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Technical Advisory

TA 235 **Date: March 24, 2004**

SUBJECT: Severability (Separation Of Insureds) And The Courts

BACKGROUND: Insurance contracts are inherently complex. This situation is occasionally made even more difficult when different parts of the contract are seemingly at odds with each other.

General principles of contract law and interpretation hold that words and phrases should be given their ordinary meaning, and that absent ambiguities, contracts should stand as written.

One of the primary sources of litigation involves certain exclusions, such as intentional acts, that apply to **"the insured," "an insured"** or **"any insured,"** and how these terms are resolved in light of the severability provision. In addition, some policies exclude prohibited acts regardless of who commits them.

(Certain intentional acts are usually excluded from first party property insurance contracts, and different contracts refer certain exclusions to "the insured," "an insured," and "any insured." However, first party property issues will not be discussed in this article.)

MAIN POINTS: The two key points of consideration when courts are called upon to resolve disputes between these two contract provisions are: (1) the exact language of the exclusion, and (2) the scope of the severability or separation of insureds provision.

POLICY EXCERPTS: SEVERABILITY (SEPARATION OF INSURDS)

Commercial General Liability (CGL) & Businessowners Policy (BOP)

Separation of Insureds. "Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:
a. As if each Named Insured were the only Named Insured; and
b. Separately to each insured against whom claim is made or suit is brought."

Business Auto

"Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or suit is brought."

Homeowners

Severability of Insurance. This insurance applies separately to each "insured." This condition will not increase our limit of liability for any one "occurrence."

Personal Auto

The Personal Auto Policy does not contain a specific reference to "severability" or "separation of insureds." However, the intent is included within the language of specific exclusions. For example, the exclusion for intentional acts says, "*We do not provide Liability Coverage for any insured who intentionally causes bodily injury or property damage.*

Another exclusion says, "*We do not provide Liability Coverage for any insured for property damage to property owned or being transported by that insured."*

The public or livery exclusion reads, "*We do not provide Liability Coverage for any insured for that insured's liability arising out of the ownership, maintenance or operation of a vehicle while it is being used as a public or livery conveyance."*

EXCLUSIONS INVOLVING "THE INSURED"

Overview

Exclusions which apply to "the insured" have a fairly consistent jurisprudence. Nearly all court cases, experts, and insurance texts interpret exclusions relating to "the insured" as pertaining to the insured seeking coverage. In light of the separation of insureds (severability) provision, most courts hold that if more than one "insured" is covered by the policy, and one insured's actions fall within an exclusion relating to "the insured," the other "insureds" retain coverage due to the severability or separation of insureds provision.

(Note: The court cases referenced throughout this article are included for illustrative purposes only, and while they reflect judicial trends, they are not intended to provide a definitive and complete legal analysis.)

Intentional Acts by "the insured."

CGL case: The president and principal stockholder in a construction company pistol-whipped the plaintiff over a dispute involving road construction. The plaintiff sued the president and his corporation.

The commercial liability policy in the name of the corporation contained an exclusion for "*intentional acts, including assault and battery, committed by or at the direction of the insured."* The court applied the severability/separation of insureds provision in holding that the exclusion only applied to the president, and not to the corporation. [*Rivers v. Brown,* 168 So. 2d 400.] (Louisiana)

CGL case: A town deputy was accused of intentionally (and unnecessarily) shooting a suspect in the process of making an arrest. The suspect sued both the deputy and the town who employed him. The town's insurer argued the intentional acts exclusion should apply to deny coverage for both defendants. However, the court ruled that the separation of insureds provision would allow the town to be covered by the insurance, since the town did not commit the intentional act. [*Baltzar v. Williams*, 254 So.2d 470.] (Louisiana)

CGL case: An employee of a construction company got into an argument at a construction site with a non-employee. The construction company employee severely beat the non-employee, who later sued both the employee and his employer. In the suit against the employer, the plaintiff alleged vicarious liability for the acts of the employee (*respondeat superior)*, as well as negligent hiring, training and supervising of the employee.

