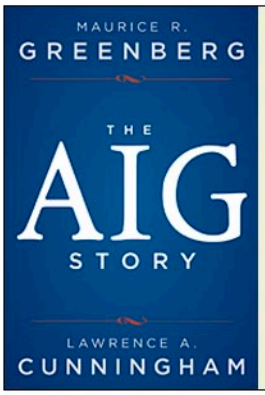
COVERAGE OPINIONS
Judicial Opinions Today - Impact On Counsel's Opinions Tomorrow

Effective Date:
February 27, 2013
Vol. 2, Iss. 5

The Cover-age Story



Declarations:
The *Coverage Opinions* Interview
With Maurice R. ("Hank") Greenberg

The AIG Story

by Maurice R. Greenberg and Lawrence A. Cunningham

I'm not a big fan of non-fiction books. I tried to think of the last time that I read a non-fiction book, that I didn't have to, and concluded it was seventh grade and a book about Joe DiMaggio. For me, reading is something I do to be entertained. And that means someone telling me a story.

So that explains why, despite finding it on the non-fiction aisle, I thoroughly enjoyed *The AIG Story* as much as I did. It is, well, a story. It has a plot, main character, supporting characters, villains, a climax and even ends on a cliff-hanger.

In *The AIG Story*, Maurice ("Hank") Greenberg, American International Group's former CEO for nearly 40 years, and George Washington University Law School professor Lawrence Cunningham, tell the story of AIG – from its rise in the 20th century to become an insurance organization with nearly $1 trillion in assets to its near-destruction in 2008 resulting in losses of billions of dollars for shareholders.

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In this issue:

Coverage Opinions Obituary: Remembering The Man Who Gave Insurers A Magic Buss

Last week the sports world mourned the loss of long-time Los Angeles Lakers owner Jerry Buss. The media tributes to Buss were filled with numerous descriptions of the man and his achievements: visionary sports team owner, creator of the Laker Girls, Ph.D., scientist, *bon vivant*, gambler, real estate mogul, hall of famer, philanthropist and admirer of (much) younger women. But none of the tributes to this Renaissance man discussed Buss's huge contribution to the world of insurance coverage: Jerry Buss v. Transamerica Ins. Co. (Cal. 1997). Only *Coverage Opinions* remembers this side of the man.

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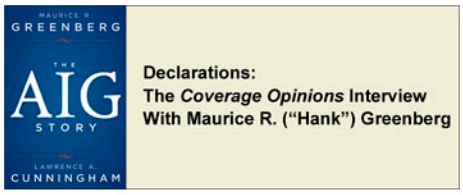

It is not easy to summarize in just a few words a book that uses over 260 pages, 575 endnotes (providing both source identification and elaboration), and an accompanying website of appendices, to tell a story, spanning 60 years, of one of the largest companies in the world. Not to mention that *The AIG Story* is in essence three stories.

First there is the story of AIG, the gargantuan insurance company that Mr. Greenberg built. Next there is the story of AIG that is not necessarily connected to insurance. In recent years, when AIG's name has been heard, the conversation has not always been about how to protect against one's life or an accident. More specifically, in 2005, AIG's name was frequently heard in tandem with an investigation by then New York Attorney General Eliot Spitzer. And since 2008, the words financial crisis have been more likely than insurance to share a sentence with AIG. *The AIG Story* has much to offer in telling these narratives. And there is still a third story – one that is just getting started.

For *Coverage Opinions* readers, dyed in the wool insurance professionals, the story of AIG and Mr. Greenberg's role in building the mammoth insurer, is naturally appealing.

The book is filled with tales of actions taken by Mr. Greenberg, starting in the early 1960s as Vice-President of C.V. Starr & Company (which founded AIG), that served to shape AIG's culture and business philosophy. Greenberg's approach to running an insurance company becomes apparent very quickly – "Because that's the way it has always been done" (my words, but his message) is not an acceptable reason for doing anything.

