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IN THE SUPREME COURT OF THE STATE OF DELAWARE

META PLATFORMS, INC. and INSTAGRAM, LLC,
Defendants Below, Appellants,

v.

HARTFORD CASUALTY INSURANCE COMPANY, et al.,
Plaintiffs and Other Parties Below, Appellees.

No. 236, 2026

On Appeal from the Superior Court of the State of Delaware
C.A. No. N24C-11-010-SKR CCLD

CORRECTED BRIEF OF AMICI CURIAE INSURANCE LAW SCHOLARS IN SUPPORT OF APPELLANTS META PLATFORMS, INC. AND INSTAGRAM, LLC AND REVERSAL

Dated: October 13, 2026

MARK M. BILLION - DE No. 5263
BILLION LAW
20184 Coastal Hwy., Suite 205, Rehoboth Beach, DE 19971
Tel: 302.428.9400 / markbillion@billionlaw.com

Counsel for Amici Curiae Insurance Law Scholars

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae Insurance Law Scholars are law professors from across the country whose teaching and research focus on insurance law, tort law, and the institutions through which liability insurance supports the civil justice system. Their work gives them a special interest and expertise in standardized commercial general liability ("CGL") insurance policies, the drafting history of those policies, and the relationship between liability insurance and tort law and practice. These are topics the California Supreme Court has considered in insurance coverage cases.

Kenneth S. Abraham, David and Mary Harrison Distinguished Professor of Law, University of Virginia School of Law;

Tom Baker, William Maul Measey Professor of Law, University of Pennsylvania Carey Law School;

Max N. Helveston, Professor of Law and Associate Dean for Academic Affairs and Strategic Initiatives, DePaul University College of Law;

Robert H. Jerry, II, Floyd R. Gibson Missouri Endowed Professor Emeritus of Law, University of Missouri School of Law;

Kyle D. Logue, Douglas A. Kahn Collegiate Professor of Law, University of Michigan Law School;

Peter Molk, John H. and Mary Lou Dasburg Professor, University of Florida Levin College of Law;

Travis Luis Pantin, Associate Professor of Law, University of Connecticut School of Law;

Anthony J. Sebok, Joseph and Sadie Danciger Chair in Law and Co-Director, Jacob Burns Center for Ethics in the Practice of Law, Cardozo School of Law;

Jeffrey W. Stempel, Doris S. and Theodore B. Lee Professor of Law, University of Nevada, Las Vegas William S. Boyd School of Law; and

Jeffrey E. Thomas, Daniel L. Brenner Faculty Scholar and Professor of Law and Associate Dean, University of Missouri-Kansas City School of Law.

This brief addresses an institutional question regarding insurance-policy design that extends beyond the parties: what function the term "accident" performs in the standard-form CGL policy's definition of an "occurrence," and what function is performed by the expected-or-intended language that first appeared in that definition in 1966 and later moved to the policy's exclusions. The drafting record and the *Restatement of the Law, Liability Insurance* illuminate that division of labor.

Amici also explain why interpreting the term "accident" to exclude coverage for liability arising out of deliberate acts that cause unintended but foreseeable harm would significantly reduce or eliminate the tort recoveries of many deserving victims. This is because the same language appears in the definitions and exclusions of the standard-form Homeowners policies that cover the liability of millions of individuals. Thus, this brief addresses whether many tort victims will be paid at all, not just whether Meta or its insurers pay in this case, since most ordinary individuals are effectively judgment-proof in the absence of their liability insurance.

The Insurance Law Scholars have no financial interest in the outcome of this appeal and speak only in their individual capacity as scholars. The arguments in this brief do not represent those of the institutions with which they are affiliated.

SUMMARY OF ARGUMENT

The undefined term "accident" in pre-1966 liability insurance policies performed multiple functions, including requiring fortuity. The 1966 revision of the standard form CGL insurance assigned the fortuity function to more explicit language precluding coverage of liability for harm that was "expected or intended" from the standpoint of the insured. Accordingly, the term "accident" in contemporary policies does not preclude coverage of liability for intended acts that result in unintended harm.

