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

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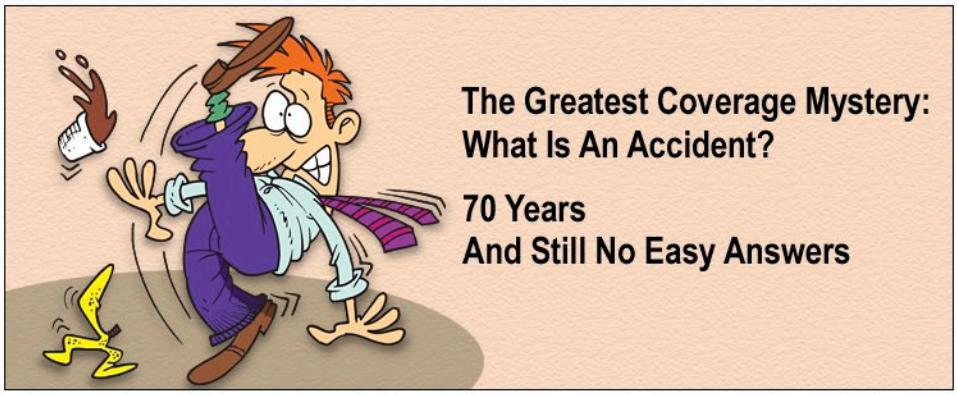
The Cover-age Story



It is something that has confounded me for my entire career.

In general terms, the fundamental purpose of liability insurance is to provide coverage for accidents. Commercial general liability insurance has been with us for 70 years (give or take) and this principle has existed since the beginning. And the question whether something qualifies as an accident is one of the most frequently asked in liability claims. Yet, despite all this opportunity, the answer to the question whether an event qualifies as an accident remains elusive and contentious. The mystery has a legal component – what is the definition of an accident? And a factual one – do these particular facts qualify as an accident? [I recognize that there are exceptions to this fundamental principle, but that does not change the discussion here.]

How is it possible that something so fundamental, critical and at the core of liability insurance, for seven decades, could still cause so much dispute? If I explained this situation to someone unfamiliar with insurance their response would likely be something to the effect of -- What have you guys been doing all this time?

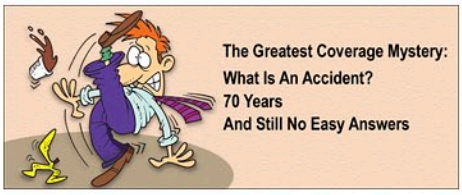
Continued on Page 2

In this issue:

Declarations: The *Coverage Opinions* Interview With Carl Salisbury Of Kilpatrick, Townsend And Stockton

In a crowded field of law blogs, Kilpatrick, Townsend and Stockton's Global Insurance Recovery Blog stands out as a really good one. Excellent in fact. It is exactly what a law blog should be. There is a very simple test to determine if a blog is really good – You bookmark it, check it frequently and are excited when a new entry is posted and disappointed when one is not. Kilpatrick Townsend's blog passes this test. The blog's co-editor, Carl Salisbury, gets it. He sits down with *Coverage Opinions* to discuss the blog and a host of other things about insurance coverage.

The Cover-age Story



I'm no sage for making this observation. The point was made better than I ever could, by the Supreme Court of Pennsylvania, in a decision issued almost exactly 50 years ago: "Everyone knows what an accident is until the word comes up in court. Then it becomes a mysterious phenomenon, and, in order to resolve the enigma, witnesses are summoned, experts testify, lawyers argue, treatises are consulted and even when a conclave of twelve world-knowledgeable individuals agree as to whether a certain set of facts made out an accident, the question may not yet be settled and it must be reheard in an appellate court." Brenneman v. St. Paul F. & M. Ins. Co., 192 A.2d 745, 747 (Pa. 1963).

I am reminded often of this enigma because it is with staggering frequency that I see the "accident question" presented to courts. And the arguments are often strong on both sides and leave courts struggling to find the answer. [To be clear, I'm not referring here to the question whether faulty workmanship qualifies as an "occurrence," which is defined as an accident. That's a teeny aspect of this overarching issue.]

Most recently this situation was demonstrated by the Court of Appeal of California in Diab v. Mid Century Ins. Co., No. B241538 (Cal. Ct. App. July 23, 2013). At issue was a single question – whether an event was an accident. The trial judge said no. The appeals court said maybe. And a dissenting judge said no.

At issue in Diab was a fight. The facts were set out as follows by the court: "Ramadan and some friends were gathered at a restaurant. … Ramadan overhead an acquaintance talking to Diab on the telephone, and Ramadan jokingly made a comment about Diab. Diab heard the comment through the telephone. Within minutes, he arrived at the restaurant in a rage and wielding a wine bottle. He approached Ramadan from behind and began yelling and verbally abusing Ramadan. Friends took the wine bottle away from him. He was aware that Ramadan was ill and had a serious heart condition, but he nevertheless continued to threaten Ramadan, including telling Ramadan he was going to kill him. At some point, he found an empty large storage crate and threw it at Ramadan, striking him in the arm and side of the chest. ... Ramadan then left the restaurant with a friend, and Diab followed. … Ramadan … complained of increasingly severe chest pain and lost consciousness. … Paramedics took Ramadan to the hospital, where he was in full arrest and pronounced dead."

