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IF YOU CHOOSE TO GO OUTSIDE WITHOUT AN UMBRELLA WHILE IT IS RAINING, EXPECT TO GET WET: WHY INSURANCE INDEMNIFICATION OF THE TORTIOUS TRANSMISSION OF SEXUALLY TRANSMITTED DISEASES IS CONTRARY TO PUBLIC POLICY

Megan L Johnson, Thomas Jefferson School of Law

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Article Written By: Megan L. Johnson
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INTRODUCTION

“To be stricken with disease through another’s negligence is in legal contemplation as it often is in the seriousness of consequences, no different from being struck with an automobile through another’s negligence.”¹

Jane goes out on a Friday night to meet some friends for dinner.² Her friends introduce her to John, with whom Jane really hits it off. The two of them begin dating and their relationship eventually turns sexual. The two of them engage in unprotected sex multiple times over the course of their monogamous six-month relationship. The relationship is going well until Jane experiences painful blistering in her genitals. When she goes to the doctor, he diagnoses Jane with herpes simplex virus, type II.³

Jane immediately calls John to question him about this condition, and he admits that he had experienced something similar on his own genitals around the time they began their sexual relationship. He never had his condition checked out by a doctor, and continued to have unprotected sex with Jane, never disclosing his suspicions that he may carry a sexually transmitted disease (STD).⁴ Jane’s life is completely turned upside down. She now has an incurable disease that causes her great pain and suffering at least once a month when she has a fever blister outbreak. She also experiences emotional problems, such as depression and fear of any future sexual intimacy, which has led her to seek counseling. Jane wants compensation for all she has been through, but is unaware of her available remedies.

² All names referenced throughout this paper are fictitious.
³ Herpes simplex virus, type I usually affects the carrier above the waist in the form of cold sores on the face and lips. In contrast, herpes simplex virus, type II usually takes the form of fever blisters and genital ulcers below the waist. Type II herpes is commonly referred to as “genital herpes.” Meany v. Meany, 639 So. 2d 229, 232, n.3 (La. 1994).
⁴ Although this hypothetical situation uses herpes as an example, when this paper references STDs, that term is meant to encompass all STDs except HIV/AIDS. HIV/AIDS is a disease with side effects that are much more serious than those that occur from other STDs. HIV/AIDS is currently incurable and often results in early death, while other incurable STDs, although extremely painful, do not often result in death. Given the difference in severity between HIV/AIDS and other STDs, HIV/AIDS will be treated as sui generis and is therefore beyond the scope of this paper.
This scenario is neither novel nor uncommon. It is no secret that an STD epidemic exists in America today; the Centers for Disease Control and Prevention estimate that nineteen million people will be infected with an STD of some sort annually. This epidemic leads to dramatically increased health care costs and serious side effects for those who suffer from these diseases, some incurable, multiplying those health care costs across the carrier’s lifetime. To help combat these major dilemmas and compensate the victims of STD transmissions, courts have allowed infected plaintiffs to bring causes of action in tort under theories of negligence, battery, intentional infliction of emotional distress (IIED), misrepresentation, nondisclosure, negligent infliction of emotional distress (NIED), and negligence per se. Some theories have been more successful than others, but almost all of the potential causes of action require that the defendant have some degree knowledge of the STD or its symptoms before the court will hold the defendant liable.

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7 Id. Some of the more serious side effects of herpes may include meningitis, radiculitis, frequent recurrences, neonatal morbidity, cervical cancer, and vulvar carcinoma in situ. B.N. v. K.K., 538 A.2d 1175, 1178, n.7 (Md. 1988).

8 See cases cited supra note 5. Collectively, this group of available theories will be referred to as “sex torts” throughout this Note.

9 See Roderick D. Blanchard & Jeffrey M. Thompson, Insurance Coverage for the Sexual Transmission of Disease, 13 HAMLINE L. REV. 37, 37 (1990) (noting that claims for negligence, battery, and fraud require an element of knowledge in the form of medical diagnosis or manifestation of symptoms, and knowledge that the disease can be transmitted sexually); see also Louis A. Alexander, Note, Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law, 70 CORNELL L. REV. 101, 129 (1984) (stating that negligence is often an easier cause of action to prove because it requires proof of an objective standard of reasonableness when compared with the subjective intent required for proving the knowledge element of intentional torts).
Under the goals of these common law torts and their accompanying requirement of some degree of knowledge, is it appropriate for the defendant’s personal liability insurance carrier to defend the tort case and indemnify the defendant for damages awarded against him? Although the purpose of insurance coverage is to spread the risk of losses and to cover accidental occurrences, the public policy of preventing STD transmission is a lot stronger than the policy behind other covered occurrences, given the extreme STD epidemic that exists in the United States today. This Note will establish that insurance companies should not be responsible for indemnification under personal liability policies for STD transmission because it contradicts the public policy interests in fighting the STD epidemic to do so. For example, if John knows his insurance company will indemnify him for transmitting his STD to Jane, what is to stop him from continuing to engage in risky sexual behavior and transmitting it to another future sexual partner without adequate disclosure? Does his insurance company help or hurt STD prevention efforts by covering his claims?

There is a split of authority on whether insurance coverage of sexually transmitted diseases will ultimately result in STD spread and is therefore against public policy. In R.W. v. T.F., a Minnesota court held that allowing insurance indemnification of sex tort actions recognizes risky sexual behavior and resulting STD transmissions as an acceptable risk of sex, because any consequences of that wrongful conduct will be insured. This goes against the strong public interest in preventing the spread of STDs, because people will engage in more risky sexual behavior and will be less likely to take measures to prevent the spread of STDs they know they carry. One author succinctly states the theory that “[i]ndividuals should be held

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11 R.W., 528 N.W.2d at 873.
responsible for their own acts” instead of being awarded indemnification for their wrongful behavior.\textsuperscript{12}

In contrast, a Wisconsin court in \textit{Loveridge v. Chartier} stated that it does not contradict public policy to include insurance coverage for STDs, because the individual defendant is still held personally responsible through the following means: increased insurance premiums, injury to reputation, increased difficulty obtaining new insurance policies in the future, and damages awards that exceed the insurance coverage limit.\textsuperscript{13} The court still adheres to the goals of tort and insurance law and works to prevent STD prevention through personal liability, so it is not against public policy to allow insurance indemnification of sex tort damages.

Ultimately, the courts agree that if the insurance company wants to exclude coverage of STDs, it can include explicit language in the policy to do so.\textsuperscript{14} In reaction to these rulings and the increasing use of courts for sex tort compensation, insurance companies nationwide have started to include coverage exceptions for intentional acts, sexually transmitted diseases, communicable diseases, sexual contact, criminal acts, bodily injury to insured, and exclusions through the definition of “occurrences” that are covered.\textsuperscript{15} These exclusions have been used in varying degrees by insurance companies to deny coverage for sex tort liability. Insurance policies vary widely as to whether they include any or all of these exclusions, and the language

\textsuperscript{13} Loveridge v. Chartier, 468 N.W.2d 146, 157 (Wis. 1991).
\textsuperscript{14} R.W., 528 N.W.2d at 873; \textit{Loveridge}, 468 N.W.2d at 158.
\textsuperscript{15} See generally Eidsmoe & Edwards, \textit{supra} note 12, at n.144 (explaining ways insurance companies can defend their decisions not to cover STD claims).
that is used differs among insurance companies.¹⁶ The exclusions are heavily litigated where insureds feel they are entitled to coverage and the insurer denies coverage.¹⁷

Coupled with the conflicting interpretation of public policy interests, judicial interpretation of policy language has led to inconsistent judicial results in insurance indemnification cases regarding sex torts. Some cases have held that insurance policies with some of these various exclusions can provide coverage for STD transmission, while others have taken a plain language approach and held that the exclusions do just what they were intended to do: exclude coverage under wrongful sexual conduct circumstances.¹⁸

As this Note will demonstrate, insurance companies have the right to include exclusions for coverage of sex torts. All insurance companies should exercise this right and include clear and unambiguous language in the form of a “tortious transmission of sexually transmitted diseases exclusion” in their policies to help curb the spread of STDs. Judicial interpretation of this type of unambiguous exclusion cannot yield inconsistent results. These exclusions will serve the public interest in STD prevention, and will also reduce unnecessary litigation over interpretations of the unclear and ambiguous exclusions in place today.