Before 1966, liability insurers intended the undefined phrase "caused by accident" to perform multiple functions, including: 1) to supply the unit for timing (i.e., the policy covered accidents during the policy period); 2) to supply the unit for determining the monetary limit of coverage (i.e., the policy paid only so much per accident); 3) to set a fortuity limitation on coverage; and 4) to limit coverage to sudden events (i.e., the industry took the position that the term "accident" connoted only an abrupt event).

The industry's 1966 revision eliminated this last function (by making it clear that non-abrupt events were covered), and it divided up the other functions among new language. The drafters assigned the fortuity function to "expected or intended" language that clarified underwriting intent, and they retained "accident" only to clarify the time of coverage and application of limits. Contemporaneous

explanations by the officials responsible for the new standard form say exactly that. The word "accident" in the "occurrence" definition was "limiting in this sense and in no other."

The 1986 relocation of the expected-or-intended language confirms the point. Moving that language from the "occurrence" definition to an express exclusion clarified its exclusionary, fortuity function. The *Restatement of the Law, Liability Insurance* follows this functional understanding and applies a subjective standard: an insured intends harm when that harm is the object of the insured's action and expects harm when the insured understands that harm to be practically certain. It does not suffice that the insured acted deliberately, knew of a risk, or could reasonably have foreseen injury. To conclude otherwise would create a negligence exclusion in a policy designed mainly to insure against liability for negligence.

Amici do not address the proper interpretation of California precedent. If this Court concludes that no controlling California decision squarely resolves the relationship between "accident" and the expected-or-intended limitation, certification is appropriate. California permits a court of last resort of another state to certify an outcome-determinative question of California law when there is no controlling precedent, and it expressly identifies uniformity and important

questions of law as considerations. This standardized policy language and its consequences for the tort system present such a question.

ARGUMENT

I. The Drafting History of the CGL Policy Makes Clear that the Term "Accident" Does Not Incorporate a Fortuity Limitation Independent of and Distinct from the Expected-or-Intended Provision.

As the California Supreme Court has recognized, the drafting history of the CGL form helps to illuminate the current meaning of that form.[1] The pre-1966 CGL policy covered liability "caused by accident." In 1966, the CGL policy was revised to cover liability caused by an "occurrence." Our central historical point is not that the undefined term "accident" never carried a fortuity meaning. It did. Rather, our point is that the drafters of the "occurrence" form of coverage at issue in this matter recognized that the undefined term "accident" had been performing this and other functions in a manner that was confusing to courts, policyholders, and claims professionals. Accordingly, they added new, more explicit language to address the fortuity requirement of the CGL policy.

The "fortuity requirement" in insurance means, in simple terms, that insurance should not cover losses that are not "fortuitous," meaning losses for which the insured itself – not an insurer – ought to be financially responsible. Fortuity is a notoriously difficult concept, both in insurance theory and practice, among other reasons because it sets the boundaries on what is and is not insurable, and insurability is a moving and contested target. To simplify considerably, the

[1] See *Montrose Chemical Corp. v. Admiral Insurance Co.*, 913 P.2d 878, 891–92 (Cal. 1995) (citing some of the same sources amici cite in this brief).

core idea is that insurers do not ordinarily wish to insure a known liability. But what exactly must be known and by whom are matters upon which reasonable insurers can (and do) disagree. Before 1966, the policy used the undefined word "accident" to draw this line and also for several other, largely unrelated purposes. After 1966, the policy used the phrase, injury or damage that was "expected or intended" to define which losses were not fortuitous.

