



## Children's Advocacy Institute

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Supreme Court of California  
Honorable Chief Justice Ronald M. George  
Office of the Clerk  
350 McAllister Street  
San Francisco, California 94102-4797

July 21, 2009

Re: *Amicus Curiae* Letter in Support of Petition to Review:  
*Brandon S. v. The State of California ex rel Foster Family  
Home and Small Family Home Insurance Fund*  
**Supreme Court Case No. S174473**  
2009 DJDAR 8052, Second District Court of Appeal, Division 4  
174 Cal. App. 4th 815 [94 Cal. Rptr. 3d 660]  
Superior Court of Los Angeles County No. B196249

Dear Chief Justice Ronald M. George,

The Children's Advocacy Institute (CAI) is an academic center and statewide advocacy group focusing on the welfare of California's children. CAI, which is part of the University of San Diego School of Law, works to improve the status and well-being of children in our society by representing their interests and their right to a safe, healthy childhood. Among other things, CAI convenes the Children's Advocates Roundtable in Sacramento — an affiliation of over 300 organizations with an interest in child-related policy. Personally, I direct the Institute, hold the Price Chair in Public Interest Law, am author of *Child Rights and Remedies* (Clarity, 2002, 2006), and begin service next month as the Chair of the Board of the National Association of Counsel for Children.

CAI respectfully requests that the California Supreme Court grant review of the *Brandon S.* decision cited above. Neither CAI nor I have any financial interest in the matter, nor have we received any money or other consideration for making our request. Without your review or its depublication, this opinion will be a regrettable precedent for California's children.

This decision concerns coverage by the Foster Family Home and Small Family Home Insurance Fund. CAI has long monitored the supply of family foster homes and is well familiar with the important disincentive from participation that flows from what is currently an effective private insurance boycott of coverage for these providers. In fact, current homeowner and other policies are increasingly strict in excluding any possible liability involving foster care. As a result, a crisis developed in the mid-1980s, with many licensees threatening to leave the field. That crisis led to the passage of legislation in 1986 creating this stop-gap fund that is here at issue.

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The decision below concerns a stepson who molested a foster child (Brandon) as the result of alleged negligent supervision by the foster parents subject to the Fund's coverage. The decision looks at Health and Safety Code section 1527.3 — the section of the relevant statute listing what is excluded from coverage. The opinion notes that subsection (a) of this section excludes from coverage “[a]ny loss arising out of a dishonest, fraudulent, *criminal*, or intentional act” (emphasis supplied by the court, 174 Cal. App. 4th 815, 819). It then concludes that this “unambiguous” language means that if any such act is implicated in the alleged wrong, coverage is denied.

The court below read subsection (a) out of context and without an understanding of its rationale. First, the exclusions of section 1527.3 run from subsection (a) to subsection (h). They are properly reviewed *en toto* prior to interpreting any of them. Every one of these subsections pertain to the foster parents who are covered — not to third parties. For example, subsection (b) pertains to “any occurrence that does not arise from the foster-care relationship”, subsection (c) excludes liability from the operation of the foster parent’s auto or other vehicle — *et al* through to subsection (h). None of the subsections phrase the limitation in the same way, but a reading of all of them makes clear the legislative intent that all of section 1527.3 deals with exclusions applicable to the situation of *the insured* (*i.e.*, the foster parent).

Apparently, the court below is implicitly contending that subsections (b) and (c) and (d) and (e) and (f) and (g) and (h) are limited to the situation of the insured, but not subsection (a). This is so because of the “literal reading.” CAI respectfully contends that any literal reading is informed by its context and by related legislative intent. To ascertain the Legislature’s intent, we must read the words of a statute as a whole, keeping in mind its nature and obvious purpose. (*Hutchinson v. Workers’ Comp. Appeals Bd.* (1989) 209 Cal.App.3d 372, 375.) Courts consider the consequences that flow from an interpretation of a statute to prevent mischief or absurdity in its application. (*Dyna-Med, Inc. v. Fair Employment & Housing Comm.* (1987) 43 Cal.3d 1379, 1392.) If a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result should be followed. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

Second, the limitation in subsection (a) is related to the decision of this Honorable Court’s decision in *J.C. Penney Casualty Insurance Co. V. M.K.* (1991) 52 Cal.3d 1009. The Court there considered the case of a foster parent who allegedly molested his foster child. The issue in *J.C. Penney* concerned the general policy against insuring against intentional torts directly. And the court held that such molestation involved a “prior intent to injure” sufficient to invoke such coverage exclusion as a matter of law. That same issue is what subsection (a) is all about. It is intended to broadly exclude from Fund coverage criminal and intentional acts to injure a child — for the obvious public policy reason that we do not want to indemnify or in any way add incentives for such behavior among insureds. We emphasize: “among insureds.” But the court below is going beyond this or any other reasonable interpretation of this exclusion, to here hold that ANY criminal or even intentional act by ANY person causing injury to a foster child prohibits coverage for the insured’s own negligent actions that allowed the injury to occur. According to the opinion of the court below, section 1527.3(a) is not limited to actions of the insured foster parent (as the exclusion intends in a full and

informed reading of the entire section), but applies to actions by third parties or *anyone* involved in the injury.

