional acts, even though they may result in injury which is unexpected, unforeseen and unintended, are not covered by the policy.”<sup>16</sup>

As suggested by the preceding quotes, the Maxim — the rule that intentional acts cannot be accidents — is a proposition adopted by proponents of the Causative Acts school. It declares as a general rule that intentional acts are not within the coverage of occurrence- and accident-based insuring agreements because they cannot be accidents, and, accordingly, one need not reach the questions of whether the complained-of injuries were caused by the act in question and whether those injuries are within the insuring agreement (e.g., whether they are covered bodily injury or property damage). The Maxim has been applied by appellate courts in ten states and by numerous federal courts in a wide variety of coverage disputes.<sup>17</sup> I shall argue below that the Maxim is a legal error because it is

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13. *Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. 273, 279 (Cal. Ct. App. 1989).

14. *Collin v. Am. Empire Ins. Co.*, 26 Cal. Rptr. 2d 391, 403–04 (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. . . .”).

15. *U.S. Fid. & Guar. Co. v. OmniBank*, 812 So. 2d 196, 200 (Miss. 2002) (internal citation omitted).

16. *Metro. Prop. & Cas. Co. v. Murphy*, 896 F. Supp. 645, 648 (E.D. Tex. 1995) (citing Texas cases).

17. For state cases, see *Armstrong v. Sec. Ins. Group*, 288 So. 2d 134, 136 (Ala. 1973); *Hartford Cas. Ins. Co. v. Merchants & Farmers Bank*, 928 So. 2d 1006, 1013 (Ala. 2005) (adopting the Maxim on the evidentiary record); *Royal Globe Ins. Co. v. Whitaker*, 226 Cal. Rptr. 435, 437–38 (Cal. Ct. App. 1986); *Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. 273, 279 (Cal. Ct. App. 1989); *Collin*, 26 Cal. Rptr. 2d at 400–01 (citing and quoting numerous California cases); *O’Dell v. St. Paul Fire & Marine Ins. Co.*, 478 S.E.2d 418, 420 (Ga. Ct. App. 1996); *Rucker v. Colum. Nat’l Ins. Co.*, 705 S.E. 2d 270, 274 (Ga. Ct. App. 2010); *Allstate Ins. Co. v. Moulton*, 464 So. 2d 507, 509–10 (Miss. 1985); *U.S. Fid.*

not implied by the term “accident” in the salient insuring agreements, is not required by the fortuity requirement, and rests on an untenable view of intentional action.

### III. THE MAXIM

The Maxim expresses the proposition that intentional acts cannot be (or are not) accidents, that the concepts of intentional act and accident are contradictory or unalterably opposed in some sense. Under long-standing California law, for example, “[a]n accident . . . is *never* present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening produces or brings about the injury or death”<sup>18</sup>; “[i]t is fundamental that allegations of intentional wrongdoing do not allege an ‘accident’”<sup>19</sup>; and “deliberate conduct is not an ‘accident’ or ‘occurrence’ irrespective of the insured’s state of mind [as to the consequences of his act].”<sup>20</sup> The appellate courts of Alabama, Georgia, Mississippi, Montana, Nebraska, Pennsylvania, Texas, Washington, and Wyoming have adopted similar or identical rules.<sup>21</sup> For some courts, the

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& Guar. Co. v. OmniBank, 812 So. 2d 196, 200 (Miss. 2002); Blair v. Mid-Continent Cas. Co., 167 P.3d 888, 891 (Mont. 2007); 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); Gene & Harvey Builders, Inc., v. Pa. Mfrs. Ass’n Ins. Co., 517 A.2d 910, 913 (Pa. 1986); Argonaut Sw. Ins. Co. v. Maupin, 500 S.W.2d 633, 635 (Tex. 1973); Devoe v. Great Am. Ins., 50 S.W.3d 567, 572 (Tex. Ct. App. 2001); Brazoswood Nat’l Bank v. Fid. & Deposit Co. of Md., No. 14-97-00129-CV, 1998 WL 30166, at \*1 (Tex. Ct. App., Jan. 29, 1998); Grange Ins. Co. v. Brosseau, 776 P.2d 123, 127 (Wash. 1989) (en banc); Stuart v. Weisflog’s Showroom Gallery, Inc., 753 N.W.2d 448, 456–61 (Wis. 2008); Everson v. Lorenz, 695 N.W.2d 298, 304–05 (Wis. 2005); Reisig v. Union Ins. Co., 870 P.2d 1066, 1070 (Wyo. 1994).

The status of the Maxim in Indiana is uncertain. Auto-Owners Ins. Co. v. Harvey, 842 N.E.2d 1279 (Ind. 2006), may have effectively overruled the leading Indiana case adopting the Maxim — Jim Barna Log Sys. Midwest, Inc. v. Gen. Casualty Ins. Co., 791 N.E.2d 816 (Ind. Ct. App. 2003) — but it did not do so expressly.

For federal cases, see Francis v. Allstate Ins. Co., 869 F. Supp. 2d 663, 673–74 (D. Md. 2012) (applying California law); Morton v. Safeco Ins. Co., 905 F.2d 1208, 1211 (9th Cir. 1990) (applying California law); Daniels v. Allstate Ins. Co., No.14-CV-00824-LHK, 2014 WL 2536400, at \*7 (N.D. Cal. June 6, 2014) (applying California law); SCI Liquidating Corp. v. Hartford Fire Ins. Co., 181 F.3d 1210, 1217 (11th Cir. 1999) (applying Georgia law); Owners Ins. Co. v. James, 295 F. Supp. 2d 1354, 1364–65 (N.D. Ga. 2003) (applying Georgia law); St. Paul Fire & Marine Ins. Co. v. McBrayer, 801 F.2d 1012, 1014 (8th Cir. 1986) (applying South Dakota law); Metro. Prop. & Cas. Co. v. Murphy, 896 F. Supp. 645, 647–48 (E.D. Tex. 1995) (applying Texas law). See also A. WINDT, 3 INSURANCE CLAIMS AND DISPUTES § 11:3, at 11-38-39 nn.10 (2013) [hereinafter WINDT] (citing numerous cases).

18. *Merced Mut. Ins. Co.*, 261 Cal. Rptr. at 279 (emphasis added) [full cite?]; *Collin*, 26 Cal. Rptr. 2d at 404 (quoting *Mendez*); see also James M. 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, 108 (1990) (“In California, the term ‘accident’ has been deemed to be the antithesis of an intended act.”).

19. *Collin*, 26 Cal. Rptr. 2d at 400–01 (citing and quoting numerous California cases).

20. *Id.* at 404.

21. See *supra* note 17 and accompanying text.

Maxim is grounded in dictionary or other common definitions of “accident” and little to nothing more. A second principal rationale for the Maxim is an understanding of the nature of intentional action. I will consider each of these purported justifications in turn.

#### A. THE ARGUMENT FROM DEFINITIONS OF “ACCIDENT”

##### 1. “Accident”

Courts that find the rationale for the Maxim in dictionary definitions or other common meanings of “accident” typically recite one or more definitions of “accident,” which often include synonyms such as unintended or undesigned, and then conclude from that definition alone that “[a]n intentional act is not an ‘accident’ within the plain meaning of the word.”<sup>22</sup> On this view, actions are analogous to geometrical figures, in that by definition any given geometrical figure (e.g., a square) cannot also be another geometrical figure (e.g., a triangle, circle, or any other figure). Just as it is nonsensical or self-contradictory to speak of a square circle, so too, the champions of the Maxim hold, it is nonsensical or self-contradictory to speak of an intentional-accidental act. This semantic argument is a nonstarter for at least three reasons.

First, the term “accident” as used in liability coverage case law is so broad and flexible<sup>23</sup> that “X is an accident,” does not necessarily imply “X is not an intentional act,” and conversely, “X is an intentional act” does not necessarily imply “X is not an accident.” Courts that draw those conclusions tend to focus on one part or parts of the definition of “accident,” (e.g., unintended, undesigned), while ignoring other possible definitions that do not directly contradict “intentional act” (e.g., “unexpected, unforeseen . . . happening or consequence . . .”).<sup>24</sup> More

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22. See, e.g., *State Farm Gen. Ins. Co. v. Frake*, 128 Cal. Rptr. 3d 301, 310 (Cal. Ct. App. 2011); *accord* *Quan v. Truck Ins. Exch.*, 79 Cal. Rptr. 2d 134, 141 (Cal. Ct. App. 1998); *Royal Globe Ins. Co. v. Whitaker*, 226 Cal. Rptr. 435, 438 (Cal. Ct. App. 1986); *Sheets v. Brethren Mut. Ins. Co.*, 679 A.2d 540, 553 (Md. 1996) (dissenting opinion); see also, *Owners Ins. Co. v. James*, 295 F. Supp. 2d 1354, 1363 (N.D. Ga. 2003) (quoting definitions of “accident” from Georgia case law and a statute, and stating “‘Accident’ and ‘intention’ are thus interpreted as converse terms”).

23. *Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.*, 334 P.2d 881, 884 (Cal. 1959) (“[n]o all-inclusive definition of the word ‘accident’ can be given.”); *accord* *N.W. Elec. Power Coop., Inc. v. Am. Motorists Ins. Co.*, 451 S.W.2d 356, 363 (Mo. Ct. App. 1969); *Botts v. Hartford Acc. & Indem. Co.*, 585 P.2d 657, 660 (Or. 1978) (no one “all-encompassing definition of ‘accident’” is applicable to all circumstances).

24. *Collin*, 26 Cal. Rptr. 2d at 403. See the related debate on whether “expected” and “intended” as used in the “expected and intended” exclusion have the same meaning. James L. Rigelhaupt, Jr., *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by the Insured*, 31 A.L.R. 4th 957 §§ 4[a]–4[b] (2014). For courts holding that they do not have the same meaning, see, e.g., *Patrons-Oxford Mut. Ins. Co. v. Dodge*, 426 A.2d 888

generally, in geometry, each definition is so precise as to define only one geometric object and to exclude all others. In insurance law and common language, “accident” is defined by numerous terms (e.g., unexpected, unforeseen, fortuitous), only some of which may be inconsistent with “intentional act.”

Even ignoring this first problem, the pick-and-choose strategy does not yield a valid inference. “Accident” and “intentional act” are contradictory only if one assumes several more additional premises to be true. Consider just the issue of point of view. Some courts define “accident” from the point of view of the injured third party. Thus, for example, “accident” has been defined as “a casualty — something out of the usual course of events and which happens suddenly and unexpectedly and without design of the person injured . . . .”<sup>25</sup> If the point of view explicit or implicit in the concept of accident is not that of the actor engaging in the intentional act, there is no necessary opposition or contradiction between intentional action and accident. The insured can act intentionally and the injured third party can view that act as an accident without any contradiction. A wholly unsuspecting victim of an intentional act that is injurious may reasonably view the act (and his injuries) as an accident or matter of fortuity (“it was a random car accident”). Point of view is also an issue when the insured is liable for the actions of a third party, as in cases of strict or vicarious liability.<sup>26</sup> To be clear, the point here is not that the perspective of the victim is the “correct” point of view for purposes of interpreting “accident” in liability insuring agreements.<sup>27</sup>

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(Me. 1981); *Northwestern Nat'l Cas. Co. v. Phalen*, 597 P.2d 720 (Mont. 1979); *State Farm Fire & Cas. Co. v. Jenkins*, 382 N.W.2d 796 (Mich. App. 1985); *see also* J. W. STEMPEL, 1 LAW OF INSURANCE CONTRACT DISPUTES § 1.05[a], at 1-38 (2004) (the better view is that these terms have different meanings, in part because dictionaries define them differently); 1 J. W. SALMOND, JURISPRUDENCE § 134, at 415 (Stevens & Haynes 1902) (“Intention does not necessarily involve expectation. I may intend a result which I will know to be extremely improbable.”).

25. *Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.*, 334 P.2d 881, 884 (Cal. 1959). *See also* *Farr v. Designer Phosphate & Premix Int'l Inc.*, 570 N.W.2d 320, 325 (Neb. 1997) (“accident” includes “any event which takes place without the foresight or expectation of the person acted upon or affected thereby.”); *Reisig v. Union Ins. Co.*, 870 P.2d 1066, 1069–70 (Wyo. 1994) (defining “accident” as a fortuitous event from the perspective of the injured third party); 16-117 APPLEMAN ON INSURANCE LAW & PRACTICE ARCHIVE § 117.4, at 49 (2013) [hereinafter, APPLEMAN ARCHIVE ].

26. APPLEMAN LIBRARY EDITION, *supra* note 6, § 1.05[2][a], at 1–42; *Wayne Twp. Bd. of School Comm'rs v. Ind. Ins. Co.*, 650 N.E.2d 1205, 1209 (Ind. Ct. App. 1995) (intent to injure could not be imputed to the insured school when there was no evidence that the school expected or intended the principal's misconduct or that sexual molestation was the result of the school's intent or design); *CSI Liquidating Corp. v. Hartford Fire Ins. Co.*, 181 F.3d 1210, 1216–17 (11th Cir. 1999) (considering whether the point of view of the insured employer or harassing employee is the appropriate perspective from which to determine whether the harassment is an “accident”).

27. The perspective of the third party virtually always leads to the conclusion that the event or loss was fortuitous. That is one reason why the majority of courts considering the issue has held that the perspective of the insured is the correct reference point for the fortuity inquiry. *See* APPLEMAN

Rather, I am only arguing that if “accident” and “intentional act” contradict each other, they do so only if one implicitly or expressly assumes a position on the correct point of view being that of the insured, and that requires argument. That position is not necessarily part of the definition of “accident.”