Gilbert Bean's 1959 account provides a useful starting point, because he wrote "The Accident Versus the Occurrence Concept" while the industry was beginning to consider making the change. [2] Bean identified several purposes insurers intended the "caused by accident" formulation to serve: to limit coverage to an "identifiable event that was sudden, detrimental and fixed in time and place"; to "eliminate coverage for intentional injury or damage, or expected harm from deliberate acts"; and to "provide a recognizable unit for the purpose of handling the mechanics of insurance – the notice and cooperation requirements, the territorial and policy-period provisions and the application of the monetary policy limits" on coverage.[3]

Bean also explained how insurers could separate those purposes. An intentional-injury exclusion could serve the fortuity function, while the term

[2] Gilbert L. Bean, *The Accident Versus the Occurrence Concept*, 1959 INS. L.J. 550, 551–52. Bean was assistant secretary of Liberty Mutual Insurance Company. *Id.* at 550.
[3] *Id.* at 551-52

"occurrence" could provide the unit for the mechanics.[4] There was no reason all those functions had to be tied to the undefined word "accident."

The "occurrence" definition adopted in the 1966 standard form Comprehensive General Liability policy implemented that separation. The new standard form defined an occurrence as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[5]

Each part of the occurrence definition performed a distinct function. "Injurious exposure to conditions" removed the old sudden-event limitation (in light of the fact that many courts had already determined that an "accident" need not be "sudden").[6] "Results, during the policy period" made the time of injury or damage the coverage trigger. The words "neither expected nor intended from the standpoint of the insured" stated the fortuity limitation and identified the perspective from which it would be applied. That left "accident" to help identify what would be regarded as an "occurrence" for the mechanics of insurance.

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[4] *Id.*

[5] Norman Nachman, *The New Policy Provisions for General Liability Insurance*, 18 CPCU ANNALS 197, 199–200 (Fall 1965). Nachman was Manager of the Casualty Insurance and Multiple Line Insurance Division of the National Bureau of Casualty Underwriters. *Id.* at 197.

[6] Roland J. Wendorff, *The New Standard Comprehensive General Liability Insurance Policy*, A.B.A. SEC. INS., NEGL. & COMP. L. PROC. 250, 253 (1966) (stating that "many courts held that bodily injury or property damage resulting from a gradual exposure to conditions was 'caused by accident'").

Norman Nachman, the National Bureau[7] official responsible for general liability insurance, made this understanding explicit. In a 1965 article explaining the then-forthcoming new form to the insurance industry, he stated that the new form would assign the fortuity-limiting function to the requirement that injury be neither expected nor intended from the insured's standpoint; and it would retain the word "accident" only for certain policy mechanics.

Richard Elliott, Secretary of the National Bureau, gave the same explanation when the new form took effect. Echoing Nachman, he wrote that the word "accident" was retained "to clarify intent with respect to time of coverage and application of policy limits, particularly, in situations involving a related series of events attributable to the same factor."[8] His conclusion was categorical: "Retention of the word 'accident' is limiting in this sense and in no other."[9] The General Accident Group's Willard Obrist repeated the same explanation in a Defense Research Institute monograph later that year.[10]

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[7] The 1966 CGL form was drafted by a joint committee of the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau. The members of the National Bureau were stock insurance companies, while the members of the Mutual Bureau were the mutual insurance companies. See Steven G. Bradbury, *Original Intent, Revisionism, and the Meaning of the CGL Policies*, 1 ENVTL. CLAIMS J. 279, 280–81 (1989).

[8] Richard H. Elliott, *The New Comprehensive General Liability Policy*, BEST'S FIRE & CASUALTY NEWS, Feb. 1966, at 32, reprinted in LIABILITY INSURANCE DISPUTES 12-3, 12-5 (Sol Schreiber ed., Practising Law Institute 1968).

[9] Id.

[10] Willard J. Obrist, *The New Comprehensive General Liability Insurance Policy: A Coverage Analysis* 6–7 (Def. Rsch. Inst. Nov. 1966).

In sum, the official explanations by the Rating Bureau personnel responsible for the 1966 form uniformly described the new form as eliminating suddenness, tying coverage to injury or damage during the policy period, and using the expected-or-intended language to address intentional injury. The word "accident" identifies and unitizes the causal occurrence for timing, notice, aggregation, and limits; it does not independently exclude deliberate conduct whose injurious result was neither intended nor expected.

