

NO. 16-0290

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY,

Plaintiff,

v.

TARA CLENDENEN, JAMES CLENDENEN, MARY A. NEESE, ADMINISTRATRIX
AND PERSONAL REPRESENTATIVE OF THE ESTATE OF SKYLAR NEESE,
DECEASED, DAVID NEESE, AND MARY A. NEESE, INDIVIDUALLY,

Defendants,

- and -

ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,

Plaintiff,

v.

MARY A. NEESE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE
OF SKYLAR NEESE, DAVID NEESE, TARA CLENDENEN, AND PATRICIA SHOAF,

Defendants.

From the U.S. District Court for the Northern District of West Virginia
Civil Action Nos. 1:14CV155 and 1:14CV172

BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION AS *AMICUS CURIAE*
IN SUPPORT OF AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY
AND ERIE INSURANCE PROPERTY & CASUALTY COMPANY

Jill Cranston Rice
(WV State Bar No. 7421)
215 Don Knotts Blvd., Suite 310
Morgantown, WV 25301
Telephone: (304) 225-1430
Facsimile: (304) 296-6116
E-mail: jill.rice@dinsmore.com

Andrew T. Kirkner
(WV State Bar No. 12349)
801 Pennsylvania Ave. NW, Suite 610
Washington, DC 22204
Telephone: (202) 372-9135
Facsimile: (202) 372-9141
E-mail: andrew.kirkner@dinsmore.com

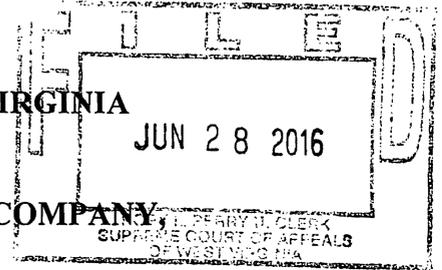


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I. INTRODUCTION

The West Virginia Insurance Federation (the “Federation”) files this brief as *amicus curiae* in support of Plaintiffs American National Property and Casualty (“American National”) and Erie Insurance Property & Casualty Company (“Erie”).¹

This case has significant implications for insurers and policyholders alike in West Virginia as the United States District Court for the Northern District of West Virginia’s (“District Court’s”) certified questions ask this Court to interpret the provisions of insurance policies that require no interpretation. Specifically, the intentional or expected acts of Sheila Eddy and Rachel Shoaf exclude coverage for all insureds under the plain language of the American National and Erie Insurance Policies. As such, the negligence claims of their co-insureds similarly would be excluded. This necessary conclusion upholds a fundamental principle of insurance law: that where coverage is specifically excluded under the plain and unambiguous terms of an insurance policy – and a corresponding premium is collected based on that excluded risk – there is no coverage.

II. STATEMENT OF INTEREST

The Federation is the state trade association for property and casualty insurance companies doing business in West Virginia. Its members insure approximately 80% of the automobiles and homes in West Virginia and more than 80% of the workers’ compensation policies insuring West Virginia’s employees. The Federation is widely regarded as the voice of West Virginia’s insurance industry and has served the property and casualty insurance industry for more than thirty-five years. It has a strong interest in promoting a healthy and competitive

¹ Pursuant to Rule 30(b) of the Rules of Appellate Procedure, the Federation provided notice on June 21, 2016 to all parties of its intention to file an *amicus curiae* brief. Moreover, the undersigned counsel authored this brief in its entirety. Neither party nor their respective counsel contributed to or made a monetary contribution specifically intended to fund the preparation or submission of this brief. This disclosure is made pursuant to Rule 30(e)(5).

insurance market in West Virginia in order to ensure that insurance is both available and affordable to West Virginia's insurance consumers.

Critical to a healthy insurance market is ability of insurers to rely on the terms of their insurance contracts. The Federation files this brief in support of the Insurers' position with respect to the questions certified by the United States District Court for the Northern District of West Virginia in order to underscore the importance of honoring the plain language of an insurance contract and giving effect, in particular, to unambiguous exclusions.

