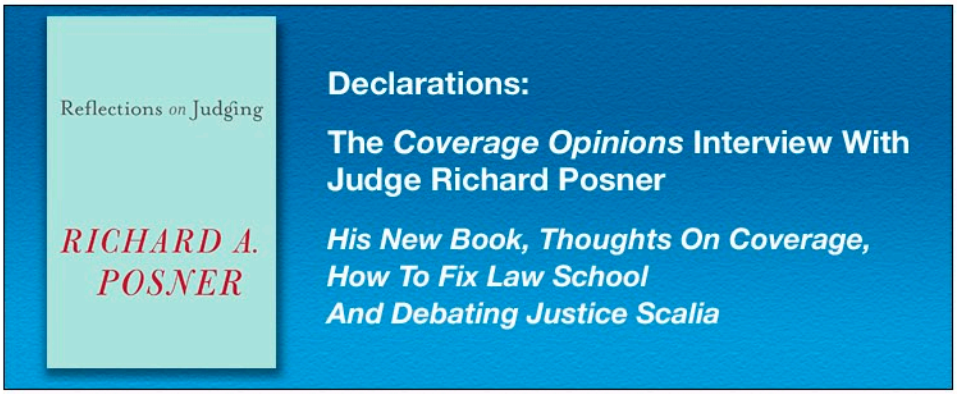
COVERAGE OPINIONS
Judicial Opinions Today - Impact On Counsel's Opinions Tomorrow

Effective Date:
October 16, 2013
Vol. 2, Iss. 19

The Cover-age Story



Let me make this simple. Richard Posner has been a judge on the powerful Seventh Circuit Court of Appeals for close to 32 years and is a senior lecturer at the University of Chicago Law School (starting as a law professor there in 1969). He has written nearly 40 books on a host of legal, economic and other topics and hundreds of articles and book reviews. He co-authors a widely read blog. One law journal identified Judge Posner as the most cited legal scholar of the 20th century. And it doesn't look like he's been playing a lot of golf in this century.

But more than just writing extensive judicial opinions, academic works and commentary, Posner's topics often-times have many points of view. And then there's the fact that he says exactly what's on his mind. He also has a highly visible platform for expressing his views. Needless to say this is a cocktail for creating critics. Posner has them. He is unlikely to be hired for the Dale Carnegie faculty.

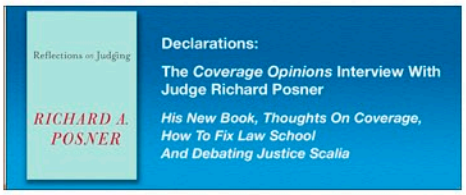
Hang in there. I'm getting to the simple part. Once in a while when a judge cites a case in an opinion he chooses to add a parenthetical, after the cite, naming the judge who authored it. While this happens only now and then, it happens with regularity when opinions cite to one of Judge Posner's cases.

Continued on Page 2

In this issue:

Happy Birthday And New And Improved Format Coming: *Coverage Opinions* turns one year old with this issue. I am thrilled with how the first year went. Thank you so much for the support, kind words and help to spread the word – over 18,000 subscribers. I learned a lot over this year about what works and what doesn't. Here's an example. Starting with the next issue *Coverage Opinions* will no longer be presented in a newsletter format that must be downloaded in its entirety to be read. I know that this was cumbersome and took time and an easier way to access it was needed. Look for the new and substantially improved format in the next issue. Getting to the articles will now be a cinch.

The Cover-age Story



There's a cite to a Seventh Circuit case and there's "(Posner, J.)" added to it. Why is this done? It is a court's way of adding emphasis to the citation because of the judge who authored it. Think of it as a citation with an exclamation point.

As I said, this is not commonly done. Yet it happens a lot when Judge Posner's cases are cited. But how often? I poked around on Westlaw to try to figure that out. My conclusion – about 1,700 judicial opinions cite a case with "(Posner, J.)" added to it. And this does not include cases where the parenthetical was used simply for the purpose of indicating that the citation is to a Posner dissenting or concurring opinion. Then there are those cases where Judge Posner's authorship is noted but in a different format. Instead of a citation to one of his cases being followed by "(Posner, J.)," the court, when describing the case, specifically states that it was penned by Judge Posner. I estimate that there are in the ballpark of 1,000 of such cases (this search was harder to do). These numbers are staggering, especially when you consider that most judges, even distinguished ones, rarely, if ever, get mentioned as the author of a cited case.

What's the point of all this? Simple. You can argue with Judge Posner about his views on certain topics. But there is no argument that his opinions command incredible respect from his fellow jurists.

I've always enjoyed reading Judge Posner's decisions because I love their conversational tone and ease to understand. They read as if he's a guy I sat down next to on the train, we started a conversation and the case is a story that he's telling me. Beyond that it seems a daunting task to study Judge Posner given his extensive catalogue of work. So I was thrilled to learn over the summer that he was publishing a book in September called *Reflections on Judging*. And from Amazon's description -- "Richard Posner distills the experience of his thirty one years as a judge of the United States Court of Appeals for the Seventh Circuit." -- it sounded like one-stop shopping for learning much more about Judge Posner.

