GENERAL LIABILITY COVERAGE FOR CLAIMS OF EMOTIONAL DISTRESS—AN INSURANCE NIGHTMARE

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I. INTRODUCTION

The wide spectrum of potential legal claims haunts businesses throughout the country.[1] The pervasiveness of such claims, as well as the potentially large awards made to claimants, have led businesses to seek various forms of insurance policies to insure against liability.[2] Thus, insurance companies design general liability policies specifically for businesses.[3] Such policies may cover only one specific risk, or a broad range of specified risks.[4] Broad range policies are called "comprehensive" policies.[5]

The most common form of liability insurance purchased by businesses is the Commercial (formerly Comprehensive) General Liability (CGL) policy.[6] A CGL policy typically provides coverage for the risks of legal liability

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1. James E. Scheuermann & John K. Baillie, *Employer's Liability and Errors and Omissions Insurance Coverage for Employment-Related Claims*, 18 W. NEW ENG. L. REV. 71, 71 (1996).

2. *Id.* (citing *Shoney's Inc.: Judge Approves Settlement of Racial Bias Lawsuit*, WALL ST. J., Jan. 26, 1993, at B4, which reported that a U.S. district court judge in *Haynes v. Shoney's, Inc.*, 1993 WL 19915 (N.D. Fla. 1993), approved a $105 million settlement in a racial discrimination suit against Shoney's Inc.).

3. George H. Tinker, *Comprehensive General Liability Insurance—Perspective and Overview*, 25 FED'N INS. COUNS. Q. 217, 232-33 (1975).

4. 1 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 3.06(1) (1992).

5. *Id.*

6. *Id.*

encountered by a business entity.[7] Coverage generally includes liability resulting from ownership and maintenance of the business premises, the conduct of business operations, the hazards associated with the business's products, and other contractual obligations.[8] The coverage afforded an insured, however, depends upon the insuring agreements, exclusions, and conditions of the policy.[9] Thus, the coverage provided by liability policies may not be co-extensive with the insured's legal liability to respond in damages on every occasion.[10]

An area of increasing concern for businesses is the rising number of employment-related claims.[11] Often in employment-related disputes, the plaintiff's only noneconomic injury is emotional distress.[12] Thus, a growing concern for businesses is whether emotional or mental distress is within the scope of coverage provided by a CGL policy. Potential coverage for a claim of mental or emotional distress typically will activate the policy's broad duty to defend,[13] which may involve coverage for significant defense costs.[14] Therefore, policyholders often argue that a CGL policy covers claims for infliction of emotional distress regardless of whether there are any accompanying physical symptoms.[15]

Although businesses have a tremendous stake in the application of liability insurance policies to claims of emotional distress, they encompass merely one category of the insureds affected by the outcome. Landlords, homeowners, automobile owners, and other individuals possessing standard

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7. *Id.*

8. *Id.*

9. 1A *id.* § 10.01.

10. *Id.*

11. Scheuermann & Baillie, *supra* note 1, at 71. Employment-related claims refer to claims arising in connection with employment discrimination, wrongful termination, constructive discharge, and sexual harassment. *Id.* at 71 n.1.

12. Stuart H. Bompey & Gary R. Siniscalco, *The Settlement Process in Employment Discrimination Litigation: A New Perspective, in* LITIGATING EMPLOYMENT DISCRIMINATION CASES 1995, at 329, 408 (PLI Litig. & Admin. Practice Course Handbook Series No. H-522, 1995).

13. Courts generally recognize that an insurer has a duty to defend against a claim which is arguably within the scope of coverage provided by the insurance policy, regardless of the claim's merit. First Newton Nat'l Bank v. General Cas. Co., 426 N.W.2d 618, 623 (Iowa 1988) (relying on McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117, 119 (Iowa 1984)). In analyzing the duty to defend, courts compare allegations in the complaint with the terms of coverage provided in the insurance policy. *Id.* If the complaint alleges any facts or grounds which might fall within the coverage of the policy, the insurer is obligated to provide a defense. *Id.* It is well-established that the duty to defend against potentially relevant claims is significantly broader than the insurer's duty to indemnify. Hartford Fire Ins. Co. v. Karavan Enters., 659 F. Supp. 1075, 1076 (N.D. Cal. 1986). Therefore, although an insurer may be required to defend against claims potentially within the scope of policy coverage, the insurer may not be required to compensate the insured for legal liability incurred.

14. Scheuermann & Baillie, *supra* note 1, at 76.

15. *Id.* at 75-76.

liability policies are all affected by the determination of coverage relating to claims of emotional distress.[16]

This Note addresses the current debate over whether a CGL policy provides coverage for claims of damages resulting from mental or emotional distress. Part II reviews the history of CGL insurance and the coverage generally provided by such policies. Part III presents and analyzes the diverging views of various courts as to whether coverage under such policies extends to claims for emotional distress when physical manifestations are not alleged. Although the majority of courts recognize that claims for emotional distress are covered under a CGL policy when accompanying physical manifestations are alleged, this Note points out that the standard for determining precisely when accompanying physical manifestations have been alleged may be unclear. Part IV presents an alternative view of differentiating between physical and nonphysical injuries for claims of emotional distress. Finally, this Note concludes by suggesting that the issue presented is properly set out for the United States Supreme Court to grant a review of the issue. In light of standardized policy language used throughout the insurance industry,[17] a standardized interpretation is necessary for both the insurer and the insured.

II. HISTORY OF THE CGL INSURANCE POLICY

General liability insurance first gained prominence in the late 1800s.[18] Initially, insurance companies drafted their own policies.[19] By the 1930s, however, inconsistent policy terms caused confusion and litigation, prompting the insurance industry to collectively draft standard policies.[20] In 1940, two insurance company trade groups released the first comprehensive general liability form.[21] For the first time, a business's general liability policy automatically covered new common law and statutory liabilities.[22] Another unique feature of the CGL policy was that it covered all liability exposures not specifically excluded by the policy.[23] CGL coverage has become the most common type of liability policy for businesses.[24]

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16. See *infra* Part III for a discussion of cases.

