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

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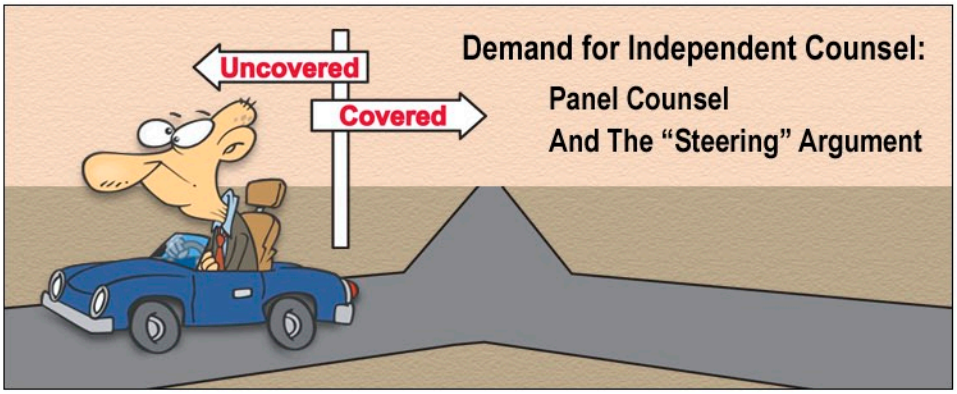
The Cover-age Story



My wife loves to read women's magazines – to me that is. When I see her coming at me with *Cosmo* in her hand… I am certain that I am about to fail a quiz.

My predictive skills, about the outcome of a test, are not as strong when it comes to some that determine coverage. Court decisions over coverage are easier to predict for some issues than others. One issue that is particularly challenging is whether an insured, being defended under a reservation of rights, is entitled to be represented by independent counsel, at the insurer's expense, i.e., counsel that the insured chooses and not counsel selected by the insurer, likely from its "panel" list. As readers of this publication know, this can be a very contentious issue (choice of one's lawyer, when they have been sued, can be very personal) and one with significant financial consequences given the possible disparity in hourly rates between the two options.

Some courts have adopted a simple solution to an insured's demand for independent counsel. They adopt a blanket rule: a defense provided under a reservation of rights creates a per se conflict of interest—no questions asked—thereby entitling the insured to independent counsel at the insurer's expense. Period. End of discussion.

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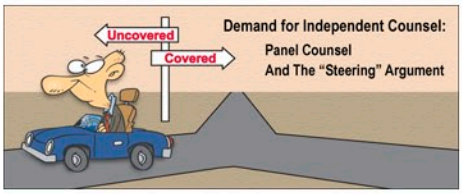
Declarations: The *Coverage Opinions* Interview With Neil Selman Of Selman Breitman, The Lawyer Who Made The Most Important Discovery Ever About Insurance Coverage

In 1980, Neil Selman, then a sixth year lawyer, started his own law firm. Thirty-three years later Selman Breitman LLP has over 100 lawyers and is a premier insurance coverage (among other things) firm in California. He began practicing coverage law long-before it was the recognized specialty that it has become. Neil talks to *Coverage Opinions* about what it was like in those early days and how Selman Breitman grew to where it is now. Oh, and Neil also happened to make the most important discovery ever about insurance coverage.

The Cover-age Story



Some courts have adopted a blanket rule in the other direction—a reservation of rights does not create a conflict of interest in any case. So no independent counsel is required.

But the majority of courts confronted with the conflict of interest issue have declined to adopt a black-and-white rule one way or the other. Rather, they conclude that the circumstances of each case must be examined to determine whether a conflict exists such that independent counsel is justified. This makes it an inherently difficult issue to predict. "Whether the potential conflict of interest is sufficient to require the insured's consent is a question of degree that requires some predictions about the course of the representation. If there is a reasonable possibility that the manner in which the insured is defended could affect the outcome of the insurer's coverage dispute, then the conflict may be sufficient to require the insurer to pay for counsel of the insured's choice. Evaluating that risk requires close attention to the details of the underlying litigation. The court must then make a reasonable judgment about whether there is a significant risk that the attorney selected by the insurance company will have the insurer." Armstrong Cleaners, Inc. v. Erie Ins. Exch., 364 F. Supp. 2d 797, 808 (S.D. Ind. 2005).

A reservation of rights, by its nature, means that some (or all) claims may not be covered. Thus, insureds sometimes argue that they fear that counsel retained by the insurer, wanting to please the insurer, in hopes of continuing to benefit from its status as panel counsel, will handle the case in such a way that he or she may steer the case to a judgment under an uninsured theory of recovery.

