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

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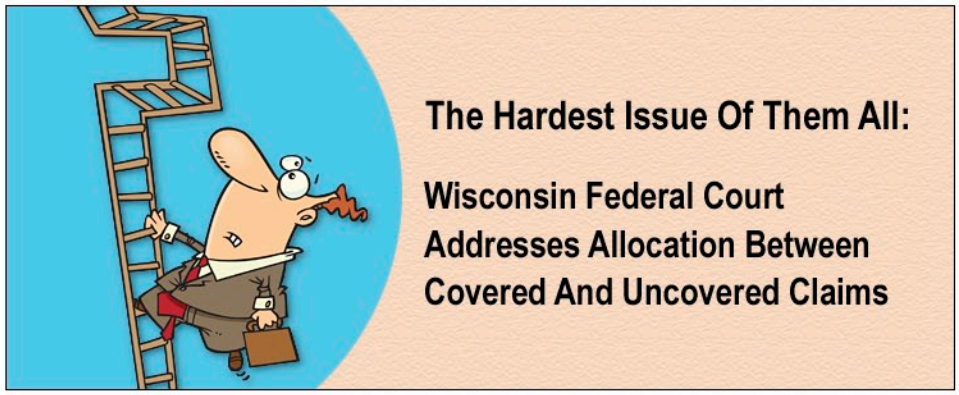
The Cover-age Story



[Follow-up to November 14, 2012 issue of *Coverage Opinions*. The introduction is repeated from that issue. But since there were many fewer subscribers at that time, and given the huge importance of this issue, it is reprised here, followed by an update.]

You have just written the greatest reservation of rights letter ever. If Felix Unger handled claims, this is what his letter would look like. If there were a hall of fame for reservation of rights letters, you would soon get to see how you looked in bronze. Your letter compares the specific allegations in the complaint, to the policy language, and explains, with laser-like precision, why, despite the insured being provided with a defense, no coverage may be owed for any settlement or judgment. You mail the letter, put a copy in the file, take a deep breath of satisfaction, waste a few minutes reading a couple of meaningless articles on Yahoo, and then off you go to your next claim.

But the challenge with reservation of rights letters is not writing them. It is enforcing them. Because a reservation of rights letter is written in a sterile environment – at someone's desk – it can easily spell out, in black and white terms,

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In this issue:

Declarations: The *Coverage Opinions* Interview With With Ryan Davidson, Co-Author Of *The Law of Superheroes*

In late 2010 a couple of young lawyers started blogging at Law and the Multiverse about the application of real-life legal principles to not so real-life scenarios involving superheroes and supervillains. The blog was soon profiled by *The New York Times*. From there the two were contacted by book agents. And then came the auction among publishers for the literary rights. In late 2012 "The Law of Superheroes" was released, followed by *The Wall Street Journal* saying it makes for "great reading." And get this, one of these two guys is a coverage lawyer.

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those claims and damages at issue in the underlying suit for which coverage may not be owed. The underlying litigation, on the other hand, is likely proceeding in a manner that is anything but as neat and tidy.

It will frequently be the case that the underlying litigation is simply not capable of producing an outcome that makes it possible for the insurer and insured to compare its results, with the reservation of rights letter, and easily decide which claims and damages are covered and which are not. To the contrary, the underlying litigation may result in a verdict that does not specify the extent to which it represents this or that type of damage or the claims on which the relief is based. In this situation, often-times referred to as a "general verdict," the policyholder is likely to argue that, because the basis for the jury's verdict cannot be determined, it must be presumed that the entirety of the jury award represents covered claims and damages. Adding to the difficulty for insurers is that it cannot ask appointed defense counsel to seek special jury interrogatories which would go a long way toward solving this problem. [And similar problems may come from a settlement.]

This issue is particularly problematic in construction defect claims, where the rule in many states is that no coverage is owed for the cost to repair or replace an insured's own defective work, but coverage is owed for damage to other property caused by the insured's defective work. While it is easy to state this rule, what happens if a verdict against a contractor-insured does not specify how much of the award is for the cost to repair or replace the insured's own defective work versus the cost to repair or replace property that was damaged by the insured's defective work.

Some courts have accepted the policyholder argument that, if the insurer created the problem of an inability to allocate between covered and uncovered claims, it must therefore bear the consequences. In other words, if it cannot be determined which portion of a verdict is covered and which is not, then all of the damages will be considered covered. Or the insurer may have a difficult burden to prove covered versus uncovered damages. See Butterfield v. Giuntoli, 670 A.2d 646 (Pa. Super. Ct. 1995); Herrera v. C.A. Seguros Catatumbo, 844 So. 2d 664 (Fla. Ct. App. 2003); TIG Ins. Co. v. Premier Parks, Inc., No. Civ.A.02C04126JRS, 2004 Del. Super. LEXIS 80 (Del. Super. Ct. March 10, 2004). In these situations, the fact that the insurer issued a world class reservation of rights letter, spelling out in detail its precise position on what is and what's not covered, is no protection against failing to prevent a general verdict and the consequences that it causes.

