

The amicus brief, Centennial Insurance Co. v. Central Texas Annual Conference of the United Methodist Church, Inc., et al., was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed in the Court of Appeals for the Fifth District of Texas on December 15, 1998.

Case No. 05-98-00007-CV
IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS, TEXAS

* * * *

CENTENNIAL INSURANCE CO.; ATLANTIC MUTUAL INSURANCE CO.;
and ATLANTIC LLOYD'S INSURANCE CO. OF TEXAS,
Appellants

v.

CENTRAL TEXAS ANNUAL CONFERENCE OF THE UNITED METHODIST
CHURCH, INC.; FORT WORTH WEST DISTRICT OF THE CENTRAL TEXAS
CONFERENCE OF THE UNITED METHODIST CHURCH, INC.; GENERAL
CONFERENCE OF THE UNITED METHODIST CHURCH; COUNCIL OF BISHOPS OF THE
UNITED METHODIST CHURCH; JOE A. WILSON; JOHN W. RUSSELL; FIRST UNITED
METHODIST CHURCH OF FORT WORTH, INC.; WILLIAM LONGSWORTH; WELDON
HAYES; and KAY JOHNSON,
Appellees

* * * *

On appeal from the 14th Judicial District Court of Dallas County,
Texas

Honorable John McClellan Marshall, Presiding

BRIEF OF AMICI CURIAE

THE EVANGELICAL LUTHERAN CHURCH IN AMERICA, THE EVANGELICAL COVENANT
CHURCH, THE FIRST CHURCH OF CHRIST, SCIENTIST, THE GENERAL ASSEMBLY OF
THE PRESBYTERIAN CHURCH (U.S.A.), THE GENERAL CONFERENCE OF SEVENTH-DAY
ADVENTISTS, THE REORGANIZED CHURCH OF JESUS CHRIST OF LATTER DAY
SAINTS, THE UNITED HOUSE OF PRAYER FOR ALL PEOPLE OF THE CHURCH ON THE
ROCK OF THE APOSTOLIC FAITH, THE UNITED STATES CATHOLIC CONFERENCE, THE
WISCONSIN EVANGELICAL LUTHERAN SYNOD and THE WORLDWIDE CHURCH OF GOD,
IN SUPPORT OF APPELLEES

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CERTIFICATE OF PARTIES AND COUNSEL

Pursuant to Rules 11(a) and 38.2(1)(A), TEX. R. APP. PROC., the following is a list of Amici represented by the attorneys filing this Brief Amicus Curiae and the attorneys' names and addresses:

1. The Evangelical Lutheran Church in America
2. The Evangelical Covenant Church
3. The First Church of Christ, Scientist
4. The General Assembly of the Presbyterian Church (U.S.A.)
5. The General Conference of Seventh-day Adventists
6. The Reorganized Church of Jesus Christ of Latter Day Saints
7. The United House of Prayer for All People of the Church on the Rock of the Apostolic Faith
8. The United States Catholic Conference
9. The Wisconsin Evangelical Lutheran Synod
10. The Worldwide Church of God

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CERTIFICATE OF INTEREST PURSUANT TO RULE 11(b)
AND DISCLOSURE PURSUANT TO RULE 11(c)

Amici curiae, The Evangelical Lutheran Church in America, The Evangelical Covenant Church, The First Church of Christ, Scientist, The General Assembly of the Presbyterian Church (U.S.A.), The General

Conference of Seventh-day Adventists, The Reorganized Church of Jesus Christ of Latter Day Saints, The United House of Prayer for All People of the Church on the Rock of the Apostolic Faith, The United States Catholic Conference, The Wisconsin Evangelical Lutheran Synod and The Worldwide Church of God, furnish the following statement, and state that this brief is tendered on behalf of the following entities, in compliance with Rules 11(b) and 11(c), TEX. R. APP. PROC.:

The Evangelical Lutheran Church in America (ELCA) is the largest Lutheran denomination in North America and the fifth largest Protestant church body in the United States. The ELCA has 65 affiliated synods and approximately 11,000 member congregations, which in turn have approximately 5.2 million individual members nationwide. There are three ELCA synods, with over 400 congregations and 150,000 members, in the State of Texas. ELCA has paid, or will pay, the fee for the preparation of this brief.