Finally, to approach the purported inconsistency from the other side, what is it about the concept of intentional action that renders it inconsistent with “accident”? On one commonly held theory of action, in an intentional action the actor desires to bring about some state of affairs and has correct beliefs about all or most of the material circumstances of her action.<sup>28</sup> So, for example, Mary wants to go home after work, and she believes (correctly) that the 61C bus passes in front of her house, so she jumps on the 61C bus at the end of her workday. But suppose Mary was mistaken in her belief that the 61C bus would take her home. In one and the same act, she *intended* to get on the 61C and did so, but she *accidentally* boarded a bus that went in the wrong direction. What is the argument that shows that proposition to be self-contradictory? No court that has adopted the Maxim has offered one, although courts frequently declare that an actor’s acting on a mistaken belief does not “transform” or change an intentional act into an accident.<sup>29</sup> Consider also the view of the Wisconsin Supreme Court, that an act of misrepresentation “requires a degree of volition inconsistent with the term accident.”<sup>30</sup> If “volition” or intent is not an all-or-nothing proposition, as this statement suggests, then some acts may have a sufficient “degree of volition” such that they are intentional and yet not so much volition that they also cannot be truly described as “accidents.” I explore these ideas further in Section IV below. The point here is that intentional action is a concept that admits of different theories and one gets a contradiction between that concept and “accident” only by assuming some such theory, and not directly from the definition of “accident.”

Appeal to common, ordinary meanings is a time-honored strategy for analyzing terms in liability policies<sup>31</sup> and I am not arguing that such a

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LIBRARY EDITION, *supra* note 6, § 1.05[2][a], at 1–42; Vt. Mut. Ins. Co. v. Malcolm, 517 A.2d 800, 802 (N.H. 1986) (“Because an injury is always fortuitous to a non-consenting victim, if its accidental character were to be judged in relation to such a victim, virtually all instances of compensable injury would also be instances of accident . . . .”); Crook v. Ga. Farm Bur. Mut. Ins. Co., 428 S.E.2d 802 (Ga. Ct. App. 1993) (“accident” is to be determined from point of view of insured).

28. A. GEWIRTH, *REASON AND MORALITY* 27, 31–42, 219 (U. of Chicago Press 1978); D. DAVIDSON, *Actions, Reasons, and Causes*, in *ESSAYS ON ACTIONS AND EVENTS* 3–8 (Oxford U. Press 1980). See *infra* Section III.B.2.

29. See *infra* Section IV.A.

30. Stuart v. Weisflog’s Showroom Gallery, Inc., 753 N.W.2d 448, 458 (Wis. 2008) (internal quotation omitted).

31. See, e.g., APPLEMAN PRACTICE GUIDE, *supra* note 9, at §§ 4.07[5], 4-44–4-45 (citing cases); Property Cas. Co. of MCA v. Conway, 687 A.2d 729, 731 (N.J. 1997); Botts v. Hartford Acc. &

strategy is flawed or never appropriate to assist in the determination of the meaning of undefined policy terms. Rather, I am arguing that, in the context of the issues under discussion here, such meanings alone do not justify the Maxim, as some courts have reasoned. Moreover, common meanings are only one tool among many available for the interpretation of key policy terms and the resolution of coverage disputes. An understanding of the conceptual structure of a liability insurance *contract* and its purpose as a form of liability *insurance* is another valuable tool. Courts that adopt the semantic rationale fail to consider how their conclusion — the Maxim — is thoroughly undermined by these less mechanical and more analytic interpretative tools. An analysis of the fortuity requirement, which is commonly said to be implicit in the term “accident,”<sup>32</sup> is a natural place to begin this less mechanical approach.

## 2. Fortuity

Because “accident” in liability insuring agreements implies or is synonymous with fortuity, we may apply an interpretive principle of charity and read the decisions adopting the semantic justification for the Maxim as, in effect, truncated arguments for the view that the fortuity requirement that is at the heart of insurance<sup>33</sup> is inconsistent with intentionality, that is, the view that an intentional act necessarily lacks the requisite randomness, contingency, chance, or uncertainty demanded by the fortuity requirement. To assess this contention, we first need to analyze the elements and scope of the fortuity requirement. This subsection is devoted to that analysis. In Section V, I argue that the concept of fortuity, so understood, is not inconsistent with intentional action.

As an initial matter, to advance beyond the shortcomings of the semantic argument just discussed, the purported inconsistency between fortuity and intentional action cannot be generated simply by reciting dictionary definitions of “fortuity” as meaning “chance,” “uncertainty,”

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Indemn. Co., 585 P.2d 657, 660 (Or. 1978) (citing cases and authorities); *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546 (6th Cir. 2008).

32. See *supra* notes 6-8 and accompanying text.

33. See, e.g., APPLEMAN PRACTICE GUIDE, *supra* note 9, at § 30.07[5][a], at 30–52 (“Fortuity—randomness, chance, or risk—is inherent in the nature of all insurance and is in fact the definitive principle behind the concept of insurability.”); Knutsen, *supra* note 8, at 75 (“The basic premise behind insurance is that it only protects against fortuitous losses, not against losses that are certain to occur.”); Stempel, *supra* note 24, at § 1.05, at 1–33 (“insurance exists to provide indemnity for fortuitous losses only . . .”); *Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co.*, 774 N.E.2d 687, 692 (N.Y. 2002) (“[T]he requirement of a fortuitous loss is a necessary element of insurance policies based on either an ‘accident’ or ‘occurrence.’”).

“contingent,” or the like.<sup>34</sup> One could at least equally plausibly argue that a common, and perhaps the most common, antonym of “fortuity” is “certainty” (or “necessity”), not “intentional action.”<sup>35</sup> “Intentional action” contradicts or is contrary to “fortuity” only if “intentional action” itself implies or is synonymous with “certainty” (or “necessity”). Establishing that inference, if it can be established, requires argument with respect to the concepts of fortuity and intentional action, not mere semantics. This is particularly the case because “fortuity,” like “accident,” is a flexible concept in the insurance case law. It is a term that “cause[s] conceptual difficulties.”<sup>36</sup>

Moreover, fortuity is a “theory-laden” concept. Different conceptions of insurance may embrace different concepts of fortuity. A conception of liability-insurance-as-a-contractual-relation is likely to view fortuity from the perspective of the parties to the insurance contract, while a conception of liability-insurance-as-part-of-the-tort-compensation-system may view fortuity from the perspective of an injured third party.<sup>37</sup> As discussed above in Section III.A.1, point of view is not a matter of definitional fiat, but of argument. There is no necessary inconsistency between fortuity as viewed by the injured third party and the intentional action of the actor.

Viewed from a liability insurance contract perspective, which is the perspective I shall adopt here, the concept of fortuity has two principal

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34. See, e.g., *Formosa Plastics Corp. v. Sturge*, 684 F. Supp. 359, 367 (S.D.N.Y. 1987) (equating fortuity with “chance”), *aff’d* 848 F.2d 390 (2d Cir. 1988); *Nw. Mut. Life Ins. Co. v. Linard*, 498 F.2d 556, 563 (2d Cir. 1974) (“happening by accident or chance; unplanned”) (citation omitted); *Avis v. Hartford Fire Ins. Co.*, 195 S.E.2d 545, 548 (N.C. 1973) (equating “fortuity” with “chance” in first-party property policy coverage action). This casual appeal to dictionary definitions, without further understanding of the role fortuity plays in insurance, appears, in many cases, to support the criticism that the fortuity requirement “has been so loosely applied that it has lost its innate helpfulness to courts and litigants.” Knutsen, *supra* note 8, at 75 (citing generally Kenneth S. Abraham, *Peril and Fortuity in Property and Liability Insurance*, 36 *TORT & INS. L.J.* 777 (2001) and Fischer, *supra* note 18).

35. Erik S. Knutsen, *Fortuity Victims and the Compensation Gap: Re-envisioning Liability Coverage for Intentional and Criminal Conduct*, 21 *CONN. L.J.* 209, 236 (2014) (contrasting fortuitous events and certain events); APPLEMAN LIBRARY EDITION, *supra* note 6, at § 1.05[2][b] (fortuity means that a loss must be uncertain).

36. *Matter of Feinstein*, 326 N.E.2d 288, 293 (N.Y. 1975) (“Terms like fortuitousness of event in the law, as with the word accident, have always caused conceptual difficulties . . . In this area it is easy to slip into metaphysical, even validly metaphysical, distinctions.”).

37. Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 *U. PA. L. REV.* 653, 658–68 (2013) (discussing four conceptions of insurance and stating that one of them, the contract conception, “is the most accurate description of what insurance is”); Craig Brown, *“Accidental Loss” and Liability Insurance*, 5 *OTAGO L. REV.* 523, 524 (1984) (“rules about liability insurance, in particular those pertaining to the question of fortuity, should be regarded as part of tort law at least as much as they should be considered part of commercial law . . . rules of fortuity constitute part of what we call the ‘system’ of compensation . . .”); Fischer, *supra* note 18, at 97 (“Compensation of the insured or the victim of the insured’s misconduct is now frequently intoned as a basic policy of insurance law. . .”); APPLEMAN ARCHIVE, *supra* note 25, at § 23.4, at 28 (making this point and citing cases).

elements: first, a conduct element, which captures the idea of the happening (or nonhappening) of an event that is contingent or a matter of chance because it is outside of the effective control of the parties to the contract and, more particularly, outside the effective control of the insured; and second, a cognitive element, which reflects the parties' symmetric beliefs or information as to the happening, nonhappening, the manner of happening, the timing, or the extent of the relevant coverage-activating event.<sup>38</sup> New York's insurance statute, for example, captures both the conduct and cognitive elements of fortuity: "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>39</sup> The classic definition of a "fortuitous event" found in the Restatement of Contracts also reflects these two components:

A fortuitous event . . . is an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, such as the loss of a vessel, provided that the fact is unknown to the parties.<sup>40</sup>

This definition occurs as part of the explication of the idea of an aleatory promise, that is, a "promise conditional on the happening of a fortuitous event, or an event supposed by the parties to be fortuitous."<sup>41</sup> An insurance policy is an example of an aleatory contract.<sup>42</sup>

Importantly, the presence or absence of fortuity is to be determined relative to the effective control (over actions or injurious effects) and beliefs of the parties to the insurance contract. There is no meaningful sense of fortuity, for purposes of liability-insurance-as-a-contractual-relation, independent of the perspective of one or both of the contracting parties.<sup>43</sup>

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38. Knutsen, *supra* note 8, at 77, 106 (insurable uncertainties belong to one of three categories: factual, temporal, or extent); George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1020 (1989) (insurance can operate only if losses are probabilistic as to either whether they occur or when they occur); Kenneth S. Abraham, *Peril and Fortuity in Property and Liability Insurance*, 36 TORT & INS. L.J. 777, 801 (2001) (uncertainty as to timing of insured event).

39. MCKINNEY'S INS. LAW § 1101(a)(2) (2014). See CAL. INS. CODE § 250 (2016) ("any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against . . .").

40. RESTATEMENT OF CONTRACTS § 291 cmt. A (1932) [hereinafter, RESTATEMENT].

41. *Id.*

42. *Id.*; see BLACK'S LAW DICTIONARY 390 (10th ed. 2014) (defining "aleatory contract").

43. Keeton & Widiss, *supra* note 9, at § 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

The fortuity requirement in liability policies is implicated both by the process of contract formation and by post-formation performance. Pre-contract-formation, the fortuity requirement operates to prevent the prospective insured from transferring to the insurer the financial responsibility for a loss that the prospective insured knows to be occurring or to have already occurred, but which the insurer does not know to be occurring or to have occurred. Insurer defenses to coverage such as the so-called “known loss,” “known risk,” and “loss-in-progress” defenses, and fraudulent concealment and misrepresentation each appeal in some fashion to the idea of fortuity precontract formation. They are grounded in either the notion that fortuity means the risk or contingency of a loss occurring (and not its certainty) before the transfer of that risk from the insured to the insurer, or, with respect to the insuring of some feature or features of a loss that has or may have occurred, symmetrical information as to that loss between the parties prior to contracting.<sup>44</sup> Professor Abraham persuasively argues that “certainty of occurrence does not violate the fortuity requirement, only certainty of occurrence when it is linked with conscious awareness of that certainty.”<sup>45</sup> The “conscious awareness” with which he is especially concerned is preformation asymmetric information that allows the insured to exploit his superior knowledge relative to the insurer to transfer a risk of loss or actual loss to the insurer that it would not have accepted, or would not have accepted on the terms that it did, if it had the same information as the insured.<sup>46</sup>

Whereas asymmetric information and the resulting risk of misrepresentations to the carrier dominate pre-formation fortuity issues, both asymmetric control of conduct leading to losses and the cognitive element of fortuity are involved in post-formation fortuity issues that are associated with the term “accident” in CGL and other occurrence- and

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basis of an insurance claim.”); *see id.* at § 5.4(c), at 510–12; *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)) (whether an act is an ‘accident’ is to be ascertained from the intention of the parties to the contract).

44. *See, e.g.*, Abraham, *supra* note 38, at 790–96; D. S. Donaldson, J. D. James, *The “Known Loss” Doctrine — Whose Knowledge and of What?*, 8 ENVTL. CLAIMS J. 43 (Spring 1996); R. L. Freuhauf, Note, *The Cost of Knowledge: Making Sense of “Nonfortuity” Defenses in Environmental Liability Insurance Coverage Disputes*, 84 VA. L. REV. 107 (1988); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1210 (Ill. 1992) (known loss doctrine grounded in fortuity requirement). Freuhauf argues that the fortuity requirement in an insurance contract is wholly a matter of placing limits “on the severity of the information asymmetry that the law will tolerate” between the parties “at the inception of the insurance contract.” *Freuhauf*, at 114; *see id.* at 112. If this were correct, then the fortuity requirement would have no role in post-formation contract performance. As will be clear from later Sections of this article, this is not the law and not how liability policies are written.