17. *See infra* Part II.

18. 7A JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE § 4491 (Walter F. Berdal ed., 1979).

19. *Id.*

20. *Id.*

21. *Id.*; *see also* Tinker, *supra* note 3, at 220.

22. In drafting this form, insurers anticipated the expansion of legal liability and used terms that were broad enough to automatically cover those expansions. Jordan S. Stanzler & Charles A. Yuen, *Coverage for Environmental Cleanup Costs: History of the Word "Damages" in the Standard Form Comprehensive General Liability Policy*, 1990 COLUM. BUS. L. REV. 449, 457.

23. C. ARTHUR WILLIAMS, JR. & RICHARD M. HEINS, RISK MANAGEMENT AND INSURANCE 353 (5th ed. 1985).

24. 1 LONG, *supra* note 4, § 3.06(1).

Standardized language, nevertheless, fails to allow for new legal, commercial, or social developments; therefore the insurance industry periodically revises its standard forms.[25] Insurance companies have revised the CGL form for a variety of purposes, including countering adverse court rulings,[26] meeting the demands of insurance buyers,[27] and clarifying ambiguities.[28] Today, revisions are made by the Insurance Services Office, Inc. (ISO).[29]

III. GENERAL LIABILITY POLICY COVERAGE

Disputes between an insurer and an insured often come down to an interpretation of the policy terms.[30] As with contracts in general, an insurance agreement is enforced according to its terms, and any ambiguity appearing in an insurance policy will be resolved in favor of the insured.[31]

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25. Stanzler & Yuen, *supra* note 22, at 450. The industry revised the CGL form in 1943, 1947, 1955, 1966, 1973, and 1986. *Id.* at 450 n.3.

26. John J. Tarpey, *The New Comprehensive Policy: Some of the Changes*, 33 INS. COUNS. J. 223, 223 (1966) ("The principle reason given for the [1966] revision of the [CGL] policies was adverse court decisions.").

27. Customers had been requesting, and often receiving, broader occurrence-based coverage for years. Insurance Services Office, Inc. (ISO) broadened the definition of "accident" in the 1966 revision to encompass certain occurrences. Tinker, *supra* note 3, at 254, 257.

28. For example, ISO revised the form in 1973 partly to clarify which insurance policy would cover certain claims that spanned periods covered by several different policies. Medard M. Narko, *The 1972 Comprehensive General Liability Policy: Response to a Continuing Need*, 61 ILL. B.J. 34, 35 (1972).

29. In a recent Supreme Court antitrust ruling, Justice Souter provided background information on the ISO:

> Defendant Insurance Services Office, Inc. (ISO), an association of approximately 1,400 domestic property and casualty insurers . . . is the almost exclusive source of support services in this country for CGL insurance. ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms. . . . For each of its standard policy forms, ISO also supplies actuarial and rating information: it collects, aggregates, interprets, and distributes data on the premiums charged, claims filed and paid, and defense costs expended with respect to each form, and on the basis of this data it predicts future loss trends and calculates advisory premium rates. Most ISO members cannot afford to continue to use a form if ISO withdraws these support services.

Hartford Fire Ins. Co. v. California, 509 U.S. 764, 772 (1993) (citations omitted).

30. *See, e.g.*, Hartford Fire Ins. Co. v. Karavan Enters., 659 F. Supp. 1075, 1077 (N.D. Cal. 1986) (finding no ambiguity in a policy concerning the duty to defend); Tschimperle v. Aetna Cas. & Sur. Co., 529 N.W.2d 421, 426 (Minn. Ct. App. 1995) (interpreting a property liability clause and an advertising liability provision in an insurance policy).

31. *See, e.g.*, Donald B. MacNeal, Inc. v. Interstate Fire & Cas. Co., 477 N.E.2d 1322, 1324 (Ill. App. Ct. 1985) ("If a provision of an insurance contract is ambiguous it will be

Individual CGL policies outline injuries that will be covered under the insurance agreement. The basic policy typically provides coverage for two types of injury: bodily injury and property damage.[32] The policy used by most insurers provides:

> The [insurance] [c]ompany will pay on behalf of the insured all sums which the insured shall become legally obligated to pay because of
> A. bodily injury, or
> B. property damage
> to which this insurance policy applies caused by an [accident, or] occurrence . . . .[33]

In determining whether a CGL policy provides coverage for claims of emotional distress, disputes often arise as to the meaning of the term "bodily injury."

Since 1966, the ISO standard-form CGL policy has typically defined bodily injury as "bodily injury, sickness, or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."[34] Can emotional distress claims, which usually feature allegations based solely on emotional distress or mental anguish, ever constitute bodily injury for purposes of providing insurance coverage? Various courts articulate differing views regarding the interpretation of the term bodily injury as it applies to claims for emotional injury.[35]

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construed in favor of the insured and against the insurer who drafted the instrument . . . ."); West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc., 503 N.W.2d 596, 598 (Iowa 1993) ("When an insurance policy is ambiguous, requires interpretation, or is susceptible to two equally plausible constructions, we adopt the construction most favorable to the insured."); Benzer v. Iowa Mut. Tornado Ins. Ass'n, 216 N.W.2d 385, 388 (Iowa 1974) ("Where insurance contracts are ambiguous, require interpretation, or are susceptible to two equally proper constructions, the court will adopt the construction most favorable to the insured."); Reliance Ins. Co. v. Arneson, 322 N.W.2d 604, 606 (Minn. 1982) ("Any ambiguity is resolved in favor of the insured.").