Part I of this Note will explain the different tort causes of action and defenses that have been used or proposed for use in the context of STD transmission cases. In Part II, this Note will explain the procedures behind insurance indemnification cases, as well as the exclusions that the courts have applied to sex torts. Part III will address the problems with inconsistent judicial

¹⁶ But see generally id. at n.50 (asserting that model language has been proposed and adopted by various insurance companies; however, the terms within the language must be better defined to avoid litigation over their interpretation, and more companies should adopt the same or similar language).
¹⁷ See infra Part II.B.
¹⁸ Id.; see R.W., 528 N.W.2d at 873 (Minn. 1995) (holding that intentional acts exclusion barred insurance indemnification); but see Loveridge, 468 N.W.2d at 148 (holding that intentional acts exclusion did not bar insurance coverage of negligent STD transmission) and Milbank Ins. Co. v. B.L.G. & M.M.D, 484 N.W.2d 52, 59 (Minn. Ct. App. 1992) (holding that intentional acts exclusion and interpretation of “occurrences” did not bar insurance coverage).
interpretations of vague and ambiguous insurance policy language, and will propose model language for all insurance companies to adopt in order to fulfill public policy goals. Finally, in Part IV, this Note will demonstrate that insurers have the authority to adopt the proposed model language to exclude sex tort coverage. It will also assert the strong public policy arguments against insurance indemnification of sex torts. Further, this part will address and refute potential counterarguments. This Note will conclude that insurance companies should not insure wrongful sexual conduct because that insurance contradicts public policy and was never the type of coverage contemplated by the companies in issuing the policies.

Thus, Jane can take her sex tort claim against John to court under various tort theories that exist to compensate her for his wrongful actions, leaving his insurance company out of the litigation. She will likely prevail on her claims and receive compensation for her damages, and John will be held personally liable. In the future, John will hesitate before having unprotected sex without full disclosure to his partner about his herpes to avoid similar personal liability. Ultimately, he will be less likely to engage in risky behavior and less likely to transmit herpes to another unsuspecting partner. Many other STD carriers like John will also face similar tort litigation and learn from their mistakes, resulting in increased STD awareness, education, and ultimately prevention of STD transmission.

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I. SEX TORTS

Sexually transmitted diseases are rampant in society today. Nineteen million people will be infected with an STD annually, and that number is growing. To attempt to prevent further spread, the courts have stepped in to protect the public’s health, allowing plaintiffs to bring various causes of action for the tortious transmission of an STD.

Tort litigation lends itself well to sex tort cases. Tort damages aim to compensate a victim who has been injured, determine the rights of the respective parties and vindicate those rights once they have been determined, punish individuals for their wrongful conduct, and deter future wrongful conduct. Different tort causes of action achieve those goals to different degrees. For instance, more damages are available for intentional torts because intentional behavior is naturally more culpable than negligent acts. Tort goals are fluid; they change as society changes, so the courts must be willing to adapt to the change in society.

These tort goals are readily applicable to sex torts as the disease rates spread like wildfire, so the courts have adopted and authors have proposed tort theories to try to curb the STD epidemic. These applicable theories include the following intentional torts: fraud, battery, and IIED. Courts or authors have also suggested or utilized the following torts grounded in negligence for STD transmission cases: negligent transmission, nondisclosure or negligent

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20 Centers for Disease Control and Prevention, supra note 6.
22 See Alexander, supra note 9, at 129 (noting that more damages are available for intentional torts than for negligence causes of action, but intentional torts are also harder to prove).
23 Id. at 109.
misrepresentation, NIED, and negligence per se. Some have gone as far as arguing for a strict liability approach to sex torts, but the courts have been resistant such a harsh theory.

Generally, the negligence causes of action have been the most successful.

A. Intentional Sex Torts

1. Fraudulent STD Transmission

To prove fraud or deceit, a plaintiff must show that the defendant made a representation concerning a material fact with knowledge or belief that the representation is false or with reckless disregard for the accuracy of its truth. The defendant must intend to induce plaintiff’s reliance on the truth of the representation. The plaintiff must prove that the reliance was justifiable, and that plaintiff’s damages resulted from the justifiable reliance.


28 Id.

29 Id.
A plaintiff can establish fraud in a sex tort scenario if first, the defendant denied that he carried an STD or affirmed that he was STD-free before engaging in sexual intercourse. The defendant must do so knowing that he carried the disease or was having STD symptoms and knowing that the STD or the symptoms were transmittable through sexual activity. Next, the victim must prove that the defendant intended to induce her into engaging in sexual intercourse. Proving this subjective intent can pose a problem for the plaintiff; however, it is a viable claim that a person would lie about their sexual health to get someone into bed. Third, the victim would likely be able to easily prove justifiable reliance since the disease carrier knows more about his body than the plaintiff. Had the plaintiff known about the STD, she would not likely have engaged in the sexual intercourse that resulted in the STD infection. Finally, the plaintiff must plead and prove that she suffered damages as a result of her justifiable reliance on the defendant’s representations that he was free from disease. Generally, damages are proved by medical records showing plaintiff has been infected with an STD and incurred medical expenses, lost wages, emotional distress, or other types of damages as a result.

In the case of Jane and John, if John had represented to Jane before their first sexual encounter that he was free from disease, Jane could likely make out a cause of action for fraud against him. Knowledge can be inferred because John experienced STD symptoms before they began having sex. Jane’s only other hurdle would be in proving that John made the

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30 The pronoun “he” is used to refer to the initial disease carrier while “she” is used to refer to the victim because the most frequent scenario is that a woman contracts the disease from a man. This is not to implicate that the reverse is never true or that homosexual partners never transmit the disease between themselves. However, some have suggested that it is the group of young males in society responsible for the bulk of our nation’s STD infections. C.f. Pollard, supra note 26, at 785 (stating that 27% of men and 48% of women who report have more than 10 partners since the age of 18 contract at least one STD and 37% of men and 55% of women who report have had 21 or more partners since the age of 18 contract at least one STD).  
32 Id.  
33 Id. at 521.  
34 Id. at 522.  
35 Id.
misrepresentations to induce her to have sex with him. Since Jane would not have likely engaged in unprotected sex with John had he told her the truth about his STD symptoms, she could prove his intent to induce her to have sex with him and her justifiable reliance on his representations of being disease-free. Finally, Jane suffered both physical and emotional damages as a result of contracting herpes from John. Thus, assuming the aforementioned facts, Jane would likely prevail on her fraudulent transmission claim.

2. Sexual Battery

The Restatement (Second) of Torts defines a battery as the intentional, harmful or offensive, and unprivileged contact with the person of another.\textsuperscript{36} Harmful contact is established for this cause of action if the parties engaged in sexual activity, and the plaintiff contracted an STD that led to physical and emotional pain.\textsuperscript{37} These elements of a battery are relatively easy to prove.

However, the requirement of intent poses a problem for the plaintiff, because she must prove that the disease carrier intended to transmit the STD to her or knew to a substantial certainty that engaging in sex with her would do so.\textsuperscript{38} Although it constitutes a minority view, at least one court has been willing to infer intent to injure from the resulting STD infection when the carrier knowingly failed to disclose the symptoms to his partner.\textsuperscript{39} Most other courts require a showing of actual knowledge that the defendant carried the STD or was having symptoms that would put the carrier on notice of the existence of an STD to prove this element.\textsuperscript{40} Under the former approach, the court could infer intent to injure if the defendant’s STD was latent. In contrast, under the latter approach, if the STD is latent, the plaintiff cannot prove that the

\textsuperscript{36} RESTATEMENT (SECOND) OF TORTS § 13 (2007).
\textsuperscript{37} Alexander, supra note 9, at 125.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 125-26; State v. Lankford, 102 A. 63, 64 (Del. 1917).
\textsuperscript{40} Alexander, supra note 9, at 126.
defendant intended to injure her.\textsuperscript{41} If the plaintiff cannot prove intent to injure under either approach, no cause of action will lie for battery.

Back to Jane and John. The harmful contact element is satisfied because Jane and John had sex that resulted in Jane contracting herpes and experiencing serious pain related to the STD. To prove intent to harm, Jane can argue that John admitted he had experienced similar symptoms on his genitalia before they had sex, so he was on notice of his STD status. Further, that John never disclosed these symptoms to Jane, coupled with the fact that he never wore a condom and the resulting STD allows the court to infer his intent to harm her under the minority approach. If John’s disease was latent, Jane could not prove intent to injure, and her battery cause of action would fail under the majority approach.

