FAMILY EXCLUSION CLAUSES: WHATEVER HAPPENED TO THE ABROGATION OF INTRAFAMILY IMMUNITY?

Since the abrogation of intrafamily tort immunities, insurance companies in California have inserted exclusionary provisions into their automobile and homeowner policies which preclude indemnity where one family member negligently injures another. These provisions, known as family exclusion clauses, are specifically authorized in automobile policies by statute, however, legislative justification for such exclusions is lacking for homeowner policies. This Comment argues that family exclusion clauses should be eliminated in both automobile and homeowner policies because the clauses violate well-settled tort principles, as well as public policy, as pronounced by the California Supreme Court.

INTRODUCTION

This Comment addresses the widespread use of family exclusion clauses in automobile and homeowner insurance policies in California. Typically, insurance agencies purport to offer comprehensive liability coverage to their customers, often through broad provisions in automobile and homeowner insurance policies.[1] However, almost every insurance policy issued in California contains several exclusionary provisions which drastically reduce actual coverage.[2]

One such provision is generally referred to as the family exclusion clause. This clause excludes liability coverage where one family member is injured by the tortious conduct of another. This Comment focuses on the inconsistency between family exclusion clauses and the California Supreme Court's abrogation of intrafamily tort immunity. Family exclusions directly contravene well-settled principles of

1. The typical automobile or homeowner insurance policy states the insurer "agrees to pay on behalf of the Insured *all* sums which the Insured shall become legally obligated to pay as damages because of bodily injury . . . ." State Farm Fire & Casualty Co. v. Alstadt, 113 Cal. App. 3d 33, 36, 169 Cal. Rptr. 593, 594 (1980) (emphasis added).

2. *E.g.*, Schwalbe v. Jones, 16 Cal. 3d 514, 521 n.9, 546 P.2d 1033, 1038 n.9, 128 Cal. Rptr. 321, 326 n.9 (1976) (judicial notice taken that family exclusion clauses appear in virtually every automobile insurance policy issued in California); Mutual of Enumclaw Ins. Co. v. Wiscomb, 97 Wash. 2d 203, 643 P.2d 441, 445 (1982) (prevalence of family exclusion clauses in that state).

tort law and public policy in California.[3] Furthermore, these unconscionable provisions reflect a bad faith effort by insurance companies to misrepresent policy benefits to unwary and unsophisticated consumers.[4]

This Comment urges the California Supreme Court to reconsider its unequivocal holdings abolishing intrafamily immunity, and declare family exclusionary clauses in homeowner policies void as against public policy. These provisions can be struck down under sound judicial principles of adhesion contract such as unconscionability, as they apply to insurance policies. Additionally, this author suggests the California legislature prohibit family exclusion clauses in automobile policies by eliminating specific sections of the insurance code which permit these unsavory provisions.

FAMILY EXCLUSION CLAUSES

Family exclusion clauses appear in virtually every automobile and homeowner insurance policy issued in California.[5] The clauses exclude indemnity for bodily injury sustained by an "insured," or any relative who resides in the same household.[6] Most policies define "insured" to include not only the named insured, but their spouse and children as well.[7] Consequently, insurance indemnity does not exist

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3. The California Supreme Court has repeatedly pursued the goals of loss distribution and compensation through a scheme of social insurance in tort law. *See* Levy & Ursin, *Tort Law in California: At the Crossroads,* 67 CALIF. L. REV. 497 (1979). These principles were used by the California Supreme Court in abrogating intrafamily immunity. However, the insurance industry continues to avoid indemnity in intrafamily torts through the use of family exclusion clauses. As noted by Levy & Ursin: "The insurance industry, . . . has attempted to reestablish these [intrafamily] immunities by including family exclusion clauses in liability insurance policies. Such clauses exclude from coverage members of the insured's family, and have the practical effect of reviving through contract the tort immunities abrogated by the court." *Id.* at 505 n.49.

4. The implied covenant of good faith and fair dealing dictates that the insurer must protect the insured's interest, as much as its own. Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 818-19, 598 P.2d 452, 456, 157 Cal. Rptr. 482, 486 (1979) *cert. denied,* 445 U.S. 912 (1980). Moreover, carriers must refrain from acts which injure the insured's rights to receive policy benefits. *Id.* at 818, 598 P.2d at 456, 157 Cal. Rptr. at 486. Extensive California case law exists regarding the implied covenant of good faith and fair dealing, however, this Comment will not examine these cases. Nevertheless, this doctrine may provide a means for courts to invalidate family exclusionary clauses and impose liability on carriers. *See* notes 80-82 and accompanying text.

5. *See supra* note 2.

6. A typical provision reads as follows: "THIS INSURANCE DOES NOT APPLY UNDER: Coverage A, bodily injury to any insured or member of the family of an insured residing in the same household as the insured." *See, e.g.,* Farmers Ins. Exch. v. Cocking, 29 Cal. 3d 383, 386, 628 P.2d 1, 2, 173 Cal. Rptr. 846, 847 (1981); State Farm Fire & Casualty Co. v. Alstadt, 113 Cal. App. 3d 33, 35-38, 169 Cal. Rptr. 593, 594-95 (1980); Meritplan Ins. Co. v. Woollum, 52 Cal. App. 3d 167, 169-70, 123 Cal. Rptr. 613, 615 (1975) (examples of typical exclusion clause language).

