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Word Cup: "Any" Insured vs. "The" Insured

California Supreme Court Addresses The Biggest Issue With The Smallest Words

What's the difference between insurance coverage and the World Cup?

Insurance coverage is exciting.

Anyone who disputes this comparison has apparently never watched Slovenia play Slovakia and after 90+ minutes the result is 0–0.

[Actually, this isn't fair. I've been following the World Cup and enjoying it. It's just easy to take pot shots at soccer for its reputation for sometimes dullness -- and I couldn't think of anything better for an opening. Sorry.]

But those who insist that insurance – like soccer – does have some moments of tedium would probably press their case by pointing to the match between "any" insured vs. "the" insured when it comes to the question of coverage for a so-called "innocent co-insured." Could there be anything more tedious, they would no doubt say, than the availability of coverage turning on the difference between "any" and "the" -- two of the most seemingly innocuous, and easy to overlook, words in the English language.

I've had this *Wall Street Journal* cartoon on the bulletin board in my office for a long time. It's all yellowed and has lots of tiny thumbtack holes in it from being moved around over the years. It depicts a lawyer sitting behind his desk reading some documents. Sitting across his desk is a client with a shell-shocked look on his face. The caption reads – "Well, here's your problem right here, Mr. Abbott. You didn't read the *finest* print."

The "any" insured vs. "the" insured situation is this cartoon. The issue initially arises when a "conduct" exclusion (such as one that precludes coverage for intentional, criminal or fraudulent acts) applies to preclude coverage for an insured that unquestionably committed the excluded conduct. For example, suppose an exclusion applies to a "criminal act of any insured" and a teenager is convicted of assaulting a neighbor. The

teenager clearly committed a criminal act and coverage is surely not available for the claims against him.

But what about the inevitable negligent supervision claim against his parents for allegedly failing to prevent their son from committing the assault. Based on the policy language, there is also no coverage for the parents [the "innocent co-insureds"] because "any insured" [their son - who is an insured under his parents' homeowner's policy] committed a criminal act. In other words, under the terms of the exclusion for a "criminal act of <u>any insured</u>," it does not matter that the parents themselves did not commit a criminal act. It only matters that "any insured" [their son] committed a criminal act. And since that's the case, the exclusion applies to the claim against the parents.

On the other hand, if the exclusion had applied to a "criminal act of <u>the</u> insured," then coverage would likely be available to the innocent co-insured parents. Here, the exclusion would likely be limited to precluding coverage for "the insured" [the son] who actually committed the criminal act. Because the parents themselves did not commit a criminal act, the exclusion is not likely to apply to them.

It would appear that, when a court concludes that "any" means "any," and does not mean "the," thereby precluding coverage for an innocent co-insured, it is being completely faithful to the policy language. But policyholders will often say Whoa Nelly -- Not so fast. Even if forced to concede that, at least on its face, "any" does mean "any," policyholders are likely to argue that coverage nonetheless remains available for innocent co-insureds, because any other outcome would be inconsistent with the policy's "Separation of Insureds" provision.

Most commercial general liability policies and, to a lesser extent, homeowners policies, contain a Separation of Insureds provision – sometimes referred to interchangeably as a "Severability of Interests" provision. Not surprisingly, innocent co-insureds, facing the prospect of no coverage because of an exclusion that applies to the conduct of "any insured," point to the Separation of Insureds clause in an effort to prevent such outcome. Their argument is that, to determine the availability of coverage for one insured, based on the conduct of another insured, would not be treating each insured as if they were separately insured with a distinct policy, *i.e.*, not complying with the terms of the Separation of Insured's provision.

Almost every state in the country has addressed this issue in some fashion and the majority of courts have held that, when an exclusion applies to the conduct of *any insured* or *an insured* [generally considered the same] there is also no coverage available for "innocent co-insureds" – <u>even</u> under policies that contain a Separation of Insureds provision. [The issue arises – and is identical -- in both the Homeowners Liability and Commercial General Liability contexts.]

On Thursday the Supreme Court of California handed down its eagerly anticipated "any" insured decision in *Minkler v. Safeco Ins. Co.* The Court addressed the issue – on a

Certified Question from the Ninth Circuit – under the following paradigm facts and adopted the minority view.

