

# California Insurance Law Coverage Newsletter for Attorneys

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## **MULTIPLE INSUREDS; CRIMINAL ACT OF ONE INSURED MAY NOT EXCLUDE COVERAGE FOR A CO-INSURED; SEVERABILITY CLAUSE**

### *The Problem*

Liability policy coverage provisions promise to defend and indemnify, within policy limits, ‘an’ insured for personal injury or property damage arising from a covered ‘occurrence’. Such policies however specifically exclude coverage for injury that is ‘expected or intended’ by ‘an’ insured, or was the foreseeable result of ‘an’ *insured’s intentional act*. Absent contrary evidence in a policy with MULTIPLE INSUREDS exclusions from coverage described with reference to the acts of ‘an’ or ‘any’, as opposed to ‘the’, insured are deemed under California law to apply *collectively*, so that if one insured has committed acts for which coverage is excluded, the exclusion applies to all insureds with respect to the same occurrence. [*Minkler v. Safeco Ins.* (2010) 49 Cal.4th 315, 318, 110 Cal.Rptr.3d 612]

### *Severability clause-conditions provisions in a policy*

However, as is often the case, liability policies also contain a severability-of-interest or ‘separate insurance’ clause in the portion of the policy under CONDITIONS. A severability-of-interest clause in the CONDITIONS provisions states that ‘THIS INSURANCE APPLIES SEPARATELY TO EACH INSURED. THIS CONDITION WILL NOT INCREASE OUR LIMIT OF LIABILITY FOR ANY ONE OCCURRENCE.’ [*Minkler v. Safeco Ins.* (2010) 49 Cal.4th 315, 320, 110 Cal.Rptr.3d 612]

Prior to the decision in *Minkler v. Safeco*, supra, insurers would deny coverage to an insured who was sued for *negligent supervision* where such allegation was based on allegations that a co-insured sexually molested another, citing the *intentional acts exclusion*.

*California rule regarding severability-of-interest as set forth in Minkler v. Safeco Ins. (2010) 49 Cal.4th 315, 319, 110 Cal.Rptr.3d 612*

Applying California principles of insurance policy interpretation, the California Supreme Court concluded that an exclusion of coverage for the *intentional acts* of ‘an insured’, read in conjunction with a severability or ‘separate insurance’ clause, creates an *ambiguity* which must be construed in favor of coverage that a lay policyholder would reasonably expect. Given the language of the ‘separate insurance’ clause, a lay insured would reasonably anticipate that, under a policy containing such a clause, each insured’s coverage would be analyzed *separately*, so that the *intentional act* of one insured would not, in and of itself, bar liability coverage of another insured for the latter’s independent act that did not come within the terms of the exclusion. The Supreme Court thus determined that a named insured sued for negligent supervision was not precluded from coverage for any personal role she played in a victim’s molestation performed by an additional insured MERELY because the additional insured’s conduct fell within the exclusion for *intentional acts*. [*Minkler v. Safeco Ins.* (2010) 49 Cal.4th 315, 318-319, 110 Cal.Rptr.3d 612]

### *Sexual molestation exclusions*

The opinion in *Minkler v. Safeco Ins.* construed the ‘intentional acts’ exclusion. The policy in question did not contain a sexual molestation exclusion. [*Minkler v. Safeco Ins.* (2010) 49 Cal.4th 315, 325, 110 Cal.Rptr.3d 612] The Supreme Court noted the distinction, stating: “... Nothing we hold in this case concerns how an exclusion framed in those terms should be construed. By the same token, the policy interpretation advanced by Safeco, i.e. that [additional

insured's] intentional act of molestation bar coverage for *all other insureds' liability* arising from these acts - would apply not only to cases of sexual misconduct, but to all claims against one insured on grounds that his or her mere negligence permitted another insured to commit an intentional tort. As we have indicated, in light of the *severability clause* in [named insured's] policies, *we cannot accept Safeco's view of the scope of its exclusion.*" (emphasis added)