ELCA and one of its synods won a decision against Atlantic Mutual Insurance Company in the United States District Court for the Western District of Texas in *Evangelical Lutheran Church in America, et al. v. Atlantic Mutual Insurance Co.*, No. A-97-CA-686JN (W.D. Tex. Dec. 18, 1997). The Court held that Atlantic Mutual had a duty to defend an underlying negligence action against the insured even though the tort plaintiffs were allegedly the victims of intentional acts by a non-insured Lutheran minister. That litigation is now on appeal to the United States Court of Appeals for the Fifth Circuit, and was argued on December 2, 1998. The General Council on Finance and Administration of the United Methodist Church (GFCA), along with many of the Amici herein, filed an amicus brief in support of ELCA and its synod in the Fifth Circuit, substantially similar to this brief, and GFCA and ELCA have split evenly the total cost of the two briefs.

The Evangelical Covenant Church is a denomination of evangelical Christian churches, with congregations throughout the United States including Texas. It has 630 churches in ten regions with an average attendance of 114,000. It grants clergy credentials to 1700 ministers. It operates schools, hospitals, children's homes, retirement communities, shelters, and social services in the United States and in foreign countries. It has an interest in the adequacy of liability insurance for donor supported not-for-profit ministries. It also has an interest in preventing sexual misconduct by persons in helping professions and in providing victims adequate care.

The First Church of Christ, Scientist, in Boston, Massachusetts, is "The Mother Church" of one of the major indigenous American religious denominations- Christian Science. Christian Science is the name given by Mary Baker Eddy to her discovery of the laws of God, including rules for Christian spiritual healing through prayer, as illustrated by the words and works of Christ Jesus as recorded in the Bible. Following this discovery, Mrs. Eddy established a church in 1879, which she reorganized in 1892 as The First Church of Christ,

Scientist. The Church and its branch Christian Science churches and societies are collectively referred to as the Church of Christ, Scientist. Local Christian Science congregations exist in over sixty-five countries and in all fifty states and the District of Columbia. There are eighty such congregations in Texas.

The Church of Christ, Scientist, has no clergy, but claims could be imagined that certain roles carry the imprimatur of the Church. Christian Science practitioners are individuals who make themselves available to provide Christian Science treatment through prayer for those who call on them. Christian Science nurses are available to provide practical wisdom necessary in the sickroom for those relying on Christian Science treatment for healing. The Church publishes a monthly magazine, *The Christian Science Journal*, in which Christian Science practitioners and nurses who qualify are able to advertise as such. All Christian Science churches have Sunday school teachers, and individual Christian Scientists serve as chaplains in the military and represent the religion in prisons and hospitals and in various other capacities throughout the world. The First Church of Christ, Scientist, supports the preservation of religious rights for all.

The General Assembly of the Presbyterian Church (U.S.A.). Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with approximately 11,500 congregations organized into 173 presbyteries under the jurisdiction of 16 synods. There are currently 564 Presbyterian congregations within the confines of the State of Texas with 145,175 members.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverance, policy and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

The theology of the Presbyterian Church (U.S.A.) has historically espoused careful stewardship of resources entrusted to its membership by our Creator. This theology was codified in the Book of Order, the constitution of the denomination, when in 1993 all governing bodies (which includes local congregations) were required to . . . obtain property and liability coverage to protect facilities, programs, and officers, including members of the session, staff, board of trustees, and deacons. The theories proposed by the Appellants in the case at bar would, if adopted by this court, make that theologically based constitutional requirement largely moot.

The Stated Clerk urges this Court to affirm the district court's ruling and to continue to protect religious organizations from such

destructive legal theories which would so clearly have negative consequences on the carrying out of ministry. Such theories also violate the strong public policy interest that civil governments have in preserving religious organizations.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 41,000 congregations with more than nine million members worldwide. The North American Division of the General Conference administers the work of the church in the United States, Canada, and Bermuda, and represents more than 4,300 congregations in the United States with nearly 800,000 members. The church's local congregations, administrative offices, and its educational, medical, and publishing institutions all have an interest in the insurance issues involved in this case.

