

ORIGINAL

ON COMPUTER - JJ

IN THE SUPREME COURT OF OHIO

<b>Safeco Insurance Company of America,</b>	:	CONSOLIDATED CASE NOS.:
	:	<b>2008-0304 &amp; 2008-0403</b>
Plaintiff/Appellant,	:	
	:	On Appeal from the Hamilton County
v.	:	Court of Appeals, First Appellate
	:	District
<b>Federal Insurance Company, et al.</b>	:	
	:	Court of Appeals
Defendants/Appellees.	:	Case No. C-070074
	:	
	:	FILED UNDER SEAL PURSUANT
	:	TO COURT ORDER

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**REPLY BRIEF OF APPELLANT SAFECO INSURANCE COMPANY OF AMERICA**

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**FILED**  
 NOV 10 2008  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

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## I. INTRODUCTION

All our work, our whole life, is a matter of semantics, because words are the tools with which we work, the material out of which laws are made, out of which the Constitution was written. Everything depends on our understanding of them.

- Felix Frankfurter

This appeal presents two issues, each of which this Court determined to be of public or great general interest to the citizens of the State of Ohio.<sup>1</sup> Both issues focus on words. Words in two insurance contracts issued in 2002 by Safeco Insurance Company of America (“Safeco”) to Lance and Diane White. Words that are similar to those present in two insurance contracts issued by Federal Insurance Company and Pacific Indemnity Company (“Chubb”) to Lance and Diane White, which Chubb originally claimed excluded coverage for the Whites.<sup>2</sup> It is Safeco’s position that the words in its policies, when reasonably construed, are not ambiguous and exclude coverage for the negligence claims asserted against Mr. and Mrs. White as a result of the intentional, criminal, abusive<sup>3</sup> conduct of their son, Benjamin. Chubb claims that if this Court agrees with Safeco’s position it would “eviscerate insurance coverage” and an apocalypse of “ruinous liability” for derivative negligence claims will ensue.<sup>4</sup> Chubb is, of course, wrong and later undercuts its own argument by setting forth numerous examples of what it admits to be clear policy language which would exclude coverage for the Whites. So it is not really the result generally that bothers Chubb.

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<sup>1</sup> April 9, 2008 Entry in Case No. 2008-0304.

<sup>2</sup> Chubb’s Motion for Summary Judgment at p. 2; DJ, T.d. 43, Supplement at p. 143.

<sup>3</sup> Contrary to Chubb’s claim, Safeco included the physical abuse exclusion in its Brief and included reference to it in its argument about the reasonable expectations of parents with respect to the conduct of their children. Safeco’s Brief at pp. 23-24. Both cases cited by Chubb in footnote 28 of its Brief involve sexual conduct and fail to address how attempted murder and felonious assault are not commonly understood to be physical abuse. Ristine ex rel. Ristine v. Hartford Ins. Co. of Midwest (Ore. App. 2004), 195, Ore. App. 226, 97 P.3d 1206, cited in Safeco’s Brief, discussed the fact that a general severability condition does not make ambiguous an abuse exclusion worded similarly to that present in the Safeco policy. Id. at 1210. See, also, Hingham Mut. Fire Ins. Co. v. Smith (Mass. App. 2007), 69 Mass. App. Ct. 1, 865 N.E.2d 1168, 1173.

<sup>4</sup> Chubb’s Brief at pp. 8-9.

And it is not that Chubb will just not deny a claim. In fact, one of the cases cited in Safeco's Brief for the principle that a clearly worded exclusion is not made ambiguous by a severability condition, Yerardi<sup>5</sup> v. Pacific Indem. Co. (D. Mass. 2006), 436 F. Supp.2d 223, involved Chubb. So what is it that caused Chubb to change its position? Perhaps it was the large verdict. Perhaps it was the risk of having to cover punitive damages because Chubb's policies contain no exclusions for such coverage. Regardless, the point is that Chubb's overheated language simply distracts from the focus of this case: What do the words in Safeco's policy mean?

In briefing the two certified questions and related issues both Safeco and Chubb have addressed the issues raised by the second certified question first and Appellant will continue to do so in this Reply Brief. Additionally, because the Brief of Amici Curiae Vincent Bilgen and Gloria Louis does not address the second certified question, the discussion of the arguments asserted by Amici Curiae will be addressed only with respect to the first certified question.

## **II. REBUTTAL ARGUMENT BASED UPON THE SECOND CERTIFIED QUESTION AND SAFECO'S FIRST PROPOSITION OF LAW ACCEPTED FOR REVIEW**

In its first Proposition of Law Chubb claims that this Court can decide the issues raised by the second certified question by "following" Doe v. Shaffer (2000), 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243. This is incorrect because the holding in Doe is not about what the words in

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<sup>5</sup> Contrary to Chubb's arguments, Yerardi does support Safeco's position. Yerardi involved a fire loss claim on a Chubb policy which excluded coverage for "any loss caused intentionally by you" where "you" was defined to mean "the person named in the Coverage Summary, and a spouse who lives with that person." Id. at 248. The court then held that an innocent spouse could not recover if the loss had been intentionally caused by her husband. Id. The court went on hold that the provision in the policy stating that "coverage applies separately to each covered person" was irrelevant. Id. at 249. "There is nothing ambiguous or inconsistent about providing for separate coverage determinations, but requiring that certain obligations remain joint. \* \* \* Although [the policy] provides separate coverage to each covered person, it also clearly expresses an intent to \* \* \* preclude coverage for innocent co-insureds where the intentional misconduct of a covered person is involved." Id. citing to McAllister v. Millville Mut. Ins. Co. (Pa. Super. 1994), 433 Pa. Super 330, 640 A.2d 1283, 1288-89, a case which Chubb admits supports Safeco's position. Chubb's Brief at p. 22 fn. 41.

an insurance contract mean, it is about Ohio public policy.<sup>6</sup> Id. at syllabus. As the First District explained below:

We hold that Ohio public policy permits a party to obtain liability insurance coverage for negligence related to intentional conduct when that party does not commit the intentional act.