3. \textit{Intentional Infliction of Emotional Distress}

To prevail on a cause of action for the intentional infliction of emotional distress (IIED), a plaintiff must prove that the defendant engaged in extreme and outrageous conduct that resulted in severe emotional distress.\textsuperscript{42} The conduct must be so outrageous that it is beyond what a civilized society could tolerate.\textsuperscript{43} Further, there must be an actual desire to harm the victim or knowledge to a substantial certainty that such harm would result.\textsuperscript{44}

In the context of sex torts, the plaintiff must prove that the defendant deliberately had sex with her at a time the carrier knew he had a transmittable STD, which caused the victim to contract the disease and resulted in severe emotional trauma.\textsuperscript{45} This conduct has been held to be

\textsuperscript{41}Id.
\textsuperscript{42}RESTATEMENT (SECOND) OF TORTS § 46 (2007).
\textsuperscript{43}Walton, supra note 31, at 518 (citing W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS 60 (5th ed. 1984)).
\textsuperscript{44}Id.
\textsuperscript{45}See Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 274 (Cal. Ct. App. 1984) (upholding plaintiff’s claim of IIED); but see Walton, supra note 31, at 518-19 (arguing that IIED claims are not suitable as claims for sex torts and instead should be used for proving damages in other tort claims).
extreme and outrageous beyond what a decent society can tolerate in at least a couple of cases.\textsuperscript{46} Although this cause of action was upheld in \textit{Kathleen K. v. Robert B.}, few plaintiffs have been successful in asserting IIED claims in the sex tort context, because evidence of emotional distress was not severe enough or because the plaintiff could not prove intent.\textsuperscript{47}

Jane can present a strong case for IIED, because she can argue that John had unprotected sex with her after noticing symptoms of an STD on his genitals and without disclosing that fact to her. Since STDs are highly contagious through sexual activity, Jane can prove that John had knowledge to a substantial certainty that his conduct would result in STD transmission to Jane. Further, this extreme and outrageous conduct has caused Jane severe emotional suffering if she can prove that her fear of future intimacy is severe. Jane could meet her burden of proof if she could show that she is afraid to leave her house and meet people, if she joined a therapy group for people with STDs, experiences panic attacks or other intense psychological problems stemming from the STD transmission. Thus, assuming Jane has evidence of the severity of her emotional distress, she has a viable claim for IIED as well as fraud and battery. Jane may request punitive damages with any of these three intentional tort claims, which makes them more appealing than any available negligence actions.\textsuperscript{48}

\textbf{B. Sex Torts Arising out of Negligence}

Causes of action for negligent transmission of STDs have been the most commonly asserted and successful claims, most likely because these claims are easier to prove than


\textsuperscript{47} See R.A.P. v. B.J.P., 428 N.W.2d 103, 109 (Minn. Ct. App. 1988) (rejecting IIED claim because statute of limitations ran before the lawsuit was filed); Doe v. Roe, 598 N.Y.S.2d 678, 692-93 (N.Y. Ct. Cl. 1993) (recognizing an IIED claim may exist, but since the plaintiff cannot prove the defendant knew he was a carrier before the sexual encounter, the IIED claim fails); Doe v. Johnson, 817 F. Supp. 1382, 1399 (W.D. Mich.).

\textsuperscript{48} Alexander, \textit{supra} note 9, at 129.
intentional torts. Further, the courts have firmly established a duty to warn one’s sexual partner of the STD or abstain from sexual intercourse.

1. *Negligent STD Transmission*

   The elements required to prove negligent STD transmission include the following: (1) a legal duty on defendant’s behalf to conform to a reasonable standard of care to protect others from unreasonable risks of harm; (2) breach of that duty; (3) proximate causation between the conduct and the resulting injury without any superseding causes; and (4) resulting damages. Damages are easily proven in a sex tort case because the plaintiff has contracted an STD, which may be incurable in some instances. It is the duty and proximate causation elements of negligence cases that are so heavily litigated.

   a. *Duty to Disclose or Abstain*

       Generally, there is no duty to disclose unless the law imposes such a duty, which may arise through a special relationship of trust and confidence and through the affirmative duty not to cause serious physical harm to another person. Both of these scenarios are present in sex tort

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49 *Id.*

50 See cases cited *supra* note 25.


52 See *id.* at 219 (finding that once a victim is infected with an STD, actual harm can be inferred through continuing medical treatment and emotional distress).


54 Generally, the duty has been limited to the duty to disclose and abstain. There is not a legally recognized duty to inquire about another’s sexual health. Further, there is no duty to warn or abstain when one engages in “high-risk sexual behavior” or belongs to a “high-risk group” for STDs, and there is no general duty to seek medical care or to take an STD test when one has no symptoms. See Blanchard & Thompson, *supra* note 10, at 160 (rejecting notion of duty to inquire about another’s sexual health as well as the notion of duty to get regular medical check-ups for STDs without any symptoms); see also Doe v. Johnson, 817 F. Supp. 1382, 1385 (W.D. Mich. 1993) (rejecting the notion that a duty to warn or abstain exists when an individual engages in high-risk sexual behavior or belongs to a high-risk group prone to STD infection).

55 See generally Walton, *supra* note 31, at 526-28 (describing the different relationships that give rise to a duty to disclose, including the relationship of “special confidence” that is usually shared between sexual partners); see also Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 276-77 (Cal. Ct. App. 1984) (holding that “. . . a certain amount of trust and confidence exists in any intimate relationship, at least to the extent that one sexual partner represents to the other that he or she is free from venereal or other dangerous contagious disease.”).
cases because a special relationship arises between sexual partners and there is always a legal
duty to avoid causing harm to another person. Disclosure of the STD allows the non-infected
partner to weigh the risks of engaging in further sexual activity before consenting or deciding not
to move forward with the sexual encounter. The only thing required of disclosure is a
statement to the effect of “I have an STD.” This is a small burden in light of the great public
policy concerns in protecting the public from the spread of STDs.

It is well-established that a defendant who has actual knowledge (usually through a
medical diagnosis) that he carries an STD has a duty to disclose it to his sexual partners or
abstain from sex and should be found liable in negligence for failing to conform to that duty.

However, most litigation focuses on whether a similar duty to disclose or abstain exists
when the STD carrier only has constructive notice of his disease. The rule for constructive
notice is that for the duty to disclose to arise, the defendant must know the risks of his actions or
they should be reasonably apparent or reasonably foreseeable. This issue is troublesome
because many STDs are asymptomatic for long periods of time before they manifest themselves
in outbreaks of symptoms. Some STD symptoms also mirror those of less serious diseases,
like colds or urinary tract infections, resulting in something less than constructive knowledge.

\[56\] Id.
\[57\] See generally Walton, supra note 31, at 523-24 (asserting that after the STD carrier has informed his partner that
he carries the disease and the partner consents to having sex anyway, there can no longer be a claim for negligence
because the “victim” gave informed consent to contracting the disease, which is an affirmative defense and bar to
recovery).
\[58\] Id. at 526.
\[59\] See R.A.P. v. B.J.P., 428 N.W.2d 103, 108 (Minn. Ct. App. 1988) (recognizing that the burden placed on the
carrier may intrude a bit on his privacy, but arguing that the burden is slight in comparison with the interest in
protecting the public from the spread of STDs).
\[60\] See cases cited supra note 25; see also Sarelson, supra note 52, at 490-91.
\[62\] Sarelson, supra note 52, at 492.
\[63\] Id.
Courts have held that an asymptomatic carrier cannot be on constructive notice of his disease, while anyone with symptoms that indicate the defendant may have an STD should be placed on constructive notice of the STD. No conclusive medical diagnosis is required for constructive notice to exist. As long as it is reasonably foreseeable that the carrier will infect his partner with an STD, he has a duty to speak up or abstain from engaging in sexual behavior all together. Failure to do so constitutes a breach of the required duty of care. Once the duty is established, the breach element of a negligence claim is easily established.

b. Proximate Causation

Generally, the defendant asserts lack of causation as a defense to a negligence cause of action because he does not believe the plaintiff can prove that he was the person responsible for transmitting the disease to her, especially if the plaintiff had multiple, previous sexual partners. Courts have held that causation of STDs is not beyond the general knowledge of the public, so expert testimony is not required. All the plaintiff must do is show by a preponderance of the

64 See McPherson v. McPherson, 712 A.2d 1043, 1044 (Me. 1998) (holding that an asymptomatic carrier was not under a duty to disclose or abstain because he did not have knowledge of his STD status when he had sex with the plaintiff); Doe v. Roe, 598 N.Y.S.2d 678, 693-94 (N.Y. Ct. Cl. 1993) (discussing claim because there was no proof the defendant was aware she carried an STD before they engaged in sexual intercourse); Doe, 817 F. Supp. 1382 at 1390-91 (finding no constructive knowledge just because the defendant engaged in high-risk behavior or belonged to a high-risk group without anything more such as symptoms, medical diagnosis, or knowledge that one of his partners carried an STD).
65 See Meany v. Meany, 639 So. 2d 229, 243 (La. 1994) (stating that a person with “open, oozing genital sores” is on constructive notice of an STD infection); M.M.D. v. B.L.G., 467 N.W.2d 645, 647 (Minn. Ct. App. 1991) (holding defendant liable for breach of duty to warn his sexual partner when he had “body acne” on his genitals, went to a doctor during a period he was not experiencing an outbreak and the doctor advised him to come back during an outbreak so they could test for herpes); Hamblen v. Davidson, 50 S.W.3d 433, 439-40 (Tenn. Ct. App. 2000) (holding that a “scratch” and “rash” on the defendant’s penis, coupled with the fact that he had an extramarital affair put him on constructive notice of his STD).
66 M.M.D., 467 N.W.2d at 647-48.
67 B.N. v. K.K., 538 A.2d 1175, 1179 (Md. 1988).
68 Id.
70 M.M.D., 467 N.W.2d at 647.
evidence that the defendant was the cause of her infection and that there were no superseding causes in the form of other sexual partners, from whom she could have contracted the STD.  