The Reorganized Church of Jesus Christ of Latter Day Saints is organized as an unincorporated religious association on a world-wide basis. The Church has its major concentration in North America, but is officially established in over 35 countries. Church membership is approximately 245,000 with over 1,500 congregations and with the vast majority of its members in North America. The church has had members and congregations in the State of Texas for well over 125 years. The church currently has 48 congregational facilities in the State of Texas, one campground in Bandera, Texas and one educational facility in Houston, Texas. Membership in the State of Texas, at present, is in excess of 4,775.

The United House of Prayer for All People of the Church on the Rock of the Apostolic Faith (United House of Prayer), is a religious society incorporated in the District of Columbia with 135 congregations in 25 states. The United House of Prayer was founded by the late Bishop C.M. Grace in the 1920's and now has a nationwide membership in the millions. The United House of Prayer was founded on principles that invite all people, irrespective of denomination or creed, to gather for prayer and to worship the Almighty God in Spirit and in Truth. It has an interest in the insurance issues involved in this case out of its need to protect the charitable work and purpose of the Church.

The United States Catholic Conference (USCC or Conference) is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Roman Catholic Bishops in the United States. The USCC is a vehicle through which the Bishops speak cooperatively and collegially on matters affecting the Catholic Church and its people. Roman Catholicism is the largest religious denomination in the United States, with over 60 million members in this country. The Conference advocates and promotes the pastoral teachings of the Church on diverse issues, including the protection of human rights, the sanctity and dignity of human life, and the importance of

religious communities, and has an interest in the existence of adequate liability insurance to protect its' and other churches' ministries.

The Wisconsin Evangelical Lutheran Synod (WELS) is a worldwide religious denomination organized and existing as a Wisconsin religious corporation. WELS has approximately 314,000 communicant members and 1,250 congregations in the United States. In Texas, WELS has over 30 local congregations, 2,000 communicant members and 65 ordained teachers and ministers.

Pursuant to its Bylaws, WELS, through its Synodical Council, is the legal representative of the Synod and is authorized to represent the Synod in all legal matters. As a part of its risk management program, WELS has purchased and maintains various liability insurance contracts. WELS has an interest in this litigation because of its duty and obligation to protect the rights and interests of the Synod in all pertinent matters.

The Worldwide Church of God, a California corporation, began in the early 1930's in Eugene, Oregon. Subsequently, it was incorporated in California in 1947 where it maintains its worldwide headquarters.

As of July 2, 1998, the Church had more than 844 local church congregations throughout the world. As of that date, the Church had approximately 45,000 adult baptized members, co-workers and donors, and approximately 409 ordained and commissioned ministers, a large portion of whom had studied at the Church's School of Theology, Ambassador University.

The governance of the Church is hierarchical with ecclesiastical government from the top down, in accord with what it deems to be the biblical example.

The Church purchases multiple types of insurance (including policies covering the Church for torts committed by persons who have some nexus to the Church in their activities) to protect itself against liability from numerous risks that it is exposed to by virtue of undertaking its charitable activities. It pays substantial premiums for such insurance coverage and might be unable to successfully defend itself against an unmeritorious suit if insurance companies are able to arbitrarily deny coverage. Further, the Church may find itself financially unable to pursue litigation against its insurers for wrongfully refusing to defend the claim. Thus, clarification of the insurance company's duties and responsibilities is of crucial importance, not only to the action taken by the Church to protect itself against risk, but perhaps to the Church's very survival.

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ARGUMENT

It is an unfortunate reality of the modern world that an explosion of litigation has exposed religious organizations and other charities to potentially massive liabilities. In the past, many states afforded tort immunity to charities, but charitable immunity is now virtually a thing of the past. Amici are religious bodies who have purchased liability insurance as a prudent measure to protect against the costs

of litigation and the risk of loss due to their own unforeseen acts of negligence, or alleged negligence.

It is also an unfortunate reality that a significant amount of churches' potential liability arises from claims that arose because some person or related group engaged in some form of intentional misconduct. These may be claims of sexual misconduct with children or adults, but they may also be claims of non-sexual battery or even financial misconduct. Courts in virtually all jurisdictions have held that religious groups are not liable under the doctrine of respondeat superior in these circumstances because such torts are outside the scope of the perpetrator's duties. Many tort plaintiffs therefore allege a direct cause of action against religious groups for failing to act reasonably to prevent perpetrators from causing harm. These allegations may be based on charges that the group failed to implement policies to anticipate these problems, or that their attempts to prevent and respond to misconduct were inadequate. Thus, religious groups face possible liability for their unintentional, albeit negligent conduct. Indeed, like all potential defendants, they face burdensome litigation even when they are not negligent, for plaintiffs routinely will sue religious entities on a variety of creative theories in the hope of securing a favorable settlement.

