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

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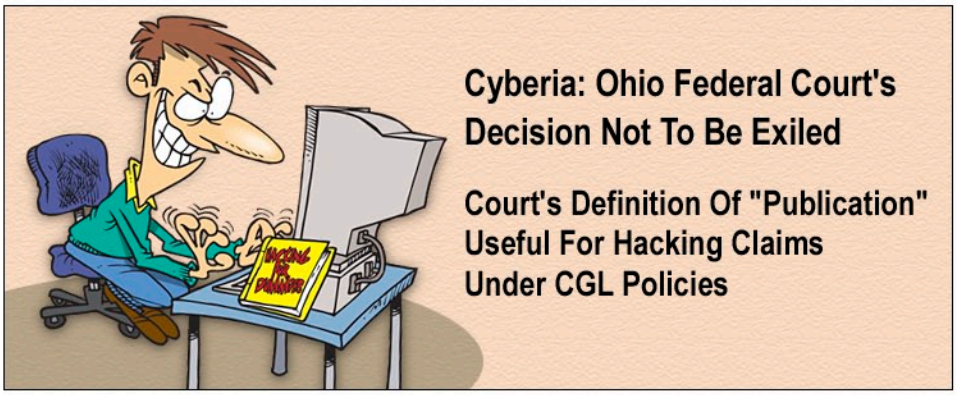
The Cover-age Story



The risks of a heart attack are generally well known: smoking, high blood pressure, high cholesterol, physical inactivity, family history, stress and the list goes on. For many, myself among them, that list also includes hearing the words: "Please listen carefully as our menu options have changed." When I hear that I practically need someone to start rubbing those paddles together. It's the health hazard equivalent to smoking a pack of Luckies a day for 30 years.

While it is easy to make fun of the frustration that can accompany dialing-up any business these days that is larger than a deli, those annoying automated answering systems are not without legal consequences. In Encore Receivable Management, Inc. v. ACE Property and Casualty Insurance Company, No. 12-297 (S.D. Ohio July 3, 2013), an Ohio federal court addressed such a situation -- and an accompanying coverage dispute. The case has nothing whatsoever to do with cyber liability or coverage. Zip. But that's where the decision is likely to have an impact.

Encore Receivable involved coverage for underlying claims filed against Encore, which operated a call center for Hyundai,

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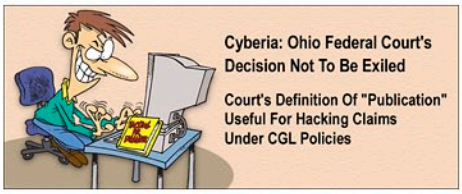
Declarations: The *Coverage Opinions* Interview With With Professor Andrew Jay McClurg, The Funniest Lawyer I Know

A lot of lawyers think they are funny. Of course it's easy to think you are a riot when there is a cadre of Summer Associates scared not to laugh at your jokes. But Professor Andrew Jay McClurg is the genuine article. No pun intended since Professor McClurg spent four years writing a humor column for the ABA Journal. In addition to his ABA Journal stint, Professor McClurg runs the very amusing website www.lawhaha.com, which looks at the lighter side of the law. He also uses humor as an effective teaching tool with his students at the University of Memphis Law School. But don't be fooled. This is also one serious law professor.

The Cover-age Story



alleging that Encore employees recorded telephone conversations between Hyundai customers and Encore customer service representatives without obtaining the customers' consent. These recordings were then allegedly distributed internally within Encore for training and quality control purposes. For this capital offense, Encore was sued (class action) for invasion of privacy and violation of various California consumer protection statutes. You know the drill.

Encore sought coverage from its liability insurers. No coverage was available under certain primary policies because they contained an exclusion for the recording of information or material in violation of law. However, certain umbrella policies did not contain this "recording exclusion." So the issue was the availability of coverage under these policies on the basis that the claims were not covered by underlying insurance. Specifically, coverage was sought for "personal and advertising injury," defined to include "oral or written publication, in any manner, of material that violates a person's right of privacy."

The umbrella insurer argued that there was no "publication" because there was no distribution of information or news to the public. The court saw it differently and held that the publication requirement had been satisfied. Looking to a 2005 California District Court opinion (unpublished), the Encore Receivable court held: "[S]ecret information does not have to be widely disseminated in order to constitute publication. The courts that have looked at recording in the secrecy context have all read publication very broadly and held that a transmittal or a further dissemination of secret information satisfies publication. The firsthand experience of the communication, the words, the tone, and the cadence are all protected. When the firsthand aspect of the communication is transmitted to the mechanical device, it constitutes publication—dissemination of that unique aspect of the conversation that the speaker no longer has the ability to control. Here, this Court need not find that the communications were actually disseminated to third parties, because the initial dissemination of the conversation constitutes a publication at the very moment that the conversation is disseminated or transmitted to the recording device."

