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

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The Cover-age Story

June is, of course, the time for weddings. And I can hardly believe my good fortune this month. I have none to go to.

Weddings are expensive and fraught with umpteen things that can go wrong. So it makes perfect sense that the insurance industry offers wedding insurance. Just think about the cost of the food for all those no-show guests because your sports team was unexpectedly in a big playoff game on your big day.

According to a recent Reuters story, wedding insurance is celebrating its 20th anniversary. Reuters told the story of a bride, whose photographer had a memory card fail, resulting in the loss of all pictures of the wedding party. She had wedding insurance and it paid the cost, up to $2,000, to re-shoot the wedding party photographs.

According to Reuters, vendor and weather issues are the main culprits. In 2012, 58% of Travelers's claims were related to problems with the photographer or videographer, 21% with the caterer, 11% with the disc jockey and 5% with the wedding planner. Premium runs between $320 and $420 for a $25,000 wedding.

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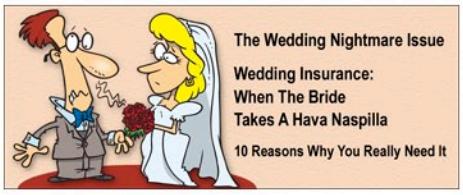
In this issue:

Declarations: The *Coverage Opinions* Interview With Linda Kornfeld and Jerry Oshinsky

For years a man from Hoboken has been saying that if you can make it in New York you can make it anywhere. Kasowitz, Benson's insurance recovery group has unquestionably made it in New York. The firm's insurance group has now expanded to Los Angeles. And by hiring Linda Kornfeld and Jerry Oshinsky -- two of the nation's top litigators in the area -- the firm is poised to make it there. *Coverage Opinions* sits down with Linda and Jerry to discuss their new firm and Kasowitz's plans for the place where it's cold and it's damp.

The Cover-age Story



I checked out a sample policy to see what it covers and what it doesn't. Of course, then there is also the list of things that it really needs to cover. More about that below. The policy I looked at contained several coverage parts. For example, coverage for cancellation or postponement. This covers deposits forfeited and amounts contracted to be paid for food, catering, hall rental, entertainment, photographs, and several more expenses that you would expect to see. But there are also exclusions, such as the decision of the bride or groom not to take part and lack of funds (unless caused by unemployment).

Other sections of the policy provide coverage for additional expenses to proceed with the wedding on account of a vendor mishap (as well as lost deposits), problems with the photographer, loss or damage of gifts and loss of special attire and special jewelry. There are also optional coverages available for liability – providing coverage for claims against the bride and groom for bodily injury and property damage taking place during the wedding.

Of course, the decision to buy insurance – any insurance -- is all about the insured's perceived need for it. The sample wedding insurance policy I reviewed seemed fine and it provides a good sense of why you may need it. But if you are planning a wedding, and thinking about whether wedding insurance is for you, you may also want to consider these other endorsements. And mazel tov.

Oy Vey Endorsement: Provides coverage if the groom cuts his foot during the Jewish tradition of stomping on a glass at the end of the ceremony.

Black Sheep Endorsement:

Provides coverage if Crazy Uncle Joe gets his hands on the band leader's microphone and recites limericks. Limit of liability doubled if any limerick contains the word Nantucket.

eHarmony Endorsement: Pays for a year's subscription to a dating website for any party stood up at the altar.

Tail Coverage: Provides coverage for up to three years after the wedding for any fallout from failing to invite any fourth cousin.

ADR Endorsement: Pays for the services of a mediator to resolve any dispute between two guests that each claim to have caught the bouquet.

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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.

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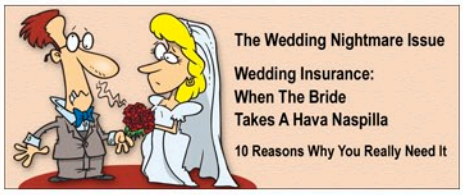
The Cover-age Story



Bridezilla Endorsement: Pays for one year's counseling for the bride to recover from the piping on the wedding cake being 1/16 of an inch narrower than promised by the bakery.

Oops Endorsement: Provides coverage if the bride unexpectedly needs to buy a new dress at Motherhood.

No, Not That Story Endorsement: Pays for the services of divorce lawyers if the wife claims, as a basis for divorce, anything learned during the Best Man's speech. [Counsel must be chosen from insurer's panel.]

