
Recent cases of interest to members of the plaintiff's bar

# Appellate Reports and Cases in brief

## *Severability clauses in insurance policies will render ambiguous certain policy exclusions*

Jeffrey Isaac Ehrlich

### *Minkler v. Safeco Ins. Co. of America*

__ Cal.4th __ [2010 WL 2402973] (Cal. Supreme 2010)

**Who needs to know about this case:** Lawyers who litigate insurance cases

**Why it's important:** Holds that a "severability of insurance" clause found in most liability policies will render ambiguous policy exclusions that withdraw coverage for the acts of "an" insured.

**Synopsis**: Scott Minkler was molested as a boy by his Little League coach, David Schwartz. He alleged that some of the abuse occurred at the home of David's mother, Betty Schwartz. David lived with Betty, and was an insured under her homeowners' policy, which was issued by Safeco. The policy contained an exclusion withdrawing coverage for the intentional acts of "an insured." It also contained a provision in the "conditions" section of the policy, titled, "Severability of Insurance," that stated, "[t]his insurance applies separately to each insured."

Minkler sued Betty and David. Safeco refused to defend or indemnify either insured based on the intentional-acts exclusion in its policy, which it interpreted to withdraw coverage for all insureds if the claim arose from the intentional acts of anyone insured under the policy. This is the established effect of an exclusion barring coverage for the intentional acts of "an" or of "any" insured. (See, e. g., *Fire Ins. Exchange v. Altieri* (1991) 235 Cal.App.3d 1352 1360-1361 [1 Cal.Rptr.2d 360].) But Minkler argued that the policy's severability clause made the exclusion ambiguous, because the clause suggested that each insured under the policy would be treated as if they were the only insured under the policy.

The district court dismissed the case for failure to state a claim. On appeal, the Ninth Circuit requested that the California Supreme Court resolve the issue of the impact of the severability clause. The Court agreed to do so. It held that the clause did render Safeco's policy ambiguous with respect to the negligent-supervision claims made by Minkler against Betty.

The Court held that the severability clause, in making reference to "this insurance" applying separately to each insured, communicated to the insured "that *each* person the policies covered would be treated, for *all policy purposes,* as if he or she were the *sole* person covered – i.e., that in effect, each insured had an *individual* policy whose terms applied only to him or her." (Emphasis in text.) The Court also rejected Safeco's arguments that the fact that the severability clause appeared in the "conditions" section of the policy meant that it did not affect clear exclusions, and that the history of the clause somehow suggested that its purpose was not to affect exclusions.

Accordingly, the Court held, "For these reasons, we are convinced that the severability clause in Betty's Safeco policies, when read in conjunction with the exclusion for the intentional acts of "an insured," created an ambiguity as to whether a coverage exclusion for an intentional act or injury by one insured extended to all other insureds under the policies. Accordingly, we must construe that ambiguity, if possible, to conform to the objectively reasonable coverage expectations of the insured."

### *Clarendon America Ins. Co. v. North American Capacity Ins. Co.*

__ Cal.App.4th __ [2010 WL 2377835] (4th Dist. Div. 2.)

**Who needs to know about this case:** Lawyers litigating duty-to-defend cases

**Why it's important:** Holds that an ambiguity in the policy's self-insured retention provision, making it unclear how the SIR must be satisfied to trigger coverage, creates potential coverage and hence a duty to defend.

**Synopsis:** Tanamera built the "Eagle Ranch" residential development in Victorville. Clarendon and North American ("NAC") insured Tanamera under separate CGL policies. When Tanamera was sued by owners of homes at Eagle Ranch, Clarendon defended, but NAC argued that coverage under its policy was not triggered until Tanamera satisfied the $25,000 SIR with respect to each "claim." NAC argued that the SIR endorsement


clearly provides that the SIR "applies to each and every claim made against any insured, to which this insurance applies, regardless of how many claims arise from a single 'occurrence' or are combined in a single 'suit.'" NAC argued that the SIR therefore had to be satisfied for each of the eight homes that were built by Tanamera within its policy period.

The trial court agreed and granted summary judgment. The Court of Appeal reversed. It held that the term "claim" as used in the SIR endorsement (which was not defined) was not clear. In some places the policy clearly differentiated between "suits" and "claims." But in others it did not, and it was not unreasonable to read the endorsement as acknowledging that "claim" was not synonymous with "suit." Ultimately, the court held that it could not construe the provision solely to mean that a "claim" dealt only with a single home built by the insured.

