COVERAGE OPINIONS
Judicial Opinions Today - Impact On Counsel's Opinions Tomorrow

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The Cover-age Story

Single Cause Is Comin' To Town

Declarations:
The *Coverage Opinions* Interview With Santa Claus

Coverage Opinions sits down with Santa Claus to discuss the *other list* that he makes and checks twice – all the insurance policies that are required to run his operation.

Santa, thank you so much for taking the time to speak with Coverage Opinions. No doubt you are very busy at the moment.

You can certainly say that again. Believe me, it would be much easier to do this in February. And that's what I told that reporter from *Rolling Stone* who wanted to come up here and see this place hummin' at full throttle – sorry, can't do it now, call me in a couple of months. But when I heard that *Coverage Opinions* wanted to interview me for the Declarations column I dropped everything -- including the tike that had been sitting on my lap. If this interview should happen to throw things off schedule, and kids in Nebraska don't get any toys, so be it. There's always next year.

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Coverage Opinions Book Review:
DRI's Professional Liability Insurance Coverage: *A Compendium of State Law*

If you are involved in any way with professional liability insurance coverage, you need to have a copy of DRI's new 50 state (and then some) compendium of professional liability insurance coverage issues on your desk. It's just that simple. *Coverage Opinions* reviews this exceptional new entrant to the field of insurance coverage reference books.

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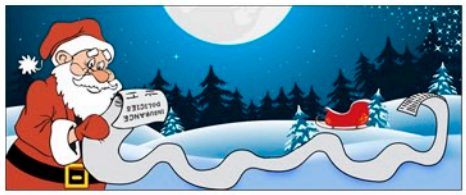

It seems surprising but I've heard that insurance coverage is something that greatly interests you.

It is. It's no secret what occupies most of my time. But people don't know much about the other things that keep me busy. Let's just say that, well, sometimes I don't deliver all of those Xbox 360 games that I should. But insurance coverage is my greatest passion. I've even thought about changing the spelling of my name to Clause. But Mrs. Claus says that if I do that I can sleep with the reindeer. Check out the sleigh in the driveway on your way out. The license plate is L8-NOTIC.

Needless to say you have a very unique organization here. This must create a lot of challenging insurance issues. Let's start with the basics. Tell me about your general liability exposure.

That's not too complex. We do not have a lot of premises exposure. Not too many people venture up here. It's cold and there are no direct flights. Our biggest premises risk is the mail man. He comes non-stop starting at Thanksgiving. It's only a matter of time before he wipes out on that ice on the walkway that sometimes I can't be bothered to clear.

But we do have some operations exposure. I can't deny that we cause damage to some roofs. Look, it's just inherent in the risk of landing the sleigh – which, by the way, is not considered an "auto" under the CGL exclusion. Check out Claus v. North Pole Casualty and Indemnity Company. I really think that people should just let it go in the spirit of the holiday. But many still insist on making a claim for the damage to their roof. But I can tell you that these ingrates never make a second claim because after that I transfer them to the naughty list. And once in a while Blitzen will bite a kid's hand when taking a carrot. The insurer usually defends based on assumption of the risk, but eventually it is usually just easier to settle for cost of defense and close the file.

Products liability is our biggest general liability concern. I'm still smarting from that Supreme Court decision that made me liable for defective products under the Restatement of Torts Section 402(A). Can you believe that? Talk about no good deed going unpunished. That decision sent our products liability premium through the roof. And now I hate having to say – "Sorry kid, can't get that for you. Too dangerous. You'll shoot your eye out. If you are not happy complain to the American Trial Lawyers Association."

If general liability is your most basic exposure, what is your most unique?

That's easy. Rudolph's red nose and my beard are critical to the long term success of this business.

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About The Editor

Randy Maniloff

Randy J. Maniloff is an attorney in the Philadelphia office of White and Williams, LLP. He concentrates his practice in the representation of insurers in coverage disputes over primary and excess obligations under a host of policies. Randy is the co-author of "General Liability Insurance Coverage: Key Issues In Every State" (Oxford University Press, 2nd Edition, 2012). For the past twelve years Randy has published a year-end article that addresses the ten most significant insurance coverage decisions of the year completed. Randy has been quoted on insurance coverage topics by such media as The Wall Street Journal, The New York Times, USA Today, Dow Jones Newswires and Associated Press. For more biographical information visit www.whiteandwilliams.com. Contact Randy at Maniloff@coverageopinions.info or (215) 864-6311.