7. See cases cited *supra* note 6 for typical policy definitions of "insured." An example is "(a) 'Insured' means (1) the named insured stated in the declarations of this policy; (2) if residents of the Named Insured's household, his spouse, the relatives of

when one family member is injured through another family member's negligence. As a result, compensation is often denied in an intrafamily tort.[8]

LEGISLATIVE AUTHORIZATION IN AUTOMOBILE POLICIES

California Insurance Code section 11580.1 permits certain exclusionary clauses in *automobile* policies.[9] Pursuant to this statute, a carrier may exclude indemnity for bodily injury to any insured in an automobile policy.[10] Moreover, the legislature has specifically noted that the Insurance Code represents the exclusive public policy in California pertaining to automobile insurance.[11] Refusing to invalidate family exclusion clauses in automobile policies, courts have consistently cited this statute for its expression of legislative intent.[12]

Despite statutory authorization, family exclusion clauses violate the mandate of California judicially created public policy and tort reform.[13] To permit family exclusion clauses after the abolition of intrafamily immunity is inconsistent. California Insurance Code section 11580.1 permits insurance companies to revive the archaic doctrine of intrafamily immunity and burdens innocent tort victims.[14]

Unlike automobile insurance, family exclusion clauses are without

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either, and any other person under the age of twenty-one in the case of any Insured . . . ." State Farm Fire & Casualty Co. v. Alstadt, 113 Cal. App. 3d 33, 37, 169 Cal. Rptr. 593, 594 (1980).

8. *See infra* note 27 and accompanying text (intrafamily tort suit usually not brought unless there is liability insurance).

9. CAL. INS. CODE § 11580.1 (West 1983).

10. "In addition to any exclusion as provided in paragraph (3) of subdivision (b), the insurance afforded by any such policy of automobile liability insurance . . . may, by appropriate policy provision, be made inapplicable to any or all of the following . . . (5) Liability for bodily injury to an insured . . . ." CAL. INS. CODE § 11580.1(c)(West 1983).

11. The Legislature declares that the public policy of this state in regard to provisions authorized or required to be included in policies affording automobile liability insurance or motor vehicle liability insurance issued or delivered in this state shall be as stated in this article, that this article expresses the total public policy of this state respecting the contents of such policies . . . .

CAL. INS. CODE § 11580.05 (West 1977).

12. Farmers Ins. Exch. v. Cocking, 29 Cal. 3d at 386-87, 628 P.2d at 2, 173 Cal. Rptr. at 847-48; Meritplan Ins. Co. v. Woollum, 52 Cal. App. 3d at 174-76, 123 Cal. Rptr. at 618-19.

13. *See generally* Levy & Ursin, *supra* note 3 (discussion of tort reform in California).

14. In comparison, Michigan has abrogated family exclusion clauses in automobile policies, deeming them void as against public policy. *E.g.* State Farm Mut. Auto. Ins. Co. v. Sivey, 404 Mich. 59, 272 N.W.2d 55 (1978). Other jurisdictions have also eliminated family exclusion clauses as being against public policy. *E.g.*, Mutual of Enumclaw Ins. Co. v. Wiscomb, 97 Wash. 2d 203, 643 P.2d 441 (1982).

specific statutory authorization in *homeowner* policies. Therefore, the courts should apply the public policy which favors compensation for all injured persons and abrogate these clauses in this context.[15]

California's Public Policy and Family Exclusion Clauses

Intrafamily exclusion clauses contravene judicial tort policy in California, because the California Supreme Court has unequivocally eliminated intrafamily immunities to negligence liability and has permitted compensation for intrafamily tort victims.[16] Spousal immunity for both negligent and intentional torts was abandoned by the California Supreme Court in 1962.[17] Parental immunity was later abolished by the same court in 1971.[18]

The fundamental policy and motivation for the abolition of intrafamily tort immunity was to provide compensation for those persons injured by the tortious conduct of others. As the court recognized in *Self v. Self*:[19]

> [T]he general rule is and should be that, in the absence of statute or some compelling reason of public policy, where there is negligence proximately causing an injury, there should be liability. Immunity exists only by statute or by reason of compelling dictates of public policy. Neither exists [in the case of intratamily torts].[20]

Self and other decisions demonstrate a fundamental concern with compensation for accident victims, rather than mere abstract notions of liability. In fact, compensation has become the basic goal of California tort law. In *Jess v. Herrmann*,[21] a case involving the question of whether there should be a set-off of plaintiff's and defendant's recoveries where there is comparative negligence, the California Su-

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15. *See supra* note 3. *See also* Farmers Ins. Exch. v. Teachers Ins. Co., 101 Cal. App. 3d 804, 805, 809, 161 Cal. Rptr. 738, 739-40 (1980) ("Public policy does not permit an automobile liability insurance carrier to exclude coverage for bodily injuries sustained by a person solely because claimant is a relative of an insured."); Mutual of Enumclaw Ins. Co. v. Wiscomb, 97 Wash. 2d 203, 643 P.2d 441, 446 (1982) ("Under any circumstances exclusion clauses which purport to deny coverage to children of the insured or any person not a party to the insurance contract are violative of this state's public policy."). *But see* State Farm Fire & Casualty Co. v. Clendening, 197 Cal. Rptr. 377 (1983) (family exclusion clauses do not violate public policy).

16. Intrafamily immunity was judicially created and barred family members from suing one another for both negligent and intentional torts. *E.g.*, Trudell v. Leatherby, 212 Cal. 678, 300 P. 7 (1931); Peters v. Peters, 156 Cal. 32, 103 P. 219 (1909).

17. Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962) (spousal immunity abolished for intentional torts); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (spousal immunity abolished for negligence torts).

18. Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

19. 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962).

20. *Id.* at 689, 376 P.2d at 69, 26 Cal. Rptr. at 101.

21. Jess v. Herrmann, 26 Cal. 3d 131, 143, 604 P.2d 208, 215, 161 Cal. Rptr. 87, 94 (1979) (a setoff case showing concern for recovery). The state of Washington has also focused upon guaranteeing compensation to tort victims. *E.g.*, Mutual of Enumclaw Ins. Co. v. Wiscomb, 97 Wash. 2d 203, 643 P.2d 441, 446 (1982) (family exclusion clauses invalidated for violating state's public policy of assuring compensation).

preme Court emphasized its concern for the injured parties' "ultimate financial recovery."

However, intrafamily exclusion clauses have virtually eliminated the effect of these decisions. The availability of liability insurance was crucial to the abrogation of intrafamily immunity because insurance provides a reliable source of compensation for tort victims.[22] In abolishing negligence immunities and promoting the goals of loss distribution and compensation, the California Supreme Court has consistently emphasized and relied upon the critical role insurance plays in modern society.[23] Following the lead of Chief Justice Traynor, the court premised over twenty years of tort reform upon the recognition that liability insurance was prevalent in modern society.[24]

Indeed, the prevalence of insurance was an important basis for the California Supreme Court's abrogation of intrafamily immunity. In

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22. 26 Cal. 3d 131, 604 P.2d 215, 161 Cal. Rptr. 87. *See* Levy & Ursin, *supra* note 3 at 497-545. *Cf.* "The purpose of liability insurance is not only to protect the insured against the adverse impact of liability but to assure that the victim be actually compensated for his tort loss instead of having merely an empty claim against a judgment-proof defendant . . . ." Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with* American Motorcycle Ass'n v. Superior Court, 30 HASTINGS L. J. 1464, 1470 (1979) (emphasis added).

23. Levy & Ursin, *supra* note 3, at 500; 2 F. HARPER & F. JAMES, THE LAW OF TORTS §§ 13.1-13.7 (1956). *See* Brown v. Merlo, 8 Cal. 3d 855, 859, 506 P.2d 212, 215, 106 Cal. Rptr. 388, 391 (1973) (automobile guest statute eliminated as it "completely ignores the prevalence of liability insurance . . . ."); Jess v. Herrmann, 26 Cal. 3d 131, 135, 604 P.2d 208, 209, 161 Cal. Rptr. 87, 88 ("[G]eneral principles of equity and common sense dictate that California courts not blind themselves to the realistic status of the parties vis-a-vis insurance.").

24. Levy & Ursin, *supra* note 3, at 500. Chief Justice Traynor recognized the existence of insurance as crucial to assessing tort liability and its equitable effect of spreading the loss or cost of an injury throughout the public sector, rather than casting it solely upon the injured victim: "The cost of an injury and loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring opinion). *See also* Traynor, *The Ways and Means of Defective Products and Strict Liability,* 32 TENN. L. REV. 363, 366 (1965). The existence of insurance has been repeatedly cited by the California Supreme Court when expanding liability to provide compensation to a greater number of tort victims. Abolishing rules which immunized land owners from negligence liability in Rowland v. Christian, 69 Cal. 2d 108, 117, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103 (1968), the court noted the "prevalence and availability of insurance" as the primary source to enhance loss distribution and compensation. This opinion was later approved by Judge Bazelon, who recognized that contemporary developments in tort law were related, in part, to the availability of insurance; "[T]here is a continual movement away from *fault* as the governing principle for allocation of losses, in favor of enterprise liability or the distribution of losses over a larger segment of society through insurance." Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101 (D.C. Cir. 1972) (emphasis in original).

Gibson v. Gibson,[25] the court focused upon the critical role of insurance in eliminating parental immunity:

> [W]e feel we that cannot overlook the widespread prevalence of liability insurance and its practical effect on intrafamily suits. Although it is obvious that insurance does not create liability where none otherwise exists (citation omitted), it is unrealistic to ignore this factor in making an informed policy decision on whether to abolish parental negligence immunity.[26]

The availability of insurance is particularly significant in intrafamily tort claims. In fact, the California Supreme Court has recognized that "virtually no [intrafamily personal injury] suits are brought except where there is insurance."[27]

Only where the family member tortfeasor is insured is it feasible for an injured family member to bring suit against the negligent relative and recover adequate compensation.[28] Absent insurance, a judgment in an intrafamily personal injury suit would generally result in a mere redistribution of family assets, rather than providing any measurable recovery to the injured party. Indeed, without insurance, the suit, if brought at all, would undoubtedly result in a net loss in overall family assets due to the attorneys' fees and other litigation expenses.

Family exclusion clauses render the abrogation of intrafamily immunity illusory and cast the entire cost of an injury upon the victim. These exclusion clauses enable insurance companies to circumvent the public policy of providing compensation for injured family members, which was the primary basis for eliminating intrafamily immunity.[29] By denying indemnity for the negligence of an insured against another family member, the insurance industry destroys what was achieved through the abrogation of intrafamily immunity.[30]

Furthermore, including intrafamily exclusion clauses in insurance policies may not be justified as a legitimate insurance underwriting practice. These exclusions are directed at a specific category of vic-

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25. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

26. *Id.* 3 Cal. 3d at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.