I reached out to Judge Posner over the summer and asked if I could send him a few questions about *Reflections on Judging* after it was published. He graciously agreed. And when the time came I couldn't resist throwing in a couple about insurance coverage. Of course. As for what Judge Posner told me about coverage, that's discussed in a separate article that starts on page 7. The article also contains one coverage lawyer's list of Judge Posner's most significant cases addressing liability coverage.

Continued on Page 3

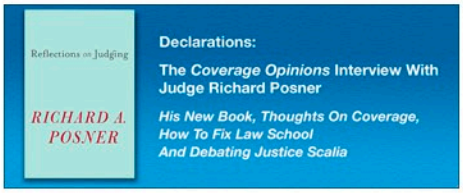
About The Editor

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.

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

The Cover-age Story



Reflections on Judging is close to 400 pages and covers a wide range of topics. I can't even come close to adequately summarizing it in the small amount of available space that I have. I feel awful that I can't do this superb book the service that it deserves in describing it. Let me take this approach. Here are seven things to know about *Reflections on Judging*.

1. As I hoped it would, *Reflections* solves the problem of wanting to learn more about this incredible jurist, but feeling overwhelmed by the volume of literature and not knowing where to begin. *Reflections* is somewhat of the *Nutshell* on Posner. It covers his upbringing, career before taking the bench and views on many aspects of the legal system and federal judiciary. And, most importantly, if your objective is to learn more about Posner, and what makes him tick, the book addresses, in detail, his decision making process (and as it compares to others). More about this below.

I asked Judge Posner if his decision to write a book called *Reflections on Judging*, not to mention with nearly 32 years on the bench, was a signal that retirement (at least from the bench) may be near? Or was this simply the right time to write such a book? He replied no to the retirement question and "[i]t was the 'right time' only in the sense that the problems I discuss in the book had become more serious in recent years."

2.The judicial confirmation process for federal appellate judges has become political and mean-spirited. Today a candidate for the federal bench can be disqualified if it is learned that he once gave out loose candy corns to trick or treaters. But it wasn't this way in 1981 when Posner was appointed to the Court of Appeals. Even by then he had a track record for controversial views. Nonetheless, despite his paper trail, the entire confirmation process was basically one question -- what size robe do you wear? It is riveting to listen to Posner describe his confirmation process when you know how it would play out in today's environment. The way it works nowadays Posner may not be confirmed as dog catcher is some places. Judge Posner notes that, owing to the political polarization of the Senate, there are fewer federal judges that are "duds," but also fewer that are "stars."

3. Judges and the judicial process are generally secretive. But Posner speaks his mind and reveals how the sausage is made – or not. "Judges understandably are uncomfortable issuing opinions to the effect that 'we have very little sense of what is going on in this case. The record is poorly developed, and the lawyers are lousy. We have no confidence that we have got it right. We know we're groping in the dark. But we're paid to decide cases, so here goes.' Yet that is the subtext of countless appellate opinions."

Continued on Page 4

Randy Spencer's Open Mic

My Time With Vince August – The Stand-up Comic That Can't Be A Judge

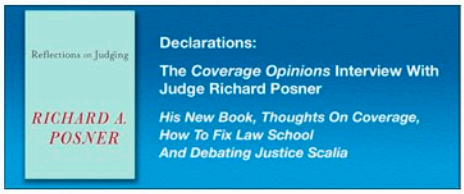
I lost track of the number of people who sent me a link to one of the many many media stories about the New Jersey Supreme Court's September 19th decision that Vincent August Sicari's career as a stand-up comic (as Vince August) precluded him from also serving as a part-time municipal court judge in South Hackensack. Thank you to everyone who sent me a note to make sure that I saw the story.

The opinion is 30 pages but it basically held that the content of Vince's comedy routines interfered with the proper performance of his judicial duties. The supreme court noted that there was no evidence that Judge Sicari ever conducted proceedings in his courtroom in any other than a professional manner.

My chin dropped when I read the first media story sent to me. I immediately said to myself – Wait, I met this guy! Vince August was the headliner at a show that I did at Caroline's on Broadway last October. Our meeting was very brief. I was in the dressing room waiting to go on stage. Vince walked in, we introduced ourselves, he changed his shirt,

Continued on Page 4

The Cover-age Story



I asked Judge Posner something that I've often wondered about a federal appellate judge: How accurately can you predict the votes of your colleagues on a panel? Just like everything else in the book about the judiciary, Posner pulled back the curtain. Instead of some wishy-washy non-answer answer he replied: "Depends on when. Before the oral argument, I can usually predict. After oral argument, when I've listened to the other judges' questions, I can predict even more accurately."

4.Posner's views toward the silliness of the *Bluebook* are well-known and he shares them in *Reflections*. Since I also believe that the *Bluebook* is moronic, this was one of my favorite parts. He has a simple solution to the *Bluebook* – he doesn't use it. One of the best lines in the book: "My judicial and academic writings receive their share of criticism, but no one to my knowledge has criticized them for citation form."

5. Posner weighs in, but not extensively, on the problems with legal education – a much discussed subject these days in the wake of the crash of the legal job market. He says that, because of the inability to escape technology in their practice, law students should be required to take a course in accounting and statistics and at last one course, elsewhere in the university, of a purely scientific or technical character. And if room needs to made in the curriculum for these courses, Posner offers this solution: cutting or shortening Constitutional law is a good place to start. This is just one of so many laugh out loud Posner-esque comments that *Reflections* offers.