On the pleadings, the claim underlying the case at bar is no different. The tort plaintiffs allege that they were sexually abused because various entities and individuals of the United Methodist Church (the United Methodists) were negligent in their decision to credential, and their failure to supervise Barry Bailey, a United Methodist minister. Thus, according to the tort plaintiffs, the United Methodists directly caused their injuries by failing to prevent Bailey from serving as a minister. The United Methodists deny that they owed any duty to these plaintiffs because Bailey was not their employee or agent. They also deny that they were negligent in credentialing Bailey as a United Methodist minister or supervising him in ministry.

Having purchased insurance to cover negligence claims, the United Methodists fully expected their insurers, Centennial Insurance Company, Atlantic Mutual Insurance Company and Atlantic Lloyd's Insurance Company of Texas (the insurers) to provide them with a defense and coverage for the underlying litigation. Instead, the insurers refused tender, asserting that there was no coverage because Bailey's alleged actions were intentional acts, and therefore not covered "occurrences" within the policies at issue. In this litigation, the insurers have taken the position that their insurance policies do not cover negligence claims against the insured religious entities if the

underlying injury was caused by an "intentional" act, from the standpoint of the perpetrator.¹

The insurers ignore the distinction between the allegations of negligence against the United Methodists and the allegations of intentional misconduct against Bailey. The United Methodists do not, themselves, argue that Bailey is covered under their policies. He is not an insured. In contrast, the United Methodists are "the insureds" under the policies, and neither the tort plaintiffs nor the insurers allege that they acted intentionally. The United Methodists neither expected nor intended the tort plaintiffs' injuries. They are entitled to a defense and coverage because the negligence that is alleged against them is precisely the type of risk for which they bought, and the insurers sold, insurance. The purpose of this brief is to demonstrate that the law, public policy and common sense require a defense for the United Methodists by those insurers.

I. NEGLIGENCE CLAIMS AGAINST RELIGIOUS INSTITUTIONS ARISING OUT OF CLERGY MISCONDUCT ARE COVERED "OCCURRENCES" WHEN THEY ARE "UNEXPECTED" AND "UNINTENDED" FROM THE STANDPOINT OF THE RELIGIOUS INSTITUTIONS

A. The Policies Provide A Defense And Coverage

An insurance coverage dispute is a contract case. The rights of the parties are determined, in the first instance, by the language of the insurance policy -- the binding contract. Since the purpose of an insurance policy is to provide insurance coverage, where the policy language is at all ambiguous, it must be construed liberally in favor of the insured. See *Gonzales v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990). Moreover, where, as here, the dispute concerns the duty to defend, as opposed to the duty to indemnify, the insured is entitled to a defense if the allegations of the underlying claim give rise to any possibility of coverage, as the duty to defend is universally recognized to be broader than the duty to indemnify. E.g., *Cluett v. Medical Protective Co.*, 829 S.W.2d 822, 829-30 (Tex. App., Dallas 1992, writ den'd).

The policies at issue provide a defense and coverage for damages due to "Personal Injury Liability" that is "caused by an Occurrence."

^{1/} This brief is limited to the argument that the commission of an intentional act by the perpetrator does not itself foreclose coverage for negligent hiring or supervision claims against a religious organization. The insurers also argue that there was a lack of fortuity here solely because the tort plaintiffs allege that the United Methodists "knew or should have known" that Bailey was engaging in misconduct. While we do not address this argument here, we concur with the argument of the Appellees. (Appellees Br. at 46-50.) Such standard negligence allegations do not vitiate the fortuity of the ultimate injury, and therefore cannot relieve the insurers of their duty to defend the United Methodists.

