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

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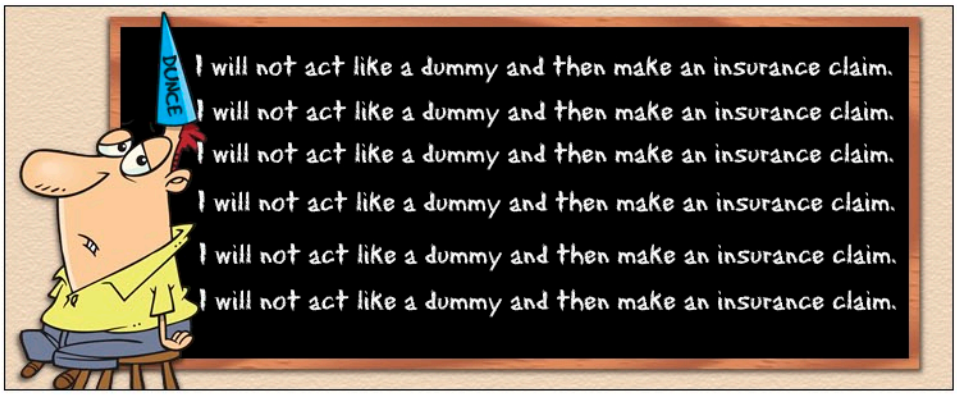
The Cover-age Story



5th Annual "Coverage For Dummies"

Reading a lot of insurance coverage cases makes you realize that some people do really dumb stuff. By definition, in general, insurance is supposed to be for things that are not planned out in advance. The head-shaking and eye-rolling behavior of these individuals causes injury and not long after, and not surprisingly, a lawsuit is filed against them. The tomfool then makes an insurance claim. I'm always fascinated that somehow these people still knew enough to buy insurance. For the past four years I have published a review of the best cases, from the year just-concluded, that demonstrate attempts to secure insurance coverage for the frailty and imperfection of the human brain. This year's installment follows (cases in no particular order).

Colon v. Liberty Mutual Ins. Co., 2012 WL 163230 (N.J. Super. Ct. App. Div. Jan. 20, 2012): A New Jersey appeals court held that an automobile exclusion, contained in a homeowners policy, did not preclude coverage for damages caused by an insured that bit a police officer upon being stopped in her automobile. Side note: when asked by a police officer for identification, probably best not to give your name as Beyonce Knowles – unless you really are. Beyonce's new single -- All the Single Ladies Want Insurance Coverage.

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In this issue:

Mold Lang Syne: Declarations: The *Coverage Opinions* Interview With Melinda Ballard

Coverage Opinions checks in with Melinda Ballard, whose 2001 verdict from a Texas jury against an insurance company for $32 million -- followed by her photo, wearing a biohazard suit, appearing on the front cover of *The New York Times Magazine* -- has been credited as the *Marbury v. Madison* of mold coverage litigation. Melinda reveals something about her story that had remained a mystery – until now.

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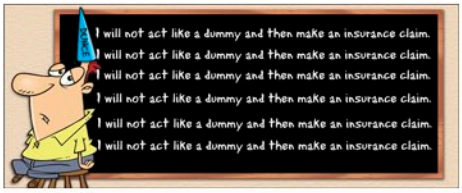

Farmers Automobile Ins. Assoc. v. Danner, 967 N.E.2d 836 (Ill. Ct. App. 2012): An Illinois appeals court held that no coverage was owed to an insured, under a homeowners policy, for damages that he allegedly caused when he hit someone with his vehicle, followed by exiting the vehicle and striking the person three times with a golf club – breaking the club. And what did the victim do to deserve this? He entered the insured's property to retrieve a baseball accidentally hit there by his son. Keep Off The Grass. No. Really. I mean it.

Physicians Ins. Co. of Wisconsin v. Williams, 279 P.3d 174 (Nev. 2012): In a dispute involving claims made timing issues, the Supreme Court of Nevada held that no coverage was owed to a dentist, under a professional liability policy, for a claim that he used street cocaine to anesthetize a patient's gums during a root canal procedure. I would have commented on this, except I'm speechless.

Sciolla v. West Bend Mut. Ins. Co., 2012 WL 5896843 (E.D. Pa. Nov. 21, 2012): The Eastern District of Pennsylvania held that unresolved issues of material fact precluded summary judgment on the question of coverage, under a general liability policy, for bodily injury sustained by teachers that were thrown off their donkeys while playing "Donkey Ball" in a middle school (playing basketball while riding a donkey, silly). The policy issued to the donkey ball organizer contained an exclusion for bodily injury to any person while practicing for or participating in any sports or athletic contest or exhibition that the insured sponsors. It was a question of fact whether the injured parties were "players" (covered) or "participants" (not covered) – or just "idiots."