I asked Judge Posner to address the criticism that law school does not adequately prepare students for practice while also recognizing that the economics of a legal education are not working (students graduating with sizable debt but no job to pay it off). Judge Posner: "The major economic changes would be reducing the size and compensation of faculty and greatly reducing the number of books in a law school's library. The major curricular changes would be greater emphasis on clinical courses in areas such as procedure and evidence that relate to the trial process, and provision of 'majors' such as civil litigation, criminal litigation, bankruptcy, and other commercial fields, in which students could concentrate."

6. One of the core components of *Reflections*, and it is discussed at length, is that judges are not well adapted by training or experience to handle the complex technological issues that now come before them. Posner summarized is like this: "We live 'in a world of increasingly complex, fragmented, and ubiquitous information.' Federal judges are on the whole not well adapted by training or experience to the technical age that we live in."

Randy Spencer's Open Mic

plugged his cell phone into the wall and just like that he was gone. I didn't get to hear Vince's set, but my parents loved it – even more than mine; thanks mom and dad -- and raved about him at dinner after the show.

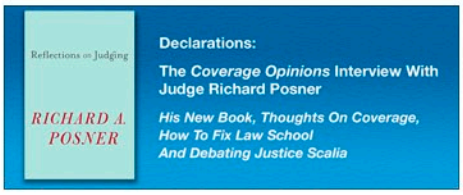
I'm sure Vince enjoyed serving as a municipal court judge in South Hackensack and that he's sorry to have to give up the post. But it was only a $13,000 per year gig. So the financial consequences could have been far greater. Stand-up comedy is a crowded field. To succeed takes being funny, of course. But that's not enough. A stand-up comic must also be able to distinguish himself from the many others competing for time on the biggest stages. Vince's story went viral, being picked up by every media outlet imaginable. A Google search of "Vince August Comic Judge New Jersey" had over 2 million hits. The publicity that his story garnered was worth many multiples of $13K. While the New Jersey Supreme Court handed Vince August a loss last month, it also awarded him instant recognition – something that many comics never achieve in a long career. I wish him all the best.

That's my time.

I'm Randy Spencer.

Randy.Spencer@coverageopinions.info

The Cover-age Story



Posner offers solutions to the problem through the hiring of law clerks and judicial training. That there is a chapter called "What can be done, modestly?" tells you that Posner is realistic in the ability of the problem to be solved.

I offered a solution to Judge Posner but he was unconvinced. Given that, in some states, it is necessary to pass a test to be an interior designer, would he favor a mandatory test for new federal judges to establish that they possess a certain level of knowledge of the most important technical issues that they are likely to confront in cases? "No; that would just lead to cramming. I think lengthier judicial training, with or without testing (probably without) is a better approach."

7. If you are reading *Reflections* on Judging to learn more about what makes Posner Posner, then his discussion of his decision making process -- and, happily, there is a lot of it – will not leave you disappointed. But it is not enough simply to understand Judge Posner's decision making process. To fully get it you must also understand an alternative decision making process that he derides.

Judge Posner describes himself as a realist judge and not a formalist judge. A formalist judge believes that "all legal issues can be resolved by logic, text, or precedent, without a judge's personality, values, ideological leanings, background and culture, or real-world experience playing any role." Realism, as Posner notes, is harder to describe than formalism, because realism is everything in legal thought and practice that is not formalism.

Posner describes a realist judge as one that "understands the limitations of formalist analysis, does not (a related point) have a 'judicial philosophy' that generates outcomes in particular cases, wants judicial decisions to 'make sense' in a way that could be explained convincingly to a layperson, and is a 'loose constructionist,' which means he believes that interpretation should be guided by a sense of the purpose of the text (contract, statute, regulation, constitutional provision) being interpreted, if the purpose is discernible, rather than by the literal meaning of the text if purpose and literal meaning are at odds with one another. The realist judge has a distaste for legal jargon and wants judicial opinions, as far as possible, to be readable by nonlawyers, wants to get as good a handle as possible on the likely consequences of a decision one way or the other, has an acute sense of the plasticity of American law, is acutely conscious too of the manifold weaknesses of the American judicial system and wants to do what he can to improve it. He does not draw a sharp line between law and policy, between judging and legislating, and between legal reasoning and common sense."

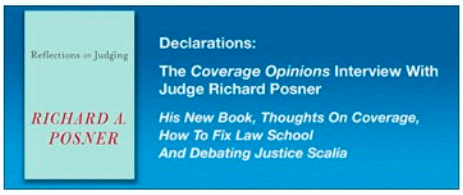
One of Posner's main messages is that judges, mistakenly, turn to techniques of formalism as a means of avoiding complexity or when they do not understand the activity from which a case before them has arisen. The moral of *Reflections on Judging* is that this will not work. "The path forward is the path of realism."

Posner is the best known realist judge and Justice Scalia the best know formalist. They see the judicial decision making process as worlds apart and have a Coke and Pepsi relationship. A full discussion of this is way beyond what is possible here. The simplest way to describe this is Posner's view that Scalia's decision making process is needlessly complicated by so-called "canons of construction" (57 that he endorses and 13 that he rejects). These, Posner says, provide Scalia with "all the running room needed to generate whatever case outcome conforms to [his] strongly felt views on such matters as abortion, homosexuality, illegal immigration, states' rights and the death penalty."