Although proximate causation is left to the fact-finder to determine, most plaintiffs can prove a direct causal link between the sexual conduct with the defendant and the resulting STD.  The trier of fact can consider facts and circumstances such as the timing of outbreaks, fidelity of the parties, whether the parties exhibited any previous symptoms, subsequent medical records showing positive STD test results, promiscuity of the parties or sexual history, and even breast implants and employment as a nude dancer.  Although a negligence cause of action is generally easier to prove than intentional torts, it yields lower damages awards and can be more of an intrusion into the parties’ privacy when proximate causation is challenged.

Looking back to the hypothetical situation, Jane would more than likely be able to prevail on her claim for negligence against John.  John had a legal duty to disclose his symptoms to Jane when they began their intimate sexual relationship.  John breached his duty by failing to warn or abstain from sex with Jane.  It was reasonably foreseeable that he would transmit the disease to Jane through multiple unprotected sexual encounters over the course of six months.  If Jane can prove that she did not sleep with anyone else during that time period and John takes an STD test

71 Id.
72 It is highly unlikely to contract an STD by any other method besides sexual intercourse, such as by sharing towels or from toilet seats in public restrooms.  C.f. Michele L. Mekel, Note, Kiss and Tell: Making the Case for the Tortious Transmission of Herpes and Human Papillomavirus: Deuschle v. Jobe, 66 MO. L. REV. 929, 954-55 (2001) (arguing that causation poses a problem for people with multiple sexual partners because oftentimes STDs are dormant for a period of time before they manifest).
73 M.M.D., 467 N.W.2d at 647-48.
74 See generally Judd v. Rodman, 105 F.3d 1339, 1343 (11th Cir. 1997) (allowing evidence of the victim’s employment as a stripper, promiscuity, and breast implants to assert that defendant was not the proximate cause of her STD infection).
75 Although there are privacy concerns anytime a victim brings a sex tort action, the privacy intrusion can be especially harsh where evidence of the victim’s sexual history is used to refute causation.  There are other available affirmative defenses to intentional torts that may invoke privacy concerns, but most other defenses are less successful or prohibited altogether and do not revolve around evidence of the victim’s sexual history with other partners.  Instead, the intentional tort defenses of consent, assumption of the risk, and contributory negligence would only focus on the victim’s sexual conduct with the defendant.  Evidence of her sexual history is not relevant to these defenses.  See infra Part I.C.
that yields positive results for herpes, she can prove that he was the proximate cause of her damages. Finally, it is a given that Jane suffered damages because she contracted an incurable disease that causes painful symptoms, expensive medical care, and emotional disturbances. Jane should be aware that her sexual history may be introduced as evidence, and that John may attempt to assert affirmative defenses to defeat her claims.

2. **Negligent Infliction of Emotional Distress (NIED)**

To prove a claim for negligent infliction of emotional distress, the plaintiff must show that the defendant should have realized that his conduct gave rise to an unreasonable risk of causing plaintiff emotional distress and that the distress, if caused, would also result in physical harm or illness. Generally, an NIED cause of action requires that the victim’s emotional distress manifest in some sort of physical harm.

To prove an NIED cause of action for a sex tort, the plaintiff would have to show that the defendant should have realized his wrongful sexual conduct posed an unreasonable risk of causing emotional distress to the plaintiff that would manifest itself in physical harm or illness. Since the physical harm of an STD usually causes emotional distress, this is not a necessary cause of action for sex torts. The emotional distress damages would already be available under a different tort based on the physical harm of the STD, so they should just be piggy-backed on the other cause of action(s) rather than attempting to prove another claim.

Although this cause of action would be viable for Jane against John, she would likely have stronger cases under other tort theories. However, if she could prove that her emotional distress was so great that it caused her physical symptoms in addition to her herpes, such as panic

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76 RESTATEMENT (SECOND) OF TORTS § 313(1)(a)-(b) (2007).
77 Id. at cmt. a.
78 C.f. McPherson v. McPherson, 712 A.2d 1043 (Me. 1998) (dismissing all plaintiff’s claims, including one for NIED, because the husband had no knowledge or reason to know he was carrying a disease).
attacks, rashes, hives, vomiting, or made her ill in some other way, she would likely be able to prevail on a NIED cause of action as well.

3. Negligence per se

Negligence per se has primarily been utilized by plaintiffs in states where statutes criminalizing STD transmission exist.\(^{79}\) In order to prove a claim for negligence per se, the plaintiff must show that the defendant breached a duty of care imposed by the legislature through a statute by failing to conform to the respective standard of care.\(^{80}\) The plaintiff must be a member of the class that the statute aims to protect.\(^{81}\) A negligence per se claim does not lie if the statute was meant to protect the public at large, because essentially that is the primary purpose of all laws.\(^{82}\)

Courts are split as to whether negligence per se claims for sex torts constitute viable causes of action. Some courts have interpreted the statutes as applicable to the general public for protection from the spread of STDs, while others upheld the cause of action.\(^{83}\) If there is a statute in Jane’s jurisdiction that encompasses a class of people in which Jane falls and does not intent to protect the public at large, Jane may have a viable negligence per se claim against John. Her success on this cause of action would depend wholly on her jurisdiction.

\(^{79}\) See Sarelson, supra note 52, at 486 (explaining that negligence per se must be based on a statutorily imposed duty, which need not proscribe civil liability in order to find a cause of action for negligence per se).

\(^{80}\) Id.

\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) See Gabriel v. Tripp, 570 So. 2d 404, 405 (Fla. 2d Dist. Ct. App. 1991) (rejecting a negligence per se cause of action because the Florida statute was meant to protect the public from STD transmission generally); Mussivand v. David, 544 N.E.2d 265, 271 (Ohio 1989); but c.f. Lockhart v. Loosen, 943 P.2d 1074, 1078 (recognizing a cause of action for negligence per se for a direct transmitter, but dismissing the cause of action as against a third party STD transmitter) and Maharam v. Maharam, 510 N.Y.S.2d 104, 107 (recognizing negligence per se as a valid cause of action based on the a New York Public Health statute).
C. Affirmative Defenses to Sex Tort Claims

As more sex tort causes of action have been asserted, various defenses have been offered to rebut the claims. These defenses have included the following: consent, interspousal immunity, in pari delicto or unclean hands, assumption of the risk, contributory or comparative negligence, statute of limitations, and right to privacy. However, most of the affirmative defenses have proven unsuccessful in the sex tort context.

1. Consent

The defendant may attempt to plead informed consent as a defense to plaintiff’s sex tort claims, because the plaintiff engaged in voluntary, consensual sex. However, most courts have held that the fraud involved in the sexual encounter (by the carrier not disclosing his STD)
vitiates any consent given by the plaintiff.  

Although the victim consented to sex with the defendant, she did not consent to contracting an STD. 

This defense has only been upheld when the carrier had no way of knowing he carried the disease before he engaged in a voluntary, consensual sexual encounter with his partner.

2. Interspousal Immunity

The doctrine of interspousal immunity held that a spouse could not sue the other spouse in tort; however, most states have abolished this doctrine because it no longer serves the purpose it was originally intended to serve. Spousal immunity was conceived to prevent a flood of litigation, disruption of marital harmony, and collusive or fraudulent claims by spouses.