In Ramadan's autopsy report the medical examiner opined "that the verbal altercation and assault with the bread crate produced a surge of catecholamines,

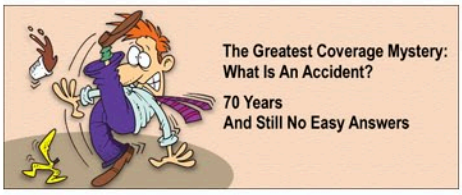
Continued on Page 3

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



which are associated with 'fear and flight'. This in turn increased the irritability of the already diseased myocardium, making it more susceptible to fatal arrhythmias."

At issue before the Court of Appeal was coverage for Diab, under his homeowner's policy, for the suit brought by Diab's widow. The court had plenty of tests from California appellate courts to guide its answer to the key coverage question -- whether there was an accident.

That may have been the problem – it had too many tests: "The term 'accident' refers to the nature of the conduct itself, not to unintended consequences. An accident is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage. When an insured intends all of the acts that result in the victim's injury, the injury is not an accident merely because the insured did not intend to cause injury. The insured's subjective intent is irrelevant. Nevertheless, coverage is not always precluded when the insured acted intentionally and the victim was injured. An accident may exist when any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity—in other words, when the insured intends less than all the acts that result in the victim's injury."

You got all that, right? While these tests sound nice, and are easy to memorize and spew out, they provide no easy answers -- as demonstrated by the extreme disagreement between the trial and appellate judges in the case. To explain how each judge addressed the "accident question" is not the point here. Rather, it is to discuss that Diab is one case out of thousands just like it. Why is that?

In response to the question -- how is it possible that something so fundamental, critical and at the core of liability insurance, for seven decades, could still cause so much dispute, the First Circuit made an interesting observation about that in Wickman v. Northwestern Nat. Ins. Co., 908 F.2d 1077, 1097 (1st Cir. 1990): "Much of the inconsistency in the case law defining and applying the definition of accident is traceable to the difficulty in giving substance to a concept which is largely intuitive." In other words, we bring an "I know it when I see it" view to the table when approaching the issue. That's no doubt an important part of the answer. The Wickman court continued: "Recognizing this problem, we continue our trek across this judicial morass realizing that some mud on our boots may be inevitable. Nonetheless, we continue to strive to avoid miring in a 'Serbonian Bog.'" [I had to look that up.] Ordinarily I do not include "accident" cases in Coverage Opinions because they are so state and fact specific. But I may start to include any that shed light on this mystery.

Randy Spencer's Open Mic

A Strange "Use Of An Auto" Case (Even By "Strange 'Use Of An Auto' Case" Standards)

Cases involving whether injury arises out of the "use of an auto" – for purposes of triggering an Auto or UM/UIM policy or the applicability of a CGL or homeowner's policy's auto exclusion -- have a way of involving strange facts. And that's not surprising. After all, while automobiles were designed with a clear purpose in mind, sometimes they are instrumentalities in our daily lives that involve more than just getting from A to B. And sometimes when we do use the automobile to get to B, it involves more than just putting the key in the ignition and pulling away.

Countless examples can be provided of cases in these categories. Looking no further than last year, there is Hays v. Georgia Farm Bureau, where a Georgia appeals court held that an auto exclusion, in a homeowners policy, precluded coverage for injury caused when an insured used his pickup truck and a pulley in an attempt to lift a portable toilet onto a deer stand. In Sunshine State Ins. v. Jones, a Florida appeals court held that coverage was owed to a teenage insured, under a homeowners policy, for injuries caused when,

Continued on Page 4

Meeting An Insurance Celebrity: But *Coverage Opinions* Turned Down For A Q&A

The insurance industry has a few celebrities, but not many. The industry is certainly not keeping TMZ in business. That's for sure. So while opportunities to meet an insurance celebrity are rare, I had one a little while back. What a thrill it was to meet The Gecko at a fundraiser for the wonderful Alex's Lemonade Stand. To answer the question you are no doubt asking yourself – Yes, he was just as cool in person as on the commercials. And he even gave me a Gecko Pez dispenser. No way you are finding one of those at 7-11. This is pure collector's item. I'm not taking it out of the package. My seven year old removed hers from the package and ate the Pez. Oh will she be regretting that someday.

By the way, The Gecko published a book not long ago -- *You're Only Human*. It is a thoroughly entertaining guide to life. It is very clever, as you would expect from The Gecko, and even laugh out loud funny in a few spots. You can read the entire book in less than hour. Definitely worth the twelve bucks.