Here, the plain language of the American National and Erie policies demand the exclusion of coverage for the claims asserted against Tara Clendenen and Patricia Shoaf.

III. BACKGROUND

The Federation largely will rely on the parties' recitation of the facts and procedural history and offers a more limited background here. It is undisputed that on July 5, 2012, Sheila Eddy and Rachel Shoaf murdered Skylar Neese. Subsequently, Sheila Eddy pleaded guilty to first degree murder and was sentenced to life in prison with mercy, and Rachel Shoaf pleaded guilty to second degree murder. Appendix at AR522. At the time of the murder, Sheila Eddy lived with Tara Clendenen ("Ms. Clendenen"), and Rachel Shoaf lived with her mother, Patricia Shoaf ("Ms. Shoaf"). At all relevant times, Tara Clendenen was the named insured on a homeowner's policy with American National Insurance Company ("American National"), and Patricia Shoaf was the named insured on a homeowner's policy with Erie Insurance Property and Casualty Insurance Company ("Erie").

In June of 2014, the parents of Skylar Neese (the "Neeses") filed a state court action against Sheila Eddy and Rachel Shoaf and also named Tara Clendenen and Patricia Shoaf. Count III of the Neese's Complaint alleged Negligent Supervision/Entrustment against Ms.

Clendenen and Ms. Shoaf, asserting that they, as parents, guardians, and custodians of Shelia Eddy and Rachel Shoaf, “were negligent and careless in their supervision and guidance of their daughters.” Appendix at AR523.

After receiving notice of the state court action, Ms. Clendenen and Ms. Shoaf both made demands for coverage from American National and Erie, respectively. Since that time, American National and Erie have been defending Ms. Clendenen and Ms. Shoaf pursuant to reservations of rights. Both insurers have since filed declaratory actions with the District Court seeking a declaration that (1) Ms. Clendenen, Sheila Eddy, Ms. Shoaf and Rachel Shoaf are not covered under their respective insurance policies, and (2) the insurers thus have no obligation to defend or indemnify the defendants to the state court action. Appendix at AR523.

The American National Policy provides in pertinent part that:

SECTION II – EXCLUSIONS

1. **Coverage E – Personal Liability and Coverage F – Medical Payments to Others** do not apply to **bodily injury** or **property damage**:
 - a. which is expected or intended by any **insured** even if the actual injury or damage is different than expected or intended;

Appendix at AR82 (Bold in original).

SECTION II – ADDITIONAL COVERAGES

* * *

2. **Severability of insurance.** This insurance applies separately to each **insured**. This condition shall not increase our **limit of liability** for any one **occurrence.**”

Appendix at AR85 (Bold in original).

The pertinent provisions of the Erie Policy state:

WHAT WE DO NOT COVER – EXCLUSIONS

* * *

We do not cover under *Bodily Injury Liability Coverage, Property Damage Liability Coverage, Personal Injury Liability Coverage, Medical Payments To Others Coverage*:

1. **Bodily injury, property damage or personal injury** expected or intended by **anyone we protect** even if:
 - a. the degree, kind or quality of the injury or damage is different than what was expected or intended; or
 - b. a different person, entity, real or personal property sustained the injury or damage than was expected or intended.”

Appendix at AR435 (Italics and bold in original).

RIGHTS AND DUTIES – CONDITIONS – SECTION II

* * *

(2) LIMITS OF PROTECTION

This insurance applies separately to **anyone we protect**. Regardless of the number of people we protect, claims made or persons injured, our total liability under Personal Liability Coverage for damages resulting from one occurrence, offense, claim or suit will not exceed the amount shown on the Declarations for Personal Liability coverage[.]

Appendix at AR437 (Bold in original).

Based on the parties’ arguments in the declaratory judgment action, the District Court has held that: (1) Skylar Neese’s murder was an “occurrence” under the policy, and (2) the severability clauses and intentional or expected acts exclusions contained in American National’s and Erie’s policies are unambiguous. The parties have submitted Motions for Summary Judgment and, on March 22, 2016, the District Court certified two questions to this Court.