But holding that coverage is permitted by public policy is not the same as holding that coverage is available under the policies in this case. We agree with Safeco that Doe (and Automobile Club<sup>7</sup>) leave room for coverage to be excluded by the express terms of the policies. The question becomes whether the policies issued by Safeco did so.

Safeco Ins. Co. of Am. v. Federal Ins. Co. (Ohio App. 1 Dist.), 2007-Ohio-7068 at ¶¶11-12.

Nevertheless, Chubb is correct that Doe provides guidance on the above issue: it cites favorably to Silverball Amusement, Inc. v. Utah Home Fire Ins. Co. (W.D. Ark. 1994), 842 F.Supp. 1151, which states that, in the presence of a general severability condition, the way to make an exclusion enforceable for all claims arising from all intentional acts regardless of who committed them is to use the “an” or “any” insured language such as that included in the Safeco policies.<sup>8</sup>

After setting forth its first Proposition of Law, lathering on some invective and discussing the language present in Safeco’s policies (including the fact that Safeco is “ignoring” the general severability condition when Safeco devoted eight pages of briefing to it), Chubb begins its argument

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<sup>6</sup> Chubb misleadingly takes language from Doe regarding the intentions or expectations of a negligent insured controlling the coverage determination out of its context (public policy analysis). Brief at p. 17. Such tactics are merely an effort to avoid focusing on what the words in Safeco’s policies actually say and should be rejected.

<sup>7</sup> Automobile Club Ins. Co. v. Mills, 90 Ohio St.3d 574, 2001-Ohio-21, 740 N.E.2d 284.

<sup>8</sup> Recognizing the potential problem of asking this Court to follow a case that embraces such guidance, Chubb points out that the policy in All American Insurance v. Burns (C.A. 10 1992), 971 F.2d 438, cited by the Silverball court, does not contain a separation of insureds clause. Chubb’s Brief at p. 21, fn. 38. But this is irrelevant because the policy in Silverball did contain a general severability condition and the Silverball court provided the guidance about what language to employ to exclude claims like the Whites. Id. at 1158. This is particularly ironic considering that the language Chubb mentions earlier in its brief comes from Silverball.

by discussing what it claims to be the meaning of the general severability condition.<sup>9</sup> This gets the cart before the horse because the place to start to understand the meaning of the general severability condition is the history of that condition itself. What Chubb seems to lose sight of in its fit of hyperbolic language is that the position taken by Safeco in this case and the interpretation of the language used by Safeco in this case did not appear fully formed in the case at bar.

Rather, the general severability condition<sup>10</sup> in the Safeco policies and the interpretation of how that language interacts with the policy exclusions to preclude coverage for the claims against Mr. and Mrs. White are in accord with the history of the language being used, the case law of the courts of Ohio interpreting that language, and the majority of foreign jurisdictions which have evaluated these issues. In fact, Chubb's original position in this case was to file a Motion for Summary Judgment asking the trial court to determine that it did not owe a duty to defend or indemnify the Whites with respect to the claims in the case. All that changed when the jury returned its verdict. Chubb tries to explain away this change of heart on the basis that the jury found Lance and Diane White were "only negligent" and not liable for punitive damages. Chubb's Brief at pp. 2, 9. However, the negligent entrustment and supervision claims against Mr. and Mrs. White had been pending since the underlying suit was filed and Chubb's policies failed to exclude punitive

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<sup>9</sup> Chubb cites several non-Ohio cases in this portion of its Brief. But, as the history of the general severability condition shows, it is extremely important when reviewing cases which are claimed to support Chubb's position that the specific language in the exclusion be reviewed to determine if, in fact, the relevant exclusion is being subjected to a separate insured analysis based upon the presence of the terms "the insured." For example, Admiral Ins. Co. v. Trident NGL, Inc. (Tex. App. 1999), 988 S.W.2d 451 and Commercial Union Ins. Co. v. State Farm Fire & Cas. Co. (D. Colo. 1982), 546 F.Supp. 543, both deal with "the" insured type exclusions. Commercial Union even states how to change the case's outcome using different language. "Had Commercial Union actually intended that the misconduct of any insured would void the policy, it could have unambiguously drafted such language." Id. at 545.

<sup>10</sup> The general severability of insurance language occurs in both Safeco policies not in the portion of the contracts setting forth coverages but in a separate section termed "Liability Conditions" or "Conditions." DJ, T.d. 2 at Ex. 1 and 2; Supp. at pp. 30, 54.

damages, unlike the Safeco policies. At a minimum, Chubb has been on both sides of this issue during the pendency of these proceedings.

