S174016

SUPREME COURT OF CALIFORNIA

SCOTT MINKLER,

Petitioner,

v.

SAFECO INSURANCE COMPANY OF AMERICA, a corporation,

Respondent.

9th Cir. No. 07-56689

(Central Dist. of Cal. No. CV-07-04374-MMM)

PETITIONER'S OPENING BRIEF ON THE MERITS

Certified Question from the United States Court of Appeals for the Ninth Circuit, No. 07-56689

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treatises

QUESTION PRESENTED

In granting the Ninth Circuit's request to answer the certified question, this Court reframed the question presented to be, "Where a contract of liability insurance covering multiple insureds contains a severability clause, does an exclusion barring coverage for injuries arising out of the intentional acts of 'an insured' bar coverage for claims that one insured negligently failed to prevent the intentional acts of another insured?" (Order granting review, filed Aug. 12, 2009.)

PRELIMINARY STATEMENT

This appeal involves an issue of insurance-policy construction that has divided courts across the United States. The plaintiff and petitioner is Scott Minkler, who is suing as the assignee and judgment creditor of Betty Schwartz, against whom he holds a judgment. That judgment is based on Schwartz's negligent failure to stop her adult son, who was Minkler's baseball coach, from sexually molesting Minkler when he was a young teen.

Defendant and respondent Safeco Insurance Company is Schwartz's homeowner's insurer. It declined to defend or indemnify both Schwartz and her son in Minkler's underlying lawsuit against them. It relied on the intentional-acts exclusion in its policy, which bars coverage for the intentional acts of "an" insured. Since Schwartz's son resided with her, he was an insured under the policy, and Safeco therefore maintained that Schwartz had no coverage, even though there was no allegation of any intentional conduct on her part.

California appellate courts have consistently held that an exclusion that bars coverage for the acts of "an" insured is effective to bar coverage for all insureds under the policy if any insured engages in the excluded conduct. (*See, e.g., Medill v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819, 832; *California Casualty Ins. Co. v. Northland Ins. Co.* (1996) 48 Cal.App.4th 1682, 1697-1698; *Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1486-1487; and *Fire Ins. Exchange v. Altieri* (1991) 235 Cal.App.3d 1352, 1361.)

Minkler has no quarrel with this rule. But the issue presented in this case is whether that rule is operative when the policy contains a "severability-of-insurance clause," which states that, "This insurance applies separately to each insured." The Safeco policy at issue here contains such a clause.

Courts across the nation have split on the effect of a severability clause on exclusions that apply to all insureds collectively, such as exclusions referring to the acts of "an" insured or "any" insured. Some have held that severability clauses make the policy ambiguous, or otherwise precludes enforcement of a collective exclusion;[1] others have taken the contrary view.[2]

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[1] *See, e.g., Worcester Mut. Ins. Co. v. Marnell* (Mass. 1986) 398 Mass. 240, 496 N.E.2d 158, 159; *American Nat. Fire Ins. Co. v. Fournelle Est.* (Minn. 1991) 472 N.W.2d 292, 294; *State Farm Fire and Cas. Co. v. Hooks* (Ill. App. 2006) 366 Ill.App.3d 819, 829, 853 N.E.2d 1, 9; *West American Ins. Co. v. AV & S* (10th Cir. 1998) 145 F.3d 1224, 1226 (Utah law); *State Farm Fire & Cas. Ins. Co. v. Keegan* (5th Cir. 2000) 209 F.3d 767, 768-770 (Texas law); *Brumley v. Lee* (Kan. 1998) 265 Kan. 810, 963 P.2d 1224, 1228; *Northwestern Nat. Ins. Co. v. Nemetz* (Wis. 1986) 135 Wis.2d 245, 400 N.W.2d 33,

To date, only one published California decision has considered the issue, *California Cas. Ins. Co. v. Northland Ins. Co.* (1996) 48 Cal.App.4th 1682, 1695-1697 ("*Northland*"). *Northland* concluded, in dictum, that the severability clause in that policy would not have an impact on the exclusion for the acts of "an" insured.

But in the concurring portion of his concurring and dissenting opinion in *Safeco Ins. Co. of America v. Robert S.* (2001) 26 Cal.4th 758, 778, Justice Baxter pointed out several flaws in the *Northland* analysis, and explained that under California's rules of insurance-policy construction, a severability clause would create an ambiguity when juxtaposed against an exclusion withdrawing coverage for the acts of "an" insured. This is because the clause would indicate to the policyholder that any claim for coverage would be treated as if there was only one insured, a view that is at odds with an exclusion that speaks to conduct by "an" or "any" insured.

37; *Illinois Union Ins. Co. v. Shefchuk* (6th Cir. 2004) 108 Fed.Appx. 294 (Ohio law); and *Premier Ins. Co. v. Adams* (Fla. App. 1994) 632 So.2d 1054, 1055-1056.