The construction company's insurer initially declined to cover the claim or defend, on the basis that there was no "occurrence," due to the intentional nature of the injury inflicted by the employee. The insurer argued that the employer's liability was "related to and interdependent on" the intentional acts of the employee, and thus the entire claim was excluded. The insurer also argued that the separation of insureds provision did not apply. The policy excluded injuries "*expected or intended from the standpoint of the insured."*

The court ruled against the insurer, and in favor of the construction company employer, holding that the separation of insureds provision allowed coverage for the employer. [*King v. Dallas Fire Ins. Co.*, 27 S.W. 3d 117] (Texas)

Homeowners case: Minor son of insured committed intentional battery against another person. Both the minor son and his father were sued.

The Homeowners policy excluded "*bodily injury expected or intended by the insured."* The insurer sought to apply the intentional acts exclusion to both the son and the father.

However, the court ruled that the severability provision allowed coverage for the father, who did not commit the intentional act. [*McBride v. Lyles,* 303 So. 2d 795] (Louisiana)

Care, Custody or Control

Personal Auto case: Insured's minor son was driving a non-owned auto. Due to his negligence, the auto was damaged in an accident. The father was sued by the owner of the damaged auto, on the basis of parental liability. The father's insurer denied the property damage liability claim on the basis of the Liability exclusion in the father's Personal Auto Policy which excluded "*damage to property rented to, used by, or in the care of that insured."*

The court held that the claim was covered on the father's behalf, as the exclusion only applied to the son, who was "that insured" who was using the auto. [*Commercial Union Ins. Co. of New York v. Hardcastle,*188 So. 2d 698] (Louisiana).

(Similar ruling in an almost identical case several years later in the same state, but different appellate court jurisdiction, *White v. State Farm Mutual,* 419 So.2d 1279.) (Louisiana)

Employers Liability Exclusion.

CGL case: An employee whose type of employment was exempt from the Workers Compensation Act was injured by fumes while spraying chemicals to eliminate odors in an airplane being repaired. The employee sued the corporation, and the president, alleging negligence in the safety procedures involving the use of chemicals.

The CGL insurer denied the claim on the basis of the Employers Liability Exclusion, which read*, "This insurance does not apply to bodily injury to an employee of the insured arising out of and in the course of employment by the insured."*

The court ruled that the exclusion applied only to the corporation itself, and not to the president, holding that the employee was not an employee of the president. [*Zaiontz v. Trinity Universal Insurance Co,* 87 S.W. 3d 565] (Texas)

CGL case: The insured was in the business of providing crews and equipment to an oil and gas facility. An employee of the servicing company was injured by a compressor explosion. He brought suit against the oil and gas facility that owned the premises where he was working.

The oil and gas facility was added to the servicing company's CGL as an Additional Insured, per their contract. The insurer of the servicing company declined to provide coverage for the oil and gas facility, citing the Employer's Liability Exclusion that read, "*This insurance does not apply to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured."*

The court ruled that in light of the separation of insureds provision, the injured employee was not an employee of the oil and gas facility, and the Employer's Liability Exclusion

was applicable only to the servicing company, who was "the insured" in the context of the exclusion. [*Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W. 2d 451] (Texas)

CGL case: A railroad hired a contractor to load and unload flatcars in the rail yard. By the terms of their contract, the railroad was added as an Additional Insured to the CGL of the contractor.

Two employees of the contractor were injured when their truck was struck by a train in the rail yard. The employees brought suit against the railroad under the CGL of their employer (the contractor). The CGL insurer denied the claim under the Employers Liability Exclusion, which excluded "*bodily injury to an employee arising out of employment by a protected person."* The insurer maintained that since the injured workers were employees of the contractor, all claims arising out of and related to them should be excluded, including a claim against an Additional Insured (the railroad). The CGL insurer also argued that the separation of insureds provision did not override the Employers Liability Exclusion.

The court disagreed with the contractor's CGL insurer, and held that the separation of insureds provision allowed protection for the railroad as an Additional Insured in the contractor's CGL. [*The Atchison, Topeka and Santa Fe Railway Co, v. St. Paul,*767 N.E. 2d 827] (Illinois).

EXCLUSIONS INVOLVING "AN INSURED"

Overview

In contrast to policy language that excludes coverage for "the insured," there are other exclusions which apply to "an insured." In light of the separation of insureds (severability) provision, courts have reached some inconsistent opinions.

Intentional acts by "an insured."