45. Abraham, *supra* note 38, at 792.

46. *Id.* at 794. *See also*, Freuhauf, *supra* note 44, at 111–12.

accident-based liability policies.<sup>47</sup> The cognitive element of fortuity comes into play there as part and parcel of the issue whether the actor had correct beliefs about the material circumstances or consequences of her action such that she could be said to have exercised effective control over her conduct and thus her action (or its injurious effects) happened as she intended. This is reflected in statements such as, “[i]f a single insured is allowed through intentional acts to conspicuously control risks covered by the policy, the central concept of insurance [i.e., fortuity] is violated.”<sup>48</sup> Similarly, Professor Stempel writes, “[w]here the ‘loss’ occurs at the direction of [i.e., intentionally and as effectively controlled by] the policyholder rather than due to a claim . . . by a third party, the loss is not fortuitous and should be excluded from coverage”<sup>49</sup> and “losses intended or surely expected by the policyholder are not the result of chance.”<sup>50</sup> In short, “[b]ecause insurance relies on fortuity, it unravels when the insured has complete control over whether a risk will materialize.”<sup>51</sup>

We can restate the post-formation fortuity requirement in more general contract law terms. The basis of the liability insurance bargain is that the insured agrees (a) to transfer to the insurer the duty to pay for his (actual or alleged) liabilities arising in connection with (actual or alleged) injuries to the interests of a third party and (b) not to intentionally cause such injuries through an action over which he exercises such effective control that the injuries are not, from his and the insurer’s perspective, a matter of practical contingency, uncertainty, or chance. Briefly, the insured

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47. Post-contract formation, the fortuity requirement also finds expression in other liability policy provisions, such as the insuring agreement’s extension of coverage for liability (and not for the third-party injury or damage on which such liability is predicated, because litigation is always uncertain), the trigger-of-coverage requirement that the injury or damage occur during the policy period, and in business risk and criminal conduct exclusions. See, e.g., M. W. Holley, *The “Fortuity Doctrine”: Misapplying the Known Loss Rule to Liability Insurance Policies*, 41 TEX. TECH L. REV. 529, 531 (2009); Abraham, *supra* note 38, at 788–90, 793–94; KNUTSEN, *supra*, note 8, at 75–78, 95–111. Only some of these issues directly implicate the actor’s control over his actions.

48. *Aetna Cas. & Sur. Co. v. Freyer*, 411 N.E.2d 1157, 1159 (Ill. App. Ct. 1980) (citing 7A APPLEMAN INSURANCE LAW AND PRACTICE § 4492.01(Berdal ed.)).

49. Stempel, *supra* note 24, at § 1.05[a], at 1-33.

50. *Id.*

51. Knutsen, *supra* note 8, at 77.

We see this as well in the expected or intended exclusion, which predominates in case law adopting the perspective of the Injurious Effects Only school. This exclusion focuses on the insured’s state of mind — the cognitive element of fortuity — but her state of mind of itself is of no interest from a coverage perspective unless it is conjoined with her effective control over her actions to bring about effects injurious to the interests of a third party. There is no coverage for losses that the insured expected or intended because the fact that the losses did occur as the insured intended or expected typically implies the insured’s control over her action and its effects to a degree that is inconsistent with the insurer’s intention that such injuries, or extent of the injurious effects, be outside the effective control of the insured. See e.g., *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1088 (Colo. 1991) (quoting *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989)).

agrees not to act with the intent to make, and with such effective control that he does make, the contingent event that activates the insurer's duties happen with certainty or a high degree of certainty.<sup>52</sup>

The upshot of this analysis is that the fortuity requirement is inconsistent with or contrary to the concept of intentional action if and only if, in any particular intentional action, the actor exercises such effective control over his action that it conforms to his intent to bring about the (otherwise) contingent event that activates the insurer's duties under the policy. The question, then, is whether proponents of the Maxim can articulate and justify a theory of intentional action that satisfies this condition for all or the great majority of those actions that are the subject of liability insurance coverage disputes regarding the term "accident." They have yet to do so and, I argue in the remaining Sections of this article, they cannot do so.

#### B. THE ARGUMENT FROM THE NATURE OF INTENTIONAL ACTION

The certitude with which adherents to the Maxim profess the rule is curious given that the concept of intentional action is one of the most well-contested battlegrounds in the law generally and one of the least analyzed concepts in insurance law. Rather than analysis, one commonly finds instead broad declarations such as "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>53</sup> Such pronouncements raise more questions than they answer. For example: Is intentionality really a matter of *either* desire *or* beliefs, and not both? What is the relation between an actor's intent as to his act and as to its consequences? Why doesn't intentionality refer to "the act itself" and not to its consequences, as courts adopting the Causative Acts position have declared?<sup>54</sup> When we talk about

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52. The concepts of fortuity and moral hazard are closely related but distinct. *See e.g.*, Knutsen, *supra* note 8, at 77–78, 87; Abraham, *supra* note 38, at 789, 791–92. One way to view this relation is that an insured-actor violates the fortuity requirement when he acts with the intent to cause the happening of the otherwise contingent event that activates the insurer's duties, and his action realizes moral hazard when he violates the fortuity requirement with the further intent or knowledge that the insurer will bear the costs of his action.

53. *U.S. Fid. & Guar. Co. v. Omni Bank*, 812 So. 2d 196, 201 (Miss. 2002) (internal quotations omitted); *Jackson Cnty. Hosp. v. Ala. Hosp. Ass'n Trust*, 652 So. 2d 233, 235 (Ala. 1994); *APPLEMAN ARCHIVE*, *supra* note 25, at § 117.4, at 28 (referring to intent in exclusionary clauses). The quoted language is taken almost *verbatim* from section 8A of the Restatement (Second) of Torts. Champions of the Maxim have yet to explain why this tort concept of intent, which refers "to the consequences of an act rather than the act itself," is applicable to the interpretation of a liability insurance contract. *RESTATEMENT (SECOND) OF TORTS*, § 8A, cmt. a (1965).

54. *See, e.g.*, *State Farm Gen. Ins. Co. v. Frake*, 128 Cal. Rptr. 3d 301, 309 (Cal. Ct. App. 2011); *Fire Ins. Exch. v. Superior Court (Bourguignon)*, 104 Cal. Rptr. 3d 534, 537–38 (Cal. Ct. App. 2010); *Collin v. Am. Empire Ins. Co.*, 26 Cal. Rptr. 2d 391, 403–04 (Cal. Ct. App. 1994).

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an intentional act, are we referring only to the actor's bodily movement plus an internal state of mind, or are the circumstances and its consequences also part of the act?<sup>55</sup> Of the infinite number of possible descriptions of an act,<sup>56</sup> which are relevant to an insurance coverage determination and by what rule or criterion? In the following discussion I shall offer an analysis of intentional action that begins, in a rudimentary way, to address these sorts of questions and to show why they are significant for the resolution of insurance coverage disputes.

### *1. The Maxim: The Either-Or View of Intentional Action*

The Maxim expresses the view that the intentionality of an act is an either-or-but-not-both proposition — an act either has the property of being intentional or the property of being accidental (unintentional), and it cannot be both at the same time. This either-or view of intentional action is both conceptually and empirically unsound.

The first obstacle that any defense of the either-or view faces is entirely conceptual — that is, making sense of the concept of an accidental action, where such an action is entirely without any intention and distinct from a mere bodily movement (e.g., a nonintentional or wholly involuntary reflex jerk, twitch, and the like).<sup>57</sup> If an “accidental action” refers only to mere bodily movements, then the Maxim effectively limits coverage under occurrence- and accident-based insuring agreements only to that narrow class of events. That, of course, is absurd, and the case law adopting the Maxim is devoid of any suggestion that such a drastic limitation on coverage is intended. We are left, then, with a concept of “accidental action” that refers to more than a mere bodily movement and yet also refers to wholly unintentional actions. I submit that this is self-contradictory. There can be no such creature and, in any event, no champion of the Maxim has yet spotted one. I discuss this point further in Section III.B.2 below.

A second obstacle that any such defense would have to surmount is that this view is contrary to common experience and, hence, is empirically unsound. Insurance coverage case law is full of examples in which one and the same act is intentional but not fully intentional and, hence, in some respect fortuitous or accidental. Champions of the Maxim reject this view because they erroneously adopt what I refer to as the Complete Control assumption. This assumption and its implications merit extended

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55. See *infra* notes 64-68 and accompanying text.

56. See *infra* notes 67 and accompanying text.

57. See *infra* notes 70-71 and accompanying text.

discussion.

a. The Complete Control Assumption

This either-or view of intentional action finds its fuller and practical (action-focused) expression in the view that in acting intentionally an actor always exercises such complete control over his action that it completely conforms to his intention and it would be inconsistent also to view the act as fortuitous (the “Complete Control” assumption). The Complete Control assumption attempts to express the idea of certainty in the realm of action or practice (as opposed to mathematical certainty ( $2 + 2 = 4$ ) or theoretical certainty (the speed of light, for example)). The idea is that an actor who has complete control over her action does that act or causes some effects with certainty, that is, leaving nothing to fortuity or accident. We see the Complete Control assumption, for example, in the leading California case adopting the Maxim, *Merced Mutual Insurance Co. v. Mendez*,<sup>58</sup> where 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 transpired exactly as [the insured] intended. No additional, unexpected, independent, or unforeseen act occurred.”<sup>59</sup> In a similar formulation, the Mississippi Supreme Court instructs us that in determining whether the insured’s act was 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>60</sup> The differences between these formulations are not material for present purposes.

58. *Merced Mutual Insurance Co. v. Mendez*, 261 Cal. Rptr. 273 (Cal. Ct. App. 1989).

59. *Id.* at 280; *accord* Delgado v. Interinsurance Exch. of the Auto. Club of S. Cal., 97 Cal. Rptr. 3d 298, 304 (Cal. 2009) (citing numerous cases, including *Mendez*); *State Farm Gen. Ins. Co. v. Frake*, 128 Cal. Rptr. 3d 301, 310, 313 (Cal. Ct. App. 2011).

60. *See* U.S. Fid. & Guar. Co. v. OmniBank, 812 So. 2d 196, 200 (Miss. 2002); *accord* Red Ball Leasing, Inc. v. Hartford Acc. & Indem. Co., 915 F.2d 306, 310 (7th Cir. 1990) (Indiana law). A third variation focuses on the injuries as the “natural result” of the intentional act. *See, e.g.*, *Thomas v. U.S. Fid. & Guar. Co.*, 247 F.2d 417, 419 (5th Cir. 1957) (“[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.”). Some version of the Complete Control assumption also is found in related caselaw. In a first-party property coverage dispute under Ohio law, a federal appellate court has contrasted the insured’s control over the loss with fortuity: “Were we to ignore plaintiff’s control over its loss [through its intentional destruction of property] in deciding the fortuitousness of plaintiff’s claim, we would convert plaintiff’s all-risk insurance policy into a cash fund for plaintiff’s business plans.” *Univ. of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1282 (6th Cir. 1995). *See also* J. W. Stempel, *A Mixed Bag for Chicken Little: Analyzing Year 2000 Claims and Insurance Coverage*, 48 EMORY L.J. 169, 219–20 (1999) (contrasting fortuitous losses with those within the control of the insured); Knutsen, *supra* note 8, at 77.

As the quoted language makes clear, the Complete Control assumption is inextricably intertwined with a theory of direct causation, that is, that the actor's actions are the direct cause of the harms to the third party. The actor's complete control implies the absence of any unexpected or unintended concurrent or intervening cause that, in addition to the intentional act, produces the injurious effects. In the Mississippi version, such an additional cause is referred to in the final clause quoted immediately above as, "the unexpected intervention of any third person or extrinsic force." In California and Washington case law, the presence of an uncontrolled (i.e., fortuitous) intervening or concurrent cause creates an exception to the Maxim that allows an intentional act to be described as an accident (the Causation Exception): "[a]n accident, however, is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage . . . ."<sup>61</sup> I analyze this theory of direct causation and its limits in Section IV.B below.

The problem with the Complete Control assumption is not that it is never true. Undoubtedly there are many actions that conform to the actor's intention because the actor has complete (or at least effective) control over his actions. These types of actions may indeed be the norm. That much allowed, the assumption is often, and perhaps usually, false in those factual scenarios that generate liability insurance coverage disputes in which the fortuity of the insured's act or its effects is at issue. Life is full of examples of intentional acts in which there is a lack of complete control (and, hence, there is fortuity) as to the fact of an act's happening, the manner of its happening, the timing of its happening, or its effects or their extent.<sup>62</sup> I

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61. *Mendez*, 261 Cal. Rptr. at 279 (internal quotations and citations omitted); *accord* *State Farm Ins. Co. v. Frake*, 128 Cal. Rptr. 3d 301, 310 (Cal. Ct. App. 2011) ; *Collin v. Am. Empire Ins. Co.*, 26 Cal. Rptr. 2d 391, 404 (Cal. Ct. App. 1994) (quoting *Mendez*); *Grange Ins. Co. v. Brosseau*, 776 P.2d 123, 127 (Wash. 1989) (en banc).

The Causation Exception is premised on a lack of fortuity in the causative act and attempts to remedy this by introducing fortuity through an "extrinsic," "additional," or "independent" event in the causal chain. That strategy implicitly is a repudiation of the fundamental premise of the Causative Acts school, namely, that there must be fortuity in the act that initiates the causal sequence. No court that has adopted the Maxim has explained this inconsistency. Moreover, if an intervening or concurrent cause is found, then, the argument goes, that event would permit or require the intentional act to be described as an accident. But it is entirely unclear why, since the act is still intentional and in many cases the insured exercises no less control over it just because a concurrent or later independent event intervenes. The insured does lose control over the effects of the act, but if loss of control as to effects is determinative, then "accident" should refer to the actor's intent as to the effects of his action and not "the [causative] act itself."