Bride's Misrepresentation Endorsement: Provides coverage for a class action against the bride, by her bridesmaids, for recovery of the amount that each paid for a dress that can never be worn again, despite the bride's representation to the contrary.

Uncle Ben's Endorsement: Coverage provided if the guests are mistakenly given sticky rice, causing large projectiles to injure the bride or groom.

Affair Decision: No Coverage For Alienation of Affections

It is a rare day that a court is called upon to address the availability of insurance coverage for a claim for alienation of affections – a tort committed by a person with the intent to alienate one spouse's affections from the other spouse. Which is why it is so strange that, in 2007, this solar eclipse of a coverage issue saw the light not just once, but twice. And as if that's not enough of a long shot, then how about this -- both decisions came from South Dakota and the insurer was represented by the same counsel. Those are Powerball odds. But I guess it makes sense. After all, once you've seen Mt. Rushmore a couple of times, what's left to do in South Dakota.

In State Farm Fire & Casualty Co. v. Harbert, 741 N.W.2d 228 (S.D. 2007), the Supreme Court of South Dakota held that no coverage was available because injury caused by alienation of affections was expected or intended and, to insure for alienation of affects, is also contrary to South Dakota public policy. In Pins v. State Farm Fire & Casualty Co., 476 F.3d 581 (8th Cir. 2007) (South Dakota law), the Court of Appeals held that no coverage was available because injury caused by alienation of affections was expected or intended.

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Randy Spencer's Open Mic

Is A Big Screen TV The Same As An Engagement Ring?

My wife was complaining the other day that I couldn't hear what she was saying because I was watching television. I looked at her with bewilderment and assured her that I could hear -- since I had turned on the closed captioning.

Unfortunately for some couples, despite all the sweet words shared after they got engaged, the relationship sours and they call it off. And when this happens, most presumably part ways as amicably, or civilly, as possible -- under the trying circumstances. Of course, this is not always the case. Suits abound between formerly betrothed individuals for the recovery of the engagement ring. While unique facts can cause an exception, the general rule is that an engagement ring must be returned to the donor, since it was a gift in contemplation of marriage and the condition failed when the marriage did not take place. In reaching this decision, most courts do not consider whose fault brought about the end of the engagement.

So an engagement ring usually must be returned to the donor if the marriage fails to take place. But what about a big screen television?

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Affair Decision: - *Continued*

In rejecting coverage, the Supreme Court of South Dakota in Harbert was unwilling to go the route that alienation of affections, while an intentional tort, results in unintended injury. The court declined to apply the reasoning of its 1991 decision, that coverage was owed to homeowner, who punched a guest in the face, causing the guest to suffer a broken ankle. "At the heart of an alienation of affections tort is the specific intent to alienate the affections of one spouse away from the other spouse. Therefore, the resulting injury is always 'expected or intended.'"

Coverage Opinions Golf Issue Featured In *The Philadelphia Inquirer*

Philadelphia was abuzz last week about the U.S. Open taking place just a few miles away at Merion Golf Club. The last issue of *Coverage Opinions* – The Golf Issue – looked at various legal questions surrounding the game, including injuries caused by wayward golf balls – hit by both professionals at tournaments and regular duffers. The Golf Issue caught the attention of *The Philadelphia Inquirer,* which took up the question of golf ball injuries in its Sunday edition on the eve of the U.S. Open – using the *Coverage Opinions* Golf Issue as its backdrop.

Check out the article here

What Do You Get For Winning The U.S. Open?

Thank you to a kind person at last week's U.S. Open who let me have some fun with the U.S. Open Championship Trophy. Justin Rose took one look at the prize and asked "Hey what's that trophy doing there?"

Wisconsin Appeals Court [colon]: Can't Stomach Insurer's Appendix That Caused A Hernia

Insurance policies can be phonebook-size documents. And when a case involves several insurance policies, the amount of paper in play could impress even a Redwood. Of course, the number of insurance policy pages actually relevant to the coverage dispute may only be a handful – and, for that matter, the dispute may even be limited to just a few policy provisions.

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Randy Spencer's Open Mic

Yes – according to one Ohio appeals court. In Zsigmond v. Vandemberg, No. 95-P-6 (Ohio Ct. App. Dec. 29, 1995) the court addressed a dispute between two individuals whose marriage failed three weeks after their honeymoon. The court issued an annulment as the marriage had been obtained as a result of misrepresentation. The parties then disputed the ownership of a big screen television. Because the situation was one of an annulment, the court analyzed the issue as if it had involved a dispute over a ring after a broken engagement.