This "steering" argument should be offensive to defense counsel -- as it is a direct accusation that they cannot be trusted to comply with their ethical duties owed to their client – the insured. Not to mention that, if the ability to "steer" even exists in a case (and that's another issue), it would be hard not to detect. Nonetheless, this offensive steering argument exists. Steering was explained, without any sugar coating, and with support from, some might say, a higher authority than any court, by the Eighth Circuit Court of Appeals in U.S. Fid. & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 938 n.5 (8th Cir. 1978) (applying Utah law): "Even the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interests of his real client the one who is paying his fee and from whom he hopes to receive future business the insurance company. Although it has perhaps become trite, the biblical injunction found in Matthew 6:24 retains a particular relevancy in circumstances such as these, "No man can serve two masters…."

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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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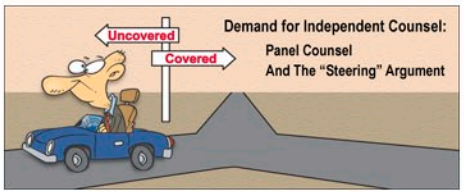

At least three courts in the past month have addressed the independent counsel issue. But the one that caught my attention was Auto Owners Ins. Co. v. Lake Erie Land Company, No. 12-184 (N.D. Ind. Aug. 13, 2013) as it involved the issue of steering.

Steering has a lot to do with the facts and issues of the underlying case to be defended. Lake Erie Land Company built a wetlands mitigation bank. This is land upon which new wetlands are developed and from which credits can be sold to people who need to offset their own damage to the environment by destroying wetlands.

The facts continue. For ease I set some out verbatim. "In 2008, a neighboring landowner, B & B, LLC, sued LEL in state court. B & B claimed that its own property had been damaged and rendered unusable as a result of LEL's creation of the wetlands mitigation bank. Allegedly, the newly-created wetlands 'spilled over' and turned B & B's property into a marsh. The Plaintiff Insurers defended LEL in the B & B lawsuit under a reservation of rights and through counsel of their choice, as was required by the insur ance policies at issue. The jury in the B & B lawsuit found against LEL. It awarded B & B roughly $1.8 million in compensatory damages and $1.5 million in punitive damages. On April 6, 2012, LEL demanded that the Plaintiff Insurers pay both the compensatory and punitive damages portions of the judgment." The Plaintiff Insurers filed a declaratory judgment action to limit their duty to indemnify the B & B lawsuit verdict.

While the coverage action was proceeding a second neighboring landowner filed suit against LEL alleging property damages resulting from the overflow of the wetlands mitigation bank. LEL notified the insurers of the suit. The insurers agreed to defend, but under a reservation of rights. The insurers insisted on using their own defense counsel, the same attorney in the B & B lawsuit. However, LEL believed, based in part on the existence of the declaratory judgment action, that a conflict of interest was present. This, LEL argued, gave it the right to retain independent defense counsel for the second suit at the insurers' expense.

At issue before the court was LEL's entitlement to independent counsel. This was tied to whether there existed a conflict of interest under the Indiana Rules of Professional Conduct. LEL made a steering argument in support of its entitlement to independent counsel. The court described it like this: "LEL's position is that presence of two different 'ways in which LEL can lose,' one of which—wilful misconduct—would necessarily involve a finding excusing the Plaintiff Insurers from coverage, and one of which-negligence-would mean coverage does exist, means that an attorney retained and paid by the Plaintiff Insurers would feel pressure to steer the litigation towards the finding in his 'real' client's best interests: the one supporting a lack of

Randy Spencer's Open Mic

Heckling The Insurance Stand-Up Comic

Heckling is often associated with stand-up comedy. However, in my experience, seeing a lot of shows, true, mean-spirited heckling, actually happens relatively infrequently. The more likely scenario is that someone in the audience shouts something out about what the comic has said. Since their action is good-natured, and they really mean no harm, it is not heckling in the traditional sense of the word. But, to be clear – this is not to say that it's welcomed either. Nonetheless, a good comic can sometimes turn this situation into gold. If he or she chooses to engage with the audience member, the resulting dialogue can sometimes end up being the best part of their set.

But while traditional heckling is not the norm, this insurance comic has not been immune from it. I went back and revisited some shows and put together a list of some of the things that have been yelled at me by audience members. It's not pretty. Hide the children.

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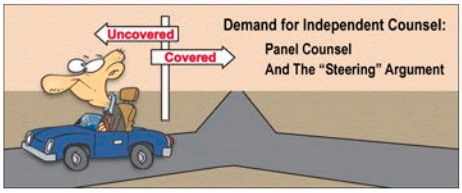
The Cover-age Story



coverage."

The insurers disputed this, because there were not two ways to lose, since there was no separate evidence or theory of the case concerning whether the alleged intrusion was merely negligent or willful and wanton. Thus, defense counsel's only job was to argue that the trespass or intrusion never occurred, i.e., a defense on which the insurer and insured had common ground.