IV. CERTIFIED QUESTIONS

The District Court’s Order of Certification to this Court requests that this Court answer two questions since this Court’s decisions “provide no controlling precedent dispositive of the questions”:

1. Applying West Virginia public policy and rules of contract construction, do the unambiguous exclusions in American National's policy for bodily injury or property damage "which is expected or intended by any insured even if the actual injury or damage is different than expected or intended," and "arising out of any criminal act committed by or at the direction of any insured," and the unambiguous exclusion in Erie's policy for "[b]odily injury, property damage, or personal injury expected or intended by 'anyone we protect' . . .," preclude liability coverage for insureds who did not commit any intentional or criminal act?
2. If so, do the unambiguous severability clauses in the insurance policies, which state that the insurance applies separately to each insured, prevail over the exclusions and require the insurers to apply the exclusions separately to each insured, despite the intentional and criminal actions of co-insureds?

Appendix at AR520.

V. ANSWERS TO CERTIFIED QUESTIONS

Because it is undisputed that insureds Sheila Eddy and Rachel Shoaf's murder of Skylar Neese constituted an intentional or expected act under the American National and Erie Policies, the plain language of the policies requires that the District Court's certified questions be answered as follows:

1. The severability clause contained in the insurance policies *does* provide coverage for each of the individual insureds covered under the Insurers' Policies; and
2. The intentional or expected acts exclusion contained in the Insurers' Policies excludes liability coverage for both the insured who committed the intentional or expected acts, and any and all co-insureds, even where they are "innocent" as to the intentional conduct.

While the case currently before the Court is tragic, the language of the policies *clearly* excludes coverage to all insureds where any insured commits an intentional or expected act.

VI. ARGUMENT

The severability clauses contained in the American National and Erie policies are unambiguous and, thus, require liability coverage for each insured individually, *where not*

otherwise excluded. Under the American National and Erie policies, however, where one insured commits an intentional or expected act, all liability coverage for co-insureds is excluded by the plain language of the intentional or expected acts exclusions. Just as the severability clauses are correctly read to convey coverage to each insured individually, the intentional or expected acts exclusions are correctly read to exclude coverage for an insured when liability arises from any insured's intentional or expected act. This Court should uphold the plain, unambiguous terms of the insurance policy and hold that there is no coverage based on the intentional or expected acts of Sheila Eddy and Rachel Shoaf.

A. There is no coverage under the plain language of the insurance policies.

This Court's analysis should begin with the severability clauses; if the severability clauses contained in the American National and Erie policies do not provide coverage to each insured individually, then the Court's inquiry can stop. There would be no need to analyze the interplay between the severability clauses and the intentional or expected act exclusions.

It is clear, however, that the severability clauses contained in the American National and Erie policies *do* provide insurance coverage to each insured covered by the policy – individually – where not otherwise limited or excluded.

1. The severability clause provides coverage to all insureds individually where not otherwise excluded.

As this Court has long recognized, in determining whether coverage exists under the terms of an insurance policy, courts look first to the language of the policy. The insurance policy should be “read as a whole with all policy provisions given effect.” *Syllabus pt. 1, Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986)(*overruled, in part, on other grounds by National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987)). Where an insurance policy's terms are clear and unambiguous, they are not subject

to judicial construction or interpretation and the Court gives effect to the clear and unambiguous terms contained within the policy. *State ex rel. Nationwide Mut. Ins. Co. v. Wilson*, 778 S.E.2d 677, 682 (W. Va. 2015) (citing *Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.714 (1970)).

The American National severability clause provides, “This insurance applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence.” Appendix at AR85 (Emphasis added). The American National policy defines “Insured” as follows:

6. “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.

Appendix at AR70.