[2] *See, e.g., Villa v. Short* (N.J. 2008) 195 N.J. 15, 27-28, 947 A.2d 1217; *Allstate Ins Co. v. Kim* (D.Hawaii 2000) 121 F.Supp.2d 1301, 1302-1303 (Hawaii law); *Michael Carbone, Inc. v. General Acc. Ins. Co.* (E.D.Pa. 1996) 937 F.Supp. 413, 416-420 (New Jersey law); *Chacon v. American Family Mut. Ins. Co.* (Colo. 1990) 788 P.2d 748, 752; *Johnson v. Allstate Ins. Co.* (Me. 1997) 687 A.2d 642, 644-645; *Gorzen v. Westfield Ins. Co.* (1994) 207 Mich.App. 575, 526 N.W.2d 43, 45; *American Family v. Copeland-Williams* (Mo.Ct. App. 1997) 941 S.W.2d 625, 627-629; *Great Central Ins. Co. v. Roemmich* (S.D.1980) 291 N.W.2d 772, 774-775; and *Mutual of Enumclaw Ins. Co. v. Cross* (2000) 103 Wash.App. 52, 10 P.3d 440, 442-445.

In ruling on Safeco's motion to dismiss Minkler's case, the district court below elected to follow *Northland*. Finding that Safeco's policy afforded no coverage, it granted the motion and dismissed Minkler's case. Minkler contends this was error because the district court's analysis, though thorough, did not apply the fundamental rule that, in California, insurance policies must be construed in the way a lay policyholder with no legal training or expertise in insurance would understand them.

Justice Mosk once admonished that, "It is not easy for lawyers and judges to read a legal document as a layperson would, but we must make the effort." (*Weil v. Federal Kemper Life Assurance Co.* (1994) 7 Cal.4th 125, 156-157 (Mosk, J., dissenting). Few, if any, of the cases that have held that a severability clause has no impact on collective exclusions reflect any attempt to undertake that effort.

Instead of asking "How would an average layperson read this policy in light of these terms?," these cases ask a different question: "What does this policy mean?" To answer that question, these cases describe the purpose of severablity clauses, trace the insurance industry's use of the clauses dating to the 1950s, examine the placement of the clauses in the policy, and rely on various legal doctrines the courts employ to construe contracts — all of which would be far beyond the ken of the ordinary lay insured.

These decisions may be correct in jurisdictions that are less protective of policyholder rights than California, but because they fail to analyze the issue under the rules a California court is required to apply, they reach the wrong result. By contrast, Justice Baxter's concurring opinion focuses on the key issue — how the insured would

be likely to understand the coverage provided by the policy in light of the severability clause. Because Justice Baxter's approach is the most consistent with the way that this Court has approached and decided insurance-policy interpretation issues, this Court should adopt it.

STATEMENT OF JURISDICTION

This lawsuit was filed in the California Superior Court in May 2007 (2 ER 26), and removed by Safeco to the U.S. District Court for the Central District of California on July 5, 2007 (*Id.*). The district court granted Safeco's motion to dismiss on October 16, 2007, and entered a judgment dismissing the action the same day. (1 ER 2.) Minkler filed a timely notice of appeal to the U.S. Court of Appeals for the Ninth Circuit on November 13, 2007. (2 ER 19.)[3]

The appeal was briefed and argued, and on April 8, 2009, the Ninth Circuit issued a per curiam order requesting that this Court exercise its discretion to accept and decide the certified question in accordance with Rule 8.548 of the California Rules of Court. (*Minkler v. Safeco* (9th Cir. 2009) 561 F.3d 1033.) On August 12, 2009, this Court issued an order accepting review and re-stating the question presented.

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[3] References to the "ER" are to the "excerpts of record" filed by Minkler in support of his appeal to the Ninth Circuit, as required by Ninth Cir. Rule 30-1. In general, the excerpts of record correspond to an appendix in lieu of a clerk's transcript under rule 8.124(b) of the California Rules of Court.

STATEMENT OF FACTS

A. Factual summary

In 2003 Minkler filed a lawsuit in the California Superior Court against Betty Schwartz and her son, David Schwartz. (1 ER 2.) Minkler alleged that in 1987 and 1988, when he was a minor, he was sexually abused by David Schwartz, who was his baseball coach. (1 ER 3.) Some of the acts occurred in the home of David Schwartz's mother, Betty Schwartz, where David Schwartz lived. (*Id.*) The complaint alleged claims against David Schwartz for, inter alia, sexual battery. (*Id.*) A negligence claim was asserted against Betty Schwartz. (*Id.*)

During the time the incidents of abuse occurred, Betty Schwartz was insured by Safeco under a series of homeowner's policies. (1 ER 3.) In February 2004, David Schwartz tendered the defense of the action to Safeco, acting on his own behalf and on behalf of his mother. (*Id.*)

Safeco denied the tender, citing the fact that the Safeco policies excluded claims for bodily injury ". . . which is expected or intended by an insured or which is the foreseeable result of an act or omission intended by an insured." (1 ER 2-3; 2 ER 92.) Safeco asserted that David Schwartz was an insured under the policy, and that his intentional acts caused Minkler's damages. (1 ER 4; 2 ER 92.) Accordingly, it denied coverage (both an indemnity and a defense) under the intentional-acts exclusion. (1 ER 4.)