Appellees' Br. at 8. There is no dispute that sexual abuse constitutes a personal injury to the underlying claimants. The issue is whether the claim constitutes an occurrence. The definition of an occurrence in the United Methodists' policies at issue here is not substantially different from that in most policies: "an accident, or a happening or event, or a continuous or repeated exposure to conditions, which unexpectedly or unintentionally result, in personal injury" E.g., Appellees' Br. at 9. Personal Injury Liability is defined as:

The term "Personal Injury Liability" shall mean
(a) bodily injury, sickness, disease, disability, shock, mental anguish and mental injury . . . (b) false arrest, detention or imprisonment, malicious prosecution or humiliation; . . . (e) assault and battery not committed by or at the direction of the insured, unless committed for the purpose of protecting persons or property; which occur during the policy period. (CtR 719, Policy Conditions, A. Definitions, (7) Personal Injury Liability).

(Appellees Br. at 9.)

The claim against the United Methodists is that their alleged negligence somehow caused the injuries claimed in the underlying litigation. Thus, they are accused of causing a "bodily injury" (an act of sexual abuse constituting a "battery") by "accident" (through negligence). The claim would appear to fit squarely within the policy language, and thus ought to be covered. It should at least be subject to the insurers' duty to defend until or unless there is evidence that the United Methodists themselves actually intended to harm the tort plaintiffs.

The definition of an occurrence requires that the "accident" or "happening or event . . . unexpectedly or unintentionally result[] in personal injury." (Appellees Br. at 9.) This definition of an occurrence works to prevent the insurance policy from becoming a license to commit intentional torts, and to prevent the insured from intentionally causing a covered event to "occur." If the insured did not expect or intend harm, then there is coverage, even if the insured caused the harm.

These principles are easy to apply in a clergy misconduct case. Religious organizations do not dispute the insurers' contention that perpetrators of sexual abuse intend the consequences of their acts. Indeed, Amici believe that this is one reason that such acts are considered in virtually all jurisdictions to be outside the scope of employment as a matter of law. Thus, perpetrators generally will have no coverage.

The governing standard is to view the bodily injury from the standpoint of the insured, not the perpetrator. In most cases,

perpetrators are not only excluded from coverage by their intention to cause harm, they are often not even named insureds under the policy. That is the case here, where the United Methodists' policies cover only the organizations and their officers and directors, not the United Methodist clergy at large. (See Appellants Br. at 13.) Thus, Bailey not only is not "the insured," he is not even "an insured" under the policies held by the national and regional church entities. Whether conduct is intentional from his "standpoint" is thus immaterial.

On the other hand, as the insurers appear to concede, from the standpoint of the United Methodists, the tort plaintiffs' bodily injuries were not expected or intended. At worst, taking the underlying complaint as true, the church groups were negligent, unintentionally causing the underlying plaintiffs harm. Accordingly, the negligence claims against the United Methodists are occurrences because they were "accidental" as far as the insureds were concerned in that they caused "bodily injury" that was both "unexpected" and "unintended" from the standpoint of the United Methodists.

The insurers argue that there can be no negligence coverage when the perpetrator acts intentionally because the act causing injury is an inherently intentional act, and thus is not covered (or is excluded from coverage) for all purposes. The intent of the policies to cover negligence claims arising from intentional acts of third parties is amply demonstrated by Appellees, but one point bears emphasis here. The policies explicitly cover a "Personal Injury Liability" caused by an "Occurrence." A Personal Injury Liability explicitly includes "assault and battery not committed by or at the direction of the insured . . ." Thus, by definition, the policies cover liabilities arising from "assault and battery" so long as the assault and battery is not "committed by or at the direction of the insured." Accordingly, the mere fact that a perpetrator of a sexual "assault and battery" intends his acts cannot vitiate "the insured's" coverage unless the perpetrator acted "at the direction of the insured." The insurers do not contend that Bailey acted "at the direction of the [United Methodists]".

The insurers cite a number of Texas intermediate appellate cases and a number of decisions of the U.S. Court of Appeals. The Court should reject the insurers' argument for a variety of reasons.

First, every contract case is governed by the contract at issue. The policy in this case explicitly affords coverage. None of the Texas authorities cited in the insurers' brief deal with the language of the United Methodists' policies. Thus, the district court, which examined the policies in detail, was entitled to hold that the negligence claims at issue were "accidents" or "happenings" or "events" that fell within the definition of an occurrence in these policies.

Second, none of the contrary authority is binding on this Court, as it consists of federal decisions and collateral intermediate appellate opinions. (See Appellants Br. at 35-36.)