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They are very challenging to price and only a few options exist for placing them. They are insured by Lloyd's – the same syndicate that had the risk on Liberace's hands. But let's face it -- insuring my beard is much more impressive.

So it's real?

Yeah wise guy. It's real.

What other risks do you contend with that no other businesses would?

Some professional liability exposures have been a real problem. And since there isn't much demand for a Santa E&O Policy it has required a lot of manuscript drafting.

What kind of professional liability exposures do you have?

Kids that ask me for something and then wake up on Christmas morning and find that it's not there. If a kid asks me for an iPad, and gets a sweater, I can expect a demand letter from his lawyer within a week. And from some of the verdicts that I've taken in these cases I can tell you that they have real jury appeal. I make it clear when speaking to the kids that I am not promising to get them anything. But the kids hear what they want to hear.

And the next thing I know I'm accepting service of a detrimental reliance suit.

I'm sure you are very careful not to make any promises.

Believe me I am. And we have a good lawyer up here who tells me exactly what to say. He's even a North Pole Super Lawyer, so you know he's gotta be good. But it's an inherent part of the business. The biggest problem are the mall Santas. Those guys mean well, and we do good training, but let's face it -- they are amateurs. They get caught up in the excitement and the next thing you know some kid thinks that Santa has promised to bring him a pony.

How do you try to minimize this?

It is hard to do. The number of mall Santas is huge. I can't police all of them. Like I said, we do a lot of training, but the problem can't be solved. I require that all mall Santas hold me harmless and name me as an additional insured on their policies. And on a primary and non-contributory basis. But it is hard to keep track of all of those certificates of insurance. And you know that sometimes getting AI rights can be challenging.

Are they any other professional liability exposures?

Unfortunately there are. It is not uncommon for a kid to be put on the naughty list and take real issue when he finds coal in his stocking. Some of these delinquents sometimes challenge these determinations and

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World To End On December 21; No Impact On Insurance Coverage

If you believe the Mayans, the world will end, or some other incredible havoc will take place, on December 21. My advice to prepare - pick-up your dry cleaning on the 20th.

Needless to say, the end of the world will throw a major monkey wrench into a lot of plans. But it will also prove that I was right to never buy the extended warranty on anything. But there are also instances where the end of civilization will have no impact whatsoever. In particular, some insurance coverage cases – since they were never going to end anyway.

Not long ago I was reading a coverage decision and the court's opening line was to observe that the case was part of a litigation saga spanning 13 years. To those unfamiliar with insurance coverage litigation, their reaction to that may have been one of surprise -- how can litigation still be on-going after such a long period of time? But I didn't even flinch at the court's observation. And neither would most people schooled in insurance coverage. And once the case is finally over it may be reincarnated as a reinsurance dispute, possibly lasting several more years.

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bring claims for what they think I should have brought them, not to mention asking for all sorts of nonsensical consequential damages and attorney's fees. Look, I've been doing this for a long time. I know when a kid deserves to be on the naughty list. These claims are baseless. But because of the expense of defending them I am forced to err on the side of caution, and put some kids on the nice list, when I know they don't deserve it.

I noticed a lot of elves when I was walking in. It would seem you have your share of workers compensation issues.

The elves are the backbone of this operation. Unfortunately they get hurt more than we'd like to see. They make many wooden toys by hand. That requires cutting a lot of wood. We have some very big mechanical saws out there. Sometimes the elves are exhausted from working 16 hour shifts this time of the year. You can see where I'm going with this. So yes, workers comp. is a big issue for us.

Is there anything special about this year's trip around the globe that you are looking forward to.

I always appreciate it when the little ones leave cookies and milk. But this year I am hoping that kids in Colorado and Washington leave me brownies.

Last question, can you tell me what you hope to get in your stocking this year?

Oh, that's an easy one. A copy of the Second Edition of General Liability Insurance Coverage: Key Issues In Every State, by Randy Maniloff and Jeffrey Stempel, available on the Oxford University Press website and Amazon.com. If you see Mrs. Claus on the way out please whisper that to her.

Santa, thank you so much for sitting down with Coverage Opinions and sharing all of this. Can I say hello to the reindeer on my way out.

Sure. Just sign this waiver and keep your hands away from Blitzen.