32. Bompey & Siniscalco, *supra* note 12, at 402.

33. BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 7.01 (7th ed. 1994).

34. 1A LONG, *supra* note 4, § 10.05. The 1992 revision to the standard CGL policy defined bodily injury in substantially the same terms. *See* Insurance Services Office, Inc., Commercial General Liability Coverage Form CG 00 01 10 93 (1992), *reprinted in* 1 SUSAN J. MILLER & PHILIP LEFEBVRE, MILLER'S STANDARD INSURANCE POLICIES ANNOTATED 417 (1986 & Supp. 1994).

35. *See, e.g.*, Voorhees v. Preferred Mut. Ins. Co., 607 A.2d 1255, 1261 (N.J. 1992). The court concluded "that the term 'bodily injury' is ambiguous as it relates to emotional distress accompanied by physical manifestations." *Id.* This conclusion was based on the pervasive disagreement among the courts. *Id.*

A. *Claims of Emotional Distress in the Absence of Physical Manifestations*

1. *Majority View*

Courts generally hold that "in the context of purely emotional injuries, without physical manifestations, the phrase 'bodily injury' is not ambiguous. Its ordinary meaning connotes a physical problem."[36] Therefore, the overwhelming majority of courts interpret the phrase bodily injury to include claims for physical injury and to exclude claims for purely nonphysical or emotional harm.[37] Consequently, in a wide variety of contexts, courts conclude that emotional distress, in the absence of physical harm, does not constitute bodily injury.[38] As one court stated, "Bodily injury . . . is a narrow

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36. SL Indus., Inc. v. American Motorists Ins. Co., 607 A.2d 1266, 1275 (N.J. 1992); *accord*, Allstate Ins. Co. v. Diamant, 518 N.E.2d 1154, 1156-57 (Mass. 1988); Farm Bureau Mut. Ins. Co. v. Hoag, 356 N.W.2d 630, 633 (Mich. Ct. App. 1984).

37. *See, e.g.*, Bituminous Fire & Marine Ins. Co. v. Izzy Rosen's Inc., 493 F.2d 257, 261 (6th Cir. 1974) (concluding that a policy covering bodily injury contemplates "some actual injury to the body of a physical nature"); EEOC v. Southern Publ'g Co., 705 F. Supp. 1213, 1219 (S.D. Miss. 1988) (holding that slander is unable to produce bodily injury because there is no harm to the body); West Am. Ins. Co. v. Bank of Isle of Wight, 673 F. Supp. 760, 765 (E.D. Va. 1987) (holding that bodily injury encompasses actual physical harm caused by negligence, but not emotional distress caused by wrongful job termination); Aetna Cas. & Sur. Co. v. First Sec. Bank, 662 F. Supp. 1126, 1128 (D. Mont. 1987) (stating that coverage for bodily injury limits coverage to physical injury to the body); St. Paul Fire & Marine Ins. v. Campbell County Sch. Dist. No. 1, 612 F. Supp. 285, 287 (D. Wyo. 1985) (holding that emotional suffering does not constitute bodily injury); Kema Steel, Inc. v. Home Ins. Co., 736 P.2d 798, 799 (Ariz. Ct. App. 1986) (holding that an "accident," under the terms of the defendant's liability insurance policy, did not include the filing of a lawsuit not involving bodily injury or property damage); AIM Ins. Co. v. Culcasi, 280 Cal. Rptr. 766, 772 (Ct. App. 1991) (finding that the term bodily injury was unambiguous and meant physical injury and its consequences, but it did not include emotional distress in the absence of physical injury); Dahlke v. State Farm Mut. Auto Ins. Co., 451 N.W.2d 813, 815 (Iowa 1990) (holding that the term bodily injury was clear on its face and did not include consortium-type damages); Allstate Ins. Co. v. Diamant, 518 N.E.2d at 1156-57 (stating that there were no cases in Massachusetts that held that bodily injury means personal injury without physical injury, and concluding that emotional distress and injury to reputation were not bodily injuries under Allstate's policy); Farm Bureau Mut. Ins. Co. v. Hoag, 356 N.W.2d at 633 (concluding that the term bodily injury is not unambiguous and does not include humiliation, mental anguish, or suffering as alleged by plaintiff); E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co., 726 P.2d 439, 443 (Wash. 1986) (finding that under Travelers' policy, the terms "sickness" and "disease" were modified by the term "bodily" and thus the policy excluded mental anguish, illness, and emotional distress).

38. *See, e.g.*, West Am. Ins. Co. v. Bank of Isle of Wight, 673 F. Supp. at 765 (holding that emotional distress caused by wrongful termination was not bodily injury); St. Paul Fire & Marine Ins. Co. v. Campbell County Sch. Dist. No. 1, 612 F. Supp. at 287 (holding that emotional suffering caused by the violation of First Amendment rights did not constitute bodily injury); Allstate Ins. Co. v. Diamant, 518 N.E.2d at 1156-57 (holding that

term and encompasses only physical injuries to the body and the consequences thereof."[39] In most states, therefore, allegations of purely emotional distress without a physical manifestation will not invoke coverage under a CGL policy.

Courts interpreting the phrase bodily injury to exclude allegations of purely emotional or nonphysical harm have based their decision upon the following grounds. First, courts simply interpret the word "bodily" in the term bodily injury to mean physical injury to the body.[40] In addition, dictionary definitions equate the term bodily with physical or corporeal, as opposed to mental or spiritual.[41] Moreover, relying upon the well-established principle of applying the ordinary meaning of the term bodily injury, courts have emphasized that they will not strain the words in order to force an ambiguous meaning.[42] Therefore, taking the words at face value, the phrase bodily injury is understood to mean hurt or harm to the human body, contemplating actual physical harm, or damage to a human body.[43]

When interpreting the typical policy definition of bodily injury as "bodily injury, sickness, or disease," several courts have found that the definition's use of the word bodily modifies the terms "sickness or disease."[44] As such, the policy definition would read "bodily injury, bodily sickness or bodily disease." This interpretation, therefore, excludes the possibility that "sickness or disease" might encompass mental or emotional sickness or disease.[45] Accordingly, the term "bodily injury" encompasses

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emotional distress, injury to reputation, and mental pain and anguish did not constitute bodily injury).