And nowhere is this more clear than in his cardinal principle -- making profits through underwriting and not simply relying on income from the investment of premium before losses and expenses are paid. As Greenberg saw it, the prospect of such investment income (the "float" as it is called) caused insurers to compete too aggressively for business, which resulted in them ignoring the risks – a recipe for an underwriting loss. To achieve underwriting profits, Greenberg was required to innovate on several fronts, including sales and marketing, pricing, underwriting standards, and the use of deductibles and reinsurance (and the rules for drinking at lunch). He stated that innovation was low on the insurance industry's list of priorities in the 1960s. Not to mention that insurance executives had a sense of entitlement and complacency. So not surprisingly, Greenberg ruffled some feathers.

Greenberg's ability to make changes, that were not always well-received, was tied to the support that he had from Starr's founder, Cornelius Vander Starr.

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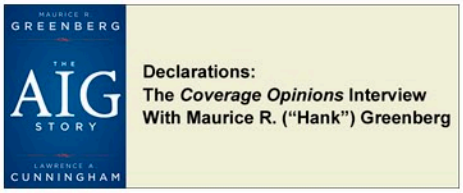
About The Editor

Randy Maniloff

Randy J. Maniloff is an attorney in the Philadelphia office of White and Williams, LLP. He concentrates his practice in the representation of insurers in coverage disputes over primary and excess obligations under a host of policies. Randy is the co-author of "General Liability Insurance Coverage: Key Issues In Every State" (Oxford University Press, 2nd Edition, 2012). For the past twelve years Randy has published a year-end article that addresses the ten most significant insurance coverage decisions of the year completed. Randy has been quoted on insurance coverage topics by such media as The Wall Street Journal, The New York Times, USA Today, Dow Jones Newswires and Associated Press. For more biographical information visit www.whiteandwilliams.com. Contact Randy at Maniloff@coverageopinions.info or (215) 864-6311.

The Cover-age Story



Starr recruited Greenberg from Continental Casualty and made him an immediate vice-president, something that did not sit well with everyone at the company. In the face of opposition to his innovations, Starr told Greenberg to steer the course as he thought best. Starr ultimately hand-picked Greenberg as his successor. While there are only a few pages devoted to the relationship between Greenberg and Starr, there is enough to make the point that Greenberg had deep respect and admiration for the man.

By the late 1960s Greenberg was president and chief executive officer of C.V. Starr. From there *The AIG Story* chronicles Greenberg's building of an insurance company from $300 million to $180 billion of market value. By telling the story through the use of brief descriptions of events and interesting anecdotes, it never once gets bogged down in minutiae or tedium -- something a book about an insurance company so easily could.

But the principal reason why *The AIG Story* reads so easily is that much of AIG's success is owed to Greenberg forging personal relationships. Story after story after story demonstrates how AIG objectives were achieved through Greenberg's use of in-person meetings. Meeting with a U.S. President, or traveling half-way around the world to meet with the leader of a country, comes across as just a day at the office for Greenberg. AIG is a company, but by telling its story through Greenberg's connections to people, the authors succeed in keeping it lively and interesting.

It would be easy to say that Greenberg had little choice but to focus on personal relationships since many of today's advances in communications did not exist when he was building AIG. But even today, with every communications gadget available to him, Greenberg says that his schedule is packed and he travels extensively to countries where he has been doing business for decades. He takes monthly trips to Asia and describes a weekend trip from New York to Oman the way most New Yorkers would a trip to the Hamptons. Insurance companies sell promises. While I'm sure Greenberg picked up the phone plenty, he is keenly aware that, when selling a product that cannot be seen or touched, it is critical for its executives to be.

The AIG Story does not say much about claims. But I was not expecting to see much. In Chapter 10 (The Domestic Front), the authors discuss the tort wars, as well as what became insurers' responsibility for the enormous costs associated with Superfund cleanups and asbestos related disease. While references are made to such claims concepts as trigger and sudden and accidental events, the crux of the discussion is macro --

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Randy Spencer's Open Mic

Insurance Coverage: Proof Of Life After Death

Not long ago a California federal court addressed a dispute between two insurers over which was liable for a collision that was allegedly caused by the negligence of a security guard hired to handle traffic for a funeral. A coverage lawyer's dream – you cause a coverage dispute on the way to your funeral.

Ordinarily death involves a certain finality. And insurance coverage should be no exception. After all, insurance is all about things that go wrong. And no matter how accident prone someone was in life, how much trouble can they cause after they've stopped moving? Well, a lot it seems. Despite death's reputation for finality, the dearly departed have a way of continuing to contribute to insurance coverage jurisprudence.