Hays v. Georgia Farm Bureau Mut. Ins. Co., 722 S.E.2d 923 (Ga. Ct. App. 2012): A Georgia appeals court held that an auto exclusion, in a homeowners policy, precluded coverage for injury caused when an insured used his pickup truck and a pulley in an attempt to lift a portable toilet onto a deer stand. [I had to look that up.]

Vam Check Cashing Corp. v. Federal Ins. Co., 699 F.3d 727 (2nd Cir. 2012): The Second Circuit held that coverage was owed to a check cashing store, under a crime policy, for a scam that went like this. An employee of a check cashing store received a call from a man who identified himself as the manager of a new check cashing store that the employee's boss was opening that day. An earlier call had been made to the employee from a woman, identifying herself as the store owner's wife, and she mentioned that new stores were being opened. The employee was told by the new store's "manager" that a government official had arrived at the new store to collect a tax bill. But because the store had just opened it did not have

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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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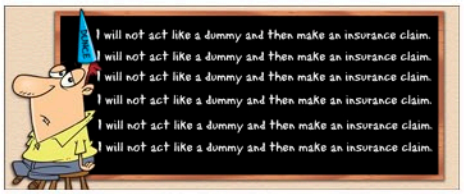
The Cover-age Story



cash on hand to pay the bill. The employee was told that someone would come to her store, give her a code number, and collect the needed funds. A man arrived, gave her the code number, and was handed a box containing $120,000.

Sunshine State Ins. Co. v. Jones, 77 So. 3d 254 (Fla. Ct. App. 2012): A Florida appeals court held that coverage was owed to a teenage insured, under a homeowners policy, for injuries caused when, in an attempt to annoy his girlfriend, he repeatedly grabbed the steering while she was driving. When she tried to push him away she lost control of the car and hit a concrete wall. As the boyfriend's actions (more likely ex-boyfriend) did not constitute use of the car, the auto exclusion in the homeowner's policy did not apply. It would have been safer to just ask, every five minutes – Are we almost there?

Lighthouse Neurological Rehabilitation Center, Inc. v. Allstate Ins. Co., 2012 WL 750068 (E.D. Mich. Mar. 7, 2012): A Michigan federal court held that coverage was owed under an automobile policy because an individual did not subjectively intend to injure himself under the following alleged circumstances.

In the midst of a quarrel with his girlfriend, and following the consumption of alcohol at a barbecue, a man exited her vehicle and was then chased by her. The vehicle came to a stop and he jumped onto the roof, holding the luggage rack, windshield wiper and antenna. His girlfriend abruptly accelerated and stopped several times, throwing him over the hood and onto the pavement. He landed on his head, causing a brain injury that led to his death. But none of this is the craziest part of the case. Addressing whether injury is the "anticipated and expected result" for someone who climbs onto a moving vehicle, the court looked for guidance to a Centers for Disease Control report that examined "car surfing" from 1990 to 2008. Yes, there really is a CDC report that examines "car surfing" from 1990 to 2008 – described by the report as "a persistent occurrence among teens in the United States." When I was a teen I collected baseball cards.

Roque v. Allstate Ins. Co., 2012 WL 150079 (Colo. Ct. App. Jan. 19, 2012): A Colorado appeals court held that no coverage was owed to insureds, under an uninsured motorist policy, for injuries sustained after a road rage incident turned into a fight in a McDonald's parking lot. Weapon used to cause the injuries -- McGolf club.

Ball v. Baker, 2012 WL 6151736 (S.D.W.Va. Dec. 11, 2012): A West Virginia federal court held that no coverage was owed to a police officer, under a commercial general liability policy issued to a county, for claims arising out of his having sex with a minor, in a police cruiser,

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1788: The First Coverage Dispute

A year-end story in Insurance Law360, addressing critical coverage cases of 2012, summed it up this way (warning, sit down first): "This past year demonstrates that insurance coverage law remains in fluctuation. Because of the nature of insurance policies, there remains a tension between insurers and their customers." Stop the presses! I am going to go out on a limb here and make a couple of very bold predictions. 2013 will also demonstrate that insurance coverage law remains in fluctuation. And one year from now there will remain a tension between insurers and their customers. Which got me to thinking. Just how long have insurance coverage disputes been around? Of course, for as long as there have been insurance policies. But I was wondering more like, *exactly* when did it all begin. With using only Westlaw as a tool, the earliest U.S. case that I could find, involving a coverage dispute, is Richette v. Stewart, handed down in 1788 from the Supreme Court of Pennsylvania.