Given that *Coverage Opinions* is committed to interviewing interesting individuals connected to insurance, I made a formal request to GEICO to do a Q&A with The Gecko about his new book and life as the Fonz of insurance spokespersons. I really did. And I even received a response from GEICO's Public Relations Director. Unfortunately, it was a no-go. Oh the things I wanted to ask him.

Massachusetts Appeals Court: Class Action Counsel Fees Are Not "Costs" Under Supplementary Payments

It is not a secret that a significant aspect of a class action settlement may be attorneys' fees for class counsel. Nor is it buried deep in the bowels of Langley that attorneys' fees are why many class actions are dreamed up.

Examples abound of class action settlements where the class members get a coupon -- to save $5 off their next purchase of a product from the very company that they just sued and accused of all sorts of bad things.

Continued on Page 5

Randy Spencer's Open Mic

in an attempt to annoy his girlfriend (no doubt now ex-), he repeatedly grabbed the steering wheel while she was driving. When she tried to push him away she lost control of the car and hit a concrete wall.

This gets me to the latest entrant into the category of Ripley's and "use of an auto." Just last week, in Allstate Ins. Co. v. Reyes, a New York appellate court held that Deborah Reyes was not able to maintain an underinsured motorist claim on account of an injury sustained when she was walking in front of a Sunoco Mart, passed in front of a parked vehicle, and a rottweiler extended its head from inside the vehicle and bit her right breast. The court held that her injuries did not result from the inherent nature of the vehicle and nor did the vehicle itself produce the injuries.

Before saying bad dog, keep in mind that Ms. Reyes was carrying two bags. My two dogs (Petunia and Barney) love to put their heads into any bag that I bring home to see if there's anything in there for them. I'm sure that's all this pooch was doing and missed.

That's my time.

I'm Randy Spencer.

Randy.Spencer@Coverageopinions.info

Massachusetts Appeals Court: - *Continued*

And while the class members are busy wondering how they could have such good fortune, counsel is deciding what to name their new yacht.

When there is coverage for a class action settlement, and it includes class counsel fees, it may be no small issue whether these fees – which could be quite significant -- are included within the policy's limit of liability or outside of it, i.e., supplemental.

This question (or one related to it) was before the Appeals Court of Massachusetts in Titeflex Corp. v. Liberty Mutual Fire. Ins. Co., No. 12-P-1905 (Mass. Ct. App. July 29, 2013). At issue was an underlying class action against Titeflex and others alleging that a certain stainless steel tubing did not have sufficient thickness to protect against combustion following a lightning strike. For reasons not important here, the Massachusetts appeals court affirmed the decision of the trial court that Liberty owed Titeflex a defense under CGL policies (In general, the issue was faulty workmanship and damage to property versus your product. You know the drill.)

Having determined that a defense was owed, the court turned to how to address the aspect of the final judgment that stated: "Titeflex shall be responsible for payment of costs, including attorneys' fees and expenses to Class Counsel in the amount of $11,611,111.00, as this Fee Award represents a fair, reasonable and adequate amount for the benefit achieved for the Class by Class Counsel."

The policy's supplementary payments provision stated that Liberty would pay all "costs" taxed against the insured in a suit. And the final judgment described a $16,000,000+ award of attorneys' fees as "costs." So it's easy to see where Titeflex was going.

However, the court concluded that the "costs" at issue in the final judgment were not the "costs" contemplated by the policy's supplementary payments provision. "The legal context ('suit') in which the Supplementary Payments provisions require Liberty to pay 'costs taxed' against its insured indicates that those 'costs taxed' should be given the meaning applied to proceedings in court. Such legal or taxable costs do not include attorney's fees, except in accordance with specific statutory provisions or court rules."

While it does not appear that a duty to indemnify was at issue (the decision seems to leave out some details), it also seems clear that, if it were, any covered class counsel fees would be included within the policy's limit of liability. "The common fund attorney's fees and administrative costs awarded by the Arkansas court were not 'costs' associated with the defense of the Berry action, but part of the 'benefit achieved for the Class by Class Counsel' under the 'common fund or common benefit' approach. So viewed, the court-ordered payment of class counsel fees is more akin to a damage award than to fees or costs of defense."

Lastly, but not least, while the specific attorney's fees at issue here were not the type contemplated as "costs," within the supplementary payments provision, the court also noted that attorneys fees awarded pursuant to a specific statutory provision or court rule may be. No doubt this is important in class action settlements involving consumer protection statutes (read as coupon awards) where statutory provisions often do allow for an award of plaintiff's attorney's fees.