Similarly, the Erie severability provision provides: “This insurance applies separately to **anyone we protect.**” Appendix at AR437 (Bold in original)(emphasis added). Under the Policy,

“**anyone we protect**” means **you** and the following **residents** of **your** household:

1. relatives and wards;
2. other persons in care of **anyone we protect.** . . .

Appendix at AR424 (Bold in original).

Applying the plain language of the American National and Erie policies, it is clear that each of the parties to the underlying action – Tara Clendenen, Sheila Eddy, Rachel Shoaf and Patricia Shoaf – is an “insured” or a “protected” person under the American National and Erie

policies, unless otherwise excluded.² The severability clauses do not increase the insurers' liability; they simply apply "this insurance" – the entire policy, including the exclusions – to each insured individually. As such, the only real question before the Court is whether the intentional or expected acts exclusions contained in the American National and Erie policies exclude coverage to Tara Clendenen and Patricia Shoaf in the underlying negligence action.

2. Coverage for Tara Clendenen and Patricia Shoaf is excluded under the clear intentional or expected acts exclusions contained in the American National and Erie policies.

Both the American National and Erie policies are clear: coverage is excluded for *all* insureds where *any* insured commits an intentional or expected act. Because Sheila Eddy and Rachel Shoaf – insureds under the American National and Erie policies – committed intentional or expected acts, there is no coverage for Patricia Shoaf or Tara Clendenen.

The American National intentional acts exclusion provides:

SECTION II – EXCLUSIONS

1. **Coverage E – Personal Liability and Coverage F – Medical Payments to Others do not apply to bodily injury or property damage:**
 - a. which is expected or intended by any insured even if the actual injury or damage is different than expected or intended;

Appendix at AR82 (Bold in original)(underlining added). The Erie policy similarly excludes intended or expected acts by anyone it insures:

We do not cover under Bodily Injury Liability Coverage, Property Damage Liability Coverage, Personal Injury Liability Coverage, Medical Payments To Others Coverage:

1. **Bodily injury, property damage or personal injury expected or intended by anyone we protect even if:**

² Coverage for Shelia Eddy and Rachel Shoaf, however, is not at issue before this Court as the District Court correctly held that coverage was excluded on the basis of their intended and criminal acts. Indeed, the District Court dismissed Shelia Eddy and Rachel Shoaf from the underlying action with prejudice in a Memorandum Opinion dated March 1, 2016.

- a. the degree, kind or quality of the injury or damage is different than what was expected or intended; or
- b. a different person, entity, real or personal property sustained the injury or damage than was expected or intended.

Appendix at AR435 (Italics and bold in original)(underlining added).

Both the American National policy (“any insured”) and the Erie Policy (“anyone we protect”) exclude coverage where any individual insured under the respective policy commits an intentional or expected act. While Ms. Clendenen and Ms. Shoaf may seek to insert some type of ambiguity into these terms, there is simply none.

The severability clauses require the application of all of the policies’ terms to each insured individually. As such, the intended or expected exclusions apply to individual insureds under the policies, including where any other insured commits an intended or expected act. As this Court has consistently held, “[i]f the policy as a whole is unambiguous then the insured will not be allowed to create an ambiguity out of sections taken out of context.” In the instant case, this Court should not read ambiguity into a provision where none exists. Instead, this Court should apply the plain language of the policies that exclude coverage.

B. This Court should adopt the majority rule which recognizes an insurer’s ability to exclude coverage based on the actions of co-insureds.

A decision by this Court that ignores the plain, unambiguous exclusions in the American National and Erie policies would shift West Virginia out of the majority of jurisdictions that have considered this question while undermining insurers’ ability to rely on their policy terms.