*Criminal or fraudulent acts of 'an' or 'any' insured*

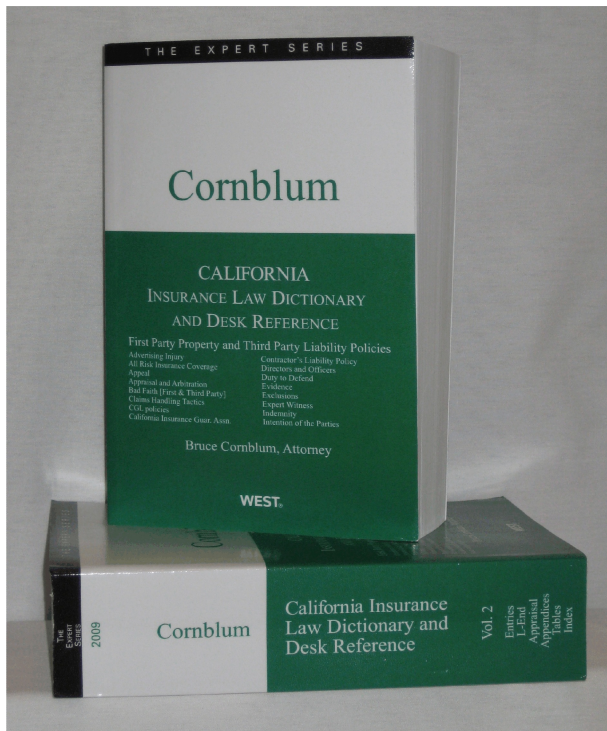
As seen above, *Minkler v. Safeco Ins.* (2010) 49 Cal.4th 315, 110 Cal.Rptr.3d 612 construed the 'intentional acts' exclusion. Would the severability clause also preserve coverage for an innocent or negligent insured where a co-insured performed criminal or fraudulent acts? The Supreme Court observed that decisions in other jurisdictions have disagreed about the effect of a severability clause in a liability policy covering multiple insureds regarding an exclusion for intentional, *criminal or fraudulent acts* of 'an' or 'any' insured. Some concluded that when one of these indefinite articles is used in the exclusion, the presence of a severability clause renders the scope of the exclusion *ambiguous*. Invoking the rule of construction in favor of the insured, these decisions have held that the exclusion is thus several, not *collective*, such that the noncovered act of one insured does not preclude coverage for other insureds who did not themselves act intentionally, criminally, or fraudulently. [*Minkler v. Safeco Ins.* (2010) 49 Cal.4th 315, 330, 110 Cal.Rptr.3d 612] The Supreme Court also referred to what it described as a 'greater number of cases' that have taken the opposite view concluding that a severability clause does not alter the collective application of an exclusion for intentional, criminal or fraudulent acts by 'an' or 'any' insured [49 Cal.4th 315, 331]. THE SUPREME COURT ADOPTED THE

MINORITY POSITION stating: "... We agree with those cases giving effect to a severability or 'separate insurance' clause as against an exclusion of coverage for intentional acts of 'an' insured. This is because the specific policy provision contained in the CONDITIONS that '... this insurance applies separately to each insured' reasonably implies a contrary result, at least in certain circumstances. Such a severability or 'separate insurance' cause may reasonably be read as applying both the policy's coverage *and its exclusions* individually to each person protected by the policy, with the result, in a case *like this one*, that an exclusion of coverage for a specified kind of culpable conduct applies *only* to the individual insured or insureds who committed it" (emphasis added) [49 Cal.4th 315, 332]. Generally see **§ C150 CRIMINAL ACTS EXCLUSION; § F54 FRAUDULENT MISREPRESENTATION.**

*Minkler rule does not apply to all exclusions bearing reference to "an" or "any" insured*

The Supreme Court stressed that the holding in *Minkler* which involved 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 the terms of "an" or "any" insured. [*Minkler v. Safeco Ins. Co.* (2010) 49 Cal.4th 315, 329, fn. 5, 110 Cal.Rptr.3d 612] The Supreme Court gave possible examples. Possible examples include common exclusions of liability coverage for *entire categories of risk* (such as liability arising from "an" or "any" insured's ownership or operation of an airplane, car, or boat), or for claims by one insured against another person insured under the same policy. [*Minkler v. Safeco Ins. Co.* (2010) 49 Cal.4th 315, 329, fn. 5, 110 Cal.Rptr.3d 612]

If there are subjects you'd like discussed in future *California Insurance Law Coverage Newsletter for Attorneys* please contact Chris at 858-485-8770 to submit those subjects or email Mr. Cornblum at [cornblum@pacbell.net](mailto:cornblum@pacbell.net) We would like to make this newsletter relevant to your practice and current cases.



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Bruce Cornblum is an acknowledged expert in the field of insurance law. For 45 years Mr. Cornblum has specialized in proving to California courts that insurance companies do not understand the meaning of their own policies.

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