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

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The Cover-age Story

The Chief Financial Officer of Major League Baseball surely has a lot on his plate. And that is no doubt the case no matter what inning it is. But the bases must be particularly full just one week before the start of the season. Despite opening day right around the hot corner, Jonathan Mariner, Major League Baseball's Executive Vice President and Chief Financial Officer in the Office of the Commissioner, was kind enough to find the time for a little chatter with *Coverage Opinions* about risk and insurance issues facing the national pastime.

The job duties of MLB's Chief Financial Officer are many--including risk management. Baseball is an inherently risky sport. And I'm not talking about the suicide squeeze. It is not hard to make a long list of risk and insurance issues facing Major League Baseball. After all, in 2012 nearly 75 million fans came together to watch games in 30 stadiums. Oh, and a few beers were sold along the way. And the game day risks are just one part of it. There are also numerous financial risks attendant to such a huge and very high profile enterprise.

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Coverage Opinions Trivia

Many baseball stadiums these days are named for corporations. It takes a lot of money to purchase the naming rights to a stadium. Insurance companies have a lot of money. And they also operate in a market where name recognition is very valuable. So it is not surprising that three of the 30 stadiums in Major League Baseball are named for insurance companies (and only eighteen stadiums are named for any company). What are the three insurance company-named stadiums? Answer inside. [Sorry, no cash prize for being right.]

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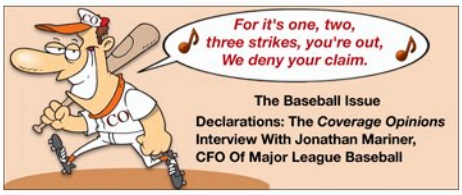
The Cover-age Story



Risk management is just one of Mr. Mariner's responsibilities. He also oversees Major League Baseball's central office budgeting, financial reporting and treasury, is responsible for overseeing all Club-level financial reporting through the team CFOs, administers MLB's $1.5 billion league-wide credit facility and provides updates at Owners' Meetings on the industry's financial health. [And let's face it, it's gotta be one of the coolest jobs in the world and there must be some incredible perks.]

Mr. Mariner has had a long career as an executive in professional sports. He previously served as EVP and CFO for the Florida Marlins Baseball Club, VP and CFO for the Florida Panthers Hockey Club and VP and CFO for Pro Player (now SunLife) Stadium.

Mr. Mariner currently serves on corporate boards of directors, as well as on numerous foundations, charitable and advisory boards. He also chairs Little League Baseball's audit committee and co-chairs its investment committee. Mr. Mariner holds a B.S. degree from the University of Virginia, an M.B.A. from Harvard Business School and is a former Certified Public Accountant.

Jonathan, thank you so much for taking the time to speak with Coverage Opinions during this hectic period. Let me start with an obvious lead-off question: What are some of the biggest risks facing Major League Baseball where risk management can play a part in addressing? Surely some of these are unique to MLB or professional sports.

Given our unique standing as "America's Pastime," the fact that our games are all televised (many nationally) and attended by tens of thousands of fans, we are always keenly aware that we could be a prime target for some sort of physical attack or mischief.

Another significant risk is related to the fact that many of our ballparks are located in high natural hazard zones susceptible to earthquakes, floods, hurricanes, tornadoes, etc. In addition to the risk of significant physical damage, there is the challenge of evacuating large numbers of spectators in the event that something occurs requiring the movement of mass numbers of people.

How does MLB use insurance and risk transfer to address its risks?

We purchase various insurance policies on a league-wide basis to protect against the adverse financial impact of different loss scenarios. These could be third party liability, first party property or financially related loss transfer mechanisms.

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About The Editor

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

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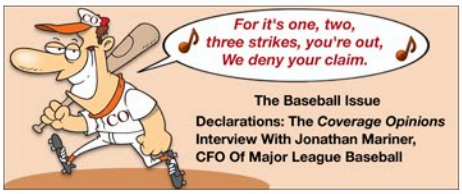

We also transfer risk contractually to third party service providers in areas such as concessions and security, as well as licensees of our intellectual property.

Are there challenges to finding insurance for some of the unique aspects of MLB's operations?

Given the size of player compensation contracts, there are limited options in the insurance market to insure against the risk of player disability. Somewhat related, there are also few insurance carriers writing professional sports Workers' Compen sation these days.

Risk management is about much more than insurance. What are some of the non-insurance aspects of MLB's risk management?