Virginia Federal Court Makes Insurer Mad (Men): Advertising Injury And A Broad Definition Of "Advertising"

While this has a "Who's buried in Grant's tomb" sound to it, coverage for advertising injury requires the commitment of an enumerated offense in the insured's, er, advertisement. Figuring out whether something qualifies as being committed in the course of advertising sounds easier than it is in some cases. Often times it is obvious and beyond dispute. Think newspaper ad or television commercial. Not surprisingly, we never hear about these cases. So when the advertising question arises in coverage litigation, there's a reason. There is probably something about the activity that is not so obvious.

Continued on Page 6

Virginia Federal Court Makes Insurer Mad (Men):

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Whether done by the policy or case law, advertising or an advertisement is usually defined more generally than specifically. This, and the wide latitude that judges can have generally when deciding whether a duty to defend is owed, can lead to some broad -- really broad -- conclusions of what is advertising. We're talking stuff that is far removed from a Frosted Flakes commercial. Travelers Indemnity Co. v. Sterling Wholesale, LLC, No. 12-156 (E.D. Va. July 19, 2013) makes this point vividly.

In Sterling Wholesale, the Virginia federal court addressed the availability of advertising injury coverage for Sterling Wholesale for claims as follows. Johnson & Johnson filed suit against 83 defendants, including Sterling Wholesale, alleging that a number of parties "acquired genuine OneTouch blood glucose test strips manufactured by LifeScan for sale in foreign markets, removed the original foreign-language labels, repackaged the products with English-language labels bearing counterfeit lot numbers and expiration dates, and then imported them into the United States for distribution and sale at U.S. retail pharmacies. Sterling was not named as an active coconspirator in the production of the counterfeit or repackaged test strips, but described in the complaint as that of a financial middleman, partnering with another distributor to import the allegedly counterfeit test strips from South Africa and deliver them to domestic wholesale distributors."

As an initial matter, the court concluded that the advertising injury offense of infringement of copyright, title or slogan was satisfied, despite the fact that the complaint alleged trademark infringement. "[A]lthough the underlying complaint's only detailed description of the packaging at issue is a list of registered trademarks that were depicted on the counterfeit packaging, a trademarked term may in some circumstances also constitute a slogan, the infringement of which may trigger an insurer's duty to defend under a policy affording advertising injury coverage."

Having concluded that the alleged conduct potentially constituted the "infringement of copyright, title or slogan," the court turned to the next requirement for coverage -- an "advertising injury" must arise from an "offense committed in the course of advertising your goods, products or services." This, the court concluded, required a determination whether there was "widespread promotion of goods or services to the public at large, or to the company's customer base."

The court held that there was, despite there being no specific allegations of advertising activity by Sterling Wholesale. However, the court noted an alleged partnership or joint venture with MC Distributors, "continuing over an eight-month period in which Sterling Wholesale con tributed its importing expertise and contacts to the joint venture's importation of 21,312 counterfeit boxes of LifeScan test strips for sale to at least four other wholesale distributors. … There is nothing in the LifeScan complaint to suggest that the sale of more than twenty thousand units of product to multiple customers were obtained exclusively by direct solicitation of these customers, one by one, nor that these several distributors did not constitute a significant portion of the joint venture's customer base."

So, despite (1) no specific allegations of advertising activity by Sterling Wholesale; (2) claims involving trademarks, a term not used in the policy when describing the coverage (yet lots of other intellectual property terms are); and (3) a Virginia duty to defend standard that we are told is based on facts and circumstances alleged in the complaint, the court concluded that a defense was owed.

Tennessee Federal Court Provides Very Important Reminder About How A Liability Policy Operates

Builders Mutual Insurance Company v. Pickens, No. 13-22 (E.D. Tenn. July 18, 2013) is a fairly pedestrian construction defect case. Nonetheless, the Tennessee federal court caught my attention when it stated: "When interpreting a CGL policy, the Court should first construe the 'insuring agreement' and then construe the 'exclusions.'"

Continued on Page 7

Tennessee Federal Court:

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When I read that I was immediately reminded of a decision, from a couple years back, where the court made the same observation. However, not content to just leave it there, this court also stated that the insurer's counsel should have been "embarrassed" for making an argument that did not give effect to the principle that CGL policies begin with a broad grant of coverage which is then limited in scope by exclusions. This was especially so because the court noted that counsel understood the difference well, based on another argument that it made.

The court in this 2011 case (which I leave nameless) was wrong to use such language to describe the insurer's counsel's conduct. But the point is well-taken. I am frequently asked about the applicability of an exclusion. And before I answer I'll ask if the insuring agreement has been satisfied? The response from the person asking the question is sometimes to the effect that he or she didn't think about that. And it's an easy thing to overlook. Consider a claim that involves pollution. Obvious first question – does the pollution exclusion apply? But in some cases it turns out that the claim may not be covered because the insuring agreement may not have been satisfied in the first instance. So the exclusion is beside the point. By initially raising the appli cability of an exclusion, wise policyholder counsel will make the argument that the insurer has conceded that the insuring agreement has been satisfied. Sometimes the simplest lessons are the hardest to remember. Just something to keep in mind as you address claims.

