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## ***Exclusion For Injury Expected Or Intended By An Insured Does Not Bar Coverage For All Insureds In Policy Also Containing A Severability Clause***

On June 17, 2010, the California Supreme Court filed its opinion in *Minkler v. Safeco Insurance Company* holding the insurer had a duty to defend an insured's mother in an action by a minor against the son for sexual molestation and against the mother for negligent supervision.

### ***Factual and Procedural Background***

Scott Minkler sued Betty and David Schwartz in superior court alleging David had sexually molested him over a period of several years. He alleged causes of action against David for sexual battery, intentional infliction of emotional distress, negligence and negligence per se. Scott also alleged a cause of action against Betty for negligent supervision based on allegations that he was molested by David in Betty's home, that Betty knew David was molesting Scott, but failed to stop the molestation.

Betty was insured by Safeco under several homeowners policies which defined "an insured" to include both the policy holder and any relative resident of the policyholder's household. Pursuant to this definition, David was an additional insured under the policy. The policies excluded coverage for bodily injury "expected or intended by an insured or which is the foreseeable result of an act or omission intended by the insured..." The policies also provided, under the Conditions section, that "this insurance applies separately to each insured. This condition will not increase [Safeco's] liability for any one occurrence."

David tendered the defense of the action to Safeco. Safeco denied the tender based on the intentional acts exclusion. Scott obtained a default judgment against Betty in the amount of approximately \$5 million. Betty subsequently assigned her claims against Safeco to Scott.

Scott filed an action in superior court against Safeco for breach of contract and bad faith, alleging Safeco had wrongfully denied coverage for the claim against Betty. Safeco removed the case to the U.S. District Court. Safeco filed a motion to dismiss the action on the ground the intentional acts exclusion barred coverage. The district court granted Safeco's motion. Scott appealed to the U.S. Court of Appeals for the Ninth Circuit which requested that the California Supreme Court decide the following question: Where a policy 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 acts of another insured?



### **Judicial Holding and Analysis**

The Supreme Court held that the exclusion for intentional acts of “an insured”, read in conjunction with the severability clause, creates an ambiguity which must be construed in favor of coverage. An insured would reasonably anticipate that under the severability clause, each insured’s coverage would be analyzed separately, so the intentional act of one insured would not bar coverage of another insured for the latter’s independent act that did not fall within the exclusion. Betty was not precluded from coverage merely because David’s conduct fell within the intentional acts exclusion.

The policies provided the company would defend and indemnify “an” insured for bodily injury arising from an occurrence, but they specifically excluded coverage for injury that was expected or intended by “an” insured. Safeco argued that because the injury to Scott was expected or intended by David, neither David, nor Betty, was entitled to coverage. Scott contended the severability clause created an ambiguity as to the scope of the exclusion. The Court agreed with Scott finding there was ambiguity as to whether the exclusion for an intentional act by one insured extended to all other insureds, and therefore the court was obligated to construe the ambiguity to conform to the objectively reasonable coverage expectations of the insured. Because of the severability clause, Betty would have reasonably expected Safeco’s policies, whose general purpose was to provide coverage for each insured’s legal liability for injury to others, to cover her *separately* for her *independent* acts or omissions causing such injury, so long as her conduct did not fall within the policies’ intentional acts exclusion, even if the acts of another insured contributing to the same injury were intentional.

The Court rejected Safeco’s argument that the second sentence of the severability clause makes clear that the purpose of the clause was to specify that each insured was separately entitled to be indemnified up to the full policy limits applicable to an individual insured, so long as the per occurrence limit was not exceeded. The Court stated that Safeco could have eliminated any ambiguity in the clause by providing that the “*limits of liability of this policy apply separately to each insured.*”

The Court recognized that the majority view is that the severability clause does not alter the collective application of an exclusion for intentional, criminal or fraudulent acts by “an” insured, because the severability clause is intended only to extend *policy limits* separately to each insured and cannot prevail over a clear expression that coverage for all insureds is barred in a case where “an” insured has committed an excluded act. The Court adopted the minority view, stating that even if a provision excluding coverage for injury arising from the specified acts of “an” insured would normally mean that the excludable conduct of an insured bars coverage for all, a provision stating that the insurance applies *separately to each insured* reasonably implies a contrary result, at least in certain circumstances.

### **Comments and Implications**

The Court stressed that its reasoning and conclusion under the specific circumstances of this case, which involves the interplay between a severability clause and an exclusion for the intentional acts of “an” insured, does not mean a severability clause necessarily affects all exclusions framed in terms of “an” or “any” insured. Application of a severability clause can never result in a finding of coverage the insured had no objective reason to expect. Thus, each exclusion applicable to “an” or “any” insured must be examined individually, and in context, to determine the effect a severability clause like the one at issue here might have on its operation.