27. 3 Cal. 3d at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293 (citing James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L. J. 549, 553 (1948)).

28. *Id.*

29. *See supra*, note 19 and accompanying text. *See also* 3 Cal. 3d at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293; ("public policy compels liability, not immunity.").

30. Insurance companies assert that family exclusion clauses have no effect on intrafamily immunity. *E.g.* Farmers Ins. Exch. v. Cocking, 29 Cal. 3d 383, 388, 173 Cal. Rptr. 846, 848 (1981) (an injured party "retains the full unrestricted right to sue the negligent insured. (approving Meritplan Ins. Co. v. Woollum, 52 Cal. App. 3d 167, 123 Cal. Rptr. 613 (1975)). The exclusion affects only the right to reach insurance proceeds for the satisfaction of any judgment obtained."). This view fails to consider two important points. First, the prevalence of insurance was crucial to the court's abrogation of intrafamily immunity. *E.g.*, Gibson v. Gibson 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288. Additionally, without insurance, intrafamily suits are generally abandoned. *Id.* at 922, 479 P.2d at 563, 92 Cal. Rptr. at 293. *See also* James, *supra* note 26, at 553.

tims, rather than toward a particular type of risk or category of tortfeasor. Few sound reasons exist for these policy provisions despite insurance industry claims.[31] In short, from a policy standpoint, family exclusion clauses are irrational.[32]

Moreover, family exclusion clauses affect persons who are not parties to the insurance contract. Children, invalids, spouses, and other family members are defined as "insureds," and, thus, are excluded from coverage for their injuries.[33]

SUPPORT FOR FAMILY EXCLUSION CLAUSES LACKS MERIT

Currently, there is no justification other than self-serving interests of the insurance industry which supports family exclusion clauses. However, the insurance industry has advanced several arguments to support these clauses. Nevertheless, California courts have unequivocally rejected these arguments in abrogating intrafamily immunity.[34]

An early justification for intrafamily immunity was the claim that

31. The insurance industry has advanced many arguments in favor of family exclusion clauses, asserting that family exclusion clauses protect family harmony, and reduce the amount of fraudulent or collusive suits. It is difficult to understand how denying compensation for injury caused by another family member promotes family harmony when the compensatory funds come from the insurer, not the family member. These same points were rejected by the *Gibson* court in eliminating family immunity. 3 Cal. 3d at 919-20, 479 P.2d at 651-52, 92 Cal. Rptr. at 291-92.

32. Compensation has become the fundamental goal of California tort law. The California cases in which many common law barriers to recovery were eliminated provide an excellent example of the concern for compensation. *See* Levy & Ursin, *supra* note 3, at 497-545 for a discussion of cases abolishing immunities. Other legal scholars have also recognized and supported this trend. *See* F. HARPER & F. JAMES, *supra* note 22 at 1069: "[I]n accident cases we believe compensation and some form of social insurance (like workmen's compensation) to be desirable and that until that can be had, every aspect of the present system which produces some of the benefits of social insurance should be fostered . . . ."

33. *See, e.g.*, Farmers Ins. Exch. v. Cocking, 29 Cal. 3d 383, 386, 173 Cal. Rptr. 846, 847 (1981); Meritplan Ins. Co. v. Woollum, 52 Cal. App. 3d 167, 169-70, 123 Cal. Rptr. 613, 615 (1975) (examples of the typical language used to exclude all family members). *See also* Mutual of Enumclaw Ins. Co. v. Wiscomb, 97 Wash. 2d 203, 643 P.2d 441, 445 (1982) (family exclusion clauses affect third parties outside the contractual negotiations). For the same reasons that family exclusions are void as against public policy, those exclusion clauses which deny indemnity to any "named insured" are also void. Whether the exclusion applies to other family members (usually children) or to any named insured (generally husband and wife as joint tenants) the provision violates public policy. *See, e.g.*, Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962).

34. *See, e.g.*, Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).

suits among family members would threaten intrafamily harmony.[35] In *Trudell v. Leatherby*,[36] an unemancipated minor child was denied a negligence action against his parent. The court stated that a suit would "bring discord into the family and disrupt the peace and harmony of the household."[37]

Contemporary courts, however, have thoroughly rejected the family discord argument.[38] The *Gibson* court stated: "If this rationale ever had any validity, it has none today."[39] In fact, the court recognized that in situations where insurance exists, the threat to family harmony is drastically reduced, if not extinguished: "[T]he risk of family discord is much less in negligence actions, where an adverse judgment will normally be satisfied by the defendant family member's insurance carrier, than in property actions, where it will generally be paid out of the defendant's pocket."[40]

Additionally, in the case of *Self v. Self*, the California Supreme Court classified the family discord argument as "illogical and unsound."[41] Actually, the lack of coverage, rather than compensation through insurance, promotes family disharmony.[42] As the Pennsylvania Supreme Court noted in abolishing intrafamily immunity in Pennsylvania:

> Denial of the action may itself promote marital discord by causing the husband and wife to pay expenses that otherwise would be paid for by insurance (citation omitted). Since the very purpose of liability insurance is compensation, its presence argues in favor of permitting an injured individual to establish the liability of his or her tortfeasor-spouse.[43]

The family harmony theory is also meritless because where an intrafamily tort is involved, conflict would already exist, if it existed at all. As Prosser notes: "This [the family discord argument] is on the bald theory that after the husband has beaten his wife, there is a state of peace and harmony left to be disturbed . . . ."[44] In short, the family discord argument does not justify denying insurance coverage for intrafamily torts.