California Appeals Court: When Neighbors Can't Get Along And Insurance Coverage

Coverage cases involve underlying dispute between parties. But not all such disputes are created equal. There are disputes between corporations over broken widgets. While these may involve a lot of money, they probably lack an emotional component. Compare that to a dispute between neighbors. Here there may not be a lot of money at stake. But what the dispute lacks in green is made up by something that may be even more powerful – seeing red.

Many examples of such cases abound. And they often times make for interesting reading. There is a certain voyeuristic pleasure in seeing what makes people unable to live in proximity. And if whatever it is led to litigation, it's probably a doozy.

The recent decision from the Court of Appeal of California in Shelton v. Fire Ins. Exchange, No. B240775 (Cal. Ct. App. July 25, 2013) is a good example of a neighbor v. neighbor coverage case. You know right from jump that this is going to be an interesting one. Here is the opening line of the court's decision: "We are asked to determine whether an insurer has a duty to defend its insureds who are sued by a neighbor for emotional distress damages, including bodily injury, based on the insureds' maintaining trees and a hedge 'in excess of six feet' on the insureds' rental property."

More specifically, Bonnie Kalcheim filed a complaint against Alda Shelton and John Sherman, alleging causes of action for breach of covenants running with the land, private nuisance and public nuisance. Kalcheim alleged that Shelton's property was in violation of a Los Angeles County Code and certain neighborhood covenants, conditions and restrictions that provided, in part, that fences shall not exceed six feet in height and hedges shall not exceed five feet in height and that fences, plants, or hedges shall not interfere with ocean views enjoyed by adjacent lots. There were more provisions at issue, but that's the gist of it. It was alleged that Kalcheim asked Shelton to trim the trees so that Kalcheim and her terminally sick daughter could enjoy the ocean view together. It was alleged that Shelton "maliciously and despicably called names and spewed obscenities at one or more people who requested that they cut the ficus hedge and/or other trees on their property."

Kalcheim alleged that she suffered annoyance, inconvenience, discomfort and interference with her rightful use and enjoyment of the property. A statement of damages claimed $300,000 in emotional distress damages and $1 million in punitive damages.

Continued on Page 8

California Appeals Court:

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Looking closer at the alleged damages, "Kalcheim testified in deposition that the blind spot caused by the hedge caused her emotional distress because '[e]very time I pull out the car, every time [my husband] pulls out of the driveway, I'm worried.' Kalcheim further testified that due to the foliage blocking her ocean view, she became stressed, angry, depressed, frustrated, and suffered sleep and appetite problems. Kalcheim had 'surgery to remove nine inches of my colon from a severe case of diverticulitis which perforated my colon and went into my ovaries and the rest of my body, and it was suggested at the time that it certainly could have been brought on by stress.' She took aspirin for headaches and antacid medication for her upset stomach. She also had a mitral valve prolapse and believed that '[s]tress is one of the elements of it.'"

As for the nuts and bolts of the coverage case, the appeals court reversed the trial court and held that Fire Insurance Exchange owed Shelton a defense under a liability policy. The issues are what you would expect to see in a dispute like this: Was there an occurrence? Was there bodily injury? Expected or intended. And the intentional acts exclusion. Fire Ins. Exchange argued that the illnesses alleged were "far-fetched." Not surprisingly, the court responded: "[E]ven if true, plaintiffs are still entitled to a defense."

As coverage issues go, Shelton isn't going to win any awards for lasting jurisprudential impact. But it demonstrates how expensive it can get when peaceful co-existence between neighbors – even over something so seemingly simple -- cannot be achieved. Rodney King said it best.

Pennsylvania Federal Court: Important Decision Addressing PMA v. Aetna

In hopes of appealing to as wide an audience as possible, I make a concerted effort for Coverage Opinions to stay away from discussing cases that are jurisdiction specific. Of course, every decision is jurisdiction specific. What I mean are cases where the issue itself is unique to a particular state. In other words, cases that do not provide an overarching lesson or take-away that can be applied widely.

I make an exception here to briefly mention the Middle District of Pennsylvania's recent decision in Endurance American Specialty Insurance Company v. H&W Equities Inc., No. 12-693 (M.D. Pa. July 17, 2013) that addressed PMA v. Aetna -- Pennsylvania's near half-century old decision that has caused policyholders to scratch their heads bald. While I recognize that the decision will have no relevance for many, it is highly significant for anyone that does liability coverage work involving Pennsylvania law. If that's you, then you are well-aware of PMA v. Aetna and have seen the drama that it can cause. For this reason, I give it a quick mention.