So what does Encore Receivable have to do with cyber coverage? It takes a brief explanation. The insurance industry is abuzz these days over protection against the risks of cyber liability. The internet is overflowing with reports and articles, from insurers and brokers, that describe various examples of data breaches, loss of personal identification information and many other types of cyber risks that businesses face,

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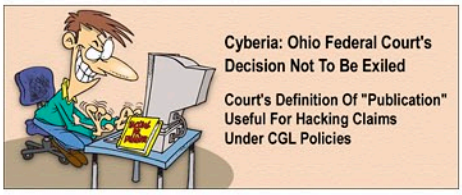
About The Editor

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.

The Cover-age Story



as well as what their financial consequences could be. All kinds of cyber liability policies are available to address these various risks. However, no matter how many cyber policy options are available, a company that sustains a cyber loss is, at least for now, far, far more likely to have a commercial general liability policy in its filing cabinet than with the word "cyber" written across the cover.

So, with no other options, a company that suffers a cyber loss – especially a data breach or hacking, where customers' personal information may have been revealed in some manner -- is likely to look for coverage, or at least a defense, under its commercial general liability policy. As in Encore Receivable, coverage will likely be sought for "oral or written publication, in any manner, of material that violates a person's right of privacy."

However, it is possible for a data breach, especially in a hacking situation, to result in no dissemination of customers' personal identification information. At most, the information is exposed, or could be exposed, to the hacker, but it never reaches the general public at large. But that does not mean that the company will not be sued out the ying-yang. It will likely be alleged that the customers need to be provided with credit monitoring services, so they can be on the look-out for unauthorized use of their information. No doubt the suit will allege the violation of a statute that allows for an award of attorneys' fees.

In such cases, insurers can be expected to argue that "personal and advertising injury" coverage is not available because there has been no *publication*, in any manner, of material that violates a person's right of privacy. However, the court in Encore Receivable held that, when it comes to secret information – which is what would likely be at issue in a data breach situation -- it does not have to be widely disseminated to constitute publication. Thus, while Encore has nothing at all to do with cyber liability or coverage, the court's holding will likely provide an opportunity for it to be used by a company that has been hacked and now needs to put its square peg of a claim into the round role of its commercial general liability policy.

Randy Spencer's Open Mic

Joan Rivers Stands Up For A Heckler And Meets The 7th Circuit

The number of judicial opinions involving a stand-up comic are minimal – like, count on one hand minimal. This is somewhat surprising when you consider that stand-up sometimes involves a guy with a microphone running his mouth at a guy running a tab. But, for whatever reason, stand-up comedians have generally eluded court case files.

Earlier this year saw an exception – and it involved one of comedy's legends: Joan Rivers. Rivers performed a show at a casino in Wisconsin. During her set she told a joke about Helen Keller. She was heckled by an audience member that had a deaf son. After the show, Ann Bogie, a different audience member, asked Rivers to autograph a book. Bogie expressed frustration to Rivers about the heckler. Rivers responded by expressing sympathy for the heckler because of her son. This exchange between Bogie and Rivers had been filmed and was used – sixteen seconds in all -- as part of an eighty-two minute documentary about Rivers.

Bogie sued Rivers alleging that she was portrayed in the film as having approved of condescending and disparaging remarks by Rivers to the heckler. Bogie alleged that her privacy

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Randy Spencer At Helium Comedy Club

Randy Spencer will be bringing his stand-up comic stylings to Helium Comedy Club in Philadelphia on Saturday July 27 (3:30 PM), appearing in a Philadelphia Comedy Academy show. He will also be at Helium on August 5th (8 PM) as a participant in the Philly's Phunniest Person Contest. Both shows are expected to be before a packed house. For more information – and free tickets to the August 5th show -- drop him a note at Randy.Spencer@coverageopinions.info.

Registration Open For 7th White and Williams Coverage College®

Registration is now open for the 7th White and Williams Coverage College. The Coverage College is being held on October 3rd at the Pennsylvania Convention Center in Philadelphia. Last year's College brought together 500 students (mainly claims professionals; but the Coverage College is open to everyone). The students represented 130 companies from 19 states. Students can choose from 16 "Masters Level" classes addressing a wide range of coverage subjects as well as attend two General Sessions. In one of the General Sessions, Bill Passannante, co-chair of Anderson Kill's Insurance Recovery Group, will discuss the most prevalent mistakes and miscalculation made by insurers and their counsel.