Insurance companies have also attempted to justify family exclusion clauses by claiming they must protect themselves from fraudu-

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35. Gibson v. Gibson, 3 Cal. 3d 914, 919, 479 P.2d 648, 651, 92 Cal. Rptr. 291 (1971).
36. 212 Cal. 678, 300 P. 7 (1931).
37. 212 Cal. at 680, 300 P. at 8.
38. *E.g.*, Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).
39. *Id.* at 915, 479 P.2d at 648, 92 Cal. Rptr. at 288.
40. *Id.* at 919, 479 P.2d at 651, 92 Cal. Rptr. at 291.
41. *Id.* at 919, 479 P.2d at 651, 92 Cal. Rptr. at 291 (citing Self v. Self, 58 Cal. 2d 683, 690, 376 P.2d 65, 69, 26 Cal. Rptr. 97, 101 (1962)).
42. Gibson v. Gibson, 3 Cal. 3d 914, 920, 479 P.2d 648, 652, 92 Cal. Rptr. 288, 292 (1971) (citing W. PROSSER, LAW OF TORTS § 116 (3d ed. 1964): "domestic harmony will not be disturbed so much by allowing the action as by denying it.").
43. Hack v. Hack, 495 Pa. 2d 314, 433 A.2d 859, 866 (1981).
44. W. PROSSER, LAW OF TORTS § 122 at 863 (4th ed. 1971).

lent and collusive lawsuits. This assertion is without merit. Undoubtedly, some claims are suspect. Nevertheless, as the California Supreme Court noted in *Klein v. Klein*:[45]

> The possibility of fraud or perjury exists to some degree in all cases. But we do not deny a cause of action to a party because of such a danger.
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> It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled simply because in some future case a litigant may be guilty of fraud or collusion. Once that concept were accepted, then all causes of actions should be abolished. Our legal system is not that ineffectual.[46]

In fact, California courts have repeatedly stated that the mere threat of fraud or collusion in future suits does not justify denying an entire class of legitimate claims.[47]

Moreover, the family discord and fraud/collusion arguments are logically inconsistent.[48] The collusion problem assumes that a personal injury suit is actually targeted at the insurance carrier, rather than the defendant family member. On the other hand, where family discord might exist, collusion seems unlikely. The two threats cannot coexist.

Family exclusion clauses in homeowner and automobile insurance policies lack any legitimate basis.[49] These unjustifiable and self-serving exclusions should not be allowed to subvert California's public policy of compensation for tort victims. Essentially, the only group which benefits from these clauses is the insurance industry, while the

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45. 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962).

46. *Id.* at 695-96, 376 P.2d at 72-73, 26 Cal. Rptr. at 104-05.

47. *E.g.*, *Id.* at 696, 376 P.2d at 73, 26 Cal. Rptr. at 105; Gibson v. Gibson, 3 Cal. 3d 914, 920, 479 P.2d 648, 652, 92 Cal. Rptr. 288, 291-92. *See also* Report of the American Bar Association Special Committee on Automobile Accident Reparations 85-86 (the threat of fraud and collusion is always a possibility, but is outweighed by the desirability of compensating those injured). *See also* Mutual of Enumclaw Ins. Co. v. Wiscomb, 97 Wash. 2d 203, 643 P.2d 441 (1982) (family exclusion clause voided in light of public policy). Regarding the fraud and collusion argument, the court stated: "This argument is wholly unpersuasive because the exclusion far exceeds the evil which it is designed to protect against; collusion and fraud are the exception rather than the rule." *Id.* 643 P.2d at 444.

48. Hack v. Hack, 495 Pa. 2d 314, 433 A.2d 859, 866 (1981) (the collusion argument is analytically inconsistent with the claim of family discord, and is "wholly speculative").

49. Admittedly, California Insurance Code section 11580.1 (West Supp. 1983) specifically authorizes family exclusion clauses in automobile insurance policies. However, these exclusions are inconsistent with California tort principles. *See supra* note 3. This section also contravenes the policy of compensation for accident victims exemplified in Financial Responsibility Laws, CAL. VEH. CODE section 16000-16560 (West 1971 & Supp. 1983).

unwary and unsophisticated consumer receives nothing.

Remedies To Eliminate Family Exclusion Clauses

Because the Legislature has permitted certain family exclusion clauses in automobile insurance policies, that governmental body must act before these provisions can be eliminated. Specifically, the Legislature could modify California Insurance Code section 11580.1, and declare family exclusion clauses in automobile policies void. Hopefully, if this were to occur, the courts would support such an effort.

However, the California Supreme Court can abrogate family exclusion clauses in homeowner policies without legislative assistance. Several principles of contract law applicable to insurance policies may be used by the courts to eliminate intrafamily exclusions.