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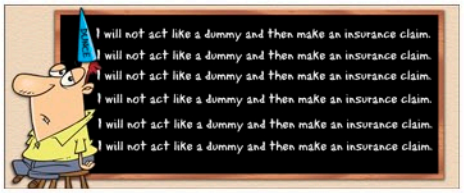
The Cover-age Story



while he was on duty. The Sheriff, also a defendant, allegedly hired the officer despite knowing that he had been terminated from a convenience store for poking holes in a wall to watch women use the restroom.

Coverage Opinions Contest: Insurance Coverage Haiku

My generous editor at Oxford University Press has agreed to donate several copies of the 2nd edition of "General Liability Insurance Coverage: Key Issues In Every State" as prizes for contests in *Coverage Opinions*. So here we go. A copy of "Key Issues" will be given to the best three examples of Haiku (using the 5-7-5 Japanese format) that have something to do with insurance coverage.

If your response to the word Haiku is to say Gesundheit, do not worry. Just look it up and in minutes you'll know all you need to get started. Trust me. The best part about Haiku is that you can't tell the difference between the work of a great master or a 6 year old. Here is my effort:

Duty to defend
Four corners of a big leaf
Cumis counsel near

Please send entries to Maniloff@Coverageopinions.info Deadline to enter is January 15.

Are There "Bad States" For Insurers? Even West Virginia?

Last month the Court of Appeals of Washington, in a case of first impression, found that an insurer was not obligated to provide coverage to a nightclub for a shooting, because of a firearms exclusion, despite arguments that the exclusion was ambiguous and did not apply because of allegations of other negligence theories. [More about the case below.] But how could this be? Isn't Washington a "bad state" for insurers?

It is not unusual to hear insurers, when assessing their chances of prevailing on coverage issues, to be concerned because the jurisdiction in which the case will be litigated is "bad for insurers." But is there really such a thing as a bad jurisdiction for insurers? Having spent four years researching the law on 21 coverage issues, across 50 states, I do not believe that such a place exists. Are there bad states for insurers on certain issues? For sure. But blanket assertions, that a certain state is bad for insurers, are not provable. Even West Virginia. I'll get to that.

Let's start with California, a state that is often described as one in which insurers would be well-served to avoid. Yes, California is the home of Montrose – a decision that produced unfavorable law for insurers on not just one major issue but two – continuous trigger and late notice.

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[If you know of an earlier one I'd love to hear about it – especially if your file is still open.]

Most interesting about Richette is that the dispute involved coverage concepts that are not entirely different from ones seen today (although the trial took place on July 4th, apparently not yet a holiday). A ship sustained storm damage. Upon arrival at the next port, Cape Francois, the Captain gave a statement of the facts. However, it was unattested by the Captain's oath. Three months later, in Philadelphia, the Captain swore to the truth of its contents before a Notary. The court ruled that no coverage was owed because the notarized account was not given at the first port of arrival after the misfortune. The court rejected what was essentially a no prejudice argument by the policyholder – the original account had sufficient indicia of truthfulness -- and held firm to the strict proof of loss rule. FYI - Virginia requires an insurer to prove prejudice to disclaim coverage for an attestation given at a second port. See *13 Colonies Survey Of Coverage Issues.*

That's my time.

I'm Randy Spencer.

Contact Randy Spencer at Randy.Spencer@coverageopinions.info

Are There "Bad States" For Insurers?: - *Continued*

But what about an insurer's right to reimbursement of defense costs. There is probably no state in the country whose law on this issue is as favorable for insurers as California.

Ah, but California has the "Cumis" counsel requirement, you say. True, but the requirement that an insurer provide independent counsel to an insured, who is being defended under a reservation of rights, if the reservation creates a conflict of interest, is the majority rule nationally. At least California's rule comes by way of a statute that permits the insurer, in this situation, to pay panel counsel rates for independent counsel. Insurers in other states, confronted with independent counsel bills at $600 per hour, would likely wish that they were fighting this fight in the Golden State.