Happy, Merry, et al.: End Of Year Editor's Note

Coverage Opinions was launched two months ago and so far so good. In this short period of time, just six issues, there are already 9,000 subscribers – with various connections to the world of property-casualty insurance coverage. Some technical bugs are getting worked out and I'm learning my way around the distribution system. My heartfelt thanks to so many of you that have written to say nice things about it.

So far my two principal objectives for *Coverage Opinions* are being achieved. First and foremost – the publication of an insurance coverage newsletter that describes cases with more than simply: "The court said this. The court said that. Next case." Rather, one objective of *Coverage Opinions* is to provide analysis

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For certain reasons, some insurance coverage cases have the ability to span years – and decades even. This summer the Supreme Court of California issued its opinion in California v. Continental Insurance Company, addressing allocation of loss among multiple triggered policies.

The court noted in its opinion that the coverage litigation was originally filed in 1993. Imagine if Rip Van Winkle had been the claims adjuster on the case. He would have woken up after being asleep for 20 years and still not have been able to close that file.

The reasons for this long lifespan for some coverage cases is too complicated to address in the Open Mic column. But it seems that coverage litigation needs to come with a prominent warning label: **To avoid long-term financial consequences, seek immediate settlement in the event of a coverage dispute lasting more than four years.**

That's my time.

I'm Randy Spencer.

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Happy, Merry, et al.:

- Continued

of recently issued coverage decisions and commentary on why they are important and why they may have an impact on the overall coverage landscape. Cases are selected because they tell a story beyond the case itself. For this reason, lots of cases are not selected for inclusion. They involve narrow issues or simply have no real impact beyond the involved parties. If you have a case that you believe would work for *Coverage Opinions*, send it to me, as some of you have done.

My second objective is the publication of an insurance coverage newsletter that goes beyond simply a discussion of coverage cases. So far the "Declarations" column has interviewed some of the biggest names in the insurance coverage world – Jerry Oshinsky, Barry Ostrager, Tom Segalla and Bill Passannante. And lots more interviews are lined up for 2013. Randy Spencer has been having a lot of fun with his "Open Mic" column, providing a lighthearted look at insurance coverage. The "Late-r Notice" column alerts you to decisions coming down the pike. The current issue delves into the area of a book review. And your editor has been enjoying the task of selecting the cover artwork. More unique features are planned for 2013.

Thank you for subscribing to *Coverage Opinions* and your support that has helped to get it off the ground.

Happy, Merry, et al. and best wishes for 2013.

Randy

15 Minutes of Claim: Andy Warhol And The Professional Services Exclusion

I'm a big Andy Warhol fan. I got his autograph when I was 12 years old and that's all it took to make me a life-long devotee. So needless to say I was curious to see what a New York state trial court's decision in The Andy Warhol Foundation for the Visual Arts v. Philadelphia Indemnity Insurance Company was all about.

At issue was coverage for The Andy Warhol Art Authentication Board, Inc., an entity related to The Andy Warhol Foundation for the Visual Arts, Inc., a non-profit corporation that includes, as one of its purposes, to promote the legacy of Andy Warhol. The Art Authentication Board has as its purpose to review pieces of artwork submitted to it to determine if they were created by Warhol.

Even with no facts you can see just where this story is going. While the court's decision does not address the allegations in detail, the Art Authentication Board was sued by a person whose artwork was determined not to have been created by Warhol. A second person filed a similar action. In the end the underlying plaintiffs had no evidence to support their claims and they voluntarily dismissed them with prejudice.

After the claims were dismissed, the Art Authentication Board sought to recover $4.6 million in defense costs from Philadelphia Indemnity Insurance Company under certain D&O policies. This was the "remaining balance" as the insurer had already paid $1.775 million in defense costs. The insurer denied coverage and the Board brought suit.

The insurer argued that no coverage was owed because the policies contained endorsements that excluded coverage for professional services.

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Coverage Opinions is a bi-weekly (or more frequently) electronic newsletter reporting and providing commentary on just-issued decisions from courts nationally addressing insurance coverage disputes. Coverage Opinions focuses on decisions that concern numerous issues under commercial general liability and professional liability insurance policies. For more information visit www.coverageopinions.info.

15 Minutes of Claim:

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The court only addressed one of the exclusions and held that it did not apply. The court concluded that the insurer could not "meet the heavy burden of proving that the Board's art authentication services constitute 'professional services,' and that there is no other reasonable interpretation of 'professional services' that would exclude art authentication services from its definition."