Family exclusion clauses can be abolished under doctrines of contract law relating to adhesion contracts such as unconscionability and ambiguity. Most insurance policies are adhesionary, as a matter of law.[50] These policies represent the standard form contract drafted by insurance company attorneys, and are offered on a take-it-or-leave-it basis.[51] In fact, many insurance companies do not offer a homeowner or automobile insurance policy without the family exclusion clauses.[52] Hence, parties are unable to avoid the harsh and unjust effect of family exclusion clauses imposed by the insurance industry through adhesion contracts.[53]

The doctrine of unconscionability provides an excellent basis for abrogating family exclusion clauses in homeowner policies. Califor-

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50. *E.g.*, Hays v. Pacific Indem., 8 Cal. App. 3d 158, 162, 86 Cal. Rptr. 815, 818 (1970) ("The insurance contract is a contract of adhesion . . . ."). Adhesion contracts exist where an agreement is entered into between two parties of unequal bargaining strength, using a standardized form drafted by the stronger party who dictates the terms, and offered to the weaker party on a take it or leave it basis. Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 269, 419 P.2d 168, 171, 54 Cal. Rptr. 104, 107 (1966).

51. *See* Mutual of Enumclaw Ins. Co. v. Wiscomb, 97 Wash. 2d 203, 643 P.2d 441, 446 (1982) (court notes there is "no freedom of contract" when a party is unable to obtain a policy without the family exclusion clause).

52. *See supra* note 2.

53. The *Cocking* court argued, however, that family exclusion clauses are not void since the insurer and insured can bargain for various kinds of liability insurance. Farmers Ins. Exch. v. Cocking, 29 Cal. 3d 383, 389-91, 173 Cal. Rptr. 846, 849-50 (1981). This viewpoint is erroneous, since parties are usually unable to avoid the family exclusion clause. *See, e.g.*, *Schwalbe v. Jones*, 16 Cal. 3d 514, 521 n. 9, 546 P.2d 1033, 1038, 128 Cal. Rptr. 321, 326. *See also* Mutual of Enumclaw Ins. Co. v. Wiscomb, in which the court indicates that:

> [T]o say there was freedom of contract in these cases is to ignore reality. A number of insurers in this state will not sell a policy without the family or household exclusion. . . . The contract analysis might be persuasive if this were a coverage that one could choose to purchase or not purchase from each insurer. The present arrangement, however, is a take-it-or-leave-it proposition.

97 Wash. 2d 203, 643 P.2d 441, 445 (1982).

nia Civil Code section 1670.5 empowers trial courts to find as a matter of law that a clause in a contract is unconscionable and thus unenforceable.[54] Additionally, this statute applies to *all* contracts, so it may be used to invalidate family exclusion clauses in insurance policies.[55] Under this statute, evidence concerning the "commercial setting, purpose, and effect" of the disputed provision may be presented to prove unconscionability.[56]

California Civil Code section 1670.5 and the doctrine of unconscionability were applied in *A&M Produce Co. v. FMC Corporation*.[57] The court held that oppression and surprise are the two factors constituting unconscionability.[58] In general, oppression represents unequal bargaining power, where the contract is between two parties, one of whom lacks any meaningful choice as to its terms.[59] Surprise occurs where one party, such as an insurance company, uses a standard form contract to unexpectedly or unreasonably allocate the risks involved in the agreement.[60]

Family exclusion clauses appear to satisfy the necessary elements of unconscionability. Oppression exists since, as previously mentioned, many carriers refuse to offer a liability insurance policy without this exclusion.[61] Furthermore, surprise occurs since the unwary consumer does not expect a family exclusion clause when purchasing a comprehensive liability policy.[62] Moreover, carriers use family exclusion clauses to shift the entire risk of injury to the insured, which appears quite unreasonable,[63] and directly contravenes a primary

54. CAL. CIV. CODE § 1670.5 (West 1983).
55. *Id.*
56. *Id.* § 1670.5(b).
57. 135 Cal. App. 3d 473, 485-87, 186 Cal. Rptr. 114, 121-22 (1982) (disclaimer of warranty and exclusion of consequential damages in seller's form contract declared unconscionable). "Unconscionability is a flexible doctrine designed to allow courts to directly consider numerous factors which may adulterate the contractual process." *Id.* at 484, 186 Cal. Rptr. at 120.
58. *Id.* at 486, 186 Cal. Rptr. at 122.
59. " 'Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.' " *Id.* (citations omitted).
60. " 'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. Characteristically, the form contract is drafted by the party with the superior bargaining position." *Id.* (citations omitted).
61. *See supra* note 53.
62. *See infra* notes 72, 73 and accompanying text.
63. See *A & M Produce Co.* in which the court said:

> [A] contract is largely an allocation of risks between the parties, and therefore . . . a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner. [T]he greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk

promise of the insurer—indemnity.[64]

Another area of adhesion contract law which might be used against family exclusion clauses is ambiguity. In interpreting adhesionary insurance contracts, the general rule in California is that any ambiguity will be resolved against the draftsperson.[65]

In California cases involving family exclusion clauses, insureds have attempted to use this rule of construction to avoid the exclusion provisions.[66] However, the courts have rejected this argument, usually holding that family exclusion clauses are unambiguous.[67]

Admittedly, such clauses seem unambiguous, but this position is in stark contrast with the reality of insurance marketing. As California courts have noted, few customers actually know of or understand the provisions contained in their insurance policy.[68] Additionally, family exclusion clauses directly contravene the broad provision in automobile and homeowner policies which states the insurer will pay *all* sums the insured is held liable for due to bodily injury.[69]

Moreover, California courts have declared that exclusionary clauses in insurance policies must provide notice of non-coverage in language which is "conspicuous, plain, and clear."[70] Determining

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reallocation which will be tolerated.
135 Cal. App. 3d at 487, 186 Cal. Rptr. at 122 (citations omitted).