The court was not persuaded. "[C]ontrary to the Plaintiff Insurers' argument, there is a very real way in which counsel's handling of the Hite Lawsuit defense could influence the coverage dispute: by addressing (or not addressing) LEL's 'state of mind' in allegedly trespassing or causing damage to the Hite property. For example, an attorney loyal only to LEL would surely make a point of arguing that even if the wetlands were constructed in such a way as to cause damage to the Hite property, LEL had no knowledge nor reason to believe such consequences would occur, and thus acted in a manner that was merely negligent. Thus, even in the case of an adverse jury verdict, LEL might be protected against treble or punitive damages (which require a finding punitive damages (which require a finding of willfulness). But an attorney loyal primarily to the Plaintiff Insurers has no reason to make that 'even if' argument; since the Plaintiff Insurers believe treble and punitive damages are not covered under either policy, it does not make sense for them to steer the litigation towards a negligence verdict as a 'backup plan.' To the contrary, it would be in the Plaintiff Insurers' best interests to steer the litigation toward a finding of wilfulness, in the event that the jury appears ready to find against LEL. In that way, as large a portion of the judgment as possible might be shoe-horned into a category of damages for which the Plaintiff Insurers do not believe they are contractually responsible." (emphasis in original).

The steering argument is insulting to defense counsel. It assumes that he or she will commit a unethical act, not to mention one that would be very easy to detect. It also makes no sense as a legal matter. Defense counsel will be arguing that the trespass or intrusion never occurred, i.e., the defense on which the insurer and insured are aligned. But, if it did occur, how can defense counsel now argue that it was willful. In other words, how do you go from it never occurred to it occurred willfully, while skipping the argument that, if it occurred, it was at worse only negligent.

Courts that reject steering, because defense counsel have ethical duties not to engage in it, have it right. See Finley v. Home Ins. Co., 975 P.2d 1145 (Haw. 1998) (holding that, because of the safeguards inherent in the Rules of Professional Conduct, as well as alternate remedies existing in the case of attorney misconduct, an attorney retained by an insurer can represent the insured without the insured's informed consent).

Randy Spencer's Open Mic

You call that a joke?! I have clients that have taken coverage positions funnier than that!

The only coverage I care about right now is getting something to put over my ears!

That joke's so old the last time I heard it the ISO 1973 version was in effect!

You stink so badly that you would be precluded by the pollution exclusion!

The Gecko's funnier than you! And better looking too!

Loss of use of property? How about loss of use of your mouth!

I wish I'd gotten late notice of this show!

Reimbursement of defense costs? I want reimbursement of my money!

Get off the stage! My limit is exhausted!

You are a liquor liability! You're killing my buzz!

What!? You're doing a late show too? You need to be a single occurrence!

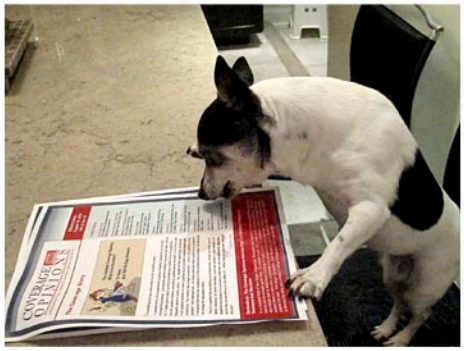
Thanks for the show. Now I know how to define wrongful act. Coming here!

Hey buddy, here's another example of a casualty. My night!

That's my time.

I'm Randy Spencer.

Coverage Opinions: 105 Year-Old Reader



Meet Petunia. My 15 year-old Toy Fox Terrier. She doesn't have much eye-sight left, but she still manages to read *Coverage Opinions* -- when her schedule allows. It is often said that a year in a dog's life is equal to seven human years. So that makes Petunia 105. But I don't buy it. I can't imagine that there is a single 105 year-old man or woman that can jump two feet in the air and snatch a piece of Velveeta from your hand.

Practically Perfect In Every Way: The Great Chimney Sweep and Insurance Coincidence

It was widely reported that on August 19 legendary actor Dick Van Dyke was pulled, safely, from his burning car on a Los Angeles freeway. Van Dyke is an American treasure so it's great news that this crazy story had a happy ending. Dick Van Dyke is, of course, the best-known chimney sweep of all time.

Now consider this. Just a mere four days earlier, a Montana federal court issued a decision in Bourdon v. Mountain West Farm Bureau Mutual Ins. Co., No. 12-97 (D. Mont. Aug. 15, 2013). According to my research, Bourdon is only the second-ever reported judicial decision involving a commercial general liability policy issued to a chimney sweep. [You are welcome to try to find others. But, if you do, just know that you are even more of an insurance coverage dweeb than me.]

This is a coincidence of epic proportion. It is practically perfect in every way. I can't even imagine what the odds are. It would make winning the Powerball look like a chance of rain in Seattle. In any event, this is probably the most inane piece of information even shared with you. But it also could not go unreported. Now please move on to something in *Coverage Opinions* that is more useful. Spit-spot.