Looking to the fact that the television was purchased only three weeks prior to the wedding and one week prior to the public announcement of their engagement, the court held that the evidence was sufficient to show that it was a gift made in contemplation of marriage. Hence, it was required to be returned to the donor.

I was glad to find this case. It was nice to be able to show my wife that I'm not the only one who got down on one knee, handed someone a remote and asked for her hand in marriage.

That's my time.

I'm Randy Spencer.

Randy.Spencer@Coverageopinions.info

Wisconsin Appeals Court [colon]: - *Continued*

This not uncommon situation seemed to be the case in Laufman v. Safeco Ins. Co., No. 2012AP2116 (Wis. Ct. App. May 21, 2013). At issue was a dispute over coverage for claims against a public utility for damages arising out of its failure to maintain or repair a dam. The Court of Appeals of Wisconsin held that St. Paul had no obligation to provide coverage under occurrence based commercial general liability policies. In general, the court's decision was that coverage was precluded because the public utility's conduct – the intentional failure to maintain the dam – was not an accident.

However, despite St. Paul being a prevailing party, the court concluded that the insurer could not recover its appellate costs, despite such opportunity otherwise being available. You see, the court was none too pleased with the appendix that St. Paul had filed – three volumes, 829 pages, comprising the three policies it issued to the utility for the policy years in question.

The court noted that St. Paul, in a footnote, offered the following rationale for its "corpulent appendix:" "Because a complete copy of Exhibit 6 to the Ertz Affidavit was not reproduced in Appellants' Appendix, it is provided in Respondent St. Paul's Supplemental Appendix in order to permit a full review of the 2000 to 2003 policies, which will show that they all contain similar insuring agreements requiring covered property damage to have been caused by an accident during the policy period, as well as the same exclusions relied on by St. Paul herein."

However, it may be that St. Paul's decision to explain the reason for its lengthy appendix is what got it in trouble. The court responded: "First, we observe that North Central never claimed in the first instance that any relevant policy language differed or failed to apply based on the policy year. Indeed, both parties quote precisely the same policy language in their respective briefs. Second, even had there been such a dispute, it would have been superfluous to provide copies of each 200–plus page policy to address a mere one or two components. . . . An irrelevant, redundant, 800–plus page appendix is inappropriate and does not aid the court in any manner."

But wait, the court was not finished. In a footnote of its own it stated that, "[w]hile we make no assumptions, the only purpose of St. Paul's appendix that we can imagine would be to unnecessarily drive up costs. In any event, it would have had that effect. Had we chosen to overlook St. Paul's excessive appendix, St. Paul would have recovered $1,616.55 in costs from North Central, just from preparation of the appendices alone (829 pages x .15/page x 13 required copies)."

Except to the parties, Laufman v. Safeco Ins. Co. is not a significant decision. The ruling on coverage will quickly slip away into nowheres land. However, the court's criticism of the St. Paul appendix is worthy of comment.

It may be that, under these facts, St. Paul's 800+ page appendix was overkill. The insured had provided a copy of one policy in its appendix, the relevant policy language had not changed and nobody disputed what the policy language at issue was. Of course, the other side of this coin is the frequently cited rule that, for purposes of interpretation of an insurance policy, the text must be considered in its entirety.

The moral of the story seems to be that, when preparing an appendix, parties in coverage cases must strike a balance between the rule that the appendix be limited to essential information and the one requiring that insurance policies be interpreted in their entirety. The other moral of the story is to hope to get a judge whose only response to an over-size appendix is to simply disregard it.

But the Wisconsin Appeals Court was off-base when it suggested that the purpose of St. Paul's large appendix was to drive up its recoverable costs. St. Paul could have lost the case and not been entitled to recover its costs. But, more importantly, the court seems to suggest that there was some sort of profit to be had or punitive value for St. Paul in increasing its costs (I can't tell which). However, $0.15 per page is not a lot of money when you also consider all of the overhead that goes into it – rent, the cost of the copier, utilities, salaries,

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Wisconsin Appeals Court [colon]: - *Continued*

and a hundred other expenses that it takes to run a law office. Second, the hassle involved in preparing thirteen copies of a three volume, 829 page appendix, is tremendous. That's 39 volumes. Nearly 11,000 copies. Not to mention that they must then be delivered to various parties. Nobody chooses to take on such an arduous task unless they believe that they need to.