Homeowners case: Insured's minor son stole over $15,000 of jewelry from the plaintiff. The plaintiff and her insurer sued the father. The father's insurer denied the claim, citing the intentional acts exclusion: *We do not cover bodily injury or property damage intentionally caused by an insured person."* The father's insurer maintained that since the minor son was an insured family member under their policy, the exclusion applied to the theft.

The plaintiffs argued that the severability provision in the father's policy should provide coverage for the father, since he did not commit the intentional act. They cited the previous jurisprudence of *McBride v. Lyles*, 303 So.2d 795 [see case above]. However, in upholding the father's insurer's denial of the claim, the court noted that in *McBride v. Lyles,* the exclusion applied to "the insured," whereas in the instant case, the exclusion applied to "an insured." [*Travelers v. Blanchard,* 431 So.2d 913] (Louisiana).

Homeowners case: Parents of a minor child were sued for vandalism committed by their child. Their Homeowners Policy excluded damage "*caused by or at the direction of an insured."* The parents argued that the Severability Provision of their policy afforded them coverage, and that the exclusion thus only applied to the person who actually committed the vandalism.

The state supreme court upheld the parents' argument, and allowed coverage for their parental liability arising from the intentional vandalism by their son. [*Catholic Diocese of Dodge City v. Raymer,* 840 P.2d 456] (Kansas).

Injuries to "an insured."

Homeowners case: A woman and her daughter lived in the home of her parents. Both parents were named insureds on the Homeowners Policy. The parents later separated, and the father moved to a new residence.

The granddaughter had gone to visit her grandfather, and on the walk back to where she lived (his previous residence), they stopped to examine an old railroad trestle. Thinking the trestle was out of use, they walked along it, but soon heard a train approaching. The man tossed his granddaughter off the trestle in order to save her from the oncoming train. However, he was struck by the train and killed. His granddaughter was seriously injured in the fall from the trestle, but survived.

The little girl's mother sued the railroad, and her late father's estate. The Homeowners insurer denied the claim, citing the injury-to-insureds exclusion: *"We do not provide Liability Coverage for bodily injury to you or an insured within the meaning in part a. or part b. of 'insured'."* In addition, the insurer argued that the severability provision had no effect on the exclusion.

The little girl's mother argued that her daughter was not an "insured" as regards the decedent's household, which was not the residence covered by the Homeowners Policy. In essence, by applying the severability provision to her late father, the plaintiff argued that the injury-to-insureds exclusion only applied to the decedent, and residents of his (current) household.

The court ruled the exclusion inapplicable to the little girl's injuries, and were thus covered by the Homeowners Policy on the residence where the little girl lived. [*State Farm Fire & Casualty Ins. Co. v. Keegan,*209 F3d 767] (U.S. Court of Appeals, Fifth Circuit). (Texas).

Employer's Liability Exclusion (employees of "an insured").

CGL case: A general contractor hired a subcontractor to do rough framing on a construction project. When two employees of the subcontractor fell from the structure being built, they sued the general contractor. Since the general contractor had been added as an Additional Insured to the subcontractor's CGL, the general submitted the claim to the sub's CGL insurer.

The CGL insurer denied the claim, on the basis of the Employer's Liability Exclusion: *"We do not pay for bodily injury to an employee of an insured if it occurs in the course of employment. This exclusion applies where the insured is liable either as an employer or in any other capacity; or there is an obligation to fully or partially reimburse a third person for damages arising out of this exclusion."*

The court upheld the insurer's denial of the claim, and agreed that the exclusion for "*an employee of an insured"* was unambiguous, and applied to both the direct employer (the sub), and the Additional Insured (the general).

However, in a strongly worded dissent, one judge took the position that the court failed to properly apply the separation of insureds provision in the subcontractor's CGL. The judge also pointed out that in one section of the exclusion, it refers to "*employees of an insured,"* yet in the next sentence, it provides that the exclusion "*applies where the insured is liable*…" [*Hayner Hoyt Corporation v. Utica First Insurance Company,* 760 N.Y.S. 2d 706] (New York).

