Supreme Court Copy

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 REPLY BRIEF ON THE MERITS

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

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INTRODUCTION

The critical clause in Safeco's policy says: "SEVERABILITY OF INSURANCE: This insurance applies separately to each insured." (2 ER 78.) Safeco urges that this provision should be read to mean, "When this policy uses the term 'the insured,' it means the insured making the claim." So construed, Safeco contends that the sole function of the clause in its policy is to clarify the meaning of the term "the insured," and that the clause therefore cannot be read to modify or make ambiguous an exclusion in its policy that refers to "an insured."

Given the words it chose to use in the severability clause, Safeco's proposed construction is puzzling for two reasons: First, the severability clause does not use the term "the insured," and so it seems odd to suggest that its purpose is to clarify that term. Second, none of the exclusions in the policy refer to "the insured," so there is no need for the clause to perform the role that Safeco assigns to it. Clearly, Safeco's proffered interpretation of its clause is based on something entirely unrelated to the actual language of the clause in question.

Safeco admits as much in its rejoinder to the analysis in Justice Baxter's concurring opinion in *Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 776-777, which Minkler urges this Court to adopt. Safeco explains that, in its view, the analysis is flawed because it "did not consider the history and intent of the severability clause, important factors in interpreting the provision's meaning." (Safeco Merits Brief at 25.) If these factors are critical to the clause's interpretation, then the interpretation is necessarily based on something other than the

words used in the clause. Safeco therefore loses at the first step of the policy-interpretation process, which focuses on the "plain meaning" of the language in question.

Safeco makes its stand at the second step of the process — which focuses on the insured's reasonable expectations. It argues that, given the history and intent of the severability clause, and its placement in the "conditions" section of the policy, no reasonable insured would expect the clause to modify the policy's clearly-worded exclusions. But neither the history of the severability clause nor its placement is as helpful to Safeco's position as it claims.

Safeco's account omits an important aspect of the clause's history — that there were two generations of severability clauses. Its analysis is limited to the first-generation clause, which said, "The term 'the insured' is used severally and not collectively." Safeco correctly explains that liability policies first began to include this clause in 1955, to clarify that the term "the insured" was intended to mean the insured seeking coverage under the policy.

But some courts were reluctant to credit the clause as having this effect, and continued to construe exclusions referring to "the insured" as if they read "an insured" or "any insured." (*See, e.g., Liberty Mut. Ins. Co. v. Iowa Nat. Mut. Ins. Co.* (1970) 186 Neb. 115, 118, 181 N.W.2d 247 [explaining courts' refusal to limit "the insured" to the person claiming coverage, even after inclusion of the clause].) The industry later developed a new, second-generation version of the severability clause, and ultimately phased out the first-generation version.

Unlike its predecessor, the second-generation clause does not define the term "the insured," nor does it use that term. Instead, it explains that the policy itself is "severable" and that the coverage it provides applies "separately" to each insured. This language has caused courts to interpret the second-generation clause to mean that the policy "provides each insured with separate coverage, as if each were separately insured with a distinct policy." (*Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.* (Tex. 2009) 297 S.W.3d 248, 253; *U.S. Fidelity & Guaranty Co. v. Globe Indem. Co.* (1975) 60 Ill.2d 295, 299, 327 N.E.2d 321; *Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th at p. 776-777 (Baxter, J., concurring.)

Although Safeco's policy contains the second-generation clause, the historical and textual analysis that its brief offers is focused on the first-generation clause. Safeco fails to acknowledge the difference in the way the two clauses are worded, and it fails to analyze the actual words in the second-generation clause in the context of its policy. As a result, it offers no reasoned explanation for why the construction of the second-generation clause relied on by Minkler is unreasonable or beyond an insured's reasonable expectations.

In fact, the construction urged by Minkler is eminently reasonable because it is based on the plain meaning of the policy's language. Nothing in the drafting history offered by Safeco provides any reason for this Court to ignore that meaning. To the contrary, Safeco's historical account shows that it would be reasonable for a policyholder to expect that the policy's severability clause would modify the policy's exclusions. As Safeco explains, the first-

generation clause was *always* intended to modify exclusions in the policy, even though it was placed in the "conditions" section of the policy. And, the exclusions that the first-generation clause was designed to modify, as construed by the courts, withdrew coverage for all insureds based on the act of a single insured. Why then would it be unreasonable for an insured to expect that the more broadly-worded second-generation clause would operate in accordance with its terms, making the policy's coverage apply "separately," and hence without regard to the conduct of other insureds?

Safeco's last line of defense is a claim that a ruling in favor of Minkler would be contrary to public policy, and would force insurers to indemnify child molesters. Not so. Betty Schwartz was not a child molester, and California law does not preclude coverage for negligent supervision in cases involving child molestation. (*National Union Fire Ins. Co. v. Lynette C.* (1991) 228 Cal.App.3d 1073, 1086.)