For more information **click here** to check out the Coverage College brochure. Registration is easy at www.whiteandwilliams.com. Do not hesitate. The Coverage College has reached capacity every year. [I serve as Dean of Students, which means a lot of time spent on disciplinary problems. Believe me, you'd be surprised.]

Pennsylvania Appeals Court: Insured Can De-fend For Itself

One Of Keystone State's Most Significant Coverage Decisions Ever

I have been saying forever that the duty to defend (especially the standard for determining

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Randy Spencer's Open Mic

was invaded by the distribution of the film and it misappropriated her image for commercial purposes without her consent.

The case made it to the Seventh Circuit which addressed several reasons why the District Court was correct in dismissing Bogie's complaint for failure to state a claim. The Appeals Court in Bogie v. Rosenberg (a/k/a Joan Rivers), 705 F.3d 603 (7th Cir. 2013) held that Bogie's conversation with Rivers was not in a place that a reasonable person would consider private. While it took place backstage, it was in the presence of several security personnel and a film crew.

In addition, the court held that the alleged intrusion into Bogey's privacy would not be highly offensive to a reasonable person. "The fact that Bogie was embarrassed to be filmed saying something she regrets having said and now deems offensive does not convert the filming itself into a highly offensive intrusion. As the district court explained, '§ 995.50 does not protect one from being associated with highly offensive material, but rather from a highly offensive intrusion on privacy.'"

As for myself, law suits by audience members are unlikely. That's one of the advantages of telling so many jokes about my wife.

That's my time.

I'm Randy Spencer.

Randy.Spencer@Coverageopinions.info

Pennsylvania Appeals Court:

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if one is owed) is the most important issue in all of liability insurance. What other issue is relevant in every liability claim that involves a civil action? No matter the facts, nor any other coverage issues that may be in play, the duty to defend is the gatekeeper of the policy. If a duty to defend is owed, the insurer is now committed to incurring expenses. And even if no duty to indemnify should ultimately be owed, or even if the insured's liability is defensible, the insurer's obligation for (potentially significant) defense costs may cause it to settle the claim and make an indemnity payment nonetheless.

The Pennsylvania Superior Court just issued a decision involving the duty to defend. And it is one of the most significant coverage decisions ever to be issue in the Commonwealth. And that's no hyperbole.

The Babcock & Wilcox Company v. American Nuclear Insurers, No. 525 WDA 2012 (Pa. Super. Ct. July 10, 2013) involves a long-standing dispute over coverage for exposure to radiation. In very general terms, the case involves coverage for a settlement and whether the insured violated a consent to settle cause in the policies. It is a complex dispute but need not be untangled to address why the decision is so important.

What's important about the decision are certain rules that the court adopted for an insurer's response to its obligation to defend, but desire to do so under a reservation of rights. Needless to say, this is a scenario that happens a lot every day across Pennsylvania -- hundreds of times, I bet. Getting right to it, the court held as follows:

"[W]e hold that, when an insurer tenders a defense subject to a reservation, the insured may choose either of two options. It may accept the defense, in which event it remains unqualifiedly bound to the terms of the consent to settlement provision of the underlying policy. Should the insured choose this option, the insurer retains full control of the litigation, consistently with the policy's terms. In that event, the insured's sole protection against any injuries arising from the insurer's conduct of the defense lies in the bad faith standard articulated in Cowden [Pennsylvania's seminal case addressing the test for an insurer's obligation to settle a case when there is a demand within limits.].

Alternatively, the insured may decline the insurer's tender of a qualified defense [read as, defense under an ROR] and furnish its own defense, either pro se or through independent counsel retained at the insured's expense. In this event, the insured retains full control of its defense, including the option of settling the underlying claim under terms it believes best. Should the insured select this path, and should coverage be found, the insured may recover from the insurer the insured's defense costs and the costs of settlement, to the extent that these costs are deemed fair, reasonable, and non-collusive." (emphasis added).

These rules are clearly stated. But the challenge is not understanding them. It is dealing with their impact. Their main impact will be felt when an insurer is deciding whether to defend under a reservation of rights. First, if the case involves an individual defendant insured, or a commercial insured, but one on the smaller side, the insured will likely accept a defense provided under a reservation of rights. In such cases, the insured is likely glad that it does not have to pay for the defense lawyer and it may not be able to afford to do so.