First, the argument that abolishing interspousal immunity will lead to a flood of litigation lacks merit because as of 1986, thirty jurisdictions abolished the doctrine and failed to see an increase in litigation. Second, spouses that bring tort claims against each other for personal injuries have already disrupted their marriage through their own tortious actions, and the court is allowed to compensate the victim for those injuries. Third, although there may be some parties willing to file tortious lawsuits against each other to share the insurance proceeds, the court is in the best position to sift through and distinguish the valid claims from the fraudulent ones. Just because a few people bring collusive claims does not require the court to deny every spouse with

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91 State v. Lankford, 102 A. 63, 64 (Del. 1917); De Vall, 96 S.W. 2d at 246; Hogan v. Tavzel, 660 So. 2d 350, 352 (Fla. 5th Dist. Ct. App. 1995).
92 Id.
94 This defense obviously only applies between spouses who sue each other for STD transmission and not between unmarried sexual partners.
95 S.A.V. v. K.G.V., 708 S.W. 2d 651, 652 (Mo. 1986); G.L. v. M.L., 550 A.2d 525, 526 (N.J. Ch. 1988); Hogan, 660 So. 2d at 352.
96 S.A.V., 708 S.W. 2d at 652.
97 Id.
98 Id. at 653.
99 Id.
a valid tort claim his or her day in court.\textsuperscript{100} Thus, the interspousal immunity defense is no longer viable to bar a sex tort action by a spouse.

3. \textit{Wrongful Conduct Rule: In Pari Delicto}

Some states still recognize fornication and adultery as criminal acts, and have statutes in place prohibiting that type of behavior.\textsuperscript{101} However, most states that have not yet abrogated these laws no longer enforce them in light of the reality that in society today, many people engage in extramarital sex of some form or another.\textsuperscript{102} Most courts are unwilling to bar a sex tort claim due to the fact that the plaintiff was engaged in fornication or adultery, alleged illegal acts when the STD was contracted.\textsuperscript{103}

Furthermore, the wrongful conduct rule states that the parties must be equally at fault for the defense to completely bar recovery.\textsuperscript{104} In the case of sex torts, the STD carrier is naturally more culpable if he knows that the encounter may foreseeably result in infection of his partner, and the victim has no idea her partner is infected.\textsuperscript{105} The uninformed partner therefore is less at fault, so the wrongful conduct rule cannot apply.\textsuperscript{106}

4. \textit{Assumption of the Risk and Comparative or Contributory Negligence}

Recall that consent to sex does not equate to consent to transmit an STD.\textsuperscript{107} And, although society has become increasingly promiscuous and STDs abound, there is no general duty to inquire about a partner’s sexual health.\textsuperscript{108} Thus, the defenses of assumption of the risk

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{99}
\item \textit{Id.}
\item \textit{See} statutes cited \textit{supra} note 19.
\item \textit{Id.} Extramarital sex is used here to refer to any type of sexual conduct that takes place between two people who are not married to each other.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{See} \textit{supra} Part I.C.1.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
and comparative or contributory negligence do not lend themselves well to the sex tort context for the same reasons consent defenses fail.

For the plaintiff to be at fault or assume any risk, she must have knowledge of the defendant’s STD and her potential to contract it, and engage in sexual activity with him despite that knowledge. Most plaintiffs refuse to give informed consent to an STD infection, which is a reasonably foreseeable consequence of having sex with an infected person. Therefore, even if the plaintiff engaged in voluntary, consensual sex with the defendant, these defenses are generally unavailable in the sex tort context.  

5. Right to Privacy

The right to privacy is not a viable constitutional defense to sex tort causes of action, because the governmental interests in protecting the public from the spread of STDs outweigh the slight burden imposed on the carrier to disclose his condition to his sexual partners. This defense has consistently failed in sex tort actions.

Thus, with a wide-range of available causes of action for Jane and generally unsuccessful defenses available for John, she will most likely be able to prevail in a tort cause of action against him for the intentional or negligent transmission of herpes. John will then more than likely hesitate to have sex with future partners without first disclosing his sexual health. However, the reverse may be true if John has an insurance policy in place willing to defend and indemnify his wrongful actions.

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109 Id.
110 The one time the assumption of the risk defense prevailed was when the male plaintiff failed to use a condom. *See* Doe v. Roe, 598 N.Y.S.2d 678 (N.Y. Ct. Cl. 1993) (holding that plaintiff did not act reasonably to protect himself in light of STD epidemic by failing to use protection, so assumption of the risk applied in this case).
111 *See* statutes cited *supra* note 19.
112 Id.
II. INSURANCE POLICY EXCLUSIONS INCONSISTENTLY APPLIED TO SEX TORT INDEMNIFICATION CLAIMS BY INSURED'S

Personal liability, homeowner, and even automobile and boat insurance policies vary widely among insurance companies and different policies within the companies. Defendants in many jurisdictions have attempted to invoke their policy’s duty to defend and right to indemnification in a sex tort action. Most policies include some type of exclusion that may operate to bar defense or indemnification of these claims, but judicial interpretations of policy exclusions have been inconsistent. These exclusions include the following: intentional acts, sexually transmitted diseases, communicable diseases, sexual contact, criminal acts, bodily injury to insured, and the definition of “occurrence” under the policy.

A. Overview of Insurer’s Duty to Defend and Indemnify

The insurer’s duty to defend and indemnify is a contractual obligation, based on the terms of the insurance policy purchased by the insured. The policy generally contains language like that found in the defendant’s policy in State Farm Fire & Insurance Co. v. Eddy:

If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, we will: (1) pay

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113 See R.W. v. T.F., 528 N.W.2d 869 (Minn. 1995) (holding that defendant was not entitled to indemnification for negligent transmission); Guillame v. Guillame, 613 So. 2d 172 (La. Ct. App. 1992) (holding that the ex-wife plaintiff could not collect under her ex-husband’s insurance policy for an STD he negligently transmitted to her during their marriage); Peters v. Firemen’s Ins. Co. of Newark, N.J., 79 Cal. Rptr. 2d 326 (Cal. Ct. App. 1998) (holding that defendant was not entitled to indemnification for STD transmission on his boat); Plaza v. Gen. Assurance Co., 664 N.Y.S.2d 444 (N.Y. App. Div. 1997) (holding that defendant was not entitled to indemnification for negligent transmission); but see Milbank Ins. Co. v. B.L.G. & M.M.D., 484 N.W.2d 52 (Minn. Ct. App. 1992) (finding that defendant would be entitled to indemnification for negligent transmission); State Farm Fire & Cas. Co. v. S.S. & G.W., 858 S.W.2d 374 (Tex. 1993) (holding that defendant would be entitled to indemnification if he was unaware that he had a contagious STD when he negligently transmitted it to the plaintiff); Loveridge v. Chartier, 468 N.W.2d 146 (Wis. 1991) (holding that defendant was entitled to indemnification for negligent transmission); State Farm Fire & Cas. Co. v. Polokoff, 526 N.Y.S.2d 171 (N.Y. App. Div. 1988) (remanding the case because although the rape was intentional, the STD transmission may have been unintentional, so there was a possibility the defendant was entitled to indemnification for the STD transmission); State Farm Fire & Cas. Co. v. Eddy, 267 Cal. Rptr 379 (Cal. Ct. App. 1990) (holding that the defendant was entitled to indemnification for negligent transmission).

114 Id.

115 Id.; see generally Blanchard & Thompson, supra note 9, at 52-65 (laying out the applicable insurance policy exclusions for sex torts); see also generally Eidsmoe & Edwards, supra note 12 (same).

116 Blanchard & Thompson, supra note 9, at 65.
up to our limit of liability for the damages for which the insured is legally liable; and (2) provide a defense at our expense by counsel of our choice . . . Our obligation to defend any claim or suit ends when the amount we pay for damages resulting from the occurrence equals our limit of liability.\textsuperscript{117}

Further, the policy may contain some exclusions where there is no duty to defend or indemnify.