39. Allstate Ins. Co. v. Diamant, 518 N.E.2d at 1156; *see also* Greenman v. Michigan Mut. Ins. Co., 433 N.W.2d 346, 348-49 (Mich. Ct. App. 1988) (stating that bodily injury is interpreted "to require at least some physical manifestation of mental injuries").

40. *See, e.g.*, Chatton v. National Union Fire Ins. Co., 13 Cal. Rptr. 2d 318, 323 (Ct. App. 1992) (holding that by examining the term bodily injury in light of the ordinary and popular meaning, the term is unambiguous and does not reasonably encompass nonphysical, emotional, or mental harm); AIM Ins. Co. v. Culcasi, 280 Cal. Rptr. at 771 ("The critical word in the term 'bodily injury' is 'bodily.'").

41. *See* AIM Ins. Co. v. Culcasi, 280 Cal. Rptr. at 772 ("[D]efinitional unanimity indicates that the ordinary and popular meaning of the word bodily does not reasonably encompass, and in fact suggests a contrast with, the purely mental, emotional, and spiritual.").

42. *Id.* at 771; Chatton v. National Union Fire Ins. Co., 13 Cal. Rptr. 2d at 323 (holding that the ordinary and popular meaning of bodily does not encompass the purely mental and spiritual); Farm Bureau Mut. Ins. Co. v. Hoag, 356 N.W.2d at 633 (holding that bodily injury does not include humiliation and mental anguish).

43. Farm Bureau Mut. Ins. Co. v. Hoag, 356 N.W.2d at 633.

44. *See, e.g.*, Aetna Cas. & Sur. Co. v. First Sec. Bank, 662 F. Supp. 1126, 1128 (D. Mont. 1987); Rolette County v. Western Cas. & Sur. Co., 452 F. Supp. 125, 129-30 (D.N.D. 1978); AIM Ins. Co. v. Culcasi, 280 Cal. Rptr. at 772 n.4; Cotton States Mut. Ins. Co. v. Crosby, 260 S.E.2d 860, 862-63 (Ga. 1979); E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co., 726 P.2d 439, 443 (Wash. 1986).

45. *See* Aetna Cas. & Sur. Co. v. First Sec. Bank, 662 F. Supp. at 1128.

only sickness or disease of the physical body and does not include nonphysical sickness or disease.[46]

Another basis for concluding that bodily injury excludes allegations of purely emotional or nonphysical harm is the distinction between the definition of the term bodily injury and the insurance term "personal injury."[47] "The term 'personal injury' is broader and includes not only physical injury, but also affront or assault to the emotional well-being of a person."[48] Bodily injury, by contrast, is viewed as a "narrow term which encompasses only physical injuries to the body."[49] Therefore, policies using the narrower term of bodily injury do not encompass all possible injuries to a person, but rather provide coverage only for physical injuries to the body.[50]

With respect to claims for mental distress arising from a noncovered economic loss, one court reasoned that "[i]t would expand coverage of these policies far beyond any reasonable expectation of the parties to sweep within their potential coverage any alleged emotional or physical distress that might result from economic loss that is itself clearly outside the scope of the policy."[51] In other words, it would be unreasonable to expect the mere presence of a mental distress claim to bring an otherwise noncovered claim for economic loss within bodily injury coverage.[52]

Finally, one court interpreting the term "bodily injury" looked for guidance from the United States Supreme Court decision *Eastern Airlines, Inc. v. Floyd*.[53] The question presented in Floyd was whether Article 17 of the Warsaw Convention permitted recovery for mental injuries unaccompanied by physical injuries.[54] Based on an interpretation of the terms of the treaty, bilingual dictionaries, and French law, the Supreme Court translated the phrase "lésion corporelle" as used in the Warsaw Convention to mean bodily injury, which the court in turn concluded was a narrow meaning excluding purely mental injuries.[55] Therefore, the Supreme Court held that the use of the phrase "lésion corporelle" precluded recovery for purely mental injuries.[56] Based on the *Floyd* holding, the California Court of

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46. *Id.*

47. *See, e.g.*, Grant v. North River Ins. Co., 453 F. Supp. 1361, 1367 (N.D. Ind. 1978); Rolette County v. Western Cas. & Sur. Co., 452 F. Supp. at 130; Chatton v. National Union Fire Ins. Co., 13 Cal. Rptr. 2d at 323; Allstate Ins. Co. v. Diamant, 518 N.E.2d 1154, 1156 (Mass. 1988); McCroskey v. Cass County, 303 N.W.2d 330, 336 (N.D. 1981).

48. Chatton v. National Union Fire Ins. Co., 13 Cal. Rptr. 2d at 323.

49. *Id.*; *see also* McCroskey v. Cass County, 303 N.W.2d at 336.

50. McCrosky v. Cass County, 303 N.W.2d at 336.

51. Keating v. National Union Fire Ins. Co., 995 F.2d 154, 156 (9th Cir. 1993).

52. *Id.*

53. Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991).

54. *Id.* at 533. Article 17 of the Warsaw Convention sets forth the conditions under which an international air carrier can be held liable for injuries to passengers. *Id.* at 532.

55. *Id.* at 542. The Supreme Court, however, has not interpreted bodily injury based solely on American legal analysis. *See id.* at 534-42.

56. *Id.* at 552.

Appeals in *Chatton v. National Union Fire Insurance Co.*[57] reasoned that the Supreme Court's interpretation supported the conclusion that the term bodily injury does not include purely nonphysical injuries, such as claims for emotional distress.[58] For these reasons, courts have concluded that bodily injury coverage referred to in general liability policies does not encompass claims involving allegations of emotional distress or mental anguish.