If Safeco had wanted to make it clear that its policy would not provide coverage for any claim arising out of child molestation, it could have included a clear exclusion to that effect. (*See, e.g., Northwest G.F. Mut. Ins. Co. v. Norgard* (N.D. 1994) 518 N.W.2d 179, 180 (*"Norgard"*). Had it done so, the severability provision would not have affected coverage. (*Id.* at p. 185.) Or, it could have simply omitted the severability clause. (*See. e.g., Villa v. Short* (N.J. 2008) 195 N.J 15, 20, 947 A.2d 1217, 1220 [noting that severability language had been deleted from policy and replaced with a "joint obligations" clause].)

If Safeco's policy is ambiguous, the fault lies with Safeco. This Court has made clear that it will not come to an insurer's aid by

reading into a policy language that the insurer omitted, but wished it had included. (*Safeco v. Robert S.,* 26 Cal.4th at p. 764.) It has also made clear that "public policy" is not an interpretative aid for construing insurance contracts. In *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 818, this Court explained that, "The answer [to coverage determinations] is to be found solely in the language of the policies, not in public policy considerations."

For these reasons, Safeco has failed to show that its interpretation of its policy is the only reasonable interpretation. This Court should accordingly find that Safeco's policy is ambiguous, and it should so advise the Ninth Circuit.

ARGUMENT

A. Safeco's brief confirms that its policy is ambiguous when construed using California's rules of insurance-policy construction

1. By admitting that the severability clause cannot be construed without reference to its "history and intent," Safeco concedes that it cannot prevail at the plain-meaning stage

Safeco's merits brief accurately summarizes most of the relevant rules of insurance-policy constructions. (Safeco merits br. at 7, 8.) It explains that, as a first step, a court must examine the plain meaning of the words used in the policy, in the context of the policy as a whole. (*See, e.g., AIU Ins. Co. v. Superior Court,* 51 Cal.3d at pp. 821-822.) As Safeco notes, intent "is to be inferred, if possible, solely from the written provisions of the contract." (*Ibid.*) Safeco does not, however, actually undertake this step.

The clause at issue in Safeco's policy is titled, "severability of insurance." Safeco argues that it would be "more accurate" to

describe it as a "severability of interests" or "separation of interests" clause. (Safeco merits br. at 18.) But that is not what the policy says. It says in its title that the "insurance" is severable. The title is fully consistent with the text of the clause, which says, "This insurance applies separately to each insured." (2 ER 78.) The most recent edition of Black's Law Dictionary defines "separate" this way: "separate, adj. (Of liability, cause of action, etc.) individual; distinct; particular; disconnected." (Black's Law Dictionary (8th Ed. 2004).)

The eighth edition of Black's does not define the word "severable," but earlier editions did: "Severable. Admitting of severance or separation; capable of being divided; separable; capable of being severed from other things to which it was joined, and yet maintaining a complete and independent existence." (Black's Law Dictionary (5th Ed. 1979).) This is consistent with the current definition of the term at Merriam-webster.com: "capable of being severed; especially: capable of being divided into legally independent rights or obligations." To "sever" is "to put or keep apart: divide; especially: to remove (as a part) by or as if by cutting" and "to become separated." (*In re Angelique C.* (2003) 113 Cal.App.4th 509, 517, citing, Merriam-Webster Dictionary.)

Hence, by stating that the insurance provided is severable, and that it applies separately to each insured, the language of the severability provision communicates that the insurance itself is separate or distinct for each insured. Accordingly, this language has been judicially (and reasonably) construed to mean that the policy "provides each insured with separate coverage, as if each were separately insured with a distinct policy, subject to the liability limits

of the policy." (*Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d at p. 253; *U.S. Fidelity & Guaranty Co. v. Globe Indem. Co.*, 60 Ill.2d at p. 299; *Diamond Intern. Corp. v. Allstate Ins. Co.* (1st Cir. 1983) 712 F.2d 1498, 1504 ["We must therefore read the policy and exclusions as if Harding and MacDonald each had a policy of his own"]; *Worcester Mut. Ins. Co. v. Marnell* (Mass. 1986) 398 Mass. 240, 244, 496 N.E.2d 158, 161("*Marnell*") [severability clause "requires that each insured be treated as having a separate insurance policy"]; *Safeco Ins. Co. v. Robert S.,* 26 Cal.4th at p. 777 (Baxter, J., concurring) [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"].)

Safeco has not attempted to offer a different explanation of the plain meaning of the terms of the severability clause in its policy. Instead, it urges the Court to examine the "history and intent" of the clause, citing *MacKinnon v. Truck Ins. Exch.* (2003) 31 Cal.4th 635, 643-645, and Justice Chin's dissent in *E.M.M.I., Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 486-487. (Safeco merits br. at 25.) Neither case suggests that the history of a particular insurance provision can trump the plain meaning of its language (and certainly not at the first step of the interpretation process, which looks solely to plain meaning).