This Court should look first to the recent decision in *State Farm General Insurance Co. v. White*, 955 S.W.2d 474 (Tex. App. Austin 1997, no writ), which is directly on point. In *White*, the insureds were accused in an underlying lawsuit of negligence for failing to report the sexual abuse of children at a day care center. The policy contained a clause excluding coverage for bodily injury "caused intentionally by or at the direction of the Insured." *Id.* at 476. The insurer attempted to avoid providing a defense on the ground that the insureds' failure to report was intentional, and on the ground that coverage was excluded because the abuse acts themselves were intentional.

The court rejected the first argument out of hand, holding that negligence and intentional wrongdoing were fundamentally different:

The pleadings do not allege an intent to harm, as the factual recitations contained in the petition do not allege any intentional acts by [insureds]. Instead, the [victims] have presented facts constituting and expressly accusing the [insureds] of negligence in failing to report the abuse; thus, the language of the petition does not trigger the intentional injury exclusion.

Id. See also *State Farm Fire & Casualty Co. v. S.S.*, 858 S.W.2d 374, 378 (Tex. 1993) (negligence is not an intentional wrong).

Turning to the insurer's argument that "the claims are excluded from coverage because intent to injure may be inferred as a matter of law in sexual molestation cases" (955 S.W.2d at 477), the Court observed the obvious:

here the actual molester is not the actor seeking a defense under [the] policy. [The insureds] are not the ones who physically molested the . . . children. Rather they were bystanders to the abuse of other children and failed to report the abuse. Since [the insurer's cited authority] all involve the actual molesters, these cases are distinguishable and, therefore, not controlling.

Id. The Court thus explicitly rejects the insurers' argument here that an exclusion of "intentional conduct" bars coverage even if the insured did not act intentionally.²

² The policy in *White* did not contain the requirement that bodily injury be caused by an occurrence; it merely covered bodily injuries that were not "caused intentionally by or at the direction of the Insured . . ." 955 S.W.2d at 476. The United Methodists' policies are functionally identical, allowing coverage for a bodily injury if the "event" or even an assault or battery is "unexpected" and "unintended" from the standpoint of the insured. The *White* Court's unequivocal refusal to equate the sexual abuser's acts with those of the negligent parties makes clear that the same analysis would apply to the definition of an occurrence in the United Methodists' policies.

This Court should follow *White*, and hold that the requirement that an occurrence be unexpected and unintended is to be analyzed from the standpoint of the insured. As such, negligence claims against a religious group for the acts of its personnel are covered claims which insurers have a duty to defend.

The insurers fail to cite any Texas authority contrary to *White*, which is the Texas case most similar to the situation at bar. The Texas authorities cited in the insurers' brief either state the obvious point acknowledged in *White* that the perpetrator will be presumed to intend the consequences of his criminal acts, or involve denials of coverage pursuant to exclusions that applied to all claims "arising out of" the excluded matter. E.g., *Burlington Insurance Co. v. Mexican American Unity Council*, 905 S.W.2d 359 (Tex. App. San Antonio 1995) (no writ) (excluding all claims for bodily injury arising out of assault and battery); *Centennial Insurance Co. v. Hartford Accident and Indemnity Co.*, 821 S.W.2d 192 (Tex. App. Houston 1991, no writ) (excluding all claims for bodily injury arising out of any automobile). These blanket clauses are understood to exclude an entire class of claims, regardless of the role the insured played in causing the injury. Such exclusions are completely different from the definitions of an occurrence and Personal Injury Liability in the United Methodists' policies, which focus explicitly on the actions of "the insured" which cause injury.

Amici acknowledge that recent decisions of the Fifth Circuit have held that "where a third-party's liability is related to and interdependent on other tortious activities, the ultimate issue is whether the underlying tortious activities are encompassed within the definition of 'occurrence.'" *American States Ins. Co. v. Bailey*, 133 F.3d 363 (5th Cir. 1998) (citing *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80, 87 (5th Cir. 1997), pet. for reh'g denied, 110 F.3d 795 (5th Cir. 1997); *New York Life Ins. Co. v. Travelers Ins. Co.*, 92 F.3d 336, 339 (5th Cir. 1996)). See also *Canutillo Independent School District v. National Union Fire Ins. Co. of Pittsburgh*, 99 F.3d 695 (5th Cir. 1996). These opinions, which all involve employees, appear to focus either on blanket exclusions³ or the fact that vicarious liability is alleged, through which it may be plausible to argue for insurance purposes that the insured's conduct was, by imputation, intentional. But see *American Home Assurance Co. v. Stephens*, 130 F.3d 123 (5th Cir. 1997) (it is against Texas public policy to exclude coverage for nonsexual misconduct merely because excluded sexual