See Devillier v. First National Funeral Homes (La. Ct. App. 1964) (addressing coverage arising out of a funeral home dropping a casket during a funeral); Reed v. Netherlands Ins. Co. (E.D. Mich. 2012) (addressing coverage for cemetery for misplacing remains); Pasha v. Rosemount Memorial Park (N.J. Sup. Ct. App. Div. 2001)

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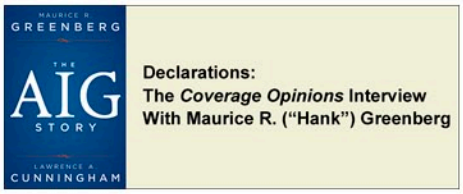

Declarations:
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how to address such wide-scale problems and whether private markets or the government offer better solutions.

While the making of AIG into a colossal insurance company is a very compelling story, it is likely that many readers are also interested in the story of AIG that is not about underwriting, expense ratios and developing international markets. No doubt many are interested in hearing about the 2005 investigation, by then New York Attorney General Eliot Spitzer, into an AIG-Gen Re reinsurance transaction that Spitzer claimed was invalid. While relatively minor in size, and a deal on which Greenberg says he may have spent 15 to 20 minutes on five years earlier, the Spitzer investigation quickly took on a life of its own. It resulted in Greenberg's resignation as chairman – a few months earlier than had been planned. Greenberg speaks very candidly about his feelings for those that he believes allowed the situation to end the way it did -- AIG's outside lawyers, auditors, outside directors and Spitzer, who he calls a "preening scion of outsized ambition."

In addition, *The AIG Story* offers much in the way of a behind the scenes look at the government takeover of AIG in 2008 in the wake of the financial crisis. Here too Greenberg minces no words when telling the story. Needless to say, it is a complex situation on several fronts. Greenberg compares the government's actions to one of a bank that lends you money to buy a home that you must repay, while the bank takes full title to the house. He states that the government would not have been able to exploit AIG the way it did if not for the disarray that plagued the company following the Spitzer situation in 2005.

Greenberg's take on the government takeover is that it was an opportunity for Treasury Secretary Henry Paulson, a former chairman of Goldman Sachs, to pay AIG Financial Products customers 100 cents on the dollar. Such customers, being Paulson's old firm and others in the clique of Wall Street firms and foreign banks, were spared a public tarnishing as recipients of a "bailout." Greenberg is incredulous that such customers, in the wake of a strained commercial situation, were not required to settle at a discount from face value – which could have extended as low as 40 cents on the dollar.

As for the third narrative in *The AIG Story*, only a handful of pages are devoted to it, but it is clear that Greenberg's story is far from over. Indeed, it is just getting underway. Even at age 87, Greenberg has embarked on making The Starr Companies a "powerful insurance and investment business with the sophistication and capital resources to insure any kind of property/casualty risk anywhere in the world." The Starr Companies are looking to develop new products, open markets,

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Randy Spencer's Open Mic

(addressing coverage for cemetery for lowering casket into grave containing three feet of water); Nationwide v. Garzone (E.D. Pa. 2009) (addressing coverage for crematorium for harvesting organs and selling them); Levine v. State Farm (Ohio Ct. App. 2005) (bad faith suit against auto insurer for declining certain funeral expenses as not "reasonable and necessary") (no word if it also said the funeral took too long); LeJeune v. Allstate (La. 1978) (addressing coverage for employer of hearse driver for death of (another) passenger in a hearse killed in an intersectional collision during a funeral); Rock v. Travelers (Cal. 1916) (addressing coverage for pallbearer that died of heart dilation from the strain of carrying a casket); and Bohreer v. Erie Ins. Group (E.D. Va. 2007) (addressing coverage for a crematorium for delivering ashes of an individual that were those of someone's pet).

As Haley Joel Osment so famously said: "I see dead people causing coverage disputes."

That's my time. I'm Randy Spencer.

