

## **PROTECTING “WHITE HATS” FROM THE SINS OF “DARK HATS”**

### **The Effect of Severability Clauses on Policy Rescission and Coverage Exclusion**

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As a director, officer, or other co-insured on a policy obtained by your company or another person, you may find yourself without insurance coverage for reasons wholly unrelated to your own conduct. A misrepresentation by one corporate officer (or law firm partner), for example, could be the basis to rescind a policy or exclude coverage of an innocent director (or partner) *unless* the policy includes a provision for full severability as to all insureds. A full severability clause requires that each insured be treated as a separate insured. If drafted with these interests in mind, such a clause can typically protect the interests of innocent insureds (“White Hats”) from the excluded or fraudulent conduct of co-insureds (“Dark Hats”).<sup>2</sup>

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<sup>2</sup> See *Cutter & Buck, Inc. v. Genesis Ins. Co.* (“Cutter”), 306 F. Supp. 2d at 988, 1013 (W.D. Wash. 2004) *aff’d*, 144 F. App’x 600, 2005 WL 1799397 (9th Cir. Aug. 1, 2005). The trial court quoted deposition testimony of an insurance broker that “severability was a term used in the industry to separate coverage for ‘white hats and dark hats. White hats being people who may not have been involved in certain activities, and then dark hats being people who were being alleged of being involved with some wrongdoing and possibly . . . not getting coverage.” 306 F. Supp. 2d at 1013.

This paper analyzes the issues arising from severability clauses (or their absence) from the standpoint of parties seeking the protection of insurance coverage, especially in situations where they were not responsible for procuring the policy. Part I addresses the impact of severability provisions on an insurer's attempt to rescind or void a policy. Part II discusses severability issues arising in connection with policy exclusions. Finally, in Part III, we offer some practical considerations for attorneys representing insureds in such circumstances, or other persons considering whether to accept a position in which they would expect to be protected by an existing policy. An appendix of cases is attached, which includes summaries of pertinent cases addressing rescission and exclusion issues and is organized within each of the two sections alphabetically by jurisdiction.

## I. RESCISSION

As a general matter, insurance policies may be held void *ab initio* if they are premised on concealed information or false representations by the insured. *See, e.g., Wedtech Corp. v. Fed. Ins. Co.* (“*Wedtech*”), 740 F. Supp. 214, 218 (S.D.N.Y. 1990); *TIG Ins. Co. of Mich. v. Homestore, Inc.* (“*Homestore*”), 40 Cal. Rptr. 3d 528, 532 (Cal. Ct. App. 2006). A co-insured may sustain coverage, however, if the policy includes a severability clause. *Wedtech*, 740 F. Supp. at 218. A severability clause, if drafted correctly, may save the so called “innocent insured” (aka “White Hat”) from losing his or her coverage because of the actions of another insured (aka “Dark Hat”). These circumstances most commonly arise in the context of a directors and officers (“D&O”) liability policy, although they can also appear in connection with other liability policies covering multiple insureds.

### A. Drafting the Clause

A severability clause has two primary components that might affect rescission: (1) each insured must be viewed as a separate insured, and (2) any statement or knowledge of one insured

shall not be imputed to another insured (“non-imputation clause”). Severability provisions that provide insureds the most protection include both parts, providing full severability. A severability provision that includes only the first part, however, may provide sufficient protection in certain circumstances and some courts.

As an example of a very explicit severability provision providing broad protection to insureds, the court in *Atlantic Permanent Federal Savings & Loan Association* found coverage for subrogees of so called “innocent insureds” based on the following clause: “[T]his policy shall not be voided or **rescinded** and coverage shall not be **excluded** as a result of any untrue statement in the [application] form, except as to those persons making such statement or having knowledge of its untruth.” *Atlantic Permanent Fed. Sav. & Loan Ass’n v. Am. Cas. Co. of Reading, Pa.* (“*Atlantic*”), 839 F.2d 212, 215 (4th Cir. 1988). On the other end of the spectrum, the severability provision in *Shapiro v. American Home Assurance Company* did not include a non-imputation clause, but the court nonetheless decided that the severability provision must be viewed in light of the policy as a whole, and the “manifest intent” of the policy was to afford coverage to the innocent insureds, *despite* an imprecise severability clause. 616 F. Supp. 900, 904 (D. Mass. 1985). Without a severability clause, however, it is unlikely that a court will infer from other clauses in the policy that severability was intended by the parties. *See Nat’l Union Fire Ins. Co. of Pittsburgh v. Sahlen*, 807 F. Supp. 743, 746 (S.D. Fla. 1992) (recognizing that a severability clause may prevent rescission as to all insureds, but refusing to infer severability from references to “the insureds” or “each director” in the policy), *aff’d*, 999 F.2d 1532 (11th Cir. 1993).

A severability clause may also carve out certain exceptions to severability. For example, the policy in the *Cutter* case provided:

[N]o knowledge possessed by any DIRECTOR or OFFICER shall be imputed to any other DIRECTOR or OFFICER *except* for material information known to the person or persons who signed the application. In the event that any of the particulars or statements in the Application is untrue, this Policy will be voided with respect to any DIRECTOR or OFFICER who knew of such untruth.

*Cutter & Buck, Inc. v. Genesis Ins. Co.* (“Cutter”), 306 F. Supp. 2d 988, 1011 (W.D. Wash. 2004), *aff’d*, 144 F. App’x 600, 2005 WL 1799397 (9th Cir. Aug. 1, 2005). The court found this provision was not ambiguous and voided coverage as to all insureds because of misrepresentations knowingly made by the signatory to the policy. 306 F. Supp. 2d at 1012. This court bolstered this conclusion by noting that a severability provision was included at the request of the insured, although it did not request specific language for the clause, and “may have subjectively intended the provision to be different than how it currently reads.” *Id.* at 1013-14; *see also Fed. Ins. Co. v. Homestore, Inc.*, 144 F. App’x 641, 648, 2005 WL 1926483, at \*4 (9th Cir. Aug. 12, 2005) (“[T]he clear and explicit language of . . . [the] D&O policy is unambiguous, and allows for the rescission of the policies ‘as to all Insureds’ based upon the misrepresentations of [the CFO] . . . in the policy application.”); *ClearOne Comm’ns, Inc. v. Lumbermens Mut. Cas. Co.*, No. 2:04-CV-00119, 2005 WL 1843450, at \*1 (D. Utah Aug. 1, 2005) (finding that “plain language” of severability clause imputed knowledge of signatory to all individual insureds).

Courts have also emphasized the placement of the severability clause in the policy. In particular, a severability clause included in the representation and warranties section of a policy favors the interpretation that each insured is held accountable for the veracity only of the representations of which he or she is aware. *See Wedtech*, 740 F. Supp. at 219. On the other hand, clauses implying that insureds should be viewed separately, which are interspersed throughout the policy but not in the section regarding representations, do not favor an interpretation protecting innocent insureds from the representations of another insured. *See*

*Homestore*, 40 Cal. Rptr. 3d 535, n. 9. Additionally, a severability clause that is listed in the section regarding exclusions may affect only the application of the exclusions and have no effect on whether misrepresentations by one insured can lead to rescission of the entire policy as to all insureds. *See Mazur v. Gaudet*, 826 F. Supp. 188, 194-195 (E.D. La. 1992).

In contrast to primary policies, excess policies need not explicitly state they are severable in order for each insured to be viewed separately. Excess policies generally follow form to the primary policy. Therefore, if an excess policy is silent on the issue of severability, then the court should arguably presume that the excess policy follows form with regard to any severability clause in the primary policy. *See, e.g., In re HealthSouth Corp. Ins. Litig. (“HealthSouth”)*, 308 F. Supp. 2d 1253, 1282 (N.D. Ala. 2004). If, however, the excess policy includes specific, alternative language regarding severability, then said language should control.

#### **B. Misrepresentations Leading to Rescission**

In some states a misrepresentation, even if made innocently, may void a policy, as compared to other states that require an intent to deceive to rescind a policy. *Compare Homestore*, 40 Cal. Rptr. 3d at 532 (citing California statute that states “Concealment, whether intentional or unintentional, entitles the injured party to rescind.”) and *HealthSouth*, 308 F. Supp. 2d at 1270 (noting that Alabama law permits rescission based on misrepresentations that are fraudulent *or* material to the acceptance of the risk assumed *or* the insurer in good faith would not have issued policy or insured the risk or would have issued policy at a different rate or for a different amount), *with Cutter*, 306 F. Supp. 2d at 997 (noting that Washington statute bars rescission “unless the misrepresentation or warranty is made with the intent to deceive”). If an

intent to deceive is required by statute or by the policy,<sup>3</sup> then a severability clause may not be as important to the innocent director who lacked such intent. If a statute or policy allows for rescission based on any material misrepresentation, made intentionally or not, then the director or officer should insist on a severability clause to distinguish him or herself from any co-insureds who made such misrepresentations. A non-imputation clause in a severability provision may negate rescission based on innocent misrepresentations, even if state law or the policy seems to otherwise allow rescission on that basis. *HealthSouth*, 308 F. Supp. 2d at 1280-81.

### **1. Materiality**

Typically a representation that forms the basis of rescission must be material to the insurer's issuance of the policy. Materiality can be shown by establishing that an insurer would have charged a higher premium or offered a lower limit of liability if it had been apprised of the facts. *Nat'l Union Fire Ins. Co. v. Sahlen*, 999 F.2d 1532 (11th Cir. 1993); *see also Cutter*, 306 F. Supp. 2d at 1003. The materiality of the representation may depend on its source, as indicated by language in the policy incorporating certain documents, such as the application and any attachments thereto. *Cutter*, 306 F. Supp. 2d at 998-1001. For example, financials of a corporate insured are often considered material if relied upon by the insurer, particularly if they are attached or requested by the insurer. *Cutter*, 306 F. Supp. 2d at 1003; *Sahlen*, 999 F.2d at 1536; *Homestore*, 40 Cal. Rptr. 3d at 538. Indeed, if an insurer asks for certain information it may be presumed to be material. *Cutter*, 306 F. Supp. 2d at 1003.

Even representations made in the negotiation or renewal of a policy may be considered material in determining an insurer's right to rescind. *HealthSouth*, 308 F. Supp. 2d at 1273.

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<sup>3</sup> Even if a statute permits rescission without an intent to deceive, a policy that requires intentional deception for rescission should control over a more liberal statute. *HealthSouth*, 308 F. Supp. 2d at 1270 (citing *State Farm Fire & Cas. Co. v. Oliver*, 854 F.2d 416, 419-420 (11th Cir. 1988)).

Representations made in an initial application or earlier financials, however, may not be a sufficient basis to rescind a renewed policy, as materiality tends to decrease over time. *HealthSouth*, 308 F. Supp. 2d at 1272. Following this analysis, insureds have argued with limited success that representations made in an application should affect only the initial policy issued and not any future renewals. *See, e.g., HealthSouth*, 308 F. Supp. 2d at 1271-73.

A severability clause may further limit the type of information on which an insurer may rely to rescind a policy. Some courts have found that an insurer may not rely on statements outside the insurance application that are not otherwise incorporated into the policy to negate the protection of a severability clause. *See, e.g., HealthSouth*, 308 F. Supp. 2d at 1281. Given the ever-growing breadth of representations that may be considered by an insurer and incorporated into a policy, it is becoming increasingly important for insureds to insist on a severability provision that includes a non-imputation clause.

## **2. Knowledge and Belief**

The import of a representation made by one insured may also turn on the manner in which the insured attested to its truth. If an insured attests to the truth of representations under the penalty of perjury, then absent a severability clause, the other insureds may be held to this attestation. If on the other hand, the insured attested to the representation only to the best of his or her knowledge and belief, then it may be more difficult for an insurer to rescind the policy, particularly as to an unknowledgeable co-insured. *HealthSouth*, 308 F. Supp. 2d at 1286. If there is a severability clause in such a policy, then arguably a subjective standard of knowledge should be applied to each insured. *Id.* at 1287.

## **3. Rescission in Whole or in Part**

Many insurers have argued that a misrepresentation made in the application for a policy should be a basis on which to hold the policy void or rescind the policy as to all insureds

retroactively. This is, at its core, a fraud in the inducement argument. While proving rescission is typically a tough burden for the insurer, if met, it is a “devastating consequence for the insured.” SHULMAN, ET AL, HOT ISSUES IN D&O INSURANCE, Insurance Coverage 2005 Claim Trends & Litigation (Feb. 22-23, 2005). If a severability clause is present, however, some courts have refused to hold the policy void *ab initio*, and instead have limited rescission to only those insureds who made or had knowledge of the offending misrepresentations. See *Atlantic*, 839 F.2d at 215 (rejecting argument that rescission clause applies to “innocent” insureds); *Am. Int’l Specialty Lines Ins. Co. v. Towers Fin. Corp.*, No. 94 Civ. 2727, 1997 WL 906427, at \*10 (S.D.N.Y. Sept. 12, 1997) (noting that had the sophisticated insureds required a severability clause, then misrepresentation by one director would lead only to partial rescission); *Mazur*, 826 F. Supp. at 194 (noting that a “policy will not be rescinded as to all insureds if it contains a severability clause”). This partial rescission remedy is at odds with general principles of contract law, which treat rescission as an unusual remedy that undoes a contract in its entirety in hopes of returning *all* the parties to the status quo before contracting. The court in *HealthSouth* pointed out this irregular direction in which so many courts appear to be headed. 308 F. Supp. 2d at 1290-91. In light of this new direction, it seems that severability provisions may act not only to create a legal fiction for the purposes of interpreting a policy severally as to all insureds, but also to create separate insurance policies that may be separately rescinded as to each insured.

## II. EXCLUSIONS

Severability clauses have also been an issue in the application of exclusions to multiple insureds, particularly when one insured performs an activity that excludes coverage while another insured seeks coverage. This type of conflict arises in a variety of circumstances, such as when a homeowner is conducting an excluded business pursuit in the home and one of the homeowner’s patrons is injured by another insured unassociated with the business, or when one

homeowner is responsible for setting fire to the home for which an innocent co-insured seeks coverage, or when an officer of a corporation is guilty of intentional conduct excluded from a policy but the corporation seeks coverage for suits arising from that conduct. Depending on the language of the exclusion, a severability clause can protect an innocent insured from the excluded conduct of a co-insured. A severability clause might also require an insurer to give adequate notice to all insureds of the existence and scope of an exclusion, as if each were separately insured. *See Am. Cas. Co. of Reading, Pa. v. FDIC*, Civ. No. 86-4018, 1990 WL 66505, at \*8 (N.D. Iowa Feb. 26, 1990), *aff'd in part, rev'd in part*, 944 F.2d 455 (8th Cir. 1991).