³ The Fifth Circuit has relied heavily on *Fidelity & Guaranty Ins. Underwriters, Inc. v. McManus*, 633 S.W.2d 787 (Tex. 1982). But *McManus* merely stands for the proposition that a policy can explicitly exclude an entire class of claims arising out of a particular kind of activity, such as the use of a recreational motor vehicle (as in *McManus*), or even "sexual misconduct." There is no such blanket exclusion in the policies at bar which, to the contrary, explicitly cover liabilities arising from assaults and batteries.

misconduct also occurred), pet. for reh'g granted, Op. withdrawn, certification to Tex. Sup. Ct. granted, 140 F.3d 617 (5th Cir. 1998).

In contrast, in the case at bar there is no allegation of vicarious liability, but only of direct negligence on the part of the church.⁴ When dealing with claims and policies similar to the one at bar, the Fifth Circuit has held that there is coverage for negligence claims arising from a non-insured's intentional conduct. E.g. *Western Heritage Insurance Co. v. Magic Years Learning Centers and Child Care, Inc.*, 45 F.3d 85, 89 (5th Cir. 1995); *Society of The Roman Catholic Church of the Diocese of Lafayette and Lake Charles, Inc. v. Interstate Fire & Casualty Co.*, 26 F.3d 1359, 1364 (5th Cir. 1994) (the negligent supervision of a priest who sexually molested 31 children constituted multiple "occurrences" under Louisiana law). Accordingly, the insurers' Fifth Circuit authorities are not even relevant. To the extent the Fifth Circuit intended to hold that Texas law requires that even innocent negligent parties like the insureds in *White* lose coverage when a third party acts intentionally, the Fifth Circuit erred. In any event, its decisions are not binding on this Court and should be rejected as contrary to the law as developed in Texas courts.

Amici suggest that when this issue reaches the Texas Supreme Court, that court will adhere to the State's overriding policy affording coverage to insureds wherever the language of a policy will permit it. The policies at issue here explicitly cover negligence by the insured; they do not cover intentional wrongdoing by the insured. The allegations against the United Methodists are that they were negligent in selecting, credentialing and overseeing the work of a minister. These acts fall squarely within the language of the policies. If the policies are held not to cover the United Methodists' negligence, then they were sold a worthless piece of paper by their insurers. This Court should follow the reasoning of *White* and hold that negligence claims against religious organizations for failure to prevent the intentional acts of individuals are "unexpected" and "unintended", and thus are covered occurrences.

B. Public Policy Supports Finding A Duty to Defend and Coverage Because Religious Organizations Should Not Be Forced To Withdraw From Serving The People

^{4/} The insurers argue that the negligence claims against the United Methodists simply state an alternative legal theory for the same injuries caused by the intentional acts. This misstates the law of torts. The claims against the United Methodists are direct claims against different parties, alleging different conduct, independent of the intentional tort claims. This is not a case of plaintiffs who assert multiple "alternative legal theories" against the same defendant, based on the same tortious conduct.

Religious organizations, their clergy and their adherents are on the front line of society, ministering to the poor, feeding the hungry, teaching the young and comforting the old. Religious groups, and charities in general, thus perform a vital social function; one that government could never fulfill completely on its own. Society would suffer immeasurable harm if religious groups and other charities withdrew from this role.

Amici do not exist to make a profit, or even to collect assets. They acquire and use their assets in fulfillment of their respective missions and ministries. Nonetheless, they have a duty to be responsible stewards of their assets, since their ability to serve their respective faith-based responsibilities depends, to some extent, on financial solvency. Therefore, Amici rely on insurance to permit them to engage in interactions with others and to bear, within reason, the risks of the secular marketplace. They do not seek a license to commit torts; they simply seek insurance for the same risk that most insureds protect against: unintentional mistakes -- that is, negligence.