In *MacKinnon*, the Court explained that the history of the pollution exclusion was consistent with the way that a reasonable insured would construe the words in the exclusion — that is, as not including every release of every possible irritant or contaminant. (*Id.*, 31 Cal.4th at pp. 652-654.) And in *E.M.M.I.*, Justice Chin observed

that the intent of the exclusion at issue, which withdrew coverage for jewelry stolen from a vehicle unless the insured was "actually in or upon such vehicle at the time of the theft," was to ensure "the actual presence of someone in or upon the car in order to avoid a theft." (*Id.*, 32 Cal.4th at p. 486.)

In both examples cited by Safeco, the history of the provision was used to harmonize it with the language used. In neither case was the history or intent used to construe the provision at issue in a way that had no connection with language contained in the provision.

Nor is it clear how, under California's contract-interpretation rules, the intent and history of a provision could be used to construe the provision in manner at variance with its plain meaning when only one party to the contract — the insurer — would be likely to have any understanding of that history or intent. That would violate the rule that insurance policies are construed from the standpoint of a lay insured, not from the viewpoint of an attorney or insurance expert. (*Haynes v. Farmers Ins. Exch.* (2004) 32 Cal.4th 1198, 1209.)

By conceding that its clause cannot be accurately construed without consulting its "history and intent" (meaning the intent of the insurance industry), Safeco has effectively conceded that it cannot prevail based on the plain meaning of the words contained in the policy. It has therefore ceded the first step in the analysis to Minkler.

2. Even if the drafting history is taken into account, Safeco loses at the second stage of the process, because Minkler's construction is objectively reasonable

a. Safeco's historical analysis focuses on a different severability clause than the one in its policy

Safeco explains that severability clauses were first created to clarify that exclusions for the employees of "the insured" did not eliminate liability coverage for suits by the employees of one insured against another insured. (Safeco merits br. at pp.18-20.) This initial version of the severability clause, as the cases from that era demonstrate, was typically worded like this: "The term 'the insured' is used severally and not collectively, but the inclusion therein of more than one insured shall not operate to increase the limits of the company's liability." (*See, e.g., Marwell Const., Inc. v. Underwriters at Lloyd's, London* (Alaska 1970) 465 P.2d 298, 305 [same clause] *Liberty Mut. Ins. Co. v. Iowa Nat. Mut. Ins. Co.* (Neb. 1970) 186 Neb. 115, 117, 181 N.W.2d 247, 249 [same clause]; *American Fidelity & Cas. Co. v. St. Paul-Mercury Indem. Co.* (5th Cir. 1957) 248 F.2d 509, 515 n.9 [describing the text of the "standard clause, apparently now in general use"].)

As explained by Chief Justice Matthews in his concurrence in *State, Dept. of Transp. and Public Facilities v. Houston Cas. Co.* (Alaska 1990) 797 P.2d 1200, 1204, "the severability of interests clause became current in 1955 and was intended to clarify what insurance companies had intended all along, namely that the term 'the insured' in an exclusion refers merely to the insured claiming coverage." (*Id., citing* N. Risjord & J. Austin, "Who is 'The Insured'"

Revisited, 28 Ins. Couns. J. 100 ("Risjord & Austin").) The clause was added because courts across the nation had split on the meaning of the term "the insured." (*See, e.g., American Fidelity & Cas. Co. v. St. Paul-Mercury Indem. Co.*, 248 F.2d at p. 515 n.9 [collecting cases on each side of the issue].)

But the introduction of the severability clause did not resolve the controversy. This was explained in *Ohio Cas. Ins. Co. v. U. S. Fidelity & Guaranty Co.* (Ill.App. 1967) 79 Ill.App.2d 457, 461, 223 N.E.2d 851, 853: "In cases decided in other jurisdictions directly involving the question of the effect of the 'severability' clause, there is the same irreconcilable conflict in the decisions." After canvassing decisions going both ways on the issue, the Illinois Court of Appeals sided with the decisions holding that the policy's exclusion for employees of "the insured" applied to employees of anyone insured under the policy. (*Id.*, at p. 460-462.) As for the impact of the severability clause, the court stated, "If it were intended to avoid the conflict in decisions, it could have been stated in clear language adequate to reconcile or avoid these conflicts. It was not so stated." (*Id.* at p. 462.)