EXCLUSIONS INVOLVING "ANY INSURED"

Overview

Some exclusions have been drafted so as to apply to "any insured." When interpreting these exclusions in conjunction with the separation of insureds (severability) provision, some courts have found no ambiguities between the two, and allowed the exclusions to stand as written. Others have held that the separation of insureds (severability) provision nullified the probable intent, and relegated the phrase "any insured" to the same status as "the insured."

Intentional acts of "any insured."

Homeowners case: The insured's minor son allegedly set fire to the plaintiff's home. The parents were sued both for the actions of their son, as well as for parental liability and negligent supervision.

Their Homeowners insurer denied all claims, citing the intentional acts exclusion for: *intentional or criminal acts of or at the direction of any insured person."* The insurer argued that the parental liability and negligent supervision claims were also excluded, since they arose from an excluded act by *"any insured person."*

The court upheld the insurer's position. The court observed, "the language of the exclusionary clause is not restricted to intentional acts of the particular insured sought to be held liable, but it is broad enough to exclude coverage for any loss intentionally caused, or at the direction of, an insured person." [*Neuman v Mauffray,* 771 So.2d 283] (Louisiana).

Homeowners case: A minor child vandalized a school, and the parents were sued as a result. Their insurer denied the claim, citing the intentional acts exclusion: *"We do not cover bodily injury or property damage caused by intentional acts committed by any insured."* The parents argued that the severability provision should deny coverage only for their child, but provide coverage for their resulting parental liability.

The state supreme court upheld the insurer's position, noting that the use of the phrase "any insured" in the exclusion should be given a different interpretation than "an insured." The court stated that "the use of the term '*any insured'* unambiguously expressed a contractual intent to create joint obligations and to prohibit recovery by an innocent coinsured."

A strongly worded dissent by the chief justice suggested that this interpretation effectively nullified the severability provision. [*Chacon v. American Family Mutual Insurance Company,* 788 P.2d 748] (Colorado).

Homeowners case: The insured's son intervened when a large kid was assaulting a smaller kid, eventually striking the assailant on the head with a metal pipe. The insured's son later pleaded guilty to aggravated assault. He and his parents were sued by the kid he had hit with the metal pipe. The suit claimed against the kid for negligent injury, and against the parents for parental liability and negligent supervision.

The parents' insurer denied the claims, based on the intentional acts exclusion: *"We will not cover bodily injury or property damage arising out of violation of any criminal law for which any insured is convicted."*

The parents contended that the severability provision should act to deny coverage only for their son, and not them, since only he was convicted of a violation of criminal law.

The court ruled in favor of the insurer. In its decision, the court commented, "Most courts that have construed the phrase 'any insured' in an exclusion have found that it bars coverage for any claim attributable to the excludable acts of any insured, even if the policy contains a severability clause. We join that majority."

In addition, the court held that the claim against the parents for negligent supervision was also excluded, since it derives from the excluded claim of their son. The court cited one of its previous cases, finding that "a claim for negligent supervision could not exist apart from the excluded negligent act." [*American Family Mutual Insurance Co. v. White,* 65 P.3d 449] (Arizona).

Homeowners case: The adoptive parents of a 4-year-old were having difficulty among their other children. They asked their married daughter to temporarily take and care for the 4-year-old in her home. The married daughter and her husband both abused the child. However, at one point the daughter struck the child in the abdomen, and he later died from injuries.

The adoptive parents sued their son-in-law for his negligence in contributing to, and not preventing, the wrongful death and pain and suffering of the child. The insurer for the daughter and her husband denied the claim, citing the intentional acts exclusion: "*Personal Liability does not apply to bodily injury or property damage which is expected*

or intended by any insured." The son-in-law argued that the severability provision should grant him coverage.

The state supreme court ruled against the insurer. In analyzing the distinction between "an insured" and "any insured," the court cited its earlier ruling in *Catholic Diocese of Dodge City v. Raymer,* 840 P.2d 456, which dealt with a Homeowners Policy exclusion relating to "an insured." In that case, the court ruled that the vandalism by a minor child did not preclude coverage on behalf of the parents, in light of the severability provision. (See above discussion).

In their analysis of the instant case, the court stated that "the words 'an' and 'any' are inherently indefinite and ambiguous." However, a strongly worded dissent by one judge stated that "Our state appears to be completely out of step with all the holdings around the United States with regard to our interpretation of these provision." [*Brumley v. Lee,* 963 P.2d 1224] (Kansas).