We have fostered a culture of best practices sharing across our league where our Clubs meet and discuss what works and doesn't work in managing different risk areas, such as Workers' Compensation and General Liability. We are also working with FM Global, the property engineering/loss prevention leaders in the industry, on ways to strengthen our ballparks and other facilities against the risk of physical damage and business interruption/loss of income. This involves anything from flood emergency response planning in Cincinnati to enhanced roof fastening techniques in Miami.

When I think about MLB's risk I constantly ask myself one question: how do MLB and the individual teams share risk in those situations where both may be involved?

It is a very rare occasion where both Major League Baseball and an individual Club are both involved on opposite sides of any specific litigation. In that rare instance we work collaboratively to resolve it in the most efficient and expeditious manner possible. As you might imagine, the Club General Counsels have a terrific working relationship with the Legal leadership at the league level. Furthermore, in instances where multiple Clubs have been involved in the same litigation, we have successfully avoided conflicts of interest and oftentimes are able to arrange joint legal representation cutting down on legal expenses and ensuring full attention and energy is paid to defeating the plaintiff versus pointing fingers at one another.

Does MLB play a role, such as setting standards or providing guidance, with the individual teams' risk management practices?

Aside from fostering best practice sharing amongst the Clubs, at the league level we work with our best in class risk management service providers to develop

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Randy Spencer's Open Mic

K.C. Royals's Mascot's "Hotdog Launch" Gone Bad

Baseball is the national pastime. Litigation is America's second national pastime. And since things don't always go as planned for some fans that head out to see the Boys of Summer, sometimes these two pastimes meet head on, like Pete Rose and Ray Fosse getting acquainted during the 1970 All-Star Game. An excellent example of this coupling came just two months ago from the Missouri Court of Appeals in Coomer v. Kansas City Royals Baseball Corporation: "Everyone who participates in or attends a baseball game assumes the risk of being hit by a ball, because the risk of being hit by a baseball is a risk inherent to the game. However, the risk of being hit in the face by a hot dog is not a well-known incidental risk of attending a baseball game. Consequently, a plaintiff may not be said to have consented to, and voluntarily assumed, the risk merely by attending the game."

Here is where the hotdog part comes in. An outing to a Royals game did not go well for John Coomer.

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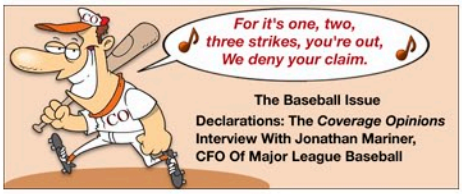

various guidelines and recommendations ranging from template insurance requirements for various types of agreements, to ballpark security protocols to ensure the safety of our employees and fans.

What were you thinking when the lights went off during the Super Bowl this year? I suspect that while everyone else was marveling at the unique spectacle, and eating more nachos, you had more serious things on your mind.

Did they test the back-up power beforehand and were there contingency plans in the event full power was never restored? How much event cancellation insurance did they purchase? Also, were they prepared to monitor the seating bowl, concourse area, restrooms, etc. to prevent panic and fan injury?

I'm having some buddies over this weekend to watch some old games. Can you please grant me Major League Baseball's express written consent to transmit or rebroadcast the pictures, descriptions and accounts of those games.

It is solely intended for the entertainment of my audience.

Very funny. As long as you paid for the licensing rights, you should be fine!

How often do people ask you for tickets [and can I get 2 for the All-Star Game in New York this year?]

Actually, I get asked more times for help in finding jobs and summer internships for friends' kids than asked for tickets. And, it's much easier to help them with tickets!

With a last name of Mariner were you destined for a career as a baseball executive? You must get a lot of comments about that.

Very few people miss the opportunity to comment! When I worked for the Florida Marlins, people would routinely transpose the names and ask me how the Mariners are doing. In fact, as a joke, rather than wearing my "Marlins" jersey with my name "Mariner" on the back, I had a Mariners jersey made with the name "Marlins" on the back! That got a few laughs!

Jonathan Mariner

Randy Spencer's Open Mic

Between innings the Royals's mascot, Sluggerrr, did the Hotdog Launch, an every-game event where he throws 20-30 dogs into the stands – some by air gun and some by hand throw. One of the hotdogs that Sluggerrr threw hit Mr. Coomer. He sustained a serious eye injury. [I checked out Sluggerrr's website. He's adorable. He doesn't look like he would hurt a fly. There is even an action shot of him doing the Hotdog Launch. I'm now following him on Twitter: @Sluggerrr.]