Here, the case will likely proceed as it may have anyway. The insurer selects the lawyer, controls the case and has the sole right to settle – something that it may do, despite the reservation of rights, after concluding that the defenses asserted therein are not applicable or not worth fighting. One issue that Babcock & Wilcox raises is whether, by going this route, the insured loses the right to seek independent counsel – at the insurer's expense -- on the basis that the reservation of rights purportedly creates a conflict of interest. I read the decision that an insured that accepts a defense under a reservation of rights may not assert a right to independent counsel – at the insurer's expense -- on the basis of

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Pennsylvania Appeals Court: - *Continued*

a conflict of interest. However, the insured here is protected because the counsel retained by the insurer is bound by the rules of professional conduct and owes his or her fidelity to the insured.

Babcock & Wilcox is likely to be felt more in the context of a defense, under a reservation of rights, being offered to a larger commercial insured. Here, if the insured does not believe that the coverage defenses asserted in the reservation of rights are strong, and if it can afford to retain its own counsel, it will likely do so. This will put the insured in the position to settle the case, perhaps quickly, assign its rights under the policy to the plaintiff to collect the settlement, and seek reimbursement of its defense costs from the insurer. In this situation, the settlement may be higher than justified, but still qualify as fair, reasonable and non-collusive. In addition, the insurer will be called upon to reimburse defense costs that, in all likelihood, are higher than panel rates – and maybe much higher – but still argued to be reasonable.

The insured's ability to reject the reservation of rights, and follow this described course of action, leading to such consequences for the insurer, may cause insurers to rethink defending under a reservation of rights if they do not believe that the defenses asserted will ultimately serve to preclude coverage. This means that when a defense is offered under a reservation of rights, and then rejected, likely leading to the insured's settlement (and possibly assignment), it will likely be followed by coverage litigation. After all, the insurer presumably would not have allowed this scenario to take place unless it felt that no coverage for the (possibly higher) settlement and (possibly higher) defense costs was owed.

Like any decision that breaks new ground, Babcock & Wilcox leaves plenty of unanswered questions in its wake, such as, how a settlement will be paid while coverage is being decided (if there was no assignment) and how the settlement may affect the coverage litigation. Also, is the insurer obligated to advise the insured that it has the right to reject the defense offered under a reservation of rights and take the alternative route allowed by the B&W court?

Nevada Federal Court: Insurer's Construction Defect Fix Violates Public Policy

Insurers continue to face significant exposure for construction defect claims – and have taken it on the chin several times this year, from supreme courts, on the question whether faulty workmanship constitutes an "occurrence." While the "occurrence" cases are unquestionably significant, they have also reached the point of redundancy and boredom. Pollution exclusion cases also suffer from redundancy; but not boredom because at least they involving different polluting substances. In any event, insurers have not done much with changes in policy language to address the "occurrence" issue. Perhaps that is because, in many situations, but not all, the "occurrence" issue is not important because of the absence of coverage anyway based on the "your work" exclusion.

When it comes to insurers making changes to their policies, to address their construction defect exposure, most of the effort has been on excluding property damage that took place prior to the policy period. In addition, there has been a use of endorsements that penalize insureds for not exercising appropriate risk management when it comes to their use of subcontractors, such as obtaining additional insured coverage and hold harmless agreements

Another way that some insurers have sought to address their construction defect exposure has been through endorsements stating that, if the insured seeks coverage from another insurer, then it may not seek coverage from this insurer, i.e., the one whose policy contains such endorsement. These endorsements do not state that they are solely applicable to construction defect claims.

But there is little doubt that that is the principal focus of their aim. While such endorsements could apply to asbestos, other toxic torts or pollution – claims that trigger multiple successive policies –

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Nevada Federal Court:

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it seems likely that CD is their target, especially when you look at other endorsements added to such policies.

In Northern Insurance Company of New York v. National Fire & Marine Insurance Company, No. 11-CV-1672 (D. Nev. July 12, 2013) the court addressed a dispute over the applicability of National Fire's "Election of Insurance Carrier for Defense Limited Duty to Defend Broad Form Limitation." It provided, in part, as follows: "If we are providing a defense for any insured to any 'suit,' including a defense under reservation of rights, and that insured or any other insured requests the defense of such 'suit' in whole or in part by any other insurance carrier, regardless of whether such insurance carrier agrees to provide a defense or agrees to provide a defense under a reservation of rights, then our duty to defend ends and we shall have the right, but not the obligation, to withdraw from any further participation in the defense of that 'suit.'"

At issue was a claim by Northern Insurance Company that National Fire owed a defense to certain of their co-insureds in construction defect litigation, as well as reimbursement to Northern Insurance for certain costs expended to defend the two companies' co-insureds. National Fire defended Northern Insurance's claim by asserting its "Election of Insurance Carrier, and so on" endorsement.