Other cases rejecting the severability clause as a basis to construe the term "the insured" to mean only the insured making the claim included *Transport Ins. Co. v. Standard Oil Co. of Tex.* (Tex. 1960) 161 Tex. 93, 99-100, 337 S.W.2d 284. There, the Texas Supreme Court explained, "The addition of the 'severability of interests' clause does not indicate that the drafters of the policy form by the addition of such clause intended that the word 'insured' means only the person claiming coverage. We cannot adopt Standard's theory

that by severing the interests in the case at bar, Standard is an insured under the 'omnibus clause' contained in the policy . . . ." (*See, also*, *Kelly v. State Auto. Ins. Ass'n* (6th Cir. 1961) 288 F.2d 734, 738 ["In our judgment, if it was intended by the severability of interests clause to provide coverage in a case like the present one, the language used was inadequate for that purpose"]; *Nationwide Mut. Ins. Co. v. Peek* (Ga. App. 1967) 115 Ga.App. 678, 680, 155 S.E.2d 661, 664 ["The 'severability of interest clause' does not modify the exclusion clause to mean only the person claiming coverage"]; *Liberty Mut Ins. Co. v. Imperial Cas. & Indem. Co.* (Fla.App. 1964) 168 So.2d 688, 690-691 [severability clause does not modify the employee exclusion clause so as to extend coverage to an otherwise excluded employee].)

In a dissent in *Transport Ins. Co. v. Standard Oil Co. of Tex.*, 161 Tex. at p. 104, Justice Walker of the Texas Supreme Court stated that, in his view, "Even prior to 1955 there was respectable authority for the proposition that the rights of each insured under the policy are to be determined as if there were no other person protected thereby, and it seems clear to me that the severability clause was added for the purpose of removing any doubt as to the intention of the parties in that respect." A decade later, in *Commercial Standard Ins. Co. v. American General Ins. Co.* (Tex. 1970) 455 S.W.2d 714, 721 the Texas Supreme Court reversed its position, adopting Justice Walker's view of the meaning of the first-generation clause.

The second-generation severability clause was evidently added to automobile-liability policies in the late 1950s, in a further attempt to clarify the policy in the wake of the conflicting judicial opinions. (*See, e.g. Maryland Cas. Co. v. American Fidelity & Cas. Co.* (D. Tenn. 1963) 217 F.Supp. 688, 694 n. 2; *Utica Mut. Ins. Co. v. Emmco Ins. Co.* (Minn. 1976) 309 Minn. 21, 31-32, 243 N.W.2d 134, 140, citing Risjord & Austin.)

Minkler's research has disclosed 78 reported state and federal decisions that quote the language of the first-generation severability clause.[1] Only 19 of these were decided after 1980. Of these 19 cases, only 3 involved policies that contained a first-generation severability clause; the rest simply quoted older cases that described the clause before the court. In sum, it appears that by 1980 the first-generation severability clause had all but vanished.

Few cases acknowledge or discuss the effect of the difference in the two versions of the severability clause. One case is the Illinois Supreme Court's decision in *U.S. Fidelity & Guaranty Co. v. Globe Indem. Co*, 60 Ill.2d at p. 298, where the court noted that the clause in the policy at issue was "a later and differently worded version" of the severability clause discussed in earlier cases.

The issue has been addressed in federal appellate decisions in which the appellate courts are bound by the construction of state law by decisions of the highest court of the forum state. In *Benton v. Canal Insurance Company* (Miss. 1961) 241 Miss. 493, 130 So.2d

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[1] This was the result using Westlaw to search all state and federal decisions that include "insurance" in the same sentence as "severally and not collectively."

840, and in *Pennsylvania Mfr.'s Ass'n Ins. Co. v. Aetna Casualty & Sur. Ins. Co.* (1967) 426 Pa. 453, 456, 233 A.2d 548, 550, the Supreme Courts of Mississippi and Pennsylvania construed first-generation severability clauses and held that they did not limit the meaning of "the insured" to the insured making the claim. Hence, the employee exclusions in those cases were held to bar claims by all employees of any insured; not just the insured making the claim.

In *Centennial Ins. Co. v. Ryder Truck Rental, Inc.* (5th Cir. 1998) 149 F.3d 378, 384, the insured argued that the differences between the wording of the first and second-generation clauses would allow the Fifth Circuit not to follow *Benton*. The Fifth Circuit agreed, stating, "We find the final decision in *Benton* failing to settle this case because the language of the Stubbs policy's severability of interests clause [in *Benton*] differs from that of Scholastic policy's separation of insureds provision. We, therefore, must resolve the dispute between Ryder and Centennial based on a forecast of what the Mississippi Supreme Court would do if confronted with it. (*Id.*) The court held that the second-generation clause operated to limit the scope of the exclusion where the insured claiming coverage was being sued by its own employee. (*Id* at p. 385.)

The district court in *Penske Truck Leasing Co., Ltd. Partnership v. Republic Western Ins. Co.* (E.D.N.C. 2006) 407 F.Supp.2d 741, 747, relied on *Centennial* and reached a similar conclusion concerning North Carolina law on the issue.