In general, in 1967, the Pennsylvania Supreme Court held in PMA v. Aetna that, where there is bodily injury to an employee of the named insured, the employee exclusion in a commercial general liability policy applies to preclude coverage to all insureds seeking coverage. In other words, the "employee" exclusion operates to exclude coverage even if the injured party is not employed by the insured seeking coverage.

This may not sound like a significant decision. And it wouldn't be -- if the employee exclusion at issue in PMA v. Aetna applied to an employee of "any insured." However, the exclusion applied to an employee of "the insured." Not to mention that the policy contained a separation of insureds provision. Therein lies the consternation and disbelief that PMA v. Aetna has presented for policyholders.

More to the story. In 1990, PMA v. Aetna was rejected by the Pennsylvania Superior Court in Luko v. Lloyd's. Since that time, a debate has raged between insurers and policyholders in Pennsylvania over which case controls – PMA or Luko. For most courts, the answer has been easy. Just as paper covers rock, PMA beats Luko. After all, the Pennsylvania Supreme Court is the highest court in the Commonwealth. The Superior Court is not. But, despite this, the debate has rolled on.

Continued on Page 9

Pennsylvania Federal Court: *- Continued*

However, in 2011, in United States Steel Corp. v. Nat'l Fire Ins., a well-regarded trial judge in Allegheny County rejected PMA in favor of Luko. Granted, if the Pennsylvania Supreme Court is higher than the Superior Court, then it is certainly higher than a trial court. Nonetheless, despite being a trial court decision, the United States Steel decision surely put a spring in the step of policyholders concerning the PMA v. Aetna battle.

The last scene brings us to the Middle District of Pennsylvania's July 17 decision in H&W Equities. Here, the court followed PMA and declined to apply Luko. On one hand, H&W Equities is one of many courts that have followed PMA, and rejected Luko. So it's not altogether significant. However, H&W Equities also specifically declined to follow United States Steel. Therein lies its import. Whatever traction policyholders may have thought they gained in the PMA fight, from United States Steel, must now be questioned based on USX's express rejection by the court in H&W Equities.

Late-r Notice:
A Look At Decisions To Come

ISO's 2013 CGL Form

ISO has introduced a new Commercial General Liability Coverage Form for 2013. ISO's CG 00 01 form is the backbone of the terms and conditions of general liability insurance. It is the granddaddy of general liability forms. And since this form is only revised every few years, this is no insignificant development – even though the changes introduced in this go-around are few in number.

Some of what's new in the 2013 form involves the liquor liability exclusion. It has been amended to state that it applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, etc. of others and the failing to provide transportation of any person that may be under the influence of alcohol. The exclusion has also been amended to state that a BYOB is not considered selling, serving or furnishing alcoholic beverages. Other changes are related to the exclusion for Recording and Distribution of Material in Violation of Law. ISO has also introduced, and made changes to, many endorsements, including some important ones related to additional insured coverage.

But as important as the introduction of a new CGL Coverage Form is, I have a hard time getting excited about it. You see, it will be years – really, years -- before there are any decisions from courts involving the new language in the form. For that matter, it will be years before some insurers even begin to incorporate the new forms into their policies. Look at the policies issued today that still use the 2001 CGL Form (and sometimes even earlier versions than that). Then it will take time for disputes to arise, litigation to be filed and work its way through the system, and then result in an opinion.

I saw this play out first-hand with the introduction of the Montrose Endorsement into the 2001 CGL Form. Despite how heralded this change was, it still took about a decade before decisions addressing this policy language began to be seen in earnest. And ISO's 2004 Additional Insured revisions, notwithstanding their significance, have still not been the subject of many opinions. Despite all this, there are still reasons to be knowledgeable now about the 2013 CGL Form. But it's a long way before it will lead to any significant changes in coverage litigation.

Declarations:

The *Coverage Opinions* Interview With Carl Salisbury Of Kilpatrick, Townsend And Stockton

Carl Salisbury

In a crowded field of law blogs, Kilpatrick, Townsend and Stockton's Global Insurance Recovery Blog stands out as a really good one. Excellent in fact. It is exactly what a law blog should be. There is a very simple test to determine if a blog is really good – You bookmark it, check it frequently and are excited when a new entry is posted and disappointed when one is not. Kilpatrick Townsend's blog passes this test.

What makes Kilpatrick Townsend's coverage blog so good? It provides the right combination of relevant topics, substantive information and author commentary. Most important of these is the last one. And the blog's co-editor, Carl Salisbury, understands this well. Carl's posts are informational based, but also include a thorough discussion, in an easy to read style, of what it all means and why it matters. When a post is titled "Meditations on Exclusions in Coverage" you can be sure that you are not about to get some unhelpful regurgitation of what a court said.