When the insured notifies the insurance company that a claim has been or may be made against him, the insurer has an affirmative duty to investigate the claims to see if they fall under the policy coverage or outside of coverage due to an exclusion.\textsuperscript{118} The insurer must determine whether it has a duty to defend the claim by looking at the nature of the claim being asserted, the facts alleged by both the claimant and the insured, and any other available evidence obtained through a preliminary investigation of the claim.\textsuperscript{119}

Once the insurer completes its investigation, it may choose one of several options: it may deny coverage; offer to enter into a Stand-By Agreement; offer to defend under a reservation of rights; accept the duty to defend and indemnify; or commence a declaratory judgment action against the insured or against the insured and the claimant for purposes of determining coverage.\textsuperscript{120}

If there is any potential duty to indemnify under the policy terms based on the facts of the claims asserted, no matter how ill-founded, false, or groundless the claims may be, the insurer has a duty to defend.\textsuperscript{121} If there is no possible basis upon which the insurer can be liable or if an

\textsuperscript{117} \textit{Eddy}, 267 Cal Rptr. at 381.
\textsuperscript{118} Blanchard & Thompson, \textit{supra} note 9, at 67.
\textsuperscript{119} \textit{See id.} at 65-66 (noting that whether or not extrinsic evidence beyond the complaint is allowed to determine the duty to defend depends on the jurisdiction).
\textsuperscript{120} \textit{See generally id.} at 73 (explaining the insurer’s options when an investigation into the insured’s claims has been conducted). A Stand-By Agreement preserves the rights of both the insurer and insured while the insured defends the underlying action on his own. \textit{Id.} at 70. The insurer also has an option to defend the insured and reserve its rights to deny coverage until after the matter has been settled. However, this has the potential to lead to a conflict of interest because the insurer must defend the insured, while still defending itself on the coverage issue. Thus, a better course of action would be to bring the declaratory action. Blanchard & Thompson, \textit{supra} note 10, at 162-63. Stand-By Agreements and reservation of rights are beyond the scope of this Note and will not be discussed in any greater detail.
\textsuperscript{121} Blanchard & Thompson, \textit{supra} note 9, at 67
exclusion applies to the circumstances of the claim, there is no duty to defend.\textsuperscript{122} If coverage is arguable, the insurer should default to defending its insured.\textsuperscript{123} Thus, there may be a situation in which there is a duty to defend, but the insurer is not ultimately liable for indemnification of its insured.\textsuperscript{124} If the insurer denies coverage or refuses to defend, the insured may accept the insurer’s decision or sue for breach of contract.\textsuperscript{125}

\textit{B. Court Interpretations of Insurance Policy Exclusions}

There are several different exclusions that may operate to bar insurance coverage of sex tort damages. Individually, they all lack characteristics of an exclusion that would consistently and effectively bar insurance indemnification in the sex tort context. When aspects of the different exclusions are combined, the insurer creates a clear and effective policy exclusion that contributes to the policy goal of STD prevention.

\textit{1. The Intentional Acts Exclusion}

Most insurance policies carry an intentional acts exclusion, whether through an explicit exclusion or through the way they define covered “occurrences” under the policy.\textsuperscript{126} Policy language may look that included in \textit{Eddy}: “This policy excludes bodily injury which is expected or intended by an insured. Bodily injury is defined as ‘harm, sickness, or disease.’”\textsuperscript{127} Other policies define “occurrence” as “an accident that results in bodily injury,” without clearly

\textsuperscript{122} \textit{Id.}.
\textsuperscript{123} \textit{Id.} at 68-69.
\textsuperscript{124} State Farm Fire & Cas. Co. v. Eddy, 267 Cal. Rptr. 379, 381 (Cal. Ct. App. 1990); see generally Blanchard & Thompson, supra note 9, at 69 (explaining that the insurer and/or the insured have a right to petition the court, before the lawsuit against the insured commences, for a declaratory judgment on the issue of whether or not the claim would be covered by the policy and whether therefore the insurer has a duty to defend).
\textsuperscript{125} Blanchard & Thompson, supra note 9, at 73-76.
\textsuperscript{126} Eidsmoe & Edwards, supra note 12, at n.66.
\textsuperscript{127} \textit{Eddy}, 267 Cal. Rptr. at 381.
defining what constitutes an accident. Essentially, the insurer must prove that its insured’s actions were not accidental (i.e. they were intended) in order for these exclusions to apply. The intentional acts exclusion and interpretation of the definition of “occurrence” are the most common ways insurers have challenged coverage of sex torts.

For an intentional acts exclusion to apply, the insurer must prove that its insured acted intentionally. The general rule is that intent may be established by the insured’s actual intent to injure or by inferring intent to injure as a matter of law. Courts have struggled with interpreting “intent” in the context of sex torts, especially in negligence cases, which have resulted in inconsistent judicial interpretations. Some courts have held the exclusion applies because unintended consequences arose out of intended actions. Others have found that an act is intended if the insured intends the consequences of his actions or believes that they are reasonably certain to follow.

Most STD carriers do not necessarily intend to transmit their diseases, but they do intend to have sex with their partners, so whether coverage is excluded under the intentional acts exclusion becomes questionable. In cases where the insured is unaware of his STD condition, he

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128 Milbank Ins. Co. v. B.L.G. & M.M.D., 484 N.W.2d 52, 56 (Minn. Ct. App. 1992). The definitions of “accidental occurrence” and “intent” have been analyzed under the same framework and are used interchangeably in this section. Any insured conduct that is non-accidental or intended is excluded from policy coverage.

129 Eidsmoe & Edwards, supra note 12, at n.66.

130 R.W. v. T.F., 528 N.W.2d 869, 872 (Minn. 1995). Intent as a matter of law was inferred in this case because the insured had reason to know he had an STD. However, intent has mainly been inferred in cases where nonconsensual sexual assault has occurred, not in cases where the sexual encounter was between two consenting adults. Id.

131 An insurance policy generally does not cover intentional torts because of the intentional acts exclusion. Negligent actions inherently lack intent to injure. Thus, when a negligence cause of action arises, it proves difficult for the insurer to prove that the insured intended to injure his partner in order to exclude coverage based on the intentional acts exclusion. Eidsmoe & Edwards, supra note 12, at n.70.


133 Loveridge v. Chartier, 468 N.W.2d 146, 150 (Wis. 1991). Cf. Milbank Ins. Co., 484 N.W.2d at 58 (defining “occurrence” as all negligently caused injury, as long as it was not intentional).

134 However, some people actually admit to infecting others on purpose out of revenge or hate. See Eidsmoe & Edwards, supra note 12, at n.84, 85 (describing events where a man refused to believe his doctor that he was diagnosed with HIV and continued to have sex with multiple partners and a woman who spread her STD out of revenge or hate she felt towards the man who gave it to her in the first place).
cannot intend or reasonably foresee that transmission to his partner will follow.\textsuperscript{135} However, in cases where the insured was aware of his disease or its symptoms, it is reasonably certain that he will transmit it to his sexual partner if he engages in sexual activity with her.\textsuperscript{136} The latter scenario is the one which gives rise to tort causes of action, so the resulting damages are intended consequences, and intent can be inferred as a matter of law in the sex tort context.

2. \textit{The Criminal Acts Exclusion}

Some insurance policies exclude coverage for the insured’s commission of criminal acts. Some states have criminalized the transmission of STDs,\textsuperscript{137} while others still have criminal fornication and adultery statutes on the books.\textsuperscript{138} The insurer can assert this exclusion if it exists in the policy and if the policy arises out of a jurisdiction with one of these criminal laws when a sex tort defendant seeks coverage. However, the trend is moving away from enforcing fornication and adultery statutes, so it is debatable whether the courts would allow those statutes to bar coverage for sex torts under the criminal acts exclusion.

3. \textit{Bodily Injury to an Insured Exclusion}

The “bodily injury to an insured” exclusion is also referred to as a “household” exclusion because insurance coverage does not apply to claims brought against one insured by another person insured under the same policy.\textsuperscript{139} These exclusions only apply between spouses who are covered under the same policy or significant others who live in the same household and share benefit plans.\textsuperscript{140} Thus, although the language is clear and unambiguous, the exclusions do not

\textsuperscript{135} See \textit{Eddy}, 267 Cal. Rptr. at 386 (finding that the infection was unintended and covered under the insurance policy because insured had tested negative for herpes and had no other reason to know he had the STD).
\textsuperscript{136} R.W. v. T.F., 528 N.W.2d 869, 873 (Minn. 1995).
\textsuperscript{137} See statutes cited supra note 19.
\textsuperscript{138} Eidsmoe & Edwards, supra note 12, at n.96.
\textsuperscript{139} Eidsmoe & Edwards, supra note 12, at n.107; see also Guillame v. Guillame, 613 So. 2d 172, 173 (La. Ct. App. 1992) (rejecting coverage for an insured’s ex-wife who became infected with herpes by insured while living in the same household and receiving coverage under the same policy).
\textsuperscript{140} \textit{Id.}
operate to bar coverage for the more common, casual relationships that give rise to sex tort actions.