The case went to trial and a jury found Sluggerrr to be zero percent at fault and Mr. Coomer one hundred percent at fault. Yeah Sluggerrr! However, in January the Missouri Court of Appeals reversed, holding, as noted above, that it was error for the trial court to charge the jury on primary implied assumption of the risk when it comes to a flying hotdog.

What's most incredible about the case is that the Royals's record in 2009 was 65-97. The incident took place at a game in September. By that point in the season I am amazed that the Royals even had 30 people in the stands.

That's my time.

I'm Randy Spencer.

Randy.Spencer@Coverageopinions.info

Idaho Supreme Court: Stadium Operator Can Be Liable For A Foul Ball Injury; Catching A Ball At A Polo Match

Many years ago when I was living in Spain I was invited to attend a polo match. As I sat and watched the match a polo ball left the field of play close to where I was sitting. I immediately sprang from my seat, ran toward the ball, grabbed it and then held it up over my head in a celebratory stance. Apparently that was not the way to react to a polo ball that enters the stands (especially when some member of the Spanish royal family is in attendance). That was my last invitation to a polo match. But do I care? No. Would I do it again? In a heartbeat. Do I remember anything about the polo match except getting that ball? Nope. Do I still have the ball all these years later? I sure do (but it's in a box in the attic that my wife has lately been threatening to throw out unless I can prove the need for the contents).

My reaction to the polo ball leaving the field of play was purely instinctive. If you are a baseball fan you are hard-wired to want to catch a foul ball. It's just that simple. I was Pavlov's pooch that day. That ball was kibble.

[We are all Steve Bartman. I can't imagine that anyone among us would not have reached for that ball. At that moment the importance of the game ceased to exist and the hard-wiring to take home the ultimate baseball souvenir took over. And I'm not convinced that Moises Alou would have made the catch anyway. Maybe. But it's no certainty. If none of this makes sense Google it. It is one of the game's greatest stories.]

As much as everyone wants to catch a foul ball, sometimes people catch them in the wrong place, such as the head. I have no statistics on this, but I suspect that 99.9% of foul ball catches end in happy memories for the catcher. In fact, you are probably at a greater risk for injury from a melee with other fans over the ball than from the ball itself. But despite the virtually certain safety that comes from watching a baseball game, injuries, some serious, do occur when a ball enters the stands. And those injured by the priceless souvenir have been known to swing for the fences in the pursuit of financial recovery.

In general, fans seeking damages for injuries sustained by a foul ball have a very difficult time recovering from the stadium operator (at least that's the formal legal conclusion; perhaps teams sometimes make accommodations in specific cases).

The majority of courts that have confronted the question have adopted the "Baseball Rule," which limits the duty owed by baseball stadium operators to spectators injured by foul balls. The Baseball Rule generally provides that a baseball stadium operator is not liable for a foul ball injury as long as it screens the most dangerous part of the stadium and provides screened seats to as many spectators as may reasonably be expected to request them.

[Hmmm. So let me get this straight. The next time I go to a Phillies game, and have bad seats, I can say that I'm nervous about being hit by a ball and ask to be moved to a seat that is protected by netting, which will presumably get me behind home plate or along the first or third base lines.]

Despite the Baseball Rule being the standard adopted by the majority of jurisdictions, the Supreme Court of Idaho recently rejected it and the protection it offers to stadium operators. Not that Major League Baseball probably has any expansion plans in Idaho, but this decision certainly did not help Boise's chances of getting a major league franchise.

In Rountree v. Boise Baseball, LLC, No. 38966 (Idaho Feb. 22, 2013), the Idaho high court addressed the duty of care owed to Bud Rountree, a 20 year season ticket holder of the Boise Hawks, a minor league team affiliated with the Chicago Cubs. Mr. Rountree attended a game with his wife and grandchildren and spent time in various parts of the stadium. While Mr. Rountree was in a part of the stadium known as the Executive Club, speaking with someone and not watching the game, he was struck by a foul ball. As a result he lost an eye.

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Idaho Supreme Court:

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The Executive Club is covered by horizontal netting but one of the only areas in the stadium not covered by vertical netting.