#### **A. Ambiguities arising from The, An and Any**

The most common dispute regarding the effect of a severability clause on an exclusion turns on which article is used to describe the insured in the exclusion. It is generally “well settled” that an exclusion referring to conduct by “the” insured combined with a severability clause requires the policy and the exclusion to be read independently as to each insured. *Strouss v. Firemans Fund Ins. Co.*, No. Civ. A. 03-5718, 2005 WL 418036, at \*4 (E.D. Pa. Feb. 22, 2005); *see also BP Am., Inc. v. State Auto Prop. & Cas. Ins. Co.*, No. 102,299, 2005 WL 2277810, at \*5 (Okla. Sept. 20, 2005); *Am. Family Mut. Ins. Co. v. Corrigan*, 697 N.W.2d 108, 115 (Iowa 2005). In other words, where the exclusion uses the term “the insured,” the claims against one insured will not be barred from coverage “solely on the basis of the [excludable] acts of other insureds.” *Stewart Title Guar. Co. v. Keifer*, 984 F. Supp. 988, 996 (E.D. La. 1997). For example, if a policy covering multiple corporate insureds excludes injury to any employee of “the insured,” but also includes a severability clause applying the insurance to each insured separately, then an injury to an employee of one insured should not exclude coverage as to another insured that did not employ the injured employee. *See Ryder Truck Rental, Inc. v. St. Paul Fire & Marine Ins. Co.*, 540 F. Supp. 66, 72-73 (N.D. Ga. 1982). *But see Valentine-*

*Radford, Inc. v. Am. Motorists Ins. Co.*, 990 S.W.2d 47, 54 (Mo. Ct. App. 1999) (finding that despite the existence of a severability clause in a policy issued to corporation, a reference to “the insured” in an exclusion included employees of the corporation as well as the corporation itself because a corporation must act through its agents).

By contrast, if the exclusion refers to “any” insured, then a majority of courts have held that the policy was intended to exclude coverage for all insureds if any insured performed excluded behavior. *See, e.g., Strouss*, 2005 WL 418036, at \*4; *Corrigan*, 697 N.W.2d at 116-17. *But see Shapiro*, 616 F. Supp. at 904 (finding the exclusion phrase - “any such insured” - refers to antecedent “any insured” and both phrases refer to a particular insured). Many courts have likewise found that a reference to “an” insured, although not as explicit as “any insured,” means that an exclusion as to one insured applies to all the insureds. For example, in *Argent v. Brady*, a homeowner’s son had a dog that bit a child to whom the homeowner was providing daycare. 901 A.2d 419 (N.J. Super. Ct. App. Div. 2006). Injuries arising from business pursuits of “an insured” were excluded from the homeowner policy, and although the resident son was a co-insured uninvolved in the day care, he was excluded from coverage because the injury was to a patron of his mother - “an insured” involved in a business pursuit. *Id.* at 423-24.

A majority of courts have found that a severability clause does not change this outcome because the intent of such a clause is “not to negate the plainly worded meaning of a business exclusion clause,” but rather to “render the coverage actually provided by the insuring provisions of the policy applicable to all insureds equally, up to coverage limits.” *Argent*, 901 A.2d at 425-27; *BP Am., Inc.*, 2005 WL 2277810, at \*5; *see also EMCASCO Ins. Co. v. Diedrich*, 394 F.3d

1091, 1096-97 (8th Cir. 2005).<sup>4</sup> *But see Worcester Mut. Ins. Co. v. Marnell*, 496 N.E.2d 158 (Mass. 1986); *Ill. Farmers Ins. Co. v. Kure*, 846 N.E.2d 644, 649 (Ill. App. Ct. 2006).

A minority of courts have interpreted policies that use “an” or “any” in an exclusion combined with a severability clause to allow for coverage of the insured who has *not* performed the excluded conduct. *See, e.g., State Farm Fire & Cas. Co. v. Keegan*, 209 F.3d 767, 771 (5th Cir. 2000); *W. Am. Ins. Co. v. AV & S*, 145 F.3d 1224, 1230 (10th Cir. 1998); *see also Brumley v. Lee*, 963 P.2d 1224, 1227 (Kan. 1998) (“The words ‘an’ and ‘any’ are inherently indefinite and ambiguous. The two words can and often do have the same meaning.”); *Ill. Union Ins. Co. v. Shefchuk*, 108 F. App’x 294, 303, 2004 WL 1858705 (6th Cir. Aug. 17, 2004) (acknowledging that the question is a “close one,” but finding precise severability clause made use of “an insured” ambiguous).<sup>5</sup> If policy language imprecisely refers to “the” and “an” insured in one exclusion but includes a severability clause, then courts are more likely to find the policy ambiguous and favor coverage. *See Shefchuk*, 108 F. App’x at 303; *Nw. Nat’l Ins. Co. v. Nemetz*, 400 N.W.2d 33, 37 n.2 (Wis. Ct. App. 1986).

## **B. Excluding Innocent Insureds**

Courts have also been concerned with excluding coverage for “White Hats,” *i.e.*, “innocent” insureds who were not involved in the excluding behavior. *See Kure*, 846 N.E.2d at

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<sup>4</sup> The Eighth Circuit has expanded on this line of authority to find that the mere definition of “insured” to include multiple individuals combined with a clear exclusion referring to “one or more insureds” is not rendered ambiguous by a severability clause. *See Diedrich*, 394 F.3d at 1096-97 (relying on the holding in *Great Cent. Ins. Co. v. Roemmich*, 291 N.W.2d 772 (S.D. 1980) that a reference to “any insured” in exclusion was not rendered ambiguous by severability clause); *accord Strouss*, 2005 WL 418036, at \*6.

<sup>5</sup> The basis of this minority position is generally that the existence of a severability clause renders the exclusion referring to “any” or “an” insured ambiguous and thus the exclusion must be interpreted in favor of coverage. *See AV & S*, 145 F.3d at 1229; *Keegan*, 209 F.3d at 770. Thus, the severability clause modifies the entirety of the policy including coverage and exclusions as if the insured claiming coverage is the only insured. *AV & S*, 145 F.3d at 1229.

649-50.<sup>6</sup> In these situations, the existence of a severability clause may not be the determining factor, but may be a basis on which a court may grant an innocent insured some relief. *See, e.g., Nemetz*, 400 N.W.2d at 38-39 (finding wife was insured under homeowner’s policy for damage caused intentionally by husband setting fire to house because policy contained severability clause and there was no evidence that wife was involved in husband’s plan to burn property himself). At least one district court, in an unpublished opinion, has held that “pending litigation” and “prior notice” exclusions could not be invoked to bar coverage for a corporate officer and director who was not a named defendant in a securities lawsuit that was pending at the time the subject policy became effective, because the policy contained the following provision: “No conduct of any insured person will be imputed to any other insured person to determine the application of any of the above exclusions.” *Lewis v. Executive Risk Indemnity Inc.*, No. 00-CV-11093-RWZ (D. Mass. Dec. 28, 2001).

Courts are nonetheless reluctant to reward one insured with coverage that might benefit an excluded co-insured for public policy reasons. Such a result might encourage dishonesty and collusion among insureds, and effectively vitiate exclusions. *BP Am., Inc.*, 2005 WL 2277810, at \*5; *State Farm Fire & Cas. Co. v. Hooks*, 853 N.E.2d 1, 9 (Ill. App. Ct. 2006). Courts may also distinguish between claims of excluded intentional behavior by one insured versus claims of negligent behavior by another insured, finding the latter is covered in light of a severability clause. *See, e.g., Mactown, Inc. v. Cont’l Ins. Co.*, 716 So. 2d 289, 292-93 (Fla. Dist. Ct. App. 1998). *But see Diedrich*, 394 F.3d at 1096-97 (finding, despite severability clause, that mother

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<sup>6</sup> Courts have occasionally favored the innocent insured even absent a severability clause, but this appears to be the exception to the rule. *See Hosey v. Seibels Bruce Group, S.C.*, 363 So. 2d 751, 753-54 (Ala. 1978) (finding policy was severable, without mention of severability clause, as to two spouses, when named insured had no involvement in arson or fraud perpetrated by wife). *But see Home Ins. Co. v. Dunn*, 963 F.2d 1023 (7th Cir. 1992) (rejecting holding in *Home Ins. Co. v. Cooper & Cooper, Ltd.*, No. 88 C 5276, 1998 WL 121564 (N.D. Ill. November 7, 1998)) refusing to rescind a policy as to an innocent insured absent a severability clause).

accused of negligent supervision of son was not covered because the son, who was co-insured, committed intentional act excluded from policy); *Jessica M.F. v. Liberty Mut. Fire Ins. Co.*, 561 N.W.2d 787, 795 (Wis. Ct. App. 1997) (finding, despite severability clause, grandmother who allegedly knew or should have known of grandfather's sexual abuse was excluded from coverage under "expected or intended" harm exclusion directed at "the insured").

### **C. Differing Treatment of Co-Insureds**

Coverage may also turn on the manner in which a party became a co-insured. For example, in *State Farm v. Hooks*, 853 N.E.2d at 9, an underlying defendant-insured was covered for damages incurred by the underlying plaintiff, who was a co-insured by virtue of her residence with *another* named insured (uninvolved in the lawsuit). The insurer argued that the underlying defendant was excluded from coverage by an exclusion for bodily injury to the named insured *or* any resident relatives of the named insured. *Id.* at 3. The court found that the severability clause required each insured be viewed separately, and because the underlying plaintiff-insured was insured by virtue of her residence with an insured other than the underlying defendant-insured, she was not a co-insured of the defendant-insured when reading the policy separately as to each. *Id.* at 9; *accord Am. Nat'l Fire Ins. Co. v. Estate of Fournelle*, 472 N.W.2d 292, 293-95 (Minn. 1991); *see also Gulmire v. St. Paul Fire & Marine Ins. Co.*, 674 N.W.2d 629, 636-39 (Wis. Ct. App. 2003) (finding injury to an employee by a fellow employee was covered by commercial automobile insurance policy, despite several exclusions for injury arising out of an injured person's employment, because employee who caused injury was separately insured according to severability clause and was not the "employer" of the injured party).

Some courts, such as the Minnesota Supreme Court in *Travelers Indemnity Co. v. Bloomington Steel & Supply Co.*, may also be willing to acknowledge a corporate fiction by distinguishing between the excluded conduct of the president/sole shareholder of a corporation

and the corporation itself on the basis of a severability clause, and finding coverage still exists for the corporation. 718 N.W.2d 888, 894-96 (Minn. 2006). The *Bloomington* court recognized that this view might indirectly reward an otherwise guilty co-insured, but invited the parties to find other avenues to disrupt any corporate fiction. *Id.* at 896-97. In contrast, the Second Circuit found that where a firm that had been sued for vicarious liability, the severability clause did not afford protection to the firm because under such a liability theory, it was proper to impute to the firm allegedly wrongful acts of the attorneys. *Steadfast Ins. Co. v. Stroock & Stroock & Lavan LLP*, 277 F. Supp. 2d 245 (S.D.N.Y. 2003), *aff'd*, 108 F. App'x 663, 2004 WL 1759133 (2d Cir. Aug. 5, 2004); *see also Am. Cast Iron Pipe Co. v. Commerce & Indus. Ins. Co.*, 481 So. 2d 892, 896 (Ala. 1985) (holding that despite severability clause and exclusion for occurrences “away from [named insured’s] premises,” parent company was allowed coverage for injury occurring on subsidiary’s premises because parent owned 100% of subsidiary, and thus, there was no severance of insured interests).

### **III. PRACTICAL APPLICATION**

With the recent onslaught of securities litigation, Sarbanes Oxley regulation, and ever-broadening exclusions, adequate insurance coverage has become even more important to anyone considering becoming an officer, director, or other fiduciary. A precisely drawn severability clause may be the critical difference in determining whether a policy affords the protection the insured expects. Many insurance policies include severability language, but insureds should be careful that the form clause is in fact a severability clause (the name alone may be misleading) and that the clause is broad enough to offer complete severability. Full severability includes both a clause requiring that each insured is viewed as if a separate insured *and* that no misrepresentation or omission by one insured is imputed to another insured without knowledge of the misrepresentation or omission. In recent years, insurance companies have begun

narrowing their form severability clauses or including exceptions for misrepresentations or omissions by the signatories. If a potential co-insured cannot successfully negotiate an adequate severability clause, he or she may consider obtaining additional separate coverage, or decline to accept a position that might not provide sufficient liability coverage.

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**APPENDIX**

**RESCISSION CASES**

**ALABAMA**

*In re HealthSouth Corp. Ins. Litig.*, 308 F. Supp. 2d 1253 (N.D. Ala. 2004)

**Holding:** Severability clause in directors and officers policy precluded insurer from rescinding coverage for all officers, directors, and employees. Severability clause in fiduciary liability policy precluded insurer from rescinding coverage for all officers, directors, and employees.

This consolidated action involved claims and counterclaims by ten insurance carriers seeking to rescind coverage to HealthSouth Corporation and various officers, directors, and employees who were covered by those policies. The carriers alleged that HealthSouth used materially false and misleading financial information to procure insurance coverage, and that the policies were thus void *ab initio*. The insureds maintained that the severability clauses in the various primary policies precluded rescission of coverage as to all insureds under the primary policies as well as the excess policies, that they characterized as “following form” of the primary policies. The policies at issue in the case included an Executive Liability and Indemnity Policy (“primary” policy) covering the company and its directors and officers that was issued by Federal, excess policies on top of that coverage, and a Fiduciaries Liability Policy issued by Travelers. The primary policy contained the following severability language:

With respect to the declarations and statements contained in such written application(s) for coverage, no statement in the application or knowledge possessed by any Insured Person shall be imputed to any other Insured Person for the purpose of determining if coverage is available.

Under the policy terms, the above language did not apply for purposes of coverage of the Insured Organization. Rather the following language applied:

With respect to the exclusions in subsections 5, 6.1 and 6.2, only facts pertaining to and knowledge possessed by any past, present or future chief financial officer, President or Chairman of any Insured Organization shall be imputed to any Insured Organization to determine if coverage is available for such Insured Organization.

Most of the excess policies stated that the coverage was not to be broader than the coverage provided by any underlying insurance. None of the excess policies contained severability clauses nor made any reference to the representations and severability clauses found in the primary policy. The Fiduciaries Liability Policy contained the following language:

No statement in the application or knowledge or information possessed by an Insured shall be imputed to any other Insured for the purpose of determining the availability of coverage hereunder.

The court specifically found no dispute as to any material facts relevant to the legal effect of the severability clauses, and stated that the precise language of the policies spoke for itself. The court found that the absence of a severability clause in the excess carriers' policies did not change the coverage provided. In so finding, the court stated that the excess policies were "follow form" policies, meaning that except where they specifically provide otherwise, the terms of those policies followed those of the primary and preceding carriers. The court concluded that the legal effect of the severability clause in the primary policies was to bar the excess carriers from rescinding their policies as to any insured who did not personally make any misrepresentation with knowledge of its falsity in any application for the policy sought to be rescinded or in negotiations therefore, if materials outside the application were specifically referenced in the excess policies. The court also held that the legal effect of the severability clause in the Fiduciaries Liability Policy was basically the same as to the primary policy, and that Travelers and the excess carriers could not rescind the fiduciary liability policies as to any insureds who did not have personal knowledge of any misrepresentation contained in the application for the specific policy.

The court then noted that the Federal severability clause applied a very different standard to HealthSouth under its Insured Organization coverage. The court found that if any specifically referenced applications or referenced documents contained knowing representations, then those statements by and knowledge of any insured person could be imputed to HealthSouth and result in rescission, which created a fact question preventing summary judgment in favor of HealthSouth. Another clause of the policy provided for reimbursement to HealthSouth for sums it paid to indemnify insured persons. This clause retained the general severability clause. The court found that HealthSouth's right to coverage was derivative of the individual insured person's right to coverage. Thus, the carriers could not deny coverage to HealthSouth, or rescind coverage under this clause unless they could prove that each insured person whom HealthSouth was obligated to indemnify made knowing misstatements in the application or specific documents referenced in the policies sought to be rescinded.