1. A majority of jurisdictions have adopted the position advocated by the Federation.

Numerous courts have reviewed the interplay between severability clauses that apply the insurance policy to all insureds and exclusions based on intentional or expected acts. The

majority of these courts³ have found that, where the language of a policy excludes coverage for the intentional acts of “any” insured and an insured commits an intentional or expected act, coverage is excluded for all insureds. *See American Family Mutual Insurance Co. v. White*, 204 Ariz. 500, 507, 65 P.3d 449, 456 (Ariz. Ct. App. 2003) (“Most courts that have construed the phrase ‘any insured’ in an exclusion have found that it bars coverage for any claim attributable to

³ The list of state and federal courts that have found that an insurer may exclude coverage for co-insureds is voluminous. *See Am. Family Mut. Ins. Co. v. White*, 65 P.3d 449, 456 (Ariz. Ct. App. 2003) (“Most courts that have construed the phrase “any insured” in an exclusion have found that it bars coverage for any claim attributable to the excludable acts of any insured, even if the policy contains a severability clause note We join that majority.”); *Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 44-8 (Iowa 2012)(“We have already considered the question of what effect severability-of-interest clauses have on insurance policy exclusions. The answer—none.”); *Johnson v. Allstate Ins. Co.*, 687 A.2d 642 (Me. 1997)(holding that an unambiguous intentional actions exclusion was not negated by a severability clause); *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320 (Minn. Ct. App. 2008) (holding the phrase “any insured” in the insurer’s severability clause did not create any ambiguity when applying the exclusion to negligent parents who were excluded for coverage for their son’s attempted murder); *American Family Mut. Ins. Co. v. Copeland-Williams*, 941 S.W.2d 625 (Mo. Ct. App. E.D. 1997)(“the use of the phrase “any insured” makes the exclusionary clause unambiguous even in light of the severability clause.”); *Am. Family Mut. Ins. Co. v. Wheeler*, 842 N.W.2d 100 (Neb. 2014)(“Such language means what it says, and the severability clause does not operate to override this clear and unambiguous language. In other words, applying the insurance separately to each insured, as the severability clause requires, does not change that the exclusions reference “an insured” or “any insured.”); *Villa v. Short*, 947 A.2d 1217 (N.J. 2008) (“...we do not read the severability clause [excluding coverage based on the actions of “any insured”] to infuse ambiguity into the plain language of the policy exclusion for the intentional or criminal acts of an insured. The severability provision merely makes the coverage available to each insured who is entitled to it up to the limits on the declarations page.”); *BP Am., Inc. v. State Auto Prop. & Cas. Ins. Co.*, 148 P.3d 832 (Okla. 2005)(“ 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 has no effect on the clear language of the exclusionary clause.”); *Ristine v. Hartford Ins. Co.*, 97 P.3d 1206 (Or. Ct. App. 2004)(“Even though the homeowners’ policy applies separately to [the individual insureds], 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 affects the substance of any provisions concerning coverage or exclusions.”); *Co-operative Insurance Cos. v. Woodward*, 45 A.3d 89 (Vt. 2012)(Assuming, without deciding, that the provision at issue is a severability clause, we conclude that this clause has no effect on — and cannot override — the intentional-acts exclusion for certain acts committed by ‘an insured.’”); *Mutual of Enumclaw Ins. Co. v. Cross*, 10 P.3d 440, 445 (Wash. Ct. App. 2000) (“We agree with the cases that have held that clear and specific language in an exclusion prevails over a severability clause.”); *J.G. v. Wangard*, 753 N.W.2d 475 (Wis. 2008)(holding that “the intentional acts exclusion in the [the insureds] homeowner’s policies excludes coverage for damages “arising out of an act intended by any covered person to cause personal injury[]”and that an action by one insured precludes coverage for other insureds); *Great Cent. Ins. Co. v. Roemmich*, 291 N.W.2d 772 (S.D. 1980)(“The use of the words ‘any insured’ makes it clear that the policy does not cover liability arising from motor vehicle use by any insured.”); *Allstate Ins. Co. v. Kim*, 121 F. Supp. 2d 1301, 1308 (D. Haw. 2000) (holding that a severability clause “clearly was intended to afford each insured a full measure of coverage up to the policy limits, not to negate the policy’s intentional acts exclusion.”); *Yerardi v. Pac. Indem. Co.*, 436 F. Supp. 2d 223 (D. Mass. 2006) (“Therefore, notwithstanding the severability language, this court finds that the 2002 Policy unambiguously prohibits recovery by an innocent co-insured where the actions of another insured fall within the scope of the provisions concerning intentional acts and concealment or fraud.”).

the excludable acts of any insured, even if the policy contains a severability clause. We join that majority.”).