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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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At the heart of these decisions is the placing of blame on the insurer for being aware that the underlying litigation may result in a verdict that does not enable a determination to be made between covered and uncovered claims and/or damages, yet it took no steps to prevent such outcome. Indeed, these decisions sometimes speak in very harsh tones -- essentially blaming the insurer for being its own worst enemy.

Last month a Wisconsin federal court issued a decision that is generally in this category. While it arises in a different posture from some others, the court's message (and tone) is the same. The court addressed the insurer in a very harsh voice for its failure to take steps to achieve an allocation that was needed to determine whether certain particular damages were covered.

In Cousins Submarines, Inc. v. Federal Insurance Company, No. 12-387 (E.D. Wis. June 13, 2013), the court addressed coverage for litigation between a franchisor, Cousins Subs, and franchisees, when sales fell below initial estimates provided by Cousins. Cousins sought coverage from Federal, which disclaimed based on a breach of contract exclusion and one involving various forms of unfair business practices.

Cousins then settled the franchise litigation by paying $600,000, followed by filing suit against Federal for coverage. As a result of summary judgment motions, the court's decision was that, while a large portion of the claims were not covered, rescissory damages were not excluded from coverage. Thus, the court concluded that a fact issue existed for trial: "[W]hat portion of the settlement between Cousins and the third parties should be attributed to rescissory damages, and what portion should be attributed to the rest of the claims (which the Court determined were excluded).

The case went to trial and the jury found that the entire settlement was attributable to the third parties' rescissory damages claim against Cousins. Following the court's decision on various coverage and related issues (a discussion not relevant here), it turned its attention to Federal's argument that Cousins failed to establish that the entire settlement should be attributed to the rescissory damages claim. The court concluded that, while the evidence may not have been the strongest – testimony from two attorneys involved in the underlying action that the rescissory damages claims were very important in the settlement negotiations -- it was credible evidence to support Cousins' claims.

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Randy Spencer's Open Mic

Toddlers, All Terrain Vehicles And Insurance Coverage

When I was three years old I had a tricycle… and a dream – to someday own the sidewalks on a Big Wheel. Little Alyssa Free would be snickering if she read that (and if she could read). At three-years old, Alyssa was cruising the Wisconsin sidewalks on a Kazuma Meerkat50-4A four wheel recreational all terrain vehicle. It had a 50 cubic centimeter 4–stroke gasoline-powered internal combustion engine, 4–speed semi-automatic transmission, timing chain, crankshaft, clutch, oil pump and pistons, with a wheelbase of 2.3 feet and net weight of 156.53 pounds. Its maximum speed is 21.75 miles per hour. I have absolutely no idea what any of that technical stuff is. But I do know what 22 miles per hour means. Did I mention Alyssa was three years old?

One day Alyssa was riding this bad boy when she struck Michelle Paskiewicz, her grandfather's neighbor. Michelle sustained serious injury to her leg – like $200,000 of serious injury. Apparently there was no coverage available from Alyssa, such as a homeowner's or auto policy issued to her parents or Pop-Pop numbskull (trust me – Google Kazuma Meerkat50-4A to see what it looks like).

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That could have been the end of it. But it was not. The court chose to add one final paragraph in which it described Federal's predicament as one that it saw as being of its own making. The following quote is long but needs to be set out in its entirety: "Finally, the Court also notes that it understands the difficulty of Federal's position. In a sense, Federal was charged with arguing against an attribution when there were no contemporaneous documents available. But, in that sense, Federal was hoist by its own petard. Federal decided not to participate in the settlement proceedings beyond offering a de minimis amount of money. Thus, Cousins proceeded ahead, alone, with its own counsel, who negotiated a settlement that did not specify how the settlement should have been apportioned by ratio or cash amount. Surely, as an insurance provider, Federal had a distinct interest in ensuring that the allocation of losses was clearly set forth, so that it could avoid the very situation it now finds itself in: arguing over attribution of losses between claimed and uncovered claims. But, no, Federal played hardball, and declined to even participate in the settlement negotiations. Obviously, that was their right. But, now that evidence has been presented in favor of Cousins' argued-for allocation without any rebuttal evidence by Federal, the Court has little doubt that Federal wishes its representatives had been present at the negotiations to ensure a breakdown of the allocations had been prepared. Perhaps, going forward, Federal will view its obligations to its insured as also benefitting itself, and engage those duties in a more meaningful way. For Federal to now object to the lack of written or specific verbal evidence is a bit disingenuous, given Federal's decision not to be a party to any of the written or verbal communication."

Cousins Submarines is not a situation where an insurer defended but was then unable to enforce its reservation of rights because it did not take steps to achieve an allocation between covered and uncovered claims. However, the case sends the same message concerning the consequences for an insurer for failing to do so -- just in a different context.

Ironically, insurers that take steps to seek to achieve an allocation between covered and uncovered claims are often-times seen as an unwelcome party. The plaintiff and insured would likely be quite happy to have a general verdict so that they can argue that coverage is owed for the entirety. Thus, expect to see them object to the insurer's presence. Of course, despite not wanting their presence, the plaintiff and insured will then likely argue that, if the insurer did not make the effort, it should have. Cousins Submarines, and similar cases, should serve as an insurer's entitlement to a seat at the table – in whatever context that may be – to achieve allocation between covered and uncovered claims.