The Nevada District Court predicted that Nevada would hold that an insurance provision, that purports to eliminate the duty to indemnify or defend, based on an insured's request that another insurer defend the action, is void as violating Nevada public policy. The court characterized the endorsement (and another like it) as "particularly egregious attempts to evade the duty to defend based on the existence of other insurance."

The court had a few reasons for reaching this result. Among others, it was troubled that the endorsement applied even if the other insurer denied coverage, yet National Fire owed a defense. In addition, the court saw this untenable position for an insured -- especially one sued via a complaint which contains no factual allegations regarding when the alleged property damage occurred. "Faced with uncertainty about which of the successive insurers might cover the claim, National Fire's policy provisions would require the insured to guess which insurer covers the claim before asking any of them to defend the claim. If the insured guesses incorrectly, the insured may face denial of coverage under National Fire's policies due to the operation of [the endorsement], and also face denial from the other insurer for failing to timely tender the claim if the insured did not present the claim to the other insurer out of fear of losing coverage under the National Fire policies."

Lastly, for those of you following cases that address exclusions that preclude coverage for property damage taking place before the policy period, the court also addressed this issue and concluded that the one contained in National Fire's policy did not apply because the complaint was silent as to when property damage occurred.

Policyholders Sing The Blues Over Song-Beverly: California Federal Court Nixes Coverage For Zip Code Claims

Examples abound of litigation that accomplishes nothing -- except to prove how easy the system can be gamed to generate attorneys fees. If you are reading this then you know some of the abuses that I have in mind. One of my favorites in this category is the offense of a merchant asking a customer for his or her zip code when using a credit card. Yes, companies are being sued for this crime against humanity. And when these make believe torts hit the scene it is not unusual for a coverage dispute to be seen coming up from behind.

A California federal court recently held in Big 5 Sporting Goods v. Zurich American Insurance Company, No. 12-3699 (C.D. Calif. July 10, 2013) that no coverage was owed to Big 5 for numerous class actions alleging that the retailer infringed privacy rights by requesting, recording and publishing customer zip codes during credit card transactions in violation of California's Song–Beverly Act. The decision is lengthy and addresses several issues. But, for purposes

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Policyholders Sing The Blues Over Song-Beverly:

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here, the court held that coverage was precluded on account of certain exclusions for violation of statutes concerning the right of privacy or the distribution, transmission, communication or sending of information.

I'm keeping this brief because the decision, involving a narrow issue, has limited applicability. But the decision does come with one important general take-away. Litigation for statutory foot faults, that cause no real harm, cannot be prevented as long as legislation is on the books that authorizes it. But if coverage for such violations is not available, the incentive for plaintiffs' attorneys to pursue the litigation is greatly diminished. Sure claims can be brought against an uninsured defendant. But plaintiffs' attorneys are much more interested in pursuing these types of cases when insurance dollars – the path of least resistance to recovery – are available. While decisions denying coverage for these types of claims leave the specific defendant at issue uninsured, they also serve as a form of indirect tort reform, by diminishing the likelihood of other companies facing such claims.

5th Circuit Strictly Interprets Notice Provision In Claims Made Pollution Buy-Back

Cases holding that the notice provision, in a claims made policy, is to be strictly enforced, are generally not the stuff of stop the presses. But the Fifth Circuit's decision in State National Insurance Company v. Settoon Towing, LLC, No. 11-31030 (5th Cir. June 18, 2013), where that was the issue, is worthy of note.

At issue in Settoon was coverage, under excess liability policies, for damage caused by the release of oil into a body of water after a vessel struck an oil well. The policies at issue contained Absolute Pollution Exclusions. However, they also contained a Sudden and Accidental Buyback, whereby the pollution exclusion did not apply if the occurrence became known to the insured within 72 hours after commencement and the occurrence was reported in writing to the insurer within 30 days after becoming known to the insured.

The Fifth Circuit held that the policies were not obligated to provide coverage because the insured failed to provide notice within 30 days. Such decision was reached despite the insured's argument that the insurer was unable to prove prejudice.

This all sounds very routine, I know. But what makes Settoon different from a run of the mill "claims made" late notice case is that it involved the notice requirements of a buy back endorsement – an open issue under Louisiana law. Second, it appears (at least from what I can tell) that the coverage provided under the main body of the policy was not claims made. Rather, it required notice of an occurrence as soon as practicable, with the further qualification that "failure to notify the Company of any occurrence which at the time of its happening did not appear to involve this Policy, but which, at a later date, would appear to give rise to claims hereunder, shall not prejudice such claims." However, for various reasons, the court rejected the insured's argument that the policy's general notice provision somehow obviated the 30 day notice requirement contained in the Buyback.