In the most oft-cited case directly on point, the Colorado Supreme Court upheld an insurer’s ability to exclude coverage for all insureds based on the intentional and expected acts of a co-insured. In *Chacon v. American Family Mut. Ins. Co.*, 788 P.2d 748 (Co. 1990), the insureds, Reyes and Sarah Chacon, sought coverage from American Family Mutual Insurance Company (“American Family”) based on the severability clause of their insurance policy. The Chacon family sought coverage for liability stemming from their son’s vandalism of a local school building. The Chacon family, like Tara Clendenen and Patricia Shoaf here, argued that the severability clause, which provided that “each person described above is a separate insured under this policy”, created coverage in the face of an intentional or expected acts exclusion that excluded coverage for the intentional or expected acts of “any insured”. The Colorado Supreme Court rejected the Chacon family’s argument, holding that American National had properly excluded coverage for the Chacon family based on the intentional acts of the son, an insured under the policy. Significantly, in its decision, the *Chacon* Court distinguished between the phrase “the insured” and the phrase “any insured”:

Initially, the ‘intentional act’ exclusion contained in the Chacon family’s homeowner’s policy referring to the actions of ‘any insured,’ must be distinguished from those policies which refer to the actions of ‘the insured.’ The majority of courts which have considered this issue have held that ‘unlike the phrase ‘the insured,’ the phrase ‘any insured’ unambiguously expresses a contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured.

Id. at 751 (quoting *Sales v. State Farm Fire & Casualty Co.*, 849 F.2d 1383, 1385 (11th Cir. 1988))(emphasis added). It also explained that the language “any insured” excluded coverage for all insureds based on the intentional or expected acts of any person insured under the policy:

We find the reasoning of the majority of courts more persuasive than that of *Worcester*,⁴ because it considers and gives effect to all the policy provisions and recognizes that an insurance policy is a contract between the parties which should be enforced in a manner consistent with the intentions expressed therein.

Id. at 752.

The Court's reasoning in *Chacon* is instructive here because American National and Erie, like American Family in the *Chacon* case, excluded coverage for intentional or expected acts of *any insured or anyone protected*, respectively. The American National and Erie policies did not limit their exclusions to the insureds that actually committed the intentional act by using language limiting coverage for only "the" insured. This distinction is not without a difference as it clearly evidences the insurers' intent to create a co-obligation between the insureds covered by the policy and exclude coverage for all insureds based on the intentional or expected acts of any insured.

A United States District Court in the Fourth Circuit also has adopted the *Chacon* rationale. In *Std. Fire Ins. Co. v. Proctor*, 286 F. Supp. 2d 567 (2003), an insured sought coverage under a homeowner's policy for liability stemming from his son's beating of a neighbor after a dispute about an auto accident. After dispensing with the question of whether the Plaintiff properly pled a negligence claim, the U.S. District Court for the Southern District of Maryland held that the insurer, Standard Fire Insurance Company ("Standard Fire") properly excluded coverage:

This Court, however, agrees with the majority of jurisdictions who have taken the alternative approach and interpreted 'any insured' as unambiguously expressing 'a contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured.' In *Chacon*, the homeowner's policy indicated that personal liability coverage did not extend to "bodily injury or property damage . . . which is expected or intended by any insured," and included a severability clause providing that 'each person described above is a separate insured under this policy.' The court indicated that a severability clause 'is not inconsistent with the

⁴ *Worcester Mut. Ins. Co. v. Marnell*, 496 N.E.2d 158 (Mass. 1986).

creation of a blanket exclusion for intentional acts.’ Furthermore, the court concluded that the ‘any insured’ provision ‘clearly and unambiguously expresses an intention to deny coverage to all insured when damage is intended or expected as a result of the actions of any insured.’