The court observed that the exclusion listed specific occupations that involved specialized knowledge, training or skill and authentication services was not listed. "Because the examples of 'professional services' listed do not relate in any way to art authentication services, PIIC cannot show that the policies state the exclusion 'in clear and unmistakable language'. As a result, the term 'professional services' is at best ambiguous and must 'be construed in favor of [Plaintiffs] and against [PIIC]."

Yes, it is true that art authentication services did not qualify as any of the specific services listed in the exclusion, such as attorney, veterinarian, dentist, radiologist or several others. However, the exclusion also applied to a claim in any way involving a "professional incident," defined in the policy as a negligent act, error or omission in the "actual rendering of professional services to others, including counseling services, in your capacity as [sic] social service organization."

It is hard to imagine how the facts here, involving art authentication, could not be a "professional incident," even without a definition of the term "professional services." The study being undertaken by the Board obviously involves a highly specialized skill, namely, being an absolute authority on the work of a particular artist. Moreover, the Board's conclusions determine if a work of art has significant value, possibly in the millions of dollars, or should instead be taped to the refrigerator door. But it seems that, even though the exclusion also encompassed non specifically listed professional services, the court simply bypassed this argument, focusing, incorrectly, on the fact that art authentication services was not one of the specifically listed occupations that involved specialized knowledge, training or skill.

The Andy Warhol Foundation for the Visual Arts v. Philadelphia Indemnity Insurance Company, No. 650917/2011 (N.Y. Sup. Ct. Dec. 6, 2012) is available on the Supreme Court of New York County web site.

Broker Liability: New York Giant Decision: New York's Highest Court Knickes Insured's Obligation To Read Policy. More Potential Exposure For New York A-Rangers Of Insurance

The New York Court of Appeals's decision in American Building Supply Corp. v. Petrocelli Group, Inc. is a significant one -- even "Top 10 Cases of the Year" worthy. I even received an e-mail from a reader asking me how it could have been omitted from the list. Unfortunately, coming in late November it fell victim to timing issues with the publication and did not make it.

While the facts of the case are simple and the decision has the Court of Appeals's trademark brevity, it is nonetheless likely to have significant implications in the area of insurance broker liability. While broker liability is not a coverage issue in the truest sense of the word, it is a subject that sometimes gets discussed, and may even play a part, in the resolution of coverage disputes. New York's highest court has now made it easier for aggrieved policyholders to pull up a chair for their broker at the claims settlement table.

Petrocelli Group was the insurance broker for American Building Supply Corp., a business that sold building materials to general contractors. ABS claimed that it specifically informed Petrocelli that it needed general liability coverage, for its employees, for its Bronx facility. Indeed, ABS claimed that it informed Petrocelli that only employees entered the Bronx location as no retail business was conducted there.

Petrocelli obtained a CGL policy from Burlington Insurance Co. The policy included DRK, LLC, ABS's landlord, as an additional insured. However, the policy contained an exclusion for injury to an employee

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Broker Liability: - *Continued*

of any insured (a.k.a. cross liability exclusion). Neither ABS or Petrocelli read the policy.

An ABS employee was injured at the Bronx facility in the course of performing his duties. DRK sought coverage and in a separate declaratory judgment action the New York Appellate Division held that the employee exclusion precluded coverage for DRK. ABS then filed suit against Petrocelli for negligence and breach of contract in connection with the procurement of insufficient insurance. The Appellate Division in ABS's case held that ABS's failure to read and understand the policy precluded recovery against Petrocelli.

New York's highest court saw it differently, despite acknowledging that New York appellate courts have gone both ways on the issue. "The facts as alleged here, that plaintiff requested specific coverage and upon receipt of the policy did not read it and lodged no complaint, should not bar plaintiff from pursuing this action. While it is certainly the better practice for an insured to read its policy, an insured should have a right to look to the expertise of its broker with respect to insurance matters. The failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker." (citations omitted). Thus, the court concluded that summary judgment was not appropriate because ABS's failure to read and understand the policy was not an absolute bar to recovery under the circumstances of the case; and there were issues of fact as to whether ABS requested specific coverage for its employees and whether Petrocelli failed to secure a policy as requested.

But two Judges said just wait a New York minute. "It seems to me elementary that before you can complain about the contents of any contract, you should at least have read it. Nearly 100 years ago we held that when an insured receives an insurance contract, he or she has a duty to read and examine its contents. There, we held that the insured is 'conclusively presumed' to know the contents of the insurance contract and assent to it, when he or she signs or accepts the contract."