Contact Randy Spencer at
Randy.Spencer@Coverageopinions.info

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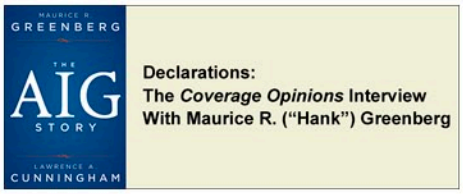

Declarations:
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and use a profit center model focused on accountability, expense control, risk analysis and generating an underwriting profit. Now where have I heard that model for an insurance company before?

Greenberg says that he spends almost every waking moment working on this new endeavor. At its core, insurance is about taking bets. And I wouldn't bet against Greenberg, even at this stage of his life, instilling enough of his DNA into The Starr Companies to create AIG-like success.

Another Greenberg story, that is just getting started, is Starr International's suits against the United States and New York Federal Reserve Bank challenging the government's take-over of AIG on the basis of the Fifth Amendment's prohibition against deprivation of property without due process of law. Speaking to CNBC, Greenberg said that he's busy building a company and would not have done it if he didn't think he would win. This he intends to do -- even if it takes five to ten years.

***Coverage Opinions:* You are known to have held your Profit Center Managers accountable for producing an underwriting profit. With this type of focus, I suspect that you always paid a lot of attention to claims. Can you talk about your approach to claims management at AIG and now Starr?**

Maurice R. Greenberg: Of course, we pay attention to underwriting profit; that is the foundation of our business. To do this, it is important to remember that the insurance business is made up of two facets. Those are underwriting and investing. There are insurance companies that only focus on investments, and they never achieve their goals. The only time that I would get involved with claims was if there was a controversy among claims managers belonging to our clients or working here. If there was a controversial claim, I would hear about it and take necessary steps.

It is important that you have a policy of having paid every claim that should be paid. Of course, many of the classes of business that we underwrite are complex so you have to go to the insurance policy to determine liabilities. That is why it is very important that the policy be very transparent as well as being clear.

CO: You are a lawyer by training but have built a career as an international business leader. How has your formal legal training influenced your management and business style?

MRG: Law has certainly helped me very much. In the end, insurance is a contract. Obviously an understanding of the law, regulations and contractual obligations is the foundation of the training of a lawyer. We focus on the importance of this when doing business.

CO: What advice would you give to someone starting out in the insurance industry today?

MRG: It is the same advice I would give to someone starting out in any industry. Make sure that you choose the right one that you want to spend your career in. While you learn all that you can, make sure that you work like hell. Success doesn't come easy, so be prepared to work hard. That is the price that we are asked to pay. Only after you give, will you start to succeed.

CO: I have to ask this question. You are almost always referred to in print as Maurice "Hank" Greenberg. Where does Hank come from?

MRG: When I was in high school, I played football. Hank Greenberg was a professional baseball player on the Cleveland Indians. So, anyone who played on a sports team at my school, especially with the last name Greenberg, was known as "Hank".

YESSS! No Coverage For City For Illegal Towing Fees

Illinois Federal Court: Restitution Is Not "Damages"

When reading coverage decisions I do not root for one side or another. I really don't. But that was certainly not the case when I was reading the Illinois District Court's decision in One Beacon America Ins. Co. v. City of Granite City, No. 12-156, 2013 WL 556533 (S.D. Ill. Feb. 13, 2013). At issue was the potential availability of coverage for Granite City for a class action suit involving towing fees. David Funkhouser alleged that the city wrongfully charged him a tow release fee for the return of his vehicle after the city towed it following his arrest. More specifically, he challenged a processing fee that was required to be paid before he could appear at the towing facility to pay the actual towing fee for the return of his vehicle. So it's a fee to pay a fee. Not to mention that the city employee that takes your money probably does not say thank-you (or even look up at you).

In my experience (and I bet yours too), city parking authorities are the bullies of local government. And I suspect they get away with it because the financial annoyance that they cause is typically in the too small to fight it category. So as I read One Beacon v. Granite City, I couldn't help but cheer for Funkhouser, this Robin Hood of motorists, to win his case. And the "icing on the case " would be a decision that Granite City would not have coverage for whatever it must pay.

I got my wish. Granite City lost the coverage case. When Granite City asked for a copy of the decision it was told that it appeared on a street sign that did not exist. But more than just an opinion to make you feel warm and fuzzy inside, One Beacon v. City of Granite City also makes a valuable coverage point.