***Hosey v. Seibels Bruce Group, S.C., 363 So. 2d 751 (Ala. 1978)***

**Holding:** Insured interests of insured and his wife were severable and neither arson nor fraud of wife in filing a false proof of loss statement would preclude recovery by husband to extent of his interests in insured property.

The South Carolina Insurance Company issued a policy to Felston Hosey, Sr., which stated:

1) ‘This entire policy shall be void if, whether before or after a loss, the insured has willfully [sic] concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.’

2) ‘. . . Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured . . . .’

Both of these provisions addressed statements by or conduct of the “Insured.” This term was defined as follows:

‘‘Insured’ means ‘(1) the Named Insured stated in the declarations of this policy; (2) if residents of the Named Insured’s household, his spouse, the relatives of either, and any other person under the age of twenty-one in the care of any insured . . . .’

The trial court instructed the jury that conduct on the part of the wife, in violation of the policy, could prevent the husband from recovering under the policy. Citing a New Jersey Superior Court holding, the Alabama Supreme Court reversed the trial court and stated: With respect to a fire insurance policy covering the interests of more than one insured . . . the obligation of the carrier should be considered several as to each person insured, and the fraud or misconduct of one insured should not bar recovery by the innocent co-insureds to the extent of their respective interests in the property involved.”

## CALIFORNIA

*TIG Ins. Co. of Mich. v. Homestore, Inc.*, 40 Cal. Rptr. 3d 528 (Cal. Ct. App. 2006)

**Holding:** A rescission clause in a D&O policy unambiguously permitted rescission as to all insureds, including innocent insureds, based on knowing misrepresentations made in the application by the officer that signed the application.

Homestore applied for renewal of a D&O policy, and, as required by the insurer, attached its most recent Form 10-Q to the application. The renewal application was signed by Homestore’s CFO. When it was discovered that the 10-Q contained material misrepresentations, the insurer sought rescission. The policy contained the following clause:

[I]n the event that the Application, including materials submitted therewith, contains misrepresentations made with the actual intent to deceive, or contain misrepresentations which materially affect either the acceptance of the risk or the hazard assumed by the Insurer under this Policy, no coverage shall be afforded under this Policy . . . for any Director or Officer who did not sign the Application but who knew on the inception date of this Policy the facts that were so misrepresented, and this Policy in its entirety shall be void and of no effect

whatsoever if such misrepresentations were known to be untrue on the inception date of the Policy by one or more of the individuals who signed the Application.

The court noted that California statutory law permits an insurer to rescind a policy when the insured has made material misrepresentations in applying for the insurance and that such rescission “shall apply to all insureds under the contract, including additional insureds, unless the contract provides otherwise.” The court also noted that the U.S. Court of Appeals for the Ninth Circuit had previously determined, in related litigation (*Federal Ins. Co. v. Homestore, Inc.*, 144 F. App’x 641, 2005 WL 1926483 (9th Cir. Aug. 12, 2005)), that the relevant 10-Q contained material misrepresentations and that the above-quoted language in the policy permitted rescission as to all insureds under California law. The court agreed with the Ninth Circuit and concluded that the language of the policy, consistent with the statute, unambiguously provided for rescission as against all insureds – including those who had no knowledge of any misrepresentations in the application – based on the knowing misrepresentations made by the CFO who signed the application. The court reasoned: “To be sure, the policy also provides that, if the application or materials submitted with it include misrepresentations made with the actual intent to deceive or material to the risk assumed by [the insurer], coverage will be denied for any non-signing director or officer who knew on the policy’s inception date of the misrepresentations. This distinct right to rescind as to non-signing individuals with actual knowledge of the application’s false representations of fact, however, does not, under any reasonable interpretation of the policy language, restrict [the insurer’s] broader right (consistent with [statute]) to rescind the contract as to all insureds in the case of an application actually signed by an officer who had knowledge of the false statements.” The court noted that Homestore could have avoided this result by purchasing a policy with a severability clause. The court further concluded that the policy’s rescission clause was not subject to any special requirement of conspicuousness, which would be required for a policy exclusion.

## FLORIDA

*Nat’l Union Fire Ins. Co. of Pittsburgh v. Sahlen*, 807 F. Supp. 743 (S.D. Fla. 1992), *aff’d*, 999 F.2d 1532 (11th Cir. 1993)

**Holding:** Insurer permitted to rescind policy as to all insureds based on misrepresentations in application.

Sahlen & Associates, Inc. applied for D&O coverage and, as required, attached various financial statements to the application. It later came to light that much of Sahlen’s supposed earnings were attributable to fictitious invoices. The insurer sought to rescind the D&O policy pursuant to a Florida statute that permits rescission when misrepresentations in an insurance application are made fraudulently, or are material, or are such that the insurer in good faith would not have issued the policy in substantially the same form had it known the truth. Innocent officers urged that coverage under the D&O policy was severable and that the misrepresentations of the applicant could not deprive them of coverage. As the court characterized their argument: “They contend that the policy would not contain language such as ‘each director’ or ‘the insureds’ unless [the insurer] intended to provide severable coverage. They also argue that Question

No. 16 of the policy application further reflects this intention, while also dictating how coverage will be affected by a misrepresentation in Question No. 14. Question No. 16 provides as follows: 16. It is agreed with respect to questions # 14 and # 15 above, that if such knowledge or information exists any claim or action arising therefrom is excluded from this proposed coverage. According to the defendants, the only reasonable interpretation of Question No. 16 requires that ‘such knowledge’ will only exclude the coverage of those insureds who had knowledge of the claim.” The court was not persuaded by these arguments. Citing *Wedtech* [see New York] and *Shapiro* [see Massachusetts], it noted that “courts have held that a policy may not be rescinded as to all of the insureds when it contains a severability clause,” but it pointed out that there was no clear severability clause in the Sahlen policy. The court found that the supposed ambiguities urged by the innocent officers were not enough to alter the application of the Florida statute.

## ILLINOIS

### *Home Ins. Co. v. Dunn*, 963 F.2d 1023 (7th Cir. 1992)

**Holding:** An attorney’s misrepresentation on the policy application rendered the malpractice policy void as to the entire firm under Illinois law.

In this case, Lawrence M. Cooper obtained a legal malpractice insurance policy providing coverage for himself and the twelve other attorneys associated with the firm. Cooper made a material misrepresentation on the application for the policy (failed to disclose that he was presently embezzling money from the firm’s clients). The Home Insurance Company, underwriters of the policy, brought this declaratory action suit claiming that the policy was null and void as to all attorneys at the firm due to Cooper’s material misrepresentation. The defendants argued that the policy intended to create a separate contract for each attorney. In support, they pointed to policy language that specifically excluded coverage for a judgment “arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts” committed by an insured. But, they also pointed out that the policy waived this exclusion for those who were not involved in the wrongful act, thus, they contended that the innocent attorneys should not be bound by Cooper’s misrepresentation.

Home Insurance contended that because Cooper knowingly made a fraudulent, material misrepresentation on the application, the entire insurance contract was void. Home recognized the waiver of exclusion provisions referred to by the defendants, but contended that they should only come into play after the policy was in force. The court noted that the distinction was subtle, but important. The court went on to find that because the fraud was committed during the negotiation of the contract, no insurance policy ever existed. Thus, because no policy existed, the defendants could not rely on the waiver provisions.

***Travelers Indem. Co. v. Bally Total Fitness Holding Corp.*, 448 F. Supp. 2d 976 (N.D. Ill. 2006)**

**Holding:** Signor’s knowledge of falsity of insurance application was sufficiently pled to avoid dismissal of rescission claim on basis that signor’s actions could not be imputed to other individual insureds under severability and “best knowledge” clauses of the application.

This suit was an action to rescind several directors and officers excess liability insurance policies. The defendant insureds argued that because the underlying complaints did not allege misstatement, omissions or knowledge that can be imputed to the individual defendants, the insurers’ action should have been dismissed based on a severability clause which stated as follows:

. . . except for material facts or circumstances known to the person(s) who subscribed the Proposal Forms, any misstatement or omission in such Proposal Forms or information provided therewith in respect of a specific Wrongful Act by a particular Director or Officer or his cognizance of any matter which he has reason to suppose might afford grounds for a future Claim against him shall not be imputed to any other Director or Officer for purposes of determining the validity of this Policy as to such other Director or Officer.

The court found that the individual defendant, Dwyer, did in fact have an intent to deceive, and thus, defendants were not allowed to rely on the severability clause to dismiss the plaintiff’s claims.

## LOUISIANA

***Mazur v. Gaudet*, 826 F. Supp. 188 (E.D. La. 1992)**

**Holding:** Trustee’s insurance policy was void *ab initio* based on a misrepresentation by another trustee in negotiation of the contract.

This case involved a Trustee who embezzled money from the trust. The rest of the trustees did not participate in the embezzlement. In the application for insurance, the trustees were asked whether the trust fund or any of the trustees were aware of any circumstances which would result in any claim being made against the trust fund or any of the present or past Trustees for errors or omissions. The guilty trustee and another trustee answered “no.” Section V of the policy contained the following language:

Whenever coverage under any provision of this policy would be excluded, suspended or lost: (a) because of any exclusion relating to dishonest, fraudulent, or malicious act or willful or reckless violation of any statute, by an Insured with respect to which any other Insured did not personally participate or personally acquiesce or remain passive after having person knowledge thereof, or (b) because of non-compliance with any condition relating to giving of notice to the Company with respect to which any other Insured shall be in default, solely

because of the default of concealment of the default by any other Insured responsible for the loss or damage otherwise insured hereunder, . . . insurance . . . shall continue in effect with respect to each and every Insured who did not personally commit or personally acquiesce in or remain passive after having personal knowledge of such acts . . .

The issue was whether Section V was a severability clause, or, was a sufficient indication of the parties' intention to make the contract severable. The court agreed that the appropriate question was whether the parties would have agreed to an insurance contract for the "innocent" trustees had the one guilty trustee been honest on the application (i.e. had he been forthcoming about his embezzlements). The court held that a rational factfinder could not have found that the insurance carrier would have proceeded to insure even the "innocent" trustees on the same terms had it known of the guilty trustee's embezzlement. Thus, the contract was held not severable.

## MASSACHUSETTS

### *Shapiro v. Am. Home Assurance Co.*, 616 F. Supp. 900 (D. Mass. 1985)

**Holding:** Former officers and directors of the corporation could not be barred from coverage under Securities Act liability policies solely on the basis of fraudulent acts of other insureds in the procurement of the policy.

Plaintiffs in this suit, Mario DePalo and Alfred Bloom, were former officers and directors of Giant Stores Corp. ("Giant"). Pacific Indemnity Company had issued a Securities Act Liability policy to Giant. In paragraph II(b) the policy contained a clause under the caption "Exclusions," providing that the insurance did not cover:

. . . any Insured for any loss, liability, cost or expense arising by reason of dishonest or criminal act, or by reason of an actual or willful intent to defraud on the part of, any such Insured or of any director, officer, partner, employees or trustee thereof, or of any person who controls any such Insured within the meaning of Section 15 of the Securities Act, whether acting alone or in collusion with others or within or without the usual scope of his duties.

Under the caption "Conditions," the policy provided:

If any Insured shall make any claim for reimbursement of loss, liability, cost or expense, knowing the same to be false or fraudulent in any material respect, this Insurance shall be void as to such Insured (and any person who controls such Insured within the meaning of Section 15 of the Securities Act) and all rights of such Insured (and such controlling person) hereunder shall terminate, but no such termination shall affect this Insurance as to any other Insured.

Additionally, the policy contained a severability clause providing:

Except for the provisions of Condition (b) of this Insurance, this Insurance shall be construed as a separate contract with each Insured so that except as aforesaid, as to each Insured, the reference in this Insurance to the Insured shall be construed as referring only to that particular Insured, and the liability of the Insurer to such Insured shall be independent of its liability to any other Insured.

The sole issue for determination was whether plaintiffs' claim to coverage under the Securities Act liability policies was barred by the fraudulent activities of insured directors and officers other than DePalo and Bloom. Reading together the severability clause and paragraph II(b), the court interpreted the policy to mean that each insured must be treated separately with respect to a defense of fraud as well as in other respects. Additionally, the court pointed out that if the insured making the particular claim of coverage willfully defrauded the insurer, then the exclusion applies and coverage for that insured would be defeated. But the court held that if only some other insured willfully defrauded the insurer, the exclusion and severability clauses taken together plainly meant that the insured who was not guilty of willful fraud would still be covered.

## NEW YORK

### *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455 (S.D.N.Y. 2005)

**Holding:** The court granted an individual insured's motion for a preliminary injunction against a liability insurer requiring it to pay his costs of defense as they were incurred pursuant to the D&O policy it issued to WorldCom.

Roberts, a former chairman of the board of directors of WorldCom moved for a preliminary injunction compelling the insurer, Continental Casualty, to honor an excess directors and officers (D&O) liability policy it had issued to WorldCom. In addition, Roberts requested that the insurer immediately advance the costs of his defense against certain federal securities law claims that were filed after the collapse of his company. The court stated that "under a D&O policy with a duty to pay defense costs provisions, 'the insurance company's obligation to reimburse the directors attaches as soon as the attorney's fees are incurred.'" The court then noted that under New York law, an insurer may avoid an insurance contract if the insured made a false statement of fact as an inducement to making the contract and the misrepresentation was material. The court then stated that a severability clause or similar provision in a policy may entitle directors to coverage even when a policy is properly rescinded against the corporation. But, the court insisted, until the issue of rescission is adjudicated, a contract of insurance remains in effect and the duty to pay defense costs is enforceable. In addition, the court noted that a severability clause meant that the policy was not necessarily void *ab initio* with respect to each director.

Continental also contended that it was under no obligation to pay defense costs because it gave notice to WorldCom that it regarded its policy as void *ab initio* and rescinded, and advised WorldCom that it "would" return the premium. The court held that Roberts was not required to show that he would succeed in defeating Continental's rescission argument at this stage in the

litigation. Rather, all he had to show was that under the terms of the policies, he was entitled to payment of defense costs as they were incurred, and that as a matter of law, that obligation existed until the rescission issues had been litigated and resolved.

***Am. Int'l Specialty Lines Ins. Co. v. Towers Fin. Corp.*, No. 94 Civ. 2727, 1997 WL 906427 (S.D.N.Y. Sept. 12, 1997)**

**Holding:** Insurers were entitled to rescission of the policies because of the Towers' misrepresentations of its financial condition in its insurance applications.

The insurers moved for summary judgment, contending that the applications for the D&O liability policies they issued to Towers contained false information. The court pointed out that under New York law, an insurance policy issued in reliance on material misrepresentations is void from its inception. Defendant Ben Barnes, a former outside director of Towers, did not dispute that the information was false, but contended that the policy should not be rescinded as to him because he had no knowledge of its falsity. The court noted that the transaction involved sophisticated businessmen, Barnes included, and that Barnes could have protected himself by requiring the policy to include a severability clause. But neither Barnes, nor Towers, required such a clause in the D&O policies. Thus, the court recommended that the insurer's motion to rescind the policies be granted.

***Wedtech Corp. v. Fed. Ins. Co.*, 740 F. Supp. 214 (S.D.N.Y. 1990)**

**Holding:** A directors and officers liability insurance policy was not void *ab initio* as to all directors and officers without regard to each individual's participation in the alleged fraudulent inducement.