The later history of the standard CGL form is equally important. In 1986, the insurance industry removed the phrase "neither expected nor intended from the standpoint of the insured" from the definition of "occurrence" and placed it in an express exclusion. As the Texas Supreme Court recognized in *King v. Dallas Fire Insurance Co.*, 85 S.W.3d 185, 192–93 (Tex. 2002),, that change in location did not give the word "accident" a broader fortuity function that the 1966 drafters had assigned elsewhere. Rather, it simply made the functional separation more visible. In that case the court focused on the "from the standpoint of the insured" portion of that language, but the reasoning the court employed applies equally to this case. The court rejected the insurer's fortuity argument on plain meaning grounds, reasoning that interpreting "accident" in that manner "renders the exclusion for intended injury surplusage" and explaining "our duty is to give effect to all contract provisions, and render none meaningless." Id. at 193.

This does not mean that the CGL form covers every injury resulting from deliberate conduct. It simply means that the "expected or intended" fortuity language determines which deliberate conduct falls outside coverage. That distinction respects all of the policy's words as well as the drafters' allocation of functions.

II. The Restatement Applies the Fortuity Limitation the Drafters Chose: Intended Injury or Injury Expected as Practically Certain.

The American Law Institute's *Restatement of the Law, Liability Insurance* follows a functional approach to the treatment of exclusions that is consistent with this drafting history. Indeed, the Restatement uses the historical definition of "occurrence" as the key illustrative example of how that approach operates. Section 32(2) of the Restatement provides, "Whether a term in an insurance policy is an exclusion does not depend on where the term is in the policy or the label associated with the term in the policy" and then illustrates this rule by using the "neither expected nor intended" language from the "occurrence" definition in the 1966 edition of the standard CGL policy.[11]

Section 32 of the Restatement also supplies the appropriate standard for interpreting that exclusion: "words in an exclusion regarding the expectation or intent of the insured refer to the subjective state of mind of the insured." Comment *d* to that Section explains: "an insured expects harm when the insured foresees *that harm* is practically certain to occur as a result of the insured's intentional act, even if that harm was not the object of the action." (Emphasis supplied.) That comment further provides the following highly relevant example:

[11] RESTATEMENT OF THE LAW OF LIABILITY INSURANCE § 32(2) & cmt. a, illus. 1 (Am. L. Inst. 2019).

> 4. Manager deliberately fires a worker and intentionally discriminated on the basis of age, causing emotional distress that is sufficiently severe that it leads to bodily injury. The fired worker files suit against Manager's Company, which has a standard commercial general-liability policy that excludes coverage for suits arising out of bodily injury that is expected or intended from the standpoint of the insured. The suit is not excluded by the expected-or-intended exclusion because Manager did not expect or intend to cause bodily injury.[12]

The Restatement standard gives "expected" a meaning distinct from "intended" without equating expectation with foreseeability. It also preserves a meaningful exclusion for conduct that lies between a purpose to injure and the foreseeable risks of deliberate action: the insured may not desire the injury, but if the insured acts knowing that the injury is practically certain, coverage is excluded.

As described in *Ohio Casualty Insurance Co. v. Henderson*, 939 P.2d 1337, 1341–43 (Ariz. 1997), the drafting history of the standard form CGL policy supports the Restatement position. As the *Ohio Casualty* court reports, the drafting committee specifically rejected language that would have excluded injury or damage resulting from deliberate acts that "with reasonable certainty may be

[12] *Id.* § 32(4) & cmt. d, illus. 4.

expected" to produce harm, because, as a key drafter testified, it "was too rough to inflict upon our insureds."[13] As the court reported, Travelers stated that it would not use the expected-or-intended language to deny coverage when foreseeability was no more than an element of negligence, because doing so would mean that liability insurance did not cover negligence, and Hartford described "expected" as "expected for a certainty."[14]

Earlier commentary, made when the term "accident" connotated fortuity because there was no other fortuity language in the policy, is consistent. As J.W. Wheeler explained in 1956, proof that an insured *should have known* that injury would almost certainly follow from an intentional act would establish negligence, but not the absence of an accident.[15] In other words, the proper distinction is not between intentional and unintentional *acts*. Rather it is between intentional and

[13] *Ohio Casualty Insurance Co. v. Henderson*, 939 P.2d 1337, 1341–43 (Ariz. 1997) (quoting testimony of Herbert Schoen, Trial Transcript, Mar. 4, 1986, at 15901, *In re Asbestos Insurance Coverage Cases*, Cal. Jud. Council Coordination Proceeding No. 1072).