Scott Minkler sued David Schwartz, his little league coach, alleging that David sexually molested him over a period of several years. Scott asserted multiple causes of action against David, as well as a single cause of action for negligent supervision against Betty, David's mother, based on allegations that David molested Scott in Betty's home, Betty knew about it, but failed to take reasonable steps to stop her son from doing so. *Minkler* at 3.

Betty was insured under Homeowner's policies issued by Safeco that contained liability coverage. David was an insured under the policy by virtue of being a resident in the home. The policies contained an exclusion that provided: "Personal Liability [coverage] ... do[es] not apply to bodily injury or 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...." *Id.* at 4 (emphasis added and alteration in original).

Betty and David tendered Scott's complaint to Safeco, who denied coverage to both based on the intentional acts exclusion. Scott obtained a default judgment against Betty in the amount of $5,020,612.20. Scott then entered into a settlement agreement with Betty in exchange for a covenant not to execute on the judgment and Betty assigned her claims against Safeco to Scott. *Id.*

Scott then filed a declaratory judgment action against Safeco. The District Court granted Safeco's motion to dismiss. An appeal was taken to the Ninth Circuit, which corner kicked it to the California Supreme Court, asking the high court to answer the following question:

> Where a contract of liability insurance covering multiple insureds contains a severability-of-interests clause in the 'Conditions' section of the policy, 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?

Id. at 5.

The Supreme Court of California answered the question as clearly as it had been asked:

> We conclude that, in light of the severability clause, Betty would reasonably have expected Safeco's policies, whose general purpose was to provide coverage for each insured's "legal[ ] liab[ility]" for "injury or ... damage" to others, to cover her separately for her independent acts or omissions causing such injury or damage, 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

> or damage were intentional. Especially when informed by the policies that "[t]his insurance applies separately to each insured," it is unlikely Betty understood that by allowing David to reside in her home, and thus to become an additional insured on her homeowners policies, "[she was] narrowing [her] own coverage for claims arising from his [intentional] torts. In light of the severability provision, Safeco's intent to achieve that result was not clearly expressed, and the ambiguity must be resolved in the [insured's] favor.

Id. at 11 (emphasis and alteration in original).

The California Supreme Court did not hide from the fact that it was adopting the minority view on this issue, noting: "A greater number of cases, we recognize, 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. These decisions have variously reasoned that a severability clause is intended only to extend *policy limits* separately to each insured and, in any event, cannot prevail over a clear expression that coverage for all insureds is barred in a case where 'an' or 'any' insured has committed an excluded act." *Id.* at 20 (emphasis in original).

The moral of the story for insurers is that, when handling a claim that involves a "conduct" exclusion, say, one that excludes coverage for intentional, criminal, or fraudulent acts, the first thing that must be examined is whether the exclusion applies to the conduct of "the" insured or, alternatively, "an" or "any" insured. In the majority of states, an exclusion that applies to "an" or "any" insured will also preclude coverage for the "innocent co-insured" – the person who will invariably be named as a defendant, for failing to prevent the bad conduct (and perhaps also named as a defendant by a plaintiff who is aware that, because of the intentional conduct, coverage may be tough to reach for the claims against the bad actor itself).

As an aside, the next question for these litigants may be whether Safeco's liability for the default judgment against Betty is $5,020,612.20 or $300,000 – the policy's limit of liability [putting aside the issue of how many policies may be triggered].

It is routine for a court, setting out to resolve an insurance coverage dispute, to begin its opinion by laying out the rules that will determine its decision. And it is likely that somewhere in the court's recitation will be a statement that its most important consideration is to be the language of the policy. Clearly this principle means what it says when coverage turns on the difference between the words "any" and "the."

For a more in-depth discussion of the "any" insured versus "the" insured issue, and the impact of a Separation of Insureds provision, attached is an article on the subject that I wrote for Gen Re's December 2009 issue of Policy Wording *Matters*. The folks at Gen Re who publish Policy Wording *Matters* (and their many other fine publications) are

leaders in the study of emerging trends in insurance policy wording. When it comes to policy wording, they can tell you today what will be in tomorrow's newspaper.

A copy of the June 17 decision from the Supreme Court of California in *Minkler v. Safeco Ins. Co.* can be accessed here.

http://www.courtinfo.ca.gov/opinions/documents/S174016.PDF

Please let me know if you have any questions.

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