Randy Spencer's Open Mic

Michelle Paskiewicz turned for coverage to Acuity, her uninsured motorist insurer. Acuity denied coverage. All agreed that the pivotal issue before the Court of Appeals of Wisconsin was whether a Meerkat50-4A is a "land motor vehicle." The court concluded that it was and UM coverage was owed. First, the policy did not define the terms "land motor vehicle," "motor vehicle" or "vehicle." [Usually not a good sign for the insurer when the court notes that.] Rejecting Acuity's argument, the court noted that "Acuity has identified no language in the policy which would exclude a motor-powered vehicle which operates on land, such as the Meerkat50–4A, from coverage based upon its size, the speed at which it can travel, or its primary use being for the entertainment or recreation of children." The policy also specifically excluded some vehicles from coverage, but not anything like a Meerkat50–4A. See Paskiewicz v. American Family Mutual, No. 2012AP2758 (Wis. Ct. App. June 26, 2013).

And so they all lived happily ever after. Michelle Paskiewicz now has the financial means to attend to her injuries and Alyssa Free is hopefully riding a Big Wheel (and probably skipping the Paskiewicz's house on Halloween).

That's my time.

I'm Randy Spencer.

Randy.Spencer@Coverageopinions.info

Randy Spencer at Helium Comedy Club

Randy Spencer will be bringing his comic stylings to Helium Comedy Club in Philadelphia on Saturday July 27, appearing in a Philadelphia Comedy Academy show. He will also be at Helium in early August as a participant in the Philly's Phunniest Person Contest (date not yet announced). He'll be performing some of the material from his Carolines on Broadway set from last Fall (the stuff that worked), as well as new material that he's been working on.

Randy Spencer's Open Mic column in *Coverage Opinions* is all about insurance. His live act has nothing at all to do with insurance – which is why it's actually funny. Both shows will have several comedians on the bill. So even if Spencer bombs, there's still a good chance that you'll laugh. For more information drop him a note at Randy.Spencer@coverageopinions.info.

Does Having Sex In A Dinghy Trigger Permissive Vessel Coverage? (Part II)

Randy Spencer discussed the Sixth Circuit's mid-October decision in New Hampshire Insurance Company v. Carleton in his Open Mic column that appeared in the November 1, 2012 issue of *Coverage Opinions*. The case addressed whether having sex in a dinghy triggered permissive vessel coverage under a marine policy. The case apparently has good staying power as another decision was just issued.

This coverage case stems from there being an unwritten rule among boaters, that when boats are tied together, and then to a dock, people are allowed to cross over one boat to reach another. Included in this unwritten rule is that, when crossing a boat, you do not linger. While at a regatta in Michigan, William Carlton and Layla Dietz took advantage of this unwritten rule of the sea. Carleton wanted to show Dietz his boat, the Tiburon. To reach it, they had to cross a dingy that was tied to it. But despite the "no linger rule," Carleton and Dietz did, well, linger. They had sex on the dinghy (after meeting shortly beforehand when Carleton helped an intoxicated Dietz stand up after tripping). In a sad turn of events, Dietz was reported missing the next day and her body was found two days later in the harbor near where Carleton's boat was docked.

For purposes of Dietz's claim against Carleton, his marine policy included coverage for bodily injury arising out of his permissive use of a private pleasure vessel that he did not own or rent. Reversing the District Court, the Sixth Circuit held that a "rational trier of fact … could conclude that the reason that they got onto the RIB [dinghy] was to gain access to the Tiburon and that Dietz drowned while she was getting off the [dinghy], a use for which Carleton also had implicit permission." The Sixth Circuit remanded.

Back at the District Court, the insurer argued that Dietz's estate's claim against Carleton was only covered if it arose out of Carleton's permissive use of the dinghy. In other words, Dietz's estate must demonstrate that she entered the water and drowned after stepping on or off of the dinghy, as this is where the permission to use was. The insurer argued that Dietz's estate was precluded from re-litigating this issue because it was already litigated in state court.

More specifically, the insurer argued that the issue of how Dietz entered the water was determined in the negligence action brought by Dietz's estate against the yacht club. Dietz's estate claimed that the yacht club had been negligent in its maintenance of the marina area and that it had breached its duty to Dietz by failing to maintain or install adequate lighting, ladders, buoys, and railings on and near the docks. However, the Michigan Court of Appeals found that Dietz's estate had failed to establish causation in fact, i.e., how Dietz fell into the water. Thus, as the state court in the underlying case saw it, "no rational trier of fact could have concluded that, but for [the yacht club's] allegedly negligent acts or omissions, Dietz would not have drowned."

Based on this decision in the underlying state case, the District Court in the coverage case concluded that, "the manner in which Dietz entered the water (and lack of evidence on the issue) was central to the Court of Appeal's determination that the estate could not establish causation.