In his underlying class action suit, Funkhouser sought the return of all monies paid for the alleged wrongful assessment of the processing fee. One Beacon filed a declaratory judgment action seeking a determination that it did not owe the city a duty to defend or indemnify, on the basis that its policies issued to the city covered only damages, which did not include an award of restitution.

This is an important issue and, in my experience, one that can sometimes be overlooked by insurers. In addition, the issue is not always tied to policy language, which insurers are usually stating is the test for measuring coverage. Instead, the issue is often discussed as a fundamental principle of what is insurable. Thus, insurers may have to overcome this potential argument to prevail.

But the Granite City court hardly broke a sweat reaching its decision. Relying on two analogous decisions from the Seventh Circuit, the court held: "In the case before this Court, the underlying suit seeks the return of a fee the City allegedly wrongfully charged Funkhouser and other similarly situated plaintiffs. As in both Level 3 and Ryerson, the underlying suit involves the potential 'restoration of an ill-gotten gain.' The Seventh Circuit has clearly held that this is not a 'loss' within the meaning of an insurance contract." The court also described its holding as restitution of monies wrongfully taken not con stituting "damages" within the meaning of an insurance policy. The lesson here is that, simply because a suit seeks money from an insured, it may not be loss or damages, as those terms are contemplated under an insurance policy.

Florida Appeals Court Squeezes Insurers: Must Appoint Separate Counsel For Each Insured

Court Creates Sunshine State For Defense Counsel

It is a question that I get asked regularly from clients: We have a duty to defend and there are four insureds (or any number greater than one). Do we need to retain separate defense counsel for each one? My answer is usually along the lines of: well, that depends on several things, and what does defense counsel say about his or her ability to represent all of them? After all, he or she has a lot at stake in the answer. As for guidance from courts on the question, there isn't much. And, in any event, as it is a fact specific issue,

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Florida Appeals Court Squeezes Insurers:

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there is no guarantee that any case law on the subject would be helpful.

This was the issue before the Florida Court of Appeal in University of Miami v. Great American Assurance Company, No. 3D09-2010 (Fla. Ct. App. Feb. 20, 2013). The court characterized it as one of first impression and held that each insured-defendant was entitled to separate counsel. The dissent disagreed. Oh did it ever. The dissenting opinion – containing more words than the majority's – starts out with this foreshadow of where it's headed: "The court today opens a new frontier in insurance litigation of benefit only to the legal profession."

The case arose as follows. Great American issued a commercial general liability policy to MagiCamp, which ran a summer swim camp for kids using the pool on the campus of the University of Miami. A four-year-old camper was pulled, unresponsive, from the bottom of the pool and was hospitalized with extensive injuries. His parents sued both MagiCamp and the University claiming the injuries were due to lack of supervision of the campers at the pool. The parents alleged that both MagiCamp and the University were each directly negligent. The University was an additional insured on MagiCamp's policy.

Great American hired one law firm to represent both MagiCamp and the University (the only defendants in the case). MagiCamp filed an answer alleging that the damages were caused, in whole or in part, by the fault of persons or entities other than MagiCamp. On the same day that MagiCamp filed its answer, the University advised Great American that there was a conflict of interest in the single representation of both MagiCamp and the University. The University demanded separate counsel of its choice. The insurer refused. Its position was that there was no conflict to justify separate counsel because MagiCamp was contractually bound to indemnify and hold harmless the University. The University retained its own counsel and, after the case was settled, brought an action seeking indemnification for the costs of its defense. The trial court granted the insurer's motion for summary judgment. The Florida Court of Appeal reversed.

The court described the question before it as: "[W]hether in this factual scenario, where both the insured and the additional insured have been sued, and the allegations claim that each is directly negligent for the injuries sustained, a conflict between the insured and the additional named insured exists that would require the insurer to provide separate and independent counsel for each. We answer the question affirmatively."