62. See MCKINNEY'S INS. LAW, *supra* note 39. For example, see the cases discussed *infra* Sections IV and V.

Professor Abraham makes a similar connection between absent belief (lack of knowledge) and fortuity in the context of first-party insurance. Abraham, *supra* note 38, at 792.

may be intentionally driving my car, but not intentionally driving twenty miles per hour over the speed limit, even though I am doing that in the very same act. A manufacturer may intentionally use materials other than those specified, but not intentionally make the product less safe, even though he is doing both in the same act. The lack of complete control often is especially apparent when the insured's actual or alleged liability arises not out of her own acts but rather out of the acts of a third party for which the insured is liable, as in cases of vicarious liability.<sup>63</sup> The Maxim erroneously expands one model of intentional action — that in which the Complete Control assumption holds true — to encompass all types of intentional action, as if it is the *only* model of intentional action.

One plausible explanation for the ready and unquestioning judicial adoption of the Complete Control assumption and theory of direct causation is the implicit acceptance of a sharp line between an action, on the one hand, and its circumstances and consequences, on the other. On this view, intent consists entirely of a desire to do an action and the “action” is conceived narrowly only as a bodily movement or narrow set of movements of some sort.

Whatever its facial plausibility may be, this argument does not withstand analysis. Consider initially the sharp distinction between an action and its circumstances. It is not unheard of in the law to define an action as consisting only of one's bodily movement and the corresponding intention. We see this, for example, in the leading hornbook on tort law: An act is “a voluntary contraction of the muscles, and nothing more.”<sup>64</sup> Yet this narrow conception of an action hardly bears the imprimatur of necessity. Consider a relatively simple act of sawing a piece of wood.

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63. See, e.g., *Messersmith v. Am. Fid. Co.*, 133 N.E. 432 (N.Y. 1921) (liability for acts of juvenile driver); *Crook v. Georgia Farm Bureau Mut. Ins.*, 428 S.E.2d 802 (Ga. Ct. App. 1993) (homeowner's liability for intentional suicide of guest); *IFCO Sys. N. Am., Inc. v. Am. Home Assur. Co.*, No. 11-2328, 2013 WL 29120 (4th Cir. Jan. 3, 2013) (employer's liability for theft by employees from a third party).

The injuries to a third party that give rise to questions of liability coverage are not necessarily causally related to the insured's actions or to the consequences of the insured's actions. *WINDT*, *supra* note 17, at § 11.3 at 11–85 (“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) (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”); *Weyerhaeuser Co. v. Com. Union Ins. Co.*, 15 P.3d 115, 129 (Wash. 2000), as amended (Jan. 16, 2001); *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 306–07 (Colo. 2003); *Auto-Owners Ins. Co. v. Harvey*, 842 N.E. 2d 1279, 1284 (Ind. 2006). “Accident” refers to any actions or events that cause injurious effects for which the insured is allegedly or actually liable. It does not necessarily refer to the insured's acts.

64. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 8, at 34 (5th ed., 1984); 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 Prosser and Keeton).

That act may be described as “moving my arm back and forth while holding a saw,” “sawing a plank,” “sawing oak,” “sawing one of Smith’s planks,” “destroying Smith’s property,” “making a great deal of sawdust,” and so on.<sup>65</sup> By what principle or rule is only the narrowest of these descriptions (that is, the first one) the “right,” “correct,” or necessary one? Again, consider the act of flipping a light switch, which may be described as: “moving my finger in an upward movement,” “flipping the switch,” “turning on the light,” “signaling a co-conspirator to begin an act of arson,” or “alerting a prowler to the fact that I am here.”<sup>66</sup> What gives only the first of these descriptions pride of place in coverage analyses? Why does only the first of these descriptions truly describe the “act”? An act can have innumerable true descriptions,<sup>67</sup> no one or group of which is necessarily authoritative. Accordingly, an act can be viewed very narrowly in terms only of intentional bodily movements or more broadly as also including its circumstances and/or consequences.

This insight is hardly novel, and particularly not novel in the law. More than 100 years ago, Salmond wrote in his classic *Jurisprudence*:

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. It is for the law to determine, in each particular case, what circumstances and what consequences shall be counted within the compass of the act with which it is concerned. To ask what act a man has done is like asking in what place he lives.<sup>68</sup>

If proponents of the Maxim are committed to a very narrow conception of “the act itself” as a bodily movement plus intent and a sharp demarcation between an act, so conceived, and its circumstances and consequences, they need to defend that view, recognizing that they are rowing against a strong and long jurisprudential current, and to show how it is required by liability policy language or other applicable insurance requirements, such as the

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65. The example is adapted from G.E.M. ANSCOMBE, *INTENTION* 11 (1976) [hereinafter, ANSCOMBE].

66. The example is adapted from DAVIDSON, *supra* note 28, at 4.

67. *See, e.g.*, ANSCOMBE, *supra* note 65, at 11–12; DAVIDSON, *supra* note 28, at 4–5, 58–59; A. R. WHITE, *THE PHILOSOPHY OF ACTION* 8 (A. R. White ed., 1968). Importantly, as we will see in Section IV, the actor may intend his action only under some of these descriptions and may be mistaken as to other descriptions, e.g., I intend to “saw one of Smith’s planks” (when in fact I am mistakenly sawing a plank that belongs to me).

68. Salmond, *supra* note 24, at § 129, at 403–04; *see also id.* at 403 (“We habitually and rightly include all material and relevant circumstances and consequences under the name of the act.”); WHITE, *supra* note 67, at 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.”).

fortuity requirement.

## 2. Act Pluralism

The alternative to the either-or theory of action embodied in the Maxim is a pluralistic theory of action that is far more empirically sound and reflects more accurately the nature of coverage disputes surrounding the meaning and application of “accident.” The pluralistic theory of action that I present here has roots reaching back to Aristotle, and has been adopted, more or less expressly, by many modern philosophers of action, jurists, and legal scholars.

On this pluralistic view, all actions by definition are intentional.<sup>69</sup> To say that an action is intentional generally means that the actor (1) has effective control over his bodily movements (an action is distinct from a mere bodily (wholly unintentional) movement such as a reflex motion, a jerk, or a fall down a flight of stairs),<sup>70</sup> (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.<sup>71</sup> Actions are less than fully intentional (or less than fully voluntary, to use a more traditional term) when one or more of these elements is missing entirely or to some degree. Thus in the case of my intentionally driving but unknowingly driving in excess of the speed limit, we might say that my doing that act was less than fully intentional and, to that extent, my act was an accident. Aristotle calls these sorts of actions “mixed,” because

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69. See, e.g., ANSCOMBE, *supra* note 65, at 12–13; DAVIDSON, *supra* note 28, at 43–45; GEWIRTH, *supra* note 28, at 27, 31–42, 219; *Messersmith v. Am. Fid. Co.*, 133 N.E. 432, 433 (N.Y. 1921) (“Every act, if we exclude, as we must, gestures or movements that are automatic or instinctive, is willful [intentional] when viewed in isolation and irrespective of its consequences. An act *ex vi termini* imports the exercise of volition.”); HOLMES’ APPLEMAN, *supra* note 5, at 512 (“It is not a sufficient line of demarcation to speak of an act as being ‘intentional.’ Almost every conscious, or voluntary, act must fall in this category.”); Knutsen, *supra* note 8, at 87 (“every action requires some level of intent”); WINDT, *supra* note 17, at § 11.3, at 11-56 nn. 29 (“almost all human acts at some level, are intentional”).

70. Some philosophers use the term “involuntary actions” to refer to what I have described as mere bodily movements. See, e.g., ANSCOMBE, *supra* note 65, at 13–14. The difference is merely semantic and not substantive. If that alternative usage is favored, our discussion would proceed with the understanding that by “action” I mean only “intentional action” or “voluntary action,” since mere bodily movements or “involuntary actions” seldom implicate insurance law.

71. See, e.g., GEWIRTH, *supra* note 28, at 27, 31–42, 219; ANSCOMBE, *supra* note 65, at 13–14; see generally DAVIDSON, *supra* note 28. On the distinction between mere bodily movements and actions specifically, see also *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 M. W. Dykes, *Occurrences, Accidents, and Expectations: A Primer of These (and Some Other) Insurance-Law Concepts*, 2003 UTAH L. REV. 831, 846–47 (2003)); RESTATEMENT (SECOND) OF TORTS § 2 (1965) (stating “[t]here cannot be an act without volition” and distinguishing an act from “a knee jerk” and other similar nonintentional behaviors).

they have elements of the intentional and the unintended.<sup>72</sup> He specifically identifies actions brought about by force and ignorance of the particular circumstances of one's action as "involuntary" or less than fully intentional.<sup>73</sup> When we consider intentional action from this perspective of fully voluntary actions and "mixed" actions, an action can have multiple properties that, in many cases, permit us to truly describe the action as both intentional and accidental. I shall refer to this as the principle of Act Pluralism.

Act Pluralism has resonated with Anglo-American legal scholars for decades. More than a century ago Salmond wrote:

An act may be wholly unintentional, or wholly intentional, or intentional in part only. It is wholly unintentional if no part of it is the outcome of any conscious purpose or design, no part of it having existed in idea before it became realised in fact. I may omit to pay a debt, because I have completely forgotten that it exists . . . . An act is wholly intentional, on the other hand, when every part of it corresponds to the precedent idea of it, which was present in the actor's mind, and of which it is the outcome and realisation. The issue falls completely within the boundaries of the intent. Finally, an act may be in part intentional and in part unintentional. The idea and the fact, the will and the deed, the design and the issue, may be only partially coincident. If I throw stones, I may intend to break a window but not to do personal harm to any one; yet in the result I may do both of these things.<sup>74</sup>

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72. ARISTOTLE, NICOMACHEAN ETHICS bk. III, ch. 1, 1110a1–15 (Terrence Irwin trans., 1985).

73. *Id.* at bk. III, chap. 1, 1110a1–1111a24; accord H. L. A. HART & A. M. HONORÉ, CAUSATION IN THE LAW 38–39, 130–34 (1978); Salmond, *supra* note 24, at § 134, 414 ("A wrong [in tort] is [wholly] intentional only when the intention extends to all of the elements of the wrong, and therefore to its circumstances no less than to its origins and consequences.")

Aristotle regarded actions done under duress or forced choice (e.g., the robber's command, "your money or your life," or jettisoning supplies from a ship in a storm) as one form of "mixed" actions, containing aspects of the fully voluntary and the "involuntary" (that is, less than fully voluntary). ARISTOTLE, *supra* note 72, at bk. III, chap. 1, 1109b35–1110a19. I shall not discuss further how duress, forced choice, and other forms of compulsion bear on my critique of the Maxim, other than to note that the analysis of these types of less than fully voluntary acts in the context of the occurrence- and accident-based insuring agreements would show that *Delgado v. Interinsurance Exch. of the Auto. Club of S. Cal.*, 211 P.3d 1083 (Cal. 2009), was wrongly decided. The argument for this claim must be left for a later article.

74. Salmond, *supra* note 24, at § 134 at 413–14.

H. L. A. Hart and A. M. Honoré similarly note that in both common speech and legal usage:

. . . a human action is said not to be voluntary or not fully voluntary if some one or more of a quite varied range of circumstances are present: if it is done ‘unintentionally’ (*i.e.* by mistake or by accident); or ‘involuntarily’ (*i.e.* where normal muscular control is absent); ‘unconsciously’, or under various types of pressure exerted by other human beings (coercion or duress); or even under the pressure of legal or moral obligation, or as a choice of the lesser of two evils, which is often expressed by saying that the agent ‘had no choice’ or ‘no real choice’.<sup>75</sup>

Hart and Honoré provide a long list of circumstances that may render an action less than fully voluntary, including physical compulsion, motives of self-preservation, safeguarding of rights, privileges, or interests of self or others, and mistake or ignorance of some relevant circumstance of one’s action.<sup>76</sup> This notion of less than fully voluntary action is sometimes expressed by the adage that “what is voluntary conduct is a matter of degree.”<sup>77</sup>

Courts adopting the Maxim commonly tell us that an accident is an “unintended act” or “an act which the insured does not intend to perform,” where such phrases are meant to exclude all intent from an act.<sup>78</sup> On the

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75. HART & HONORÉ, *supra* note 73, at 38.

76. *Id.* at 134–44.

77. *Id.* at 133. *Accord, e.g.*, Joel Feinberg, *Action and Responsibility*, in *THE PHILOSOPHY OF ACTION* at 117–18 (A. R. White ed., 1968) (“Voluntariness . . . is a matter of degree.”); Stuart v. Weisflog’s Showroom Gallery, Inc., 753 N.W. 2d 448, 458 (Wis. 2008) (an act of misrepresentation “requires a degree of volition inconsistent with the term accident.”) (internal quotation omitted).

The notion that intent can be a matter of degree, and is not always an all-or-nothing proposition, is not foreign to insurance coverage law. It is common for courts to hold that while losses that are subjectively expected or intended are excluded from coverage, acts with a lesser degree of intentionality with respect to the injurious effects, specifically recklessness, gross negligence, and negligence, are not excluded. *See, e.g.*, Thomas v. Benchmark Ins. Co., 179 P.3d 421, 431–32 (Kan. 2008); United Serv. Auto Ass’n v. Elitzky, 517 A.2d 982 (Pa. Super. 1986); Allstate Ins. Co. v. Steinemer, 723 F.2d 873 (11th Cir. 1984). If an actor can have varying degrees of intent with respect to the injurious effects of which a third party complains, there would appear to be no reason why the actor cannot similarly have varying degrees of intent with respect to his own actions. At least there is no principle of insurance law that would prohibit such a conceptualization of an insured actor’s actions for purposes of resolving coverage disputes.