4. **Communicable Disease Exclusions**

   The communicable disease exclusion was the insurance industry’s first attempt to exclude coverage for STD transmission cases. \(^{141}\) “Communicable disease” was defined by one insurance policy as “an infectious disease transmissible from person to person by direct contact with an affected individual or that person’s discharges.” \(^{142}\) However, many other policies have not defined communicable diseases, and at least one insured has challenged the definition as ambiguous in the context of sex torts. \(^{143}\)

   Any challenges to the definition have been based on the jurisdiction’s health reporting laws. If the health reports do not include certain STDs in their list of communicable diseases and the policy does not define what constitutes a communicable disease, there will always be an attorney willing to argue that STD transmission was not excluded by the policy’s coverage. \(^{144}\)

5. **Sexual Contact and Sexually Transmitted Disease Exclusions**

   The insurance companies’ best efforts to exclude sex tort coverage have taken the form of sexual contact and sexually transmitted disease exclusions. These exclusions seem unambiguous on their face: coverage does not apply to “bodily injury or property damage arising out of the transmission of sickness or disease by an insured through sexual contact.” \(^{145}\)

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\(^{142}\) *See id.* at n.31 (citing State Farm’s home liability policy exclusion for communicable diseases).

\(^{143}\) *C.f.* Plaza v. Gen. Assurance Co., 664 N.Y.S.2d 444 (N.Y. App. Div. 1997) (rejecting the insured’s contention that the communicable disease exclusion was ambiguous and finding that policy coverage excluded claims for the transmission of AIDS). In *Plaza*, the insured asserted that HIV was a virus and not a disease, so it was not included under the communicable diseases exclusion and the insurer should cover the claim. The court disagreed and asserted that it is common-sense that HIV is a communicable disease, so it is not covered under the policy. *Id.*

\(^{144}\) *C.f.* Eidsmoe & Edwards, *supra* note 12, at n.50 (asserting that common-sense should prevail in judicial interpretation of communicable disease exclusions, but insurance companies should be more prudent and define the terms explicitly in their policies).

\(^{145}\) *Id.* at n.63.
However, there are still insureds who argue that the exclusion is unduly broad, applying to more than just the transmission of STDs to include any personal injury arising out of an STD in any way, shape, or form.\textsuperscript{146} When courts are faced with overly broad exclusions, they are less likely to apply them.\textsuperscript{147} Thus, the STD exclusions themselves stand to be improved.

\section*{III. ENFORCING A CLEAR AND UNAMBIGUOUS SEXUALLY TRANSMITTED DISEASE EXCLUSION WILL REDUCE INCONSISTENT JUDICIAL DECISIONS AND ULTIMATELY REDUCE LITIGATION}

Given the available insurance coverage exclusions, insurance companies attempted to react with clear and unambiguous language to exclude sex tort claims. However, their attempts fell short, and unnecessary litigation over language interpretation of vague policy exclusions has resulted. Public policy considerations demand that the insurance companies should act to include clear and unambiguous language to exclude coverage of sex torts. Such unequivocal exclusions benefit the insurance company too, so there is no valid reason for insurance companies not to take their efforts one step further and adopt a clear, model sex tort exclusion.

\subsection*{A. Court Interpretation of Ambiguous Insurance Policy Language}

Insurers are currently required to litigate many coverage claims, because they do a poor job of defining the terms of their policies for the insured. The court’s role in interpreting an insurance policy is to “ascertain the intent of the parties as manifested by the language of the policies.”\textsuperscript{148} If the policy is not ambiguous, the court will interpret it according to the plain language of the contract.\textsuperscript{149} An insurance policy contract is ambiguous if it is reasonably susceptible to different constructions and is capable of being understood in more than one

\textsuperscript{146} See 12th St. Gym, Inc. v. Gen. Star. Indem. Co., 93 F.3d 1158, 1161 (3d Cir. 1996) (finding that the STD exclusion applied only to the direct transmission of STDs, not to every potential action remotely related to STDs); see also Kiewit Eastern Co. v. L. & R. Constr. Co., 44 F.3d 1194, 1199 (\textit{citing} Hutchison v. Sunbeam Coal Corp., 519 A.2d 385, 390 (Pa. 1986)) (finding ambiguity in the policy’s STD exclusion).

\textsuperscript{147} Eidsmoe & Edwards, \textit{supra} note 12, at n.58 (\textit{citing} American States Ins. v. Kolomus, 671 N.E.2d 726, 730 (Ill. 1997)).

\textsuperscript{148} J2 St. Gym, 93 F.3d at 1165.

\textsuperscript{149} Id.
If the court finds the language to be ambiguous, it will construe it against the insurer and mandate coverage.\textsuperscript{151}

Courts have held that policies without a definition of what constitutes a “sexually transmitted disease” are ambiguous because it could refer to a disease transmitted through sexual conduct or any injury or damage arising in any conceivable way out of a sexually transmitted disease.\textsuperscript{152} Claims could feasibly be brought under these ambiguous exclusions for almost any incidental occurrence related to an STD. This leads some courts to conclude that STDs are excluded, while others find that STD transmissions are covered under the policies.\textsuperscript{153} Parties to sex tort indemnification lawsuits cannot possibly predict the outcomes of their cases.

Adoption of a clear and unambiguous model exclusion reduces the unpredictability of these lawsuits. Inconsistent judicial interpretations of the policy language will disappear. Insurance litigation will decrease. Insurance premiums may decrease as insurers are required to defend and indemnify fewer occurrences. Parties may be more likely to settle their coverage claims out of court or not bring them in the first instance since challenges to an unambiguous provision will be interpreted according to its plain meaning: STDs are excluded from coverage.\textsuperscript{154}

\textbf{B. Model Sexually Transmitted Disease Insurance Policy Exclusion}

If insurance companies nationwide adopted similar language for an exclusion, litigation will decrease as courts look to other jurisdictions for help with interpretation of similar

\textsuperscript{150} Id.

\textsuperscript{151} Id. at 1166.

\textsuperscript{152} See id. at 1165 (stating that fear of contracting an STD and slander or libel relating to an STD could conceivably be covered under the policy and requiring a clearer definition of “sexually transmitted disease” and a narrower limit on the scope of the exclusion).

\textsuperscript{153} See supra cases cited in note 113.

\textsuperscript{154} C.f. Eidsmoe & Edwards, supra note 12, at n.29 (highlighting that the reason these cases exist and thrive is because the attorneys know they can get paid from the deep pockets of the insurance companies and to take that away would reduce the incentive to accept these cases).
exclusions. Thus, insurance companies should band together, exercising their right to include explicit exclusions in their policies and adopt model language for a sexually transmitted disease policy exclusion. Possible language should include the following or something similar:

**Coverage:** If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, we will: (1) pay up to our limit of liability for the damages for which the insured is legally liable; and (2) provide a defense at our expense by counsel of our choice . . . . Our obligation to defend any claim or suit ends when the amount we pay for damages resulting from the occurrence equals our limit of liability.  

**Sexually Transmitted Diseases Tort Exclusion:** Because it is against public policy and this company’s coverage policy to endorse and insure the spread of sexually transmitted diseases, all diseases or viruses transmitted through sexual activity will be excluded from coverage. There is no insurer duty to defend the insured in a tortious transmission of sexually transmitted diseases lawsuit. ‘Bodily injury’ under this policy includes harm, sickness, or disease. ‘Disease’ includes any and all infectious or communicable diseases transmissible from person to person by direct contact with an affected individual or that person’s discharges. ‘Infectious or communicable diseases’ include all tortuously transmitted sexual diseases, whether transmitted intentionally, negligently, recklessly, or carelessly. Sexually transmitted diseases are those transmitted through any type of sexual conduct, including but not limited to oral, anal, vaginal, manual, and penal contact. Specifically, sexually transmitted diseases include but are not limited to herpes (Type I and II), gonorrhea, chlamydia, syphilis, human papillomavirus (HPV), HIV/AIDS, chancre, hepatitis, pelvic inflammatory disease, bacterial vaginosis, trichomoniasis, lymphogranuloma venereum, and pubic lice. Any doubts as to coverage will be resolved in favor of exclusion in order to protect the public policy interests at stake.

Insurance companies have an almost limitless right to include exclusions in their policies. Although they cannot be forced to do so, companies should adopt this language or at least attempt to define every term in their policy in clear and unequivocal terms. The model language provided does so because it is explicit, unambiguous, provides comprehensive

156 Id. at 381.
157 Eidsmoe & Edwards, supra note 12, at n.31 (citing State Farm’s home liability policy exclusion for communicable diseases).
158 See generally Centers for Disease Control and Prevention, supra note 6 (for list of sexually transmitted diseases).
159 Loveridge v. Chartier, 468 S.W.2d 146, 158 (Wis. 1991).
definitions, and is easy for the court to interpret should a party even attempt to bring a lawsuit challenging the STD exclusion. In addition, it serves the policy goal of preventing the further spread of STDs.