Federal Insurance Co. issued Wedtech Corp. a directors and officers ("D&O") liability insurance policy that stated:

The written application for coverage shall be construed as a separate application or coverage by each of the Insured Persons. With respect to the declarations and statements contained in such written application for coverage, no statement in the application or knowledge possessed by any Insured Person(s) shall be imputed to any other Insured Person(s) for the purpose of determining the availability of coverage with respect to claims made against any Insured Person(s) . . . .

The policy also stated that the insurance company relied on all declarations and statements in the written application for coverage, which were considered incorporated into the policy. Federal declared the policies void *ab initio* upon learning that Wedtech's directors and officers had concealed material information and provided false information when applying for the policies. Under New York law, fraud in the inducement can render an insurance policy void *ab initio*. The court held, however, that "where the insurance policy contains a severability provision, some of the officers and directors might still be entitled to coverage," and thus the policy is not void *ab initio*. The court was influenced by the placement of the severability clause directly after the discussion of the insurer's reliance on declarations and statements in the policy application.

## TENNESSEE

*Fed. Sav. & Loan Ins. Corp. v. Burdette*, 718 F. Supp. 649 (E.D. Tenn. 1989)

**Holding:** Coverage under a D&O policy can be denied based on misrepresentations in the application, but only as to those who signed the application or knew representations were made in the application.

FSLIC, as receiver for a savings and loan association (S&L), filed suit against former officers and directors of the S&L. The officers and directors sought indemnification from their D&O insurer. The insurer attempted to avoid coverage by alleging that the proposal form by which the S&L applied for the D&O policy contained misrepresentations. However, the policy contained the following clause: “[T]his policy shall not be voided or rescinded and coverage shall not be excluded as a result of any untrue statement in the Proposal Form, except as to those persons making such statement or having knowledge of its untruth.” Noting that exactly the same language was at issue in *Atlantic Permanent* [see Virginia], the court held that the plain language of the policy controlled – only the officers that signed the proposal form or had knowledge of misrepresentations in the proposal form could be denied coverage based on misrepresentations made in the proposal form.

## UTAH

*ClearOne Comm’ns, Inc. v. Lumbermens Mut. Cas. Co.*, No. 2:04-CV-00119, 2005 WL 1843450 (D. Utah Aug. 1, 2005)

**Holding:** Absent a determination whether the insurer’s rescission was, in fact, based upon the insureds’ responses to certain application questions, the court was not able to conclusively determine the effect of the severability clause as it applied to the rescission of the D&O Policy, and thus denied summary judgment.

ClearOne obtained \$3 million in primary director and officer insurance coverage from National Union Fire Insurance Company. The application was signed by Frances Flood, ClearOne’s CEO and chairman, and contained a severability clause that read:

It is further agreed that in regard to the applicability of questions 8, 9, and 10 above, the facts pertaining to any knowledge possessed by any insured (other than the knowledge and/or information possessed by the person(s) executing the application) shall not be imputed to any other Insured Person; only facts pertaining to any knowledge possessed by any past, present or future chairman of the board, president, [CEO, COO, CFO] and General Counsel (or equivalent position) of the Organization shall be imputed to the Organization.

The insureds moved for partial summary judgment on the limited issue of the effect of this severability clause as it applied to National Union’s decision to rescind the D&O Policy. The court noted that the plain language of the severability clause clearly stated that all of the individual insureds were imputed with the knowledge of the person who signed the applications,

and that it also indicated that the clause was limited to questions eight, nine and ten of the application. The court held that absent a determination whether National Union's rescission was, in fact, based upon the response to questions eight, nine, or ten, the court was not able to conclusively determine the effect of the severability clause as it applied to the rescission of the D&O Policy. Thus, it held that summary judgment was inappropriate.

## VIRGINIA

*Atlantic Permanent Fed. Sav. & Loan Ass'n v. Am. Cas. Co. of Reading, Pa.*, 839 F.2d 212 (4th Cir. 1988)

**Holding:** Affirmed judgment of the lower court, which was based on a jury verdict. Among other things, it was appropriate for the trial judge to instruct the jury that misrepresentations in the insurance renewal application would bar coverage only for those officers who had knowledge of the misrepresentations.

Three officers of Atlantic Permanent were sued, and Atlantic Permanent indemnified the officers for the costs of defending and settling the suit. Atlantic Permanent, in turn, sought indemnification from its D&O insurer, which denied coverage, asserting, among other things, that the most recent renewal of the D&O policy was void because procured through misrepresentation. The court noted that, under Virginia law, "a misrepresentation of fact in an insurance application renders the policy void if the misrepresentations were material to the risk when assumed." However, the court also pointed to a provision in the policy which read: "[T]his policy shall not be voided or rescinded and coverage shall not be excluded as a result of any untrue statement in the [application] form, except as to those persons making such statement or having knowledge of its untruth." The court found that this clause "was plainly designed to prevent misrepresentations made by the particular officers responsible for preparing an application form from depriving their innocent colleagues of coverage, and to refuse to give it effect here would undermine the parties' manifest intent. The language of the policy is plain and unambiguous, and we are obligated to apply it, absent a showing that it is in violation of law or inconsistent with public policy. Though [the clause] provides the insured officers with greater protection than would otherwise be available to them under the law of Virginia, we have not been shown that it is inconsistent with any expressed public policy of that state."

## WASHINGTON

*Cutter & Buck, Inc. v. Genesis Ins. Co.*, 306 F. Supp. 2d 988 (W.D. Wash. 2004), *aff'd*, 144 F. App'x 600, 2005 WL 1799397 (9th Cir. Aug. 1, 2005)

**Holding:** Rescission of director and officer policy as to all insureds on the basis of intentional material misrepresentation by officer signing application was proper, where the policy's "severability of application" clause unambiguously indicated that such a misrepresentation would void the policy as to all insureds.

Genesis Insurance Company (“Genesis”) issued a director and officer liability policy to Cutter & Buck, Inc. (“Cutter & Buck”). The policy contained a “severability of application” clause that stated:

[I]n the event that the Application, including materials submitted therewith, contains misrepresentations made with the actual intent to deceive, or contains misrepresentations which materially affect either the acceptance of the risk or the hazard assumed by the INSURER under this Policy, this Policy in its entirety shall be void and of no effect whatsoever; and provided, however, that no knowledge possessed by any DIRECTOR or OFFICER shall be imputed to any other DIRECTOR or OFFICER except for material information known to the person or persons who signed the Application. In the event that any of the particulars or statements in the Application is untrue, this Policy will be voided with respect to any DIRECTOR or OFFICER who knew of such untruth.

Genesis subsequently discovered that Cutter & Buck’s application contained material misstatements known to Steve Lowber, the Cutter & Buck officer who signed the application. Genesis rescinded the policy. Applying Washington law, the district court held that the severability of application clause unambiguously indicated that “innocent directors or officers retain[ed] coverage unless the applications signor kn[ew] of a misrepresentation within the application, in which case even innocent directors lose coverage.” The court noted that a contrary interpretation would result in the nullification of a portion of the severability of application clause. The Ninth Circuit Court of Appeals affirmed.

## EXCLUSION CASES

### ALABAMA

*Am. Cast Iron Pipe Co. v. Commerce & Indus. Ins. Co.*, 481 So. 2d 892 (Ala. 1985)

**Holding:** Despite policy's severability clause, exclusion for injuries occurring away from "the named insured[s]" premises did not preclude coverage for injury on the insured's subsidiary's property because (1) the insured parent company designated the subsidiary an additional insured under the policy, and (2) the parent owned 100% of the subsidiary's stock; thus, there was no severance of insured interests.

A parent company owned 100% of the stock in a subsidiary company, and the parent had a general liability policy under which the named insured was "[parent company] and any subsidiary . . . in which [parent company] owns . . . more than 50% of the combined voting power." The liability policy included a severability clause, and the policy excluded coverage for "bodily injury or property damage. . . occur[ring] away from premises owned by or rented to the named insured."

While one of the subsidiary's employees was working, he was injured on the subsidiary's premises. The parent company sought coverage under its liability policy. The court held that the severability clause did not modify the "named insured" provision and did not limit activities covered by the exclusion. Therefore, the question was whether the injury that occurred on the subsidiary's property was away from the property owned by "the named insured," the parent company. Because the parent company owned 100% of the subsidiary's stock and therefore had ultimate voting authority and control over the subsidiary, the court stated that it could not conclude that the parent's designation of its subsidiary as an additional insured created a severance of insured interests. The parent company essentially owned the "premises" on which the injury occurred, so the exclusion did not apply.

### ALASKA

*Marwell Constr., Inc. v. Underwriters at Lloyd's, London*, 465 P.2d 298 (Alaska 1970)

**Holding:** Because the policy included a severability clause, exclusion for injuries to any employee of "the insured" did not negate coverage for omnibus insureds for liability arising out of an injury to an employee of the named insured.

A construction company and its crane operator were omnibus insureds under a trucking company's automobile policy. An employee of the trucking company was injured due to the crane operator's negligence while he was loading a truck owned by the trucking company. The court held that the policy's severability clause required the exclusions as to "the insured" to be interpreted as referring only to the party seeking coverage. Accordingly, the court found that although this was the trucking company's automobile policy, the construction company and its crane operator, as omnibus insureds, were not subject to the employee exclusions in the policy because they did not employ the injured person.

## ARIZONA

*Am. Family Mut. Ins. Co. v. White*, 65 P.3d 449 (Ariz. Ct. App. 2003)

**Holding:** An exclusion in a homeowner’s policy for injuries arising from the criminal acts of “any insured” barred coverage for the parents of a child who pled guilty to aggravated assault.

A teenage boy struck another boy in the head with a metal pipe and pled guilty to aggravated assault as a result of the incident. The victim’s parents sued the assailant and his parents, alleging negligence by the assailant, urging imputation of that negligence to the assailant’s parents, and alleging negligent supervision by the assailant’s parents. The assailant’s parents’ insurer filed a declaratory judgment action, seeking to deny coverage based on a policy exclusion for “bodily injury . . . arising out of . . . violation of any criminal law for which any insured is convicted.” The policy also contained a severability clause that stated: “This insurance applies separately to each insured.” After concluding that the criminal acts exclusion applied to non-intentional acts and was not against public policy, the court addressed the impact of the severability clause. The court distinguished between exclusions based on conduct of “an insured” and those based, like the exclusion in this case, on conduct of “any insured.” The court determined that “the phrase ‘any insured’ in an exclusionary clause means something more than the phrase ‘an insured. [T]he distinction between ‘an’ and ‘any’ is that the former refers to one object . . . and the latter refers to one or more objects of a certain type.” The court joined the majority of jurisdictions in holding that “the phrase ‘any insured’ in an exclusion . . . bars coverage for any claim attributable to the excludable acts of any insured, even if the policy contains a severability clause.” The court found the claims asserted against the assailant’s parents to be derivative of the excluded claim against the assailant and concluded that the parents were excluded from coverage.

## ARKANSAS

*Curran Dev. Co. v. Sec. Ins. Co.*, 194 F. Supp. 727 (W.D. Ark. 1961)

**Holding:** Although policy excluded coverage for any obligation of “the Insured” under worker’s compensation laws or for injuries to an employee of “the Insured,” it did not preclude coverage for the negligence of an executive officer of the company.

An executive officer of an insured company was sued for negligence related to the death of a company employee. The relevant insurance policy contained a severability clause, and it defined “the Insured” as including both the company and any executive officer acting within the scope of his employment. The policy also contained two exclusions, the first of which barred coverage for any obligation for which “the Insured” may be liable under workers compensation, unemployment or disability laws, or similar. There was also an employee exclusion that precluded coverage for bodily injury, sickness, or death of “any employee of the Insured” in the course of his employment.

In its decision, the court emphasized Arkansas’ clear policy of interpreting insurance contracts in favor of the insured. It held that where a policy contains a severability clause, any exclusion as

to employees of the insured should be limited to the employees of the employer who is seeking coverage. The court also noted that the traditional purpose for an employee exclusion was to preclude duplicate recovery for injuries already covered under workers compensation laws. The logic for the exclusion disappears, however, when the claim is against someone other than the employer. Given this fact, in addition to the severability clause in the contract, the court held that the executive officer was entitled to protection under the policy. If the insurer wanted to further limit its liability under the policy, it should have drafted the contract more clearly.

## CALIFORNIA

*Cal. Cas. Ins. Co. v. Northland Ins. Co.*, 932 S.W.2d 416 (Cal. Ct. App. 1996)

**Holding:** Exclusion as to “an insured” was unambiguous, and severability clause did not negate its effect in barring coverage for co-insured.

The homeowner’s policy at issue excluded coverage for liability arising from the use of certain watercraft owned by “an insured” (“watercraft exclusion”). The court found that the watercraft exclusion was plainly worded and unambiguous. Moreover, although the policy contained a severability clause, the court found that coverage was still precluded as to the liability of one insured for the acts of a co-insured. The court emphasized that the purpose of a severability clause is to allow each insured full coverage up to the policy limits, not to contradict bargained-for, unambiguous exclusions in the contract. The court was also particularly influenced by the community property laws and stated that a contrary ruling would, in the context of co-insured spouses, allow one spouse the ability to demand defense of his or her community property interest arising out of the acts of the other spouse, regardless of whether coverage was excluded by the policy.

## COLORADO

*Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748 (Colo. 1990)

**Holding:** Despite a severability clause in the policy, the exclusion is unambiguous because it applies to actions by “any insured,” and coverage is precluded as to the innocent co-insureds.

A homeowner’s policy contained a severability clause and excluded personal liability coverage for bodily injury or property damage resulting from the intentional acts of “any insured.” The named insureds filed a claim under their policy for a loss resulting from their 10-year old son’s vandalism of school property. The son was an additional insured under the policy. The court found that the exclusion was unambiguous as drafted and was not inconsistent with the severability clause. According to the Court, this interpretation gave effect to all the provisions in the policy and enforced the contract in a manner consistent with the parties’ intentions as expressed therein. The court thus declined to “rewrite” what it considered a plainly worded contract, and the parents were denied coverage.

## CONNECTICUT

### *Sacharko v. Ctr. Equities Ltd. P'ship*, 479 A.2d 1219 (Conn. App. Ct. 1984)

**Holding:** Exclusion for injuries to “any employee of the Insured” did not preclude coverage where injured employee sued a different insured that was not her employer and where policy contained a severability clause.

A restaurant employee sued the restaurant’s landlord for injuries resulting from a fall on the premises. The landlord, as an additional insured under the restaurant’s liability policy, sought defense by the insurer. The policy contained a severability clause as well as an employee exclusion clause that precluded coverage for “[p]ersonal injury to any employee of the Insured arising out of and in the course of his employment by the Insured or to any obligation of the Insured to indemnify another because of damages arising out of such injury.” The court held that because the policy contained a severability clause, the insurer was recognizing that it had a separate obligation to each insured. Furthermore, the exclusion provision applied only to the employees of the party seeking coverage under the policy. Accordingly, the landlord was entitled to defense by the insurer because the injured person was not the landlord’s employee.

## FLORIDA

### *Mactown, Inc. v. Cont'l Ins. Co.*, 716 So. 2d 289 (Fla. Dist. Ct. App. 1998)

**Holding:** Lower court reversed; a policy exclusion barring coverage for injuries arising from intentional acts did not completely bar coverage of an employer against whom both intentional torts and negligence were alleged.