A post last week discussed two recent decisions concerning D&O coverage. Lots of blogs discuss recent decisions concerning coverage. But the point here was to demonstrate that the two decisions reached opposite outcomes on essentially the same issue. Of course, lots of cases do this as well. But then this led to the following discussion: "How is a lawyer supposed to advise an insured about the possibility of coverage under a D&O policy and how is a policyholder supposed to make a rational decision about whether to spend money engaging in potentially expensive coverage litigation in light of these two perfectly inconsistent decisions?"

Besides being a frequent contributor to the blog, Carl spearheaded the effort to get it off the ground, although he is quick to point out that the blog would never have left the drafting table had it not been for the hard work and support of key people on the marketing, IT, and Insurance Recovery teams at Kilpatrick Townsend. The blog is now a collaborative effort between his co-editor, Ed Kneisel, and members of the firm's Insurance Recovery team.

No doubt a blog is fun and easy to maintain when it is new. But as time goes on, and the novelty wears off, it is easy for the blog to take a back seat to other responsibilities. It becomes that thing on the to-do list that just keeps getting put on the next to-do list. Before you know it the gap between posts goes from weeks to months and then finally the blog flat lines. This is the fate of many blogs. I suspect that this is so because the blogger knows that very few people are reading the posts. And it is not easy to find the motivation to write something that nobody is going to read. From what I've seen so far, Kilpatrick, Townsend and Stockton's Global Insurance Recovery Blog is going to gain a big following -- and that will keep it going as one of the best in the insurance coverage area. You can check out the Kilpatrick, Townsend and Stockton Global Insurance Recovery Blog here: **http://blognetwork.kilpatricktownsend.com/insurancerecovery**

Carl Salisbury has more than 20 years experience in litigation and trial of complex commercial disputes – insurance and otherwise. He has handled a variety of claims for small and middle-market corporations to Fortune 100 companies. Some of these have involved environmental pollution, workplace discrimination, bodily injuries and property damage, mold contamination and construction defects. He is also a prolific writer of commentary in the area of insurance coverage. For Law360 he recently tackled some sophisticated issues concerning construction defect coverage. He is a graduate of the University of New Hampshire and Wake Forest University School of Law

Continued on Page 11

Declarations:

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Carl, thanks for taking the time to speak with Coverage Opinions. How did you get into the representation of policyholders in providing coverage advice and handling disputes?

It was by chance. My first job after law school, following a judicial clerkship, was with the New York office of Anderson Kill & Olick. In the 1980s, that firm was among the first and most prominent of the big firms doing work for policyholders. At the time, that wasn't important to me. What was important was its intriguing structure. In those days, everyone joined that firm as a partner. The day I arrived, one of the lawyers I met said, "Come by this afternoon if you need work because I need some help." The case was one of those massive, multi-site, multi-carrier environmental coverage actions that were being filed every week, it seemed, back in the '80s. I have been representing policyholders ever since.

Congratulations on the launch earlier this year of the Global Insurance Recovery Blog. What made you and your colleagues decide to do it and what do you hope for it to achieve?

Many thanks. I floated the idea of starting a blog at a partners' retreat earlier this year. Once our IT people began construction of the site, it became a little like a train that built momentum and gathered support and input from key members of the Insurance Recovery Team as it rolled down the track toward completion. A blog is an attractive project for a number of reasons. It permits a style of writing that doesn't require you to forget you have a personality or to pretend you don't have a sense of humor. There's a freedom to be provocative and engaging with a blog that isn't available in traditional outlets that publish attorneys' work. You do this extremely well with Coverage Opinions, by the way, so I think you know what I'm saying. We knew that, if we did what blogs do and if we did it well, it would give our team exposure and would provide readers with something to talk about and debate. A blog also gives our associates the opportunity to get their written work published without any barriers to publication.

You've handled coverage claims in a large number of contexts. What's keeping you busiest these days and what issues do you see keeping coverage lawyers busy down the road?

At the moment, I'm spending a lot of time on an Insurance Fraud Prevention Act case that's pending in state court in New Jersey. These days, I'm also advising policyholders in construction-defect coverage disputes and, interestingly, in traditional first-party property damage claims. Near-term, we are on the cusp of a surge in data-breach coverage disputes. Every state has a data-breach liability statute. On average, a company will spend $3 million on investigation, defense,and remediation of each hacking or data-breach event. Increasingly, policyholders are going to be looking for coverage in the Personal and Advertising Liability provisions of their CGL policies. They're also going to be making claims under the relatively new cyber policies. I wrote an article about that recently. It's up on the Global Insurance Recovery Blog.

I also think that the Whistleblower provision of Dodd-Frank is going to inspire a significant increase in SEC-imposed liability. Policyholders will --or at least should -- be looking for coverage of these claims under Directors' & Officers' liability policies. In 2012, the federal Office of Whistleblower Protection fielded more than 3,000 tips from would-be whistleblowers. This is the subject of a recent blog post.

You spoke earlier this year at a New York City Bar Association event on "Insurance Coverage for Fashion Industry Risks." You are also coverage counsel for Saks. Are you a clotheshorse and what are some coverage issues that are unique to the fashion industry?