Since the meaning of the provision could not be gleaned solely from examining the ordinary meaning of the terms used in the context of the policy, the court next examined whether the insured could have a reasonable expectation of coverage. NAC offered no evidence on this issue. But its construction would require the court to conclude that if each of the 450 homes built by Tanamera at Eagle Ranch had been subject to the suit, then Tanamera would have had to pay $11.25 million in SIRs for $2 million in liability coverage. The court concluded that since Tanamera paid a premium of over $400,000 for the policy, it could reasonably expect that it would not have to satisfy the SIR for each home in the development to trigger its insurer's defense obligation. NAC therefore failed to carry its summary-judgment burden.

### *Bowman v. Wyatt*

__ Cal.App.4th __ [2010 WL 2613079]

**Who needs to know about this case:** Lawyers litigating cases involving the issue of whether a person is an employee or an independent contractor

**Why it's important**: Holds that CACI Instruction 3704, which instructs the jury on how to distinguish between employees and independent contractors, fails to correctly state the law, and giving the instruction is prejudicial error.

**Synopsis**: Bowman was badly injured when he collided with a dump truck while riding a motorcycle. The dump truck had rolled through a stop sign and collided with Bowman as he made a left turn. The truck's driver, Wyatt, was under contract with the City of Los Angeles Bureau of Street Services, to deliver asphalt to City worksites. Wyatt had just delivered a load of asphalt for the City and was returning to a City yard to determine if there was another load for him to haul.

The case went to trial before a jury. Bowman presented evidence that the dump truck's brakes failed, that Wyatt's motor-carrier permit had been suspended, and required safety inspections had not been performed as required by law. Wyatt and the City presented evidence that the brakes did not fail; that Wyatt's motor-carrier permit had not been suspended, that required inspections were performed, and that the City was not responsible for maintaining the dump truck.

The jury found that Wyatt was negligent, that he was the City's employee, and that the City was vicariously liable for his negligence. The jury assessed 75 percent of fault against the City. The City appealed.

CACI 3704, as given at trial, states: "In deciding whether [Wyatt] was the City of Los Angeles's employee, you must first decide whether the City of Los Angeles had the right to control how [Wyatt] performed the work, rather than just the right to specify the result.

"It does not matter whether City of Los Angeles exercised the right to control. *If you decide that the right to control existed, then [Wyatt] was the City of Los Angeles's employee*.

"If you decide that the City of Los Angeles did not have the right of control, then you must consider all the circumstances in deciding whether Wyatt was the City of Los Angeles's employee.

"The following factors, if true, may show that Wyatt was the employee of the City of Los Angeles: [listing factors]."

The City argued that the instruction misstated the law, because while the existence of control is an important factor in determining whether someone is an employee or an independent contractor, it is not the only factor. Instead, where the right to control is not absolute, the fact finder must be allowed to weigh the extent of the control that could be exercised against additional factors to determine if the worker is more like an employee or more like an independent contractor. The Court of Appeal agreed, finding that control was an important factor, but not the only factor in the analysis.

It held that, "CACI No. 3704, given in the present case, did not correctly instruct the jury that it must weigh all of these factors to determine whether Wyatt was an employee or an independent contractor. Instead, it told the jury that if it decided that the City had the right to control how Wyatt performed his work, then it *must* conclude that Wyatt was a City employee. In other words, it told the jury that the right of control, *by itself,* gave rise to an employer-employee relationship. Since this misstated the law, it was error to give the instruction, and the error was prejudicial, requiring a new trial.

### In brief

*Brief summaries of cases that may be of interest, but which cannot be fully discussed because of space constraints.*

• **Attorney's fees; Equal Access to Justice Act.** *Astrue v. Ratliff* (2010) __ U.S. __ [2010 WL 2346547]. Ratliff was Ree's attorney in a successful suit against the U.S. Social Security Administration for Social Security Benefits. The district court granted her unopposed motion for attorney's fees under the Equal Access to Justice Act ("Act"). Before paying the award the government discovered that Ree owed


the U.S. a debt that predated the award. Accordingly, it sought administrative offset of the award. Ratliff intervened to challenge the offset, arguing that under the Act, a fee award belongs to the applicant's attorney, not the applicant, and therefore offset based on Ree's debt was improper. The Supreme Court held that under the Act, the fees are awarded to, and belong to, the client, not the lawyer. Accordingly, the offset was proper.