The Third Circuit reached a contrary conclusion in its unpublished decision in *Brown & Root Braun, Inc. v. Bogan Inc.* (3d Cir. 2002) 54 Fed.Appx. 542, 546. There, the court held that it was bound by the earlier state-law decision, notwithstanding the different wording in the first-generation clause in the older decision and the second-generation clause before it.

In *Cameron Mut. Ins. Co. v. Proctor* (Mo.App. 1988) 758 S.W.2d 67, 70, the Missouri Court of Appeal recognized that the difference in the wording between the two generations of severability clauses could cause different outcomes. There, the policy at issue contained a first-generation clause, and the court declined to follow precedents involving second-generation clauses because of the differences in wording.

b. Nothing in the drafting history or language of the clause makes Minkler's construction objectively unreasonable

Safeco's attempt to limit the function of the severability clause in its policy to clarifying the meaning of the term "the insured" in the policy by relying on the drafting history of severability clauses is problematic for several reasons. First, and foremost, that is not what the second-generation clause says. Unlike the first-generation clause, the second-generation clause does not refer to the manner in which the policy uses the term "the insured." Accordingly, there seems little reason to assign it that role or to rely on cases that construe the meaning or drafting history of the differently-worded first-generation clause.

Second, there is no need for a severability clause to clarify the meaning of the term "the insured" in Safeco's policy, which is almost-uniformly framed in terms of "an insured." The insuring clause in section II, which provides the policy's liability coverage, refers to claims brought "against *an insured* for damages because of bodily injury or property damage." (2 ER 74, emphasis added.) The additional coverages in section II are all framed in terms of coverage to "an insured." (2 ER 75 [promising to pay expenses and costs "taxed against an insured"; plus first-aid expenses incurred by "an insured"; plus property-damage caused by "an insured"; and credit-card and forgery losses incurred by "an insured"].)

As Safeco notes in its brief, all the exclusions refer to "an insured." (Safeco merits br. at 26, n.11, citing 2 ER 76, 77 [listing exclusions].) In sum, there is no need in the Safeco policy to clarify the meaning of the term "the insured" because Safeco's obligations run to "an insured," and the ambiguity that the first-generation clause was designed to clarify does not exist.

Next, Safeco argues that "no objectively reasonable insured would expect the *severability* provision to cover them for another insured's intentional act. He or she would naturally look to the intentional acts exclusion." (Safeco merits br. at 28, emphasis in text.) But Minkler is not suggesting that the severability clause itself provides coverage — only that it tells policyholders that the coverage that they have purchased applies separately to them, as if they were the only person insured under the policy. In light of the language used in the clause in the Safeco policy, this would be a reasonable thing for

a policyholder to expect. Safeco's argument does not take into account the meaning of the words used in its clause.

Nor is there merit in Safeco's suggestion that, given the placement of the severability clause in the policy's "conditions," it would be unreasonable for a policyholder to expect that a severability clause could affect the policy's exclusions. Safeco's own historical account shows that severability clauses were always intended to modify the way courts applied exclusions and that they were always placed in the conditions portion of the policy.

Safeco also argues that any conflict between the severability clause and the exclusions should be resolved by applying the rule that specific provisions prevail over general ones. While this is a valid rule of contract construction in a general sense, it does not factor well into the inquiry of what a lay insured would expect. Safeco argues that its intentional-acts exclusion is "specifically tailored," but it is not; it is a generic exclusion that seeks to eliminate a broad class of claims from coverage. A lay insured would be unlikely to know whether the severability clause or the intentional-acts exclusion was more "specific." Safeco's argument amounts to nothing beyond a claim that exclusions are more specific than conditions and should therefore control. This argument fails to give proper consideration to the language in the severability clause.

Safeco cites *Northwest G.F. Mut. Ins. Co. v. Norgard* (N.D. 1994) 518 N.W.2d 179 (*"Norgard"*) for the proposition that a "general" severability clause cannot prevail over a more specific exclusion. But *Norgard* actually cuts against Safeco's argument because the exclusion the court enforced in that case was not the

policy's intentional-acts exclusion, but was a specific exclusion in the policy's endorsement that provided day-care coverage. That exclusion withdrew coverage for sexual molestation "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 held that, given the specificity of this exclusion, no one insured under the policy could reasonably expect that the policy might provide coverage for any type of claim related to molestation occurring in the insured's day-care business. (*Id.*)

Norgard is a particularly poor example for Safeco to rely on because the *Norgard* court refused to accept the argument that Safeco makes here — that because its exclusion referred to the acts of "an" insured, instead of "the" insured, the scope of the exclusion was clear. In rejecting this approach, the court stated, "We doubt that a layperson would agree that the choice of articles alone renders either exclusion free from ambiguity. . . . We decline to base our construction of the sexual molestation clause on the distinction between the articles." (*Id.*, 518 N.W.2d at p. 183, n.2, citing *Shelter Mut. Ins. Co. v. Brooks* (Mo.1985) 693 S.W.2d 810 ["the insured", when coupled with severability clause, is ambiguous]; *Catholic Diocese of Dodge City v. Raymer* (1992) 16 Kan.App.2d 488, 825 P.2d 1144; aff'd 251 Kan. 689, 840 P.2d 456 ["an insured," coupled with severability clause, is ambiguous].)