2. *Minority View*

Despite the majority of cases holding that bodily injury does not encompass purely nonphysical harm, some courts have reached a contrary conclusion.

a. *Cases Prior to* Lavanant v. General Accident Insurance Co. of America. Although the majority of California courts conclude that the term bodily injury as defined by CGL policies does not cover claims resulting from mere emotional distress,[59] a minority of California cases suggest that emotional distress in the absence of alleged physical manifestations constitutes bodily injury. In *Abellon v. Hartford Insurance Co.*,[60] the court held that a wife's loss of consortium was an independent bodily injury under an insurance policy that covered bodily injury.[61] The *Abellon* court relied on the reasoning of prior California court decisions[62] including *Molien v. Kaiser Foundation Hospitals*.[63] In *Molien*, the California Supreme Court reasoned that "the attempted distinction between physical and psychological injury merely clouds the issue."[64] The *Abellon* court stated, "'Even doctors have a difficult time distinguishing between "mental" and "physical," because every emotional disturbance has a physical aspect and every physical disturbance has an emotional aspect.'"[65]

Furthermore, the *Abellon* court stated that modern California case law has determined that bodily injury can and does result from emotional distress and that the injury sustained is compensable.[66] The *Abellon* court cited *Employers Casualty Insurance Co. v. Foust*,[67] in which the court held that bodily injury "covers bodily or physical injury even where such injury is proximately caused, not by direct collision, but by emotional distress induced

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57. Chatton v. National Union Fire Ins. Co., 13 Cal. Rptr. 2d 318 (Ct. App. 1992).

58. *Id.* at 324.

59. *See id.* at 323.

60. Abellon v. Hartford Ins. Co., 212 Cal. Rptr. 852 (Ct. App. 1985).

61 *Id.* at 854-55.

62. *See, e.g.*, Vanoni v. Western Airlines, 56 Cal. Rptr. 115, 117 (Ct. App. 1967).

63. Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980).

64. *Id.* at 821.

65. Abellon v. Hartford Ins. Co., 212 Cal. Rptr. at 855 (quoting Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1241 n.24 (1971)).

66. *Id.* at 856.

67. Employers Cas. Ins. Co. v. Foust, 105 Cal. Rptr. 505 (Ct. App. 1972).

directly or indirectly."[68] Therefore, the *Abellon* court concluded that loss of consortium may constitute an independent bodily injury for purposes of insurance coverage.[69]

A recent Iowa Supreme Court case also produced conflicting authority on the issue of whether purely emotional or mental injuries constitute bodily injury for purposes of insurance coverage.[70] In *Pekin Insurance Co. v. Hugh*,[71] the Iowa Supreme Court addressed the issue of whether injury resulting from emotional distress to an accident witness constituted bodily injury within the meaning of an underinsured provision in an automobile liability policy when the person who sustained the injury was in no way physically harmed by the vehicle.[72] In *Pekin* the insureds demanded that *Pekin* compensate them for emotional injuries sustained as a result of witnessing the deaths of family members in an automobile accident.[73] The automobile liability policy defined bodily injury as "bodily harm, sickness or disease, including death that results."[74] On the issue of whether the insureds sustained bodily injury, the court stated that the question involved a medical or psychological problem of proof rather than a question of law.[75] Further, the court recognized that any attempt to distinguish between physical and psychological injury merely clouded the issue "because the medical community now knows that 'every emotional disturbance has a physical aspect and every physical disturbance has an emotional aspect.'"[76] Therefore, the court concluded that the issue of whether the insureds suffered compensable injuries should not turn on an "artificial and arbitrary classification such as 'physical' or 'psychological.'"[77] Rather, the court based its holding that the emotional distress claims were covered under the insured's auto policy on the fact that the bystander claims were independent bodily injuries separate from the bodily injuries suffered by the family members.[78]

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68. *Id.* at 508.

69. Abellon v. Hartford Ins. Co., 212 Cal. Rptr. at 857.

70. *Compare* Pekin Ins. Co. v. Hugh, 501 N.W.2d 508, 512 (Iowa 1993) (holding that claims of negligent infliction of emotional distress were independent bodily injuries under an insurance policy), *with* Dahlke v. State Farm Mut. Auto. Ins. Co., 451 N.W.2d 813, 815 (Iowa 1990) (holding that psychological and physical effects do not constitute bodily injuries under an automobile insurance policy).

71. Pekin Ins. Co. v. Hugh, 501 N.W.2d 508 (Iowa 1993).

72. *Id.* at 509.

73. *Id.*

74. *Id.* at 510.

75. *Id.* at 512.

76. *Id.* (quoting Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1241 n.24 (1971)).

77. *Id.*

78. *Id.* The *Pekin* court distinguished *Dahlke* by holding that the loss of consortium damages alleged in *Dahlke* were dependent upon the underlying bodily injury suffered by the injured spouse or child. *Id.* at 510-11. Therefore, the claims in *Dahlke* were not separate bodily injuries compensable under the uninsured motorist provision of the insureds' automobile policy. *Id.* at 511.