Minkler subsequently took a default judgment against Betty Schwartz for $5,020,612.20. (1 ER 4.) He then obtained an assignment of her rights against Safeco. (*Id.*) Based on his status as the assignee and judgment creditor of Betty Schwartz, Minkler filed this action against Safeco for breach of contract and tortious breach of the implied covenant of good faith and fair dealing. (*Id.*)

B. Relevant policy provisions

Safeco concedes that the relevant terms in the series of policies that it issued to Betty Schwartz were the same. (2 ER 24.) The 1993 policy, which was one of the policies attached to Minkler's complaint in this action, is included in the excerpts of record as an exemplar. (2 ER 61-89.)

The policy defines an "insured" in this way:

"Insured" means you and the following residents of your household:

a. your relatives;

b. any other person under the age of 21 who is in the care of any person named above. (2 ER 65.)

The liability coverage in the policy is in Section II. Coverage E is titled "Personal Liability." (2 ER 74.) The insuring clause promises that, "If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence 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 . . . ." (2 ER 74-75.)

The intentional-acts exclusion is contained in the Section II exclusions. It provides:

> 1. Coverage E — Personal Liability . . . [does] not apply to bodily injury and property damage: (a) which is expected or intended by an insured or which is the foreseeable result of an act or omission intended by an insured." (2 ER 76.)

The Section II Conditions portion of the policy contains the following relevant provisions:

> 1. Limit of Liability. Our total liability under Coverage E for all damages resulting from any one occurrence will not exceed the limit of liability for Coverage E stated in the Declarations. This limit is the same regardless of the number of insured, claims made or persons injured.
>
> 2. Severability of insurance. This insurance applies separately to each insured. This condition will not increase our limit of liability for any one occurrence. (2 ER 78.)

PROCEDURAL SUMMARY

After Safeco removed this action to the district court, it filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. On October 16, 2007, the district court granted the motion, issuing a 17-page written order. (1 ER 2-18.)

The district court noted that courts had split on the effect of a severability clause, and that the divergent outcomes reflect, in large measure, different views regarding the purpose of such a clause.

(1 ER 12.) Some courts found that the clause was designed to ensure that each insured receive the full benefit of coverage limits; while others found that the clause requires the insurer to consider each insured in isolation when evaluating coverage. (1 ER 13.)

The court noted that even under this broader view, it does not inexorably require that collective exclusions be applied only to the insured whose conduct gives rise to the claim. (*Id.*) The court cited a 1990 unpublished memorandum disposition by the Ninth Circuit, in *Employer's Mutual Co. v. G.D.* (9th Cir. 1990) 894 F.2d 409, 1990 WL 4854, decided under Montana law, which held that a severability clause did not have an impact on an exclusion pertaining to an exclusion relating to claims that "an insured" sexually molested a child at a day-care center.

The district court then noted that the history of the use of severability clauses in the insurance industry supported this view. (1 ER 14.) It also noted that because the clause was placed in the Conditions portion of the policy, and not in the portion of the policy relating to coverage, its function was intended to be procedural, not substantive, and that a reasonable person would understand this. (1 ER 15.)

Finally, the court noted that an interpretation of the policy that rendered some terms ambiguous or superfluous should be avoided, and that the severability clause could not be read to do this. (1 ER 16.)

STANDARD OF REVIEW

The interpretation of an insurance contract is an issue of law, which is reviewed de novo. (*E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470.)

ARGUMENT

A. The types of severability clauses used by insurers

Insurers in the United States appear to use two types of severability clauses. The most commonly-used type is the kind that appears in Betty Schwartz's Safeco homeowner's policy, which states that, "This insurance applies separately to each insured." (For the purposes of this brief, this kind of clause will be referred to as the "standard clause.") All but two of the cases cited in footnotes 1 and 2, above, deal with policies that contain the standard clause or a virtually identical variant.

The less commonly-used clause contains two parts. The first part consists of the standard clause, to which a second sentence is added that states that the insurance applies "As if each named insured were the only named insured." One of the cases cited in footnotes 1 and 2 deals with a policy that contains this type of clause, *West American Ins. Co. v. AV&S*, 145 F.3d at p. 1226. Other cases that involve this kind of clause include *McGrath v. Everest Nat. Ins. Co.* (N.D. Ind. 2008) 625 F.Supp.2d 660, 668; *Bituminous Cas. Corp. v. Maxey* (Tex. App. 2003) 110 S.W.3d 203, 210; and *Stewart Title Guar. Co. v. Kiefer* (E.D. La. 1997) 984 F.Supp. 988, 996.)

Courts do not seem to distinguish between the two types of clauses in their analysis of the impact of severability clauses. For example, the court in *Bituminous Cas. Corp. v. Maxey*, 110 S.W.3d at p. 210, was presented with a two-part clause, but relied extensively on cases dealing with the standard clause, without noting that the clauses in various cases differed.