Louisiana Federal Court: Nightclub's Loud Music Causes Covered "Bodily Injury" And "Property Damage"

A commercial general liability policy is designed to provide coverage for "bodily injury" and "property damage" caused by an "occurrence," i.e., an accident. Unlike a "named perils" policy, which provides coverage for a cause of loss if it is so listed (as in some property insurance policies), a CGL policy provides coverage for unspecific causes. Using this format, the causes of "bodily injury" and "property damage," for which coverage can be sought, are unconstrained. Then, whether the cause at issue comes within, or exceeds, the boundaries of the policy, is where courts come in.

Tying general liability coverage to unspecific causes of "bodily injury" and "property damage" means that unique claims scenarios will necessarily land on adjusters' desks. These are the claims that make for interesting and challenging work -- the ones where you walk over to your colleague and ask – *Hey, have you ever seen one like this before?*

The Louisiana district court's decision in Houston Specialty Insurance Company v. New Jax Condominium Association, No. 13-639 (E.D. La. Aug. 13, 2013) involves a claim in this category. Although not groundbreaking, it is also far from a leaky window or a slip and fall in a supermarket.

The coverage dispute in New Jax arose from loud music played in Jax Bar, a nightclub located in New Jax's condominium building. New Jax filed suit against Jax Bar, alleging that the bar had been playing "illegal live and/or recorded amplified and unamplified music and entertainment which is so offensive as to deprive its neighbors of their peaceable possession of their property." New Jax also alleged that the music was a nuisance and a "noise trespass which unreasonably deprives Defendant's neighbors of the peaceful enjoyment of their neighboring homes and/or property."

Jax Bar's general liability insurer filed an action seeking a declaration

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Louisiana Federal Court:

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that it did not owe a duty to defend or indemnify the bar in the underlying suit. Not surprisingly, a key issue in the coverage case was whether the complaint alleged "bodily injury" or "property damage." The court had little trouble concluding that it did.

On the subject of "property damage," the court held that "New Jax alleges that members of the Association have been deprived of 'their peaceable possession of their property' and 'the peaceful enjoyment of their neighboring homes and/or property.' By alleging that its members have lost peaceable possession of their property, New Jax has alleged 'loss of use of tangible property that is not physically injured.' Accordingly, New Jax alleges property damage under the terms of the insurance policy."

The court also held that, because the underlying complaint alleged that Jax Bar had caused New Jax members "physical discomfort," it alleged "bodily injury," defined as bodily injury, sickness or disease. Indeed, the insurer did not dispute this.

The more contentious aspect of the opinion is whether New Jax alleged an "occurrence." The court held that it did. The court's analysis was based on its initial conclusion that, under Louisiana law, whether an event is an "accident" is interpreted from the viewpoint of the victim – "losses that the victim could not expect are the result of an accident."

Notwithstanding that New Jax entered into an agreement with Jax Bar, and was, therefore, aware that the bar would be playing live and recorded music, such agreement "prohibit[ed] disturbing noises, and specifically prohibit[ed] the playing of live and/or recorded music between the hours of 11:00 p.m. and 8:00 a.m." Thus, as the court saw it, the injuries that New Jax, the victim, sustained, were not expected, and were the result of an accident. More specifically, New Jax would not have entered into the agreement had the members expected Jax Bar to disregard its terms and play music at levels that violated local ordinances and state law and cause them damage. "[B]ecause the New Jax members possibly could not anticipate that Jax Bar would play music so loud as to injure them, the complaint alleges facts that would fall within coverage."

To be sure, the claim at issue in the Louisiana district court's opinion in Houston Specialty Insurance Company v. New Jax Condominium Association is not Lady Gaga-strange. The pursuit of general liability coverage, for the impact of noise, is not unheard of -- but music-based noise claims are very infrequent. So while New Jax is not a meat suit, it does demonstrate that commercial general liability claims are like a box of chocolate.

MAD Magazine Offers A Valuable Lesson In Insurance Policy Drafting:

Sometimes people choose a complicated solution to a problem when a simpler one was readily available. The current issue of MAD Magazine (yes, I still read that) has a cartoon that demonstrates this well. A man puts his arm around his grandson and tells him that it's time to let him in on the secret of the family business – a funeral home. You see, there is only one other funeral home in town and it is a constant competition with them. To deal with this, the grandfather explains, he's been killing people who have relatives loyal to his business. The grandson shouts: "What!" He is in a state of complete disbelief. The grandfather explains that customers don't just come out of nowhere. Yes, the grandson acknowledges this. But it still makes no sense. He asks why not just kill the owners of the other funeral home?

This lesson – choose the simpler solution -- can be applied to insurance policy drafting. I've discussed this in prior issues of *Coverage Opinions* and a recent Alabama federal court decision provides reason to reprise it here.