A female employee of Mactown sued Mactown and a co-worker who allegedly placed his hands around her neck and made sexual comments to her. The suit included a count of battery against the co-worker and two counts against Mactown – one count for battery on a respondent superior theory and one count for negligent retention. Mactown sought a defense from its insurer, which declined based on multiple exclusions, including an “employment-related practices” exclusion, which barred coverage for: “‘Personal injury’ arising out of any . . . harassment, humiliation, discrimination or other employment-related practices, policies, acts or omissions.” The court found this exclusion inapplicable to the negligent retention claim against Mactown because of the policy’s severability clause, which provided “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.” The court held that “the effect of the severability clause is that allegations of battery by [the co-worker] are not imputed to Mactown so as to bar coverage.” Because Mactown was entitled to coverage for one of the claims against it, the insurer was obligated to defend Mactown against the entire action.

**Premier Ins. Co. v. Adams, 632 So. 2d 1054 (Fla. Dist. Ct. App. 1994)**

**Holding:** Policy's exclusion for intentional acts by "any insured" was ambiguous in light of its severability clause, and by construing the policy against the insurer, the insureds were entitled to coverage despite intentional acts by a co-insured.

Two insureds under a homeowner's policy were sued for negligence relating to the intentional acts of a co-insured. The insurance policy excluded coverage for "bodily injury or property damage . . . which is expected or intended by any insured." The contract also contained a severability clause stating "[t]his insurance applies separately to each insured."

The court reasoned that despite the exclusion's use of the phrase "any insured," if the insureds were denied coverage for injuries resulting from a co-insured's intentional act, it would render the severability clause useless. Adopting the reasoning used in *Worcester Mutual Insurance Company v. Marnell*, 496 N.E.2d 158 (Mass. 1986), the court held that although this interpretation ignored the word "any" in the exclusion, it was preferable to rendering superfluous the entire severability clause. Further, this construction resolved the ambiguity in the exclusion in favor of the insureds. The court did reiterate, however, that the co-insured would not be entitled to coverage because the policy clearly excluded coverage for his intentional acts.

**GEORGIA**

**Ryder Truck Rental, Inc. v. St. Paul Fire & Marine Ins. Co., 540 F. Supp. 66 (N.D. Ga. 1982)**

**Holding:** An exclusion barring coverage for injuries to employees of "the insured" did not exclude coverage for an additional insured when the injured party was not employed by the additional insured.

Ryder leased trucks to a franchise and was listed as an additional insured on the franchise's insurance policy. A franchise employee was injured while driving one of the leased trucks, and the employee sued Ryder for negligence. Ryder sought a defense and indemnity from the franchise's insurer, which denied coverage based on the following policy exclusion: "THIS INSURING AGREEMENT DOES NOT APPLY . . . [t]o bodily injury to any employee of the Insured arising out of and in the course of his employment by the Insured . . . ." The policy also contained a severability clause: "The insurance afforded applies separately to each Insured against whom claim is made or suit is brought except with respect to the limits of the Company's liability." The court concluded that the severability clause rendered the employee exclusion ambiguous as to Ryder, reasoning that: "Construing the [exclusion] provision on its own, the term 'the insured' can be read to refer to any insured under the policy, thus excluding coverage with regard to all insureds under the policy when the injured person is an employee of any insured. On the other hand, when read in light of the severability of interests clause, 'the insured' can be interpreted to refer only to the party seeking coverage under the policy, excluding coverage only when the injured claimant is the employee of the party seeking coverage . . . . Faced with this ambiguity, the court believes that the policy should be liberally construed in favor of the insured." Since the injured party was not an employee of Ryder, Ryder was entitled to liability coverage for that party's injuries.

## HAWAII

### *Tri-S Corp. v. W. World Ins. Co.*, 135 P.3d 82 (Haw. 2006)

**Holding:** By operation of a severability clause, exclusions for any obligation of “the insured” under workers compensation or similar laws, and for bodily injury to an employee of “the insured,” did not apply to a co-insured executive officer under the policy.

A company’s comprehensive general liability policy excluded coverage for several liabilities relating to injury to an employee of “the insured.” The court found that an executive officer of the company was an insured under the policy, and the tort claims asserted against him relating to the death of a company employee were liabilities for which the officer was entitled coverage under the policy. The court stated that when the term “the insured” is used in an exclusion, instead of “the named insured” or “any insured,” it must be read as referring only to the party seeking coverage. Moreover, the court’s decision was influenced by the logic traditionally underlying employee exclusions. These exclusions are often included in policies to prevent an employee from suing his or her employer for injuries that are covered by workers compensation regardless of whether the employer was negligent. The court concluded, however, that this rationale vanishes when the employee is suing someone other than the employer for negligence resulting in injury. Accordingly, the employee exclusions did not apply to the executive officer.

## ILLINOIS

### *Ill. Union Ins. Co. v. Shefchuk*, 108 F. App’x 294, 2004 WL 1858705 (6th Cir. Aug. 17, 2004)

**Holding:** Severability clause rendered a dishonesty exclusion in a professional liability policy ambiguous, and therefore of no effect.

Illinois Union issued a professional liability policy covering Robert and Gregory Shefchuk as “insureds.” The policy excluded coverage for “dishonest, fraudulent, criminal, malicious, or knowingly wrongful” acts committed “by or at the discretion of an insured.” The policy also contained a severability clause that provided that the “inclusion of multiple insureds will not affect the rights of any such persons or organizations to be protected by this policy. We will cover each such person or organization just as if a separate policy had been issued to each.” The Shefchuks were sued by various parties under a variety of tort and negligence causes of action. Repeatedly noting the poor and unclear draftsmanship of the policy, and recognizing that “the question is a close one,” the court found that the severability clause rendered the term “an insured” ambiguous, and thus precluded reliance on the exclusion.

*Ill. Farmers Ins. Co. v. Kure, 846 N.E.2d 644 (Ill. App. Ct. 2006)*

**Holding:** Policy exclusion for intentional acts did not preclude coverage of parents' liability for child's conduct.

Farmers insured Matthew Kure and his parents under a homeowner's liability policy. Kyle Signorelli and his parents filed a complaint against Matthew and his parents seeking damages sustained by Matthew during a fight with Kyle. During the fight, Matthew lifted Kyle from the ground and drove his head into the ground with the weight of his body, resulting in Kyle being paralyzed from the neck down.

The sole issue in this case was whether Farmers had a duty to defend Matthew's parents under their policy. That policy stated:

We do not cover bodily injury, property damage or personal injury which is either: (a) caused intentionally by or at the direction of an insured; or (b) results from any occurrence cause by an intentional act or [sic] any insured where the results are reasonably foreseeable.

Farmers raised two arguments on appeal. First, Farmers argued that Kyle's injury did not result from an "occurrence" as defined in the homeowner's policy and therefore the complaint did not make allegations that fell within the coverage provided by the policy. Matthew's parents responded to both of Farmers' arguments by first asserting that under the policy, "[w]hether one who contributes to an injury is negligent is independent from the question of whether another who directly caused the injury acted intentionally." The policy contained a severability clause that stated "[t]his insurance applies separately to each insured." Thus, Matthew's parents' reasoned that because of the severability clause, the court was bound to determine whether an "occurrence" occurred as if Matthew's parents were the only insureds. Viewing the incident from Matthew's parents' point of view, the court held that the complaint made allegations that were within the coverage provide by the policy. The court noted that the underlying complaint alleged only negligence by Matthew's parents and made no allegation that they intended that as a result of their alleged act of negligence, that Matthew would injure Kyle.

Second, Farmers argued that if the allegations of the complaint did fall within the policy's coverage, Matthew's intentional conduct would trigger the intentional act exclusion as it related to Matthew's parents. The trial court found that Matthew's acts were intentional. But on appeal, the court noted that Matthew's parents did not participate in Matthew's conduct. The court pointed out that "[t]he duty of the insurer is determined by the allegations of the underlying complaint." The court went on to note that the complaint against Matthew's parents contained no allegation that they intended or even expected that as a result of their alleged negligence Matthew would injure Kyle. Nor did the complaint allege that such a result was reasonably foreseeable from Matthew's parents' allegedly negligent acts. Thus, the court held that the intentional act exclusion did not eliminate Farmers' coverage of Matthew's parents.

*State Farm Fire & Cas. Co. v. Hooks*, 853 N.E.2d 1 (Ill. App. Ct. 2006)

**Holding:** Tenant’s status as an insured due to her marriage to co-insured did not release insurer from duty to defend another insured in tenant’s action.

Tenant sued Landlord for negligence. Tenant was married to Landlord’s brother, who was co-owner of the building with Landlord. The insurance brought suit seeking a declaration that it had no duty to defend or indemnify Landlord. The policy stated:

DEFINITIONS ‘You’ and ‘your’ mean the ‘named insured’ shown in the Declarations. Your spouse is included if a resident of your household. ‘We’, ‘us’ and ‘our’ mean the Company as shown in the Declarations. . . . 5. ‘insured’ means you and, if residents of your household: a. relatives . . . 6. ‘insured location’ means: a. the residence premises; . . . 11. ‘residence premises’ means: a. the one, two, three or four-family dwelling, other structures and grounds; or b. that part of any other building; where you reside and which is shown in the Declarations.

SECTION II-EXCLUSIONS 1. Coverage L and Coverage M do not apply to: . . . h. bodily injury to you or any insured within the meaning of part a. or b. of the definition of insured. This exclusion also applies to any claim made or suit brought against you or any insured to share damages with or repay someone else who may be obligated to pay damages because of the bodily injury sustained by you or any insured within the meaning of part a. or b. of the definition of insured.

SECTION II-CONDITIONS . . . 2. Severability of Insurance. This insurance applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence.

The insurance carrier contended that because Tenant was married to Landlord’s brother, Tenant was a relative of both Landlord and Landlord’s brother, and thus was an “insured” under the policy. The carrier further asserted that under the policy it had no duty to defend Landlord, as the named insured, against claims of bodily injury from another “insured.” Both Landlord and Tenant contended that Tenant was not an insured as to Landlord because Landlord did not reside at the premises and was not a member of Tenant’s household. But they both conceded that Tenant was an insured as to Landlord’s brother because they were married and lived together at the insured residence. Landlord additionally contended that the policy’s severability clause required that Tenant’s status be determined independently for each “named insured” and that, therefore, Tenant’s status as an “insured” as to Landlord’s brother did not release the carrier from its obligations to defend and indemnify Landlord because Tenant did not qualify as an “insured” as to her.

The insurance carrier contended that the severability clause had no effect on whether someone qualifies as an insured. Placing importance on the language of the policy, the court found that the clear import of the term “applies separately to each insured” in the severability clause of the policy must be construed to modify the exclusion so as to render the insurer liable for claims brought by a related household member of one named insured against another named insured residing in a separate household.

***Atchison, Topeka & Santa Fe Ry. Co. v. St. Paul Surplus Lines Ins. Co.*, 767 N.E.2d 827 (Ill. Ct. App. 2002)**

**Holding:** Due to the severability clause, the exclusion’s use of the term “a protected person” applied to each insured separately as if each had its own distinct policy.

An additional insured demanded insurance coverage for four underlying tort claims, two of which involved injuries to its own employees, and two of which involved injuries to employees of the named insured. The policies at issue contained a severability clause, which stated in part that the insurance applied “to each protected person named in the Introduction as if that protected person was the only one named there; and separately to each other protected person.” The policies also precluded coverage “for bodily injury to an employee arising out of and in the course of his or her employment by a protected person.”

The court first found that the additional insured was precluded from coverage for its own employees’ injuries as a result of the plain language of the employer’s liability exclusion. Regarding the injured employees of the named insured, however, the court held that the additional insured was entitled to coverage. Under Illinois law, a severability clause allows separate coverage to each insured person as if each had a separate policy. Therefore, the employer’s liability exclusion did not preclude coverage to the additional insured for injuries to the employees of the named insured.

**INDIANA**

***Indiana Ins. Co. v. O.K. Transp., Inc.*, 587 N.E.2d 129 (Ind. Ct. App. 1992)**

**Holding:** Affirmed trial court’s finding that insured was entitled to coverage where policy contained a severability provision and policy’s named insured provision was ambiguous.

A family owned two legal entities – a corporation and a partnership. An employee of the corporation injured a person with a truck owned by the partnership. Under the companies’ business insurance policy, the named insured was “[corporation],[partnership],” and the policy also contained a severability clause. The policy allowed personal liability coverage for the named insured(s) for “non-owned autos,” which were “[o]nly those autos you do not own, lease, hire, or borrow which are used in connection with your business. This includes autos owned by your employees or members of their households but only while used in your business or your personal affairs.”

The dispositive issue in the case was whether designating the named insured as “[corporation],[partnership]” created two separate insureds or one single insured. If treated as one insured, coverage for the corporation would have been excluded because the partnership, as part of that single entity, owned the truck. If they were deemed two separate insureds, however, the corporation would have been entitled to coverage because its employee was driving a truck owned by the partnership. The truck would therefore be a “non-owned auto” borrowed from the partnership and used for the corporation’s business affairs. The court found the policy ambiguous due to the named insured provision, and it construed the policy in favor of the

insured. Thus, it interpreted the policy as designating two named insureds, and the corporation was entitled to coverage. Although the court did not itself discuss the impact of the severability clause, it does note that the trial court appeared to have based its decision in part on this clause.

## IOWA

***Am. Cas. Co. of Reading, Pa. v. FDIC*, Civ. No. 86-4018, 1990 WL 66505 (N.D. Iowa Feb. 26, 1990), *aff'd in part, rev'd in part*, 944 F.2d 455 (8th Cir. 1991)**

**Holding:** Though not a central issue in the case, the court found, *inter alia*, that the carrier should have notified the insureds individually that their coverage would be terminated and far more limited coverage would be substituted.

This case involved a situation where the D&O liability insurance coverage of a bank was significantly limited by a renewal of the policy, which was actually more akin to a termination of the previous policy and a substitution of a far more limited policy. Among many other issues in the case, the court pointed out that the insurer should have directed a formal written notice of non-renewal to the bank or notified the insureds individually of this change in coverage. The court stated that the language of the policy manifested an intent to treat the insureds severally, extending coverage to each as a separate promisee. In support of this finding, the court pointed out that the policy contained a severability clause.

***Am. Family Mut. Ins. Co. v. Corrigan*, 697 N.W.2d 108 (Iowa 2005)**

**Holding:** Lower court reversed; an exclusion in a homeowner's policy for injuries arising from the criminal acts of "any insured" barred coverage for a homeowner whose son criminally abused a child in the home.

A homeowner's son operated a childcare business out of the home, and one of the children for whom he cared was found to suffer from shaken baby syndrome. The son eventually pled guilty to child endangerment. The abused child's parents sued both the homeowner and his son. The homeowner's insurer filed a declaratory judgment action, seeking to deny coverage based on a policy exclusion for "bodily injury . . . arising out of . . . violation of any criminal law for which any insured is convicted." The policy also contained a severability clause that stated the insurance "applies separately to each insured." There was no dispute that the son was excluded from coverage, but the parties disagreed as to whether the homeowner was excluded. The court found that the bodily injury for which the abused child's parents sought compensation from the homeowner "inescapably ar[ose] out of [the homeowner's son's] violation of criminal law for which [the son] was convicted." The court noted that all theories of liability asserted against the homeowner required as an element proof of the son's conduct in inflicting the injuries. The court therefore determined that the homeowner's alleged conduct could not be considered an independent cause of the injuries so as to invoke the rule that, when there are two proximate causes of an injury – one excluded and one not – coverage is not barred. The court further determined that the policy's severability clause did not render the criminal acts exclusion ambiguous. The court distinguished between exclusions based on conduct of "the insured" and

those based, like the exclusion in this case, on conduct of “any insured.” The court concluded that an exclusion based on conduct of “any insured” was unambiguous regardless of the presence of a severability clause. The homeowner was not entitled to coverage for injuries that resulted from the criminal acts of any insured, including his son.