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Does Having Sex In A Dinghy Trigger Permissive Vessel Coverage? (Part II)

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Without evidence regarding how Dietz entered the water, the estate could not prove that any condition of [the yacht club's] property caused her injury. The state court judgment in favor of [the club] was based entirely on the estate's failure to present evidence of causation in fact." Therefore, the District Court in the coverage case concluded that collateral estoppel precluded a determination that Dietz's death arose out of Carleton's permissive use of the dinghy. See New Hampshire Insurance Company v. Carleton, No. 10–11152 (E.D. Mich. June 24, 2013).

As coverage cases go, Carlton is not significant. But the case demonstrates one thing. I do a lot of policy drafting in my practice. There are several aspects to that process. And one of them invariably involves a discussion, by the interested parties, of conceivable claim scenarios, followed by an examination of how the policy will respond. But no matter how many heads are put together, and no matter how many hypothetical claims are considered, there will always be actual claims that arise that nobody could have ever seen in their crystal ball. Nobody.

July 4th And Insurance Coverage

I hope that readers of *Coverage Opinions* enjoyed the Independence Day holiday – our annual celebration of the freedom to purchase liability policies from American companies instead of British ones. July 4th is filled with symbols marking the day. And as the following demonstrates, none of them have been immune from being part of an insurance coverage dispute.

Kennett v. Amica Mutual Ins. Co., 2010 WL 2977373 (E.D. La. July 20, 2010): At issue: Coverage for additional living expenses as a result of plaintiff's displacement after Hurricane Katrina. The court held that the plaintiff's purchase of a $2.00 hotdog at Target did not qualify for additional living expense coverage. Essentially, the hotdog would have been purchased even if plaintiff had not been displaced to California by the storm. I kid you not. [Ikea has the best hotdogs. They taste great, are only 75 cents and you don't need that little wrench to eat them.]

Ford v. Nationwide, 214 F. Supp. 2d 11 (D. Maine 2002): At issue: Whether insurer's accident reconstruction expert should have been allowed to testify wearing an American flag lapel pin. Plaintiff's counsel somehow had this idea that such pins are more commonly worn by Republicans than Democrats, and, thus, the witness's wearing of the pin might improperly influence some jurors by identifying the witness's partisan political views. Wait, there's more.

Plaintiffs argued "that their ability to aggressively cross-examine the witness was prejudiced because he was allowed to 'drape himself in the American flag, thereby cloaking his testimony with patriotism and inviting the jury's emotional instinct.'" I kid you not.

The court concluded that it did not abuse its discretion in allowing the witness to testify: "To my observation, there was nothing unusual about the pin's size or nature. I am not sure how well the jury could see it, but I will assume that at least the closest juror could see it and inform the rest of the jury. Because the pin was worn by a witness, not an officer of the court, there was little risk that it would compromise the environment of impartiality and fairness in the courtroom. Additionally, unlike the pin at issue in Berner, a two-inch pin urging a particular vote on a pending referendum issue, this was not a political pin that took a position on an issue of current controversy. As I observed at the time, these flag lapel pins have swept the country since September 11; whatever their status was before September 11, they no longer make a person stand out or provoke political dissension. In today's world, they are more common than neckties or scarves."

Maxum Indemnity Co. v. Gillette, 940 N.E.2d 78 (Ill. Ct. App. 2010): At issue: Coverage under a commercial general liability policy

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July 4th And Insurance Coverage - *Continued*

issued to a company in the business of preparing, providing and transporting parade floats, for injury sustained when a passenger was thrown from a float. The insurer argued that no coverage was owed on account of the auto exclusion. The court agreed. The policy defined "auto" to include a trailer. "[W]e find the float constitutes a 'trailer' as contemplated by the policy due to the fact that it was a non-automotive vehicle being pulled on a public road by an automobile while transporting passengers and displays. We believe this fact also supports the conclusion that the float was designed 'for travel on public roads' as contemplated by the policy. The trial court itself recognized that trailers used for travel on public roads are frequently converted to parade floats. To the popular mind, to most people, to ordinary laypersons, 'trailer' connotes a parade float."

Taylor v. Traders and General Ins. Co., 164 So. 2d 905 (Miss. 1964): At issue: Coverage for workers compensation benefits for Lesley Taylor, who was injured during horseplay while doing brick work on a contract for his Uncle Sam Spiers.

Michigan Millers Mutual Ins. Co. v. Awad, 2006 WL 1084351 (Mich. Ct. App. 2006): At issue: Coverage under a homeowners policy for injury caused when someone lit a bottle rocket from inside a vehicle. The court held that no coverage was owed under a homeowners policy, issued to the person that sold or gave the bottle rocket, on the basis of the business pursuit exclusion. The insured, a college student, along with two other men, operated three stands to sell fireworks. They rented tents and purchased fireworks and signs from a wholesaler. They borrowed a truck and trailer to purchase about 200 cases of fireworks. They also obtained permits from the local governments. The business pursuit exclusion remained applicable, notwithstanding that the stands operated for only about two weeks until the Fourth of July holiday, due to the seasonal nature of the product being sold.