Occasionally, insurers use a non-standard form of the severability clause. For example, the clause in *Illinois Union Ins. Co. v. Shefchuk*, 108 Fed.Appx. at p. 302 [the other case cited in footnote 1 and 2 that does not use the standard clause or its two-part variant], states, "The inclusion of multiple insureds will not affect the rights of any such persons or organizations to be protected by this policy. We will cover each such person or organization just as if a separate policy had been issued to each." (*Id.*)

Evidently, because of the dispute about the meaning of severability clauses, some insurers have eliminated them entirely. (*See, e.g., Villa v. Short*, 195 N.J. at p. 32, 947 A.2d at p. 1227, dissenting opn. of Long, J.) In *Villa* there were two Allstate homeowner's policies at issue. The earlier policy, which was in effect from 1983 to 1985, contained the standard severability clause. (*Id.*, 947 A.2d at p. 1220.) But the later policy contained no severability clause at all. Instead, it contained a "joint obligation clause," which states that the policy imposes joint obligations on the named insured and on other insureds, and that "this means that the responsibilities, acts and failures to act of a person defined as an 'insured person' will be binding upon another person defined as an 'insured person.'" (*Id.*)

The cases indicate that severability clauses were first included in liability policies in the mid-1950s, to clarify that the term "the insured," when used in an exclusion, would refer only to the insured claiming coverage. (*See, e.g., Alaska Dep't. of Transp. and Public Facilities v. Houston Cas. Co.* (Alaska 1990) 797 P.2d 1200, 1205, concurring opn. of Matthews, C.J. [describing history of severability clauses]; *Michael Carbone, Inc. v. General Acc. Ins. Co.*, 937 F.Supp. at p. 419 [citing Chief Justice Matthews' concurring opinion].)

The courts are split on the true purpose of severability clauses. The courts that take the view that the clauses operate to negate the effect of collective exclusions generally find that the purpose of the clause is to treat each insured as if he or she had his or her own policy, subject only to the liability limits of the policy. (*See, e.g., State Farm Fire and Cas. Co. v. Hooks*, 366 Ill.App.3d at p. 829, 853 N.E.2d at p. 9.)

By contrast, courts who view the clauses as not affecting the enforceability of collective exclusions generally construe the purpose of the clauses to render the coverage provided by the insuring provisions in the policy applicable to all insureds equally, up to the policy limits. (*See, e.g., Argent v. Brady* (N.J. Super. 2006) 386 N.J. Super. 341, 901 A.2d 419, 427-428.)

B. The nationwide split of authority on the impact of severability clauses

In California, if an exclusion refers to acts of "the" insured, and there are multiple persons insured under the policy, the exclusion will be construed to refer only to the acts of the particular insured seeking coverage. (*See, e.g., State Farm Mut. Auto. Ins. Co. v. Jacober* (1973)

10 Cal.3d 193, 202.) The *Jacober* court reached this result because it viewed the exclusion as ambiguous in the context of the policy. Other jurisdictions have reached the same result, but have based their conclusion on the presence of a severability clause, concluding that the clause creates an ambiguity because it suggests that the coverage applies separately to each insured. (*See, e.g., Sacharko v. Center Equities Ltd. Partnership* (1984) 2 Conn.App. 439, 444, 479 A.2d 1219, 1222.)

As the court in *Michael Carbone, Inc. v. General Acc. Ins. Co.*, 937 F.Supp. at p. 418, explained, "[T]he vast majority of jurisdictions which have addressed the issue . . . hold that the severability doctrine or a separation of insureds clause modifies the meaning of an exclusion phrased in terms of 'the insured.'" (*Id.*, collecting cases.)

The consensus breaks down, however, if the exclusion is drafted with reference to the acts of "an" insured, or "any" insured. In Wisconsin, for example, the courts find that a severability clause will render an exclusion referring to the intentional acts of "an" insured ambiguous, but not an exclusion referring to the acts of "any" insured. (Compare *Northwestern Nat. Ins. Co. v. Nemetz* (Wis. App. 1986) 135 Wis.2d 245, 256, 400 N.W.2d 33, 38 ["an insured" ambiguous]; with *Taryn E.F., by Grunewald v. Joshua M.C.* (Wis. App. 1993) 178 Wis.2d 719, 505 N.W.2d 418, 420 [severability language did not prevail over clause excluding coverage for malicious acts of "any" insured].)

1. The cases that find ambiguity

The courts that have held that a severability clause renders exclusions that refer to the acts of "an" or "any" insured ambiguous generally apply the analysis relied on by the Wisconsin Court of Appeals in *Nemetz*: "We conclude that this contract is ambiguous because the severability clause creates a reasonable expectation that each insured's interests are separately covered, while the exclusion clause attempts to exclude coverage for both caused by the act of only one." (*Id.*, 135 Wis.2d at p. 256.)

Similar analysis appears in *Worcester Mut. Ins. Co. v. Marnell* (1986) 398 Mass. 240, 496 N.E.2d 158, 159, one of the most widely-cited cases by courts that take this view of severability clauses. In *Marnell*, the parents' homeowner's policy included their son as an insured. The policy excluded coverage for liability arising from the operation or ownership of a motor vehicle by "any" insured, but also contained a severability clause. (*Id.* at p. 159.) The son held a party at his parents' house, and served alcohol. While driving some friends home after the party, he struck and killed a pedestrian. The parents were sued on a theory of negligent supervision. Citing the motor-vehicle exclusion, the carrier denied coverage. The trial court held that the carrier was required to defend. The Massachusetts Supreme Judicial Court affirmed.