In Safeco Insurance Company v. Golden, No. 12-537 (M.D. Ala. Aug. 20, 2013) the court addressed coverage for the following unpleasant circumstances. A minor female was spending the night in the Golden's home for a sleep-over. It was alleged that Mrs. Golden volunteered to supervise. However, she allegedly went out drinking with friends, was arrested for drunk driving and spent the night in jail. Meanwhile, back home, Mr. Golden

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MAD Magazine: - *Continued*

removed the minor's clothing and took video and photographs of her body. Where do you begin with this?

The minor's parents, the Bences, filed suit against the Goldens alleging all of the claims that you would expect to see in a case such as this. The Goldens sought coverage under their Safeco homeowners policy. A defense was provided under a reservation of rights. A declaratory judgment action eventually ensued and at issue was coverage for Mrs. Golden. Among other issues was the applicability of the policy's exclusion for loss or damage "which is expected or intended by any insured or which is the foreseeable result of an act or omission intended by any insured."

Not surprisingly, the question whether the expected or intended exclusion applied to Mrs. Golden was tied to the argument, on one hand, that it did, because it was applicable to "any insured." Thus, it applied to Mrs. Golden, as an innocent co-insured, despite the fact that the conduct in question was caused by her husband (since he was an "any insured"). On the other hand, Mrs. Golden argued that the exclusion could not apply to her because the policy contained a "severability clause." Thus, "any insured" refers to her alone and excludes coverage for her intentional acts only.

Countless courts, in just about every state, have grappled with the "any insured versus severability clause" issue and the results are split. The Golden Court spent several pages addressing it. The analysis was complex. It involved a review of Alabama law and case law nationally. In the end, after this whole rigmarole, the court concluded that it did not even need to decide how Alabama state courts would interpret the "any insured"-intentional act exclusion in conjunction with the severability clause.

How was the court able to avoid this thicket? Easy. The policy also contained an exclusion barring coverage for harm "arising out of … sexual molestation or sexual harassment." Period. And this the court seized upon. "Unlike the exclusions for intentional acts and criminal acts, this exclusion is unconditional and does not require that the molestation be committed by 'any insured.' As this exclusion does not require that Golden herself molested the Bences' daughter, it is unaffected by the severability clause; the exclusion applies regardless as to who committed the molestation. And it is clear from the face of the Bences' complaint that the damages alleged 'arise out of' their daughter's molestation." Therefore, the court granted summary judgment in favor of Safeco on the applicable counts.

Unlike the complexity that using an "any insured"-intentional act exclusion created for an innocent co-insured situation, the sexual molestation exclusion – based solely on the conduct to be excluded, without regard to the identity of who committed it -- gave rise to nothing of the sort. Safeco clearly intended to exclude coverage for loss or damage "expected or intended." So if that's the case, they should have said that – and only that. Courts consistently apply exclusions to all insureds when they are triggered solely by expressed conduct – without regard to who committed it. Policy drafters can take a lesson from the grandson in the family run funeral home in MAD: choose the simpler solution.

Pennsylvania Superior Court: Allocation Between Covered And Uncovered Claims

Allocation between covered and uncovered claims is an enigmatic issue. Somehow, one of the most important coverage issues of them all does not have much of a body of law. For this reason, it is an issue that I follow closely and one that has been addressed in past issues of *Coverage Opinions.*

A little while back the Pennsylvania Superior Court addressed this issue in Executive Risk Indemnity Company v. Cigna Corporation, No. 1117 EDA 2012 (Pa. Super. Ct. July 18, 2013), a long-running coverage case relating to coverage for Cigna, as an insured, under a professional liability policy, for a multi-million dollar settlement it reached for allegedly underpaying doctors for services performed. In a very small nutshell, the settlement was for $140 million. Cigna, and its insurer, Executive Risk, did not dispute that breach of contract claims were not covered under the policy and RICO claims were covered.

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Pennsylvania Superior Court: - *Continued*

What was disputed, however, was which party bore the burden of apportioning the settlement between those claims that were covered versus those that were excluded.

It is widely acknowledged that, as a general principle, an insured bears the burden of proving that its claim comes within the scope of coverage and the insurer must then prove that an exclusion applies. So if an insurer must prove that an exclusion applies, one would expect to see a policyholder argue that the insurer must also bear the burden of proving how to allocate a settlement between two exclusions. The policyholder will no doubt see this as a close cousin of the general principle.

But the Pennsylvania Superior Court did not see it that way. The court stated, in the most important line in the opinion, that "proof of a policy exclusion and proof of allocation of excluded policy claims are distinctly different inquiries."

The court held that the insured is the one that must bear the burden of apportionment between the claims. The rationale for this decision was a few-fold. The court described the insured as "the party that has access to the evidence and the parties' intent behind the settlement process. This is especially true where the final settle ment is based upon the claim forms which detail the individual contract breaches and resultant damages."