These dissenting Judges saw the decision as opening a big ol' can of worms: "By permitting ABS to evade the conclusive presumption rule, the majority in essence allows an insured, months and possibly years after a policy is procured, to complain, following a loss, that it made a request of its broker for the relevant coverage but it was not forthcoming. This will almost always result in a 'he said-she said' battle of what occurred during coverage discussions between the insured and broker." Whether you agree with the decision or not, it is easy to see such a "he said-she said" situation coming to fruition.

American Building Supply Corp. v. Petrocelli Group, Inc., No. 188 (N.Y. Nov. 19, 2012) is available on the New York Court of Appeals website

Absolut Auto: Exclusion Applied Straight Up By Florida Federal Court

When you think of the word "absolute" as a label on a policy exclusion it is likely that the pollution exclusion comes to mind. But while the pollution exclusion has always had labels attached to it, the label has never told the entire story.

The first pollution exclusion to be used in earnest was the "sudden and accidental." It was intended to exclude coverage for pollution-related claims unless the discharge of the pollutant was "sudden and accidental." Insurers interpreted this language to mean that the discharge must be both unintentional and abrupt if there was to be coverage. However, approximately half the states disagreed and found it sufficient to establish coverage if the discharge was unintentional, no matter how extended or ongoing the time period of the discharge.

Reacting to this situation, the insurance industry replaced the "sudden and accidental" pollution exclusion with an "absolute" pollution exclusion that became part of the 1986 CGL form. Under the absolute pollution exclusion, the CGL policy clearly provides that it does not cover pollution-related claims, provided that the discharge, dispersal, etc. was of waste or from various specifically described premises, subject to exceptions

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Absolut Auto: - *Continued*

While the absolute pollution exclusion has undergone changes over the years, its general purpose has remained the same -- eliminate the "sudden and accidental" exception that had generated so much litigation over its scope.

Although adoption of the "absolute" pollution exclusion was supposed to end the split in the states that had surrounded the "sudden and accidental" pollution exclusion, this proved not to be the case. While courts have consistently applied the "absolute" pollu tion exclusion to bar coverage for suits against a CGL policyholder involving traditional "smokestack" or "dumping" pollution, courts have divided over whether the exclusion, despite its broad language, applies to any claim involving a chemical or irritant—in other words, any hazardous substance.

Next came the "total" pollution exclusion. While the "absolute" pollution exclusion requires that the discharge, dispersal, etc. of "pollutants" be of waste or from certain specifically described premises, the total pollution exclusion, as its name implies, does not contain such qualifications.

The moral of the pollution exclusion story is this. While the pollution exclusion has always had a seemingly clear label attached to it, the label has never prevented litigation over its meaning.

Based on the pollution exclusion experience, it may not be unreasonable for an insurer to be cautious when approaching an "absolute" auto exclusion, and pause to consider whether it will be interpreted as definitely as its name states. But first, why the need for an "absolute" auto exclusion when the ISO commercial general liability form contains an "auto" exclusion?

The "auto" exclusion contained in ISO's standard CGL form applies, in general, to injury or damage arising out of the ownership or use of an auto. However, for the exclusion to apply the auto must be owned or operated by or rented or loaned to any insured. On the other hand, the "absolute" auto exclusion applies to injury or damage arising out of the use of any auto. In other words, the "absolute" auto exclusion removes the qualification that the auto must have some connection to an insured, i.e., that it must be owned or operated by or rented or loaned to any insured.

As a result of this, the "absolute" auto exclusion can be quite broad in its application, as demonstrated very clearly by the Southern District of Florida in James River Ins. Co. v. Fortress Systems, LLC. The coverage dispute in Fortress Systems arose like this.

Bodywell Nutrition, LLC, a sports nutrition and dietary supplement company, retained Fortress Systems to manufacture a powder-form drink called First Order. While FSI manufactured First Order without defect, the companies to whom FSI subcontracted the shipping of the product used vehicles without proper cooling systems. This caused the First Order powder to clump together and became insoluble. Bodywell filed a complaint against FSI.

FSI was insured under a $5 million CGL policy issued by James River. This was no small claim. Bodywell and FSI entered into a settlement in excess of $10 million including an assignment of policy rights against James River, which had disclaimed coverage.

At issue in the subsequent coverage dispute was the applicability of the Absolute Auto Exclusion – barring coverage for property damage arising out of the use of any auto. James River asserted that the exclusion applied because the clumping occurred as a result of the shippers' failure to use temperature controls in their vehicles.