Safeco claims that to accept that the severability clause creates an ambiguity when juxtaposed against the intentional-acts exclusion is to countenance "an absurd result." (Merits br. at 31.) This harsh

judgment is unfounded in light of the decisions of numerous courts across the country (and members of this Court) that have considered the issue and reached precisely this result. While Safeco may disagree with these cases, the result they reach follows from the language that Safeco chose to include in its policy. It cannot be called absurd.

3. The out-of-state authorities relied on by Safeco do not apply California's approach to policy construction

In his opening brief, Minkler argued that few, if any, of the decisions on which Safeco relies made any attempt to apply the same rules of insurance-policy construction that California requires. Safeco disagrees, stating that "several of the majority cases examined the policy from the standpoint of the insured." (Safeco merits br. at 42.) The examples Safeco provided were *Norgard*, 518 N.W.2d at pp. 183-184; *Chacon v. American Family Mut. Ins. Co.* (Colo. 1990) 788 P.2d 748, 752; and *Villa v. Short* (N.J. 2008) 195 N.J 15, 32, 947 A.2d 1217, 1227. Safeco does not actually examine these decisions in any detail; it merely observes that they state rules of construction that parallel those used in California. But a closer look bears out Minkler's initial observation.

Norgard does not even qualify as a case that falls into what Safeco calls the "majority" view. As explained above, the court actually rejected the argument that Safeco relies on here — that its use of the article "an" in its intentional-acts exclusion precludes any finding of ambiguity. (*Id.*, 518 N.W.2d at p. 183, n.2.) Rather, its holding was that, given the highly-specific molestation exclusion in the policy's specific coverage for the policyholder's child-care

business, there was no ambiguity, even if the severability clause was given full meaning.

Villa v. Short does support Safeco's overall argument. It finds that an intentional-acts exclusion that withdraws coverage for the acts of "an insured" is not ambiguous, and it further finds that the severability clause does not "infuse ambiguity into the plain language of the policy exclusion." (195 N.J. at p. 28.) The court does, as Safeco claims, cite an approach to policy construction that appears to mirror California's approach. (*Id.* at p. 23.)

Whether the court actually applied these rules is open to debate. The dissenting justices did not believe so. (*Id.*, at p. 30, Long, J., dissenting [noting that the insurer's construction of the policy was not the only reasonable construction].) The *Villa* majority noted that the severability provision was placed in a different part of the policy than the exclusion. (*Id.* at p. 27.)

More importantly, the severability clause in the policy was not titled "Severability of Insurance" as is the clause in Safeco's policy. Rather, it was titled "Our limits of liability." (*Id.*) That provision contained the severability clause as well as a lengthy disclaimer that explained that the policy limits did not increase regardless of the number of claims presented, and that all claims resulting from one occurrence were considered one loss. (*Id.* at p. 27.) The court concluded that this provision needed to be construed in its entirety, and that its meaning was to inform the policyholder that, "all insureds under the policy are entitled to equal coverage up to the total policy limit on the declaration page, rather than one insured receiving

coverage and possibly leaving no insurance for the other insureds." (*Id.* at pp. 27-28.)

Safeco has not contended in this case that this is the function of a severability clause, nor could it make a plausible argument to this effect. Its clause provides that the insurance applies separately to each insured, and it explains that the policy limits are the exception to this rule. (2 ER 78.) The *Villa v. Short* construction of the clause appears to take the clause's exception and treat it like the entire purpose of the clause. But there is no need for an exception without the rule.

Chacon v. American Family Mut. Ins. Co. also supports Safeco's position (and was also decided over a 3-justice dissent.) The majority held that the intentional-acts exclusion was clear, and believed that to enforce it because of the severability clause would render the reference to "any" insured in the exclusion superfluous. (*Id.*, 788 P.2d at p. 752.) The court acknowledged that cases like *Marnell,* 398 Mass. 240, held that enforcement of the exclusion rendered the severability provision superfluous, but it concluded this approach was preferable and that the cases rejecting *Marnell* were more persuasive than *Marnell.* (*Chacon*, 788 P.2d at p. 752.)