The court conceded that the exclusion, standing alone, would bar coverage for the parents. (*Id.*, 496 N.E.2d at pp. 160-161.) But the court held that the severability clause changed this result, because it "requires that each insured be treated as having a separate insurance policy." (*Id.* at p. 161.) As a result, "the term 'insured' as used in the

motor vehicle exclusion refers only to the person claiming [liability] coverage under the policy." (*Id.*) Because the parents did not own or operate the car involved in the accident, the exclusion did not bar coverage for the claim against them. (*Id.*)

The *Marnell* court conceded that its construction of the policy could be seen as rendering the term "any" in the phrase "any insured" superfluous, but it believed that this was preferable to the insurer's construction, which would render the entire severability clause meaningless. (*Id.*)

Courts adopting a similar view include *American Nat. Fire Ins. Co. v. Fournelle Est.* (Minn. 1991) 472 N.W.2d 292, 294, holding that the severability clause required coverage for claims of minor children who were insured as household residents despite household-resident exclusion for "any" insured); *State Farm Fire & Cas. Ins. Co. v. Keegan* (5th Cir. 2000) 209 F.3d 767, 768-770 (under Texas law, where husband-wife homeowner's policy with severability clause defined additional insured to include "member of your household" and excluded bodily injury coverage for "an" insured, husband, who had moved from marital household, was covered for negligent injury to child who remained with wife as household resident); and *Brumley v. Lee* (1998) 265 Kan. 810, 963 P.2d 1224 (holding that because a severability provision gives each insured separate coverage, a homeowner's policy clause excluding liability coverage for intentional acts by "any" insured was ambiguous and did not bar coverage for an insured husband, sued on grounds he negligently failed to prevent his coinsured wife from inflicting an intentional, and fatal, blow upon a child).

2. The cases rejecting that view

An equal or greater number of courts take a contrary view. Their decisions are grounded on a variety of reasons. Some cases rely on the fact that the particular exclusion at issue is very specific and clearly communicates that the policy will not provide coverage for the type of claim at issue, under any circumstances. A good example of this approach is *Northwest G.F. Mut. Ins. Co. v. Norgard* (N.D. 1994) 518 N.W.2d 179, 181 ("*Norgard*").

There, the policyholders were a husband and wife who operated a day-care center. They were sued by the parents of a child who attended the center, whom they alleged had been molested by the husband. The issue in the case was whether the policy would cover claims against the wife, who was not alleged to have been involved in the improper activity, but who negligently allowed it to occur.

The court considered the conflicting authorities on the effect of a severability-of-insurance clause, and concluded that on the facts of the case before it, there was no ambiguity created by the interplay between the policy's exclusion and the severability clause because of the wording of the exclusion. This was because the policy in question contained additional coverage for the day-care center for an additional premium, and it also contained a sexual-molestation exclusion that withdrew coverage for sexual molestion "inflicted upon any person by or at the direction of an insured, an insured's employee, or any other person involved in any capacity in the day care enterprise." (*Id.*, 518 N.W.2d at p. 180.)

The court explained that, "Determinative here is the unique language of this exclusion; the exclusion does not pertain only to the acts of an insured, but also to the acts of 'an insured's employee or any other person involved in any capacity in the day-care enterprise." (*Id.* at p. 183.) The court concluded that this clause was clear on its face that the policy would provide no coverage for child molestation "where anyone connected with the operation of the day-care center commits an act of sexual molestation on one of the children." (*Id.*)

In the court's view, the specificity of this clause, which was tailored to withdraw any coverage for sexual molestation occurring in the day-care operation, regardless of who was the perpetrator, would control over a more general provision concerned with who is covered. (*Id.* at p. 183.) Since the parties expressly contemplated that there would be no coverage for sexual molestation, the court found no ambiguity and no coverage.

The court in *Argent v. Brady*, 386 N.J. Super. at pp. 355-356, 901 A.2d at p. 427, expressed a similar view, explaining that an appropriate factor in construing a collective exclusion and determining whether a severability clause makes it ambiguous is "how the policy interacts with other available forms of insurance." (*Id.*) In *Argent*, the court concluded that the business-pursuits exclusion in the homeowner's policy would negate any reasonable expectation by the insured that claims arising out of the operation of a business at home might be covered, regardless of any severability clause. (*Id.* at p. 427.)

Other courts simply reject outright the idea that the effect of a severability clause is to require that each insured be treated as if they were the only insured. For example, in the view of the Kentucky Court of Appeals in *National Ins. Underwriters v. Lexington Flying Club, Inc.* (Ky. App. 1979) 603 S.W.2d 490, 492, stated, "The purpose of severability clauses is to spread protection, to the limits of coverage, among all of the named insureds." It is not, under this view, "to negate bargained-for exclusions which are plainly worded." (*Id.*)

A majority of the courts that reject the view that severability clauses make collective exclusions ambiguous simply do not see any ambiguity, and conclude that the *Marnell* approach re-writes the policy by eliminating "any" or "an" from the exclusion. (*See, e.g., United Fire & Casualty Co. v. Reeder* (5th Cir. 1993) 9 F.3d 15, 18; *Chacon v. American Family Mut. Ins. Co.,* 788 P.2d at p. 752 n. 6; *American Family Mut. Ins. Co. v. Moore* (Mo. App. 1995) 912 S.W.2d 531, 534-535; and *Taryn E.F., by Grunewald v. Joshua M.C.* (App. 1993) 178 Wis.2d 719, 505 N.W.2d 418, 420-21.)