## KANSAS

### *Brumley v. Lee*, 963 P.2d 1224 (Kan. 1998)

**Holding:** A severability clause renders an exclusion for intentional acts of “any insured” ambiguous because “any” can be interpreted as “an.”

Homeowner’s policy contained a severability clause and excluded coverage for the intentional acts of “any insured.” The court found that the words “any” and “an” are indefinite, ambiguous, and often have the same meaning. Thus, the insurance company could not claim that one insured does not have negligence coverage relating to the intentional acts of a co-insured simply because the insurer added the letter “y” to a word in the policy. When a policy has a severability clause, Kansas law states that coverage for each insured is determined separately, and the exclusions in the policy are to be applied only against the party seeking coverage. The court was also influenced by the fact that the term “occurrence,” defined in the policy as an “accident . . . which results . . . in bodily injury or property damage” was ambiguous because “accident” was undefined in the contract. The court resolved the ambiguity in favor of the insured and allowed coverage for an insured sued for negligence resulting from the intentional acts of a co-insured.

## KENTUCKY

### *K.M.R. v. Foremost Ins. Group*, 171 S.W.3d 751 (Ky. Ct. App. 2005)

**Holding:** Policy containing exclusion for intentional acts “by any of [the insureds]” was unambiguous, and severability clause did not negate the operation of the exclusion.

A homeowner’s policy contained both a severability clause and an intentional acts exclusion, which precluded coverage for bodily injury “[r]esulting from any act or omission that is intended by any of you to cause any harm or that any of you could reasonably expect to cause harm.”

One of the insured homeowners was sued for negligence relating to a co-insured’s intentional acts. The court held that the phrase in the exclusion “by any of you” precluded coverage for the insured. Because the co-insured’s acts were intentional, the insured could not seek defense or indemnity from the insurer for claims arising out of those intentional acts by the co-insured. The court stated that the insurer had carefully drafted its exclusionary clause to ensure this result. The court also observed that there were several other plainly worded provisions pertaining to the co-insured’s specific behavior that precluded coverage as well.

## LOUISIANA

### *Stewart Title Guar. Co. v. Keifer*, 984 F. Supp. 988 (E.D. La. 1997)

**Holding:** Title insurer’s underlying claims against agency were potentially covered under errors and omissions policy, thus precluding summary judgment for the insurer.

Stewart Title, a title insurer, had an agency agreement with Charter Title. Charter filed bankruptcy, and it was then revealed that Charter’s escrow accounts were deficient. Stewart brought this action against various employees and attorneys of Charter to recover the deficiency. Stewart also asserted claims against various insurers, including Northfield, who had issued liability policies that arguably covered Stewart’s losses.

Section I(B)(6) of the policy excluded coverage for “[a]ny damages arising out of any intentional, dishonest, fraudulent, criminal or malicious act, error or omission by or on behalf of or at the direction of (1) the insured or (2) any employee regardless of whether or not qualifying as an insured.”

Stewart and the defendants argued that § I(B)(6) must be read in conjunction with the “Separation of Insureds” provision at § VII(g). Section VII(G) stated that:

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: 1. As if each named Insured were the only Named Insured; and 2. Separately to each Insured against whom ‘claim’ is made or ‘suit’ is brought.

The court stated that where the exclusion at issue uses the term “the insured,” the claims against an insured will not be barred from coverage “solely on the basis of the [excludable] acts of other insureds.” The court went on to state that inclusion of the language, “any employee regardless of whether or not qualifying as an insured,” did not dictate a different result. The court noted that the term “any employee” followed the term “the insured.” Thus, the court found that “any employee” must refer to “any employee” of “the insured” – namely, the insured claiming coverage for the particular claim at issue. Coverage for Stewart was therefore not excluded by the wrongdoing of Charter’s employees.

## MAINE

### *Johnson v. Allstate Ins. Co.*, 687 A.2d 642 (Me. 1997)

**Holding:** Despite containing a severability clause, the term “an insured” in intentional acts exclusion is interpreted as applying to “any insured,” and therefore coverage is precluded for an insured’s negligence related to the intentional acts of a co-insured.

An insured homeowner was sued for negligence relating to a co-insured’s intentional acts, and the plaintiff sought to collect her judgment from the homeowner’s policy. The policy contained an exclusion for injury “intentionally caused by an insured person” and a severability clause

stating that the policy “applies separately to each insured person.” The court held that because “an” is an indefinite article often used to mean “any,” the insurer unambiguously excluded coverage for intentional damages caused by “any” insured person. The court observed that the plaintiff made no claims that the insured’s negligence caused any damages other than those caused by the co-insured’s intentional acts, and the plaintiff therefore could not recover under the policy. In its holding, the court insisted that “[a]n unambiguous exclusion is not negated by a severability clause” and that it refused to rewrite the policy when the language was unambiguous.

## MASSACHUSETTS

***Lewis v. Executive Risk Indem., Inc.*, Civ. A. No. 00-CV-11093-RWZ (D. Mass. Dec. 28, 2001)**

**Holding:** Because of a severability or non-imputation clause, the insured’s coverage was not barred by an exclusion for claims arising from pending litigation to which he was not a party.

Executive Risk denied coverage to a former director and officer of a bankrupt company in an adversary proceeding on the grounds that the adversary proceeding arose from a securities lawsuit that was pending at the time the policy became effective. The policy excluded losses for any claims related to pending litigation or to litigation for which prior notice had been given pursuant to a previous policy. The insured, however, was not a party to the securities litigation and therefore argued that the pending litigation exclusion did not apply. The court found that the following severability clause modified the pending litigation exclusion: “No conduct of any insured person will be imputed to any other insured person to determine the application of any of the above exclusions”. Thus, the court found that when the adversary proceeding was filed there was no pending litigation filed against this insured because he was not a named defendant in the securities litigation, and the conduct of other directors or officers alleged in the pending securities litigation could not be used against him to bar coverage.

***Worcester Mut. Ins. Co. v. Marnell*, 496 N.E.2d 158 (Mass. 1986), *aff’d* by 795 N.E.2d 545 (Mass. 2003)**

**Holding:** Due to the severability clause in a policy, the term “any insured,” as used in policy’s automobile exclusion, applied only to the person seeking coverage.

A homeowner’s policy contained a severability clause and also included an automobile exclusion that precluded liability coverage for “bodily injury or property damage . . . arising out of the ownership, maintenance, [or] use [of] . . . a motor vehicle owned or operated by or rented or loaned to any insured.”

Richard and Ellen Marnell were the named insureds under the policy, and their son Michael was an unnamed insured. The Marnells allowed Michael, who was not old enough to legally drink alcohol, to have a party at their home. That evening, Michael drove while intoxicated and killed someone with a vehicle that he owned. The victim’s estate sued the Marnells for negligent

failure to supervise their son, and the Marnells demanded that their insurer defend the action. The court first held that the severability clause required treating each insured as having a separate insurance policy. Therefore, the term “insured” under the automobile exclusion applied only to the individual claiming coverage. The court accordingly held that because the Marnells did not own or operate the vehicle that killed the decedent, the automobile exclusion did not preclude liability coverage as to them. The court admitted that its holding rendered the word “any” in the exclusion superfluous. It stated, however, that a contrary construction of the policy would have rendered the entire severability clause meaningless and would not have best met the parties’ intent. The court noted that a negligent supervision theory is one distinct from the use or operation of a motor vehicle, and the Marnells could therefore have reasonably expected protection for this activity under their policy.

***Soc’y for Christian Activities v. Markel Ins. Co.*, 775 N.E.2d 1244 (Mass. App. Ct. 2002)**

**Holding:** Vacated lower court’s decision and ordered new judgment that policy exclusion for “any insured” was unambiguous and excluded coverage, even though policy contained a severability clause.

A church camp had a commercial general liability policy that excluded coverage of claims for “bodily injury . . . arising out of the ownership, maintenance, use or entrustment to others of any . . . ‘auto’ . . . owned or operated by . . . any insured.” It also contained a severability of interests clause under which the insurance applied “[s]eparately to each insured.”

A camp employee, who was also as an officer and director of the camp, was sued for negligence as a result of a camp-owned vehicle accident that injured a minor camper. The court found that the employee was acting in the scope of her employment and was therefore an insured under the policy. However, despite the existence of a severability clause, the court held that the policy clearly and unambiguously excluded coverage for the underlying tort claims, and the insurer had no duty to indemnify or defend the employee or the camp. The court made particular note that in this instance, as distinguished from *Worcester Mutual Insurance Company v. Marnell*, 496 N.E.2d 158 (Mass. 1986), the camp owned the vehicle that caused the injuries.

**MARYLAND**

***Standard Fire Ins. Co. v. Proctor*, 286 F. Supp. 2d 567 (S.D. Md. 2003)**

**Holding:** The language “any insured” created joint liability between the insured parties such that one party’s acts may result in exclusion of coverage for an innocent co-insured.

The Standard Fire Insurance Company brought this action against Mr. Proctor and his son Gary Proctor (the “defendants”) requesting judgment as a matter of law that it had no duty to defend and/or indemnify the defendants in an underlying tort action. The underlying tort action allegedly occurred when Mr. Lockhart stopped on the way to work to help Mr. Proctor, his wheelchair bound neighbor, exit his vehicle in front of Mr. Proctor’s home. Then Mr. Lockhart accidentally collided with the side of Mr. Proctor’s car. But before they could exchange

insurance information, Mr. Lockhart received an emergency call from work and attempted to explain to Mr. Proctor that he would return later to give him the insurance information. But, Mr. Proctor became agitated and called for his son Gary Proctor, who was inside the home. Mr. Lockhart alleged that Gary Proctor then appeared and, without explanation, began to beat him. Further Mr. Lockhart alleged that Mr. Proctor positioned his wheelchair so that Mr. Lockhart could not escape.

The court agreed with Standard Fire that Mr. Proctor was barred from coverage as a direct result of Gary Proctor's intentional actions. The policy's exclusionary language stated that personal liability coverage did not apply to bodily injury "which is expected or intended by any insured." The policy defined an "insured" as "you and the following residents of your household: a. relatives; b. any other person under the age of 21 who is in the care of any person named above." Gary Proctor resided at all relevant times in Mr. Proctor's household, and therefore was "an insured" under the policy.

The court interpreted the phrase "any insured" as unambiguously expressing "a contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured." The court agreed that a severability clause such as the one in the policy at issue ("each person described above is a separate insured under this policy") was "not inconsistent with the creation of a blanket exclusion for intentional acts." Thus, the court found that Standard Fire's insurance policy, which excluded from liability coverage "any insured" who "expected or intended" the bodily injury, precluded coverage for Mr. Proctor, where the injury resulted from the intentional acts of Gary Proctor, the co-insured.

## MICHIGAN

### *Gorzen v. Westfield Ins. Co.*, 526 N.W.2d 43 (Mich. Ct. App. 1994)

**Holdings:** Exclusions in parents' homeowner's insurance policy applied to preclude coverage of a negligent entrustment claim against the parents, despite a severability clause, where the parents' alleged claim for coverage was wholly derivative of the son's excluded claim, and the severability clause did not render the exclusions ambiguous.

Westfield Insurance Company ("Westfield") issued a homeowner's policy to the Hubbard family that excluded coverage for injuries arising from "(1) the use of a motor vehicle owned or operated by an insured; (2) negligent entrustment by an insured of a motor vehicle; and (3) statutorily imposed vicarious parental liability for actions of a child using a motor vehicle." The policy also contained a severability clause, which stated that: "This insurance applies separately to each insured. This condition will not increase our liability for any one occurrence." The Hubbard's son Tim was involved in a car accident in which his two passengers, Aaron and Nathan Gorzen, were killed. The decedents' parents, the Gorzens, filed suit against the Hubbards, for negligent parental control and supervision of their son. The Hubbards and the Gorzens filed a declaratory action against Westfield alleging that the severability clause prevented operation of the exclusion as to the Hubbards.

The court held “Because the Hubbards’ claim for coverage is wholly derivative of Tim’s claim, which is excluded under the policy, the Hubbards are not entitled to coverage.” The court also stated that “regardless of whether there is a severability clause, if an exclusion operates to preclude coverage for one insured’s actions, the exclusion also operates to preclude coverage for any claims deriving from that one insured’s actions.”

## MINNESOTA

### *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888 (Minn. 2006)

**Holding:** Reversed lower court’s summary judgment and found that exclusion for expected injuries did not operate against corporation because of a severability clause, even though the corporation’s sole shareholder, director, and officer may have had reason to expect the injury.

Travelers Indemnity issued commercial general liability and umbrella liability policies to Bloomington Steel & Supply Company. Both policies excluded coverage for bodily injury “expected or intended from the standpoint of the insured” and contained a severability clause stating that the policies applied “as if each Named Insured were the only Named Insured” and “separately to each insured against whom claim is made or suit is brought.” Cecil Reiners, Bloomington’s sole shareholder, director, and officer, intentionally struck an employee of another company, who then sued Bloomington. The court held that the language of the exclusion, which referred to “the insured” rather than to “an insured” or “any insured,” together with the severability clause, required that Travelers show that Bloomington itself expected the injury. The court further held that, on the limited record before the court, there was no evidence to warrant the imputation of Reiners’s expectation to Bloomington.

### *Metro. Prop. & Cas. Ins. Co. v. Miller*, 589 N.W.2d 297 (Minn. 1999)

**Holding:** Lower court reversed; the plain language of the policy excluded from coverage any injury in the form of sexual molestation, and there was no need to address the severability clause.

A child, B.M.F., by her parents, brought an action against former friends and neighbors Jennifer and Michael Miller for abuse that Michael Miller perpetrated against B.M.F. The lawsuit alleged that Jennifer Miller negligently failed to prevent the abuse. The Millers’ homeowner’s insurer sought to deny coverage to Jennifer Miller. The insurance policy, in the definitions section, excluded “the actual, alleged or threatened sexual molestation of a person” from the meaning of “Bodily Injury.” The policy also contained a severability clause: “Subject to the limit of liability, this insurance applies separately to each covered person or organization against whom claim is made or suit is brought.” The court of appeals opined that insurers cannot exclude coverage for sexual molestation without using language such as “arising out of” or “resulting from” sexual molestation. The court of appeals went on to conclude that the severability clause entitled Jennifer Miller to coverage, reasoning simply that “[b]y the plain language of [the severability] clause, Michael Miller’s conduct should not affect coverage for Jennifer Miller.” The Minnesota Supreme Court reversed, determining that “[t]he plain language of the policies provides no coverage for injury in the form of sexual molestation regardless of whether the

injury was caused by an insured or the injury could have been prevented by an insured.” The Supreme Court saw no need to address the issue of severability given its holding that the plain language of the policies precluded coverage for bodily injury in the form of sexual molestation.

***Am. Nat’l Fire Ins. Co. v. Estate of Fournelle, 472 N.W.2d 292 (Minn. 1991)***

**Holding:** A “household exclusion” in a homeowner’s policy did not preclude coverage for a named insured’s killing of his two children, where the children resided with the mother, also a named insured, and not with the father.