[14] *Id.* (quoting Letter from R.J. Fisher to Robert F. Bauer in response to survey (Aug. 19, 1966), Trial Ex. 2216, and Letter from Harold Schaffner to Robert F. Bauer in response to survey (Aug. 25, 1966), Trial Ex. 2219, *In re Asbestos Insurance Coverage Cases*, Cal. Jud. Council Coordination Proceeding No. 1072).

[15] J.W. Wheeler, *"Caused by Accident" as Used in Comprehensive Liability Policies,* 1956 INS. L.J. 87, 107.

unintentional *injury*.[16] Collapsing this distinction would remove from liability insurance the risks policyholders principally purchase insurance to address.

[16] Id.; see also John J. Tarpey, *The New Comprehensive Policy: Some of the Changes*, 33 INS. COUNS. J. 223, 223–24 (1966). ("The courts have recognized and applied the distinction between intending the act and intending the harm (bodily injury or property damage). It will be a rare case where a court will find that an insured intended the harm or expected it"). John Tarpey was a partner at LeBoeuf, Lamb & Leiby, the insurance industry's leading outside law firm at the time and for many years after.

III. Interpreting the Term "Accident" to Embody a Separate and Independent Fortuity Requirement Would Severely Limit the Tort Recoveries of Many Victims by Inserting a Negligence Exclusion in Liability Insurance Policies

The practical consequences of this decision align with the institutional reality the drafters knew from their experience. Liability insurance is not simply a fund that pays judgments after tort law has done its work. Liability insurance shapes which claims are brought, who defends them, and who can obtain redress.[17] A coverage rule that excluded volitional conduct done in the ordinary course of business would render liability insurance nearly worthless. Under the test applied by the Superior Court, every commercial enterprise would be denied the liability coverage it purchased merely for engaging in its regular business activity such as manufacturing, transportation, construction, or professional services. Homeowners would lose coverage merely for hosting a guest who was injured.

The lower court erred by focusing on the volitional aspect of policyholder conduct rather than the policyholder's subjective understanding as to the consequences. Evaluating tortious conduct for liability insurance purposes according to an objective standard would effectively bar liability coverage for negligence, defeating the core purpose of liability insurance. Applying the view of the lower court, insurance would be available for companies like Meta only if a worker mistakenly hit the wrong letters on a keyboard. Under such a regime,

[17] See Tom Baker, *What Is Insurance for Tort Law?*, 112 VA. L. REV. 101, 104, 109–13 (forthcoming 2026) (manuscript on file with amici).

commercial policyholders would have little reason to buy insurance. Indeed, in their attempt to avoid covering this loss, the insurers are arguing for a legal rule that would harm the insurance industry in the future by reducing the utility of liability insurance.

Negligence liability commonly arises from ordinary business activity which is of course volitional – and for which the commercial policyholder expects to provide useful goods or services. Awareness of risk is not the same as expecting injury or knowing that a specific injury is certain to take place. The fact that policyholders have a general understanding that things will occasionally go wrong does not render tortious conduct non-accidental. Indeed, nearly all negligence consists of deliberate choices when described at a sufficiently high level of generality.

A manufacturer intentionally designs and distributes a product knowing that (like all products) it is not without risk. An employer intentionally hires, trains, and supervises employees whom (like all employees) the employer knows have the potential to cause harm. A property owner intentionally chooses an inspection or maintenance practice that (like all such practices) is not completely foolproof. A business intentionally selects a warning, a safety protocol, or a method of operation that it knows comes with a risk – but not the certainty – of injury to its customers or users. In each case the conduct is deliberate; the injury is not. In each case, tort

law asks whether the actor should have taken greater care because injury was foreseeable. If deliberate conduct combined with foreseeable injury rendered an occurrence not an "accident," coverage would disappear for these common business activities and for a wide range of torts, leaving victims of all but the asset-rich without practical recourse.