Hence, a foster parent can engage in negligent supervision (*e.g.*, pay no attention to the foster child in terms of where he is or who he is with or what he is doing) and there is no liability for the foster parent's underlying actions that allow the injury or death to be caused by the criminal (or dishonest or even intentional) act of a third party. *Query*, is that what is intended here?<sup>1</sup>

Regrettably, the instant misinterpretation effectively forecloses Fund coverage unless there is no criminality (broadly defined), dishonesty, or intentional act involved in the causation of an injury — and not just by the policyholder, *but by anyone at all*. It is unclear what is left for such a Fund to cover, and why the Legislature would bother to create a Fund without a likely recipient. Certainly the entire concept of negligent supervision, the obligation of foster parents to perform as they are employed to act, would here be foreclosed from coverage based on the arbitrary happenstance that the injury causation related to some third party's intentional act. Such an interpretation has nothing to do with the rationale for "criminal intent" denial of coverage for policyholders who commit intentional, criminal acts. In fact, it has nothing to do with any rational policy consideration we can articulate. Nor has the court below provided one.

CAI has monitored foster family homes over the last two decades. Their numbers have been falling steadily and precipitously. In 2001 over 16,000 foster children were in family placements. Today, less than 6,000 are so placed. Such families are the origin of 80% of the non-kin adoptions of foster kids — the outcome all of us want for those who have lost their biological parents. The

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<sup>1</sup> Such an imprudent interpretation is contrary to legislative intent, a fair reading of the entire Act and this section beyond the subsection here mistakenly parsed. We fully understand the literal words of subsection (a) comport with the literal interpretation of the court below. And we appreciate the famous interpretative maxim that "what is not included is deemed excluded." Hence, the court below reasoned that a "foster parent" or "insured" reference in (b) through (h) implies that its omission somewhere else (*e.g.*, in subsection (a)) intends that it not apply there. In response to this maxim, my students have heard the following story each year over the past 25, illustrating the maxim's flaw:

When my son Aaron was 7 years old I caught him with Oreo cookie crumbs on his mouth at 7 a.m. I told him: 'Aaron, your mother makes you breakfast at 7:30 and it is unfair to her and not healthy to you to be eating Oreos before breakfast. Do you understand?' 'Yes,' he said dutifully. That night I returned home at 5:30 and found him sitting in the living room, just before dinner, with more Oreo cookie crumbs on his mouth. 'What did I tell you this morning?', I asked. 'You told me I couldn't eat cookies before breakfast, so you must have meant it was okay before dinner.'

Aaron is now a law professor at Arizona State. But my point is important to this case — for sometimes a reference is not made because it is assumed or implied that it is so included in the communication. Aaron was actually quite aware that when I said "you should not be eating Oreos before breakfast" that I was not conferring permission to do so before every other meal — quite the opposite. And when the Legislature is dealing with the limitations on a policy covering *foster parent insureds*, it understandably assumes that it need not repeat the words "as to the insured foster parent" in every sentence — any more than I should be required as a parent to say "no cookies before breakfast, lunch, dinner, or any other regularly scheduled meal unless I specifically approve of it." Neither parents nor legislators include every specification in every sentence. And interpretation, to be faithful to the intent of either, read the statements made in context, and mindful of the overarching subject matter and concern of the speaker.

decline in these placements is partly the result of California's unlawfully low compensation for such foster parents — now at over 40% below out-of-pocket cost. (For details and court findings/evidence regarding family foster care placement supply diminution, see the record in *California State Foster Parent Association v. Wagner* (U.S. District Court, Northern District of CA, #C 07-5086 WHA, now before the Ninth Circuit, #09-15025); see evidence and judgment at [www.cachildlaw.org/FC\\_Litig.htm](http://www.cachildlaw.org/FC_Litig.htm).) But we well know that insurance or Fund coverage and related risk is a significant factor in stimulating supply and choices for these children of the state.

This supply diminution and the concomitant drop in adoptions in California will now be amplified by a decision that denies Fund coverage to foster parents across the widest breadth of possible liability. The consequence of the decision is that anyone generous and big hearted enough to ignore the economics and take a foster child into his or her home will now face virtually certain personal liability should harm occur to the child. There is no private coverage. And the Fund we have all relied upon to persuade such persons to assume this important role is now stripped away by this misinterpretation of the exclusions section of the relevant statute. In this case, the misinterpretation was certainly not with the intention to yield such a consequence by the court below, but it underlines the importance of reading subsections in light of the entire section and Act in which they sit, and in light of overall legislative intent. Here, the error will have consequences for the least powerful among us.

Sincerely,



Robert C. Fellmeth  
Price Professor of Public Interest Law  
Executive Director, Children's Advocacy Institute

**PROOF OF SERVICE BY MAIL**

Cal. Supreme Court Case No. S174473

Second District Court of Appeal Case No. B196249

Los Angeles County Superior Court Case No. BC333074

*Brandon S. v. State of California ex rel Foster Family Home  
and Small Family Home Insurance Fund*

I, Elisa Weichel, declare that I am over the age of 18 years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California, where the mailing occurs; and my business address is 5998 Alcalá Park, San Diego, CA 92110.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

I caused to be served the following document: *Amicus Curiae Letter in Support of Petition for Review* by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4783  
*Original and 13 copies sent via Federal Express*

Clerk of the Court of Appeal  
Second Appellate District  
300 South Spring Street, 2nd Floor  
Los Angeles, CA 90013

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*Counsel for Defendants/Respondents*

I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service (except as noted above), this same day, at my business address shown above, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 21, 2009.



ELISA WEICHEL