It's interesting, and funny, that you would notice a connection between Saks and the NYC Fashion Law Committee presentation and conclude that I might be a clotheshorse.

Continued on Page 12

Declarations:

- *Continued*

I can see why it occurred to you. But, no, I'm not a clotheshorse. Retail companies face exposure to trademark, trade dress, and copyright issues. The savvy ones always have good indemnity agreements in place but an indemnity is only as valuable as the financial strength of the indemnitor. So it is important for fashion companies in particular, and retailers in general, to put their carriers on notice of such claims, which may be covered as Advertising Liabilities. Data breaches, and claims arising from collection and disclosure of private information through credit card transactions, are also of growing concern to fashion retailers.

What is the biggest challenge that you've ever had to overcome to achieve a victory for a client?

Every time a dispute goes to trial it creates challenges. Once a trial begins, no matter how much preparation goes into it beforehand there are, inevitably, surprises. One trial from many years ago stands out in that respect. The client and I were thoroughly prepared and the company's treasurer was going to be my first and -- I thought -- star witness. She was smart, earnest, and forthright. We had spent many hours preparing her very important testimony. She was going to be a wonderful witness. As I was finishing up my opening statement, the courtroom door opened and everyone turned to see her walk in wearing a tight-fitting leopard-print mini-skirt and dark sunglasses. She took the stand looking like she had just stepped off the set of a David Lynch movie. To make matters worse, she seemed to have trouble focusing and her answers were coherent only about half the time. I got her off the stand as soon as I reasonably could and put the rest of the evidence in through other witnesses. During a break after I rested my case, one of the carriers made a surprisingly favorable settlement offer and the other two soon followed with their own offers. But I felt as if I was tap dancing when that first witness was on the stand.

What are some of the biggest mistakes that you see insurance companies make that can increase their exposure for claims?

The mistake that comes up most frequently is not unique to insurers; I struggle against this tendency, myself. Carriers too often fall in love with their own story. They get invested in believing that their denial of coverage cannot possibly be wrong. Great sums of money then get spent defending the indefensible with respect to claims that could and should be settled, if only the carrier would contemplate the mere possibility that it might not be right.

Policyholders have secured some big victories this year before supreme courts in construction defect cases. Is this a trend or just coincidence?

When one state supreme court decides an issue a certain way, it might be a one-off event. When two courts decide the same issue consistently, maybe that's a coincidence. When three do it in quick succession, I think it's fair to call it a trend. Since April, four state Supreme Courts (North Dakota, West Virginia, Connecticut, and Georgia) have concluded that faulty workmanship can be a covered "occurrence" under standard-form CGL policies. That's a trend.

You grew up in Milford, New Hampshire (pop. 15,000). This Rockwellian experience is a world away from your current life. How did Milford prepare you for the rough and tumble New York legal world?

It didn't. You're right about the "world away" observation, though. It's interesting to me that the population is now 15,000. I didn't know that. When I was growing up, Milford was half that size. It was also more hard-scrabble and solidly blue-collar then than it is now. But I really can't draw on any experiences there that prepared me for life or work in Manhattan. I have to admit, though: That may be more a function of the limits of my own imagination than anything it might say about the value of growing up in small-town America.

Continued on Page 13

Declarations:

- *Continued*

You are a private pilot and the proud owner of a Cessna 172. How often do you get in the air and where do you go? I guess owning an airplane brings with it some insurance issues.

I don't get into the air nearly as often as I wish I could. I know few private pilots who do. When we're down here, we wish we were up there. Incidentally, that is much better than being up there wishing we were down here. The truth is, I fly pretty frequently, all things considered. My in-laws live in southern New Hampshire. Sometimes my wife and I will get up on a weekend morning and, if the skies are blue, we'll fly up there from the airport in Somerset, NJ, where we keep the plane, to have lunch with her parents. We use the plane to visit friends in North Carolina. There are also a few spots in upstate New York and in Maryland where we like to go for the proverbial $100 hamburger (or $100 crab cake sandwich, as the case may be).

Last fall, I flew my daughter back to college in Appleton, WI, which is 20 miles south of Green Bay. That was fun. She's a student pilot, herself. She's soloed in my plane and in the trainer that she flies in Appleton. The big insurance issue that arose for me when I started flying was life insurance.

My old policy excluded coverage if my death occurred while I was acting as pilot-in-command of an airplane. I had to get that fixed. Luckily, I found a good broker who put a reasonably priced policy in place that will provide for my family if I should ever have a really bad day in my plane. Pilots don't like to dwell on that possibility, though. The fact is, flying is very safe if it's given the respect, and done with the seriousness of purpose, that it warrants. And it has added such joy and satisfaction to my life that I really can't imagine living without it. Maybe next time, we can devote the entire Q&A to flying. What do you think?

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.