It is fundamentally important to be aware that the Homeowners insurance policies sold to most homeowners in the United States contain the same "accident" language at issue here.[18] Businesses may be able to satisfy judgments even if their CGL policies do not cover them. But homeowners typically cannot.[19] Ordinary victims of (non-auto) torts committed by homeowners and their families – involving injuries from a deliberately unshoveled sidewalk or step to give just a single example of many that are possible – would be deprived of a source of recovery if the term "accident" were to be interpreted to preclude coverage of liability for the merely foreseeable result of a deliberate act.

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[18] *Compare* TOM BAKER, KYLE D. LOGUE, AND CHAIM SAIMAN, INSURANCE LAW AND POLICY: CASES AND MATERIALS 709 (5th Ed. 2021) (reproducing a standard Homeowners insurance policy, which provides: "'occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions…") *with id.* at 747 (reproducing a standard CGL insurance policy, which provides, "'occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions").

[19] Stephen Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 605-07, 662-66, 678, and 714-15 (2006).

The expected-or-intended limitation avoids that result while preserving a legitimate boundary. Coverage remains unavailable when the insured acts to cause injury or acts knowing injury is practically certain. But the policy continues to cover liability arising from risks that the insured should have recognized or reduced but negligently did not. That is the familiar domain of negligence.

IV. IF CALIFORNIA LAW DOES NOT SQUARELY RESOLVE THE QUESTION, THIS COURT SHOULD CONSIDER CERTIFICATION.

This appeal asks a Delaware court to decide an important question of California insurance law. California Rule of Court 8.548 permits the California Supreme Court, on request from the court of last resort of another state, to decide a question of California law when the answer could determine the pending matter and there is no controlling precedent. In deciding whether to accept the request, the California Supreme Court may consider whether a decision is necessary to secure uniformity or settle an important question of law.[20]

If the Court concludes that California precedent does not squarely resolve the question whether insurers are obligated to defend a suit seeking damages for injury arising out of deliberate acts that cause unintended but foreseeable harm, certification would be appropriate. That question concerns standardized language used in liability policies far beyond this dispute and, accordingly, insurers' duty to defend lawsuits involving a wide range of commonly occurring circumstances. A definitive answer from the California Supreme Court would promote uniformity and allow California to determine its own insurance law on this important issue.

The certified question could ask whether, when a liability policy defines an occurrence as an accident and uses expected-or-intended language to limit coverage, "accident" imposes a separate fortuity requirement that excludes injury

[20] Cal. R. Ct. 8.548(a), (f)(1).

resulting from deliberate conduct even though the insured neither intended the injury nor subjectively expected it as practically certain to result.

CONCLUSION

For these reasons, the Insurance Law Scholars respectfully submit that the judgment should be reversed. In the alternative, if this Court concludes that California law does not squarely answer the question presented, the Court should certify that question to the California Supreme Court.

Respectfully submitted,

BILLION LAW

/s/ Mark M. Billion
Mark M. Billion (No. 5263)
20184 Coastal Hwy., Suite 205
Rehoboth Beach, DE 19971
Tel: 302.428.9400
Fax: 302.674.2099
markbillion@billionlaw.com

Counsel for Amici Curiae Insurance Law Scholars

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirement of Supreme Court Rule 13(a) because it has been prepared in Times New Roman 14-point typeface. Subject to the exclusions in Rule 28(d), this brief contains 4,096 words.

/s/ Mark M. Billion

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2026, a true and correct copy of the foregoing Corrected Brief of Amici Curiae Insurance Law Scholars was caused to be served via File & ServeXpress upon all counsel of record in this appeal.

/s/ Mark M. Billion