Returning to the history of the general severability condition, Chubb confuses the guidance provided by two articles authored by Norman E. Risjord and June M. Austin in 1955 and 1961 entitled “Who is ‘The Insured’”<sup>11</sup> and “Who is ‘The Insured’ Revisited”<sup>12</sup> treating the articles as if they discuss the interaction of “an” or “any” insured language with the then newly emerging general severability condition. Although it should be self-evident from the titles of the articles, the authors are discussing the addition of a new condition labeled “Severability of Interests”<sup>13</sup> to insurance policies which exclusively referred to the term “insured” or “the insured” in standard liability policies in the late 1950s and early 1960s.<sup>14</sup> The authors stated:

As a result, in 1954, the present writers, in “Who is ‘The Insured’”, asserted that “the insured” was *only* the person claiming coverage. The 1955 revisions of the standard provisions promulgated by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau carried a new condition labeled “Severability of Interests”, intended to express the purpose formerly implied and to avoid further erroneous decisions on this subject. The 1956 and 1958 standard family automobile policies and the 1959 special and package automobile policies \* \* \* expressed the purpose even more clearly.<sup>15</sup>

After the 1955 introduction of “Severability of Interest”, the present writers in a later version of “Who is the Insured” reasserted their earlier position, pointing out that the 1955 severability of interest

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<sup>11</sup> (1955), 24 U. Kan. City L. Rev. 65.

<sup>12</sup> (1961), 28 Ins. Counsel J. 100.

<sup>13</sup> The first Severability of Interests provision stated: “The term ‘the insured’ is used severally and not collectively, but the inclusion herein of more than one insured shall not operate to increase the limits of the company’s liability.” Who is ‘The Insured’ at 65, fn 2.

<sup>14</sup> “All liability policies use the word ‘insured.’ Most liability policies afford insurance to persons other than the policyholder, and they usually designate such other persons as ‘insured.’ Where the intention is to make reference to the policyholder alone he is designated as ‘named insured,’ but where the intention is to make reference to either the named insured or some other insured, as circumstances require, the designation is ‘the insured.’” Who is ‘The Insured’ at 65.

<sup>15</sup> This marks the emergence of the specific language used in the Safeco policies.

condition merely reaffirmed the previous intention of the underwriters.

Id. at 101.

What Risjord and Austin make clear is that the general severability condition present in the Safeco policies issued in 2002 was first placed in insurance policies beginning in 1959 in order to correct and clarify that where the term “the insured” appears in a policy, it is not intended to be applied collectively.<sup>16</sup> Chubb also cites to a portion of the 1961 Risjord and Austin article for this conclusion. Chubb’s Brief at p. 15. Thus, the presence of a general severability condition in a policy in no way creates ambiguity with respect to the use of the terms “an<sup>17</sup> insured” or “any insured” in the policy. It does not even apply to them. It only applies to language in the policy which uses the term “the insured.”<sup>18</sup> While the majority of exclusions present in Safeco’s policies

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<sup>16</sup> This conclusion echoes a passage from Taft v. West American Ins. (Ohio App. 11 Dist.), 1999 Ohio App. LEXIS 853 at 5, cited in Safeco’s Brief. Chubb’s argument that the outcome in Taft would be different if the policy contained a severability provision applicable to the applicable type of coverage is simply erroneous. The Taft Court never reached the issue of the impact of the severability provision because it was not applicable to the coverage at issue. Bocook v. Sandy & Beaver Valley Farmers Mut. Ins. Co. (Ohio App. 4 Dist), 2002-Ohio-6307 was not cited in Safeco’s Merit Brief.

<sup>17</sup> Safeco notes that Chubb devotes a portion of its Brief to claiming ambiguity is present in the words “an” and “any” when they are used to modify “insured” whether a general severability clause is present or not. Brief at pp. 28-30. Chubb cites no Ohio case law to support its argument despite the existence of the Taft, *supra* and United Ohio Ins. Co. v. Metzger (Ohio App. 3 Dist.), 1999 Ohio App. LEXIS 920, decisions from Ohio which hold to the contrary. Chubb then disingenuously distinguishes three foreign cases supporting Safeco’s position on the basis that two of them don’t contain a general severability condition and the one that does dealt with a business risks exclusion. This makes no sense since Chubb began the argument claiming ambiguity existed in “an” or “any” insured whether a general severability condition was present or not. Moreover, this argument is particularly unpersuasive in light of the history of the interaction between “the” insured and the general severability condition as outlined by Risjord and Austin.

<sup>18</sup> At another point in its Brief, Chubb quotes Risjord and Austin from 1955 article foreshadowing the changes carriers would later make to preclude coverage for all insureds when any insured committed an assault and battery. Brief at p. 21. Yet Chubb tries to apply the quote as though Risjord and Austin were discussing “an” or “any” insured language. Chubb’s position is misguided.

This same problem occurs again when Chubb cites to Risjord and Austin’s 1955 article in claiming that an insurance company’s use of an “omnibus” clause contracts coverage for the named

reference “an” or “any” insured, both policies also have exclusions which use the term “the insured.”<sup>19</sup> This is the reason the general severability condition is still present in Safeco’s policies.<sup>20</sup>

Chubb even challenges Safeco’s reliance on Phoenix Assurance Co. v. Hartford Ins. Co. (Colo. Ct. App. 1971), 29 Colo. App. 548, 488 P.2d 206 for the proposition that a general severability condition was added to standard policies in 1955 to clarify that “the insured” did not mean “any insured” under the policy. Safeco’s reliance is well supported. The Phoenix court stated: “Prior to 1955, the majority of cases held, that the word ‘insured’ meant any insured under the policy. In 1955, to clarify the matter, a severability clause was added to the standard automobile insurance policy. The Hartford policy contains such a clause.” Id. at 207.<sup>21</sup>

As the foregoing discussion illustrates, there is no ambiguity with respect to “an” or “any” insured created by the presence of the general severability condition when one understands the history of that condition. This makes Chubb’s discussion of majority and minority positions on this issue simply a red herring. As a practical matter, the history of the general severability condition demonstrates that there is not a majority and a minority position but rather that there is a right and a wrong conclusion to reach with respect to the impact of the general severability condition on “an”

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insured. Chubb’s Brief at pp. 30-32. Ben’s coverage has precisely the same terms as that of his parents. “A caveat against any mental block based upon the unsound economic theory that the omnibus [additional] insured who did not pay the premium should not have “more coverage” than the named insured who did pay the premium. The theory is unsound because the coverage for the omnibus insured is not more than, but rather equal to, the coverage for the named insured \* \* \*.” Who is ‘The Insured’ Revisited at 107.