64. *See* Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 272, 419 P.2d 168, 173, 54 Cal. Rptr. 104, 109 (1966).

65. *Id.*, 65 Cal. 2d 263, 269, 419 P.2d 168, 171, 54 Cal. Rptr. 104, 107; Steven v. Fidelity & Casualty Co., 58 Cal. 2d 862, 868, 377 P.2d 284, 288, 27 Cal. Rptr. 172, 176 (1962). *See also* Continental Casualty Co. v. Phoenix Constr., 46 Cal. 2d 423, 437-38, 296 P.2d 801, 809-10 (1956):

> It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer. If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates.

(Citations omitted).

66. *E.g.*, Meritplan Ins. Co. v. Woollum, 52 Cal. App. 3d 167, 170, 123 Cal. Rptr. 613, 615 (1975).

67. *Id.* at 174, 123 Cal. Rptr. at 618. *See also*, California State Auto Ass'n Inter-Ins. Bureau v. Warwick, 17 Cal. 3d 190, 194-95, 550 P.2d 1056, 1059, 130 Cal. Rptr. 520, 523 (court notes the difference between a policy using the term "the" insured as opposed to "any" insured and holds the latter is unambiguous).

68. Raulet v. Northwestern Nat'l Ins. Co. of Milwaukee, 157 Cal. 213, 230, 107 P. 292, 298 (1910) ("It is a matter almost of common knowledge that a very small percentage of policy-holders are actually cognizant of the provisions of their policies . . . ."), *see also* Steven v. Fidelity & Casualty Co., 58 Cal. 2d 862, 879, 377 P.2d 284, 294, 27 Cal. Rptr. 172, 183 (1962); Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 272, 419 P.2d 168, 182, 54 Cal. Rptr. 104, 109 (1966).

69. *See supra* note 1.

70. Steven v. Fidelity & Casualty Co., 58 Cal. 2d 862, 878, 377 P.2d 284, 294, 27 Cal. Rptr. 172, 182 (1962); Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 271, 419 P.2d 168, 172, 54 Cal. Rptr. 104, 108 (1966). *See also* Ponder v. Blue Cross of So. Cal., 145 Cal. App. 3d 709, 719, 193 Cal. Rptr. 632, 637 (1983) in which the court transformed this traditional test into a two-tiered approach:

> We have chosen to divide the traditional statement of the requirement that insurance policy exclusions be "conspicuous, plain and clear" into separate tests.

whether this standard has been satisfied, courts attempt to measure and protect the buyer's "reasonable expectations."[71]

The reasonable expectation principle establishes a means for interpreting insurance contracts to protect the typical unwary consumer, and could be used by the California Supreme Court to strike down family exclusion clauses in homeowner policies. Nevertheless, courts have so far been unwilling to nullify these clauses on this basis.[72] This judicial unwillingness is confusing. It appears problematic to conclude that the ordinary, reasonable consumer who purchases an insurance policy expects that an exclusion clause will deny indemnity if one family member were injured by the negligent acts of another.[73] In purchasing the policy, who more than family members does an insured expect and desire to protect? Indeed, this is the very protection which the insurance industry purports to offer.[74]

Faced with these exclusions, families must look to the courts for protection and relief from deceptive insurance industry practices such as the family exclusion clauses, which weave a web of exclusion behind the general policy language of protection and indemnity.[75]

As a matter of logic, this brief clause imposes two very different demands on those who draft insurance policies. First, the exclusion must be positioned in a place and printed in a form which would attract a reader's attention. Secondly, the substance of the exclusion must be stated in words that convey the proper meaning to persons expected to read the contract.

71. Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 271, 419 P.2d 168, 172, 54 Cal. Rptr. 104, 108 (1966). *See also* Coast Mut. Bldg. & Loan Ass'n v. Security Title Ins. & Guar. Co., 14 Cal. App. 2d 225, 229, 57 P.2d 1392, 1393 (1936): "Not only the provisions of the policy as a whole, but also the exceptions to the liability of the insurer, must be construed so as to give the insured the protection which he reasonably had a right to expect . . . ."

72. State Farm Fire & Ins. Casualty Co. v. Alstadt, 113 Cal. App. 3d 33, 38, 169 Cal. Rptr. 593, 595 (1980).

73. To assume that a consumer purchases an insurance policy with the reasonable expectation that the policy will not apply to injuries involving the negligence of one family member upon another is suspect. Instead, the insured ordinarily expects their family to be in Allstate's "Good Hands," to "Get a Piece of the Rock," or proclaim "Aetna, I'm glad I Metcha." Such advertisements, as well as the broad policy language at the beginning of each policy, lead the insured to reasonably expect adequate, substantial coverage from carriers who are reliable and dependable, particularly when the insured experiences a compensable loss.

74. *Id.*

75. Historically, the insurance industry has been poorly regulated. *See, e.g.*, JOINT LEGISLATURE AUDIT COMMITTEE, REPORT TO THE CALIFORNIA LEGISLATURE: REVIEW OF THE DISCIPLINARY FUNCTIONS OF THE DEPARTMENT OF INSURANCE, *Summary* 1 (1977). Powerful insurance lobbies are undoubtedly largely responsible for the lack of regulation in this field. The courts provide a unique forum to control the insurance industry. Bad faith, for example, is an area of law which courts developed to regulate the insurance industry. Additionally, the imposition of punitive damages helps control abuses in the insurance practice. *See generally* Levine, *Demonstrating and Preserving the Deter-*

The California Supreme Court should implement principles of adhesion contract law to eliminate these unconscionable provisions in homeowner policies.