7th Circuit And The "Contractor" Exclusion: Posner Pushes Back On Insurers' Efforts To Reduce Construction Exposure (And Provides Lesson For Insurers)

Insurers have long been writing endorsements to reduce their exposure for property damage caused by construction defects. These efforts have been taking place with First Manifestation, Loss in Progress and similar named endorsements.

Of course, insurers also face enormous exposure for bodily injury on construction sites. Recently, insurers have been attempting to reduce this tremendous exposure as well. The effort, growing in frequency by my anecdotal estimate, has come about in the form of endorsements that preclude coverage for bodily injury sustained by an employee of a contractor or subcontractor.

Under some of these endorsements, the injured party need not have been working for a subcontractor that was retained by the insured. Rather, the exclusion applies if the injured party was employed by any contractor or subcontractor on the project. Since the people most likely to be injured on a construction site, especially one closed to the public, are employees of a contractor – some contractor -- it is easy to see the breadth of such an exclusion.

For the most part, insurers have been winning the cases where such exclusions have been at issue. In some cases, the breadth of the exclusion has not gone unnoticed by the insureds and courts. Nonetheless, courts have rejected the insureds' argument that, what the exclusion must have meant, is that it applied only to independent contractors and subcontractors of the insured and not just any independent contractor or subcontractor on the project. Courts have been willing to uphold such exclusions because the claims before them fall within the policy language.

In Atlantic Casualty Insurance Company v. Paszko Masonry, Inc., Nos. 12-2405, 12-2485 (7th Cir. June 7, 2013), the Seventh Circuit, with Judge Posner writing for the court, was troubled by the breadth of the contractor exclusion -- and this seemed to play a part in the court's decision to decline to apply it to preclude coverage.

The facts at issue in Pasko are unique. Really unique. So much so that, in one sense, the decision could be viewed as having little value in the future concerning contractor exclusions. But, just the opposite, the decision is in fact possibly the most significant to date in this area and likely to play a part in some future cases involving contractor exclusions.

The claim at issue arose when an employee of a waterproofing company was providing a demonstration to a general contractor. The GC wanted to be sure that the waterproofing company was competent to do the job before hiring it so the water proofer caulked a few windows. After the demonstration was complete, the employee of the waterproofing company was injured when a beam fell on him. Thirty minutes or so after the accident the GC and waterproofing company signed the contract.

Putting aside a host of issues as to who was whom, and how the case reached the Seventh Circuit, the court had before it an insurer, that was not willing to provide coverage, because the injured person's employer was a subcontractor or providing services of any kind to a contractor. Because of this, the injured person was considered a "contractor," thereby triggering the exclusion for bodily injury to a contractor.

The court was required to determine if the waterproofing company was a "contractor" under the unique facts – a demonstration -- surrounding the accident: "The exclusion is poorly drafted. The term 'contractor' is exemplified rather than clearly defined.

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7th Circuit And The "Contractor" Exclusion:

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The wording of the exclusion leaves uncertain whether Raincoat was a contractor simply because companies that engage in construction are called 'contractors,' or whether it did not become a 'contractor' until it signed a contract with Prince or until it provided materials or services other than the demonstration of caulking, or whether the demonstration itself was a service provided by a contractor. The complaint in Rybaltowski's tort suit refers to Raincoat as a 'contractor,' but this has no significance for the interpreta tion of Atlantic's policy, to which Rybaltowski was a stranger."

The court's conclusion, that the exclusion did not apply, was based on its analysis of all of the things that "contractor" could mean under these unique facts. The court observed that Atlantic could have plugged the loophole by excluding any and all construction workers from coverage, rather than contractors.

Given Paszko's unique facts, the decision could be viewed as an outlier and having little value in future cases concerning contractor exclusions. However, the decision is unlikely to go by the wayside on that basis. Rather, cases involving Judge Posner get noticed. And Posner's opinion is full of language that makes clear that he was troubled by such a broad exclusion – one that would preclude coverage for, as Posner observed, "the vast majority of persons" at a construction site. Thus, courts that are confronted with a situation where a contractor exclusion clearly applies on its face, but find the exclusion troubling, because of its breadth, may be inclined to follow Judge Posner's lead, and fix more than one meaning to it, in an effort to avoid its application. For insurers intent on using contractor exclusions, Posner's message is clear: they are not inapplicable, but they must be tight.