Mr. Rountree filed suit and the case made its way to Idaho Supreme Court on the question whether Idaho should adopt the Baseball Rule. The court looked at the competing arguments and declined to do so, choosing instead to make a call to the bullpen: the legislature. "No … link between baseball and spectator injuries has been shown. In fact, Boise Baseball admits that at least for 'seven seasons[, Mr. Rountree's] accident is the only time a spectator has suffered a 'major' injury because of a foul ball' at Memorial Stadium. The rarity of these incidents weighs against crafting a special rule. There is no history of accidents that we can look to, and draw from, to sensibly create a rule. Furthermore, Boise Baseball has not provided any broader statistical evidence regarding the prevalence of foul ball injuries in general, and-assuming they are so prevalent—how varying stadium designs might prevent them. Without this information, drawing lines as to where a stadium owner's duty begins, where netting should be placed, and so on, becomes guesswork. These kinds of questions are appropriate for the Legislature because it 'has the resources for the research, study and proper formulation of broad public policy.' Declining to adopt the Baseball Rule leaves policy formulation to the deliberative body that is better positioned to consider the pros and cons of the issue."

As a result of the Idaho Supreme Court's rejection of the limited duty owed under the Baseball Rule, Mr. Rountree's case will proceed under the general duty of care owed to a business invitee, that is, the landowner owes a duty to keep the premises in a reasonably safe condition or to warn of hidden or concealed dangers.

Postscript: In the "What are the odds of that?" category, just two weeks ago the Court of Appeals of Texas applied the Baseball Rule in the context of a claim by a fan that sustained an orbital fracture and corneal laceration upon being hit by a batting practice home run at a Houston Astros game. The court held: "[W]e conclude that the baseball rule applies to the facts presented here. On both negligence and premises liability, the Astros met its summary-judgment burden to prove that it complied with its limited duty to provide an adequate number of screened seats. Additionally, regardless of whether the Astros had an additional duty not to distract spectators, the summary-judgment evidence demonstrates that the Astros did not distract Martinez and thereby increase her risk of injury." Martinez v. Houston McLane Company, LLC (Houston Astros Baseball Club), No. 01-12-433 (Tex. Ct. App. Mar. 12, 2013).

Mascot Liability: The Phillie Phanatic Gets His Day In Court

This picture of the Phillie Phanatic, reading "General Liability Insurance Coverage: Key Issues in Every State," was intended as just a Sophomoric stunt when I handed the book to him and asked him to pose for the picture. Except after the picture was taken he started reading the book and didn't want to give it back. After a minute I was like, "OK buddy, I'll take that back now. If you want one there are plenty for sale on Amazon." But no can do. He wasn't letting it out of his furry little fingers.

And no wonder the Phanatic wants to read about insurance coverage. He needs it. Most of his job duties would get him arrested if not for the fact that he is green and furry. While that may keep the Phanatic out of some courtrooms, it cannot keep him out of all. This the Phanatic learned in 2003 when he was named as a defendant in Kohri v. The Phillies, LP and The Phillie Phanatic, Court of Common Pleas of Philadelphia County, May 2003,

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Mascot Liability:

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No 0583. [I am not making this up. You can check Westlaw for yourself.]

The Phanatic's troubles came about in June 2001 when Plaintiff, along with his wife and son, were attending a Phillies–Braves game at Veteran's Stadium. They were seated behind the Phillies dugout. The trial court described the situation as follows: "During the bottom of the seventh inning of a close game, [plaintiff] was struck in the right eye by a foul ball causing severe injury. At the time of the incident, the Phanatic was on top of the dugout some 30 feet in front of plaintiff to the right. Some so-called Atlanta fans were yelling at the Phanatic to get out of the way so they could see the field of play. The plaintiff contended that a commotion was created causing the plaintiff to direct his attention to it and away from the game. The foul ball struck him, he asserts, because his attention was diverted toward the commotion. The Phanatic never touched nor harassed the plaintiff."

The Phanatic defended the suit on the basis of the "no duty" rule, which the Pennsylvania Superior Court has held means that "operators of a baseball stadium and other amusement facilities owe no duty to protect or to warn spectators from common, frequent and expected risks adherent in the activity in which they are engaged." The trial court agreed and dismissed the action.