The South Carolina Court of Appeals in *State Farm Mutual Automobile Insurance Co. v. Ramsey*,[79] also concluded that emotional trauma constitutes bodily injury under a standard automobile liability policy.[80] The court in *Ramsey* relied on previous South Carolina case law which provided that "to receive bodily injury . . ., plaintiff need not lose [a] limb or have [a] wound inflicted."[81] In its analysis, the court of appeals also recognized the South Carolina Supreme Court's trend of allowing recovery for the tort of intentional infliction of emotional distress.[82] Therefore, the court concluded that negligent infliction of emotional distress constituted "bodily injury for which damages could be recovered under a standard policy of insurance."[83]

Louisiana courts also recognize insurance coverage for claims of purely emotional injuries. The Louisiana Court of Appeals in *Bloodworth v. Carroll*,[84] held that bodily injury included mental anguish, fright, distress, and humiliation allegedly caused by a car that was driven in reverse toward the claimant at a high speed.[85] In reaching its conclusion, the court relied on *Levy v. Duclaux*[86] and *Holcomb v. Kincaid*.[87] The *Levy* court attached significance to the fact that the insurance policy defined bodily injury as "sickness or disease," and stated, "these broad terms must include mental distress."[88] The court reasoned that it is impossible "to separate a person's nerves and tensions from his body."[89]

The *Holcomb* court also relied on *Levy* in concluding that mental anguish was within the definition of bodily injury provided in an insurance contract.[90] The insurance policy in *Holcomb*, however, expansively defined bodily injury as "bodily injury, sickness or disease, including care, loss of services and death resulting therefrom."[91]

The Eleventh Circuit affirmed the district court decision in *Morrison Assurance Co. v. North American Reinsurance Corp.*,[92] which found that the words "mental anguish" as alleged in the complaint were not contained in the basic policy.[93] According to well-established principles of contract

79. State Farm Mut. Auto. Ins. Co. v. Ramsey, 368 S.E.2d 477 (S.C. Ct. App. 1988).

80. *Id.* at 478.

81. *Id.* (citing Spaugh v. Atlantic Coast Line R. Co., 155 S.E. 145, 147 (S.C. 1930)).

82. *Id.* (citing Ford v. Hutson, 276 S.E.2d 776, 778 (S.C. 1981)).

83. *Id.*

84. Bloodworth v. Carroll, 455 So. 2d 1197 (La. Ct. App. 1984), *rev'd on other grounds*, 463 So. 2d 1313 (La. 1985).

85. *Id.* at 1205.

86. Levy v. Duclaux, 324 So. 2d 1 (La. Ct. App. 1975).

87. Holcomb v. Kincaid, 406 So. 2d 646 (La. Ct. App. 1981).

88. Levy v. Duclaux, 324 So. 2d at 10 (stating that the policy was "broader than it would have been had that definition not included the words 'sickness or disease'").

89. *Id.*

90. Holcomb v. Kincaid, 406 So. 2d at 648-49.

91. *Id.* at 648.

92. Morrison Assurance Co. v. North Am. Reinsurance Corp., 588 F. Supp. 1324 (N.D. Ala. 1984), *aff'd*, 760 F.2d 279 (11th Cir. 1985).

93. *Id.* at 1327.

interpretation, the court reasoned that the language must be construed against the insurer.[94] The court held that mental anguish "is necessarily included within the terms 'sickness or disease.'"[95] Subsequent courts, however, have found *Morrison* unpersuasive and have rejected the decision.[96]

Finally, in *Omark Industries, Inc. v. Safeco Insurance Co.*,[97] the United States District Court for the District of Oregon concluded on a preliminary basis that "severe emotional distress resulting from sex discrimination in employment can be 'bodily injury, sickness or disease.'"[98]

The decisions up to this point, however, have exerted little influence over the majority position which holds that physical manifestations must be alleged in conjunction with emotional or mental injuries to obtain coverage under a CGL policy. In 1992, however, New York's highest court strengthened the minority position.

b. Lavanant v. General Accident Insurance Co. of America. In *Lavanant v. General Accident Insurance Co. of America*,[99] the New York Court of Appeals in abruptly abandoned the physical injury requirement and held that emotional distress, without an accompanying physical injury, constitutes bodily injury.[100] *Lavanant* involved tenants who were present, but physically untouched, when the ceiling in their apartment collapsed during renovation of the premises.[101] While the tenants claimed they suffered emotional distress, they alleged no resulting physical injury.[102] The property owners' CGL policy defined bodily injury as "bodily injury, sickness, or disease."[103] The court determined that the average reader of such a policy might reasonably conclude that the definition included mental, as well as physical, sickness, or disease, noting that "emotional trauma may be as disabling as physical injury, and that whether a person suffers one form of injury or the other may be a fortuity determined solely by the particular vulnerability of an individual."[104] The court concluded that the ambiguous policy language covered purely mental injuries involving neither physical injury nor physical contact.[105]

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94. *Id.*

95. *Id.*

96. *See, e.g.*, Chatton v. National Union Fire Ins. Co., 13 Cal. Rptr. 2d 318, 325 (Ct. App. 1992); AIM Ins. Co. v. Culcasi, 280 Cal. Rptr. 766, 775 (Ct. App. 1991).

97. Omark Indus., Inc. v. Safeco Ins. Co., 590 F. Supp. 114 (D. Or. 1984).

98. *Id.* at 117. The court, however, found a specific exclusion in the general liability policy. "Sex discrimination in employment 'aris[es] out of and in the course of . . . employment . . . ." *Id.* at 120. Therefore, the court declined to analyze further or make a final determination of whether emotional distress in the absence of a specific exclusion constitutes bodily injury, sickness, or disease. *Id.*

99. Lavanant v. General Accident Ins. Co. of Am., 595 N.E.2d 819 (N.Y. 1992).

100. *Id.* at 822.

101. *Id.* at 820.

102. *Id.*

103. *Id.*

104. *Id.* at 822.

105. *Id.* at 820, 823.