C. California authorities considering the impact of severability clauses

1. *Northland* and *Bjork*

Two published California decisions have discussed the effect of a standard severability clause on a collective exclusion: *Northland,* 48 Cal.App.4th at pp. 1695-1697, and *Bjork v. State Farm Fire and Cas. Co.* (2007) 157 Cal.App.4th 1, 11.

Bjork is easily dispensed with because it did not actually take a position on the issue. Instead, it noted the conflicting approaches and

concluded that regardless of how the severability issue might be resolved, the policy under consideration would nevertheless not provide coverage. (*Id.*, 157 Cal.App.4th at p. 11, n. 11.)

Northland, did, however, reach a conclusion, albeit in dictum. It sided with the cases rejecting the view that severability clauses create ambiguity that precludes the enforcement of collective exclusions, relying most heavily on *Norgard*. Specifically, *Northland* concerned an exclusion for liability arising from the operation of personal watercraft. The policyholders, identified in the opinion as "Mr. and Mrs. Joe Harmer," were operating a Waverunner watercraft on the Colorado River when they collided with and seriously injured Memorie Yessian, who was operating a Jet Ski. (*Id.*, 48 Cal.App.4th at pp. 1687, 1688.) The Harmers had 3 policies, but only the coverage with California Casualty ("CCIC") is relevant here.

CCIC defended the Harmers in the underlying action under a reservation of rights. It then filed a declaratory-judgment action against them and Yessian seeking to establish that they had no coverage. The CCIC policy expressly excluded liability arising from the use of a watercraft with inboard motor power, such as the Waverunner. (*Id.* at p. 1687.) The trial court granted summary judgment for CCIC, rejecting the policyholders' claim that the exclusion did not apply to a Waverunner because it was powered by a jet pump, and not a propeller. (*Id.* at p. 1689.) The policyholders appealed, and the Court of Appeal affirmed.

The court first held that the exclusion for watercraft with inboard-motor power applied to the Waverunner, which all parties

conceded had an inboard engine — that is, an engine mounted inside the craft's hull. (*Id.* at p. 1691.)

The court then turned to the policyholders' contention that even if the watercraft exclusion barred coverage for Mr. Harmer, CCIC had a separate duty to cover Mrs. Harmer, who was also an insured under the policy. (*Id.* at p. 1695.) The insureds noted that under California law, Mrs. Harmer's community-property interest could be held liable for a judgment against Mr. Harmer. Because of this, they reasoned that such liability would not arise from Mrs. Harmer's use of the watercraft, but her liability for Mr. Harmer's torts under community-property law. (*Id.*)

The *Northland* court was not receptive to this argument. First, it noted that nothing in the complaint against the Harmers indicated that Yessian sought to hold Mrs. Harmer liable on any theory not based on the ownership or use of the watercraft. The complaint, after all, alleged that both Mr. and Mrs. Harmer owned the Waverunner, and that each of them had been operating and controlling it at the time of the accident. (*Id.*)

Next, the court found that a spouse's community-property interest could not provide an independent basis for insurance coverage. (*Id.*) Here, the court relied on the cases explaining that exclusions that withdraw coverage for claims arising from "an" insured's activities generally bar coverage for anyone insured under the policy, not just the insured involved in the accident. (*Id.* at p. 1696.)

Finally, having already disposed of the issue of coverage, the court reached the contention that the severability-of-coverage clause

in the policy operated to require that coverage for each insured be considered independently, as if each has a separate policy. The court noted that there were no California cases in point, and that the courts in other jurisdictions had split on the issue. (*Id.*, 48 Cal.App.4th at p. 1696.)

The *Northland* court stated that it found the decisions rejecting the view that the severability clauses created coverage more persuasive than those on which Yessian relied. (*Id.,* 48 Cal.App.4th at p. 1697.) The court relied heavily on *Norgard,* noting:

> The court in *Norgard* acknowledged but rejected all three of Yessian's authorities. (518 N.W.2d at p. 182.) It reasoned that a clause excluding liability for specific conduct should prevail over a more general severability provision. It also noted the purpose of severability clauses is to afford each insured a full measure of coverage up to the policy limits, not to negate bargained-for and plainly-worded exclusions. (*Id.* at p. 183.) (*Northland*, 48 Cal.App.4th at p. 1697.)

The *Northland* court then explained that it reached the same conclusion, "*at least in the context of this case, in which coverage is urged on the basis of the community property laws.*" (*Id.* at p. 1697, emphasis added.) This was because the court feared that acceptance of the insureds' position would effectively nullify exclusions from coverage in any case involving married coinsureds and a policy with a severability provision. (*Id.* at pp. 1797-1798.) The court explained:

> A spouse could always demand a defense based on potential liability of his or her community property

interest, regardless of whether the act giving rise to the liability was excluded. A spouse could make that demand even where, as here, he or she was expressly alleged to have participated in the tortious act. It is inconceivable that parties to a policy would include clauses specifically excluding coverage for claims based on certain types of conduct, but intend those exclusions to have no effect in any case involving claims against coinsured spouses. (*Id.*, 48 Cal.App.4th at p. 1698.)