78. *See, e.g.*, Collin v. Am. Empire Ins. Co., 26 Cal. Rptr. 2d 391, 403 (Cal. Ct. App. 1994) (“accident” refers to “an unintended act” and “an act which the insured does not intend to perform”); ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co., 53 Cal. Rptr. 3d 786, 799 (Cal. Ct. App. 2007) (“An ‘accident’ requires unintentional acts or conduct”); Ray v. Valley Forge Ins. Co., 92 Cal. Rptr. 2d 473, 477 (Cal. Ct. App. 1999); Owners Ins. Co. v. James, 295 F. Supp. 2d 1354, 1364 (N.D. Ga. 2003)

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pluralistic theory of action I have presented, such phrases are oxymorons or otherwise meaningless. If champions of the Maxim claim that they are not — as they must — then it is incumbent upon them to declare what they mean by these phrases and to argue for the theory of action that justifies them, all without conceding the principle of Act Pluralism.<sup>79</sup> How can an act be (a) wholly unintended or nonintentional, (b) something other or more than a mere bodily movement, and (c) not an instance of less than fully voluntary action (partially intentional and partially accidental or nonintentional) all at the same time? I submit that it cannot be, and yet that is exactly the position to which proponents of the Maxim are committed.

Advocates of and courts who adopt the Maxim view human conduct as falling into three categories: (a) mere bodily movements, (b) intentional actions in which the actor exercises complete control over his action such that it completely conforms to his intention, and (c) a mysterious, unexplained category of “accidental actions” or “unintentional actions.” The alternative pluralistic view of action also views human conduct as consisting of categories (a) and (b), and has the added virtue of being able to offer an explanation for category (c). Act Pluralism holds that “accidental action” and “unintentional action” refer to an action that is both intentional in some respect and not intentional in some other respect, that is, an action that is “mixed” in being not fully intentional. As I will discuss further in the following Section, these sorts of “mixed” actions are at the heart of many types of coverage disputes, and those disputes only can be analyzed and resolved properly from the perspective of a pluralistic theory of action.

To summarize the critique thus far, the Maxim does not follow as a direct implication of the definition of “accident,” reflects an incoherent theory of intentional action, and is grounded in an assumption of the actor’s complete control over his actions that is an empirically unsound model for many, and maybe most, insurance coverage disputes. These many flaws in the arguments for the Maxim ought, at the very least, to give champions of this rule serious reason to pause and reconsider its merits. They are also, I submit, more than sufficient reason to abandon the Maxim as a general rule of decision altogether.

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(“accident” refers to “an unforeseen or unexpected act that was involuntary or unintentionally done” and to “accidental acts”). *See also* *Cap. City Ins. Co. v. Forks Timber Co.*, No. CV 511–039, 2012 WL 3757555, at \*3 (S.D. Ga. 2012) (“unintentional acts that cause unintended injuries constitute accidents”).

79. To concede that principle is, of course, to reject the monistic “either-or” view of action that informs the Maxim.

#### IV. ACTIONS THAT MISFIRE

When an actor's action does not completely conform to his intention, when the actor performs an action but fails to do what he intends, we may say that his act "misfired." Actions that misfire are the contrary of those actions in which the actor exercises such control that they completely conform to his intention, that is, actions in which the Complete Control assumption is empirically grounded. Actions that misfire are one common type of action at issue in many coverage disputes. In this Section I discuss actions that misfire to further illustrate the fundamental problems with the Maxim (and its associated doctrines, the theory of intentional action, the Complete Control assumption, and the theory of direct causation), and the soundness of a pluralistic theory of action for the resolution of many coverage disputes. Thereafter, in Section V, I use misfires to show the consistency between the pluralistic theory of action I have presented and the fortuity requirement, which is also to demonstrate that the Maxim is not a necessary implication of the fortuity requirement.

##### A. MISTAKEN BELIEF AND IMPROPER EXECUTION

One way an action can misfire is that the actor acts on a mistaken belief (or beliefs) as to one (or more) material circumstances of his action. Aristotle held that one class of "involuntary" actions (that is, less than fully voluntary actions) is that in which the actor is ignorant of the circumstances of the action or the objects with which it is concerned. "A man may be ignorant, then, of who he is, what he is doing, what or whom he is acting on, and sometimes also what (e.g., what instrument) he is doing it with, and to what end . . . and how he is doing it . . ." <sup>80</sup> More recently, Hart and Honoré identify mistake as one of the several circumstances of an action that renders it less than fully voluntary. <sup>81</sup> To revert to an earlier example, Mary was mistaken in her belief that the 61C bus would take her home, and so she boarded a bus that did not take her home. Or, to take a standard example of driving an automobile from a classic coverage opinion by Justice Cardozo: "A driver turns for a moment to the wrong side of the road, in the belief that the path is clear, and deviation safe. The act of deviation is willful, but not the collision supervening." <sup>82</sup> In other words, the driver's belief that the path was clear forms part of the driver's intent to act, and that belief was mistaken. The point to be drawn from these

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80. ARISTOTLE, *supra* note 72, at bk. III, ch. 1, 110b5–111a3-8.

81. See HART & HONORÉ, *supra* note 73, at 38.

82. *Messersmith v. Am. Fid. Co.*, 133 N.E. 432, 433 (N.Y. 1921). See also Fischer, *supra* note 5, at 91.

examples is that when mistaken belief is a property of an intentional action the actor does not exercise complete control over his action and the action can be described as both intentional and as an accident.<sup>83</sup>

Closely related to misfires as a result of mistaken belief are misfires due to improper execution (or mistake in performance). To revert to Justice Cardozo's hypothetical, if asked, the insured driver would state that his intent was to drive safely, to arrive at his destination safely and without causing property damage to a third party, and the like. He did not execute his intent properly, however. His improper performance of his intended act thus could be described as accidental. The improper execution misfire focuses on the end desired or wanted by the insured actor, here, his desire to arrive at his destination safely and without causing property damage to a third party. This is distinct from, but closely related to, the mistaken belief misfire, which focuses on the beliefs of the insured actor and not his desired ends.

Of course, as the example demonstrates, one might improperly perform an action because of a mistaken belief ("there is no oncoming traffic in the left lane"), but a mistaken belief is not a necessary condition of improper execution. Suppose our driver knows that there is an oncoming car but routinely makes sharp turns in front of oncoming vehicles. He improperly performs his firmly held intention of driving safely or arriving at his destination safely, and yet without a mistaken belief. Whether improper execution is joined with mistaken belief or not, an intentional act that is improperly executed often also can be described as an accident even without reference to further effects of the act (*e.g.*, whether the driver hit another car).<sup>84</sup>

Courts that adopt the Maxim commonly reject misfire analysis. Specifically, they often state that a mistaken belief as to some circumstances of the act does not "transform," "change," or "alter" an intentional act into an accident, even where the mistake was not a mistake about the act's injurious effects. In reviewing wrongful termination coverage cases in California, the Court in *Modern Development Co. v. Navigators Insurance Co.*<sup>85</sup> stated, "[a] mistake of fact in an employment

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83. Closely related to mistaken belief is absence of belief. An actor may not have a belief about circumstances relevant to her decision-making, as when, for example, a driver speeds down a dark road and does not know whether the road stays straight or curves sharply to the left or right. I ignore this distinction for present purposes and treat mistaken belief as including absence of a relevant belief.

84. Consider another automobile hypothetical. An insured is intentionally driving to work. As he approaches an intersection, a clearly visible stop sign directs him to stop. Yet he does not stop because he does not see the stop sign. He clears the intersection without colliding with another vehicle. When a policeman pulls him over and asks why he ran the stop sign, the insured driver may correctly say, "It was an accident, I didn't see the sign," or "I was distracted."

85. *Modern Development Co. v. Navigators Insurance Co.*, 4 Cal. Rptr. 3d 528 (Cal. Ct. App.

termination does not transform the intentional act of terminating an employee into an accident thereby triggering an insurer's duty to defend."<sup>86</sup> In a coverage action for rape and sexual assault, the Court rejected the argument that the insured's mistaken belief as to the victim's consent allowed his intentional acts to be described as accidents: "Yet even if a jury was to find that the insured was mistaken in his belief as to whether the claimant 'consented' to the touching, embracing . . . there was still no additional happening constituting an 'accident' which caused the injuries. The other party's consent, or lack thereof, cannot change the [non-accidental] nature of the insured's deliberate acts."<sup>87</sup> In a case of felonious sexual assaults by the insured, the insured claimed that he honestly believed that the victim consented to his assaults, and thus that the assaults, although intentional, were an accident or negligent. The Court rejected the argument that "this mistaken belief 'alter[s] the very character of the act itself' and renders it accidental."<sup>88</sup>

The error in this view is *not* that mistaken belief *does* transform an intentional act into an accident. Rather, the error is found one step earlier. The judicial framing of the issue as being whether an intentional act can be "transformed," "changed," or "altered" into an accident itself is misguided. It misconceives the problem as a sort of pragmatic "alchemy"; to wit, is mistaken belief a catalyst that when added to an intentional act eliminates the intent and transforms it into an accident? When so (mis)conceptualized, it is an easy step for the courts to rule that this "alchemy" must fail. Viewing the issue as one of the change or transformation of an intentional act into an accident is misplaced in the first instance because misfires due to mistaken belief are concurrently both

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2003).

86. *Id.* at 535 (citing and quoting, *inter alia*, *Lipson v. Jordache Enter., Inc.*, 11 Cal. Rptr. 2d 271, 276 (Cal. Ct. App. 1992) ("An employment termination, even if due to a mistake, cannot be unintentional.")).

87. *Quan v. Truck Ins. Exch.*, 79 Cal. Rptr. 2d 134, 143–44 (Cal. Ct. App. 1998).

88. *Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. 273, 280 (Cal. Ct. App. 1989). *See also* *Delgado v. Interinsurance Exch. of the Auto. Club of S. Cal.*, 211 P.3d 1083, 1091–92 (Cal. 2009) (rejecting insured's argument that his unreasonable belief in need for self-defense converts an intentional act into an accident); *Lyons v. Fire Ins. Exch.*, 74 Cal. Rptr. 3d 649, 656–57 (Cal. Ct. App. 2008) (mistaken belief in victim's consent did not make intentional sexual assault and false imprisonment an accident); *Mindis Metals, Inc. v. Transp. Ins. Co.*, 209 F.3d 1296, 1297 (11th Cir. 2000) (Georgia law); *Red Ball Leasing, Inc. v. Hartford Acc. & Indem. Co.*, 915 F.2d 306, 311 (7th Cir. 1990) (Indiana law) ("A volitional act does not become an accident simply because the insured's negligence [in having a mistaken belief] prompted the act."); *Cap. City Ins. Co. v. Forks Timber Co.*, No. CV 511-039, 2012 WL 3757555, at \*6 (S.D. Ga. Aug. 28, 2012) (Georgia law) (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); *Macon Iron & Paper Stock Co. v. Transcontinental Ins. Co.*, 93 F. Supp. 2d 1370, 1374 (M.D. Ga. 1999) (the insured "may have been mistaken about its property rights, but that mistake . . . does not amount to an 'accident' . . .").

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intentional and accidental acts. We can begin to see this by considering actions that misfire because of improper execution.

Consider a few examples of improper execution: misreading a sign, misinterpreting an order, underestimating a weight, and miscalculating a sum.<sup>89</sup> In each of these cases, the actor is doing something intentionally: A misreading is an intentional reading; misinterpreting an order is an interpretation of the order with the intention of interpreting it correctly, and so on. In each case, however, the actor fails to do what he intends, and his action is, then, to some extent outside of his control and accidental (and, significantly, is accidental without the obvious or detectable intervention of an “extrinsic” or “independent” force as required by the Causation Exception). The act is not “transformed” or “changed” from an intentional act into an accident. Rather, the same act can be described as an intentional act, by reference to those properties that make it intentional, or as an accident, by reference to those properties that make it accidental.

The same analysis applies in cases of misfires due to mistaken belief. If I intentionally spill a liquid from my mug believing it is tea when in fact it is coffee, then I intentionally spill the contents of my mug but at the same time accidentally spill the coffee. I did not intend to spill the coffee, and so my action is not an intentional “spilling of the coffee,” even though it is an intentional “spilling of the liquid in my mug” (which I mistakenly believed was tea). Significantly, I did not exercise such effective (let alone complete) control over my action that it completely conformed to my intention. The act I intended — spilling the tea — did not happen at all, and thus did not happen as I intended. The same action, then, is both an intentional act (under one description) and an accident (under another description), with talk of the “transformation” or “change” of one to another being superfluous at best and otherwise misguided.

The judicial rejection of misfire analysis also is sometimes based on evidentiary considerations, namely, the court simply will not credit the insured’s claim that certain acts, particularly repugnant acts of sexual assault or child abuse, were done with a mistaken belief as to a material circumstance of the act, especially when the alleged mistaken belief is unreasonable. But those cases present an issue of the existence, or not, of an evidentiary predicate for the application of a misfire analysis. The existence or absence of evidence in a particular case is not an argument that an intentional act can never misfire such that it would never be proper to also describe it as an accident.

Indeed, some courts that reject the misfire analysis on the facts of the

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89. The examples are from DAVIDSON, *supra* note 28, at 45. My discussion of improper execution in this paragraph and the next borrows from Davidson’s Agency, at 45.

case before them concede, inconsistently, the possibility of misfire in principle. The California Court of Appeal in *Swain v. California Casualty Insurance Co.*,<sup>90</sup> a wrongful eviction coverage case, rejected the misfire analysis for cases of mistaken belief, but suggested that it was acceptable in cases of improper execution: “[W]e can imagine an arguably ‘accidental’ firing where, *e.g.*, the employer intends to discharge John Doe but, through miscommunication, fires Don Joe instead. Similarly, a landlord’s agent might ‘accidentally’ serve notice to quit on the wrong tenant. Those facts are not before us . . .”<sup>91</sup> The Court, however, failed to explain why an act can be described as both intentional and accidental in the case of improper execution misfires but not mistaken belief misfires. It cannot be simply a matter of more credible evidence in one type of misfire (improper execution) than in the other (mistaken belief), since, again, that is simply a matter of the existence, or not, of the evidentiary predicate for applying a misfire analysis to particular facts. Note, further, that in accepting the possibility of the application of a misfire analysis and the dual act descriptions in improper execution cases, the *Swain* Court has implicitly abandoned the Maxim.