A final possible source of help in abrogating family exclusion clauses in homeowner policies arises from the fiduciary nature of the insurance relationship. California courts view the relationship between the insurance carrier and the insured to be fiduciary.[76] This suggests that an insurer is under a duty to notify the insured of the general provisions in an insurance policy, including any basic exclusions.[77]

Some jurisdictions require an insurance company to establish that actual notice of an exclusionary clause was given to an insured, even where the policy language is clear and unambiguous, before the provision will be enforced.[78] Thus, the carrier cannot merely rely on an exclusion clause hidden in the policy, but must demonstrate that the insured knew of the exclusion and had it explained before purchasing the policy.[79]

Without providing information to the customer, the insurer not only violates its fiduciary duty, but may be acting surreptitiously and in bad faith.[80] The use of family exclusion clauses demonstrates an attempt by carriers at the very inception of the relationship to surreptitiously deny important coverage to the insured through uncon-

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rent Effect of Punitive Damages in Insurance Bad Faith Actions. 13 U.S.F.L. REV. 613 (1979) (discussing the need for punitive damages and their regulatory function).

76. *See, e.g.,* Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 820, 598 P.2d 452, 457, 157 Cal. Rptr. 482, 487 (1979); Spindle v. Chubb/Pacific Indem. Group, 89 Cal. App. 3d 706, 712, 152 Cal. Rptr. 776, 780 (1979); *see also* Goodman & Seaton, *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court,* 67 CALIF. L. REV. 309, 346-47 (1974).

77. Since the insurance relationship is a fiduciary one, with the corresponding trust and confidence, the concurring duty to inform the insured of the provisions within a policy would seem logical. However, no decisions have yet established this duty. Nevertheless, a California court established liability for insurers who fail to inform policy holders of the provisions in their policies, basing the duty to inform on the disparity of knowledge between the parties concerning the policy. *See* Westrick v. State Farm Ins., 137 Cal. App. 3d 685, 691-92, 187 Cal. Rptr. 214, 218-19 (1982) "A long line of California cases has recognized that a disparity of knowledge may impose an affirmative duty of disclosure.

. . .

We find no reason to distinguish between the misfeasance of giving erroneous information and the nonfeasance of giving no information at all." *See also supra* note 68 and accompanying text for discussion regarding the fact that few policy-holders actually are aware of the provisions within their policy.

78. Cornwell v. State Farm Fire & Casualty Co., 527 F. Supp. 310, 313 (E.D. Pa. 1981).

79. *Id.*

80. *See supra* note 4. It may be argued that by failing to inform policyholders about family exclusion clauses, an insurance company breaches the implied convenant of good faith and fair dealing since these exclusions drastically reduce the actual coverage purported in the insuring clause.

scionable provisions.[81] Perhaps such provisions can be struck down through combining the bad faith guidelines developed in California with principles of adhesion contract.[82]

CONCLUSION

Family exclusion clauses are widely used in California. Insurance companies use such clauses to avoid financial responsibility for injuries to innocent tort victims. Moreover, these provisions are grossly repugnant to the tort principles and public policy which the California Supreme Court has propounded over the last twenty years.

There is no justification for these exclusionary provisions.[83] The California Supreme Court should abolish family exclusionary clauses in homeowner policies as being in violation of public policy. These clauses are inconsistent with the abrogation of intrafamily immunity, and the recognized tort principles of loss distribution and compensation. Furthermore, the court can rely on adhesion contract principles such as unconscionability, as well as the doctrine of bad faith, to strike down intrafamily exclusion clauses, rather than using simply a public policy argument.

The Legislature must act in order to eliminate family exclusion clauses in automobile policies. California Insurance Code section 11580.1, which permits certain family exclusions, is inconsistent with other laws in this state, and merely benefits insurance companies. The Legislature should reconsider the policy of affording compensation to injured motorists, as expressed in the Financial Responsibility Laws,[84] and prohibit family exclusion clauses in all automobile policies issued in California.

Only a complete elimination of family exclusion clauses will guarantee actual compensation for accident victims who are injured by

81. Despite the fiduciary obligations of an insurer, and the implied covenant of good faith and fair dealing, insurers use adhesionary family exclusion clauses to evade their legal duties and obligations such as indemnity.

82. *See supra* notes 4, 81, and accompanying text. *See also* Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 96, 383 P.2d 441, 443, 32 Cal. Rptr. 33, 35 (1963) (exculpatory provisions are permissible only if they do not involve "the public interest"). If family exclusion clauses are struck down as unconscionable and against public policy, insurers using them could be held liable for wrongfully withholding benefits to their insureds in bad faith. *See, e.g.*, Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 818-19, 598 P.2d 452, 456, 157 Cal. Rptr. 482, 486 (1979).

83. *See supra* note 48.

84. California Vehicle Code sections 16000-16560, the Financial Responsibility Laws, indicate legislative concern for automobile liability coverage and the corresponding compensation which insurance guarantees. CAL. VEH. CODE §§16000-16560 (West 1971 & Supp. 1983). Family exclusion clauses contravene this important legislative policy.

the negligence of their own family members. Without necessary legislative and judicial action, the insurance industry will continue dictating the tort law in this state, while the courts merely express hollow and ineffectual legal philosophy.

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