Second, "CIGNA drafted the settlement agreement and was fully aware that allocation between the classes of claims would become a coverage issue. Although CIGNA periodically gave Executive Risk updates regarding the status of the settlement negotiations, albeit in general plaintiff class-specific terms, CIGNA also specifically told its insurers that it did not want Executive Risk representatives to attend or participate in the mediation for fear that the insurer's presence would drive up settlement demands because the plaintiffs would infer that coverage was available." Lastly, since a settlement typically represents concessions made by both parties, a third-party, such an Executive Risk, who was not privy to the settlement process, would have difficulty deter mining what portion of the settlement is meant for what aspect of the claims made."

There is nothing glamorous about Executive Risk v. Cigna – coverage for a dispute over HMO payments. But its significance cannot be overstated for what it does for this very important issue -- not to mention one that wants for more guidance.

Truss Me: Check Out How Washington Federal Court Hammered Insurer Over Residential Construction Exclusion

Sometimes you read a coverage case and come away with a sense that the insurer never had a chance.

Not because its position was not meritorious; but, rather, because where there's a will there's a way for a court to find coverage. As Justice Hecht of the Texas Supreme Court once put it (in a dissenting opinion): "I remain troubled by the way the Court goes about reading insurance policies, which we constantly reiterate must be interpreted and construed like other contracts, but which hardly ever are because courts approach them, not as neutral arbiters of words on a page, but in hopes there will be coverage." Utica National Insurance Company v. American Indemnity Company (Tex. 2004).

That was my feeling after reading one portion of the Washington federal court's decision in Madera West Condominium Association v. First Specialty Ins. Corp., No. 12-0857 (W.D. Wash. Aug 6, 2013). Madera West involves coverage for construction defects at a condominium complex, addressing some of the issues that are typically seen in such cases. If I attempted to discuss these here I would fall asleep at my desk. Think forehead landing hard on keyboard. Many construction defect coverage cases have reached the point of a Benadryl and Madera West is no exception – and maybe even more so than most.

But Madera West is not without an issue capable of discussion without slipping into a trance.

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Truss Me: - *Continued*

The court examined the potential applicability of a Residential Construction Exclusion. The exclusion applied to "[a]ny and all claims, including ... claims for ... 'property damage' ... arising out of, related to, caused by or associated with, in whole or in part, the construction of residential properties, including but not limited to ... apartment buildings or complexes, townhomes, or condominiums." The Residential Construction Exclusion is one of a host of exclusions that insurers have introduced in recent years to address their skyrocketing construction defect exposure.

The insurer for the contractor at issue alleged that the Residential Construction Exclusion applied to bar coverage. After all, the claims against the contractor arose out of the contractor's work involving renovation of unit interiors. This included replacing carpeting and flooring, painting, and replacing door handles, electrical outlet covers, and appliances. In some cases the contractor also applied a coating to exterior decks and made other repairs to decks.

The court concluded that these activities did not come within the scope of the Residential Construction Exclusion. The court focused on the meaning of the word "construction" and turned to two dictionaries for guidance. These sources defined "construction" as "the action of framing, devising, or forming, by the putting together of parts; erection, building" and "the act of putting parts together to form a complete integrated object." Based on these definitions, the court concluded that "the average person purchasing insurance could easily understand this exclusion to apply only to the building or erection of residential properties (i.e. new construction)." The court rejected the insurer's argument that "construction" refers to any and all work on residential property, including maintenance, improvements, or repairs.

It seems to me that there is little doubt that the insurer intended for its policy to exclude coverage for property damage arising out of its insured's work, of any type, on residential properties -- and not just when such work is associated with properties being built from the ground up. But, in any event, the Madera West Court saw it differently. Perhaps there is a narrow lesson here for insurers about another way to draft a Residential Construction Exclusion. But the real lesson is broader – the one that Justice Hecht observed a decade ago.

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.

Declarations:

The *Coverage Opinions* Interview With Neil Selman Of Selman Breitman

Making The Most Important Discovery Ever About Insurance Coverage

My first introduction to Neil Selman came in 2011. We were on a panel together at the West Coast Casualty Construction Defect Conference in Anaheim. During the first panelists' conference call he agreed to handle the most challenging of the topics, as well as take on the responsibility of quarterbacking the collective Power Point presentation. I was a fan.

I knew little about Neil Selman, except that he had started Selman Breitman many years earlier and it had grown to be a large firm and one with a big footprint in the West when it came to insurance coverage. And it didn't take long to see how this happened. He was an instantly likeable guy – funny and didn't take himself too seriously. Clients want to like their lawyers. But, of course, you also need to deliver results for them. And as Neil explained to me below, that means more than just finding the right answer -- which he says most lawyers can do. Listening to Neil's explanation, of what else a successful lawyer must bring to the table, makes it easy to see how he has achieved what he has. It is advice that every lawyer – whether striving to be a rainmaker or not -- should take.