Book 'Em Dann-Occurrence: Tikki Look At A Recent Decision Showing How The Hawaii Legislature Flubbed Its Solution To Construction Defect Coverage

The debate whether faulty workmanship qualifies as a Don Ho-ccurrence continues to rage luau of control. Oahu knows what the next development is going to be. Certainly not Lanai. All Maui can do is speculate and lei odds. For the most part we are in limbo. Lately there has been a surfeit of legislation designed to solve the problem. This wave seems poised to continue. For most states the waikiki to the solution has been continuous attempts by courts to clarify the issue. It is driving everyone coconuts. Let's tikki look at one state's legislative approach to the problem. As you'll see, it is easy to step on a banana peel.

In June 2011, Hawaii adopted legislation that took direct aim at Group Builders, Inc. v. Admiral Ins. Co., 231 P.3d 67 (Haw. Ct. App. 2010), where the Hawaii Court of Appeals held that "under Hawaii law, construction defect claims do not constitute an 'occurrence' under a CGL policy. Accordingly, breach of contract claims based on allegations of shoddy performance are not covered under CGL policies. Additionally, tort-based claims, derivative of these breach of contract claims, are also not covered under CGL policies."

The Hawaii legislature, following several pages of findings that paint the Group Builders decision in very problematic terms for the state's economy, announced that, in a policy issued to a construction professional, for liability arising from construction-related work, the meaning of the term "occurrence" "shall be construed in accordance with the law as it existed at the time that the insurance policy was issued." Haw. Rev. Stat. § 431:1-217(a). The intent is that policies that were issued after the decision in Group Builders would be subject to its holding that construction defect claims—contract and tort—do not constitute an "occurrence" under a CGL policy. In essence, the legislature provided a hybrid approach to the problem – it defined "occurrence," but did so with resort to case law.

But can a state legislature wave a wand and, just like that, bring about

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Book 'Em Dann-Occurrence:

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the results it desires concerning coverage for construction defects? The Hawaii District Court's recent decision in Nautilus Insurance Company v. 3 Builders, Inc., No. 11-303 (D. Hawaii June 24, 2013) demonstrates that it is more difficult than it looks to legislate coverage for construction defects. Or that the Hawaii legislature chose the wrong solution.

In 3 Builders, the Hawaii District Court, generally confronted with the question whether construction defect damages were caused by an "occurrence," turned to § 431:1-217. Following the legislature's mandate, the court determined that the operative case law governing its decision was that which existed in January 2008 – when the relevant policy was issued. Looking back to that period, the court concluded that the case law in effect at such time was consistent with, get this, Group Builders. Thus, the court held "that the actions which form the basis of the contract claims and the contract-based claims in the Underlying Proceedings are not occurrences within the meaning of the Applicable Policies." Therefore no duty to defend or indemnify was owed.

To put this all another way, the Hawaii legislature was displeased with the Court of Appeals decision in Group Builders that construction defect claims – both breach of contract and tort-based, derivative of breach of contract -- do not constitute an "occurrence" under a CGL policy. To solve the problem, the legislature enacted a statute which states that the meaning of the term "occurrence" "shall be construed in accordance with the law as it existed at the time that the insurance policy was issued." But, as the 3 Builders court observed, the state of the law in Hawaii, prior to Group Builders, was that contract and contract-based tort claims are not within the scope of CGL Policies. In other words, the state of the law in Hawaii *prior* to Group Builders, concerning coverage for construction defects, was the same as it is *after* Group Builders. So tell me again how the Hawaii legislature, specifically setting out to solve the many problems that it identified with Group Builders, did so?

Salt Ache City: Utah Federal Court Demonstrates The Pains In Policy Drafting

Insurance policy drafting is very difficult. Insurance policies are lengthy and sometimes complex documents and any word can be relevant to a court's determination of what any other word means. Not to mention that the policyholder generally doesn't even have to prove what the policy means, only that it could mean more than one thing. There is so much more that can be said about the challenges for insurers on account of various rules of policy interpretation and otherwise. That's not the point here. Rather, it is to demonstrate that, when it comes to interpreting an insurer's own policy, a court's resort to other policies may not even be off-limits.

The District of Utah recently addressed an insurer's duty to defend in Aspen Specialty Ins. Co. v. Utah Local Governments Trust, No. 12-176 (D. Utah June 19, 2013). At issue was coverage under an errors and omissions policy for litigation between an insured and its insurance agent. The details of the dispute are sparse and, in any event, not necessary here.

Addressing the duty to defend, the court noted that, based on the insuring agreement, it applied to a "claim." The policy defined "claim" as follows: "1) a written demand for civil damages or other civil relief that appears reasonably likely to involve payment under this Policy commenced by the Insured's receipt of such demand, 2) civil proceeding commenced by the service of a complaint or similar pleading."

The court observed that, under this definition of "claim," which had two options, the first one made reference to coverage under the policy and the second one did not. This was a significant fact for the court. Since the claim at issue involved a counterclaim, it was clearly a "civil proceeding commenced by the service of a complaint or similar pleading." However, unlike option one, where "claim" was defined as a written demand for damages, and then qualified by appearing

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Salt Ache City: - *Continued*

"reasonably likely to involve payment under this Policy," option two, the civil proceeding, had no such reference to coverage under the policy.