But here's the interesting part. The Plaintiff attempted to circumvent the "no duty" rule because, he asserted, it was the Phanatic that was the source of commotion in the stands that caused the Plaintiff to divert his attention from the game. The trial court did not agree: "[A] diversion which may have momentarily directed the plaintiff away from the game does not create an exception to the no-duty rule. Inherent in the rule is that a spectator in the stands watching a game at all times must be aware that there is a risk of being struck by a foul ball. Fan activity, diverting one's attention away from the game, whether precipitated by the Philly (sic) Phanatic or fights by fans, does not diminish the fact that the risk of being hit still exists and the duty rests upon the spectator to avoid it. Under Pennsylvania law, when a person attends a baseball game and sits in the stand he or she must be forever vigilant and cannot use the excuse that the spectator's attention was drawn from the field of play due to activities which are generated by the crowd."

The trial court's decision was summarily affirmed by the Superior Court. The Plaintiff sough review by the Pennsylvania Supreme Court but the court declined to hear the appeal. [585 Pa. 698 (2005)]. Can you imagine oral argument of this case before the Pennsylvania Supreme Court? There's the Phanatic, sitting at counsel table, sticking out his tongue anytime Plaintiff's counsel says something that he does not like. Then, when the argument is over, the Phanatic goes up to the bench and does his trademark rub of any bald justice's head. Aaah, what could have been.

Little League Baseball + Over-Eager Grown-Ups = Insurance Coverage Disputes

Chico's Bail Bonds Knew What It Was Doing

It has to be one of the most innocent things in the world – Little League baseball. Tiny people dressed like and emulating their big-league idols. The kids are just out to have fun, unbothered when they swing at and miss a ball that is in another zip code or one goes through their legs or over their heads. It will all be forgotten by the time they get to McDonalds for a post-game Happy Meal.

The best-known movie portrayal of Little League baseball is surely The Bad News Bears, where a team made up of the worst of the worst players wore jerseys blazoned with Chico's Bail Bonds across the back. Of course, the choice of a bail bondsman, as the sponsor of a Little League team, was for comedic effect–and it fit perfectly with everything about the hapless team, especially Morris Buttermaker, the Bears's alcoholic manager played brilliantly by Walter Matthau.

But would it be so crazy for a real bail bondsman to actually sponsor a Little League team? After all, despite the sweetness of Little League baseball, some in attendance may leave the game with a need to be sprung from the pokey.

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Little League Baseball:

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News accounts are filled with stories of violence at youth games at the hands of grown-ups. And besides possible criminal liability, civil litigation may not be far behind. And when that happens, a coverage dispute may not be far behind that. For some, attending a Little League game can result in a need for coverage counsel.

Examples of coverage litigation, arising from the actions of over-eager grown-ups at youth sports events, are abundant. Here are two of my favorites involving baseball.

Baggett v. Allstate Ins. Co., 39 So. 3d 666 (La. Ct. App. 2010)

What not to allegedly do at a Little League game – sit behind home plate, in the lowest row of the bleachers, and tell the catcher, who is someone else's son, that he is making too many mistakes. And especially don't do it six or seven times in one inning. And doubly especially don't do it if you need a cane to walk. Well, the catcher's father found a way to quiet the guy down. You can imagine how. Addressing whether the expected or intended exclusion, contained in the catcher's father's homeowners policy, applied to preclude coverage, the court held that a genuine issue of material fact precluded entry of summary judgment. "[T]here is a question whether [the catcher's father] acted in self-defense/defense of another (his son), rather than as an aggressor. Was his act a spontaneous and instinctive move to defend his minor son from a perceived attack by an adult, or did he intend his act or the injury that resulted or may reasonably have been expected to result from it?"

Ellison v. Kentucky Farm Bureau Mut. Ins. Co., No. 2009-CA-116, 2010 WL 2696289 (Ky. App. Ct. July 9, 2010)

Something else not to allegedly do at a Little League game, in particular when you are the league president – assault a spectator causing multiple facial fractures, including a broken nose, septum and permanent nerve damage. And, in particular, avoid doing this when the spectator is Grandmom Nellie – a player's nana. The league president pleaded guilty to fourth-degree assault and first-degree wanton endangerment. The jury in a civil trial against the league president concluded that punitive damages were appropriate. The court held that no coverage was owed to the league president, under his homeowners policy, because his actions were not an "accident."