Std. Fire Ins. Co. v. Proctor, 286 F. Supp. 2d 567, 574-575 (D. Md. 2003)(Internal citations omitted)(emphases added).

Like in *Chacon* and *Standard Fire*, American National and Erie “unambiguously express[ed] ‘a contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured.’” Assuming *arguendo* that Tara Clendenen and Patricia Shoaf are “innocent” co-insureds,⁵ they agreed to create a joint obligation by all insureds to not commit intentional or expected acts by agreeing to the plain language of the intentional or expected acts exclusions.

While *Chacon* and *Standard Fire* are instructive, this Court’s analysis of the certified questions may be more informed by *American Family Mutual Insurance Co. v. White*, 65 P.3d 449 (2003), because the facts are very similar to this one. In *American Family*, the insured sought coverage where his minor son struck the plaintiff in the head with a metal pipe. The plaintiff sued the insured alleging that the actions of the minor son should be imputed to the insured father. In addition, the plaintiff alleged that the father *negligently supervised the minor son*. The minor son later pled guilty to a lesser criminal offense. The insured’s policy contained a “violation of criminal law” provision which excluded coverage “arising out of...violation of any criminal law for which any insured is convicted. . . .” *Id.* at 503 (emphasis added). The

⁵ A minority of courts have adopted the position advocated by Tara Clendenen and Patricia Shoaf, holding that there is no co-obligation created by intentional or expected acts exclusions. Several of these cases are distinguishable from the instant case. See *Transport Indem. Co. v. Wyatt*, 417 So. 2d 568 (Ala. 1982); *West Bend Mut. Ins. Co. v. Salemi*, 511 N.E.2d 785 (Ill. App. Ct. 2d Dist. 1987) (distinguishable because co-insured was innocent, instead of negligent as is the case here); *Brumley v. Lee*, 963 P.2d 1224, (Kan. 1998); *Worcester Mut. Ins. Co. v. Marnell*, 496 N.E.2d 158 (Mass. 1986); *Ryan v. MFA Mut. Ins. Co.*, 610 S.W.2d 428 (Tenn. Ct. App. 1980) (distinguishable because it was likely an innocent co-insured [remanded to determine that issue] and policy stated “an insured”); *West American Ins. Co. v. AV&S*, 145 F.3d 1224 (10th cir. 1998) (distinguishable because co-insured was “innocent”); *McFarland v. Utica Fire Ins. Co.*, 814 F. Supp. 518 (S.D. Miss. 1992) (distinguishable because the policy says “an insured” which the court declined to read to mean “any insured”); *Am. Family Mut. Ins. Co. v. Bower*, 752 F. Supp. 2d 957 (N.D. Ind. 2010).

insurer, American Family, filed an action seeking a declaration that it had no duty to defend or indemnify the father against the plaintiff's claims, including the alleged negligence of the insured in supervising his son. The court ruled in favor of American Family:

[W]e conclude that the phrase 'any insured' in an exclusionary clause means something more than the phrase 'an insured.' 'The 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.'⁶ As we recently stated in another case, 'Courts have consistently interpreted the language 'any insured' as expressing a contractual intent to prohibit recovery by innocent co-insureds. Thus, if any one of the insureds [violates the exclusion], no other insureds can recover.'

Am. Family Mut. Ins. Co. v. White, 204 Ariz. 500, 508, 65 P.3d 449, 457 (Ariz. Ct. App. 2003) (quoting *Brown v. United States Fid. & Guar. Co.*, 194 Ariz. 85, 95, 977 P.2d 807, P 61, 977 P.2d 807, 817 (App. 1998) (internal citations omitted).