If, as some insurers contend, negligent hiring and retention claims against religious organizations are not covered by comprehensive general liability insurance whenever a perpetrator acts intentionally, even when not expressly excluded from coverage, these organizations will have no way to protect against negligence claims. After paying premiums, they will have to hire lawyers to defend negligence cases, and will be exposed to potentially catastrophic judgments in those cases, even where there is no allegation that they did anything more than make a mistake.

Such exposure would undoubtedly cause religious groups to avoid serving others. Rather than take on challenging missions, religious organizations might be forced to make decisions based principally on economic factors, rather than on the religious values that previously have motivated their actions. In the past, religious groups were protected from this dilemma by charitable immunity, which shielded them from liability for unintentional torts. Charitable immunity served public policy by protecting charitable assets and encouraging charitable activities, but it troubled courts and legislatures because it left injured parties uncompensated. With the advent of a reliable insurance system for negligence claims, almost all jurisdictions abolished charitable immunity because, in their view, it was no longer needed.

The Texas Supreme Court has expressly acknowledged these policy concerns. In *Cox v. Thee Evergreen Church*, 836 S.W.2d 167 (Tex. 1992), the court abolished common law immunity for unincorporated associations from suits by members of the association. The court noted, however, that from 1987 onward charitable associations could "effectively insulate themselves from liability by maintaining the statutorily required levels of insurance" under the Charitable Immunity and

Liability Act of 1987, Tex.Civ.Prac. & Rem. Code Ann. Sec. 84.001-.008 (Vernon Supp. 1992). Id. at 173 (footnote 10). Under the Act, the liability of a "nonhospital charitable organization for damages based on an act of omission by the organization or its employees or volunteers . . . is limited to . . . \$500,000 for each person and \$1,000,000 for each single occurrence of bodily injury or death" Sec. 84.006 (emphasis added). These damage caps "do not apply to any charitable organization that does not have liability insurance coverage in effect on any act or omission to which [the damages caps] appl[y]." Sec. 84.007(g). The Texas Attorney General has held that the Act only protects charitable organizations that carry the required insurance. Tex.Atty.Gen.Op.No. JM-1257 (21-11-90). Thus, Texas law requires charitable organizations to purchase liability insurance for negligence claims arising out of the acts of their "employees or volunteers" if they are to receive an important legal benefit, limited liability. It therefore makes no sense to argue, as the insurers do, that Texas law simultaneously precludes the purchase of such insurance.

By placing the burden on charities to purchase insurance, policy makers sought to create a more equitable system without forfeiting the essential protection for charities that immunity formerly provided. The irony of the insurers' argument is that, if it is adopted by this Court, charities will have neither immunity nor insurance. This would leave charities only the alternatives of risking charitable assets or curtailing charitable activities, the very dilemma that gave rise to the immunity doctrine in the first place. The paradoxical result of this state of affairs would be that religious organizations could best ensure their continued existences by failing or refusing to serve the very social and religious needs they exist to serve.

The risk of loss, or even ruin, may be a valid deterrent to intentional wrongdoing, and it would violate public policy to offer insurance for the insured's own intentional acts. In contrast, negligence unfortunately may result from a church's legitimate religious activities, as it may from any human enterprise. Rather than curtail their exercise of religion and diminish their vital social contribution, religious organizations buy insurance for negligence, voluntarily undertaking the risk of loss in a rational, financially responsible way. If there can be no negligence coverage as the insurers maintain, then there can be no risk management. More importantly, religious groups will be forced to restrict their activities. Public policy strongly favors affording religious organizations coverage for negligence, especially where insurance policies on their face even appear to provide such coverage. Any other outcome would chill the valuable activities of religious and charitable organizations and defeat the very purpose of insurance.

CONCLUSION

Amici respectfully request that the Court affirm the order of the district court granting summary judgment to Appellees.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Motion and Brief of Amici Curiae The Evangelical Lutheran Church in America, The Evangelical Covenant Church, The First Church of Christ, Scientist, The General Assembly of the Presbyterian Church (U.S.A.), The General Conference of Seventh-day Adventists, The Reorganized Church of Jesus Christ of Latter Day Saints, The United House of Prayer for All People of the Church on the Rock of the Apostolic Faith, The United States Catholic Conference, The Wisconsin Evangelical Lutheran Synod and The Worldwide Church of God in Support of Appellees, along with Amici's Motion for Leave to File have been served upon the counsel of record listed below by overnight courier delivery, this 14th day of December, 1998:

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