Posner also observes of Scalia that he "makes judging too difficult by telling judges to master and apply a baffling and ultimately fruitless system for avoiding engagement with reality. He is a complexifier, though it is less likely that complexity guides his judicial votes (and those of others of his school of thought) than that it conceals the biases that actually generate those votes."

Continued on Page 6

The Cover-age Story



I asked Judge Posner about his differences of opinion with Justice Scalia and suggested an idea:

Q: Your disagreements with Justice Scalia on realism versus formalism are widely known. This is addressed in the book. In addition, the debate has played out in the media and on law blogs. Would you consider a live debate, on a stage, with Justice Scalia over your disagreements? While neither would change the other's mind, it would be very enlightening for the legal field and have the excitement of a Super Bowl atmosphere.

A: I'd be happy to debate Justice Scalia, but he would never agree, because he would regard it as lowering himself (a supreme court justice) to the level of a mere court of appeals judge (me).

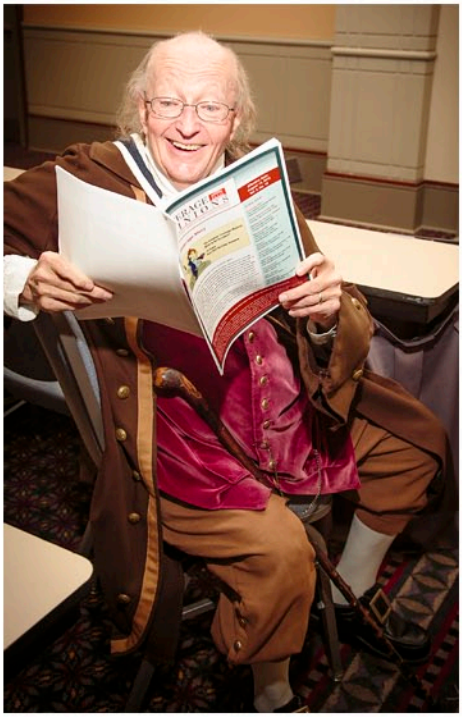
Judge Richard Posner

Coverage Opinions

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.

The views expressed herein are solely those of the author and are not necessarily those of his firm or its clients. The information contained herein shall not be considered legal advice. You are advised to consult with an attorney concerning how any of the issues addressed herein may apply to your own situation. Coverage Opinions is gluten free but may contain peanut products.

Coverage Opinions Meets The Father Of Insurance



On October 3rd the 7th White and Williams Coverage College was held in Philadelphia. It was a great day of education, food, schmoozing and entertainment. There were 600 students registered and they came from 18 states and 130 companies.

In 1752 Benjamin Franklin and his fellow firefighters founded The Philadelphia Contributionship, the nation's oldest successful property insurance company. So who better to serve as the lunchtime speaker at the Coverage College than the father of insurance himself. Ben Franklin gave a rousing lunchtime speech followed by working the room as well as any politician today.

He called the Coverage College the third most important meeting ever held in Philadelphia – right after the two Continental Congresses. [He really did. I was like – Wow, he came prepared.] Franklin also took a look at *Coverage Opinions* and concluded that it reminded him of *The Pennsylvania Gazette* – the newspaper that he began publishing in 1729. By the way, Ben Franklin is thinner in person. As they say, being on currency adds ten pounds.

To learn much more about Benjamin Franklin's role in insurance visit The Philadelphia Contributionship's website.

Dictionaries Not Allowed: Asking Judge Posner About Insurance Coverage And His Seven Most Significant Liability Coverage Decisions

I asked Judge Richard Posner if he enjoys resolving insurance coverage disputes. More specifically, I inquired if there is a spring in his step when he walks to the courtroom knowing that a coverage case is on the day's argument list. His response was without ambiguity: "I love insurance cases (seriously). They're fascinating. I have written many opinions in such cases."

I suspect that it is because of insurance's reputation for being dry and dull that Judge Posner felt the need to add that he was being serious, and not sarcastic, when he said that he loves insurance cases. Of course, he did not need to add that clarification for my benefit -- nor anyone else who reads his coverage cases. His opinions in such cases leave no doubt that he really does enjoy them.

Here's what else Judge Posner had to tell me about coverage cases. "I don't believe in dictionaries as a resource for interpreting statutes or contracts, including insurance contracts. I am particularly interested in the consequences for premiums, adverse selection, and moral hazard of alternative interpretations of particular provisions in such contracts."

I've never tried to put together a scorecard on Judge Posner's coverage decisions to see if he favors insurers or policyholders. When it comes to coverage cases that's a fool's errand – whether looking at Posner's cases or those of any particular judge or court. Coverage cases are just too different (apples and snow shovels) for any such tally to have any meaning.