Homeowners case: The insureds minor son was accused of sexually abusing another minor. The parents of the abused minor sued the parents of the offender for parental liability, and negligent supervision.

The Homeowners insurer denied the claim on the basis of the intentional acts exclusion: *"Personal Liability and Medical Payments do not apply to bodily injury or property damage which is expected or intended by any insured."*

The insureds argued that the severability provision should allow the claims against the parents to be covered.

The court ruled in favor of the Homeowners insureds. The court squarely addressed the apparent conflict between the exclusion and the severability provision, and concluded that the insurer's interpretation of the policy's two conflicting provisions "would render the severability clause meaningless." The court cited for guidance a Massachusetts Supreme Court case, *Worcester Insurance Co. v. Marnell*, 496 N.E.2d 158 (discussed below). [*Premier Insurance Co. v. Adams,*632 So.2d 1054] (Florida).

CGL case: A security firm was hired by an apartment complex. A security guard of the firm kidnapped, beat and robbed the apartment complex manager. She sued the security firm and the guard. The plaintiff's allegations against the security firm included not only its vicarious liability as employer, but also for negligent hiring and supervising of the employee.

The CGL insurer denied the claim on the basis of an endorsement to the CGL policy which excluded "*any actual or alleged criminal act by any insured, by any employee of any insured, or by any person or entity for whom any insured is legally liable, or arising out of negligent hiring, training or supervising."*

The court upheld the exclusion as clear and unambiguous. [*Michelet v. Scheuring Security Services, Inc.* 680 So.2d 140] (Louisiana).

CGL case: A restaurant patron was returning to her car in the parking lot when she was shot by a masked robber. She sued the restaurant and the security firm hired by the restaurant.

The security firm's CGL insurer denied the claim, based on a broad assault and battery exclusion: *"This insurance does not apply to Bodily Injury or Property Damage arising from: A) assault and battery committed by any insured, any employee of any insured, or any other person, whether or not committed by or at the direction of any insured; B) the failure to suppress or prevent assault and battery; C) the failure to provide an environment safe from assault and battery or failure to warn of the dangers of the environment which could contribute to assault and battery; D) the negligent hiring, supervising or training of any employee of the insured; E) the use of any force to protect persons or property whether or not the bodily injury or property damage was intended from the standpoint of the insured or committed by or at the direction of the insured."*

The plaintiffs argued that the exclusion was so broad that it excluded virtually all activities for which a security firm would purchase insurance. The insurer countered that the insured could have requested coverage for assault and battery at an additional premium.

The state supreme court upheld the exclusion. One judge dissented, and supported the plaintiff's observation about how expansive the exclusion was. He commented, "The assault and battery exclusion, as written in this policy of insurance, excludes from coverage the security guard's actions and failures to act under nearly all circumstances, including his failure to provide an environment safe from assault and battery and the failure to warn of an unsafe environment." [*Hickey v. Centenary Oyster House,* 719 So.2d 421] (Louisiana).

Auto exclusion – owned/operated by "any insured."

CGL case: A CGL policy was issued with two named insureds, a trucking company and the company from whom they leased a tractor/trailer rig. The leasing company was responsible for maintenance and upkeep on both the tractor and trailer.

The rig was being operated by an employee of the trucking company when it rear ended an auto, severely injuring the driver. The accident report revealed that there was faulty maintenance on the braking systems of both the truck and trailer. The plaintiff sued the trucking company and its driver, as well as the leasing company and its maintenance supervisor.

The CGL insurer denied the claim, citing the auto exclusion that excluded *"bodily injury or property damage arising out of an auto…owned or operated by or rented or loaned to*

any insured." The plaintiff challenged the insurer's position by arguing that the separation of insureds provision did not exclude the negligence of all insureds.

The court upheld the insurer's denial of the claim. The court also commented that "to hold that the term 'any insured' in an exclusion clause means 'the insured making the claim' would collapse the distinction between the terms 'the insured' and 'any insured' in an insurance policy exclusion clause, making the distinction meaningless. It would also alter the plain language of the clause, frustrating the reasonable expectations of the parties when contracting for insurance."