<sup>19</sup> DJ, T.d. 2 at Ex. 1 p.15 and 2 p. 13 back; Supp. at pp. 29, 53 back.

<sup>20</sup> This is the answer to the “puzzle” Chubb claims exists about why the general severability condition is present in Safeco’s policies. Chubb’s Brief at p. 15. This also demonstrates the falsity of Chubb’s claim that Safeco simply elected to change every use of “the insured” to “an” or “any insured” and neglected to remove the general severability provision. The language was carefully chosen to reflect the desired outcome and has a definite legal meaning. See Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 219, 2003-Ohio-5849, 797 N.E.2d 1256.

<sup>21</sup> Perhaps Chubb had trouble locating this passage because Safeco pinpoint-cited only in the Pacific 2d Reports while Chubb apparently relied upon only the Colorado Appellate Reports.

or “any” insured exclusionary language.<sup>22</sup> This is why Allan D. Windt’s treatise states unequivocally: “[I]t has been held that an “any insured” exclusion will be treated like a “the insured” exclusion if the policy contains a severability clause; that is, a provision stating that the ‘insurance applies separately to each insured.’ Such a holding is not justifiable. A severability clause provides that each insured will be treated independently under the policy. The fact remains, however, that as applied even independently to each insured, an ‘any insured’ exclusion unambiguously eliminates coverage for each and every insured.” Insurance Claims and Disputes: Representation of Insurance Companies and Insureds §11:8 5<sup>th</sup> Edition 2007 (emphasis added). Chubb never even discusses this recent treatise.

Instead Chubb complains that the general principles of contract interpretation set forth in Safeco’s Brief are incomplete because they did not include a requirement that exclusions be construed narrowly. Chubb’s Brief at p. 15. Yet Chubb’s position assumes ambiguity exists in the exclusion and is incorrect. If the words in the exclusion are clear and unambiguous then the exclusion speaks for itself. As was set forth in Safeco’s Brief, a contract is unambiguous if it can be given a definite legal meaning which avoids rendering words in the contract meaningless or unnecessary.<sup>23</sup> Chubb’s interpretation of the policy exclusions would make the words “an” and “any” as used to modify “insured” meaningless. Chubb’s own cases admit this is true.<sup>24</sup> Ohio law

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<sup>22</sup> This severely undermines Chubb’s Second Proposition of Law under the Second Certified Question because, by Chubb’s faulty logic, as soon as one foreign jurisdiction gets it wrong, then Ohio courts have no choice but to get it wrong too. That cannot be what this Court intended in George H. Olmsted & Co. v. Metropolitan Life Ins. Co. (1928), 118 Ohio St. 421, 161 N.E. 276 which dealt solely with the question “whether the standard mortgage clause is to be construed as a covenant or whether it is to be construed as a condition.” Id. at 426.

<sup>23</sup> Westfield Ins. Co. v. Galatis, supra; Wohl v. Swinney 118 Ohio St.3d 277, 2008-Ohio-2334, ¶22, 888 N.E.2d 1062.

<sup>24</sup> A “seminal” 21 year old case relied upon by Chubb in its Brief, Worcester Mut. Ins. Co. v. Marnell (Mass. 1986), 496 N.E.2d 158, candidly acknowledges that its construction of the policy at issue in that case rendered the word “any” in the phrase “any insured” meaningless. Id. at 161.

thus requires this Court reject Chubb's argument and attempt to harmonize the provisions of the contract including the severability provision with all of the language present in the exclusions. Chubb responds "That is not so because [the exclusion] would still exclude coverage for damages from the intentional act of 'an insured' or 'any insured'." But Chubb is incorrect because "an" and "any" do not mean "the". Despite Chubb's arguments to the contrary, harmonization is clearly possible. This is because a general severability condition does not make the "an" or "any" insured language referenced above ambiguous.<sup>25</sup>

Chubb next turns to the Ohio cases which have addressed this issue and attempts to make the argument that Ohio cases are all in accord in their treatment of a general severability condition with one exception - United Ohio Ins. Co. v. Metzger, *supra*. Safeco agrees with Chubb that Ohio cases generally are in agreement in how they address this issue. However, it is Safeco's position that the First District's Decision below is the outlier.<sup>26</sup>

Buckeye Union Ins. Co. v. Phillips (Ohio App. 3 Dist.), 1986 Ohio App. LEXIS 7809 and Havel v. Chapek (Ohio App. 11 Dist.), 2006-Ohio-7014, discretionary appeal not allowed 2007-

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Another of Chubb's cases Premier Ins. Co. v. Adams (Fla. App. 1994), 632 So.2d 1054, relies heavily on Marnell.