Insurer's Obligation?: Address All Policies Or Only The One Mentioned By The Insured

I get this question now and then from clients. An insured has provided notice of a claim, such as by way of letter or Acord, and the notice makes specific reference to a certain policy. But the insurer discovers that it issued other policies to the insured – and they may provide coverage. Is the insurer's obligation limited to addressing coverage solely under the policy specifically referenced by the insured in its notice or does its obligation apply to all policies that it issued that could be relevant?

This was the question before the Court of Appeals of Minnesota in Engineering & Consulting Innovations, Inc. v. Western National Mutual Ins. Co., No. A12-1785 (Minn. Ct. App. June 10, 2013). At issue was coverage for Engineering & Consulting Innovations for damages arising out of its work on a sewer piping project. ECI injected grout in the ground and somehow grout got into a pipe – which wasn't supposed to happen – and it rendered the pipe unusable. ECI acknowledged its duty to remove the grout. It took two months to do so and cost over $700,000.

Prior to starting work ECI renewed two policies with Western National Mutual – commercial general liability and inland marine. ECI sought coverage under the CGL policy. ECI filed a declaratory judgment action and the Court of Appeals of Minnesota held that an exclusion precluded coverage.

Following this determination ECI submitted a claim under its inland marine policy, alleging that it was previously unaware of its potential coverage under the policy. Putting aside the merits of the claim – not the point of discussion here – the appeals court addressed whether ECI's claim was barred by res judicata and the policy's two year suit limitation provision. Both issues were tied to the fact that ECI had not sought coverage under the inland marine policy earlier. ECI's initial notice of claim letter clearly indicated that ECI was submitting a claim under the CGL policy.

The court sided with ECI. "The parties dispute whether ECI knew, or should have known, of its potential coverage under the IM Policy. ECI contends that it did not have the opportunity to raise the IM Policy in the first suit due to Western National's 'misrepresentations and silence regarding [the policy].'

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Insurer's Obligation?:

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We agree. While Western National effectively argues that ECI should have known of its coverage options, because they paid their premium and received binders with the policy details, it never explains its failure to sustain its statutory duty to inform its insured of all available coverage options."

The court cited to a Minnesota statute that makes it a violation of the standards for filing and handling a claim when an insurer "fail[s] to notify an insured who has made a notification of claim of all available benefits or coverages which the insured may be eligible to receive under the terms of a policy and of the documentation which the insured must supply in order to ascertain eligibility." The court held that the insurer had violated the statute when it failed to inform ECI of its potential coverage under the inland marine policy, as well as argued to the court, in the first appeal, that ECI did not have the type of coverage provided under the inland marine policy.

As a result of this determination, the appeals court concluded that "it would contravene public policy to allow Western National to assert a res judicata shield when its own violation of a statutory duty prevented ECI from asserting its claim under the IM Policy in the first instance." As for the two year suit limitation provision, the court, based on a similar predicate, concluded that Western National was estopped from relying on the provision. "Western National was silent when it had the duty to speak. ECI had the right to rely on its insurance provider to make it aware of possible coverage options and, when its insurance provider was silent, to rely on that silence as an indication that coverage was unavailable. Western National should not benefit from its omission."

Guest Commentary: Dan Kohane And Steve Peiper, Two Of New York's Best, Examine The N.Y. High Court's Mountainous Decision In K2 And Address Its Impact

The coverage world was aflutter last week over the New York Court of Appeals's decision in K2 Investment Group, LLC v. American Guar. & Liab. Ins. Co., where the Empire State's top court held that an insurer, that wrongfully fails to defend its insured, loses the right to rely upon policy exclusions for purposes of determining its indemnity obligations.

Dan Kohane and Steve Peiper, of Hurwitz & Fine, P.C. in Buffalo, experts on New York coverage law, provide a comprehensive summary and analysis of this significant decision. The court's opinion is an easy read. The real question is what impact it will have from here out on coverage for many New York liability claims. The answer – a lot. Dan and Steve bring their considerable experience to this question in their Commentary "K2 – An Avalanche of New York Coverage Challenges." **Click here to read.**

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Declarations:

The *Coverage Opinions* Interview With Linda Kornfeld and Jerry Oshinsky

Linda Kornfeld

Jerry Oshinsky

For years a man from Hoboken has been saying that if you can make it in New York you can make it anywhere. Kasowitz, Benson's insurance recovery group has unquestionably made it in New York. The firm's insurance group has now expanded to Los Angeles. And by hiring Linda Kornfeld and Jerry Oshinsky -- two of the nation's top litigators in the area -- the firm is poised to make it there. *Coverage Opinions* sits down with Linda and Jerry to discuss their new firm and Kasowitz's plans for the place where it's cold and it's damp.