Applying Nebraska law, the Florida federal court concluded that the Absolute Auto Exclusion applied. The court rejected the argument that damage did not arise out of the use of the shippers' vehicles, but, rather, the heat in the vehicles. "By Bodywell's own admission, First Order was damaged by the shippers' failure to use climate-controlled vehicles. . . . Bodywell claimed that the shippers failed to heed the warning labels requiring that First Order be stored in a cool dry place, and 'either used transport vehicles that were not temperature-controlled or did not use any temperature-controlling capabilities

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Absolut Auto: - *Continued*

that were available in those vehicles.' . . . Bodywell's statements show that it was the manner in which the vehicles were used, or the capabilities of the vehicles employed, that damaged First Order. There is a clear causal connection between the use of the shippers' vehicles and the subsequent property damage. Therefore, the Court concludes that the damage arose out of the use of an auto, and that Defendants' coverage claim is barred by the Absolute Auto Exclusion."

Fortress demonstrates that the "absolute" in the absolute auto exclusion isn't kiddin' around. The decision shows in stark terms the significant difference between an "auto" exclusion and an "absolute" auto exclusion. Fortress had nothing whatsoever to do with the shipping of First Order. That would have clearly prevented the applicability of a standard "auto" exclusion. But not so with this unqualified "absolute" auto exclusion.

James River Ins. Co. v. Fortress Systems, LLC, No. 11-60558 (S.D. Fla. Dec. 11, 2012) is available on the PACER System.

Nevada District Court Provides National Survey Of Right To Independent Counsel And Specifically Adopts "Cumis"

The District of Nevada's decision in Hansen v. State Farm Mut. Auto Ins. Co. is fairly lengthy and it would take some time to explain the facts. But the real importance of the case is more general and involves legal issues. So that's where the following discussion will focus. In addition, the court provided convenient sound bites of various positions in this area. My discussion will quote them liberally.

In very general terms, at issue in Hansen was an insured's right to independent counsel, when being defended under a reservation of rights, in an assault action alleging both negligent and intentional conduct. This is a common scenario that gives rise to the question of an insured's right to independent counsel. Besides addressing the issue under Nevada law, where the landscape was sparse, the court also took the time to survey the issue nationally.

The court held that Nevada law requires that independent "Cumis" counsel be appointed when a conflict of interest arises between an insurer and insured on account of the provision of a defense under a reservation of rights. Cumis is the 1984 California appeals court decision that created this rule, which was followed by California's 1987 statutory codification of the case, thereby giving rise to the so-called "Cumis Statute."

The rationale for the court's adoption of Cumis was as follows: "The Nevada Supreme Court's determination [in Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court, 152 P.3d 737 (Nev. 2007)] that an attorney cannot represent an insured against its former insurer in a later conflict means the Court would similarly prohibit a single attorney to represent both the insured and the insurer in a case when a conflict arises. Moreover, the Court (1) recognized that defense counsel represents both the insurer and the insured in the absence of conflict; (2) recognized that a conflict of interest can exist between an insured and insurer; and (3) held by negative implication that when such a conflict exists in more than hypothetical form, the parties must have separate and independent counsel."

The court also observed, correctly so, that the majority of courts nationally apply a Cumis-type duty, thereby remedying "the conflict attendant with defending subject to a reservation of rights by requiring the insurer to pay the reasonable expenses of independent counsel." This is so because "[t]he conflicting interests of retained counsel's two clients makes ethical representation of both difficult if not impossible. Courts identify the following potential problem areas: First, retained counsel may become aware of information damaging to a client through confidential communication with the other client. Second, retained counsel potentially could manipulate the trial strategy to benefit the interests of one client to the detriment of the other.

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Nevada District Court:

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For example, when seeking special verdicts, retained counsel will be responsible for framing jury questions, the answers to which, in many cases, will determine coverage/non-coverage."

The court also noted that there is a minority view that "a conflict of interest between the insured and insurer does not require the appointment of independent counsel because (1) attorneys owe a duty of loyalty to the insured, not the insurer, and (2) external mechanisms such as malpractice lawsuits or ethical sanctions disincentivize a lawyer placing the insurer's interests above the insured."

But there was still more to the case, since there is still more to the Cumis story. That is, does an insurer's provision of a defense, under a reservation of rights, create a per se conflict of interest that always entitles an insured to independent counsel. The Hansen court set out a national survey of the yes and no states on this issue.