However, this much can be said about Judge Posner's leaning in coverage cases. Because he eschews the use of dictionaries to resolve coverage disputes, I make insurers a three point favorite in cases before him. You see, when a court in a coverage case turns to a dictionary to interpret the meaning of a term, there is a good chance that it is not going to end well for the insurer. Dictionaries usually have multiple meanings of a term. Not to mention that there are multiple dictionaries for a judge to choose from. So if a test for ambiguity is that a term in an insurance policy can have more than one meaning, a judge using a dictionary, or several, in search of the meaning of a term,

Continued on Page 8

Dictionaries Not Allowed:
- *Continued*

is more likely than not on his way to concluding that the policy is ambiguous. And you know what that means. Judge Posner may not find for the insurer, but at least it won't be because he used a method that is inherently skewed against insurers.

I set out to select Judge Posner's ten most significant opinions that he's authored (not just where he was on the panel) involving liability coverage. By significant I mean ones that have been influential on other courts or have the potential to be. My methodology was not scientific. It did not involve Shepardizing cases followed by a painstaking study of the results. It was simply based on my experience, as a coverage lawyer, knowing what's important and what's not when it comes to liability coverage issues. In essence I used an I know it when I see it test. But I believe that my list would approximate one that was conducted with actual analysis.

As I was putting this article together I realized that space constraints would prevent me from discussing all ten that I selected. So I had to limit it to seven. Space issues also prevent me from explaining in detail why each case was chosen and how it involves the various concepts that Judge Posner stated he uses to decide coverage cases. They do. [*Coverage Opinions* is a low budget operation. Space constraints have often-times been a casualty of that. But that will be fixed starting with the new format in the next issue.] The following cases are in no particular order, except for the first two, which are unquestionably deserving of the top spots.

Level 3 Communications, Inc. v. Federal Insurance Co., 272 F.3d 908 (7th Cir. 2001)

Level 3 is the granddaddy case upholding the principle that insurance cannot be had for restitution of an ill-gotten gain. Judge Posner addresses this same principle in Ryerson, Inc. v. Federal, 676 F.3d 610 (7th Cir. 2012). Level 3 is also at the heart of the concept that insurance is not available to pay an obligation that an insured otherwise owes. This is a hugely important point. However, because it is based on a fundamental concept, and not specific policy language, insurers may be challenged on it.

Eljer Manufacturing v. Liberty Mutual Ins. Co., 972 F.2d 805 (7th Cir. 1992)

"If a manufacturer sells a defective product or component for installation in the real or personal property of the buyer, but the defect does not cause any tangible change in the buyer's property until years later, can the installation itself nonetheless be considered a 'physical injury' to that property? The defective product or component in such a case is like a time bomb placed in an airplane luggage compartment: harmless until it explodes. Or like a silicone breast implant that is harmless until it leaks. Or like a defective pacemaker which is working fine now but will stop working in an hour. Is the person or property in which the defective product is implanted or installed physically injured at the moment of implantation or —in a word, incorporation—or not until the latent harm becomes actual?"

Held: Physical injury to tangible property, for purposes of determining coverage under a CGL policy, occurs when an allegedly defective product is incorporated into a larger structure or product, rather than when the system malfunctions, causing physical damage to the structure or product.

James River Ins. Co. v. Kemper Casualty Ins. Co., 585 F.3d 382 (7th Cir. 2009)

Discussing the outer bounds of "arising from" and "but for" causation – concepts that some courts seem to suggest have none. "If Christopher Columbus had bought insurance against liability for claims arising out of his voyages and had later been sued for assaulting an Indian in Hispaniola, he could not have required the insurance company to defend him on the ground that had it not been for his voyage to Hispaniola he would not have assaulted anyone there."

Pastor v. State Farm, 487 F.3d 1042 (7th Cir. 2007)

Federal Rule of Evidence 407, precluding evidence of subsequent remedial measures, served to preclude an insured from arguing that her interpretation of a policy clause was correct, based on the insurer's subsequent amendment of the clause to comply with her interpretation. "Rule 407 is not limited to 'repair' in the usual sense."

Continued on Page 9

Dictionaries Not Allowed:

- Continued

Charter Oak Fire Ins. Co. v. Color Converting Industries, 45 F.3d 1170 (7th Cir. 1995)

The insurer did not have an implied duty to avoid handling a claim in a manner that would cause the insured to lose its best customer. "If the insurance company is required to do exactly as the insured would do if the latter had no insurance, then it might be required to settle a completely groundless claim if, because the claimant was a valued customer of the insured, the latter would have settled the claim despite its being groundless. An insurer is not the insured's alter ego. Its fiduciary duty is bounded by its contractual undertakings, which here did not include the protection of customer relations."

Farmers Automobile Ins. Assoc. v. St. Paul Mercury Ins. Co., 482 F.3d 976 (7th Cir. 2007)

Concluding that the word "similar," standing alone, "partakes of the vagueness of other verbal signifiers of matters of degree, such as 'substantial,' 'significant,' and 'probable.' But context can give it a precise meaning, as this case illustrates." Thus, no coverage was owed for a violation of the Illinois Minimum Wage Law, based on an exclusion for violation of the Fair Labor Standards Act or "other similar provisions of any federal state or local statutory or common law." No doubt there are judges that would look at the term "similar," especially as used in an exclusion, conclude it lacks sufficient precision, and say next case. Posner's common sense approach leads to a different conclusion. Incidentally, the case has my favorite Posner line in a coverage case: "It is curious to see an insurance company, in the role of insured, asking a court to make law adverse to insurance companies."