Settoon is not going to win any awards for being an exciting decision. But given the prevalence of "claims made" endorsements in occurrence policies – Pollution Buyback or otherwise – it's an important decision (especially when the "claims made" notice period is brief, as it was here).

Declarations:

The *Coverage Opinions* Interview With Professor Andrew Jay McClurg, The Funniest Lawyer I Know

A lot of lawyers think they are funny. Of course it's easy to think you are a riot when there is a cadre of Summer Associates scared not to laugh at your jokes. But Professor Andrew Jay McClurg is the genuine article. No pun intended since Professor McClurg spent four years writing a humor column for the ABA Journal. In addition to his ABA Journal stint, Professor McClurg runs the very amusing website www.lawhaha.com, which looks at the lighter side of the law. He also uses humor as an effective teaching tool with his students at the University of Memphis Law School. But don't be fooled. This is also one serious law professor.

Despite all its seriousness, there is a lot of humor in the law. And people enjoy it. You know what happens when a judge writes a funny opinion. It goes e-mail viral. You receive it three times in one week by people telling you that you must check out this opinion. It could be a decision from a trial court in Wyoming, located in a county that doesn't have electricity, addressing a dispute over a game of checkers, but as long as it's funny, people will take the time to read it.

Humor in the law comes in many forms and Professor McClurg's website www.lawhaha.com is your one-stop shop. The website is divided into very useful categories and subcategories that make it easy to find things. Interested in Strange Judicial Opinions? Just click on that tab and then choose from cases involving such things as bickering lawyers, cranky judges, frustrated judges and more. Another category on the site is Law School Stories, with subcategories including First Year Follies & Foibles, Exam Madness and Interview Faux Pas. You can also get a fix of Legal Oddities. And the offerings go on.

With Professor McClurg being an expert on tort law and products liability, it is not surprising that Lawhaha has a strong focus on these areas. This can be found in "Tortland," described as the website's "odyssey into that great body of mishaps, missteps, misdeeds, slips, falls, spills, chills, thrills, botched operations, vicious dogs, tainted food, falling ladders, collapsing reservoirs, defective products, slander, libel, and pain and suffering that collectively make up one of the world's most controversial and certainly most interesting adjudicatory systems: the American tort system." Professor McClurg acknowledges that there's nothing funny about torts because it involves people who were injured or even killed. But, as he says, the human element, combined with very unusual fact patterns, is what makes tort law so fascinating.

The two largest cities in Tortland are Spot the Tort and Warning Labels. Spot the Tort provides photographs of situations that appear to be just minutes away from becoming the basis for a personal injury suit. But more than just the pictures, Professor McClurg also provides a back story and commentary. Trust me. Check it out. Good luck not laughing out loud. Same goes for Tortland's section on warning labels and signs. While there are serious lessons taught here about the use of warnings, I nearly spit up my coffee reading some of the posts.

Photo Credit: Justin Burks

Professor Andrew Jay McClurg

In addition to Lawhaha, Professor McClurg's claim to being the real deal in legal humor circles includes his four year stint as the author of the ABA Journal's humor column "Harmless Error: A Truly Minority View on the Law," which ran monthly from September 1997 to December 2001 for a total of fifty columns. The columns can be read at Lawhaha.

Professor McClurg also has a serious side. In addition to tort law, his teaching and research interests include legal education, privacy law and firearms policy. He has taught at several law schools and currently holds the Herbert Herff Chair of Excellence in Law at the University of Memphis Cecil C. Humphreys School of Law. He is the author and editor of several books, two dozen

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law review articles and numerous other publications. His scholarly articles have been cited/quoted by more than 500 legal scholars and courts.

Professor McClurg's book credits include 1L of a Ride: A Well-Traveled Professor's Roadmap to Success in the First Year of Law School. The just-published updated second edition provides a roadmap for academic and emotional success during the first year of law school. The book addresses such things as top student fears, the first-year curriculum, effective class participation, exam preparation and the impact of law school on outside relationships. The book is assigned as recommended or required reading at law schools throughout the country.

More information about "IL of a Ride" can be **found here.**

Admittedly there is no real insurance angle to this Declarations column. But torts is a first cousin to insurance. And I like humor and the law – and you probably do too -- and Andrew McClurg is a master at it.

Professor McClurg, thanks for sitting down (on a whoopee cushion) to yuk it up with Coverage Opinions. Why do you believe that humor is such an effective tool in your teaching?