The court held: "In this case, single defense counsel was provided by Great American to defend both MagiCamp and [the University] and to present adverse legal theories. There exists no factual dispute, as evidenced by the record, that, in defense of both co-defendants, Great American's counsel would have had to argue conflicting legal positions, that each of its clients was not at fault, and the other was, even to the extent of claiming indemnification and contribution for the other's fault. In so doing, legal counsel would have had to necessarily imply blame to one co-defendant to the detriment of the other. On these facts, we believe this legal dilemma clearly created a conflict of interest between the legal defenses of the common insureds sufficient to qualify for indemnification for attorney's fees and costs for independent counsel."

Of course, when you phrase the question like that, the answer, that a conflict exists, warranting separate counsel, is hardly surprising. What makes the decision surprising to me is that it was reached despite there being no disputes over the availability of coverage or adequacy of limits.

The dissent set forth a host of reasons why it disagreed with the majority opinion. First, MagiCamp had no defense to the lawsuit and MagiCamp was contractually obligated to indemnify and hold the University harmless.

Second, while each party preserved the right to seek contribution or indemnity from the other, the University's counsel admitted at oral argument that neither the University nor Magicamp sought to prove liability of the other at any time during the course of the underlying litigation. As both knew, such a course almost certainly would have

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Florida Appeals Court Squeezes Insurers:

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been fatal." In essence, the dissent viewed the situation between the parties as one of a "paper conflict."

Third, "[a] liability insurer's contractual right to control the defense and indemnity features of its contract is indispensable to the protection of its financial interest in the litigation and thus the product itself. This meaningful contractual right should not be penalized merely because there exists the potential for insurer-selected counsel to become impermissibly conflicted in its representation."

Lastly, the dissent was "persuaded the rules governing the Florida Bar and the attendant threat of malpractice liability provide sufficient assurance that counsel appointed by an insurer will not continue to represent an insured in the event a conflict of interest interferes with counsel's ability to make independent professional judgments on behalf of the client."

The dissent provided the following ominous warning as a result of the majority decision, to afford dual insureds separate counsel, anytime an insured articulates a conflict in a pleading, whether or not real: "The future of dual insured claims should not be hard to see."

California Federal Court: Asbestos And The Products And Completed Operations Hazards

Asbestos: The Ketchup Of My House

I'm not a big asbestos coverage watcher, but I know a big decision when I see one. And that's what the California Superior Court's was in Plant Insulation Company v. Fireman's Fund Insurance Company, No. 06-448618 (Sup. Ct. Cal. Jan. 31, 2013). While Plant Insulation is only a Tentative Statement of Decision, it involves a significant enough issue to warrant discussion here.

Ironically, while asbestos is an effective fire retardant, it has burned through countless billions of insurer dollars. And that's what asbestos coverage litigation is all about – dollars. Coverage for asbestos claims is a topic that may seem to have left the barn ages ago. Now many coverage disputes focus on how much insurers must pay. But it's even more than that. Sometimes after insurers have paid what they believe to be the limits of their policies – which could be multi-millions -- and declared them exhausted, policyholders say not so fast and attempts are made to extract even more from the policies. It's kinda like ketchup in my house. I'll declare a bottle empty and prepare to place it in the recycling bin for collection (every other Tuesday in my neighborhood). Then my wife will come along, say not so fast, do some shake thing with the bottle, and manage to get a lot more out.

Plant Insulation is one of these not so fast cases. Plant Insulation distributed and installed asbestos containing insulation products. You know the drill. Plant was named as a defendant in a gazillion asbestos cases and over the course of two decades its numerous primary and excess insurers paid $125 million in defense and indemnity to resolve them. The insurers declared their policies exhausted. Plant read the leaves differently. Litigation ensued and a trial was held in mid-2012.

At the center of the controversy was whether the asbestos claims qualified as products or completed operations, such that they were subject to the policies' aggregate limits, or were "operations" and not subject to the aggregate limits. In other words, Plant wanted the claims to be characterized as operations so that they were subject to an occurrence limit but outside the reach of an aggregate cap.

The competing arguments went like this. "According to Plant, the completed operations and product hazard provisions apply only where the source or cause of the injury occurs after the operations have been completed or possession of the products relinquished. In contrast, the insurers contend that the policies unambiguously provide that the completed operations hazard and products hazard provisions apply where the bodily injury

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California Federal Court: Asbestos And The Products And Completed Operations Hazards:

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in a given policy period occurs after the operations have been completed or possession of the product has been relinquished. In other words, according to the insurers, the determinative factor is the timing of the injury rather than the source or cause of it."