How about New Jersey? I've heard it said that insurers do not want to find themselves stuck in the mud in the swamps of Jersey. New Jersey was an early adopter of the continuous trigger for purposes of latent injury claims. That certainly suggests that it is not friendly to insurer interests. But once it is determined that the continuous trigger has resulted in multiple policy years being obligated to provide coverage, a court will turn to how to allocate the loss among all of the triggered players. Here New Jersey is quite favorable to insurers, having no qualms about assigning loss to the insured for periods of no coverage.

New Jersey's rule, that an insured must consent to being defended under a reservation of rights, has produced harsh results for insurers. Bad for insurers. On the other hand, New Jersey's "Burd" rule, that an insurer can decline a defense in many situations, and convert the duty to defend to a duty to reimburse defense costs, and for covered claims only, makes New Jersey probably the stingiest state in the country for insureds when it comes to defense.

Now let's turn to the mother of all "bad states" for insurers -- West Virginia. It is traditionally described as almost heaven for policyholders. Much is made of West Virginia being a bad state for insurers because of the so-called Shamblin letter – one demanding that an insurer settle a case within policy limits, or be liable for an excess verdict, unless the insurer can demonstrate that there were good grounds for not settling (that's a general statement and not meant to be the exact West Virginia test). But while West Virginia's demand to settle comes with a brand name, a Shamblin letter, this rule, in one form or another, exists in just about all states.

When this bad state for insurers was presented with the question whether faulty workmanship qualifies as an "occurrence," West Virginia's highest court held that it did not. And West Virginia could have expanded liability insurers' exposure by holding that emotional injury qualifies as "bodily injury." But the state's highest court declined to do so -- making West Virginia far more insurer-friendly than even New York on that issue. Another big opportunity to expand insurers' liability, that West Virginia passed on, concerns the duty to defend standard. The state limits the determination of an insurer's duty to defend to the four corners of the complaint. A rule that allows resort to extrinsic evidence, to determine an insurer's duty to defend, would put more insurer appointed Mountaineer defense lawyers to work.

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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.

Are There "Bad States" For Insurers?: - *Continued*

I'm not saying that insurers should be wishing that all of their declaratory judgment actions are venued in West Virginia. The moral of the story is that coverage disputes are not won and lost based simply on where the complaint is filed. Coverage disputes are about specific issues. And when examining coverage on an issue-by-issue basis, every state is a mixed bag for both insurers and insureds. It is on this basis that insurers' considerations, about whether to engage in coverage litigation in a certain state, should be undertaken.

A Lesson In Policy Drafting: Less Is More (Insurer Wins); More Is Less (Insurer Loses)

The discussion in The Cover-age Story, whether there are "bad states" for insurers, was prompted by the recent decision from the Court of Appeals of Washington in Capitol Specialty Insurance Corp. v. JBC Entertainment Holdings. The decision demonstrates that, when it comes to a policy exclusion, less can be more. And a recent Illinois federal court decision, discussed below, teaches that sometimes the insurer is better-served to put down its pen when drafting an exclusion.

First, JBC Entertainment, and why less can be more. In 2010, Jackson Jacob Mika was injured when an unknown person fired a gun in Jillian's, a nightclub in Seattle. Mika filed a complaint for damages against JBC Entertainment, the operator of Jillian's. "Mika alleged that JBC should have provided enhanced security such as 'wanding' for firearms, given the large number of hip hop/rap patrons in order to keep the Plaintiff safe. Mika's claims included negligent hiring, training and supervision and negligent failure to provide adequate security. All claims relate to the shooting itself; Mika did not claim any negligence occurred after the shooting."

JBC tendered the defense to Capitol Specialty, its CGL insurer. Capitol agreed to defend under a reservation of rights and filed a declaratory judgment action to determine if the policy provided coverage. Capitol argued that no coverage was owed because of the policy's Firearms Exclusion. The exclusion precludes from coverage "'[b]odily injury' or 'property damage' that arises out of, relates to, is based upon, or attributable to the use of a firearm(s)."

The trial court granted Capitol's motion for summary judgment, holding that the Firearms Exclusion precluded coverage for Mika's claims. The Washington appeals court affirmed. The court rejected the argument that, because the claims for negligent hiring, training, supervision and security alleged a concurrent and independent cause, they fell outside the firearms exclusion. The court concluded: "JBC's alleged liability for negligence is wholly dependent upon the shooting, an occurrence that is specifically excluded from coverage."

The court also rejected an argument that the Firearms Exclusion was ambiguous because an "average purchaser of insurance could fairly conclude that the firearms exclusion applies only if the insured itself uses a firearm in connection with its business." Likewise, the exclusion was not found ambiguous on the basis that "Capitol could have added clarifying language if it intended to exclude coverage for claims arising out of the use of a firearm by someone other than the insured."