• **Land-use law; limits on City's powers under Community Redevelopment Law.** *County of Los Angeles v. Glendora Redevelopment Project* (2010) 185 Cal.App.4th 817 (6th Dist.) City of Glendora adopted a redevelopment plan by ordinance, under the Community Redevelopment Law ("CRL"). The court affirmed the trial court's invalidation of the development plan. It held that the CLR requires a finding that the area to be redeveloped is blighted, and that the agency's findings of blight were not supported by substantial evidence in the administrative record. The Court held that it did not have to defer to the City's findings, and that the statutory criteria under the CLR had not been met. The City failed to show serious building-code violations causing unsafe or unhealthy buildings, failed to show deterioration or dilapidation, failed to show defective design or construction, failed to show incompatible uses hindering economic development, and failed to meet other statutory requirements.

• **Insurance; primary, excess, and umbrella.** *Legacy Vulcan Corp. v. Superior Court* (2010) 185 Cal.App.4th 677. City sues Legacy Vulcan ("Vulcan"), a dry cleaner, for use of toxic chemical resulting in environmental contamination. Transport Insurance covered Vulcan, and denied coverage. The trial court held that Transport's policy provided both excess and umbrella coverage, but that its duty to defend was only as an excess carrier, and therefore had not been triggered. The Court of Appeal granted a writ. It explained that primary insurance provides coverage immediately for an event giving rise to liability; excess coverage provides coverage only after exhaustion of the underlying primary coverage; and umbrella coverage provides coverage for claims not covered by the primary coverage, and when it applies, acts as primary coverage. The court held that Transport's policy provided umbrella coverage for the City's claims against Vulcan, and that Transport's duty to defend did not depend on the exhaustion of any "underlying insurance," which was ambiguous in the context of the policy.

• **Anti-Slapp motion; litigation privilege; protected conduct.** *G.R. v. Intelligator* (2010) 185 Cal.App.4th 606. Intelligator represented wife in divorce action. In post-dissolution proceedings, she filed a motion against husband, and attached an unredacted version of his credit report in violation of court rules. Husband sued Intelligator, she filed an anti-Slapp motion, which was granted. Affirmed. Intelligator's conduct in filing the credit report in connection with post-dissolution activity was protected activity within the meaning of section Code of Civil Procedure section 425.16. "All communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute." While attaching an unredacted version of the credit report violated Rule 1.20 of the California Rules of Court, this was not the sort of illegal conduct that fell outside the coverage of the Anti-Slapp law. Husband could have sought sanctions against Intelligator for violating the rule, without filing a separate lawsuit. Intelligator's conduct fell within the litigation privilege, Civil Code section 47(b), notwithstanding the violation of Rule 1.20. Accordingly, Husband could not establish a reasonable probability of prevailing on the merits, and the motion was properly granted.

• **Uninsured-Motorist Claims; limitations; minors.** *Blankenship v. Allstate Ins. Co.* (2010) __ Cal.App.4th __ [2010 WL 258420 (Third Dist.) Thirteen-year old Dakota Blankenship was injured in September 2004 while riding his bike when he collided with a car. The driver was uninsured. Blankenship's stepfather made a claim with Allstate, his auto insurer under his policy's uninsured-motorist (UM) coverage. In May 2005 Allstate made a settlement offer, and advised the family that a claim against the UM policy was subject to a two-year limitations period, that would expire on September 10, 2006. No one responded until Blankenship hired counsel who demanded UM arbitration in October 2007. The trial court denied his petition to compel UM arbitration because the claim was time-barred. Affirmed. The clear language of Insurance Code section 11580.2, subd. (i) makes clear that the Legislature did not intend that minority would excuse the two-year limitation period for UM claims.


Ehrlich

*Jeffrey Isaac Ehrlich is the principal of the* Ehrlich Law Firm *in Claremont. His practice emphasizes insurance bad-faith and appellate litigation. He is certified by the State Bar of California as an appellate specialist, and is the editor-in-chief of* Advocate *magazine in Southern California.*