Neil represents insurers in a host of first- and third-party property-casualty issues, including construction, environmental, entertainment, professional liability, primary/excess and extra-contractual. He also advises his clients on business practices, underwriting, claims handling and drafts policy language. His work involves both counseling and litigation, having tried coverage and bad faith cases in California and other states and he has appeared before the California appellate courts, including the California Supreme Court, in cases which have had significant impact on California insurance coverage law and the rights of insurers. Neil is a 1971 magna cum laude graduate of the University of Southern California and received his J.D. from the University of Southern California in 1974.

Oh, right, that thing about Neil making the most important discovery ever about insurance coverage. As part of our panel presentation at the West Coast Casualty Construction Defect Conference Neil provided concrete evidence that insurance coverage is one of mankind's greatest virtues. This Neil discovered in a stained glass window at the Huntington Library in San Marino, California. This window, created in 1898 by Morris and Company, and titled "Humility, Mercy, Generosity, Charity, Justice, Liberty, Truth, Love, Faith, Courage," puts insurance coverage in its rightful place among all that it great about humanity. Click here to see the complete window and a close-up of the most important part.

Neil Selman

Neil, thank you for taking the time to speak with Coverage Opinions. Tell me about your background and what led you to law school.

I chose law school because I wanted to go into politics, and I actually started working in politics at a fairly young age. Starting at the bottom, I would slap up campaign posters in the middle of the night with buckets of wheat paste, and then I was hired to write the college position papers for a presidential campaign. I also worked as an advance man in the Hubert Humphrey campaign and the successful John Tunney campaign for US Senate, actually doing advance work for the then Congressman. But I became disillusioned with politics, decided to go into criminal law, but landed a clerking job with a firm that dealt with insurance issues. Looking back, it seems that I didn't decide my future as much as it was decided for me.

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Declarations:

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You are coming up on 40 years as a lawyer. What has changed about the profession, and insurance coverage practice, since your early days?

First, it seems pretty clear that the judges are all younger than they used to be.

In terms of insurance coverage, I think the sophistication of the field has changed. Litigation is now a huge part of the business world and the costs of lawsuits and settlements have skyrocketed in exponential fashion. Insurance proceeds are the "mother's milk" of litigation and the battle for insurance money is more evolved than ever. My adversaries are now smarter, more creative, and lucre-hungry people who have significantly raised the bar as to quality of lawyering and the aggressiveness with which they pursue it. They keep things interesting to say the least.

As insurance lawyers today, we are responding to ideas and concepts that our predecessors never had to deal with or even considered. For example, those of us who have worked in the environmental or construction defect coverage world have spent more time on trigger than Roy Rogers' butt ever did, yet before I started I'm sure it was an unknown concept.

Is there one case in your career that stands out as the most memorable – for hardest fought or most satisfying victory, craziest facts or whatever the reason why you'll never forget it.

My cases before the California Supreme Court stand out because they are always active oral arguments and you know legal precedent is being created. These cases get a lot of interest and groups on both sides are working with the main lawyers in the case, so it's a unique experience. Plus, the Supreme Court courtroom in San Francisco is beautiful, and the Justices and the entire court staff are very welcoming to the lawyers before them.

As to one case in particular, I am still working on an environmental case that began for me in 2001. The insured took us all into bankruptcy court, and I have to say I loved being in bankruptcy court where it was all about the "deal." We were able to use our insurance proceeds to broker a deal with lots of recovery options and we went after them. Today, we have recovered great sums, and my main job is trying to market a huge 1,000 acre parcel of land which will provide the final pay-off since my client now holds the first trust deed. I loved this case because it took me out of the normal into bankruptcy court, municipality law, and real estate transactions.

I've lamented that I never had the chance to witness an entirely new and significant coverage landscape form before my eyes. You were there since the earliest days of asbestos and hazardous waste and had the opportunity to shape such then-unique issues as trigger and allocation, among others. Can you describe what that experience was like?

It was pretty amazing. We all have the case where there is an issue of first impression, but this was a field of first impression. We all were rookies and would be in depositions and hearings just kind of feeling our way through. What seems so clear now was anything but clear back then. I can't tell you how many asbestos and environmental claims were disposed of on a manifestation theory in the day. Imagine trying to do that now.

I'm sure you could blackmail some of the top insurance lawyers of today by showing them their early coverage opinions in this area, written when "Stringfellow" meant a very thin person. These opinions were crafted before there was continuous trigger, stacking, sudden and accidental, or pick-a-year to name a few, and I groan when I see some of mine.

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Declarations:

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I also think document copiers had a huge effect on the area. When I started, secretaries used carbon paper, and since you could get about six copies of a document on an IBM Selectric, it was practically impossible for anyone to sue 40 parties. The copier made huge litigation possible, and I think that Xerox helped build my firm as much as Anderson Kill did.

Can you describe something about practicing in California that a non-California lawyer may not appreciate?

Driving to court in January with the top down.

No doubt a lot of managerial responsibilities come from being a named partner of a 100+ lawyer firm. How much of your time is spent on that and what are its biggest challenges?