The lesson from JBC Entertainment is that if an insurer does not want to assume any exposure, in any way, shape or form for a loss associated with a forearm, then it should say just that. It should use what would be described as an "Absolute Firearms Exclusion." That's what the insurer did in JBC Entertainment and the court hardly broke a sweat to uphold it. Likewise, that's what the general liability insurer did in James River Ins. Co. v. Fortress Systems, LLC, discussed in the December 19th issue of *Coverage Opinions*. The insurer wanted nothing to do with auto exposure. It used an Absolute Auto Exclusion. And, viola, it had no liability for an auto claim, even where the use of the auto was quite removed from the insured's conduct.

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A Lesson In Policy Drafting: - *Continued*

Now here's what can happen when an insurer presumably wants no exposure for a certain type of claim, but uses more words than necessary to attempt to achieve it. In Starr Indemnity & Liability Co. v. Boys and Girls Club of Carbondale, the Southern District of Illinois addressed coverage for a boys and girls club, and its executive director, for a claim that a club volunteer removed minor children from the club's premises and sexually assaulted them.

The club was insured under a commercial general liability policy issued by Starr. Starr argued that it had no duty to defend or indemnify on account of certain policy exclusions, including one titled Abuse or Molestation Exclusion, that precluded coverage for bodily injury "arising out of": (1) "[t]he actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured" or (2) the negligent supervision of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by [the preceding paragraph]."

Putting aside various other issues, the court held that the Abuse or Molestation Exclusion did not apply. While the court concluded that the exclusion was not ambiguous, it did not apply because the abuse did not occur while the children were in the care, custody or control of any insured.

The alleged abuser, Brooks, lost his insured status because his actions were unrelated to and beyond the scope of the club's business. Further, the "care, custody or control" requirement was not satisfied for the other insureds seeking coverage. Focusing on the "while" requirement, the court held: "The … complaints allege that the children were removed from the Club's custody and then sexually abused. Starr has not disputed that the children were not in the Club or Osborne's [executive director] care, custody or control when they were sexually abused. Furthermore, care, custody or control is generally construed as meaning immediate possession. 'care' refers to 'charge' or 'supervision'; 'custody' is defined as 'immediate charge and control'; and 'control' means 'to exercise restraining or directing influence.'" (citations and internal quotes omitted).

It is likely that the Abuse or Molestation exclusion would have been upheld if it simply precluded coverage for bodily injury arising out of the actual or threatened abuse or molestation by anyone of any person. And it seems that the exclusion was likely intended to be such a blanket exclusion or very close to it. After all, given that the insured was a boys and girls club, it seems reasonable that, if abuse were to take place, it would be of a child in the club's care, custody or control. Therefore, as a practical matter, the expressly stated "care, custody or control" requirement likely added nothing to the exclusion -- except to open up a door to prevent its applicability.

Capitol Specialty Insurance Corp. v. JBC Entertainment Holdings, No. 68129-0 (Wash. Ct. App. Dec. 10, 2012) is available on the Washington Courts website. Starr Indemnity & Liability Co. v. Boys and Girls Clubs of Carbondale, No. 11-0858 (S.D. Ill. Nov. 19, 2012) is available on the PACER system.

Nevada Federal Court: Ongoing Operations = Completed Operations For Construction Defect

Of course it is standard practice for a general contractor to require that it be named as an additional insured on a subcontractor's general liability policy. But often times this contractual requirement is expressed in non-specific terms. In other words, the general contractor does not include any description of what the additional insured coverage is to entail. While the subcontractor complies with its obligation, by obtaining a general liability policy that includes an endorsement that affords additional insured coverage for any party that it is contractually obligated to so name, it is not uncommon for such an endorsement to limit coverage to liability arising out of the named insured's ongoing operations for the addi tional insured. And construction defect suits frequently involve property damage that is within the products-completed operations hazard. Translation – the general contractor,

Nevada Federal Court: : - *Continued*

despite being named as an additional insured, as required by the contract, is not afforded coverage.