<sup>25</sup> This is not a case analogous to State Farm Fire & Cas. Co. v. Hooks (2006), 366 Ill. App.3d 819, 853 N.E.2d 1, cited in Chubb's Brief, where State Farm did not provide any plausible purpose or function for the severability clause. To the contrary, Safeco has demonstrated, based on the history of the general severability condition as explained by Risjord and Austin, exactly why such a condition exists in the policy. And exactly why a general severability condition creates no ambiguity with respect to "an insured" or "any insured" language. The fact that the Court in Hooks did not have the benefit of this information does not make Safeco's arguments incorrect.

<sup>26</sup> As was discussed previously, the issue presented in the Second Certified Conflict cannot be resolved by "following" Doe, and Doe's favorable view of Silverball actually supports Safeco's position with respect to the interaction of a general severability condition with "an" or "any" insured exclusions. Thus Safeco is not requesting that this Court modify or overrule Doe and Chubb's reference to the expectations of a negligent insured in the context of a public policy considerations are irrelevant. See footnote 6, *supra*.

Ohio-2208, cited by Chubb as examples of Ohio cases that are on point<sup>27</sup> where coverage was excluded where “an” or “any” insured commits an intentional act and a general severability condition is present, are actually distinguishable. Nor is it a good idea to rely upon them as support for any rule about the interaction between excluded conduct and derivative negligence. Why? Because in Phillips no exclusion was triggered, because no excluded intentional conduct existed.<sup>28</sup> And in Havel there were no negligent insureds.<sup>29</sup>

As was discussed at length in Safeco’s Brief, Metzger, on the other hand, is directly on point. Chubb claims Metzger is old, although it is more recent than eleven of the decisions from foreign jurisdictions which Chubb cites as support for its argument. If Metzger is bad law because it is old, much of Chubb’s case law must be worse. Although the Metzger decision cites Phillips, Metzger is the later case and thus represents the current law in the Third District. And most importantly, in Metzger, unlike in Phillips, the policy exclusion at issue was triggered. In all likelihood the Metzger court recognized that fact.

Metzger makes an appearance in the Sixth Circuit’s effort to predict what this Court would do with the unique policy language<sup>30</sup> it faced in Illinois Union Insurance Co. v. Shefchuk (C.A.6

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<sup>27</sup> Cases which include a joint obligations clause or which contain no general severability condition are obviously distinguishable.

<sup>28</sup> Phillips involved a property damage insurance claim for a fire which their insurer, Buckeye Union, alleged was intentionally set by Bessie or Marlow Phillips. Phillips at p. \*2. The insurer’s claim against Bessie was directed out. Id. “At the conclusion of the case the jury returned its verdict in favor of Marlow Phillips.” Phillips at p. \*3. Therefore neither Bessie nor Marlow trigger any exclusion which would have prevented them from recovering. Chubb’s claim that the issue in Phillips was whether arson and insurance fraud by one insured operated to exclude coverage for “any insured” is wrong, there was no arson or insurance fraud.

<sup>29</sup> The Havel decision does not even involve a situation where a valid negligent supervision or entrustment claim existed with respect to the intentional actor’s parents. Havel at ¶61. As noted by the dissent in Havel, the Eleventh District determined as a matter of law that no negligence claim existed against the parents. Id. at ¶64.

<sup>30</sup> The Severability clause in Shefchuk reads: “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

2004), 108 Fed. Appx. 294 cert. denied (2006), 127 S.Ct. 379. This unique policy language makes Shefchuk distinguishable from the case at bar, but nonetheless Shefchuk court found the decision a close one in a situation where the policy did not contain a general severability condition and contained an exclusion which used “the”, “an”, and “any” insured language interchangeably. Can there be any doubt that the Shefchuk court would view the facts of the present case differently?

In the next portion of its Brief Chubb focuses on the interaction of “an” or “any” insured language with a general severability condition in jurisdictions outside Ohio. Chubb claims that Safeco’s citation to case law from thirteen<sup>31</sup> jurisdictions outside Ohio which conclude the existence of a general severability condition does not affect a clearly worded exclusion applicable if harm arises out of the actions of “an” or “any” insured do not represent a majority view, even when the cases say that. The majority of the decisions cited by Safeco have been decided since 1997<sup>32</sup> and more recently Oklahoma and Indiana have agreed with Safeco: BP America, Inc. v. State Auto Property & Cas. Ins. Co. (Okla. 2005), 2005 OK 65, 148 P.3d 832 as corrected (October 30, 2006), (To hold that a severability clause affords coverage in contravention of an “any insured” exclusion “ignores the purpose of the severability clause - to afford each insured a full measure of coverage up

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person or organization just as if a separate policy had been issued to each.” Id at 298. The dishonesty exclusion which is at the heart of the dispute in Shefchuk used the term ‘an insured’ in its first sentence, the term ‘the insured’ in its second sentence, and the term ‘any insured’ in its third and last sentence, which barred coverage of insider trading. Id. at 304.

<sup>31</sup> Chubb will only concede that nine foreign jurisdictions support Safeco’s position, but the reality is that some of the jurisdictions which Chubb claims support its position are evolving in a different direction. Massachusetts and the 2006 Yerardi decision are one example. See footnote 5, *supra*. Minnesota is another. In Travelers Indem. Co. v. Bloomington Steel & Supply Co. (Minn. 2006), 718 N.W.2d 888, the Minnesota Supreme Court began its analysis by holding that “a severability clause requires that coverage exclusions be construed only with reference to the particular insured seeking coverage.” The Court went on to note, however, that the insurer could have prevailed, regardless of the severability clause, if “instead of excluding coverage for bodily injury expected by \* \* \* ‘the’ insured, the \* \* \* policies [had] excluded coverage for bodily injury expected \* \* \* [by] ‘an’ or ‘any’ insured.” Id. at 894-895.