Atlantic Casualty Ins. Co. v. Paszko Masonry, 718 F.3d 721 (7th Cir. 2013)

Addressing an exclusion in a CGL policy for injury to "contractors." Such exclusions are becoming more and more common in liability policies as insurers seek to limit their exposure at construction sites. Judge Posner questioned why anyone would want a policy containing such a broad exclusion. While he held that the exclusion did not apply to the case before him, he also concluded that it did not render coverage illusory and could be as broad as the insurer believed.

Oklahoma: Happy Hour For Insurer That Solves The Liquor Liability Exclusion Challenge (ISO - Pull Up A Stool)

For various reasons, insurers have not always had an easy go at enforcing the liquor liability exclusion contained in a general liability policy. There are various complex reasons that can be provided to explain this. But there is also a simple one. The liquor liability exclusion, like all exclusions, spells out a specific situation for which coverage is not intended to apply. But, by definition, when the liquor liability exclusion is in play, situations are often-times not black and white, not to mention that the facts do not always come with just one version. In other words, call me crazy, but somehow when you throw alcohol into the mix insurance coverage has this way of becoming more complex.

In general, a liability policy's liquor liability exclusion serves to preclude coverage for bodily injury or property damage for which any insured may be held liable by reason of causing or contributing to the intoxication of any person; the furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

The reason for the liquor liability exclusion is simple. Based on the nature of such exposure, it is better served, and priced, through a liquor liability policy – one specifically designed to cover the furnishing of alcohol beverages. Just as commercial general liability policies have an auto exclusion, so they cannot be used as substitutes for auto policies, CGL policies have a liquor liability exclusion so they are not liquor liability policies.

But the liquor liability exclusion can sometimes be challenging to enforce because of the "alcohol factor" mentioned above and difficulty of proving that the insured's liability is because of the serving of alcohol, as opposed to simply the presence of alcohol -- and the assorted problems that that can cause.

Continued on Page 10

Oklahoma: - *Continued*

Again, when things go south in a bar, the whos, whats and wheres, etc. may not be easy to answer. And when the duty to defend is broad, well, you see where I'm going.

In Essex Ins. Co. v. Way Jose Enterprises, No. 13-233 (W.D. Ok. Sept. 30, 2013) an Oklahoma federal court addressed the potential for coverage, under a general liability policy, for injuries that took place following a night of drinking at a bar. The policy's liquor liability exclusion was not the standard one. And this proved to be quite significant.

Jennifer Lawmaster and Mathew MacAllister celebrated homecoming at The College Bar. [The court didn't say what school but I looked it up because I'm the curious type – Oklahoma State. A review on Yelp described The College Bar as: "Rad tunes, cheap booze and (something I deleted as not appropriate to say here). Not huge but always a good time."] They both became noticeably intoxicated.

It was alleged that, at some point in the evening, Lawmaster was drugged and this caused her to lose consciousness and the ability to remember the events that happened after she left the bar. She was later found abandoned, assaulted, and horrifically injured. She was either assaulted by MacAllister or abandoned by MacAllister and sustained injuries from an unidentified source. She alleged that the bar breached a number of duties owed to her, including to provide for her safety, to police and prevent activities which would lead to an unreasonable risk of harm, to come to the aid of patrons, and to train the employees in regard to serving alcohol to intoxicated individuals.

Essex alleged that its general liability policy did not provide coverage for any of these potential theories or sources of liability. Coverage litigation ensued. At issue was the applicability of the following liquor exclusion: "The coverage under this policy does not apply to 'bodily injury' ... or any injury loss or damage arising out of: Any act or omission by an any insured, any employee of any insured, patrons, members, associates, volunteers or any other persons respects (sic) providing or failing to provide transportation, detaining or failing to detain any person, or any act of assuming or not assuming responsibility for the well being, supervision or care of any person allegedly under or suspected to be under the influence of alcohol."

The court had no trouble concluding that the exclusion applied to everything. "Under the express terms of the liquor exclusion highlighted above, there can be no liability under the policy—once 'under the influence of alcohol' is shown—for not caring for her, or supervising her, or any other act of 'assuming or not assuming responsibility' for her. The exclusion extends both to omissions or failures to act by [the bar] and its employees and to those of MacAllister (a 'patron' of the bar). The exclusion thus precludes liability based on any theory of [the bar] being liable for negligent acts of MacAllister."

Of significance for insurers that have been struggling with ISO's liquor liability exclusion, the court pointed out that the claim involved circumstances that are different from the cases cited by the bar: "This is not a situation where the insurer's liability will be determined by whether alcohol sold by it contributed to the tortious acts committed by MacAllister or otherwise contributed to or caused the injuries to Lawmaster. It is also (sic) does not matter whether MacAllister's conduct did or did not constitute a supervening cause. Rather, the . . . exclusion turns on Lawmaster's condition—was she under the influence of alcohol or not? If she was, there is no coverage."

If an insurer that issues a general liability policy to a bar or restaurant does not want to have exposure for any aspects of its insured's operation that come from serving liquor, it seems easier to prove that the claims arose because someone was under the influence of alcohol -- rather than how they got that way. This is especially the case when you consider the "alcohol factor." In other words, focusing on the impact of alcohol, rather than the cause of the problems flowing from alcohol, seems more likely to accomplish an insurer's objective of wanting to wash its hands of all things alcohol-related.