Similarly, in *Lyons v. Fire Insurance Exchange*,<sup>92</sup> a coverage case involving alleged sexual overtures and false imprisonment, the Court rejected the misfire analysis as to the insured’s claim that he mistakenly believed that the victim consented and yet discussed two other hypothetical false imprisonment examples in which a mistaken belief would permit an intentional act to be described as accidental. “In the first example, a shopkeeper at closing time intentionally locks his storage vault but forgets he had sent an employee inside to take inventory. In the second example, a store employee honestly but mistakenly detains a customer the employee believes is a shoplifter.”<sup>93</sup> The Court concluded from these examples, “even though conduct is intentional and results in the restraint and control of the movements of another person, false imprisonment can be in some circumstances accidental.”<sup>94</sup> The Court made no attempt to reconcile this conclusion with the Maxim. Rather, the Court attempted to distinguish its own two misfire hypotheticals from the mistaken belief case before it on the grounds that those examples involve “mistakes as to objective facts” whereas the insured here “asserts merely his mistaken subjective belief about another person’s consent.”<sup>95</sup>

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90. *Swain v. California Casualty Insurance Co.*, 120 Cal. Rptr. 2d 808 (Cal. Ct. App. 2002).

91. *Id.* at 813.

92. *Lyons v. Fire Insurance Exchange*, 74 Cal. Rptr. 3d 649 (Cal. Ct. App. 2008).

93. *Id.* at 655 (internal citations omitted).

94. *Id.*

95. *Lyons*, 74 Cal. Rptr. 3d at 656.

The distinction is spurious. The mistaken beliefs of the insured in *Lyon* and of the store employee with respect to the hypothetical shoplifter are equally “subjective”; further, the victim’s consent, or lack of consent, to the imprisonment and restraint is equally an “objective fact” in the case that was before the Court and in its hypotheticals. The Court offered no grounds for holding otherwise and, I submit, there are none. A belief actually held by an actor cannot be anything other than “subjective” and, if one likes the language of “objective facts,” it is difficult to see how the fact of a person’s consent (or lack of consent) to being the recipient of an act of another could be any less “objective” than any other fact (the employee is in the storage vault) that may (or may not) exist.<sup>96</sup>

Sometimes we flub an act — it misfires. There is no good general argument for the rejection of the proposition that, when the appropriate evidentiary basis exists, an action may misfire and, when it does, the action is both intentional and accidental.

#### B. MISFIRES AND DIRECT CAUSATION

If the foregoing analysis of misfires is correct, then there is no need to embark on a quest for an “external” intervening or concurrent cause to “transform” or “alter” an intentional act into an accident.<sup>97</sup> There are properties of the act itself — “internal” to the act, if one favors that language — that make both the description of the act as intentional and the description of the act as an accident true. A mistaken belief is an ill-formed or incorrect part of the actor’s intention itself (“I believe the liquid in the mug is tea” when in fact it is coffee), and this “internal” property of my act permits it to be described as an accidental spilling of the coffee, even while it is also intentional spilling of the contents of the mug. Mistaken belief as to material circumstances of an action can make that action an accident no less than an “external” intervening or concurrent cause. My wife asks, “why did you spill out your coffee?” and I very naturally answer, “it was an

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96. The judicial rejection of the view that a mistaken belief may “transform” an intentional act into an accident also may be informed, more or less implicitly, by the view that there is a sharp demarcation between an action as a bodily movement plus intent, on the one hand, and the circumstances or consequences of the act, on the other hand. *See supra* notes 64-68 and accompanying text. On this view, a mistaken belief as to the circumstances in which an action takes place or as to its consequences is a mistake with respect to something other than the action itself and, further, is distinct from the conative aspect that purportedly is the whole of intentionality (that is, the want or desire). A mistaken belief, then, cannot alter the intentional nature of the bodily movement that is (deemed to be) the action and, hence, a mistaken belief cannot transform an intentional act into an accident. I have discussed previously the difficulties with this view of intentional action. *See supra* notes 64-68 and accompanying text, and Section III.B.2 generally.

97. *See supra* notes 85-88 and accompanying text.

accident; I didn't intend to; I thought it was tea." My colleague asks, "why did you add the column of numbers incorrectly?" and I answer, "it was an accident; I didn't intend to; I made a mistake." The theory of action informing the Maxim and the corollary of direct causation cannot account for this very common use of "accident" and our common characterization of some of our acts as both intentional and accidental without the presence of any "external" cause.

It is useful to consider one of the leading cases in which a court appeals to the theory of direct causation to bolster its analysis of a mistaken belief misfire, and to see why its use of the theory of direct causation is especially flawed. In *Red Ball Leasing, Inc. v. Hartford Accident & Indemnity Co.*,<sup>98</sup> the insured seller repossessed four trucks because its accounting system erroneously indicated that the buyer had defaulted on its payments. The United States Court of Appeals for the Seventh Circuit rejected mistaken belief misfire analysis, stating "a volitional act that is based on erroneous information is not an 'accident' or 'occurrence.'"<sup>99</sup> The Court attempted to justify this view by the Complete Control assumption and the theory of direct causation:

The only relevant consideration is whether . . . the chain of events leading to the injuries complained of was set in motion and followed a course consciously devised and controlled by appellant without the unexpected intervention of any third person or extrinsic force.<sup>100</sup>

This argument is doubly flawed.

First, if the insured's mistaken belief is credited as fact, as it was here, then the "course" of events that occurred — the conversion of the trucks — was not "consciously devised and controlled" by the insured through his action(s). The insured's mistaken belief just means that he did not "consciously devise" "to convert the trucks." Rather, he "consciously devised" "to repossess the trucks consistent with his legal rights" (or to bring about some other similarly legitimate purpose), and that did not

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98. 915 F.2d 306 (7th Cir. 1990) (Indiana law). The Indiana Supreme Court later rejected *Red Ball Leasing* as a correct statement of Indiana Law. *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1285–86 (Ind. 2006). Nonetheless, for the points discussed here, *Red Ball Leasing* did not rely on any Indiana law, but rather on cases from other jurisdictions. Moreover, it is an oft relied on case (*see, e.g., CRC Scrap Metal Recycling, LLC v. Hartford Cas. Ins. Co.*, No. 7:12–146–HMH, 2012 WL 4903661, at \*5 (D.S.C. Oct. 15, 2012)), and its reasoning is paradigmatic on misfires and direct causation, and so it merits analysis.

99. *Red Ball Leasing, Inc.*, 915 F.2d at 310 (quoting *Ed Winkler & Son, Inc. v. Ohio Cas. Ins. Co.*, 441 A.2d 1129, 1132 (Md. Ct. Spec. App. 1982)).

100. *Id.*

happen because of his mistaken belief.<sup>101</sup> It is inconsistent for the Court to hold both that the insured acted with a mistaken belief as to the buyer's default and that in acting under that mistaken belief the insured "consciously devised" the alleged conversion. The insured did not do the act he intended and, therefore, the Complete Control assumption is not empirically grounded in this case.

A champion of the Maxim may respond, citing to *Red Ball* and many other cases, that the inescapable fact is that the insured did exactly what he intended to do. "*Red Ball* intended to repossess the trucks" and it did just that.<sup>102</sup> In a coverage case in which insureds took more than 5,000 cubic yards of "borrow material" (dirt, rocks, and the like) from land under the mistaken belief that the seller had title to the material, the Court stated that in removing the material the insureds "did exactly what they intended to do."<sup>103</sup> Similarly, in a coverage action in which the insured cut up railcars for use as scrap metal in the mistaken belief that it had good title to them, the insured "at all times acted in a deliberate and purposeful manner," it "intended to damage the railcars . . ." and it did just that.<sup>104</sup>

This response, however, is unsatisfactory because it purports to identify the insured's intent without reference to the insured's beliefs about the material circumstances of his action that are part of that intention. In each case, the insured acted with a belief as to its legal rights (that the buyer of the trucks had defaulted on its loan, that the sellers of the borrow material and railcars had good title to the property). The champion of the Maxim takes those beliefs to be distinct from, or merely ancillary to, the insured's intent rather than being an essential part of that intent. This is an error. In each case the court credits the insured's claim that in fact it acted on that mistaken belief; these are not cases in which the alleged mistake is not credited as being true. In each case, then, the insured's action cannot be explained apart from and without including that mistaken belief; but for the mistake the insured would not have acted intentionally as it did. A man may desperately want an ice cream cone but that want alone does not explain why he walked into an ice cream shop. For that explanation, we also must know that he believed that he could buy an ice cream cone in that shop.<sup>105</sup> An actor's belief about the material circumstances in which the actor is acting or about to act, is not, then, distinct from intentionality, but rather is an essential component of it, along with desires. Because the

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101. *Red Ball Leasing, Inc.*, 915 F.2d at 309.

102. *Id.*; see *id.* at 311–12.

103. *Argonaut Southwest v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973).

104. *Macon Iron & Paper Stock Co. v. Transcontinental Ins. Co.*, 93 F. Supp. 2d 1370, 1375 (S.D. Ga. 2012).

105. DAVIDSON, *supra* note 28, at 3–8.

description of an action can include, and typically does include, some of the circumstances in which the actor is acting,<sup>106</sup> his beliefs as to those circumstances, whether correct or mistaken, are properly viewed as beliefs about the action itself, and not just something (circumstances or consequences) external or extrinsic to it.

Second, the *Red Ball* Court's direct causation theory only recognizes the intervening act of a third person or the intervention of an "extrinsic force" as possible events that could "convert" an intentional act into an accident. But that theory is viable only if the Complete Control assumption is applicable, and in this case it is not. Moreover, while insurance coverage courts commonly refer to "extrinsic" forces and events, we would do well to ask by what criterion is "extrinsic-ness" to be determined. In *Red Ball*, the insured's accounting system erroneously indicated that the buyer had defaulted. Why isn't human error in entering information into a computer or computer-generated misinformation an "extrinsic" concurrent or intervening cause? What standard declares that it is not and why must that standard be adopted?

Moreover, what is so special about "extrinsic" causes that gives them special status over "intrinsic" or "internal" causes, such as we may classify mistaken belief? Extrinsic causation is not an essential element of the Causation Exception to the Maxim or of a theory of direct causation. In the leading California case adopting the Maxim and the direct causation theory, *Merced Mutual Insurance Co. v. Mendez*,<sup>107</sup> the Court stated the Causation Exception as: "an 'accident' exists when *any* aspect of the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity."<sup>108</sup> As stated, the Causation Exception is sufficiently broad to include mistaken belief. The insured-actor cannot intend to be mistaken, or know or believe herself to believe something false, and so her mistaken belief is "unintended . . . and a matter of fortuity." That mistaken belief is an "aspect of the causal series of events leading to the injury or damage" — but for that belief she would not have done what she did. In short, "externality" or "extrinsically" is not required by the Causation Exception or the theory of direct causation and it is arbitrary to insert such a requirement into the Exception or the theory.<sup>109</sup>

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106. See *supra* notes 64–68 and accompanying text.

107. 261 Cal. Rptr. 273 (Cal. Ct. App. 1989).

108. *Id.* at 279 (emphasis added). See also *supra* note 61 and accompanying text.

109. The idea that a fortuitous cause or event must be "extrinsic" or "external" is commonly found in first-party property insurance case law, which traditionally has held that "intrinsic" or "internal" defects in a product or chattel were not fortuitous. Professor Abraham explains that the "internal-cause" exclusions in first-party property policies (e.g., exclusions for loss resulting from latent and design defects, inherent vice, mechanical breakdown, and ordinary wear and tear) "reflect the heritage of property insurance as peril-based coverage. When property breaks down, ceases to function, or

In sum, advocates of, and courts that adopt the Maxim, view causation as being of only two kinds: (a) the direct causation of an intentional act in which the actor exercises complete control over her action and (b) causation consisting of an intentional act plus an “extrinsic,” “external,” or “independent” event that is a concurrent or intervening cause. Under the alternative pluralistic theory of action, causation is of three kinds, namely, kinds (a) and (b) above, plus (c) the “internal” causation of misfires due either to mistaken belief or improper execution (mistake in performance). As I will discuss in the following Section, the “internal” causation of misfires is entirely consistent with the fortuity requirement, given the appropriate evidentiary predicates. There is no sound reason *a priori* or grounded in the insurance doctrine of fortuity to reject “internal” causation as a legitimate source of fortuity in intentional action.

When actions misfire they can be truly described as both intentional (voluntary) and accidental (less than fully voluntary). Judicial rejection of misfire analysis on the ground that intentional acts cannot be “transformed” into accidents is conceptually misguided from the start. In addition, whether misfire analysis applies in any particular case is a matter of the evidence, not a matter of a general rule. Misfire analysis further illustrates the problems with the theory of direct causation that informs the Maxim; an “extrinsic,” “external,” or “independent” cause is not a necessary condition for an intentional act to be an accident.