Last week a Nevada federal court, a state that is no stranger to construction defect suits, held that an additional insured endorsement, despite being limited to ongoing operations, provided coverage for completed operations. In general, in Jaynes Corp. v. American Safety Indemnity Company, the federal court relied on the 9th Circuit's 2011 decision in Tri-Star Theme Builders, Inc. v. One-Beacon Insurance Co., which held: "The key phrase -- 'arising out of the Named Insured's ongoing operations' (which is not defined) -- addresses only the type of activity (ongoing operations) from which the ... [additional insured's] liability must arise in order to be covered, not when the injury or damage must occur. In other words, this language does not state that injury must occur, or liability must arise, *during the* Name Insured's ongoing operations, but rather requires only that the liability arise *'out of'* the ongoing operations, which may require only a minimal causal connection between the liability and the 'ongoing operations.' ... At the very least, there is an argument that the endorsement's undefined language is ambiguous and should be construed against the drafter." (italics in original).

In reaching this decision, the Jaynes court rejected contrary opinions, because their conclusions were based on the drafting history of the additional insured endorsement, and not policy language. Calling the decisions a "history lesson" that "makes for an interesting read," the court concluded that they are "not persuasive in the face of the plain language of the ongoing operations clause."

Given how much coverage for construction defects is currently precluded for additional insureds, because they are covered under endorsements that are limited to ongoing operations, wide-spread adoption of Jaynes would certainly lead to increased exposure for insurers in CD cases.

Jaynes Corp. v. American Safety Indemnity Company, No. 10-cv-764 (D. Nev. Dec. 26, 2012) is available on the PACER system.

Mold Lang Syne: Declarations:

The *Coverage Opinions* Interview With Melinda Ballard

Coverage Opinions checks in with Melinda Ballard, whose 2001 verdict from a Texas jury against an insurance company for $32 million -- followed by her photo, wearing a biohazard suit, appearing on the front cover of *The New York Times Magazine* -- has been credited as the *Marbury v. Madison* of mold coverage litigation. In reality, the story is more complicated than that. Melinda's case is long over, but it was not the end of her involvement with insurance coverage. *Coverage Opinions* sits down with Melinda to discuss her famous case and what's she's been up to since then. Melinda reveals something about her story that had remained a mystery – until now.

The case evolved from a homeowner's claim for water damage to a hardwood floor in her home located in an Austin suburb. The lion's share of the damages awarded by the jury were for certain fraud and bad faith components of the case. A Texas appeals court ultimately upheld certain damages, but did away with a $17 million award for mental anguish and punitive damages. Melinda explains the numbers below. The case was eventually resolved by way of a confidential settlement.

While the initial verdict had a wide disparity between damages for bad faith/fraud and property damage caused by mold, plenty of articles were written about it without sufficiently distinguishing between these types of damages. In fact, the trial judge precluded the plaintiffs' medical experts from testifying on the basis of insufficient evidence linking the health problems at issue to mold exposure. So, none of the award was for bodily injury, despite the clear impression to the contrary when Melinda was pictured on the front cover of The *New York Times Magazine*, standing inside her mold-infested home wearing a biohazard suit that looked like she was getting to visit Chernobyl.

There is no doubt that significant numbers of mold claims were filed after the Ballard verdict. But that is not because Melinda made a scientific discovery that mold can be hazardous (recognizing that there are differences of opinion on the health hazards of exposure to mold). Melinda Ballard's contribution to mold litigation is that her story created a very compelling narrative for media stories. Such stories served to increase public awareness of mold. And that resulted in an increase in claims.

Melinda, thank you so much for taking the time to speak with *Coverage Opinions*, especially during this very busy last week of the year. Please tell me about your background – personally and professionally.

In short, I am a quasi-retired advertising executive. I worked for United Brands,

Melinda Ballard

Oscar de la Renta, Ralph Lauren, and then opened my own ad agency which was based in New York. Our clients included everything from MTV, top designers, Sony, major banks, to various foreign governments such as Israel, Italy, Brazil, and others.

Much of my youth was spent in Texas and the New York/New Jersey area because my father was with Prudential and was transferred between Pru's offices in Houston and Newark. I stayed in the NY area for college (Monmouth University) and grad school (NYU and Columbia), and to pursue a career. In 1988, I sold my agency to Ruder Finn, Inc. (a large agency) and moved back to my Texas roots. Once my case was concluded, I left Texas and moved to a house I had purchased earlier in downtown Charleston, South Carolina.

It has been a decade or so since your case was at the epicenter of mold litigation. Can you tell me what you've been up to since that time.