<sup>32</sup> The average age of Safeco’s cases is a little over 8 years. Chubb’s decisions average more than 15 years.

to the policy limits, rather than to negate bargained-for and plainly-worded exclusions \* \* \* The separation of insureds clause has no affect on the clear language of the exclusionary clause. Simply, a claim made against any insured is excluded. The purpose of severability is not to negate plainly worded exclusions.” *Id.* at 841.); T.B. ex. rel. Bruce v. Dobson (Ind. Ct. App. 2007), 868 N.E.2d 831, transfer denied (Ind. Dec. 6, 2007) (“[The] purpose of a [severability] clause is solely to render the coverage actually provided by the insuring provisions of the policy applicable to all insureds equally, up to coverage limits. The severability clause is not denominated a ‘coverage provision,’ and it would be unreasonable to find that it operated independently in that capacity to increase the insurance afforded under the insurance provisions of the policy, or to partially nullify existing coverage exclusions. The purpose of severability clauses is to spread protection, to the limits of coverage, among all the insureds. The purpose is not to negate bargained for exclusions which are plainly worded.” *Id.* at 837.) Of the cases cited by Chubb<sup>33</sup>, only three have been issued this century. Early but incorrect decisions such as Marnell and American National Fire Ins. Co. v. Estate of Fournelle (Minn. 1991), 472 N.W.2d 292 are slowly being supplanted by correctly decided later cases.

In Chubb’s Second Proposition of Law under the Second Certified Question it argues that this Court is foreclosed from finding that the exclusions in Safeco’s policies have a definite legal meaning because foreign courts have reached varying conclusions, citing to George H. Olmsted & Co. v. Metropolitan Life Ins. Co. This argument is unpersuasive. As this Court has previously held:

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<sup>33</sup> Chubb claims the Metzger decision is weakened by the fact that it passed on a business risks exclusion but then cites numerous cases to try to bolster its position which focus on exclusions other than for intentional acts. See e.g. Litz v. State Farm Fire & Cas. Co. (Md. 1997) 346 Md. 217; U.S. Underwriters Ins. Co. v. City Club Hotel, LLC (S.D.N.Y. 2003), 2003 U.S. Dist. LEXIS 7266; Worcester Mut. Ins. Co. v. Marnell, *supra*.

It is too well settled to require supporting authority that, since the insurer prepares the policy of insurance, it must be liberally construed in favor of the insured, and, likewise, if there is a real ambiguity that ambiguity must be construed in favor of the insured. However, a policy is a written contract, and its terms must be given a reasonable construction. An ambiguity which is created by giving a strained or unnatural meaning to phrases or by mere casuistry does not constitute an ambiguity at all.

Yeager v. Pacific Mut. Life Ins. Co. (1956), 166 Ohio St. 71, 78, 139 N.E.2d 48 (emphasis added).

Chubb's argument attempts to usurp this Court's ability to distinguish between real ambiguity, as referenced above, and a strained or unnatural meaning of the wording in a policy which does not constitute any ambiguity at all. This Court's review of a question of law is *de novo*. Cleveland Elec. Illum. Co. v. Pub. Util. Comm., 76 Ohio St.3d 521, 523, 1996-Ohio-298, 668 N.E.2d 889.

The mere fact that a foreign jurisdiction has found ambiguity cannot be controlling upon this Court. Ohio Const. IV Section 2. "If the number of cases or conflicting opinions in other states be accepted as a criterion for ambiguity, practically no case would ever escape the application of such a rule for the presence of ambiguity; and, if we add cases in which there are dissenting or fragmented opinions and multi-judge courts, there would be very little except ambiguous law." Akers v. Beacon Insurance Co. of America (Ohio App. 3 Dist.), 1987 Ohio App. LEXIS 8550 at \*5.

Nor is such a rule of construction being applied in other jurisdictions, as Chubb claims it is. Brief at p. 34. In both Pennsylvania and Indiana, which Chubb says are jurisdictions which follow the rule of construction it is arguing for, courts have determined that no ambiguity exists with respect to the interaction between "an" or "any" insured worded exclusions and a general severability provision. See McAllister v. Millville Mut. Ins. Co., *supra*, (Pennsylvania law); T.B. ex. rel. Bruce v. Dobson, *supra*, (Indiana law). To the extent that Chubb implies that a split of lower courts in the same jurisdiction triggers application of this same "logical syllogism" this Court has recently rejected that argument as well. Wohl v. Swinney, *supra*.

Chubb's argument in this vein also references the timing of the various decisions and how that reflects upon the coverage provisions at issue. Metzger was decided three years before Safeco issued the policies in this case to Mr. and Mrs. White. At the time the policies were issued, this Court's decision in Doe had provided guidance to insurers with respect to how to include language in a policy with a general severability provision in such a manner as to exclude coverage for all insureds based on the excluded conduct of any one insured. That advice was "If [the carrier] had wished to exclude coverage for all claims arising from all intentional acts regardless of who committed them, it could have easily drafted its policy to exclude coverage arising from the intentional acts of 'any insured'." Silverball at 1158. Safeco followed this guidance. No Ohio cases existed at the time Safeco issued its policies which stated anything but that the language in the Safeco policy should preclude coverage for claims against Mr. and Mrs. White. Until the First District issued its decision below, there was not a single non-advisory Ohio case with similar language that supported Chubb's position. By requesting affirmance of the First District's decision on this issue, Chubb is asking this Court to ignore the history of the words at issue, treatise law which is up to date and directly on point, the conclusion of the Third District in Metzger, dicta from this Court, as well as the modern majority of foreign jurisdictions which have addressed the issue. That is asking a lot, particularly in light of entirety of the language used.