Dozens of studies document the values of humor as a communication tool. They show that humor helps hold audience attention, enhances audience perception of the speaker, increases interest in the subject matter, builds rapport between speaker and audience, and increases retention of the content. The key in professional settings is to use humor as a means to an end, as a tool for conveying serious information in an interesting, attention-retaining way, never just for its own sake.

How did you get the ABA Journal "Harmless Error" column. What are some of your favorites?

It was kind of a fluke. One afternoon back in 1995 I was in my office writing a law review article, frustrated by the requirement to document every sentence with a footnote. I exited the document and dashed off *The World's Greatest Law Review Article*, a parody that started out by footnoting every word. I didn't know what to do with it so I sent it to ABA Journal and they said they wanted to publish it. One thing led to another and next thing I knew I was writing Harmless Error.

A column your readers might enjoy is Insurance Deterrence (Mar. 2001), where I take aim at insurance companies for unilaterally altering their policies just by sending out a notice. I decided to rewrite my own policy in return. Fan favorites include Hogwarts Torts about all the torts inflicted on poor Harry Potter, and Santa Suit (Jan. 2000), a class action against Santa Claus by the children of the world. Caroline Kennedy republished that one in her *A Family Christmas* anthology.

My personal favorites are the Suzy Spikes columns, about a litigious preadolescent modeled after my daughter when she was that age who tried to solve all childhood problems through legal means. I once tried to pitch it as a TV series to Disney and Nickelodeon. It didn't work out but it was a fun experience being involved in pitch conferences with television execs.

Links:

http://lawhaha.com/wp-content/uploads/2012/12/The--Worlds-Greatest-Law-Review-Article.pdf

http://lawhaha.com/insurance-deterrence/

http://lawhaha.com/hogwarts-torts/

http://lawhaha.com/santa-suit/

http://lawhaha.com/harmless-error/suzy-spikes-columns/

There are many categories of legal humor on Lawhaha. I know that you are particularly fond of ridiculous product warnings. Of course these can be very funny. But on a serious note, what advice would you give to a manufacturer of a product, that has some potential for causing harm, about preparing the warning for its package? [By the way, I state in every issue of Coverage Opinions that the publication is gluten free

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Declarations:

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but may contain peanut products (I'm not kidding. I really do.).]

It is easy to make fun of manufacturers for including "silly" warnings such as "Viagra is not for newborns" on the packaging, but most wacky warnings are included because someone has actually used the product that way. For example, it turns out that sildenafil, the active ingredient in Viagra, is useful for treating pulmonary hypertension in infants and some docs have used it for that purpose.

But we definitely are in an era of "over-warning," not to be confused with "global warming," which is also a problem. The danger of too many warnings is one of dilution; that is, diluting the impact of warnings consumers really need to know about. Nevertheless, I confess that when I consult with product makers, I always advise to over-warn rather than under-warn.

Two pieces of advice I would give to manufacturers about warnings: First, let other people make fun of product warnings. NEVER, as some manufacturers are doing, try to make funny warnings on your own products. Can you picture the cross-examination if something went wrong and a consumer was injured or died because of a defective warning? "So, Mr. Product Maker, are you saying to the jury that your company considers product warnings to be a joke?"

The other advice is to moderate attempts to convey complex warning information in graphical or pictorial (non-verbal) warnings. Those are some of the funniest warnings posted on Lawhaha.com. You can't figure out what the heck they are trying to say. I appreciate the reason for them, of course, which is to construct warnings that can be understood by people who speak different languages or who are not literate, but some of the results are pretty silly.

You suggested that your students take a date to Walmart and stroll the aisles, holding hands and reading product warnings. I proposed that to my wife. And now instead of getting a lesson in tort law I'm getting one in matrimonial law. Thanks. Any other great ideas for mixing legal education and dating that you care to share?

Haha. Well, Randy, it has to beat reading Coverage Opinions by candlelight. One of my students took me up on it and had such a good time she put together a PowerPoint presentation of her Wal-Mart warning date. You can find it on the Warning Labels section of Lawhaha (post date March 19, 2012).

You nicknamed your daughter Tortgirl. Any concern that she'll rebel and arrange for an anvil to fall on your head?

That came from teaching her to play "Spot the Tort" when she was a little girl. It worked like this: We'd be sitting in a public place and I'd say, "Tortgirl, spot the tort!" Then I'd time her as she ran around trying to identify the nearest defective premises condition. She rebelled in a different way, by growing up to be a risk-seeking snow-boarder, mountain-biker and skydiver in Colorado.