Based on how other insurance policies are drafted, the ULGT court noted that the policy before it contained an "unusual duty to defend provision." "In this policy, the insurer's duty to defend any 'civil proceeding commenced by the service of a complaint or similar pleading' does not refer to coverage under the policy or to any external fact." Other policies that the court looked at "wrap[ped] consideration of coverage into the duty to defend. Aspen's policy [did] not." Therefore, Aspen's duty to defend arose simply because the defendants were insureds under the policy.

Insurance Marketers Rejoice: "Vague Puffery" Is Not Misrepresentation

It is not a secret that some good policyholder firms maintain a database of ads for insurance policies, such as those found in publications that are directed to risk managers. The objective is to demonstrate that a claim that is denied, was, in fact, advertised by the insurer as being covered. I'm sure this scenario happens, although I wonder just how often the stars are aligned for such gotcha moments to take place.

In any event, in a decision along these longs, although not exactly, the Fourth Circuit in CRC Scrap Metal v. Hartford, No. 13-1036 (4th Cir. June 27, 2013) recently addressed a claim by a scrap metal recycling outfit that was denied coverage for damages arising out of the sale of stolen aluminum forms. The court held that coverage was precluded by the "your product" exclusion.

Taking another tack, the insured argued that it relied, to its detriment, on the recommendations of its insurer's agent's employee as to the "best possible coverage," yet purchased insurance that did not provide coverage for the property damage at issue. On one hand, the court noted that "[g]enerally, an insurer and its agents owe no duty to advise an insured, but an insurer that expressly or impliedly undertakes to advise its insured must exercise due care. An implied undertaking may be shown if ... the insured made a clear request for advice."

On the other hand, an insured's "request for 'full coverage,' 'the best policy,' or similar expressions does not place an [insurer] under a duty to determine the insured's full insurance needs, to advise the insured about coverage, or to use his discretion and expertise to determine what coverage the insured should purchase." The court put it another way: "An insurer's vague puffery that a policy provides the 'best and broadest' available coverage does not constitute a factual misrepresentation."

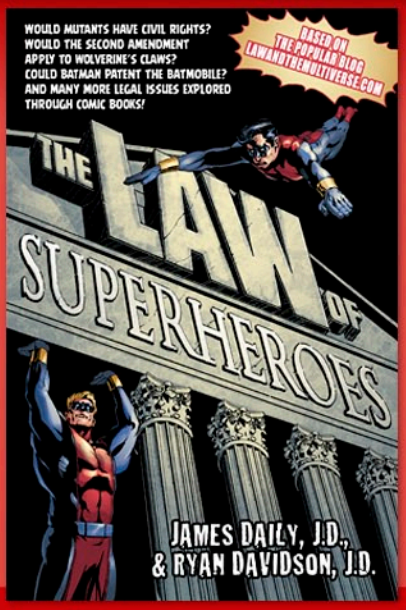
Guest Commentary: "The Duty to Defend – Part II: Two's Company and Sometimes Three's a Crowd"

Joe Junfola, 35 year veteran of the insurance industry, once again tackles the duty to defend. This time Joe looks at the impact that a conflict of interest may have on the insurer's right to defend.
Read Joe's article here.

Interested in submitting a Guest Commentary, and reaching 17,000+ subscribers involved in every facet of the P&C industry? It's easy. Just drop me a line at Maniloff@coverageopinions.info.

Declarations:

The *Coverage Opinions* Interview With Ryan Davidson, Co-Author Of "The Law of Superheroes"



Ryan Davidson

This is a great story. In late 2010, James Daily and Ryan Davidson, a couple of young lawyers, started blogging at Law and the Multiverse about the application of real-life legal principles to not so real-life scenarios involving superheroes and supervillains. The blog grabbed a lot of online attention and was profiled by The New York Times in a front page Arts section story. From there the two were contacted by book agents. And then came the auction among publishers for the literary rights. In late 2012 Gotham Books, a member of Penguin Group (who else), released "The Law of Superheroes." The Wall Street Journal said it makes for "great reading." And get this, one of these two guys, Ryan Davidson, is a coverage lawyer. Once I learned that I knew I needed to speak with him.

"The Law of Superheroes" seems the last thing we need a book about. Do we really need to know if it violates the Confrontation Clause of the Sixth Amendment if a superhero testifies in court while, necessarily, wearing his costume. But like a train wreck, you can't stop looking at it.

"The Law of Superheroes" is divided into thirteen chapters and the table of contents resembles a bar exam prep book, with entries including constitutional law, criminal law, evidence and contracts.

The book provides over 300 pages of answers to legal questions that you've never asked -- and never would. What to do about a murder conviction if the victim comes back to life. Can Batman be liable for an assault committed by Robin on the basis that their relationship is a partnership? Were things said by Daredevil, when he was arrested by Captain America, inadmissible because no Miranda warning was given? And there are many hundreds more like this.

Of course, I was quite curious to see what the book had to say in the Tort Law and Insurance chapter. Here the authors address the issue quite cleverly. It would be a spoiler for me to go further. But I was left saying Wow (in a good way) when I saw how insurance was applied to people who routinely commit massive destruction of property.