IV. THE POLICY INTEREST IN PREVENTING THE SPREAD OF SEXUALLY TRANSMITTED DISEASES OUTWEIGHS THE INTERESTS IN INSURANCE INDEMNIFICATION FOR SEX TORTS

Public policy considerations authorize insurance companies to exclude coverage of sex torts. There is an extremely strong government interest in preventing the spread of STDs to the general public. Although the proposed model STD exclusion language cannot solve the problems of the STD epidemic, it can contribute to reducing the spread by holding the individual STD carrier personally responsible for infecting his/her sexual partners.\(^{160}\) It will encourage the STD carrier to use precaution in future sexual encounters by either abstaining or disclosing his sexual health. The informed partner can then either refuse to engage in the sexual encounter or take greater protective measures to prevent STD infection. Ultimately, the safer practices will contribute to reducing STD infection rates.

A. Insurance Companies have Authority to Shape Socially Responsible Behavior

Insurance policies exist to cover accidental occurrences and spread the inherent risks of every day life.\(^{161}\) There is no question that this is a positive and necessary strategy. However, these insurance concepts are not applicable to the transmission of STDs because all tortious transmission requires some degree of knowledge to be actionable.\(^{162}\) When the insured has knowledge of the adverse consequences of his actions, the occurrence or spread of an STD is no

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\(^{160}\) See generally R.W. v. T.F., 528 N.W.2d 869, 873 (Minn. 1995) (holding that it would be contrary to the purpose of insurance coverage and public policy to indemnify the defendant’s conduct when he was found to have knowledge of his herpes and nevertheless engaged in intercourse with the plaintiff knowing that he could transmit his STD to her).

\(^{161}\) Blanchard & Thompson, supra note 9, at 54.

\(^{162}\) Id.
longer an accident and the goals of insurance are no longer achievable, so coverage should not be available in this context. The insured who perpetuates the pandemic spread of STDs by his knowing actions should not be indemnified for his actions. Instead, he should be punished by the judicial system for his tortious acts and taught to discontinue his risky sexual behavior and protect any and all future partners against further STD transmissions.

STDs are serious problems in the United States, and no one denies that there is a great need to halt their spread. The public generally needs to find a way to control the endemic spread of incurable and even life-threatening diseases that could have been prevented in the first instance. STDs are expensive, painful, and unnecessary for those infected.

However, insurance indemnification of STDs contradicts the strong public policy in preventing and controlling the spread of STDs. By covering the tortious transmission of STDs, insurance companies effectively promote the abdication of personal responsibility for the insured’s actions. If the insurer indemnifies its insured’s tortious STD transmission, the tortfeasor is not properly reprimanded for the risks of his knowing conduct. He may continue to engage in risky sexual behavior, putting the greater public at risk of contracting his disease in the future. Insurance indemnification essentially accepts the risks inherent in sexual activity today. This is in stark contrast to public policy of STD prevention.

\[ \text{id.} \]
\[ \text{See Centers for Disease Control and Prevention, supra note 6.} \]
\[ \text{id.} \]
\[ \text{id.} \]
\[ \text{R.W. v. T.F., 528 N.W.2d 869, 873 (Minn. 1995).} \]
\[ \text{id.} \]
\[ \text{Blanchard & Thompson, supra note 10, at 165.} \]
\[ \text{id.} \]
\[ \text{id. at 164. (citing N. Star Mut. Ins. Co. v. R.W., 431 N.W.2d 138 (Minn. Ct. App. 1988)).} \]
Insurance can be utilized as a way to shape socially responsible behavior. In fact, courts have given insurance companies the authority to exclude coverage as they see fit, so the companies should take advantage of that authority to fulfill national public policy goals. Holding individuals financially responsible through tort suits instead of indemnifying them via an insurance claim will help achieve public policy goals and prevent the spread of STDs. If the individual is responsible for his own actions, there is greater emphasis on education, protection, and preventative care, all weapons extremely necessary to fight the STD epidemic today. The individual will bear all the risks associated with his choices to engage in risky sexual behavior. Once he loses a tort suit once, it is a near guarantee that the tortfeasor will think twice before committing the same risky and wrongful actions again.

Although a clear and unambiguous insurance policy exclusion for sex tort damages is not in and of itself the solution to the STD epidemic, it may contribute to an overall scheme that reduces rates of STD transmission in the United States. If an insurance exclusion is combined with greater emphasis on education and STD awareness, abolition of abstinence only programs, access to information about STDs and their transmission, and maybe even criminal sanctions for the intentional transmission, the general public may become more apt to take preventative measures and personal responsibility for their own actions.

172 R.W., 528 N.W.2d at 873; Loveridge v. Chartier, 468 N.W.2d 146, 158 (Wis. 1991).
173 Blanchard & Thompson, supra note 10, at 164.
174 R.W., 528 N.W.2d at 873.
175 Although this Note proposes to take a comprehensive approach to sex tort liability, which includes criminal sanctions for the most culpable behavior, criminal liability for sex torts is beyond the scope of this Note. This Note’s discussion is limited to how insurance policy exclusions can contribute to STD overall prevention efforts.
B. Potential Indemnification Policy Counterarguments Refuted

1. The Judgment-Proof Defendant

The number one goal of tort law is to compensate the victim.\(^{176}\) However, the reality of life is that a tort victim cannot choose her tortfeasor. An occasion may arise where the plaintiff is granted damages against an insolvent or judgment-proof defendant, and had his insurance been required to cover this type of claim, the plaintiff may have received compensation.

This exceptional situation does not warrant full-scale insurance coverage of sex torts. Instead, this argument leads to a slippery slope. If sex torts are covered by insurance companies, what is to stop courts from interpreting all “ambiguous” criminal or intentional acts exclusions to allow coverage for those claims as well? If insurance companies have to cover these types of claims, policies will become too expensive for people to obtain any coverage at all. These are just not the types of claims insurance policies are intended to cover,\(^{177}\) and there is always a situation where a plaintiff sues a defendant who is unable to pay.

2. Tortfeasor is not already Forced to Take Personal Responsibility with Insurance Coverage of Sex Tort Claims

Proponents of insurance coverage have argued that the insured is in fact already held individually responsible for his actions even if insurance policies are in place. Insurance premiums will go up with each claim. Damages may exceed the coverage limit. It may be difficult for the insured to obtain future insurance. And, the claims will harm the insured’s reputation.\(^{178}\) In some instances, the court has found it hard to decline insurance indemnification for “simple cases of negligence.”\(^{179}\)

This argument overlooks the fact that for liability under any sex tort theory, even

\(^{176}\) Mekel, \emph{supra} note 72, at 49.
\(^{177}\) Eidsmoe & Edwards, \emph{supra} note 12, at n.12.
\(^{178}\) \emph{Loveridge}, 468 N.W.2d at 157.
\(^{179}\) \emph{id.} at 158.
negligence, the tortfeasor must have some degree of knowledge of his STD or its symptoms, which gives rise to a legal duty to disclose or abstain from sex.\textsuperscript{180} The reason the tortfeasor faced liability in the first place is because he failed to conform to that duty and hold himself individually responsible. The regime in place today that allows insurance indemnification of these claims has proven ineffective in preventing the spread of STDs. A flat prohibition on sex-tort coverage is better suited to achieve these goals.

**V. CONCLUSION**

Insurance companies should not insure wrongful sexual conduct because that insurance contradicts public policy and was never the type of coverage contemplated by the companies in issuing the policies. Instead of combating the spread of STDs, insurance indemnification encourages STD carriers to continue to engage in risky sexual behavior and recognizes the risks of this behavior as acceptable. The defendant should instead be held responsible through the judicial system, where sex tort claims have proven successful against defendants who had some degree of knowledge of their STDs. In the future, a defendant who has been held liable for a sex tort will be less likely to commit the same tortious acts.

Insurance companies have authority to implement a clear and unambiguous insurance policy STD exclusion to prohibit such coverage. They should adopt the model language proposed in this Note to do so. Coupled with a greater plan of STD education and awareness and even some criminal sanctions, this will lead to a decline in insurance coverage litigation and inconsistent judicial results. More importantly, this will achieve public policy goals by curbing the pandemic spread of STDs in American society.*

\textsuperscript{180} See cases cited supra note 25.

* B.A. Psychology, University of Wisconsin-Madison, 2005; J.D. candidate, Thomas Jefferson School of Law, May 2008. A special thanks to Professor Julie Greenberg for her guidance, feedback, and mentorship on this article.