2. Justice Baxter's concurrence in *Safeco v. Robert S*

In *Robert S*, the policyholder's son shot and killed his friend. The son was convicted in juvenile court of a felony for the shooting. The victim's family sued the parents and their son for wrongful death. Safeco denied coverage based on an exclusion in the policy for "illegal acts." A five-justice majority of this Court held that the exclusion was unenforceable because it purported to bar coverage for any act that violated any provision of California law, including the provision in the Civil Code which forms the basis for negligence liability in California, Civil Code section 1714.

Justice Baxter and Justice Brown did not join the majority. In their view, the illegal-acts exclusion should be enforced to bar coverage for the son who had pulled the trigger. Accordingly, they dissented on this basis to the extent the majority held that the policy provided coverage for the son.

But they also believe that the severability-of-insurance clause in Safeco's policy (which is identical to the clause at issue here) operated to create coverage for the parents, who did not commit the wrongful fact, but who may have negligently allowed it to occur.

Justice Baxter canvassed the cases that have held that a severability clause demanded that coverage be construed only with reference to the particular insured seeking coverage. (*Id.*, 26 Cal.4th at p. 774.) He discussed the cases identified in *Northland*, and several decided in the five years after *Northland* had been decided. (*Id.*) He also noted that several courts had reached the contrary conclusion. (*Id.* at p. 775, n. 3.)

Justice Baxter then noted that in California, only *Northland* had discussed the issue. He noted that the *Northland* court saw no indication that the wife's liability was vicarious only, in light of the allegations in the underlying complaint that she jointly owned, operated, and controlled the watercraft at the time of the accident. (*Id.*, 26 Cal.4th at p.776.)

He then examined the *Northland* court's discussion of the severability issue, and distinguished the case in this way:

> The severability discussion in *[Northland]* is arguably dictum, since the Court of Appeal appeared to believe the exclusion applied directly to the wife by virtue of her personal conduct. Moreover, it is unclear the extent to which the court's narrow construction of the severability provision stemmed from its particular concern that exclusionary clauses might be nullified in actions against the community for the torts of a single

spouse. Such concerns are not present here. (*Id.* at p. 776.)

He noted that any liability on the parents for the shooting death was not merely derivative or vicarious; it was premised on an entirely separate, independent theory of negligent supervision and control. (*Id.*) For this reason, he explained that he was persuaded by the cases that hold that the effect of a severability clause ". . . is to extend both the policy's coverage, and its exclusions, *individually* to *each* insured, as if he or she were the *only* insured, subject to policy limits." (*Id.* at pp. 776, 777, emphasis in text.)

He added that, under this approach, "exclusions from coverage are personal and may not be imputed from one insured to another, even where, as here, language internal to an exclusionary clause, viewed in isolation, could be read to withdraw coverage from all insureds for the excludable conduct of one." (*Id.* at pp. 776, 777, emphasis in text.)

Where Justice Baxter's view differs materially from the cases that have held that severability clauses have no impact on collective exclusions, is that his concurrence is grounded on California's rules for insurance-policy construction. (*Id.* at p. 777.) In particular, he focused on the reasonable expectations of the insured, who would conclude based on reading the severability clause that the policy apply *only* to him or her, and who would not conclude that by allowing their coverage to extend to a child, it would reduce the insurance available to them for their own negligent acts. (*Id.* at p. 778.)

D. This Court should adopt the approach outlined in Justice Baxter's concurring opinion in *Safeco v. Robert S.* because it is the most consistent with California's approach to insurance-policy interpretation

Under California law, courts must construe insurance-policy terms to give effect to the mutual intention of the parties at the time the policy was issued, and this intent should be inferred, to the extent possible, "solely from the written provisions of the [policy] contract." (*MacKinnon v. Truck Ins. Exch.* (2003) 31 Cal.4th 635, 647.)

Words will be interpreted in their ordinary and popular sense, unless used by the parties in a technical sense, or a special meaning is given to them by usage. (*Id.* at p. 648.) A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. (*Id.*) But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract." (*Id.*) "The policy should be read as a layman would read it and not as it might be analyzed by an attorney or an insurance expert." (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1209, citing *Crane v. State Farm Fire & Cas. Co.* (1971) 5 Cal.3d 112, 115.)

In addition, "insurance coverage is interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] . . . exclusionary clauses are interpreted narrowly against the insurer." (*Id.*, brackets and ellipsis in text, internal quotation marks omitted.)

Ambiguity in an insurance policy can result from contradictory or inconsistent provisions in the policy. (*St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1244, citing

Delgado v. Heritage Life Ins. Co. (1984) 157 Cal.App.3d 262, 271; and *Smith Kandal Real Estate v. Continental Cas. Co.* (1998) 67 Cal.App.4th 406, 416.) "Even language that appears to be 'plain and clear' may be ambiguous when read in the context of the policy as a whole and the circumstances of the case." (Croskey, Heeseman, & Popik, *California Practice Guide — Insurance Litigation* (Rutter 2008 rev.) § 4:30 ("*Insurance Litigation*").