I still want to work on cases, so most times, I spend much less than half of my time on management and client issues combined because I am blessed to have an Executive Director who has been with me since 1989. We now can communicate by brain wave transmission. Also, my executive committee is made up of amazing partners who have been with our firm for practically all of their legal lives so we have a very clear idea of our culture and each other and how we like to approach matters. They take responsibility for some areas of management as well.

It also helps that I am a quick decision maker. I believe that 90% of the time, it is more important to make a decision than it is to make the best decision. Once a decision is made people can start to work in a certain direction. Then, if the decision needs tweaking, we can do that. Not deciding means people can't do anything. I am also fortunate to have excellent partners and people around me, so I trust them. This enables me to be a good delegator.

What rainmaking skills enabled you to start a law firm and build it to the size you have?

It starts with being more than a good lawyer. In Los Angeles, there are tons of good lawyers. You need to show you are what David Maister called a "trusted advisor." This gets done by ramping up client service and really caring for your client's long term goodwill. They know when you care. I think you also have to provide confident leadership so that you are providing more than a specific legal answer. Most lawyers can find the right answer. You need to identify the end game for the client and provide a path for achieving the client's interest in the matter as a whole. Once you get a reputation for that kind of solution oriented leadership, you will be successful. When you have that piece, adding the personal touches deepens the relationship and makes a lifelong association. I have so many friends for whom we work that I have known for decades. It's really my favorite part of the gig. That's how to build a practice.

But to build a firm, you have to recognize the breadth of skills you need firm-wide and reward them. A good business developer attracts more work than he or she could possibly do, and you need to have partners who have taken these clients on and become the "go to" person. If I was afraid of letting that happen, I wouldn't have a firm. Some of my partners are great business producers, others are great business keepers. Neither one can survive without the other.

The thrill of building a firm like this is most apparent at our firm picnic when I see the families and know we are providing good incomes, health coverage, and benefits for so many great people.

I started my firm in my 6th year as a lawyer in 1980. I was given several thousand asbestos defense files, around 7,500. In six months, I was able to get them all dismissed without payments. The carriers involved asked if I had put myself out of business which was the case and they stepped up and started giving me different kinds of work. So, our firm is still the national counsel for that first defendant and part of the new work they gave was coverage. This proves the point that putting yourself out of business is the best way to build one if it helps a client.

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What keeps you busy when you are not in the office?

Music. I love music. I'm a banjo, guitar, and dulcimer player and when I need to smile fast, I pick up the uke. Most days I come home from work and go directly to the place where the instruments are and play for at least 20 minutes and then come out to be with my wife, Cindy. We go to a few concerts each week and listen to music constantly. We like rock and roll, folk, classical of all eras, jazz, and world. It's all just music and I just respond to it.

What do you listen to when sitting in L.A.'s interminable traffic?

Other than listening to the sound of client's refusing to pay for travel time, I listen to the sound of gnashing teeth since the traffic is really getting so outrageous. Since LA could not surpass Houston for horrible humidity, we took them on in traffic and totally won. I honestly thought about creating a political committee that would oppose all incumbents until the traffic issues were being fixed, but it ended up taking too long to drive to the meetings.

Late-r Notice:
A Look At Decisions To Come

ISO CGL Data Breach Exclusion Coming Soon

The insurance industry is abuzz these days over protection against the risks of cyber liability – especially data breaches. The internet is overflowing with reports and articles, from insurers and brokers, that describe various examples of data breaches, loss of personal identification information and many other types of cyber risks that businesses face, as well as what their financial consequences could be. There is a trove of information out there. And not all of it is consistent.

All kinds of cyber liability policies are available to address assorted cyber risks. They vary widely in their coverage and terms. Multiple policy forms and unique claims (as cyber will be) is not the recipe for a narrowly defined body of law to guide the disputes – as can be the case with many CGL issues.

But a few things can be said about cyber insurance that applies the same widely. First, cyber risks are real. They will not be one of the many risks that have been predicted over the years to cause liability -- but never came to fruition.

Second, no matter how many cyber policy options are available, a company that sustains a cyber loss is, at least for now, far, far more likely to have a commercial general liability policy in its filing cabinet than one with the word "cyber" written across the cover. The Wall Street Journal recently reported that only 31% of respondents to a research center's survey had insurance to specifically protect against a data breach. [And that number seems high to me.]

So, with no other options, a company that suffers a cyber loss – especially a data breach or hacking, where customers' personal information may have been revealed in some manner -- is likely to look for coverage, or at least a defense, under its commercial general liability policy. And no matter how certain insurers are that such claims are not meant to be covered by a CGL policy, some courts will likely disagree. That's just the nature of the beast.

Until cyber policies take hold, there will be many cyber coverage disputes under CGL policies. This likely explains why, so I'm told from a couple of different sources, ISO has a data breach exclusion for its CGL policy in the works. More on that to come.