"Under Plant's interpretation, once a claim is considered an operations claim under one policy—the policy in effect at the time the operations took place—the claim must be considered an operations claim under every subsequent policy, including policies issued long after the operations were completed."

Following a lengthy analysis, that included a discussion of policy language and several arguments raised by Plant, the court sided with the insurers. The court observed that its decision was consistent with others around the country that have weighed in on the issue, including the best known -- the Fourth Circuit's in In re: Wallace & Gale (2004). The court also reached a similar decision with respect to interpretation of the products hazard for purposes of the aggregate limit.

The Tentative Statement of Decision is 47 pages, and involves several issues, so all I can do here is scratch the surface. But as important as how the decision was reached (and the court spells that out), its message is its impact, both here and in other asbestos cases where categorization of claims, as products or completed operations (and subject to aggregate limits) versus "operations" (subject to an occurrence limit but not an aggregate limit), can be a significant factor in determining the extent of insurer liability. If Plant stands, it will be a significant asset for insurers that are or become involved in disputes over categorization of asbestos claims. Needless to say, in some cases, a win for the policyholder on this issue could result in significant additional impact on insurers' exposure under policies that they thought were exhausted.

Tanc Schiavoni of O'Melveny & Myers, who served as trial counsel for ACE Fire and ACE P&C for this aspect of the case, told me this about the significance of the products and completed operations rulings in the tentative decision: "The decision should serve as a guidepost to other courts struggling with the issue. By delivering certainty, this decision should significantly reduce coverage actions in an area that historically has been very litigious." Schiavoni said that the ACE companies reached a settlement with Plant after the trial and before issuance of the tentative decision.

The *Coverage Opinions* Obituary: Dr. Jerry Buss

Remembering The Man Who Gave Insurers A Magic Buss.

On February 18 long-time Los Angeles Lakers owner Jerry Buss passed away at age 80. Buss had been battling cancer for some time and died of kidney failure. The media tributes to Buss, and there were many, were filled with numerous descriptions of the man and his achievements: successful sports team owner, creator of the Laker Girls, Ph.D., scientist, *bon vivant*, gambler, real estate mogul, hall of famer, philanthropist and admirer of (much) younger women. But none of the tributes to this Renaissance man mentioned Buss's huge contribution to the world of insurance coverage: *Jerry Buss v. Transamerica Ins. Co*. (Cal. 1997).

There was one word that was used repeatedly in the tributes to describe Buss – visionary. Lakers legend Magic Johnson used that term. So too did NBA Commissioner David Stern. As well as an ESPN writer. The owner of the Los Angeles Clippers chose that term, as did former Laker Derek Fisher. Buss's vision was turning the Lakers into a show ("Showtime" as it was called) and developing new ways to monetize team ownership. Even his 3,500 guest private memorial service last week in L.A. was a Hollywood-style show, based on how it was described in the The Los Angeles Times.

But to readers of *Coverage Opinions*, Jerry Buss will also be remembered as the man behind the California Supreme Court's 1997 decision in Buss v. Transamerica Ins. Co. And not surprisingly, there is one word that best describes the law that his case made – visionary.

Here's the Buss story (brief obituary version). In addition to the Lakers, Buss owned other sports teams in Los Angeles, the Great Western Forum indoor arena and various cable television broadcasting networks. A dispute arose between Buss and H&H Sports over the provision of advertising for Buss. H&H filed a 27 count complaint against Buss. Buss sought coverage from Transamerica under CGL policies. Transamerica agreed to defend Buss on the basis of a defamation cause of action – the only cause of action out of 27 that Transamerica believed was potentially covered.

"I don't care how much it costs. Buss. Magic Buss." With apologies to The Who's Pete Townshend, Transamerica did care how much it cost. Transamerica reserved all of its rights, "including to deny that any cause of action was actually covered, and, '[w]ith respect to defense costs incurred or to be incurred in the future, . . . to be reimbursed and/or [to obtain] an allocation of attorney's fees and expenses in this action if it is determined that there is no coverage . . . . '"

Buss paid H&H Sports $8.5 million to settle the dispute. Transamerica paid Buss's Cumis counsel approximately $1,000,000 and a Transamerica expert concluded that the amount to defend the defamation cause of action was between $21,000 and $55,000.