If the provision at issue is ambiguous — that is, subject to more than one reasonable construction — California courts do not select the "correct" interpretation, or weigh which interpretation is more reasonable. (*MacKinnon*, 31 Cal.4th at p. 655, citing *State Farm Mut. Auto. Ins. Co. v. Jacober* (1973) 10 Cal.3d 193, 201-202.) Hence, if any reasonable interpretation of the policy would result in coverage, a court must find coverage even if other reasonable interpretations would preclude coverage. (*Id.*)

Because this case presents an issue of insurance-policy construction, the question this Court must answer is not whether the courts that have concluded that severability clauses have no impact have the better argument; it is whether an insured — with no legal training or expertise with insurance — would be likely to understand how to reconcile the statement in the policy that the coverage applies separately to each insured, with an exclusion for the acts of "an" insured.

Few, if any, of the cases that enforce collective exclusions in the face of a severability clause actually analyze the issue from the standpoint of a lay insured. The court in *Norgard* did, explaining that "We doubt that a layperson would agree that the choice of articles

[between "the" insured and "an" insured] alone renders either exclusion free from ambiguity. . . . We decline to base our construction of the sexual molestation clause on the distinction between the articles." (*Norgard*, 518 N.W.2d at p. 183, n. 2.)

But for the most part, the cases apply the tools that lawyers and judges use to resolve knotty legal issues, as the district court did here. It examined the historical use of severability clauses dating from the 1950s, and the insurer's intent in including them in the policy. It looked at the policy's structure, to determine that a severability clause was intended to be "procedural" and not "substantive" because it was contained in the part of the policy titled "Conditions." It examines the insurer's purpose in including the clause. Regardless of how accurate or scholarly this analysis was, it does not reflect a lay insured's reading of the policy.

Only Justice Baxter's concurring opinion in *Safeco v. Robert S.* analyzes the impact of a severability clause on a collective exclusion under California's rules, which place the focus of the inquiry on the manner in which a lay insured would read the policy. (*Id.*, 26 Cal.4th at p. 777.) As he observed, it was unlikely that the parents of the boy who shot his friend in *Robert S.* understood that by extending their homeowner's coverage to include their son as an additional insured, that they were narrowing their own coverage for claims arising from his torts. (*Id.*)

Rather, the severability provision's meaning, based on the clear meaning of the words used, was "that each of multiple insureds under the policy was to be treated, within policy limits, as though the policy applied *only* to him or her. This promise of severable interests would

be rendered meaningless if the single word "an" in the exclusionary clause were nonetheless found to prevail, and to make the exclusion collective." (*Id.*, emphasis in text.)

Hence, enforcing the exclusion on a collective basis, based on the insurer's use of the word "an" in the exclusion, would not satisfy the insured's reasonable expectations, in light of the severability clause, to have coverage determined as though he or she was the only insured. (*Id.*)

Minkler would concede that the existence of conflicting judicial opinions on the impact of a severability clause does not automatically establish ambiguity. (*See, e.g., Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 208-209, *ACL Technologies, Inc. v. Northbrook Prop. & Cas. Co.* (1993) 17 Cal.App.3d 1773, 1787, n. 39.) But the issue presented here has truly split courts across the United States.

Even courts that have rejected the view espoused by Minkler have issued split decisions in doing so. For example, the New Jersey Supreme Court's decision in *Villa v. Short* was a 3-2 decision, with the minority finding that the severability clause rendered the policy ambiguous. (*Id.*, 947 A.2d at p. 1226-1227, Long, J., dissenting, ["Even if that is one reasonable interpretation of the exclusion, it is not the only one."].)

It is likewise difficult to conclude that the courts that have found an ambiguity — including the highest courts of Massachusetts, Kansas, and Minnesota, (not to mention two Justices of this Court) were not only wrong, but so wrong that their construction cannot be characterized as reasonable. This case presents a situation where the

fact that so many courts have split on construing the same policy language shows that the language is capable of more than one reasonable construction. It is therefore ambiguous, and should be construed to provide coverage.

CONCLUSION

When the focus of the inquiry is placed on the way in which a lay insured would construe the policy, and less on academic notions of which interpretation provides the "correct" solution, the answer to the question presented is clear — a collective exclusion that refers to the acts of "an" insured is ambiguous in a policy that provides, as Safeco's policy does here, that "this insurance applies separately to each insured." This Court should therefore adopt the views expressed by Justice Baxter in his concurring opinion in *Robert S.*

Dated: September 11, 2009. Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

According to the word-count feature in the Microsoft Word software used to prepare the brief, it contains 7,498 words, including footnotes. This brief therefore complies with the 14,000-word limit established by Rule 8.520(c)(1) of the California Rules of Court.

Dated: September 11, 2009.

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Re: ***Minkler v. Safeco Insurance Co. of America***
Supreme Court No. S174016
Ninth Circuit No. 07-56689
USDC Case No. CV07-4374 MMM

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, CA 91711.

On **September 11, 2009**, I served the foregoing documents described as **PETITIONER'S OPENING BRIEF ON THE MERITS** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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[XX] BY MAIL I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Claremont, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

[] BY FACSIMILE ("FAX") In addition to the manner of service indicated above, a copy was sent by FAX to the parties indicated on the service List.

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[] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

[XX] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **September 11, 2009**, at Claremont, California.

Debbie Hunter

Re: ***Minkler v. Safeco Insurance Co. of America***
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Filed Via Overnight Delivery
(13 copies of Opening Brief on the Merits)