## V. MISTAKEN BELIEF MISFIRES, “ACCIDENT,” AND FORTUITY

merely deteriorates, loss has occurred without the occurrence of any evident peril.” Abraham, *supra* note 38, at 784–85. Beyond this historical explanation for the presence of such exclusions in first-party policies, these exclusions allow insurers to decrease the probability that they will cover losses resulting from the low quality of the property insured, and thus allow insurers to avoid the adverse selection that may result when an insured purchases property of below-average quality and insures it for that reason or for more than those whose property is of average or higher quality. *Id.* at 785. That rationale, however, permits us to draw only an attenuated connection between internal-cause exclusions and the fortuity requirement. The “internal cause” exclusions do not bar coverage for all losses resulting from internal causes, but generally only those losses to the property itself and only if the losses are caused exclusively by the internal deficiency. *Id.* at 785–86. If a commercial freezer malfunctions because of a design defect, the loss of the freezer typically would not be covered, but the loss to the food products it makes or stores would be covered. *Id.* at 786.

There are obvious conceptual parallels between the historical rejection of internal causes as fortuitous in first-party property coverage disputes and the notion in third-party liability coverage case law that only an “extrinsic” or “external” cause can convert an intentional act into an accident. Whatever may be the merits of this limitation in the first-party context, my contention is that it is not appropriate in the third-party liability context at issue in this article. Moreover, to the extent that some first-party coverage is available when losses are caused by a so-called “internal cause,” that suggests that the search, in third-party liability coverage disputes, for an “extrinsic,” “independent,” or “external” cause as the only type of causal factor that allows us to regard some intentional acts as accidents is too strong a requirement even should one find the first-party “peril-based” doctrine persuasive.

The foregoing analysis of mistaken belief misfires implies the compatibility between intentional action, on the one hand, and the fortuity requirement and common definitions of “accident” adopted by courts, on the other hand. In this Section I shall argue for this important conclusion in further detail. If this conclusion is correct, then it provides another reason why the Maxim is a legal error that should be scrapped.

In cases of mistaken belief where the mistake is credited as fact, when the act is described in such a way as to expressly or implicitly incorporate the mistake, then the act-so-described is an “accident” because it satisfies one or more of the common definitions of the term. It is, to quote a leading California case, “an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause” and is “something out of the usual course of events . . . which happens suddenly and unexpectedly and without design.”<sup>110</sup> The host of cases arising out of alleged acts of trespass and/or conversion provides a useful illustration of this point. In the typical insurance coverage fact pattern for such cases, the insured-actor’s argument for coverage is that he (mistakenly) believed that he had legal rights to possess or have access to some chattel or real property, that he intended only to do an action consistent with those rights, and that, accordingly, his intentional act was an accident. Courts adopting the Maxim routinely, and incorrectly, reject such arguments.

In *Argonaut Southwest v. Maupin*, for example,<sup>111</sup> the insured truly believed that it had a contractual right to remove borrow material from a parcel of land. Accordingly, its act could be properly described as “intentionally exercising my contractual right to move the borrow material,” which is coverage-neutral because the act-so-described is not a cause of (actionable) injurious effects to a third party. When the act is described to reflect the actual facts, e.g., “trespass and/or conversion of the borrow material (because the other contracting party was not the true owner and had no authority to sign the contract for the removal of the material),” the insured could truly say, “yes, I now (*ex post*) understand I did *that*, but I did not know I was doing *that* and I did not intend to do *that*.” He may further add, accurately, even if somewhat artificially, “I did *that* without intent, foresight, expectation, or design — it was an accident and fortuitous from my perspective. I had no intent to do an act (or cause a loss) that activated the insurer’s duties to defend or indemnify.” From the insured’s perspective, the happening of a trespass or conversion of the borrow

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110. *Collin v. Am. Empire Ins. Co.*, 26 Cal. Rptr. 2d 391, 403 (Cal. Ct. App. 1994) (internal quotations omitted).

111. *Argonaut Southwest v. Maupin*, 500 S.W. 2d at 633.

material was fortuitous, and not a certainty caused by his action *as he intended and understood it when acting*, and not an event over which he had complete control. The insured did not *intend* (expect, foresee, etc.) to turn a coverage-activating event that was otherwise contingent from his perspective and that of the insurer into a certainty by virtue of his action.<sup>112</sup> His action, then, was both fortuitous and accidental (from the insured's point of view and from an insurance-as-a-contractual-relation perspective) and intentional (since the insured acted with intent). The same analysis applies to virtually all of the many trespass and conversion cases in which the courts have rejected misfire analysis and applied the Maxim to deny coverage.<sup>113</sup>

Some courts have attempted to avoid this conclusion by rejecting mistaken belief as to the "legal significance of a particular act" as a ground for describing the insured's act as an accident. In *Macon Iron & Paper Stock Co. v. Transcontinental Insurance Co.*,<sup>114</sup> the insured cut up railcars to use as scrap metal in the mistaken belief that the seller, the General Manager of the railroad, had the authority to sell the railcars. In the railroad's subsequent action for conversion and other torts, and in the coverage litigation, the defendant-insured argued mistake as to ownership of the railcars. The Court rejected the claim that a mistake as to the "legal significance of a particular act" could permit an act to be an accident within the insuring agreement of a CGL policy in conclusory fashion: "Plaintiff intended to damage the railcars — it was cutting them up for use as scrap metal. This action may have been due to a mistake as to ownership, but there was nothing 'accidental' about it."<sup>115</sup> The Court fails to provide any argument as to why a mistake as to "legal significance" or the property rights of a third party is not a mistake as to a material circumstance of an action that constitutes a misfire and permits the action to be described as an

112. See Knutsen, *supra* note 35, at 236, 238, 243 (making a similar point with respect to intended losses).

113. See, e.g., *Mindis Metals, Inc. v. Transp. Ins. Co.*, 209 F.3d 1296, 1297 (11th Cir. 2000) (Georgia law) (conversion of scrap metal; incorporating and relying on the entire opinion of the court in *Macon Iron & Paper Stock*); *Red Ball Leasing, Inc. v. Hartford Acc. & Indem. Co.*, 915 F.2d 306, 311 (7th Cir. 1990) (Indiana law) (conversion of trucks); *Cap. City Ins. Co. v. Forks Timber Co.*, No. CV 511-039, 2102 WL 3757555, at \*6 (S.D. Ga. 2012) (Georgia law) (conversion of timber); *Macon Iron & Paper Stock Co. v. Transcontinental Ins. Co.*, 93 F. Supp. 2d 1370, 1374 (M.D. Ga. 1999) (conversion of railcars); *Brazoswood Nat'l Bank v. Fid. Deposit Co. of Md.*, No. 14-97-00129-CV, 1998 WL 30166 (Tex. Ct. App. Jan. 29, 1998) (conversion of equipment and accounts receivable); *Thomason v. U.S. Fid. & Guar. Co.*, 248 F.2d 417 (5th Cir. 1957) (Ala. law) (trespass on land).

114. *Macon Iron & Paper Stock Co. v. Transcontinental Insurance Co.*, 93 F. Supp. 2d 1370 (M.D. Ga. 1999); *accord Cap. City Ins. Co.*, 2012 WL 3757555, at \*5-6 (citing *Macon Iron & Paper Stock* favorably and rejecting the argument that the insured's mistake as to the "unexpected legal consequences" of his action, *i.e.*, conversion of timber), rather than the "unintended real consequences," permitted the intentional action of harvesting timber to be described as an accident).

115. *Id.* at 1375.

accident. Notwithstanding the catchy lyrics of an '80s pop song,<sup>116</sup> we don't just live in a material (physical) world; it is also a world full of social and legal relations that constitute the material (in the legal sense of the term) circumstances of our actions, and indeed, of many of our most important actions. There is no reason why these social and legal relations should not count in coverage analyses of actions that misfire due to mistaken belief.

Misfires due to mistaken belief also are entirely consistent with fortuity when legal relations are not implicated. In the case of *State Farm Fire & Casualty Co. v. Superior Court (Wright)*,<sup>117</sup> the insured, in the midst of an argument, intentionally picked up the underlying plaintiff and threw him into a swimming pool, with the intent that the plaintiff get wet but with no intent to injure the plaintiff. The insured, however, did not throw the plaintiff out far enough into the water; the plaintiff landed on the pool's concrete steps and sustained a serious injury. The insured's act "misfired" either as a result of a mistaken belief or improper execution or both. The Court describes the misfire as a mistaken belief as to causation: "[the insured] miscalculated one aspect in the causal series of events, namely, the force necessary to throw [the plaintiff] far enough into the pool so that he would land in the water."<sup>118</sup> Thus the insured's misfired intentional act was described by the Court as "throwing too softly so as to miss the water" and the act, so described, "was an *unforeseen or undesigned happening or consequence* and thus was fortuitous."<sup>119</sup> In other words, the act was an accident. At the same time, the Court described the act as an intentional act: "he deliberately picked up [the plaintiff] and threw him in the pool."<sup>120</sup> Alternatively, the act that the insured intended could be described narrowly (without regard to its effects) as an intentional act — "[I intended to] throw him into the middle of the pool" — or as an accident — "I threw him on the concrete steps [but did not intend to]." The bracketed phrases are designed to show that the act was intentional under the first description and was an accident under the second description.

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116. MADONNA CICCONE, *LIVING IN A MATERIAL WORLD* (Sire Records 1984).

117. *State Farm Fire & Casualty Co. v. Superior Court (Wright)*, 78 Cal. Rptr. 3d 828 (Cal. Ct. App. 2008). Consistent with the California courts' adoption of the Maxim and general rejection of the misfire analysis I have proposed here, *Wright* has not been followed by any other California case and has been criticized by later California appellate courts as "'in variance' with the California rule that 'accident' refers to 'the nature of the act giving rise to liability; not to the insured's intent to cause harm.'" *State Farm Gen. Ins. Co. v. Frake*, 128 Cal. Rptr. 3d 301, 312–14 (Cal. Ct. App. 2011) (quoting *Fire Ins. Exch. v. Superior Court (Bourguignon)*, 104 Cal. Rptr. 3d 534, 537–38 (Cal. Ct. App. 2010)). For reasons stated in the text, I submit that these criticisms are misguided.

118. *Id.* at 836.

119. *Id.* (emphasis in original).

120. *Id.*

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When an actor acts under a mistaken belief as to a circumstance of her action or its consequences that is material to coverage under the policy, she lacks complete control (and lacks effective control to some lesser or greater extent) over her action and does not act with the intent to cause the event that activates the insurer's duties under the policy. That is, her intentional act is also accidental and fortuitous (and every bit as fortuitous as when something "extrinsic" has a role in causing the event that activates the insurer's duties, if not more so). In acting on such a mistaken belief, the insured acts intentionally, but she does not intend to do an act that activates the insurer's duties.

To illustrate this abstract point concretely, suppose we change the prosaic example of my mistakenly spilling the coffee in my mug to a more coverage-significant example of a worker mistakenly spilling toxic waste from barrels. The worker may intend to spill the liquid from the barrel onto the ground, but does not intend to spill toxic waste, because he mistakenly believes the liquid in the barrel is nontoxic (he believes it is rainwater or has been properly treated, etc.). His action can be truly described both as intentionally spilling liquid from the barrels and as nonintentionally (accidentally or fortuitously) discharging toxic waste (or causing property damage). He did intend to "spill the nontoxic liquid in the barrels" or "spill rainwater from the barrels," and his act so described would not activate the insurer's duties if that is in fact what the insured did. He did not intend to "discharge toxic waste" (or "cause property damage"), and it is that act that happened and that activated the insurer's duties.<sup>121</sup> There is no asymmetrical information or belief on which the insured acts contrary to the basis of its bargain with the insurer. Because his mistaken belief is coverage-neutral, that is, it would not activate the insurer's duties if it were true and acted on, the insured has no intent to make happen the event that activates the insurer's coverage obligations. His action, then, is both intentional (under one true description) and does not conflict with the fortuity requirement, because he does not intend to do the coverage-activating act or to cause it. We can state this point as a general rule: In those instances, in which an insured acts on a mistaken belief and such an act (described with reference to the mistake) would not activate a duty of the insurer under the policy, then the insured does not violate the fortuity requirement, the act is an "accident" within the meaning of occurrence- and accident-based insuring agreements, and coverage should be forthcoming (subject to other policy terms). There is nothing in the fortuity requirement

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121. See Salmond, *supra* note 24, at § 134, at 414 ("To trespass on A's land believing it to be one's own is not a willful wrong. The trespasser intended, indeed, to enter upon the land, but he did not intend to enter upon the land of A. His act was unintentional as to the circumstances that the land belonged to A.").

that demands that coverage be denied in such cases of mistaken belief.<sup>122</sup>

This analysis of misfires due to mistaken belief also aligns nicely with the fortuity requirement considered in Section III.A.2 above. Under New York's insurance statute, a "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>123</sup> In cases of action on mistaken belief as to a material circumstance or aspect of the action, where such an action activates the insured's duties under the policy, the mistake takes the insured's action "to a substantial extent" beyond his control, where "control" refers not only to the insured's physical power but also to his corresponding cognitive state in directing and guiding his action to produce a desired outcome. Such actions, e.g., spilling of toxic waste from a barrel, are, moreover, "assumed by the insured to be" beyond his control because he (mistakenly) believed that he only had the power to spill the contents of the container that were not toxic waste.<sup>124</sup> A similar analysis applies with respect to the definition of a "fortuitous event" found in the Restatement of Contracts.<sup>125</sup> From the perspective of the insured, an action done on a mistaken belief is "dependent on chance"; the action described with respect to the mistaken belief, e.g., spilling the toxic waste, is (a) outside the actor's effective control (but for the mistake he would not have done the action), and (b) unknown to the insured-actor until his belief is corrected (since an actor cannot be mistaken and know he is mistaken at the same time, and cannot intend to be mistaken).