The *Lavanant* court relied upon three grounds in its conclusion that a claim constituted bodily injury in the absence of allegations of physical injury, harm, pain, or contact. First, the court found that the term bodily injury was ambiguous.[106] The court noted that the policy provided two coverages—one for bodily injury and one for property damage—which suggested that the policy provided "one covered category of injury to the person" and "[one] covered category of injury to property."[107]

Second, the *Lavanant* court found heightened ambiguity by the policy's definition of bodily injury as "bodily injury, sickness or disease."[108] The court concluded that "sickness" and "disease" enlarged the term bodily injury, which "to the average reader, may include mental as well as physical sickness and disease."[109] The court declined "to rewrite the contract to add 'bodily sickness' and 'bodily disease'" or to add "a requirement of prior physical contact for compensable mental injury."[110]

Third, the court noted that its own tort-law jurisprudence had expanded, and that "recognition of the compensability of purely mental injuries for claimants" results "in increased exposure to liability for insureds."[111] The *Lavanant* court also expressly declined to follow the interpretation of the Warsaw Convention by the United States Supreme Court in *Eastern Airlines, Inc. v. Floyd*, which provided that purely nonphysical injuries, in the context of interpreting international law versus a personal insurance contract, do not constitute bodily injury.[112]

B. *Emotional Distress with Physical Manifestations*

While the majority of courts have concluded that purely nonphysical harm is outside bodily injury liability coverage,[113] many courts agree that allegations of emotional distress or mental anguish come within bodily injury coverage if accompanied by allegations of physical manifestations.[114] Even

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106. *Id.* at 822.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 822-23.

112. *Id.* at 821-22 (citing Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 533 (1991)). *See supra* notes 53-56 and accompanying text for a discussion of *Floyd*.

113. *See* SL Indus., Inc. v. American Motorists Ins. Co., 607 A.2d 1266, 1274-75 (N.J. 1992).

114. *See, e.g.*, EEOC v. Southern Publ'g Co., 894 F.2d 785, 789 (5th Cir. 1990) (holding that physical pain in addition to embarrassment, humiliation, emotional distress, "continued and persistent grabbing," and "assault and battery" were sufficient to allege a bodily injury); Western Cas. & Sur. Co. v. Waisanen, 653 F. Supp. 825, 832 (D.S.D. 1987) (holding that the allegation of high blood pressure in addition to emotional distress was "an allegation of physical harm"); McGuire v. American States Ins. Co., 491 So. 2d 606, 607-08 (Fla. Dist. Ct. App. 1986) (holding that mental distress, headaches, and muscle spasms resulting from alleged false imprisonment and malicious prosecution constituted bodily injury).

courts that have concluded that nonphysical harm does not constitute bodily injury have held otherwise when the emotional distress produces discernible physical symptoms.[115] The New Jersey Supreme Court made this distinction in two cases decided on the same day: *Voorhees v. Preferred Mutual Insurance Co.*[116] and *SL Industries, Inc. v. American Motorists Insurance Co.*[117] Because the emotional distress in *Voorhees* resulted in physical manifestations, the court found that bodily injury existed,[118] whereas the lack of physical manifestations in *SL Industries* produced the opposite result.[119]

The primary issue presented in *Voorhees* was "whether a homeowner's insurance policy providing coverage for bodily injury caused by the insured" encompassed liability "for emotional distress accompanied by physical manifestations."[120] The New Jersey Supreme Court held that a parent's homeowner's carrier had a duty to defend the parent against claims of extreme emotional distress resulting in physical manifestations, which were made by their child's former teacher.[121] The claims were in response to the parent's statements at a school board meeting regarding the teacher's competency and fitness to teach.[122] The court found that the term bodily injury was ambiguous in the context of allegations of mental anguish accompanied by alleged physical manifestations and held that the policy's bodily injury coverage encompassed the teacher's claims.[123] The *Voorhees* court concluded that the teacher's allegations of "humiliation, embarrassment, emotional distress and mental anguish"[124] accompanied by interrogatory responses claiming "'an undue amount of physical complaints,' including 'headaches, stomach pains, nausea . . . [and] body pains'"[125] gave rise to a duty to defend.[126]

In *SL Industries*, however, the same court held that a claim for wrongful termination and age discrimination did not come within bodily injury liability

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115. Voorhees v. Preferred Mut. Ins. Co., 607 A.2d 1255, 1262 (N.J. 1992) (citing AIM Ins. Co. v. Culcasi, 280 Cal. Rptr. 766 (Ct. App. 1991)); Albin v. State Farm Mut. Auto. Ins. Co., 498 So. 2d 171, 174 (La. Ct. App. 1986); Greenman v. Michigan Mut. Ins. Co., 433 N.W.2d 346, 349 (Mich. Ct. App. 1988); Farm Bureau Mut. Ins. Co. v. Hoag, 356 N.W.2d 630, 633 (Mich. Ct. App. 1984); Artcraft v. Lumberman's Mut. Cas. Co., 497 A.2d 1195, 1196 (N.H. 1985)); *see also* Dahlke v. State Farm Mut. Auto. Ins. Co., 451 N.W.2d 813, 815 (Iowa 1990) (holding that "the term 'bodily injury' is clear on its face and does not include the physical manifestations of the parent's" emotional distress).

116. Voorhees v. Preferred Mut. Ins. Co., 607 A.2d 1255 (N.J. 1992).

117. SL Indus., Inc. v. American Motorists Ins. Co., 607 A.2d 1266 (N.J. 1992).

118. Voorhees v. Preferred Mut. Ins. Co., 607 A.2d at 1260-62.

119. SL Indus., Inc. v. American Motorists Ins. Co., 607 A.2d at 1273-75.

120. Voorhees v. Preferred Mut. Ins. Co., 607 A.2d at 1257.

121. *Id.* at 1257-58, 1262.

122. *Id.* at 1257-58.

123. *Id.* at 1260-62.

124. *Id.* at 1257.

125. *Id.* at 1258 (quoting from medical evidence generated in response to interrogatories).