In late May, Linda Kornfeld and Jerry Oshinsky left Jenner & Block's Los Angeles office to open an L.A. office for New York powerhouse Kasowitz, Benson, Torres & Friedman, LLP. Kasowitz's plans for an insurance recovery practice in L.A. are big. Robin Cohen, head of Kasowitz's insurance recovery group, told Law360 that the firm is looking to build up its insurance recovery practice "to the point where we basically own the space." Actions speak louder than words. And in hiring Linda and Jerry, Kasowitz has made a thunderous statement that it is serious in its intentions. Indeed, while lawyers change firms every day -- and these moves often make the news in their local area -- very few law firm changes in the ranks are the stuff of stories in *The Wall Street Journal.* This was the case with the move by these two lawyers.

Linda Kornfeld has been involved in insurance coverage litigation – both trial and appellate - for over 20 years. Her experience includes claims involving data breach and privacy issues; directors' and officers' liability; business interruption and extra expense; employee fidelity; professional errors and omissions; employment; entertainment industry liabilities; intellectual property infringements; construction defects; and asbestos, environmental and product liabilities. She has been named as one of California's "Top 75 Women Litigators" by the Daily Journal and one of the "Top 250 Women in Litigation" by Benchmark Litigation. Linda is a graduate of UCLA and George Washington University Law School.

Jerry Oshinsky has recently been called "the foremost practitioner at the policyholder Bar" by Chambers USA, which also accorded him "Star" ranking in its national insurance category for three consecutive years. Additionally, in 2013, Jerry was the sole honoree of the prestigious Chambers "Lifetime Achievement Award." He has been called one of the "10 Most Admired Attorneys" by Law360.

Most recently, Jerry has been focusing on issues relating to cyber liability, intellectual property, antitrust and sexual abuse claims, as well as natural disaster cases related to earthquakes and events such as Hurricane Katrina and Superstorm Sandy. Jerry and Linda have been representing Penn State University in its pursuit of insurance coverage for the sexual abuse cases against Jerry Sandusky.

Jerry was one of the architects behind Keene Corp. v. Insurance Company of North America (D.C. Cir. 1981), the inaugural case that adopted the continuous trigger – a coverage doctrine that started out by setting rules for how courts, policyholders and insurers approached claims for asbestos and other toxic torts as well as hazardous waste. But the continuous trigger has since led to an overall change in thinking about claims – with the question being asked, now in a variety of other claims scenarios, whether the doctrine has applicability on the basis that "bodily injury" or

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Declarations:

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"property damage" was potentially taking place during more than one policy period.

Jerry is also an actor, producer and director of plays. He has performed in Twelve Angry Men (Juror No. 7), The Man Who Came to Dinner, Frost/Nixon, Inherit The Wind, The Persians, The Exonerated, Spoon River Anthology and many others. He recently produced, directed and also performed one of the monologues in "The Vagina Monologues."

On a personal note, the first issue of *Coverage Opinions* appeared in October 2012. For the initial Q&A I went for a reach and asked Jerry Oshinsky if he'd be willing to take the inaugural plunge. There were no subscribers and I had no sample issue to send him. For all he knew, he was signing on to be a part of what could have been my middle school newspaper. But despite the uncertainty of it, Jerry said yes. His willingness to help me out with my new venture, under these circumstances, is something that I'll always be thankful for.

Linda and Jerry, thank you for taking the time to discuss your recent move and some other things. Your move to Kasowitz Benson was based on wanting to reunite with Robin Cohen, head of the firm's insurance recovery group. How do the three of you know each other?

[LK] When my long term colleague Kirk Pasich and I were recruited to turn our insurance recovery boutique (Pasich & Kornfeld) into the L.A. office of Dickstein, Shapiro, Morin & *Oshinsky*, Robin and Jerry were assigned to recruiting me. In the process we became close friends and that friendship grew over the years that we all were together at Dickstein. I was Dickstein's L.A. office managing partner, and Robin managed the New York office. She also had a fantastically impressive insurance recovery practice (a practice that has grown and become even more impressive over the years). Robin was a wonderful mentor to me and we formed a very strong bond. The opportunity for Jerry and I to reunite with Robin and her team at Kasowitz was simply too exciting to bypass. Already, we are having great fun and success as a combined force.