Safeco also argues that most of the cases on which it relies do not find any ambiguity but simply construe the plain language of the policy. As examples, it cites *Allstate Ins. Co. v. Kim* (D. Hawaii 2000) 121 F.Supp.2d 1301, 1309, and *Michael Carbone, Inc. v. General Acc. Ins. Co.* (E.D. Pa. 1996) 937 F.Supp. 413, 422-423.) These too are poor examples for Safeco. *Carbone* found that there was no ambiguity created by the severability provision because the policy before the court included some exclusions that referred to "the

insured," and others that referred to "any" insureds. (*Id.*, 937 F.Supp. at p. 422.) Hence, the court was able to conclude that the severability clause was not rendered meaningless by its construction because it still served the function of clarifying the term "the insured" as used in the exclusions framed in that manner. (*Id.* at p. 423.)

The policy in *Allstate v. Kim*, like the policy in *Villa v. Short*, was not titled "severability of insurance"; it was labeled "Our limits of liability." The court concluded that, "This provision clearly was intended to afford each insured a full measure of coverage up to the policy limits, not to negate the policy's intentional acts exclusion." (*Id.* at p. 1308.)

In explaining why it declined to follow the cases that hold that a severability clause creates ambiguity in the meaning of exclusions, the court observed that the clause in each of the cases cited, including *Marnell*, 398 Mass. 240; *Northwestern National Ins. Co. v. Nemetz* (Wisc. App. 1986) 135 Wis.2d 245, 400 N.W.2d 33; and *Norgard,* 518 N.W.2d 179, was denominated a "severability clause," unlike the clause before it. (*Id.* 121 F.Supp. at p. 1308 n. 5.) The court further explained that, in its view, the contrary cases were better reasoned and more consistent with the rules of contract interpretation of the Hawaii state courts. (*Id.*)

None the examples cited by Safeco considered whether the interpretation advanced by the insured was reasonable, or whether the insurer's interpretation was the *only* reasonable interpretation of the policy. Presumably, if Safeco could find other out-of-state cases that provided stronger evidence that the cases it relied on were decided the way that a California court would decide the issue (i.e., by focusing

on how a lay insured would read the policy, on the actual words of the severability clause as opposed to other decisions or drafting history, and whether or not there was only a single reasonable way to construe the policy), Safeco would have provided them. Minkler accordingly stands by his contention that the cases relied on by Safeco do not examine the issue in the manner that a California court would.

B. Public policy is not an interpretative tool for insurance policies, and Safeco's "practical concerns" are overstated

Safeco tries to frighten this Court into issuing a favorable ruling by raising the specter of insurance coverage for child molesters and supervisors turning a blind eye to molestation. But while the underlying claim in this case does arise out of child molestation, the issue raised by this case sweeps far more broadly. The cases on both sides of the issue reach all types of conduct, including automobile-liability,[2] vandalism,[3] fire losses,[4] negligent supervision of a child, resulting in a fall,[5] negligent investment advice,[6] and wrongful death.[7]

Nor is Safeco correct in arguing that anyone who could potentially be held liable for negligent supervision of a child molester is necessarily complicit in the molestation and therefore guilty of

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[2] *Marnell*, 398 Mass. at p. 242.
[3] *Chacon v. American Family Mut. Ins. Co.*, 788 P.2d at p. 749.
[4] *Sales v. State Farm Fire & Cas. Co.* (11th Cir. 1988) 849 F.2d 1393, 1384.
[5] *State Farm Fire & Cas. Ins. Co. v. Keegan* (5th Cir. 2000) 209 F.3d 767, 767.
[6] *Illinois Union Ins. Co. v. Shefchuk* (6th Cir. 2004) 108 Fed.Appx. 294, 297.
[7] *American Nat. Fire Ins. Co. v. Estate of Fournelle* (Minn. 1991) 472 N.W.2d 292, 293.

willful misconduct, which bars coverage under Ins. Code section 533. In *National Union Fire Ins. Co. v. Lynette C.*, 228 Cal.App.3d at p. 1086, the court held that the public policy of discouraging willful torts that animates Insurance Code section 533 did not preclude coverage for a negligent-supervision claim against the spouse of a child molester for failing to use reasonable care to prevent the molestation.

Safeco cites no contrary authority. All of the cases it cites, such as *Chaney v. Superior Court* (1995) 39 Cal.App.4th 152, 157, and *Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1082, are cases dealing with the statute-of-limitations on child-abuse claims, not insurance cases.

Nor would a finding that Safeco's policy is ambiguous result in an entirely new class of unforeseen liability for it or for other insurers. Safeco's policy already provides coverage for negligent supervision of someone who does not qualify as an "insured" under the policy. Hence, if Betty's son had lived next door, instead of in her house, there his intentional acts would not bar a negligent-supervision claim against her. This would also be true if the abuser had been a boarder living in Betty's house, but not related to her.