American National issued a homeowner’s policy to Robert Fournelle and his wife Joanne Grimsrud that excluded coverage for “bodily injury to you and any insured within the meaning of [the definition of ‘insured’],” where “‘you’ and ‘your’ refer to the ‘named insured’ . . . and the spouse if a resident of the same household,” and “‘insured’ means you and the following residents of your household: a. your relatives; b. any other person under the age of 21 who is in the care of any person named above.” The policy also contained a severability policy stating that the “insurance applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence.” Grimsrud later filed for divorce and obtained a court order granting her possession of the insured premises and excluding Fournelle therefrom.

The court noted that a “reasonable interpretation of [the severability clause] leads to the obvious and singularly correct conclusion that each insured must be treated separately, applying exclusions individually as to the insured for whom coverage is sought.” Because only Fournelle sought coverage under the policy, the exclusion focused only on Fournelle and those relatives who were residents of his household. “The doctrine of severability limits application of the exclusion to the insured claiming coverage and those deriving their insured status from that insured claiming coverage.” The court also found that the language in the policy was “at best, ambiguous” and therefore required construction against the insurer.

**MISSISSIPPI**

***Am. Guar. and Liab. Ins. Co. v. 1906 Co., 129 F.3d 802 (5th Cir. 1997)***

**Holding:** An agent’s expectation and intent were imputed to the principals so that an “intentional act” exclusion precluded coverage for negligent supervision of the agent by the principals, despite a severability clause.

American Guarantee and Liability Insurance Company (“American”) issued a commercial general liability policy to the 1906 Company, which excluded coverage for bodily injury or property damage “expected or intended from the standpoint of the insured.” The policy also contained a severability clause providing that the policy applied “[a]s if each Named Insured were the only Named Insured; and . . . [s]eparately to each insured against whom claim is made or ‘suit’ is brought.” The 1906 Company was sued for negligent supervision related to the tortious actions of an employee. In finding that coverage for the claims was excluded, the court held that “where negligence claims against an employer, such as negligent hiring, negligent

training, and negligent entrustment, are related to and interdependent on the intentional misconduct of an employee, the ‘ultimate question’ for coverage purposes is whether the employee’s intentional misconduct itself falls within [the intentional act exclusion].” The court noted that “the issue turns largely on principles of agency and imputed intent.”

## MONTANA

*Valentine-Radford, Inc. v. Am. Motorists Ins. Co.*, 990 S.W.2d 47 (Mo. Ct. App. 1999)

**Holding:** The policy excluded coverage for claims of conversion and negligence.

The exclusion clause in the policy provided:

This insurance does not apply to: . . . j. ‘Property damage’ to: . . . 4) Personal property in the care, custody or control of the insured.’

In this case, the court found that when the named insured on a policy of insurance is a corporation, the phrase “the insured” must be read to include not only the named corporate insured, but all of its employees as well. Finding that the alleged negligence occurred while the property was in the “care, custody or control” of an employee of the corporation, the court found that the exclusion clause applied. Thus, the claims were not covered or arguably covered under the policy and the insurer did not have a duty to defend.

*American Motorists Ins. Co. v. Moore*, 970 S.W.2d 876 (Mo. Ct. App. 1998)

**Holding:** Decedent’s relatives’ claim against decedent’s husband for her wrongful death was unambiguously precluded by a bodily injury exclusion, despite a severability clause.

American Motorists issued a homeowner’s insurance policy to Lloyd and Sherry Grass as named insured, which excluded “bodily injury to you or an Insured [as defined],” where “you” expressly referred to the named insured and “insured” meant “you and residents of your household who are: a. your relatives; or b. other persons under the age of 21 and in the care of any person named above.” The policy also contained a severability clause that provided that the “insurance applies separately to each Insured. This condition will not increase our limit of liability for any one occurrence.” After Lloyd killed Sherry, Sherry’s sons and mother sued Lloyd’s estate for wrongful death. The court found that the bodily injury exclusion applied because the wrongful death claim was predicated on bodily injury to Sherry, an insured. The court further found that the severability clause did not render the exclusion ambiguous.

## NEW HAMPSHIRE

### *Sciadone v. Steuk*, 512 A.2d 1108 (N.H. 1986)

**Holding:** Wrongful death claim by wife’s estate and son’s guardian against husband was unambiguously precluded by a bodily injury exclusion, despite a severability clause.

State Farm Fire and Casualty issued a homeowner’s policy to Walter and Fay Shankle, which excluded coverage for “bodily injury to you or any insured [as defined],” where “you” expressly referred to named insured, and “insured” was defined to include “you and the following residents of your household: a. your relatives; b. any other person under the age of 21 who is in the care of any person named above.” The policy also contained a severability clause that provided that the insurance “applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence.” Following the Shankle’s divorce and separation, Walter entered the home and killed Fay and injured her son. The court found that the bodily injury clause precluded coverage because Fay and her son were “insureds” under the policy. The court further found that the severability clause did not affect the analysis or render the exclusion ambiguous, noting that “[w]hatever its effects may be in identifying the nature of an insured interest and the extent of coverage, the clause has nothing to do with identifying the insureds.”

## NEW JERSEY

### *Michael Carbone, Inc. v. Gen. Accident Ins. Co.*, 937 F. Supp. 413 (E.D. Pa. 1996)

**Holding:** Under New Jersey law, automobile exclusion in commercial general liability policy unambiguously precluded coverage for car accident, despite a severability clause.

General Accident Insurance Company (“General”) issued a commercial general liability policy to Michael Carbone, Inc. (“Carbone”), which excluded coverage for injury “arising out of the ownership, maintenance, use or entrustment to others of any . . . ‘Auto’ . . . owned or operated by or rented or loaned to any insured.” The policy also contained a severability clause that provided that the “insurance applies: a. [a]s if each Named Insured were the only Named Insured; and b. [s]eparately to each insured against whom claim is made or ‘suit’ is brought.” Carbone was sued for a car accident involving one of its employees acting in the scope of employment, but operating the employee’s personal automobile. Noting that the distinction between “the insured” and “any insured” was “paramount,” the court held that the automobile exclusion was not affected by the severability clause and unambiguously precluded coverage of the claim.

### *Argent v. Brady*, 901 A.2d 419 (N.J. Super. Ct. App. Div. 2006)

**Holding:** Negligence claim against a day care operator’s son was unambiguously precluded by business pursuits exclusion, despite a severability clause.

New Jersey Manufacturers Insurance Company (“NJM”) issued a homeowner’s policy to Linda and Joseph Brady, which excluded coverage for injuries “[a]rising out of or in connection with a

business engaged in by an insured.” The policy also contained a severability clause that provided that the insurance “applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence.” The Bradys ran a day care service from their home. One of their infant charges was injured by a dog allegedly belonging to the Bradys’ son. The court found that the business pursuits exclusion precluded coverage because the day care was a business engaged in by an insured. The court noted that “the insurer’s use of the phrase ‘an’ insured can be reasonably understood only as encompassing a business engaged in either by Linda, her husband Joseph or her son Michael, the three persons to whom homeowner’s protection was, in general terms, offered under the policy at issue. Courts have uniformly held that the use of the article ‘an’ in this context is not susceptible to any other meaning, and in this context cannot be deemed synonymous with ‘the.’”

## NEW YORK

*Steadfast Ins. Co. v. Stroock & Stroock & Lavan LLP*, 277 F. Supp. 2d 245 (S.D.N.Y. 2003), *aff’d*, 108 F. App’x 663, 2004 WL 1759133 (2d Cir. Aug. 5, 2004)

**Holding:** Severability clause did not preclude imputation of knowledge from one attorney to entire firm, where the operation of the severability clause was limited to the determination whether coverage applied, and not to the determination of liability.

Steadfast Insurance issued a professional liability policy to Stroock & Stroock & Lavan LLP (“Stroock”), which excluded coverage for knowing wrongful acts and unlawful gain. The policy also contained a severability clause that provided that “no fact pertaining to or knowledge possessed by any Insured shall be imputed to any other Insured to determine if coverage applies.” Stroock was sued under various causes of action, each of which alleged knowing wrongful acts or unlawful gain. The court held that because the suit “alleged that Stroock itself – rather than the partners or associates employed by the firm – engaged in knowingly wrongful conduct and that Stroock received a profit or advantage to which it was not legally entitled, there is no question as to whether coverage applie[d]. Thus, the issue of whether knowledge can be imputed from one insured to another [was] irrelevant. Stroock’s liability depended solely upon whether the conduct and knowledge of Stroock’s attorneys could be imputed to Stroock under the traditional agency principle of respondent superior.”

## NORTH DAKOTA

*Northwest G.F. Mut. Ins. Co. v. Norgard*, 518 N.W.2d 179 (N.D. 1994)

**Holding:** Reversed lower court and held that sexual molestation exclusion in home day-care coverage endorsement precluded coverage for day-care operator in tort claim brought by parents of a child molested by the operator’s husband.

Northwest issued a homeowner’s policy to Jean and Ray Norgard, including an additional endorsement for the day-care operated by Jean. Jean was sued as a result of Ray’s molestation of

one of the day-care's charges. The policy excluded coverage for injuries "arising out of sexual molestation . . . inflicted upon any person by or at the direction of an insured, an insured's employee or any other person involved in any capacity in the day care enterprise." The policy also contained a severability clause that provided that the insurance "applies separately to each insured except with respect to the Limit of Liability."

After observing that several "jurisdictions that have attempted to reconcile severability clauses and exclusionary clauses have not done so uniformly" and noting that it "doubted that a layperson would agree that the choice of articles [in the exclusion] renders [the] exclusion free from ambiguity," the court held that the "unique language" of the exclusion decided the matter. The exclusion did not "pertain only to the acts of an insured, but also to the acts of 'an insured's employee or any other person involved in any capacity in the day care enterprise.'" The court noted that Ray was no stranger to the day care because it was operated in his house, in which he lived and was present daily. The court found that the parties' clear intent was to preclude coverage for anyone connected with the operation of the day care who committed sexual molestation of a child. Thus, the "sexual molestation clause [was] clear on its face: no coverage [was] provided where anyone connected with the operation of the day care commit[ted] an act of sexual molestation."

## OHIO

### *United Ohio Ins. Co. v. Metzger*, No. 12-98-1, 1999 WL 84201 (Ohio Ct. App. Feb. 8, 1999)

**Holding:** Negligence claim against a business operator's wife was unambiguously precluded by a business pursuits exclusion, despite a severability clause.

United Ohio issued a homeowner's policy to John and Karen Metzger, which excluded coverage for injuries "[a]rising out of or in connection with a business engaged in by an insured." The policy also contained a severability clause that provided that the insurance "applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence." John Metzger owned a building supply company, in connection with which he maintained a fuel tank at the Metzger's private residence. The tank subsequently exploded and injured a third party. The court found that the business pursuits exclusion precluded coverage for Karen, regardless of the fact that she was not personally involved with the business. The court held that "here the use of the word 'an' before the word 'insured' does not identify the insured whose act must cause the condition excluding coverage. Therefore, it is immaterial that Karen did not contribute to the business use of the fuel tank at her residence. The policy simply does not differentiate as to which insured must cause an unauthorized risk to occur before coverage is precluded. Once an unauthorized risk is caused by "an" or any insured, no coverage is owed."

## OKLAHOMA

***BP Am., Inc. v. State Auto Prop. & Cas. Ins. Co.*, No. 102,299, 2005 WL 2277810 (Okla. Sept. 20, 2005)**

**Holding:** (1) The term “any insured” in an auto liability exclusion clause excluded from coverage all auto-related occurrences of any insured, and (2) “auto liability exclusion” and “separation of insureds” clause did not create ambiguity in policy that warranted further interpretation by the reviewing court.

The insured filed this suit against the insurer seeking recovery under its general liability policy for settlement monies paid to plaintiffs in the underlying personal injury and wrongful death suits. In interpreting the policy language at issue, the court stated, “Usage of the term ‘any insured’ in an exclusionary clause clearly and unambiguously indicates that coverage will be denied to all insureds – even innocent parties.” The court went on to note that “inclusion of a severability clause in an insurance policy does not render an otherwise clear and unambiguous exclusionary clause questionable.” Thus, the court stated, “In the context of exclusionary language relating to ‘any insured,’ the majority determines that the severability clause’s only effect is to alter the meaning of the term ‘the insured’ to reflect who is seeking coverage.” The separation of insureds clause had no effect on the clear language of the exclusionary clause because the “purpose of severability is not to negate plainly worded exclusions.”

## OREGON

***Ristine v. Hartford Ins. Co. of the Midwest*, 97 P.3d 1206 (Or. Ct. App. 2004)**

**Holding:** Sexual molestation exclusion unambiguously precluded coverage in tort claim brought by mother of a child allegedly molested, despite a severability clause.

Hartford issued a homeowner’s policy to David and Carol Purcell. The policy excluded coverage for injuries “arising out of sexual molestation.” The policy also contained a severability clause that provided that the insurance “applies separately to each insured.” Carol was sued as a result of David’s alleged molestation of an overnight guest at the Purcell’s home. Noting that the “policy refers to claims arising out of sexual molestation without reference to any limitation as to who committed the act of molestation,” the court held that “the exclusion [was] based on the nature of the act, not the identity of the actor.” The court stated, “Even though the homeowner’s policy applies separately to David and Carol Purcell, the fact remains that the policy that separately applies to them contains an exclusion for bodily injury ‘arising out of sexual molestation.’ There is nothing in the wording of the severability provision itself that remotely suggests that it affect the substance of any provisions concerning coverage or exclusions.”

PENNSYLVANIA

***Brown & Root Braun, Inc. v. Bogan, Inc.*, 54 F. App'x 542, 2002 WL 31746554 (3d Cir. Dec. 5, 2002)**

**Holding:** Employee injury exclusion unambiguously precluded coverage for a negligence claim, despite a severability clause.

Home Insurance issued a commercial liability policy to Bogan, Inc. (“Bogan”), a subcontractor to Brown & Root Braun, Inc. (“B&R”). The policy excluded coverage for injuries to an “employee of the insured.” The policy also contained a severability clause that provided that the “insurance applies: a. [a]s if each Named Insured were the only Named Insured; and b. [s]eparately to each insured against whom claim is made or ‘suit’ is brought.” B&R sued Home seeking coverage under Bogan’s policy as an “additional insured” for Bogan employee claims arising from an incident in a B&R project in which Bogan was a subcontractor. Following Pennsylvania Supreme Court precedent, although noting later lower-court precedent to the contrary, the court held that the severability clause, even if ambiguous in itself, did not prevent the operation of the unambiguous employee exclusion.

***Strouss v. Fireman’s Fund Ins. Co.*, No. Civ. A. 03-5718, 2005 WL 418036 (E.D. Pa. Feb. 22, 2005)**

**Holding:** The severability clause in the policy did not modify or render ambiguous the intentional injury exclusion.

Jay Strouss sought a declaration that Fireman’s Fund had a duty to defend and indemnify him in an underlying civil action according to the terms of a homeowner’s policy issued to Mr. Strouss by Fireman’s Fund. The underlying action involved allegations of negligence on the part of Mr. Strouss in failing to safeguard the gun that his son used to shoot another person. Fireman’s fund argued that it was entitled to summary judgment because the intentional injury exclusion in the policy barred coverage. Mr. Strouss argued, *inter alia*, that the severability clause in the policy defeated, or, in the alternative, rendered ambiguous the intentional injury exclusion. The court noted that it is well-settled that an intentional injury exclusion, applicable only to “the insured,” permits an innocent (or negligent) insured to recover losses caused by bodily injury intended by a co-insured. But the exclusion clause in the policy at issue in this case applied to “one or more insured[s].”