2nd Circuit: Policyholder Gets Its Sought-After Interpretation Of The "Sub-Contractor" Exception

I used to think that the pollution exclusion was a heavily litigated coverage issue and one on which policyholders and insurers could not even come close to seeing eye to eye. Then along came the surfeit of litigation over coverage for construction defects. It turns out that the pol lution exclusion was in the minor leagues. By my estimation, construction defect has now surpassed the pollution exclusion in terms of litigation frequency. And while policyholders and insurers have never seen eye to eye on the pollution exclusion, at least there have generally been only two different interpretations that separate them. I've lost count of the number of different rationales that parties and courts have raised when addressing coverage for construction defects.

Ironically, at least as a starting part, policyholders and insurers generally agree on something: the cost to repair or replace an insured's defective completed work product is not covered. That is either because defective workmanship is not an "occurrence" or the operation of the "your work" exclusion. While these outcomes may be the same, which rationale a court employs to reach it can make a world of difference. The reason being that the "your work" exclusion also contains the "subcontractor exception," which restores coverage for damage to an insured's own work that was caused by the operations of a subcontractor.

However, many courts hold that, if damage to an insured's defective workmanship is not covered, because it does not qualify as an "occurrence," then the insured has not satisfied the requirements of the insuring agreement. As a result, coverage is excluded and the court's analysis ends there,

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2nd Circuit: - *Continued*

without any need to address the potential applicability of policy exclusions. In other words, by resting its decision on the insured's failure to satisfy the insuring agreement, it is unnecessary for the court to reach the "your work" exclusion. Translation-policyholders are denied the opportunity to invoke the "subcontractor exception."

Policyholders have long argued that this interpretation makes no sense as it begs the question what's the point of the "subcontractor exception?" While the Second Circuit's decision in Scottsdale Ins. Co. v. R.I. Pools, No. 11-3529 (2nd Cir. Mar. 21, 2013) does not address this issue in detail, it seems to adopt the policyholder's argument–allowing the existence of the "subcontractor exception" to play a part in the determination whether faulty workmanship qualifies as an "occurrence."

R.I. Pools had installed pools in the summer of 2006. In 2009, nineteen customers complained of cracking, flaking, and deteriorating concrete, causing the pools to lose water and, in some cases, rendering them unusable. R.I. Pools employed outside companies to supply concrete and to shoot the concrete into the ground. Three customers filed suit.

R.I.'s insurer filed suit seeking a declaration that it had no duty to defend or indemnify. The District Court agreed that neither duty was owed, concluding that "defects in the insured's workmanship could not be considered 'accidents,' therefore were not within the policy definition of 'occurrences,' and accordingly were not within the coverage."

The Second Circuit reversed, concluding that the District Court did not consider whether the defects came within the "subcontractor exception" to the "your work" exclusion when deciding that defects in the insured's own work do not qualify as an "occurrence." "The district court's analysis essentially read the subcontractor exception out of the policies."

Of note, the Second Circuit did not seem to disturb existing Connecticut law that defects in the insured's own work do not qualify as an "occurrence." Rather, the Court of Appeals's decision was that, when the work of a subcontractor is at issue, a different analysis of the "occurrence" issue is required. Thus, the insured was not precluded from reaching the subcontractor exception in a state that otherwise holds that an insured's own defective workmanship does not qualify as an "occurrence."

Pennsylvania Superior Court: Insurer Has No Duty To Advise Insured About Coverage

There are two things that I am certain about, and one I am not, when it comes to the Pennsylvania Superior Court's decision in Albert v. Erie Insurance Exchange, No. 1780 EDA 2012 (Pa. Super. Ct. Mar. 20, 2013). I am certain that the decision involves policy language that has rarely been addressed by a court. I am also certain that the decision, as it relates to the specific issue before the court, is of minimal importance. But what I do not know is if the decision could end up being quite important in the context of a broader and more general issue.

Cathy Albert was involved in a motor vehicle accident that resulted in litigation. Erie Insurance provided her with a defense under an automobile policy. In addition to a defense, the policy also provided "reasonable expenses anyone we protect may incur at our request to help us investigate or defend a claim or suit. This includes up to $100 a day for actual loss of earnings."

[We've all seen this language in liability policies. And we've all glossed over it, like the nuclear exclusion and those state specific endorsements that amend the cancellation condition. But as Warhol said, all insurance policy provisions have fifteen minutes of fame. By the way, if $100 per day for loss of earnings seems stingy, I recently saw a policy that limited the wage reimbursement to $50 per day. That's less than minimum wage based on an eight hour workday.]