Regarding the impact of the separation of insureds provision, the court observed that "constructing the term 'any' the same way as the word 'the' in an exclusion clause when an insurance policy contains a separation of insureds or severability of interests clause would require a tortured reading of the terms of the policy." [*Bituminous Casualty Corp. v. Maxey,* 110 S.W. 3d 203] (Texas).

CGL case: An employee of the named insured was operating his own personal automobile when he injured another driver in an at-fault collision. The injured party sued both the employee as driver, and his employer.

The CGL insurer denied the claim for both the employee and employer, based on the auto exclusion for: *"bodily injury or property damage arising out of an auto…owned or operated by or rented or loaned to any insured."* In the CGL policy, employees are included within the definition of "insured."

The employer argued that the separation of insureds provision should operate to deny coverage only to the employee, but not to the employer.

The court upheld the insurer's denial of the claim. The court distinguished between the phrases "the insured" and "any insured," calling the difference "paramount." It held that the clear intent of the exclusion was not superceded by the separation of insureds provision. [*Michael Carbone, Inc. v. General Accident Insurance Co.,*937 F Supp 413] (Pennsylvania).

BOP case: A high school student was delivering pizzas in his own car when he hit a pedestrian in a crosswalk. His employer was a pizza franchisee, who was insured on a Businessowners Policy naming as named insureds the pizza franchisee, the franchisor, as well as several of its other related franchisees. Under the BOP, employees were included within the definition of "insured."

The plaintiff sued the driver of the auto, his immediate employer, the franchisor, and all other franchisees who were named insureds on the BOP.

The BOP insurer denied the claim, citing the auto exclusion for: *"bodily injury or property damage arising out of an auto…owned or operated by or rented or loaned to*

any insured." The employer and other named insureds sought protection under the policy through application of the severability of insureds provision.

The court held that the auto exclusion only applied to the driver, and his immediate employer. The court interpreted the separation of insureds provision as granting coverage for the other named insureds. Commenting on the apparent conflict between the auto exclusion and the separation of insureds provision, the court observed, "we concur with the conclusion reached in those cases holding that the term 'any insured' in an exclusion clause in a policy that also contains a severability clause does not exclude coverage for all insureds when only one insured is at fault." [*West American Insurance Co. v. AV&S, AM&S, LSK, AS&S, and Ambassador Pizza, Inc.,* 145 F.3d 1224] (U.S. Court of Appeals, 10th Circuit) (Utah).

CGL case: Following a collision between a school bus and a train, the school system and bus driver were sued by the families of injured children. The plaintiffs alleged not only negligent operation of the school bus, but also claimed that the school system was negligent in hiring a reckless driver, as well as failing to properly train and supervise its drivers.

The CGL insurer denied the entire claim on the basis of the auto exclusion for: *"bodily injury or property damage arising out of an auto…owned or operated by or rented or loaned to any insured."*

The school system argued that the alleged tort of negligent hiring, training and supervising was separate and distinct from the negligent operation of the bus by its employee, referred to as a "second independent cause."

The court held that the auto exclusion was inapplicable to the plaintiffs' claims against the school system for negligent hiring, training, and supervising its employees involving the use of school buses. The ruling maintained that these torts were independent of the torts related to the use of the bus. [*Northbrook Property and Casualty Insurance Co. v. Transportation Joint Agreement,* 722 NE 2d 280] (Illinois).

(Editor's note: Insurance commentators have cited this and similar cases as the reason for a revision in the 2001 ISO CGL related to the auto exclusion. The additional language states that *"this exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured…"*).

Homeowners case: The insureds resident son held a party in the home, while the parents were also at home. After consuming alcohol during the party, their son left the home to in his own auto to take some guests home. While driving his auto, he struck and killed a person.

The survivors of the deceased sued the son for negligent operation of his auto, and his parents for negligent supervision of their son.

The Homeowners insurer of the parents denied the claim, citing the motor vehicle exclusion: *"Liability coverage does not apply to bodily injury or property damage arising out of the ownership, maintenance, use, loading or unloading of a motor vehicle owned or operated by or rented or loaned to any insured."*

The parents argued that the severability provision in their policy should operate to deny coverage only to their son, while covering them for allegations of negligent supervision. They further maintained that the claim against them for negligent supervision was a separate and distinct action unrelated to the use of an automobile.