Cumis does not hold that an insured is automatically entitled to independent counsel simply because an insurer defends under a reservation of rights. And the Hansen court held that Nevada would go along with that. "The Court determines that a reservation of rights letter can create a conflict of interest, but that Nevada courts would determine the question on a case by case basis. This is because insurers almost always defend under a reservation of rights, and defending under a reservation of rights always creates at least a theoretical conflict of interest. However, the Yellow Cab Court left room for dual representation when a conflict of interest is merely speculative. So a per se rule would not comport with Nevada law. Accordingly, whether or not an insurer's reservation of rights creates a conflict of interest must be determined by looking to the particular facts of each case."

Looking to the specifics of the situation before it, the Hansen court held that the conflict of interest was more than the hypothetical one that arises with every reservation of rights defense. While the Hansen court did not state that a finding of a conflict of interest would be the case in every situation involving allegations of both intentional and negligent conduct, such a situation certainly favors that outcome based on the court's analysis. The court observed that punitive damages were at issue and there was a possibility that the insurer-appointed defense counsel would only make nominal efforts to defend against the intentional tort claims and would gain access to confidential information which could later be used against the insureds if the insurer contested coverage.

Hansen v. State Farm Mut. Auto Ins. Co., No. 10-1434 (D. Nev. Dec. 12, 2012) is available on the PACER System.

Build-A-Bear Duty To Defend Standard: Making Your Own Facts To Trigger The Duty

Most states allow for the consideration of extrinsic evidence, in one form or another, to determine an insurer's duty to defend. I sometimes hear people say that most states limit the determination of an insurer's duty to defend to the "four corners" of the complaint. Not so. If you do the math you'll see.

While the application of extrinsic evidence rules, in practice, are not always easy, at least the insurer knows going in that the duty to defend determination may not automatically be based on just two documents – the complaint and the policy. Just how far beyond the complaint and the policy the duty to defend determination will go is the critical issue in these states. That was the question before the Eastern District of California in Assurance Company of America v. Lexington Insurance Company. The answer – really far.

Putting aside how the case came about (contribution action between Criner's insurers), at issue in Assurance was a duty to defend a subcontractor for construction defects at a hotel. Criner was a subcontractor hired by the general contractor to install doors and hardware. While one of Criner's insurer's defended, another denied a defense on the basis that the complaint, and extrinsic evidence, did not show facts that Criner could have been held liable for consequential damages.

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Build-A-Bear Duty To Defend Standard:

- *Continued*

In other words, there were no facts to suggest that the doors caused damage to the door frames or any other consequential damages.

The reason why this was the duty to defend test is well-known in construction defect coverage. This was succinctly stated by the court: "[G]eneral liability policies, such as the policy Defendant issued Criner, apply when an insured's work or defective materi als 'cause injury to property other than the insured's own work or products.' Therefore, Defendant's duty to defend depends on whether at the time of tender, allegations in the underlying complaint or other facts known to Defendant indicated a potential for covered consequential damage caused by the doors."

With California not being a "four corners" state, the court turned to the extrinsic facts at issue and examined whether they demonstrated a potential for coverage.

Looking at the Amended Final Statement of Claims, the court noted that it referred to Criner's work in hanging the doors and did not refer to damage caused by the doors. A report, seemingly from an expert, referred to sticking doors and did not mention that the doors caused the sticking or that the sticking caused property damage. The court noted that the report provided that movement in the walls caused the sticking and that the doors themselves would have to be repaired. And a letter from the general contractor's defense counsel to Criner was described by the court as follows: "The letter to Criner mentions that door frames are askew, but it does not state or even imply that the doors caused the door frames to be askew."

But despite all of this evidence, that Criner's work did not cause consequential damages, the court was not to be deterred. While the letter from the general contractor's defense counsel to Criner did not allege consequential damages, a letter from the general contractor's defense counsel to Criner's insurance broker stated that "faulty construction of the doors and door-frames has caused consequential damages." This was all it took for the court to conclude that a duty to defend was owed as "the letter from Swinerton's [general contractor] defense counsel to Criner's insurance broker created a potential for coverage."

In addition to a defense being owed to Criner, the general contractor also benefitted as it was now entitled to a defense as an additional insured. Hence, a self-serving letter written by a party, stating the facts needed to obtain a defense for itself, was all it took to trigger one.

Assurance Company of America v. Lexington Insurance Company, No. 11-2928 (E.D. Cal. Nov. 20, 2012) is available on the PACER System.