Dr. Jerry Buss

The California Supreme Court held that, in a so-called "mixed" action, in which some claims are potentially covered and others are not – thereby triggering a duty to defend the action in its entirety – an insurer may seek reimbursement of defense costs for claims that are not potentially covered.

Admittedly, as a practical matter, the Buss rule can be difficult to apply. The court held that "[a]n insurer is only entitled to recover those defense expenses which can be fairly and reasonably allocated solely to non-covered claims for which there never was any potential for coverage." As the Buss Court itself noted, the task of allocating defense costs solely to claims that are not even potentially covered is at best extremely difficult and may never be feasible. However, in a situation where there was no duty to defend any claim, the Buss challenge, of allocating defense costs solely to non-covered claims, for which there never was any potential for coverage, is eliminated.

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Buss gave rise to many other states addressing whether an insurer can obtain reimbursement of defense costs following a determination that it had no duty to defend. Courts nationally are generally split on the issue.

John R. Brydon, of Brydon Hugo & Parker in San Francisco, who successfully argued the case for Transamerica before the California Supreme Court, told me this when reflecting on Mr. Buss and the decision: "His fame and success in business and sports touched many -- including those of us in the world of insurance law. I suspect his legacy will live on in ways he could have never imagined."

Despite the significance of the case, I was not able to locate a single story about Buss's death that mentioned it (not one). I brought this omission to the attention of Bill Dwyre, former Sports Editor for 25 years, and now columnist, for The Los Angeles Times. Dwyre himself wrote a wonderful tribute to Buss. He indicated that he passed my concern along to the business columnist folks. But so far I have seen nothing in the paper about Buss's contribution to the world of insurance coverage.

I've always wondered if Jerry Buss knew how significant his insurance case went on to become. Based on the many things keeping him busy, I suspect he didn't. And if he had any angst about the loss, it was probably short-lived. Transamerica won. But Buss had the Laker Girls.

Late-r Notice:
A Look At Decisions To Come

California Supreme Court To Address Coverage For "Implied Disparagement"

Cases addressing coverage for "implied disparagement" have been frequent of late. There is little doubt in this commentator's mind that the issue is currently one of the most important in the "personal and advertising injury" arena. The case to garner the most attention is Travelers Prop. Cas. Co. v. Charlotte Russe Holding, Inc., in which the California Court of Appeal in 2012 held that a retailer's price markdown caused significant and irreparable damage to and diminution of a manufacturer's trademark and that was enough to implicate "personal and advertising injury" coverage for disparagement of goods. The court stated: "Versatile's [manufacturer] pleadings alleged that the People's Liberation brand [of jeans] had been identified in the market as premium, high-end goods; and that the Charlotte Russe parties [retailer] had published prices for the goods implying that they were not. It therefore pled that the implication carried by the Charlotte Russe parties' pricing was false. That is enough."

In Hartford Cas. Ins. Co. v. Swift Distribution, Inc., issued just four months after Charlotte Russe, the California Court of Appeal distinguished Charlotte Russe from a case involving underlying patent and trademark claims from an insured's copycat product. But more than just distinguishing Charlotte Russe, the Swift court was harshly critical of it. Addressing Charlotte Russe, the Swift Distribution Court stated: "We fail to see how a reduction in price—even a steep reduction in price—constitutes disparagement. Sellers reduce prices because of competition from other sellers, surplus inventory, the necessity to reduce stock because of the loss of a lease, changing store location, or going out of business, and because of many other legitimate business reasons. Reducing the price of goods, without more, cannot constitute a disparagement; a price reduction is not 'an injurious falsehood directed at the organization or products, goods, or services of another[.]"

Given how commonplace deep discounting in retail stores is, the potential consequences of Charlotte Russe are readily apparent. On February 13, the Supreme Court of California agreed to hear an appeal in Swift Distribution. While the court earlier declined to hear an appeal in Charlotte Russe, there is little doubt that the case about the price of jeans will be front and center before the California high court.

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