[JO] Robin and I met when she was a first year lawyer at Anderson Kill in 1987. We worked together on cases for W.R. Grace, North American Phillips and other clients. We moved with about 35 additional attorneys in 1996 to Dickstein Shapiro. Robin became Managing Partner of Dickstein's New York office and I was in D.C. We knew of Linda from the coverage world and she joined with us when we opened an L.A. office in 2005. I moved to California and passed the California Bar in February 2007.

Linda and I very much enjoyed and appreciated our years at Jenner, especially working with old friends and terrific lawyers including Lorie Masters, John Mathias and Matt Jacobs.

Moving firms is not easy. But in your case you also set up a brand new office. No doubt that had some challenges. What were some of them?

[LK] The transition to Kasowitz has been quite exciting. Starting a new office involves a number of administrative activities that require time to ensure that the process runs smoothly. We have had fantastic internal support, which has made our move a success.

[JO] There is no real change in the work that we are doing for clients except for increased opportunities that occur when you combine separate practices that operate in the same arena.

Jerry: You've been at this for a long time – about 45 years. A move like this, at this stage of your career, suggests that you have no intention of slowing down anytime soon. Am I reading that correctly?

I did a speech recently at the Chambers Awards Dinner in NYC where I pointed out that some folks practicing as long as I have are winding down, but that I am winding up.

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Declarations:

- *Continued*

By opening an L.A. office, and doing so with marquee names, Kasowitz has made a very strong statement about its intentions as a West Coast policyholder recovery firm. How will Kasowitz position itself against the other well-known policyholder recovery firms in California?

[JO] We have a national practice with offices in 8 cities. Our group is prepared to try cases to verdict and the insurance companies know that. In fact, our coverage practice has more depth with respect to successful jury trial experience in major cases in the past few years than most other coverage practices. So in addition to our knowledge base and deep bench, we are ready to go to court and relish the opportunity.

What are your plans for growing the office? I suspect you've gotten some calls from L.A. coverage lawyers looking for a new address.

[LK] I have been designated as L.A. managing partner, with responsibility for growing the office. We opened a month ago with three lawyers and already have added a senior coverage associate and a new coverage partner, Michael Miguel, who joined us from K&L Gates. We have received a number of phone calls from others who we have known over the years both in the coverage and non-coverage arenas. We are focused on strategic growth that allows us to best serve relationships with existing Kasowitz clients on the West Coast, but that also is synergistic with the firm's practice area growth strategies. We are very excited about doing our part to continue to build Kasowitz's west coast reputation.

[JO] We have gotten calls, and not just from coverage lawyers. I learned a long time ago from Gene Anderson that if you align yourselves with lawyers with the same skill set, that you can effectively support each other. Among other practice areas we are interested in attorneys with complex case litigation experience.

Linda: What are some of the things that you've learned from working with Jerry? How do your styles compare?

Jerry and I first worked together at Dickstein. We found then that our styles with respect to practicing law complement each other almost perfectly. The list of things that I've learned while practicing with Jerry is too long to set forth here. Jerry is a brilliant lawyer whose instincts are the best that I've seen. I've learned from Jerry to most effectively trust my instincts. He has taught me that if I believe in a position, to pursue it and not to over think it.

Linda: What have been some of your most challenging cases?

I love our practice area because it so often allows us to advance new legal theories and create new law. Most days as an insurance recovery lawyer I am presented with insurance policy language that has not previously been judicially interpreted with respect to a fact pattern impacting my client(s), and am required to identify an interpretation that favors my client's ability to maximize its return on its insurance asset. In the process, sometimes I am lucky enough to create law. Most recently I enjoyed doing so with Dickstein's Jim Murray in the National Surety v. Immunex matter pending in Washington State. In March this year, the Washington Supreme Court ruled on an issue of first impression under Washington law that an insurer that agrees to defend its policyholder may not at the same time seek to reserve its right to seek reimbursement of amounts paid in defense of the claim if later a court decides that the claim is not covered. Jim and I advanced this theory in the trial court in 2009 and have spent the past four years on appeal. It is exciting to develop a theory that ultimately is adopted by a state's highest court as law of that jurisdiction.