Fortuity is lacking "when the thing to be done [by one party, the insurer] is supposed to depend on the will of the other party [the insured] . . . ."<sup>126</sup> In an insured's action on a mistaken belief, the activation of the insurer's duties does not depend on "the will" — i.e., the intention — of the insured, since the insured did not "will" (intend) to do the act that activates those duties, though in fact he did that act intentionally (under another description). He nonintentionally or accidentally did the coverage-activating act (spilling the toxic waste) while at the same time doing the

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122. The insured's assertion that he did act on a mistaken belief is always subject to testing against the evidence, of course. The rule does not require acceptance of the insured's assertion of mistake *ipse dixit*.

123. MCKINNEY'S INS. LAW, *supra* note 39.

124. An identical analysis applies when we consider an insurance contract as an aleatory contract, one that contains a "promise conditional on the happening of a fortuitous event, or event supposed by the parties to be fortuitous." See Stempel, *supra* note 24 and accompanying text. An action that misfires due to the actor's mistaken belief as to a material circumstance of his action is "an event supposed by the parties [and specifically by the insured] to be fortuitous." *Id.*

125. See RESTATEMENT, *supra* note 40 and accompanying text.

126. BLACK'S LAW DICTIONARY 36 (Abridged 5th ed. 1983) ("Aleatory Contract"); see also BLACK'S LAW DICTIONARY 390 (10th ed. 2014).

same act with a different, coverage-neutral intention (intending to spill the rainwater). Moreover, in such a misfire, there is no information (or belief) asymmetry that the insured actor can exploit to transfer to the insurer a loss (or risk of loss) that the insurer would not have accepted if it had the same information (belief) as the insured actor. The basis of the insurance bargain is preserved when the insured's act misfires.<sup>127</sup>

Courts that reject misfires arising out of mistaken belief as inconsistent with fortuity effectively reject the notion that fortuity is to be assessed from the insured actor's subjective point of view. More particularly, they reject her cognitive state (her actual beliefs) and also reject her appetitive or conative state (her desire or want to perform *this* action, rather than the action she in fact performed). At a minimum, this rejection is inconsistent with many of those same courts' rule that "accident" is to be determined from the insured's point of view.<sup>128</sup> It is also inconsistent with the blackletter rule that fortuity is to be determined from the point of view of the parties to the insurance contract, and especially from the point of view of the insured.<sup>129</sup>

If the preceding arguments are correct, the Maxim must be rejected. Intentional acts are not as a general matter or necessarily inconsistent with the fortuity requirement. To the extent that there is still cognitive resistance to this conclusion, I suggest that it is, in part, a remnant of an understanding of fortuity as a function of the happening of physical events such as the unexpected icing of a road or a storm at sea. That physicalistic approach is clearly part of the theory of direct causation and the Causation Exception to the Maxim. On this theory, intentional acts are like cue balls that send their effects into the world (4-ball into the corner pocket) unless deflected from their course by an "extrinsic" intervening or concurrent cause (a ricocheting 9-ball), in which case the intentional act is deemed to be an "accident." While this "billiard ball" theory of causation may be useful and appropriate in many instances, there is no reason to believe that

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127. I submit that the same considerations that show that misfires due to mistaken belief exhibit both fortuity and intentionality can also be applied, *mutatis mutandis*, to improper performance misfires. But the argument for that assertion must be left for a later effort.

128. See *supra* note 27.

129. See *supra* Section III.A.2. This rejection also does not comport with the reasoning embodied in the majority rule adopted by the Injurious Effects Only school, that is, that whether injurious effects are expected or intended — that is, not fortuitous — is to be determined according to the subjective point of view of the insured. See, e.g., *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072 (Fla. 1998); *Preferred Mut. Ins. Co. v. Gamache*, 686 N.E.2d 989 (Mass. 1997); *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1088 (Colo. 1991); *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1153 (2d Cir. 1989). See also KEETON & WIDISS, *supra* note 9, at § 5.4(c) at 511 (endorsing the subjective approach); 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, 76 nn. 51–52 (2012) (the subjective standard is the majority rule) (citing numerous cases).

it is well-suited for the analysis of liability insurance coverage disputes, that it exhausts the possible applications of the concept of fortuity, or that it comports with, let alone is required by, the pluralistic understanding of intentional action that I have articulated here.

## VI. THE ALTERNATIVES TO THE MAXIM

If I am correct in concluding that the Maxim must be rejected as a general rule, the obvious question then is: what is the alternative rule? Broadly, there are two options. The first option is to reject the premise of the Causative Acts school that “accident” refers to the causative act and not the injurious effects of such an act. That would lead to the adoption of one of the interpretations of “accident” employed by the Injurious Effects Only school.<sup>130</sup> I shall not explore that option further. The other option is to maintain the Causative Acts view that “accident” refers to the causative act independent of intended effects and, if possible, to formulate a rule consistent with that approach that is not burdened with the deficiencies of the Maxim. I shall explore this second option here, assuming *arguendo* the appropriateness of the Causative Acts approach.

In those cases, in which an act can truly be described as either intentional or accidental, an occurrence- or accident-based insuring agreement places before the court the question which description applies. The starting point in answering that question must be the very same language of the insuring agreement at issue. A defining feature of occurrence- and accident-based liability insuring agreements is that they provide that an accident be the cause of injurious effects of which the third party complains.<sup>131</sup> The first inquiry under such agreements, then, is whether the act can be described as an accident and thus is *within* the grant of coverage. The first question is not, as advocated by proponents of the Maxim,<sup>132</sup> whether the act can be described as intentional and thus *outside* the grant of coverage. To ask as an initial matter whether the act is intended by the insured, where an affirmative answer would take the act outside of the coverage grant *before one ever gets to the question of whether the act can also be described as an accident*, is to treat the grant of coverage as an exclusion. This is to stand the proper coverage analysis on its head.<sup>133</sup> There is no intentional *act* exclusion in post-1966 standard

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130. See, e.g., French, *supra* note 129, at 76-79; see also *supra* notes 10-12 and the authorities cited therein.

131. See *supra* Section II.

132. See, e.g., Collin v. Am. Empire Ins. Co., 26 Cal. Rptr. 2d 391, 403 (Cal. Ct. App. 1994) (“the term “accident” refers to the insured’s intent to commit the act giving rise to liability. . .”).

133. See generally Schinner v. Gundrum, 833 N.W.2d 685, 693 (Wis. 2013); Capstone Bldg. Corp.

form occurrence- and accident-based CGL policies, and *a fortiori*, no such exclusion is to be found in their insuring agreements. Rather, there is only express exclusionary language for injurious effects “expected or intended from the standpoint of the insured.”<sup>134</sup> The Maxim, however, effectively rewrites these types of policies to include an intentional *act* exclusion in the policies’ *grant* of coverage.<sup>135</sup>

Once one has identified an act that is properly described as an accident, the next step in the decision procedure mandated by the accident-cause-injuries insuring language is whether that act so described is a cause of covered injuries to the interests of a third party. Courts that adopt the Maxim (and the insurers who advocate it to the courts) have yet to explain why *only* the term “accident” in the insuring agreement is the relevant focus of the coverage decision procedure. They cannot explain this because the terms of the insuring agreement ask a broader question — whether there is an accident that is the cause of covered injurious effects for which the underlying plaintiff seeks a remedy. Questions (and disputes) under liability insurance policies arise only if a third party claims that the insured’s actions (or the actions of someone for whom the insured is legally liable, say, under a theory of vicarious liability)<sup>136</sup> were a cause of his injury.<sup>137</sup> Without such injurious effects, the insured’s action would not give rise to any coverage questions and, from a coverage perspective, would be a nullity (as most actions commonly are because they do not result in injurious effects that give rise to a coverage claim, e.g., when I am jostled in a crowded elevator by a fellow passenger). (Similarly, when the insured’s action is described more inclusively to refer to its properties that

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v. Am. Motorists Ins. Co., 67 A.3d 961, 974 (Conn. 2013); Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 137 P.3d 486, 490 (Kan. 2006); Auto-Owners Ins. Co. v. Home Pride Cos., Inc., 684 N.W.2d 571, 576 (Neb. 2004).

134. Allstate Ins. Co. v. Moulton, 464 So.2d 507, 509 (Miss. 1985) (“There is no express disclaimer in the policy for acts ‘intentionally’ done . . .”); 21 HOLMES’ APPLEMAN ON INSURANCE 2D, INSURANCE LAW & PRACTICE § 132.2[A] (2006) (“Moreover, the new 1986 ‘intentional injury’ exclusion excludes an intentional ‘injury’ rather than an intentional ‘act.’ Consequently, this ‘intentional injury’ exclusion does not exclude liability insurance protection of an insured who commits an intentional act, unless the consequences (harm) of the act was either intended or expected from the standpoint of the insured.”); *Id.* at § 132.2 [B](2).

135. My argument here does not depend upon the blackletter rule of construction that insuring agreements are to be interpreted broadly. *See, e.g.*, S. Plitt et al., 2 COUCH ON INSURANCE § 22:31, nn. 2–3 (3d ed. 2010) (stating the blackletter rule that insuring agreements are to be broadly construed in favor of coverage). Rather, my argument is that independent of that rule and, further, independent of any position on whether the term “accident” is ambiguous, if one does not *begin* by asking whether there is a basis for the act in question to fall within the grant of coverage (for it to be described as an accident), then there is no *grant* of coverage, or only a weak and nearly vacuous one.

136. *See supra* note 63 and the cases and authorities cited therein.

137. Events that are not actions of the insured or anyone else may also be an accident for which a third party seeks to hold the insured liable. We can ignore this refinement here.

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are neither accidental nor casually related to injurious effects that are covered under the insuring agreement, that broader description is not coverage relevant.)

A champion of the Maxim may object that this focus on the causal relation between an accident and the injurious effects is unnecessary. There is no need to look at the causation issue if the act is intentional, because in that case there is no accident and no coverage *ab initio*, by virtue of the Maxim. This, however, turns the proper coverage analysis upside down, as just discussed. To sharpen this point, the salient question cannot be whether the insured intended to do the act *simpliciter*. The answer to that will always be in the affirmative, since by definition an act is intentional under one or more descriptions.<sup>138</sup> As one jurist noted, without a hint of criticism or irony, in commenting on Mississippi's application of the Maxim, "the test to determine if the insured's actions were intentional is whether the insured intended the action, not the consequences of the action."<sup>139</sup> This "test" is a tautology, and hence will always be satisfied for any action. There will always be *some* description under which the action is intentional, and quite often, when intent to do the act is the criterion for the act description, many such descriptions.<sup>140</sup>

Finally, it is important in the decision procedure to recognize that the insuring language instructs us that, although it is possible and not uncommon to describe an act broadly to include its effects,<sup>141</sup> those descriptions are not coverage-relevant. Rather, the language requires us to treat the injuries for which the third-party plaintiff seeks a remedy as consequences distinct from the insured's action, such that a coverage relevant act description will describe the act in terms of its accidental character and causal role in producing such distinct injurious effects.

In sum, the salient insuring agreements require that an accident cause covered injurious effects (usually bodily injury or property damage) for which a thirdparty seeks to impose liability. The first question in the coverage analysis under these *grants* of coverage, then, is whether (1) there is an aspect or property of the act in question that permits it to be truly described as an accident (because the actor lacked control over his action such that the act did not conform to his intent to some extent, whether due to a misfire or otherwise) and (2) there is a basis to show that the

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138. See *supra* Section III.B.2.

139. U.S. Fid. & Guar. Co. v. OmniBank, 812 So. 2d 196, 203 (Miss. 2002) (Diaz, J., dissenting).

140. The Maxim wrongly assumes that an actor always acts only with one intention. Examples to the contrary are easily found. I may intend to drive in excess of the speed limit and intend to drive safely. An insured may intentionally manufacture a product with a less costly material than specified and also intend to manufacture a safer product thereby. In such multiple-intention cases, the Maxim offers no guidance or rule for the selection of the coverage-relevant intent or act description.

141. See *supra* notes 67-68 and accompanying text.

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accidental-act to be the cause (in the right sense)<sup>142</sup> of covered and complained-of injurious effects. If the answer to both of these questions is in the affirmative, then that description of the act-as-accident-and-cause is the coverage-relevant act description. In place of the Maxim, then, the first rule of decision of the Causative Acts school should be:

Under an occurrence- or accident-based insuring agreement of a liability policy, if the act has an actual or alleged property (or properties) that allows us to describe it as an accident and the act-so-described has the right causal relation to the third party's complained-of injuries that are within the insuring agreement, then that description is the coverage-relevant act description.

Adoption of this rule as a general rule of decision, and rejection of the Maxim as a general rule of decision, should lead to fairer outcomes in coverage disputes and a more sound insurance coverage jurisprudence.

## VII. CONCLUSION

The concepts of intentional action and fortuity are central to the positions of those who hold that "accident" in occurrence-and accident-based policies only requires fortuity in the injurious effects of the insured's action (the Injurious Effects Only school) and those who hold that "accident" requires fortuity in the act that causes injurious effects to the interests of a third party (the Causative Acts school). Yet despite the many cases and scholarly articles contributing to the debate between these schools, the participants by and large have been content to advance their positions with little recognition of the need for rigorous analysis of the concept of intentional action and the implications of that concept for the resolution of liability insurance coverage disputes. In this article, I have attempted to advance the debate between these two schools by analysis of the theory of action that informs the Maxim and its corollary doctrines, the Complete Control assumption and the theory of direct causation. If my critique of the Maxim is correct, then this rule has no sound justification in policy language, in the fortuity requirement, or in the theory of action that informs it, and moreover, it is contrary to the pluralistic theory of action best-suited to resolving liability insurance coverage disputes. The alternative rule of decision I have articulated further confirms that the

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142. The proper causal analysis is beyond the scope of this article. The courts have offered various alternatives.

Maxim is not the only rule of decision available to the Causative Acts school. Accordingly, the Maxim is a fundamental legal error that should be rejected as a general rule of decision untethered to any evidentiary predicate in a particular case.

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