On July 15, 2003, seventeen year old Benjamin White attempted to murder thirteen year old Casey Hilmer while she was jogging in the 8800 block of Given Road in Indian Hill, Hamilton County, Ohio. Ben went on to plead guilty to attempted murder and felonious assault and was sentenced to a lengthy prison term. At the time of the attack, Ben lived with his parents who had homeowners and umbrella policies through Safeco and homeowners and excess policies through Chubb. Liability coverage under Safeco's homeowners' policy did not apply to bodily injury

“which is expected or intended by [Ben White] or which is the foreseeable result of an act or omission intended by [Ben White].” Liability coverage also does not apply to “liability \* \* \* arising out of<sup>34</sup> any illegal act committed by or at the direction of [Ben White].” Similarly, the exclusions section of the Safeco Personal Umbrella indicate that the policy does not apply to “any injury caused by a violation of a penal law or ordinance committed by or with the knowledge or consent of [Ben White].” The umbrella policy also does not apply to “any act or damage which is expected or intended by [Ben White] or which is the foreseeable result of an act or omission intended by [Ben White].” Finally, the umbrella policy also does not apply to any personal injury arising out of “physical or mental abuse” with no reference to whom may have caused it.

It is important to understand that Chubb’s position is that Mr. and Mrs. White, in reading the enumerated exclusions, could reasonably conclude that the negligence that they exhibited in supervising Ben and entrusting a knife to Ben would be covered by their insurance policy when Ben tried to kill someone. Chubb wants this Court to think of the case as one in which Safeco is quibbling over “minutia” when it says that words such as “an” and “any” are different than “the”. But those are important distinctions. Words matter. And the words used in Safeco’s policy have a definite meaning; and that meaning can be reasonably understood to preclude coverage.

In reviewing the specific exclusions present in the Safeco policies, it becomes clear that Chubb’s arguments do not produce any real ambiguity. To the contrary, the language of the exclusions present in the Safeco policy is broad and a reasonable construction of those exclusions precludes coverage for Mr. and Mrs. White based on the intentional, criminal, abusive acts committed by their son.

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<sup>34</sup> The terms “arising out of” as used in insurance policies is generally understood broadly to mean “flowing from” or “having its origin in,” thereby “indicating that there need be “a causal connection, rather than a proximate causal connection.” Couch on Insurance 3d Section 101: 54 (1997).

**III. REBUTTAL ARGUMENT BASED UPON THE FIRST CERTIFIED QUESTION AND SAFECO'S SECOND PROPOSITION OF LAW ACCEPTED FOR REVIEW**

In its First Proposition of Law under the First Certified Question Chubb asks this Court to follow Doe and Automobile Club v. Mills in answering the Certified Question in the affirmative. The syllabus in Doe states “Ohio public policy permits a party to obtain liability insurance coverage for negligence related to sexual molestation when that party has not committed the act of sexual molestation.” (Emphasis added) “[Doe] addressed public policy, not policy language. The fact that public policy allows the purchase of insurance for negligence related to sexual molestation says nothing about whether the [insurer’s ] policy exclusion applies in this case.” Lehrner v. Safeco Insurance/American States Ins. Co. (Ohio App. 2 Dist.), 171 Ohio App.3d 570, 2007-Ohio-795, 872 N.E.2d 295 at ¶46. This Court’s guidance from Automobile Club is even more limited, as the opinion simply consisted of a reversal of the decision of the lower court. The Decision of the Twelfth District Court of Appeals below never sets forth how the term “occurrence” was defined in the Automobile Club policy at issue. Automobile Club Ins. Co. v. Mills (Ohio App. 12 Dist.) 2000 Ohio App. LEXIS 3060.

In contrast to Auto Club and Doe, this Court’s decision in Gearing v. Nationwide Ins. Co. 76 Ohio St.3d 34, 1996-Ohio-113, 665 N.E.2d 1115, addressed a policy in which “occurrence” was specifically defined<sup>35</sup> as “bodily injury or property damage resulting from: a. one accident.” where accident was undefined. Id at 36. As was the case in Gearing, the Safeco policies fail to define accident. Where words or phrases are undefined in a contract they must be given their natural or usual meaning. Watkins v. Brown (1994), 97 Ohio App.3d 160, 164, 646 N.E.2d 485, discretionary appeal not allowed (1995), 71 Ohio St.3d 1458, 644 N.E.2d 1030. This Court has stated that the

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<sup>35</sup> Cuervo v. Cincinnati Ins. Co., 76 Ohio St.3d 41, 1996-Ohio-99, 665 N.E.2d 1121 never discussed any definition of occurrence. Nor did Westfield v. Kette, 77 Ohio St.3d 154, 1996-Ohio-335, 672 N.E.2d 166.

word “occurrence” when defined as an accident is intended to mean just that – an unexpected, unforeseeable event. Randolph v. Grange Mutual Cas. Co. (1979), 57 Ohio St.2d 25, 29, 385 N.E.2d 1305.<sup>36</sup>

The factual circumstances that led up to Ben White’s attempt to murder Casey Hilmer were set forth in some detail in the Factual Background section of Safeco’s Motion for Summary Judgment filed in the trial court.<sup>37</sup> The jury which heard the underlying case determined that Lance and Diane White were negligent and that their negligence proximately caused injury to Casey Hilmer and Steve Hilmer. In order to recover for such parental negligence, Plaintiffs necessarily proved to a jury that Mr. and Mrs. White failed to exercise reasonable control over Ben when they knew or should have know that injury to another was a probable consequence. Huston v. Konieczny (1990), 52 Ohio St.3d 214, 217-18, 556 N.E.2d 505. This is not an accident as it is commonly understood.