Safeco's argument ultimately amounts to a claim that it would be onerous for insurers to have to defend and possibly indemnify policyholders for claims arising out of the intentional acts of their co-insureds. There is no question that insurers are permitted to draft policies that withhold such coverage. But there is a significant difference between what insurers are permitted to do and whether the

policies they issue are sufficient to accomplish the permitted objectives.

This Court addressed this distinction directly in *AIU Ins. Co. v. Superior Court,* 51 Cal.3d at p. 818. That case presented the issue of whether CGL policies covered the cost of responding to environmental clean-up and other "response" costs under state and federal environmental laws. The Court noted that it could conceive of many arguments "for and against permitting insurance against the costs of rectifying pollution." (*Id.*) But it made clear that these public-policy based considerations had no relevance to the insurance-construction issues it faced. This was because Congress and the Legislature has enacted laws that expressly allowed polluters to insure against the cost of environmental clean-ups, so the relevant public-policy determinations had already been made. (*Id.* at p. 818.) Accordingly, the Court explained:

> [T]he issue before this Court is not whether CGL policies *may* provide the coverage sought, but whether they *do* provide it according to their terms. The answer is to be found solely in the language of the policies, not in public policy considerations. (*Id.*, emphasis in text.)

This analysis applies here. The range of "parasitic" tort claims that Safeco objects to are insurable. Safeco can articulate reasons why the insurance industry would prefer not to cover such claims. And mechanisms are available to insurers to exclude them. The question presented here is whether Safeco's policy was up to the task.

Public policy is not an interpretive aid. (*Ward General Ins. Services, Inc. v. Employers Fire Ins. Co.* (2003) 114 Cal.App.4th 548, 553.) "An insurance policy is a contract, to be interpreted and enforced as such. The principles of contractual interpretation, as applied to insurance policies . . . do not include using public policy to redefine the scope of coverage." (*Id.*)

Safeco has long had the means at hand to eliminate the ambiguity from its policy. Surely the string of cases dating from *Marnell* in 1986 would alert an insurer to the potential problem lurking in the policy. Other insurers have taken steps to sidestep the problem. By 1985, Allstate had replaced the standard severability clause with a "joint obligation clause" that explained that the policy imposed joint obligations on all insureds, and that the acts and failures to act of a person defined as an insured would bind others who also fell within the policy's definition of insured. (*Villa v. Short*, 195 N.J. at p. 20, 947 A.2d at p. 1220.)

This Court has declined to read into an insurance policy language that the insurer omitted, but in hindsight wished that it had included. (*Safeco v. Robert S.*, 26 Cal.4th at p. 764 ["we cannot read into the policy what Safeco has omitted"]; *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 401, 33 Cal.Rptr.3d 562, 580 ["We will not rewrite the policies to insert a provision that was omitted"].) This rule should prevent the Court from doing what Safeco asks here — reading *out* of its policy a provision that it now wishes it had omitted.

CONCLUSION

Forty-seven years ago, Judge Frank W. Wilson, in *Maryland Cas. Co. v. American Fidelity & Cas. Co.* (D.Tenn. 1963) 217 F.Supp. 688, 693, confronted a case similar to this one. He described what had already become a pitched disagreement in the courts over the impact of severability clauses, and his disapproval over how the battle over their meaning was typically fought. He noted that the issue had been ruled on numerous times but generated divergent results in cases interpreting identical or nearly-identical policies. He explained that it was the existence of these conflicting strands of authority that complicated what would otherwise be a fairly straightforward issue:

> Divergent authority begets divergent authority. In the welter of divergent authority, resort to the language of the policy being construed is more often than not disregarded and use of the usual rule of construing ambiguous language against the carrier issuing the policy is generally ignored, with the battle being fought over citations to previous authorities. (*Id.* at p. 693.)

Safeco engages in precisely this tactic, glossing over the rules of policy construction and arguing that its "majority" position enjoys a 2-to-1 numerical advantage over the "minority" view advanced by Minkler. (Safeco merits br. at 41.) But cases are not chess pieces, and numerical advantage does not dictate the proper outcome of this case. In fact, the existence of the divergent strands of authority is strong proof that Minkler holds the stronger position. As Judge Wilson asked rhetorically, "[D]oes not the fact that various

courts with equal desire to correctly construe the policy have reached conflicting conclusions at least raise a question of ambiguity?" (*Id.*)

It does, of course. Safeco's policy is reasonably subject to more than one interpretation; it is therefore ambiguous. This Court should accordingly advise the Ninth Circuit that the district court's ruling was in error.

Dated: January 20, 2010.

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 7,120 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: January 20, 2010.

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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 **January 20, 2010**, I served the foregoing documents described as **PETITIONER'S REPLY 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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Executed on **January 20, 2010,** at Claremont, California.

Debbie Hunter

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Filed Via Overnight Delivery (13 copies of Reply Brief on the Merits)