The Arizona appellate court's salient distillation of a similar exclusion is persuasive. Like *American Family*, American National and Erie excluded coverage here because an intentional or expected act was committed by "anyone" or "any insured." The intent of the parties could not be more clear: where any insured commits an intentional or expected act, coverage is excluded for all insureds.

2. A decision by this Court finding coverage where it is clearly and unambiguously excluded could destabilize affect West Virginia's insurance market.

Finding coverage in this case would send a message to West Virginia insurers that exclusions in their policies are meaningless. More importantly, it would leave insurers unable to accurately price insurance policies. Insurers price policies based on risk. Each policyholder represents a certain degree of risk for an insurer, and insurers evaluate certain risk factors that help determine if that insurer can accept or decline that risk and, in turn, what premium to collect to cover that policyholder's share of the premium pool. The risk of an individual insured – or a

⁶ *Taryn E.F. v. Joshua M.C.*, 505 N.W.2d 418, 421, 178 Wis. 2d 719, 725 (Wis. Ct. App. 1993).

group of individuals insured under one policy – is determined by the terms of the insurance policy. Insurers exclude certain coverages which the insurer is either unable or unwilling to underwrite, and they do so in order to keep costs low and accurately price insurance products for policyholders.

In this case, American National and Erie excluded insurance coverage where any individual otherwise insured under the policies committed an intentional or expected act. If these exclusions are stripped of their effect, then insurers are left to question what risks they are underwriting. And, if the exclusions applied only to the individual that engaged in the intended or expected act, then the policies would say so, and American National and Erie would have collected premiums – laden with potential moral hazards – that allowed an insured to recover under their policies, even where a co-insured intended or expected to create liability with their actions.

Instead, Tara Clendenen and Patricia Shoaf paid premiums that were commensurate with their coverage – coverage that excluded intentional acts for all insureds. This Court should not permit sympathetic facts to create bad law, and the parties’ bargained-for agreement should be upheld.

VII. CONCLUSION

For these reasons, the West Virginia Insurance Federation respectfully requests the Court to apply the plain language of the American National and Erie policies, and answer the certified questions as set forth herein.

WEST VIRGINIA INSURANCE FEDERATION

BY DINSMORE & SHOHL, LLP



Jill Cranston Rice (WV State Bar No. 7421)

215 Don Knotts Blvd., Suite 310

Morgantown, WV 25301

Telephone: (304) 225-1430

Facsimile: (304) 296-6116

E-mail: jill.rice@dinsmore.com

Andrew T. Kirkner (WV State Bar No. 12349)

801 Pennsylvania Ave. NW, Suite 610

Washington, DC 22204

Telephone: (202) 372-9135

Facsimile: (202) 372-9141

E-mail: andrew.kirkner@dinsmore.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the *Brief of the West Virginia Insurance Federation as Amicus Curiae in Support of Brief of American National Property and Casualty and Erie Insurance Property & Casualty Company* upon all parties to this matter by depositing a true copy of the same in the U.S. Mail, postage prepaid, properly addressed to the following:

Dwayne E. Cyrus
Shuman McCuskey & Slicer, PLLC
P.O. Box 3953
1411 Virginia Street East, Suite 200
Charleston, WV 25301

Margaret L. Miner
Shuman McCuskey & Slicer PLLC
1445 Stewartstown Road, Suite 200
Morgantown, WV 26505

Laurie C. Barbe
Steptoe & Johnson PLLC
P.O. Box 1616
Morgantown, WV 26507-1616

Amy M. Smith
Steptoe & Johnson PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330

J. Michael Benninger
Benninger Law PLLC
P.O. Box 623
154 Pleasant Street
Morgantown, WV 26507

Trevor K. Taylor
Paul W. Gwaltney, Jr.
Taylor Law Office
34 Commerce Drive, Suite 201
Morgantown, WV 26501

Elisabeth H. Rose
Rose, Padden Petty Taylor & Lilly
P.O. Box 1307
Fairmont, WV 26555-1307

This 28th day of June, 2016.



Jill Cranston Rice (WV State Bar No. 7421)