Although Chubb claims that Safeco is relying upon discredited and overruled case law by citing to Offhaus v. Guthrie (2000), 140 Ohio App.3d 90 and Noftz v. Ernsberger (1998), 125 Ohio App.3d 376, neither case has been overruled. Furthermore, various cases from other jurisdictions reached the same conclusion as that reached by the Sixth District Court of Appeals in Noftz, and the

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<sup>36</sup> The syllabus in Randolph states: “A homeowner’s insurance policy that provides coverage for ‘property damage caused by an *occurrence*,’ which latter term is defined in the policy as ‘an accident,’ does not obligate the insurer to pay the claim of an insured under the policy who incurs liability under R.C. 3109.09 for intentional damage caused by another separately insured under the same policy, absent other clear indicia of such obligation in the insurance contract.” Safeco’s homeowners’ policy contains an additional coverage section entitled “Statutorily Imposed Parental Liability” which is applicable to provide coverage to Lance and Diane White pursuant to R.C. 3109.10. This section contains no language creating a duty to defend. Chubb states that this additional coverage is “irrelevant to the interpretation of the intentional and criminal act exclusions at issue in the certified conflicts.” Chubb’s Brief at p. 3, fn. 11. However, the Randolph syllabus demonstrates that the presence of the Statutorily Imposed Parental Liability additional coverage is further evidence that parental negligence derivative of excluded conduct by “an’ or “any” insured is not covered by the Safeco policies.

<sup>37</sup> DJ, T.d. 37, Supp. at pp. 90-141.

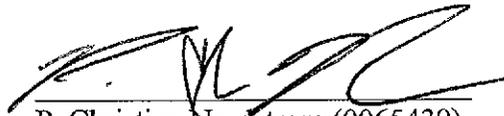
Fifth District Court of Appeals in Offhaus. These other cases recognize that parental negligence claims are derivative and cannot constitute a separate occurrence or accident apart from the underlying intentional tort committed by Ben White. See Mutual of Enumclaw v. Wilcox (Idaho 1992), 123 Idaho 4, 843 P.2d 154, 158-159 (Court held that the insured's alleged negligent failure to report or warn the proper authorities of the child molestation perpetrated by her ex-husband did not constitute an occurrence; the court reasoned that her conduct was "not an occurrence under the policies because it was not the conduct which caused the injury. The injury suffered by the minor is child molestation.") Sweet Home Central School District of Amhurst and Tonawanda v. Aetna Commercial Insurance Company (N.Y. 4<sup>th</sup> Dept. 1999), 263 A.D.2d 949, 695 N.Y.S. 2d 444, 446-447 ("It is the nature of the underlying acts, not the theory of liability that governs. Because the operative acts giving rise to any recovery are intentional acts, i.e. assault and sexual abuse, it is of no import that the complaint in the underlying action alleges only negligent hiring, retention and supervision." There is still no occurrence.) Michigan Basic Property Ins. Association v. Wasarovich (Michigan 1995), 214 Mich. App. 319, 542 N.W.2d 367, 370-371 (Claim that insured was negligent in failing to protect injured party from being shot by the insured's husband could not give rise to coverage because the shooting was not an occurrence.)

Chubb is asking this Court to review this case with blinders on. Chubb asks this Court to ignore the fact that but for Ben White attacking and injuring Casey Hilmer, the Hilmers would not have had a claim against Mr. and Mrs. White. This Court should refuse Chubb's unreasonable request and determine that negligence in relation to an intentional tort is not an "occurrence" separate and apart from the underlying intentional tort, but instead is a derivative claim arising out of the intentional acts.

#### IV. CONCLUSION

For the foregoing reasons, as well as those more fully set forth in its Merit Brief, Appellant respectfully requests that this Court reverse the decision of the First District Court of Appeals, answer both certified questions in the negative and remand this matter to the First District Court of Appeals with instructions to consider whether Ben White's conduct triggers application of any of the exclusionary language present in the Safeco policies and, if it does, then Safeco does not owe coverage for the Hilmer's judgment against Lance and Diane White or Ben White.<sup>38</sup>

Respectfully submitted,



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<sup>38</sup> Chubb admits that "Benjamin White committed an intentional act" and then argues that if Safeco's position is correct, remand to the trial court for an evidentiary hearing is required. Chubb's Brief at p. 43. However, the question of whether Ben White's conduct triggered the relevant exclusions and whether Safeco's Motion for Summary Judgment on that issue was properly denied were before the First District and that is where the case should be remanded. See General Acc. Ins. Co. v. Insurance Co. of North America (1989), 44 Ohio St.3d 17, 22-23, 540 N.E.2d 266; Fraternal Order of Police, Akron Lodge No. 7 v. City of Akron (Ohio App. 9 Dist.), 2002-Ohio-2649, ¶5. ("Unless some exception to the general rule applies, such as an order made in a special proceeding, [an order denying a motion for summary judgment] is not final and appealable.")

V. CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Reply Brief of Appellant Safeco Insurance Company of America was sent by ordinary U.S. Mail to the following this 10<sup>th</sup> day of November, 2008:

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