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Declarations: - *Continued*

When the media took an interest in our case in Texas, I received tens of thousands of calls from strangers from all over the country. After weeding out the fruitcakes, the same common denominators popped up: symptoms expressed and living in a home that had a history of water damage. In many instances, the water damage was hidden and the homeowners had to hire plumbers and others to leak- and/or moisture- test their homes. In almost every situation, the materials on which mold was found was either drywall, plywood or both.

I knew the data I was collecting was anecdotal but realized that because these are the very products used to build homes, the problem was bigger than I ever imagined. Unless the public was made aware of the damage wet wood and wet wood byproducts could do, things would only get worse.

By the time my case went to trial, I had about 25,000 families from across the country in my database. The numbers of property owners (both commercial and residential) that were contacting me was so overwhelming that I founded Policyholders of America to serve as a resource so I wouldn't have to field calls all day and night.

By the time the case was settled, in 2004, I had well over 100,000 families and had charted almost all of them. Today, there are approximately 2,000,000.

One of the first turning points for Policyholders of America was the tropical storms and hurricanes of 2004. About four months after the storms, commercial and residential property owners started to realize they were not going to be compensated for their losses. Our membership skyrocketed and soon we were also being contacted by State and Federal legislators. A year later, Katrina hit and the same thing happened.

Throughout my case, the insurance industry focused exclusively on the media coverage, calling it hype. The industry spent millions of dollars deploying a battery of well-clad but empty "suits" (also known as lobbyists) and their usual go-to medical experts (usually handpicked from the good old days of tobacco litigation) to downplay the problem. We could have saved them a ton of money because what was occurring behind the scenes was something quite different than they ever would have suspected. Until now, the real untold story has remained a mystery.

In 2002, I, along with a group of other philanthropists, gave a large grant that funded some of the most exciting research that has ever been done in the area of water damage. The resulting research found a way to actually prohibit mold, much of the termite and other insect infestations and bacterial problems associated with water damage. Dr. David Straus from Texas Tech University developed a formula that, if incorporated in cellulose (plant-based) building products, makes it impossible for mold to grow regardless of the number of wettings. This is key because mold – and I am referring to any species of mold but particularly the more aggressive types – degrades and rots the material (wood and/or wood byproduct) on which it grows and attracts insects. Insects and insect droppings are responsible for much of the bacteria found in wet buildings. Obviously, some insects also consume wood as well.

The formula developed by Straus works because it changes the pH level of the treated substrate from acidic to alkaline and mold cannot and will not grow on anything alkaline. For example, you'll never see mold grow on sand, which is alkaline. Building materials treated with the formula will not lose their strength and the efficacy of the formula never fades over time. Other products now on the market only retard or reduce the likelihood and only work for a relatively short period of time.

But, there was a major obstacle – to work, it can't just be sprayed on the exposed surface of the building material. Manufacturers of gypsum and plywood would need to incorporate the formula into the manufacturing process and, even though that could happen for pennies per square meter, manufacturers resisted. The end result is that we don't have a real, long term solution to the problem.

Had the insurance industry looked for solutions beyond policy exclusions, insurers would dramatically slash the cost of repairs

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and homeowners would jump to use any preferred vendor offering such a solution. Sadly, that didn't happen.

Instead, the exclusions-only approach resulted in an unintended consequence: when looking at a huge repair bill that couldn't be passed on to the carrier, many owners of water damaged buildings chose to conceal the problems and sell to unsuspecting buyers. The problems didn't go away; they were "re-gifted" like an unwanted present from Aunt Elsie.

Can you comment on the impact of your case on mold litigation.

It has often been cited that the appeals court's reduction of the judgment was to $4 million. But that figure did not include about $2 million which had been deposited in the registry of the court at the 11th hour, nor does it include the interest from the time the carrier knew it owed us for the loss but didn't pay. So, assuming the 45% attorney's fees (45% because of an appeal) and adding interest of 18% per year, the judgment was reduced from $32 million to about $11 million. While I cannot disclose the settlement figure, I can tell you that I got one-hell-of-a-whopping tax write off. To this day, nearly a decade later, I still offset my taxes with it. The industry should want me to scream the settlement figure from atop the highest mountain.

Additionally, our case was not a "mold" case; it was a bad faith case. I fixed the leak but was forbidden from ripping out the wet flooring and walls. Years passed and damage mounted to the point that the house had moved off its foundation and the balconies had separated from the exterior walls. I bulldozed the house and everything in it because kids were breaking in and looting the place and I feared the house would collapse and kill someone.