The court went on to state that it is equally well-settled that where an intentional injury exclusion applies by its terms to “any insured” or “one or more insured[s],” an innocent insured is precluded from recovering losses related to contractually proscribed conduct by a co-insured. The court observed that there was no Pennsylvania Supreme Court case that addressed whether a severability clause narrows the scope of an intentional injury exclusion, applicable to “one or more insureds,” so that intentional injury caused by one insured will not defeat coverage for the non-intentional conduct of all additional insureds. Yet, the court pointed to a Pennsylvania Superior Court case that addressed the issue and held that the clear language of the exclusion prescribed joint obligations for the policy’s insureds, regardless of whether each named insured

was defined as a “separate insured” pursuant to the policy’s severability clause. Mr. Strouss provided no Pennsylvania law to the contrary, but he did bring forth contrary case law from other jurisdictions. The court agreed that the sheer volume of conflicting judicial interpretations concerning the interplay between an exclusion applicable to “any insured” and a severability clause provided some evidence of ambiguity. Still, the court declined to overrule the previous Superior Court decision, and refused to find that the severability clause rendered the “one or more insured” language in the policy ambiguous as a matter of law.

## **SOUTH DAKOTA**

### ***EMCASCO Ins. Co. v. Diedrich*, 394 F.3d 1091 (8th Cir. 2005)**

**Holding:** Intentional acts exclusion in home day-care coverage endorsement precluded coverage for day-care operator in tort claim brought by parents of a child molested by the operator’s son, despite a severability clause.

EMCASCO issued a homeowner’s policy to Edith and Wayne Diedrich, including an additional endorsement for the day-care operated by Edith. The policy excluded coverage for injuries “expected or intended by one or more ‘insureds’ . . . [or] arising out of sexual molestation.” The policy also contained a severability clause that provided that the insurance “applies separately to each insured except with respect to the Limit of Liability.” Edith was sued as a result of her son’s molestation of one of the day-care’s charges. Noting that the language of the intentional acts exclusion had been modified from “the ‘insured’” to “one or more ‘insureds’” by a rider to the policy, the court concluded that the exclusion applied to all claims that arose out of an intentional act committed by any one or more of the insureds. The court held that the severability clause did not create any ambiguity in the exclusion.

## **TEXAS**

### ***State Farm Fire & Cas. Ins. Co. v. Keegan*, 209 F.3d 767 (5th Cir. 2000)**

**Holding:** Household exclusion that precluded coverage for “an insured” as defined in the policy was rendered ambiguous by a severability clause in the policy, and thus of no effect.

State Farm issued a homeowner’s policy to Russell and Linda Green, which excluded coverage for “bodily injury to you or an insured [as defined],” where “you” was defined to mean the named insured and “insured” was defined to mean “you and residents of your household who are: a. your relatives; or b. other persons under the age of 21 and in the care of any person named above.” The policy also contained a severability clause that provided that the “insurance applies separately to each insured.” Jaclyn Green Keegan and her daughter Diana Green lived with the Greens, Jaclyn’s parents and, after the Greens’ divorce, Jaclyn and Diana continued to live with Linda. Jaclyn sued Russell’s estate after he negligently caused injury to Diana. Jaclyn argued that the severability clause operated so that Diana was not an ‘insured’ with respect to Russell, and therefore did not fall within the household exclusion. The court found that “[g]iven the

conflicting interplay between the definition of the term ‘insured,’ the meaning of the phrases ‘the insured’ and ‘an insured,’ and the severability clause, . . . as a matter of law . . . the policy language is ambiguous.” The court therefore construed the policy in favor of coverage, consistent with Texas’ public policy.

***Bituminous Cas. Corp. v. Maxey*, 110 S.W.3d 203 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)**

**Holding:** Automobile exclusion in commercial general liability policy unambiguously precluded coverage for truck accident, despite a severability clause.

Bituminous Casualty issued a commercial general liability policy to L&R Timber Company, Inc. (“L&R”) and Triple L Express, Inc. (“Triple L”), which excluded coverage for injury “arising out of the ownership, maintenance, use or entrustment to others of any . . . ‘Auto’ . . . owned or operated by or rented or loaned to any insured.” The policy also contained a severability clause that provided that the “insurance applies: a. [a]s if each Named Insured were the only Named Insured; and b. [s]eparately to each insured against whom claim is made or ‘suit’ is brought.” L&R and Triple L were sued for a truck accident involving an employee of Triple L driving a trailer belonging to L&R. Noting Texas precedent construing “the insured” and “any insured,” the court held that the “effect of the separation of insureds clause on a particular exclusion in an insurance contract . . . depends on the terms of the exclusion. If the exclusion clause uses the term ‘the insured,’ application of the separation of insureds clause requires that the term be interpreted as referring only to the insured against whom a claim is being made under the policy. If, however, the exception clause uses the term ‘any insured,’ then the application of the separation of insureds clause has no effect on the exclusion clause; a claim made against any insured is excluded.”

## UTAH

***W. Am. Ins. Co. v. AV & S*, 145 F.3d 1224 (10th Cir. 1998)**

**Holding:** Automobile exclusion in commercial liability policy precluding coverage for automobiles owned by “any insured” was rendered ambiguous by a severability clause, and thus of no effect.

West American issued a liability policy to AV & S, Inc. (“AV & S”), which excluded coverage for injury “arising out of the . . . use . . . of any . . . ‘auto’ . . . owned or operated by or rented or loaned to any insured.” The policy also contained a severability clause that provided that the “insurance applies: a. [a]s if each Named Insured were the only Named Insured; and b. [s]eparately to each insured against whom claim is made or ‘suit’ is brought.” An employee of AV & S negligently struck a pedestrian while on company business delivering a pizza. The pedestrian’s custodian sued. After noting conflicting interpretations of “any insured” with respect to severability clauses in various jurisdictions, the court found that “[g]iven the conflicting interpretations of the interplay between a severability clause and an exclusion clause

using the term ‘any insured,’” the policy was ambiguous, and therefore was to be construed in favor of the insured under Utah law.

## VIRGINIA

### *Gov’t Employees Ins. Co. v. Moore*, 580 S.E.2d 823 (Va. 2003)

**Holding:** Reversed lower court and held that coverage of an automobile accident claim under an umbrella liability policy was unambiguously precluded by a household exclusion in the policy, despite a severability clause.

Government Employees Insurance Company (“GEICO”) issued an umbrella liability policy to Holmes and Maude Moore, which excluded coverage for “[p]ersonal injury to any insured.” The policy also contained a severability clause. Maude negligently caused a car accident in which Holmes, a passenger in the Moore’s vehicle, was injured. Holmes sued Maude for negligence, in what amounted to a suit by the Moores against GEICO. Noting Virginia precedent that a severability clause may prevent an insurer from denying coverage for a permissive user of an automobile as an “insured,” in order to protect a member of the public from injury by the permissive user, the court found that the severability clause did not affect the personal injury exclusion or render it ambiguous here, where the “obvious intention of the parties” was to exclude coverage for personal injury to any insured, and Holmes was not a member of the general public, but a holder of the policy.

## WASHINGTON

### *Truck Ins. Exch. v. BRE Props.*, 81 P.3d 929 (Wash. Ct. App. 2003)

**Holding:** Severability clause operated to prevent the application of an exclusion referring to “the insured” in a commercial general liability policy.

Truck Insurance Exchange (“Truck”) issued a commercial general liability policy to West Star Construction (“West Star”), a subcontractor to BRE Properties (“BRE”), covering West Star and BRE. The policy contained a complicated exclusion provision that repeatedly used the term “the insured.” The policy also contained a severability clause that provided that the “insurance applies: a. [a]s if each Named Insured were the only Named Insured; and b. [s]eparately to each insured against whom claim is made or ‘suit’ is brought.” A West Star employee sued BRE for negligence, and BRE subsequently sued West Star and sought coverage under the policy issued by Truck. Noting prior Washington decisions to this effect, the court held that “[w]hen an insurance policy contains an exclusion for ‘the insured,’ each insured is entitled to read the policy as if applying only to that insured.” The court found that the “policy clearly only excluded coverage for employees of ‘the insured’ (BRE), and not ‘an insured’ (West Star). Because the injured worker was not an employee of BRE, BRE is entitled to policy coverage for the claim.”

## WISCONSIN

### *Gulmire v. St. Paul Fire & Marine Ins. Co.*, 674 N.W.2d 629 (Wis. Ct. App. 2003)

**Holding:** Exclusions in a commercial automobile policy did not bar coverage due to a severability clause.

St. Paul issued a commercial automobile insurance policy to Fox Valley Auto Auction (“Fox Valley”), which contained “fellow employee,” “employer’s liability,” and “worker’s compensation” exclusions. The policy also contained a severability clause that provided that the policy applied “to each protected person named in the Introduction as if that protected person was the only one named there; and separately to each other protected person.” While acting in the scope of employment, Fox Valley employee Floyd Klister drove a vehicle into co-employee Mary Gulmire. Gulmire sued Fox Valley and St. Paul refused coverage on the basis of the three exclusions. The fellow employee exclusion precluded coverage for “bodily injury to a fellow employee of any protected person arising out of and in the course of the fellow employee’s employment by you.” The court applied the severability clause so that the exclusion effectively read: “bodily injury to a fellow employee [Gulmire] of any protected person [Klister] arising out of and in the course of the fellow employee’s [Gulmire’s] employment by you [Klister].” The court thus found that the exclusion did not apply because Klister was not Gulmire’s employer. The court found that the employer’s liability exclusion, which addressed “bodily injury to an employee arising out of his or her employment by a protected person” was similarly inapplicable. The employer’s liability exclusion precluded coverage for “any obligation that the protected person has under a worker’s compensation . . . law.” The court again found the exclusion inapplicable, noting that Klister, the “protected person” after application of the severability clause, was not an employer and had no worker’s compensation obligations. The court noted that the effect of the analysis was that the policy provided more coverage to Klister, an additional insured, than to the named insureds on the policy, and that such a result was not contrary to Wisconsin case law or policy.

### *Nw. Nat’l Ins. Co. v. Nemetz*, 400 N.W.2d 33 (Wis. Ct. App. 1986)

**Holding:** Lower court affirmed; a negligent insured could not be excluded from coverage by the intentional acts of her co-insured.

Husband and wife were co-insureds on two property policies. The husband intentionally burned down the insured property, resulting in the destruction of a neighboring property as well. In the underlying trial, the wife was found negligent with respect to the damage to the neighboring property. The wife sought liability coverage for the damage to the neighboring property, but the insurers contended that coverage was excluded by the policies’ intentional acts exclusions. One policy excluded coverage for “damage expected or intended by *an* insured,” and the other policy excluded coverage for “damage expected or intended by *the* insured.” Each policy contained a severability clause, which read: “This insurance applies separately to each insured person against whom a claim or suit is brought, subject to our limits of liability for each occurrence.” The court found the “an insured” policy ambiguous “because the severability clause creates a reasonable expectation that each insured’s interests are separately covered, while the exclusion clause

attempts to exclude coverage for both caused by the act of only one.” The court concluded that the policy should therefore be construed against the insurer, reasoning that “[w]e cannot release an insurer from a risk that may have been excluded through more careful contract drafting.” The court went on to determine that the “the insured” policy “clearly cannot exclude [the wife] from coverage simply because of [the husband’s] alleged intentional acts.” The court rejected the insurer’s argument that the wife should be excluded from coverage because she was not innocent with respect to the arson. The court noted that the wife was aware of and may have participated in a conspiracy to hire an arsonist to burn the property, but the court concluded that this scheme was abandoned and that there was no credible evidence that the wife had any involvement in the husband’s later plan to burn down the property himself. The insurer had thus failed to show that the wife was not innocent with respect to the arson.

***Jessica M.F. v. Liberty Mut. Fire Ins. Co., 561 N.W.2d 787 (Wis. Ct. App. 1997)***

**Holding:** Intentional acts exclusion barred homeowners’ liability coverage for one who knew or should have known of sexual abuse committed by spouse, despite severability clause, and regardless of whether policy included sexual misconduct exclusion.

The complaint alleged that for several years, the grandfather sexually abused his four grandchildren. The complaint also alleged that the grandmother knew or, in the exercise of reasonable care, should have known that the grandfather was abusing the grandchildren. The grandchildren and their parents sought to establish coverage under their grandparents’ homeowner policies for these alleged injuries. The policy excluded coverage for injuries that were “expected or intended” by the insured. The insureds acknowledged that the intentional-acts exclusions precluded coverage for the grandfather’s acts, but they contended that the same exclusions did not preclude coverage for the alleged actions and/or inactions of the grandmother because each policy also included a severability clause. The court rejected this contention and noted that “sexual molestation of a minor falls within [the] category of intentional conduct ... substantially likely to cause injury so as to warrant an inference of an intent to injure.”

The court went on to find that the intentional-acts exclusion defeated coverage for the grandmother’s alleged conduct. In so finding, the court pointed out that the complaint alleged that the grandmother “knew or, in the exercise of reasonable care, should have known” of the grandfather’s sexual abuse of the grandchildren, and that they must assume that the facts pleaded were true. Thus, the court held that if the grandmother “knew” of her husband’s actions, then she “expected or intended” the harm to her grandchildren. The court went on to reject the insureds’ argument that the severability clause in the policy allowed an innocent spouse to retain coverage. The court noted that the grandmother allegedly knew or should have known, therefore she was not innocent with respect to the intentional damages resulting from the sexual abuse.

## WYOMING

### *Barnette v. Hartford Ins. Group*, 653 P.2d 1375 (Wyo. 1982)

**Holding:** An exclusion barring coverage for injuries to employees of the insured company did not exclude coverage for the president of the company because he was not the employer of the injured party.

The president of a corporation was sued and found liable in negligence for injuries sustained by another employee of the corporation when a corporate-owned truck rolled over the employee's legs as a result of brake failure. The president then sued the corporation's auto insurer for indemnity. The insurer moved for summary judgment based on the policy's cross-employee exclusionary clause, which read: "None of the following is an insured . . . (i) any person while engaged in the business of his employer with respect to bodily injury to any fellow employee of such person injured in the course of his employment." The policy also contained a severability clause: "'insured' means any person or organization qualifying as an insured in the 'Persons Insured' provision of the applicable insurance coverage. *The insurance afforded applies separately to each insured against whom claim is made or suit is brought*, except with respect to the limits of the company's liability." (emphasis in opinion) The court surveyed the case law from around the country and found that, absent a severability clause, courts had reached divergent conclusions as to whether an employee exclusion bars coverage for an additional insured who is not the employer of the injured party. The court noted that the public policy behind employee exclusions is to save the insured company money by excluding from coverage risks already insured against by purchase of workers' compensation insurance. This purpose, said the court, is not served by applying the employee exclusion to non-employer additional insureds. The court went on to find that the insurance industry itself had clarified the issue by adding severability clauses to standard automobile public liability policies. The court concluded that "[b]y this addition the policy clearly intends that the 'insured,' with whom we are at any given time concerned when applying the cross-employee exclusionary rule, must be held to be the insured seeking protection under the policy. If that insured is an employer whose employees are making a claim against him or her, the cross-employee exclusionary rule serves to preclude coverage. . . . If, on the other hand, the insured in question is *not* an employer who seeks policy protection from the claims of employees, then the cross-employee exclusionary rule cannot interfere with the coverage of that insured." Because the president was not the employer of the injured party, he was entitled to coverage under the auto policy.