Coverage Opinions Book Review:

DRI's Professional Liability Insurance Coverage: A Compendium of State Law

When I heard that DRI had just published a compendium of state law on professional liability insurance coverage issues by ears perked up. Having spent four years co-authoring a compendium of state law on general liability insurance coverage issues I have a keen interest in books of this nature. My personal journey down the 50 state survey road also makes me, I believe, well qualified to review a book of this ilk. Not to mention being a tough critic at that.

Before I cracked the cover of DRI's just-released Professional Liability Insurance Coverage: A Compendium of State Law I had a checklist of things to look for. I was interested in seeing the breadth of coverage issues addressed, their relevance to the day to day situations that those handling professional liability claims encounter, and thoroughness of the analysis. The Compendium gets very high marks in all three categories.

First, some numbers. The Compendium is in fact not a 50 state survey but actually addresses 55 jurisdictions. The 50 states, District of Columbia, Puerto Rico, U.S. Virgin Islands, Guam and Canada (sans Quebec). For each jurisdiction there are 25 coverage issues addressed. In total the Compendium addresses over 1,750 cases.

Editor-in-Chief Mark Cohen of Zelle McDonough & Cohen LLP starts things off with a very thorough introduction, discussing the background of the issues addressed, significant findings and emerging trends in the law. It is an excellent overview of professional liability coverage – helpful for both the novice as well as one steeped in the issues – as well as serving as a primer for things to come. After that the Compendium gets going into its surveys -- setting out a state-by-state review of the issues, tackled by experienced counsel, with many located in the particular state.

As for the breadth of coverage issues addressed, and their relevance to the day-to-day situations that those handling professional liability claims encounter, the Compendium nails it. Some of the important issues addressed, including sub-issues, are: what is a "professional service"; what is a "claim" and when is it made; inter-related claims; various reporting and notice issues; key exclusions such as insured versus insured and dishonest acts; and is monetary relief "loss" or "damage" (a sometimes overlooked issue, but not here). There are no esoteric issues here that would only be of interest to a scholar. The issues are the ones that those handling claims, and advising on claims, see on a regular basis.

Concerning the all-important issue of thoroughness of the answers, the Compendium authors unquestionably describe the cases with adequate detail – facts, relevant policy language when needed,

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and the court's rationale for its decision -- to enable them to provide true guidance. There is no substitute for reading the actual case. But the Compendium certainly describes the cases with enough detail to enable the reader to get a solid handle on the claim scenario that he or she is confronting.

Lastly, while DRI is "The Voice of the Defense Bar," the Compendium is not slanted toward any particular point of view. The case descriptions simply state what the court said without editorializing by the authors.

If you are involved in any way with professional liability insurance coverage, you need to have a copy of DRI's Professional Liability Insurance Coverage Compendium on your desk. It's just that simple. The book is available at www.dri.org (click on the Store tab).

In the interest of full disclosure, while I am member of DRI, I had nothing whatsoever to do with the preparation of the Compendium.

Late-r Notice:
A Look At Decisions To Come

Indiana High Court And Maybe A New Take On Separation Of Insureds

The Supreme Court of Indiana will decide in Holiday Hospitality Franchising, Inc. v. Amco Ins. Co. whether negligent hiring and supervision of an employee constitutes an "occurrence" by the employer in a case involving sexual molestation by a hotel employee of a minor guest.

While there is nothing unusual about the question whether negligent hiring and supervision constitutes an "occurrence," it generally turns on whether the employer's conduct was an accident. However, in Holiday Hospitality, the court may address the issue in the context of a Separation of Insureds provision. In other words, based on a Separation of Insureds provision, can the employer's conduct be an "occurrence," even if the employee's is not. This would be unique territory for the application of a Separation of Insureds provision.

The provision usually finds itself at the center of the dispute over whether an exclusion that applies to "any" insured precludes coverage for an "innocent co-insured."

The court also has before it whether, for purposes of an abuse or molestation exclusion, does "care, custody or control" require something more than mere business invitee status such as a minor being supervised by hotel employees. It is not unusual for an abuse or molestation exclusion to include a provision that the victim must be in the care, custody or control of an insured.

Holiday Hospitality Franchising, Inc. v. Amco Ins. Co., No. 33A01-1103-CT-104 (Ind. Ct. App. Oct. 13, 2011) is available on the Indiana Court of Appeals website.