On one hand, the 2013 version of ISO's CGL policy amends the liquor liability exclusion to state that it applies even if the claims against the insured allege negligence or other wrongdoing in the supervision,

Continued on Page 11

Oklahoma: - *Continued*

hiring, employment, training or monitoring of others; or providing or failing to provide transportation with respect to any person that may be under the influence of alcohol, if the occurrence which caused the bodily injury or property damage involved the otherwise excluded liquor liability conduct. However, in general, even under ISO's expansion of the liquor liability exclusion, it must still be established that the insured caused or contributed (furnished) to the intoxication of a person.

Magic Mushroom: The Absurd Argument For Coverage That You Must See

I get it. Lawyers get paid to solve their clients' problems. And when the problem is a tough one, and it looks bleak, it calls for putting on a size XL thinking cap. And great lawyers win cases because they think of creative solutions. But at some point a lawyer's creativity jumps the shark. And that's what happened in Heinecke v. Aurora Healthcare, Inc., No. 2012AP2469 (Wis. App. Ct. Oct. 8, 2013). The argument put forth in favor of coverage was absurd. Really absurd. Ironically, the argument pushing creativity to the outer bounds is related to mushrooms.

In Heinecke, the Court of Appeals of Wisconsin was called in to address coverage for Creative Business Interiors for injuries suffered by individuals on account of contracting Legionnaire's disease. CBI had contracted with Aurora Healthcare to renovate a hospital's lobby. This included the construction and installation of a decorative fountain. Individuals allegedly contracted Legionnaire's by breathing in mist or vapor contaminated with Legionella bacteria.

[Incidentally, the Legionnaire's bacteria was first isolated in 1976 at the Bellevue-Stratford Hotel in Philadelphia. It's an incredible and tragic story that's worth reading about. The former Bellevue (now a Hyatt) is just down the street from my office and I eat lunch in the food court there fairly regularly. The original Bellevue-Stratford sign hangs on the wall. They seemed to have solved the problem.]

Back to the case and CBI's pursuit of coverage under its general liability policies. Nobody disputed that the Legionnaire's claims were excluded by the first half of the fungi or bacteria exclusion, which applied to "bodily injury" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any 'fungi' or bacteria on or within a building or structure, including its contents."

The dispute was over the potential applicability of the exclusion's so-called "consumption exception," which stated that the exclusion "does not apply to any 'fungi' or bacteria that are, are on, or are contained in, a good or product intended for consumption."

CBI argued that the "consumption exception" applied to restore coverage because the fountain was "consumed" when it was observed and enjoyed by hospital patrons. Yes, they really argued that. CBI relied on a dictionary definition of "consumption" that provided "the utilization of economic goods in the satisfaction of wants or in the process of production resulting in immediate destruction (as in the eating of foods), gradual wear and deterioration (as in the habitation of dwellings), no change aside from natural decay (as in the enjoyment of art objects), or transformation into other goods ..."

Admittedly, the proffered definition of consumption included "no change aside from natural decay (as in the enjoyment of art objects)." The insurers argued that the appropriate definition here was "to eat, to drink, to use up, to consume." In others words, we exclude bacteria or fungi, but, if the injury is caused by bacteria in food, such as a problem in the hospital cafeteria, that's an exception to the exclusion.

The Heinecke court observed that: "The mere fact that a word has more than one dictionary meaning, or that the parties disagree about the meaning, does not necessarily make the word ambiguous if the court concludes that only one meaning applies in the context and comports with the parties' objectively reasonable expectations." Following that rule, the court held that "the Consumption Exception's reference to 'a good or product intended for consumption' clearly did not mean to encompass the observation and enjoyment of art."

Continued on Page 12

Magic Mushroom: - *Continued*

To avoid any argument that I did not tell the whole story, there are a few cases that have held that the "consumption exception" applied in bacteria exposure situations not involving food. However, the court concluded that those were distinguishable (and, in my view, are quite a stretch themselves). "In each case cited by CBI, the insured intended the water in the swimming pool or hot tub to be used by guests and guests were expected to have physical contact with the water, unlike the Fountain here."

Oh, Oh, Telephone Line: Missouri Court Considers Answering Policyholder's Call To Disconnect The TCPA Exclusion (And Leaves Message For ISO)

Whenever I read a Telephone Consumer Protection Act coverage case I think of Electric Light Orchestra's great song Telephone Line. Man I love ELO. TCPA cases? Not so much. They were interesting when they first came onto the scene. But lately they have just become irritating. I thought a solution to the TCPA thorn would be found in the ISO general liability exclusion for "Distribution of Material in Violation of Statutes." [Soon to have a new name in the ISO 2013 form.] And no doubt the exclusion has had a significant impact on the availability of TCPA coverage, and, hence, the motivation for plaintiffs to bring such cases. And that may still be the case. But not long ago a Missouri federal court considered an argument by a policyholder that the "Violation of Statutes" exclusion did not apply to a TCPA claim. And the argument was not rejected out of hand.