126. *Id.* at 1262.

coverage, even when the emotional distress claims were accompanied by allegations of "loss of sleep, loss of self-esteem, humiliation and irritability."[127] The court observed that the alleged sleeplessness was the "only symptom that might remotely be considered a physical injury."[128] The court concluded that sleeplessness is "at base, emotional in nature," in contrast to the allegations in *Voorhees* of medically diagnosed "stomach pains, body pains, [and] nausea" which "fall on the side of physical injuries."[129]

While *Voorhees* and *SL Industries* purport to recognize a division between claims of mental anguish with and without allegations of physical manifestations, the dividing line may not be as apparent as the New Jersey Supreme Court suggests. The difficulty is in determining whether allegations are sufficient to bring a particular claim within bodily injury coverage. The two New Jersey cases represent the point that many courts find coverage when claims for emotional distress are accompanied by allegations of a specific physical injury, such as ulcers or exacerbated hypertension.[130] In other courts, however, claims of emotional distress that are accompanied by vague or minimal allegations of physical symptoms may be sufficient to trigger bodily injury coverage.[131]

Additionally, some courts—finding it impossible to distinguish between physical and emotional injuries—have concluded that both types of injuries should be construed as bodily injuries.[132] Conversely, the court in *SL Industries* suggested a case-by-case analysis "to determine whether the alleged injuries are sufficiently akin to physical injuries,"[133] and held that sleeplessness was an emotional injury.[134] Therefore, if an alleged emotional or mental injury is so close to a physical injury that a court cannot tell whether it actually is a physical injury, an ambiguity exists with regard to whether the alleged injury is a bodily injury.[135] Although the *SL Industries* court recognized that "there is no litmus test for determining where to draw the line between emotional and physical injuries," the court nevertheless believed that such a distinction existed.[136]

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127. SL Indus., Inc. v. American Motorists Ins. Co., 607 A.2d 1266, 1273-75 (N.J. 1992).

128. *Id.* at 1273.

129. *Id.* (citing Voorhees v. Preferred Mut. Ins. Co., 607 A.2d at 1262).

130. *See* AIM Ins. Co. v. Culcasi, 280 Cal. Rptr. 766, 774-76 (Ct. App. 1991) (citations omitted).

131. *See, e.g.*, Voorhees v. Preferred Mut. Ins. Co., 607 A.2d at 1262.

132. *See, e.g.*, Abellon v. Hartford Ins. Co., 212 Cal. Rptr. 852, 855-57 (Ct. App. 1985) (holding that petitioner cannot be foreclosed from recovering for either loss of consortium or the insurance policy's "per occurrence" provision because of the difficulty in distinguishing between mental and physical injuries that are worthy of compensation); Levy v. Duclaux, 324 So. 2d 1, 10 (La. Ct. App. 1975) (stating that "[w]e are unable to separate a person's nerves and tensions from his body").

133. SL Indus., Inc. v. American Motorists Ins. Co., 607 A.2d at 1274.

134. *Id.* at 1273.

135. *Id.*

136. *Id.*

C. *Alternative View*

In *Keating v. National Union Fire Insurance Co.*,[137] the Ninth Circuit adopted an alternative analysis to avoid the difficult task of differentiating between physical and nonphysical injuries.[138] Rather than looking at the nature of the claimed injuries, the Ninth Circuit examined the underlying cause of the claimed injuries.[139] In *Keating*, several former officers and directors of a failed financial institution sought legal defense from their former institution's CGL carrier against several investor lawsuits, which alleged "emotional and physical distress."[140] In concluding that the CGL carrier did not have a duty to defend, the Ninth Circuit stated:

> The injuries that the third-party plaintiffs allegedly suffered, including emotional and physical distress, arose from economic loss. . . . Economic loss of the sort alleged . . . is . . . not potentially within the coverage of National Union's policies. Nor, in our view of California law, is emotional and physical distress induced by an uncovered economic loss. It would expand coverage of these policies far beyond any reasonable expectation of the parties to sweep within their potential coverage any alleged emotional or physical distress that might result from economic loss that is itself clearly outside the scope of the policy.[141]

It remains to be seen, however, whether the *Keating* approach of focusing on the cause rather than on the nature of the injury will gain widespread acceptance. The *SL Industries* court rejected this approach stating that "'standard bodily-injury policies do not predicate coverage on the theory of the wrong; rather the nature of the injury generally determines coverage.'"[142]

IV. CONCLUSION

Although a majority of courts have consistently held that claims of emotional distress in the absence of physical manifestations are not encompassed by bodily injury coverage provided in general liability insurance policies, a minority of courts have reached the opposite conclusion. Historically, the minority decisions have provided little influence over the majority position. The New York Court of Appeals decision in *Lavanant*, however,

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137. Keating v. National Union Fire Ins. Co., 995 F.2d 154 (9th Cir. 1993).

138. *Id.* at 156 (applying California law).

139. *Id.*

140. *Id.*

141. *Id.* (citing Chatton v. National Union Fire Ins. Co., 13 Cal. Rptr. 2d 318, 327 (Ct. App. 1992)).

142. SL Indus., Inc. v. American Motorists Ins. Co., 607 A.2d 1266, 1275 (N.J. 1992) (quoting John E. Peer & Robert E. Mallen, *Insurance Coverage of Employment Discrimination and Wrongful Termination Actions*, 54 DEF. COUNS. J. 464, 470-71 (1987)).

provides a solid basis for the minority position. The New York court provided a detailed analysis and sound reasoning to support its decision. Thus, the debate on the status of emotional distress claims with respect to insurance coverage continues.

Although the United States Supreme Court has held that bodily injury does not include purely mental injuries, its reasoning and decision was based on an interpretation of international law.[143] Therefore, courts in the United States have found little guidance on this issue. In an insurance industry with standardized policies and language, insurers as well as insureds rely on standardized interpretations of the terms in those policies. Without such consistency in interpretation, truly standardized policies become a difficult, if not unattainable, goal. The issues are clearly set forth before the Supreme Court in an abundance of decisions across various geographical areas. Courts, insurance companies, and insureds are merely waiting for guidance from the highest court.

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143. *See* Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991).