Have you been able to use your talent for mixing humor and the law to do entertaining CLEs and other public speaking – or maybe appearances on cable news?

For a while I did a "stand-up" legal humor presentation for lawyer banquets, bar meetings and the like. It was fun but a bit daunting. I'd stare out at a hundred lawyers with their arms crossed saying, "Okay, funnyman, make me laugh."

You've tried your hand at stand-up, Randy, so you know the feeling. When it "kills," it's a huge rush, but all comedians bomb and when that happens it's a lonely place up on that stage. Most of the time, my shows went over well, probably because I had such a low baseline to compete against: all the coma-inducing speeches lawyers usually are subjected to at such events. I stopped doing the stand-up years ago, but always make it a point to incorporate humor in my public speaking.

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Declarations:

- *Continued*

So much has been written these days about the difficulties facing newly minted lawyers and criticism of law schools for not sufficiently preparing students for actual practice. What's your take on these two important aspects of the current law school dialogue?

That's a great question. There's a definite tension. For decades influential reports have recommended more skills training for law students but it took the weak economy to start real movement. The push is all-out to convert law schools into practical skills training grounds.

I have mixed feelings about it. Law students need to develop a base of doctrinal knowledge and critical reasoning skills before they learn to draft leases or whatever. That takes time. I would argue law schools have always emphasized skills-training by training students to conduct legal analysis, the ultimate lawyering skill. If I were legal education czar, I would retain the traditional first and second year curricula and convert the entire third year into a pure practical skills curriculum.

What would you say to a college senior who asked you if she should apply to law school?

I get the question all the time from people who contact me after reading my law school prep book, 1L of a Ride: A Well-Traveled Professor's Roadmap to Success in the First Year of Law School. I tell them all the same thing. If you are truly committed to being a lawyer, go for it! I will always believe strongly that law is a noble, honorable and certainly interesting profession. But don't do it just because you can't think of anything else to do with your liberal arts degree in Things that Happened in England in 1208 A.D. That used to be a popular reason to go to law school, followed by many students, but it doesn't work in the new economy.

In a prior issue of Coverage Opinions I expressed my belief that the law school curriculum does not give insurance coverage enough attention compared to how important it is in real world practice. As a Torts professor, do share this view?

I absolutely do, even though I, like most law professors, am an offender. Part of the problem is that law schools keep cutting the credit hours for the traditional first-year doctrinal courses, including Torts, making it impossible to get through even the basic material. Another explanation is that most Torts professors probably don't know enough about the particulars of insurance coverage to feel comfortable teaching it. It definitely seems out of whack to omit something as important as insurance coverage when insurance drives the tort system.

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.

Professors tend to follow their casebooks. If insurance coverage is included, it's usually stuck in the back in a chapter professors never get to. The most effective way to integrate insurance coverage would be for someone to craft a casebook that integrated the relevant insurance issues from beginning to end.

Late-r Notice:
A Look At Decisions To Come

Parties Can't Reach A Montruce So Ohio Supreme Court To Address Allocation

The amount of paper filed by the parties in the District Court of Ohio in The Lincoln Electric Company v. Travelers Surety and Casualty Company, asking for a ruling on an allocation question, is staggering. Faced with this daunting task the court made a wise decision. It certified the question to the Supreme Court of Ohio. This is the judicial equivalent of "go ask your mother."

Here is what the Ohio federal court shipped off to Columbus: "May an insured who has accrued indemnity and defense costs arising from progressive injuries, and who settles resultant claims against primary insurer(s) on a pro rata allocation basis among various primary insurance policies, employ an 'all sums' method to aggregate unreimbursed losses and thereby reach the attachment point(s) of one or more excess insurance policies?" Lincoln Electric, No. 11-2253 (D. Ohio July 3, 2013).

Kidding aside, the question before the court is a serious one. And the federal court set forth good reasons for certification: "Given the determinative importance of the certified question in the action before this Court, the likelihood of future litigation, the conflicting status of state and federal precedent on the issue (as reflected in the holdings in GenCorp, Goodrich, and MW Custom Papers), and the lack [of] controlling precedent in the decisions of the Supreme Court of Ohio, this Court seeks a judicial determination from the Supreme Court of Ohio[.]"

It is hard to say much about the case in a column this brief but the issue presented is an interesting one. Normally the fight in cases involving allocation of damages, in the context of continuous injury claims, is over which method controls: pro-rata or joint and several (all sums). Here the issue is whether one method can be used in one context and then a different method employed in another. If so, perhaps the court should name this technique Mickey Mantle allocation, in honor of baseball's greatest switch hitter.