Erie requested that Albert appear for a deposition. She did and incurred lost wages of $114.00 plus travel expenses. She claimed that Erie failed to reimburse her. Albert filed suit. Of course, the case wasn't really about $114. She sought to certify a class of other similarly situated folks.

The problem for Albert was that she never asked Erie to reimburse her. However, she asserted that, by appearing at the deposition, Erie became obligated to reimburse her,

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Pennsylvania Superior Court: - *Continued*

the absence of a request notwithstanding. Albert asserted that Erie's failure to do so was a breach of the express policy terms.

The trial court disagreed. And so did the Superior Court: "The trial court correctly noted that 'the contract does not require Erie to advise [Albert] of the terms of the policy which she read and signed.' Furthermore, Paragraph 13 of the policy section governing 'Rights and Duties—General Policy Conditions' provides that 'when a loss happens,' the policyholder must notify the insurer or its agent. Accordingly, the trial court held that 'while the contract imposes no duty on Erie to take the initiative, ... it does impose on the policyholder a duty to come forward with his or her claim.'"

The court rejected Albert's argument that, because Erie appointed an attorney to represent her, and because it was the actions of counsel that caused her to incur the expenses, counsel had a duty to disclose reimbursement rights to her. While the court acknowledged that "insurance is an area in which the contracting parties stand in somewhat special relationship to each other," the court concluded that "[e]ach insured has the right and obligation to question his insurer at the time the insurance contract is entered into as to the type of coverage desired and the ramifications arising therefrom. Once the insurance contract takes effect, however, the insured must take responsibility for his policy."

On one hand, because the issue in Albert is quite limited, it would be easy to conclude that so too will be its impact. But will it? Does the decision also stand for the proposition that an insurer does not have an affirmative obligation to advise insureds about the possibility of coverage for which there has been no specific request or tender? If an insured seeks coverage under one specifically identified policy, is the insurer obligated to consider coverage under other policies that it may have issued to the insured? Is an insurer obligated to advise parties, who did not themselves ask, that they may be additional insureds under a policy? While Albert is a narrow decision on its facts, it is likely to be examined in the future in a case that involves the issue in a broader context.

Coverage Opinions Trivia: Answer

The three Major League Baseball stadiums that are named for insurance companies:

Great American Ball Park (Cincinnati Reds)

Progressive Field (Cleveland Indians)

Safeco Field (Seattle Mariners)

Coverage Opinions is a bi-weekly (or more frequently) electronic newsletter reporting and providing commentary on just-issued decisions from courts nationally addressing insurance coverage disputes. Coverage Opinions focuses on decisions that concern numerous issues under commercial general liability and professional liability insurance policies. For more information visit www.coverageopinions.info.

Late-r Notice:
A Look At Decisions To Come

Supreme Court Of Illinois: Are TCPA Damages Penal And Uninsurable?

There is only one thing more annoying than a junk fax: a decision about coverage for junk faxes. TCPA go away. But it won't. Surely the commercial general liability policy exclusion for Distribution of Material in Violation of Statutes is having a big impact on the availability of coverage and, hence, the desire of plaintiffs' attorneys to continue to game the system in some situations. But it has not turned the machine off all together. Junk faxes keep coming, cases are filed and coverage is sought.

In 2012 the Appellate Court of Illinois held in Standard Mutual Ins. Co. v. Lay that damages available under the Telephone Consumer Protection Act for sending out unsolicited fax advertisements - $500 per occurrence – were not meant to compensate for any harm. This, the court reasoned, was because the cost to a recipient of an unwanted fax (a sheet of paper, some toner and the time to take it from the fax machine) is far below $500.

Thus, the damages awarded are a penalty to the sender, in the nature of punitive damages, and, hence, uninsurable as a matter of Illinois law and public policy. The majority of federal courts have found otherwise: TCPA damages are remedial and not punitive.

The case is now before the Supreme Court of Illinois. Insurance Law360 reported that oral argument was held last week. According to Law360's reporting, there were several issues addressed during the argument, including how to reconcile the fact that the TCPA separately allows for treble damages for willful violations. In other words, so the argument goes, doesn't that mean that the $500 damage award must be for something other than punishment? Also according to Law360, counsel for the insured argued that the question should be addressed in terms of the specific conduct at issue (as the insured allegedly hired a company that promised to send fax ads legally) and not as a general statement that the $500 damage award for each violation of the TCPA are uninsurable punitive damages.