What ensued after the $32 million verdict was announced was this: many people with legitimate claims were penalized because of a few slacker homeowners who thought they could cash in on the litigation du jour. All parties – the media who sensationalized it, the industry who ran from it, the lawyers and experts -- on both sides – who, in many cases, either over-dramatized it or labeled those with the problem as "greedy", opportunistic vendors who profited from it, and nutty policyholders who blamed everything on mold – share blame. Carriers – fearing they too would be on the receiving end of a large verdict – paid claims that should have been denied. This played into the hands of the worst mankind has to offer – people who would do anything for a buck. But, no one should have thrown the baby out with the bathwater.

I am just as guilty. My biggest regret is that I allowed a New York Times photographer to dictate my attire for a photo he took that became the front cover of the New York Times Magazine. I knew better and counseled many a head of state and other important client against caving to such pressure. I have no excuse.

Perhaps the old saying about the lawyer who represents himself or herself… *they've got a fool for a client*…applies.

Regardless of why, that photo was used effectively by the industry and frankly, if someone handed a similar opportunity to me, I would have done the same.

Had all parties addressed the situation methodically instead of hair-on-fire mode, long term solutions would have been embraced and repair costs would, even today, be far less because water damage (rot, degraded building materials, termite and other insect infestations and bacterial contamination) would not occur.

There has been, however, a positive result: the public is more educated about water damage and many property owners are far more diligent about maintenance and repairs.

I know from our discussions that Policyholders of America is not what some people think when it comes to the portrayal of insurance companies.

There are a number of responsible and worthy carriers and we recommend those companies to our members because we want to reward good behavior. We are not a bunch of crazed communist activists who think "profit" is a four-letter-word.

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Most of us are well educated, well-to-do property owners who strongly believe in the free enterprise system and want insurance companies to be strong and financially healthy. Part of any free market is choice and we do our best to steer members from insurers with bad track records. It's working; people listen.

Another fact that may surprise many of your readers is that Policyholders of America continues to work with key industry players on solutions and while we may disagree with some practices of some industry members, we are always respectful in the way in which we disagree and find common ground on which bridges can be built. And, bridges ARE being built and include everything from developing an affinity program for property and casualty insurance (modeled after AARP's health insurance program) to helping insurers lower contents replacement costs using the 30-50% trade/interior design discounts extended to Policyholders of America by almost every home furnishings manufacturer. While many homeowners don't trust an insurer to replace contents with like *kind and quality*, they trust us. There is plenty of fertile ground on which we can work together that result in higher profits for carriers. And, to my knowledge, no savvy executive ever said that profitability and customer service are mutually exclusive; profitability is a direct result of customer service.

Insurance is pretty boring stuff and, as a rule, people don't read their policies until a claim is filed. Only then do they care about their carrier's claims handling practices. At that point, they find us and we are one of, if not the only, free resource available that takes a hands-on approach to claims. We don't advocate suing and we are certainly not a shill for trial lawyers or public adjusters, like many of the others. We evolved over time to something far better.

Do you still have the biohazard suit that was featured on the cover of The *New York Times Magazine*? If there were a museum for insurance coverage I imagine it being on display there, much like the Smithsonian has Dorothy's ruby red slippers.

I am happy to report the suit was retired immediately after that photo shoot. This *Devil prefers Prada* and not a Tyvek "haz-mat" suit and I'll not fall for that old media trick again.

Late-r Notice:
A Look At Decisions To Come

California Supreme Court To Revisit Henkel

Cases concerning how insurance policies and liabilities are handled, following complex corporate transactions, possibly spanning long periods of time, are oftentimes challenging. The best-known case is this area is 2003's California Supreme Court decision in Henkel Corp. v. Hartford Accid. & Indem. Co. In Henkel, the California high court held that a company that acquired a policyholder's assets and liabilities could not receive the benefits of its liability coverage because it did not obtain the insurer's approval.

The California Supreme Court recently agreed to hear an appeal in Fluor Corp. v. Hartford Accid. & Indem. Co. At issue in Fluor is whether Henkel was wrongly decided because the court, and everyone involved in the case, ignored the existence of an 1872 California statute which provides: "An agreement not to transfer the claim of the insured against the insurer after a loss has happened, is void if made before the loss...."

If you believe that the statute sounds like it could apply, here is the rub: Can this statute be the legislative expression on the assignability of liability insurance if liability insurance did not exist in 1872?

The California Court of Appeal decision in Fluor Corp. v. Hartford, No. G045579 (Cal. Ct. App. Aug. 30, 2012) is available on justia.com. It is an interesting and light-read – a rarity for a corporate succession coverage case.