"The Law of Superheroes" is a highly entertaining read. You don't need to be a "comic book person" to enjoy it. I'm not. Although someone versed in comics would no doubt enjoy it more as they'd recognize more characters than just the best known ones. The book's discussion of legal principles is generally basic -- but still provides enough information to be educational. On this point, the book strikes just the right balance to appeal to both lawyers and non-lawyers alike. And let's face it, you are reading about law and superheroes. Do you really want something that reads like a law review article? It is hard to read the book without constantly saying to yourself – I can't believe a book like this exists. But it does, and you'll be glad for that.

Ryan Davidson is a 2009 graduate of Notre Dame Law School and recently worked at the well-regarded Indiana firm of Hunt Suedhoff Kalamaros, LLP where he practiced in the area of insurance coverage. He left HSK not long ago to move to Pennsylvania with his wife and very soon to be child and is now beginning practice there.

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He can be contacted at ryan.davidson@gmail.com to discuss law and superheroes or more serious issues involving insurance coverage.

Ryan, thank you for taking the time to speak with *Coverage Opinions* about your rather unique expertise in the law. What are some places where you and James have had the opportunity to promote and discuss the book?

We gave our first presentation at a collector's convention in Chicago in May 2011. Since then, we've both appeared at comic book and sci-fi conventions on our own and together. We've both appeared at New York Comic Con (2012) and WonderCon (2013), and James will be appearing at Comic Con International in San Diego this month. I've also hit a few local/regional comic and sci-fi cons in Indiana and plan to continue doing that in Pennsylvania.

Can you turn your notoriety in this area, and the entertaining and unique features that your expertise offers, into a way to make money from it?

Well we've already received a very nice advance from our publisher, and we're exploring other projects, both on our own and with collaborators. Further, both James and I have participated in various CLE events around the country. James will be appearing at the ABA conference in Chicago this August, and I will be participating in the Literature and the Law conference in Philadelphia around the same time. Information is available at the organizer's website: http://www.markerlawmediation.com/Marker_Law_Conferences.html

Do you ever find yourself thinking about aspects of Superheros when addressing real world legal questions for real clients?

Speaking for myself, it happens quite a bit, but I don't necessarily say so. I want clients to take me seriously, and to know that I'm taking them seriously. But my research for this project has taken me in so many different directions that it's not uncommon to come across an issue that I first researched in the context of Batman.

What is your favorite example of a Superhero and the law situation?

Stories that deal with the integration of superhuman powers into society are fascinating to me. Examples can be found in Watchmen, Marvel's Civil War event from 2006, The "Days of Future Past" X-Men storyline from the 1980s, and pretty much the entire run of Brian Michael Bendis's Powers. The existence of such powers would be an enormously significant political issue, and the stories that try to take that seriously are very interesting to me.

What are some other goals that you've set for yourself in this area now that you have so much street cred?

We're starting to talk with content creators about acting as a sounding board for their stories. We'd love to be able to act as subject-matter expert consultants for writers and media companies trying to ensure that their treatment of legal issues are accurate, or at least accurate enough to remain within reasonable bounds of artistic license. We're also starting to write for national publications about the intersection of law and culture, and we're both pretty excited about that.

Last year the Supreme Court of Wisconsin held that bat guano was a pollutant within the pollution exclusion. Just last month a Louisiana federal court decided the same. Not that this would be an issue for the elegant Bruce Wayne, but do you believe that the Court of Common Pleas of Gotham City, applying Gotham City law, would also conclude that the pollution exclusion applies to bat guano?

There isn't any reason to think that the Gotham courts wouldn't find those cases persuasive. Any idea that Batman would obviously win any case in Gotham City isn't necessarily true. In fact, these days Batman has a somewhat adversarial relationship with law enforcement and the courts,

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both of which take the official position that there is no such person as "The Batman." Think of Batman's relationship with Commissioner Gordon in The Dark Knight trilogy.

As to guano specifically, as Bruce Wayne himself does not actually produce guano, there's no real liability exposure for potentially damaging others' property. The major implication here would be if Bruce Wayne decided to file a claim for property damaged caused by bat guano in the Batcave. But as Wayne tends to avoid making anything related to Batman a matter of public record, he's likely to self-insure for that particular exposure. It's what he does for everything else.

I hired Spiderman for my kid's birthday party and he left the house covered in webs. My homeowner's insurer disclaimed coverage citing the vermin exclusion. Do they have a leg, or eight, to stand on?

As with the bat guano cases, there's no reason to think that a New York court wouldn't agree with others that have held that spiders constitute "vermin." The Eastern District of California recently concluded that arachnids unambiguously fall within the "vermin" exclusion, and that result seems accurate.