At issue in Nationwide v. Harris Medical Associates, No. 13-7 (E.D. Mo. Sept. 23, 2013) was coverage for Harris Medical Center for its alleged transmission of six unsolicited faxes to St. Louis Heart Center. St. Louis Heart sued Harris for violation of the TCPA, conversion under Missouri common law and violation of the Missouri consumer protection act (that last one was voluntarily dismissed). Harris sought coverage from Nationwide under primary and umbrella liability policies.

At issue was the applicability of an exclusion for any action or omission that violates or is alleged to violate: The Telephone Consumer Protection Act, including any amendment of or addition to such law; or any statute, ordinance or regulation, other than the TCPA ..., that prohibits or limits the sending, transmitting, communicating or distribution of material or information. The court had no problem concluding that the exclusion precluded coverage for the TCPA claims. For that claim the exclusion was clear and unambiguous.

However, the Harris court was not so quick to conclude that the exclusion applied to the common law conversion claim. It might, but not on this day. Nationwide argued that the exclusion applied to the conversion claim because violation of the TCPA and common law conversion arise from the same conduct: the alleged transmission of the same unsolicited facsimile advertisements. Nationwide pointed to the breath of the language of the exclusion, arguing that, because the conversion claims arise "directly or indirectly out of any act or omission that is alleged to violate" the TCPA, coverage is barred by the exclusion.

The insured saw things differently. It argued that the exclusion must be construed narrowly. By its terms it only applies to the violation of statutes and does not unambiguously reach claims based on an alleged violation of the common law. The court stated that St. Louis Heart cited a number of unpublished decisions from the Lake and Cook County, Illinois circuit courts holding that a similar Violation of Statutes exclusion did not preclude coverage for claims that are not based on statutory violations, even though the claims were based on the same underlying conduct. These citations were not provided – although the court did cite two cases (Michigan appellate and Washington appellate) that it said went the other way.

It was also argued in favor of coverage that a conversion claim is cognizable and independently sufficient even if there was no TCPA claim and it seeks damages that are independent of a TCPA claim, and, so, it does not arise out of the TCPA. Further, the elements of a TCPA claim and a conversion claim are different. And one more thing -- Nationwide could have excluded conversion or other common law claims, but did not do so.

Continued on Page 13

Oh, Oh, Telephone Line:

- *Continued*

However, other insurance companies have supposedly used broader exclusions that apply to any "unsolicited communications," rather than the more narrow language that applies to the "violation of statutes" and "distribution of material in violation of statutes." So the argument went – "[T]he broader language makes it clear that all claims based on unsolicited communications are excluded, regardless of whether they are based on a statutory violation or not, while the narrower language present in [Nationwide's] policies is limited to claims based on unsolicited communications that violate statutes."

The Harris court concluded that it could not reach a decision because it was required to determine whether Georgia or Missouri law should apply. And the court did not have the facts relevant to the significant contacts for undertaking a choice of law analysis. So its decision would have to wait. However, the court did make a concluding comment that could be seen as a nod to the policyholder's position. The court noted that it was "mindful that under the laws of both Georgia and Missouri, the insurer bears the burden to show that a policy exclusion applies, and exclusions are to be construed against the insurer and in favor of the insured."

Randy Spencer Appearing At Helium Comedy Club

Randy Spencer will be doing a set on October 23 at Helium Comedy Club in Philly. The headliner is Sebastian Maniscalco. Sebastian has a one-hour Comedy Central special, appeared on The Tonight Show with Jay Leno and has numerous other prestigious TV and stand-up credits. His Helium shows are close to selling out. But I think that has a lot more to do with Sebastian than Spencer. I hope you can make it if you're local. More information is avalable at Helium's website.

Late-r Notice:
A Look At Decisions To Come

California Supreme Court To Address Important Cumis Issue

On one hand, the Cumis statute is uniquely California (and generally Alaska too). As much so as the Hollywood sign. On the other, Cumis also provides the most expansive body of law nationally concerning the ins and outs of an insured's entitlement to independent counsel. As such, when it comes to independent counsel issues, no matter where pending, California is likely to be examined for guidance. Last month the California high court agreed to hear an appeal of Hartford Casualty Insurance v. J.R. Marketing. In J.R., the Court of Appeal of California addressed certain Cumis consequences for an insurer that breached the duty to defend, including the duty to provide independent counsel.

The Cumis statute provides certain protections for an insurer that allows its insured to retain independent counsel on the basis that the provision of a defense, under a reservation of rights, creates a conflict of interest. One of those protections is that the insurer can pay its insured's selected counsel (so called Cumis counsel) the same hourly rate that it would have paid panel counsel for the same representation. However, courts have held that the Cumis protections do not exist for an insurer that has breached its duty to defend.

In J.R., Hartford was ordered by the court to pay the fees incurred by its insured's independent counsel. This was a lot of money -- $15 million. Hartford then sought reimbursement – from independent counsel -- of amounts that it believed were unreasonable and unnecessary. Hartford had a host of reasons why certain fees were unreasonable and unnecessary. The California appeals court put the kibosh on Hartford's effort: "To hold otherwise would effectively afford the insurer that has waived the protections of [Cumis] through its own wrongdoing more rights in a fee dispute with independent counsel than the insurer that has not waived such protections." The court held that "where a conflict arises with respect to defense fees or costs paid by an insurer in breach of its duty to defend to the independent counsel hired by its insured following this breach, the insurer must look to the insured, not independent counsel, to resolve the conflict."