I don't see a lot of reported decisions concerning coverage for things that go wrong with movie and television productions.

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Declarations:

- Continued

Does the entertainment industry spawn a lot of coverage disputes?

[JO] The entertainment industry spawns all sorts of coverage disputes including infringement, unfair competition and event cancellation issues, as examples. A good example is our insurance case for the rock band "Tool" which involves a copyright infringement claim by their former manager.

What are some emerging coverage issues that you are seeing develop?

[JO] Emerging areas include privacy and cyber security/data breach issues, and sexual abuse claims, including our case for Penn State stemming from the Sandusky claims. Our group is actively involved in handling matters for our clients with respect to each of these areas, and of course many multiples of others.

What are some mistakes that insurers make when handling claims that increases their exposure?

[JO] Insurers' principal errors include failing to respond to claims for coverage in a timely manner and denying a duty to defend when the potential for coverage is obvious. In these instances, insurers are opening themselves up to bad faith claims.

Jerry: What's new in your theater work? Any upcoming performances to share?

In my theater world, I presently am directing "Freud's Last Session." We have done this play previously to great acclaim, so my time commitment is minimal. I recently appeared in David Ivers' play "New Jerusalem," about the 1656 heresy trial of Spinoza in Amsterdam, but do not have much time right now to act in a major or even supporting role. I am very interested in "A View From the Bridge" but I am not doing that for quite some time.

Linda: What are some of the things that keep you busy outside the office?

I learned early on in my career that I can best represent my client's interests if I have something outside of work that operates as a complete escape to work. For me, for years I have found that escape in horses, and in particular, in jumping horses. When jumping a course of fences it is not possible to think about the first sentence of the introduction to a summary judgment motion that is due a week later. Riding horses requires complete focus and as a result provides me with the necessary escape from my intense law practice. Time with my family and friends of course also is critical for maintaining the necessary balance between work and non-work.

Who are some celebrities that you've seen walking around L.A. lately?

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.

[JO] Oprah Winfrey, Rob Lowe, Jeff Bridges, John Cleese, David Crosby, Jimmy Connors, Carol Burnett, Kirk Douglas, Neil Patrick Harris, Floyd Mayweather, Dennis Franz, Jack Nicholson, Adam Sandler, David Beckham, Tia Toscano—I could go on!

Late-r Notice:
A Look At Decisions To Come

Ninth Circuit ~~To Address~~ Addresses Breach Of Contract Exclusion

I know that the Late-r Notice column is supposed to discuss a case where the decision is pending. And trust me, that's what I had been planning with Strategix, Ltd. v. St. Paul Fire & Marine, where the Ninth Circuit heard oral argument on June 7. So the Ninth Circuit did me no favors when it handed down its decision on June 12. Thanks. But despite the Ninth Circuit's Usain Bolt-like decision messing up my plans, I'm not wasting my write up of Strategix.

The case involved coverage for Strategix, a professional services/IT sales recruiting company that sold its assets to Infocrossing. Infocrossing had an obligation to make payments to the sellers based on revenue. The deal soured when revenue failed to meet pre-purchase projections. The situation took the turn for the worst when Strategix published an email announcement to information technology managers that prominently displayed the Strategix logo and announced that "Strategix Ltd. is no longer part of Infocrossing, Inc. and the leadership of Strategix Ltd. will be retained by Matthew Aarsvold [its founder]."

Infocrossing filed for binding arbitration and the arbitrator found in its favor. Strategix sought coverage for "personal and advertising injury" under a commercial general liability policy issued by St. Paul. It denied coverage and litigation ensued.

Strategix based its argument on the email communication, in which Strategix used the logo that it had sold to Infocrossing and on the allegations that Strategix improperly continued the use of the trade name "Strategix." St. Paul maintained that it had no duty to defend because the claims fell within the breach of contract exclusion.

The California District Court agreed with St. Paul. The Ninth Circuit affirmed: "The third-party claims clearly fell within the breach of contract exclusion in the insurance policy because they resulted from Strategix's alleged breach of the Asset Purchase Agreement and the Consulting Agreement. The alleged breach had more than a minimal causal connection or incidental relationship to the claims. Indeed, Strategix's potential liability would not exist without the contracts." (internal quotes omitted). Based on Law360's reporting of the argument, the appeals court seems to have rejected Strategix's position that Infocrossing could have recovered damages under theories other than breach of contract.