The state supreme court upheld the parents' position. The court commented that the interpretation offered by the insurer, in an attempt to resolve the conflict between the exclusion for "any insured" and the severability provision, "would render the entire severability clause meaningless." The court also agreed with the parents' argument concerning the independence of the negligent supervision claim from the auto exclusion, stating "negligent supervision, unlike negligent entrustment, is a theory of recovery that is separate and distinct from the use or operation of an automobile." [*Worcester Mutual Insurance Co. v. Marnell,* 496 N.E.2d 158] (Massachusetts Supreme Court).

EXCLUSIONS FOR PROHIBITED ACTS REGARDLESS OF WHO COMMITS THEM

Overview

An alternative used in some insurance policies to broadly exclude certain acts is to exclude the act without specifying who commits the act. That is, there is no reference in the exclusion to "the insured" or "an insured" or "any insured."

Claims Service E&O case: The insured operated an insurance claims adjusting service. It was discovered that a long-term employee had embezzled around $150,000 from the trust account. The fidelity insurer paid $10,000. The claims company sought the balance from its Adjuster's Professional Liability Insurance Policy.

The insurer denied the claim, citing the dishonesty exclusion: "*This policy does not apply to any dishonest, fraudulent, illegal, criminal, or malicious act, other than malicious prosecution."*

The insured argued that the corporation should be protected against subsequent claims of its clients brought against it due to the employee's embezzlement. It asked the court to consider the issue of negligence independent of the excluded acts of the employee.

The court ruled in favor of the insurer in denying all claims arising from the embezzlement. Regarding the issue of separating the acts of the employee from

separate negligence of the corporation, the court commented: "Irrespective of the legal theory through which the corporation's clients proceed against it – whether vicarious tort liability, independent tort liability, or even contractual liability – the employee's perfidy remains an essential, if not the, legal proximate cause of the clients' damage. Alternatively stated, regardless of why the corporation is held liable, any claims it files with its insurer will in the end stem from the employee's "dishonest," "criminal" act – expressly excluded under the policy." [*Littleton v. Employers Reinsurance Corp.,* 933 F.2d 337] (U.S. Court of Appeals, 5th Circuit) (Louisiana).

Homeowners case: The insured's minor son got into an altercation with another kid, and ended up shooting him. The parents of the shooting victim sued the parents for parental liability arising out of their son's acts, and for negligent supervision of their son.

The Homeowners insurer of the shooter's parents denied all claims, citing the intentional acts exclusion: "*We do not cover bodily injury or property damage resulting from an act or omission intended or expected to cause bodily injury or property damage. This exclusion applies even if the bodily injury or property damage is of a different kid or degree, or is sustained by a different person or property, than that intended or expected."*

The parents contended that their parental liability should be covered by the policy, as well as the separate allegation for negligent supervision.

The insurer argued that all claims arising out of the intentional shooting should be excluded.

The parents and insurer each put forth various court cases on intentional acts exclusions, citing cases supporting their own position and interpretation of the exclusion of the instant case.

The court agreed with the insurer. Noting the broad language in the exclusion, and in light of the jurisprudence argued in the case before it, the court commented, "The express policy language in the intentional act exclusion of the policy at issue in this case is broad enough to exclude coverage for *any* bodily injury or property damage arising out of an intentional act. Because the shooting of the plaintiff's son was an intentional act, coverage is expressly excluded for any and all damages arising out of the intentional act by the policy at issue."

In an insightful dissent, one judge noted that the exclusion "does not specify *whose* intention or expectation is involved and does not state for *whom* coverage is excluded. One interpretation of this exclusion, apparently adopted by the majority, is that if bodily injury is intended or expected by *anyone* then coverage is excluded as to *everyone*. However, because the exclusion is silent as to whose intent or expectation is involved and as for whom coverage is excluded, another reasonable interpretation is that coverage is excluded only for the individual who is expected or intended to cause bodily harm. Under this interpretation, coverage is excluded for the shooter but coverage is

not excluded for his parents." [*Hewitt v. Allstate Insurance Co.,*726 So.2d 1120] (Louisiana).

NECESSARY ACTION: Circulate this Technical Advisory to all appropriate agency staff.