But here's the point that's easy to miss. In most versions of the Spider-Man story, his "webs" aren't actually spider silk. They're some artificial polymer with some properties similar to spider silk which Peter Parker projects from mechanical "web slingers" of his own invention that he wears on his wrists. So while he and everyone else refers to the resulting strands as "webs," they should be pretty easy to distinguish from natural spider silk. So if an insurer wanted to deny coverage based on a "vermin" exclusion, they would need to prove that the "webs" in question actually came from natural spiders. In most Spider-Man settings, an expert would be able to prove pretty easily that they weren't, by conducting some kind of chemical analysis. He might not be able to testify that they come from Spider-Man, but he should be able to testify that whatever they are, they are not natural. That would take the claim outside the vermin exclusion. Of course, in other versions, the webs are very much like natural spider silk, as they're organically projected from Peter Parker's wrists. In that case, the insurer would have a much easier time excluding coverage.

And don't discount the pollution exclusion possibly coming into play. The "webs" may not be "waste," as in the bat guano cases, but they might well still fall into the definition of "pollution" as an irritating and/or corrosive substance. Next time play it safe and hire Elmo.

In Superman, The Movie, Superman turned back time to save Lois Lane's life. Should he be allowed to turn back time to help a tardy insured satisfy the reporting requirement on a claims made and reported policy?

If we're talking about filing claims within the policy period, it's hard to see how this would prejudice the insurer. The insurance company would get timely notice of the claim, and, thus, be able to investigate and defend the claim like any other. No harm, no foul, yes?

But I think the real problem for insurers here is someone with knowledge of a claim travelling back in time to procure insurance for it. That represents quite a moral hazard, as part of the whole premise of the insurer/insured relationship is that the insured does not have any knowledge of outstanding or potential claims. Using time travel to procure an insurance policy for a loss that is known to have occurred would be really, really unfair to the insurer. Prudent insurers might want to consider asking whether applicants have the ability to engage in time travel.

What about coverage for property damage caused by magic? Magic regularly appears in comic books, e.g., Dr. Strange in the Marvel stories, who is slated to appear in the Marvel movies at some point in the next few years. Would damage caused by magic be covered?

Make no mistake - Insurers would want to find a way of excluding

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magical property damage. Sorcerers in comic books are capable of causing damage on the scale of hurricanes and earthquakes -- on the low end, in some instances -- and a company that did not make arrangements to avoid covering damage caused by such actors could easily face insolvency.

The key here is that magic is probably going to need to be woven into the insurance policy in terms of exceptions and exclusions. Many of the magical effects common in fictional settings, including comic books, are basically just supernatural ways of producing real perils: fire, cold, lightning, sound, material substances of every description, even earthquakes. The list goes on. So simply saying that a house damaged by magical lightning was damaged by "magic" is the equivalent of saying that a roof which collapsed under the weight of ice and snow was damaged by "gravity." Both statements may be true, but they're not terribly helpful, as they don't help us answer coverage questions. So classifying magic as a specific peril doesn't seem like it would work.

But insurance policies already take this sort of thing into consideration with other perils. For instance, fire is almost always a covered peril, but we make a distinction whether or not any given fire is covered based upon the circumstances of the fire. If the fire is caused by accident, or deliberately set by someone other than the insured (or someone acting on the insured's behalf), then there is coverage. But if the insured burns down his own building, there is not only no coverage, but the insured is going to jail. So we would probably need to think about "magic" that way: a factor related to the causation of other perils rather than a peril in its own right. Of course, proving that a particular loss was or was not caused by magic could be a really hard evidentiary problem, which creates a new job category: magical forensic investigator!

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.

Late-r Notice:
A Look At Decisions To Come

2nd Circuit To Address Choice Of Law: The Pebble In Your Shoe Of Coverage Issues

Choice of law is a hugely important issue in coverage disputes. By definition, the mere fact that it is being litigated may be because the outcome whether coverage exists will depend on which state's law applies. But despite its importance, it is an awful issue to deal with. Unless a state applies lex loci contractus – the fairly clear-cut rule that the policy is governed by the law of the state where it was issued – you have likely just entered the murky world of the Restatement (Second) of Conflict of Laws. This is the Restatement's so-called "most significant relationship" test – the tedious process of weighing a slew of state contacts with the parties to determine which state tips the scale in favor of its law applying.

These Restatement rules, like many that require a balancing of various factors, do not always lend themselves to a definitive answer (although, if you choose the insured's address on the policy, as the applicable state law (see Comment b. to Restatement §193), there is a high probability that you'll be right).

So not only is choice of law analysis tedious, but even after all that work the end result does not always bring with it the same confidence in the answer, as can be the case with other coverage issues. This can be a dissatisfying outcome for both the lawyer providing the advice and the client who needs it.

Law360 reported that in mid-June the Second Circuit heard oral argument in Certain Underwriters at Lloyd's v. Illinois National Ins. Co. At issue is which state's law – New Jersey or New York – governs the determination of coverage for a construction accident. In particular, at issue is how to interpret "loading and loading," as New Jersey and New York apply different tests. For determining which state's law will govern the "loading and loading" question, New York uses the "center of gravity" test, which generally considers five contacts. It is easy to see how application of this test could be challenging.

Space constraints of the Late-r Notice column preclude me from discussing the case further. But the point of this was mainly just to question whether a better solution is needed to resolve something as important, and frequently arising, as choice of law in coverage disputes.