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

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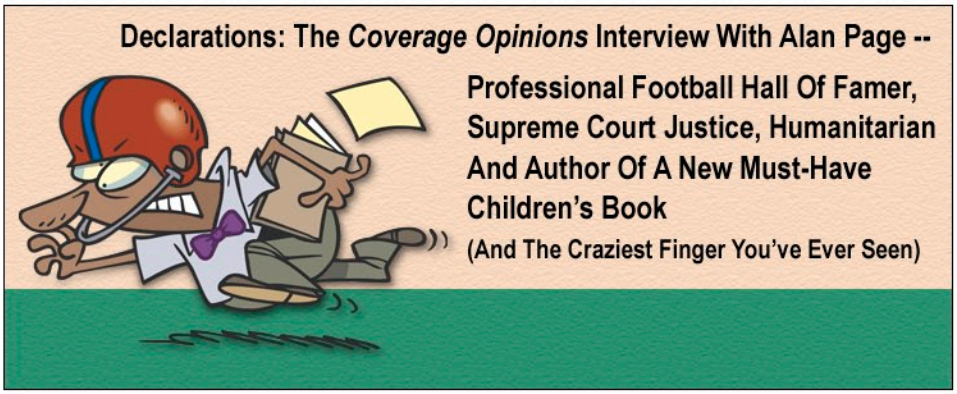
The Cover-age Story

The Football Issue



Alan Page wears bowties. I wear bowties. While we share good looks and a keen sense of fashion, we have some differences too.

Alan Page played for fifteen seasons in the National Football League, appeared in nine Pro Bowls and four Super Bowls, won the MVP Award (a rarity for a defensive player), had his number retired by the Minnesota Vikings, is a member of the Professional Football Hall of Fame and was ranked 34th by The Sporting News on its list of the 100 greatest football players of all time. My experience with football? Running to the fire hydrant and cutting left. In fact, I've never thrown a football that didn't have the word Nerf written on it.

In addition to football legend, Alan Page is Justice Page. He has been a member of the Supreme Court of Minnesota for 21 years. Just think about that for a second. Reaching the highest peak in your profession is of course an incredible accomplishment. Justice Page did it twice. And in two professions that could not be more different. Professional Football Hall of Famer. Supreme Court Justice. We're not talking about luge and bobsledding here.

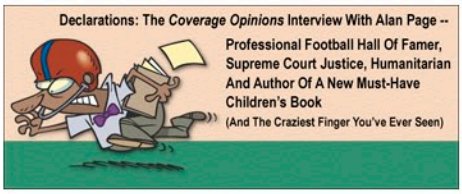
Continued on Page 2

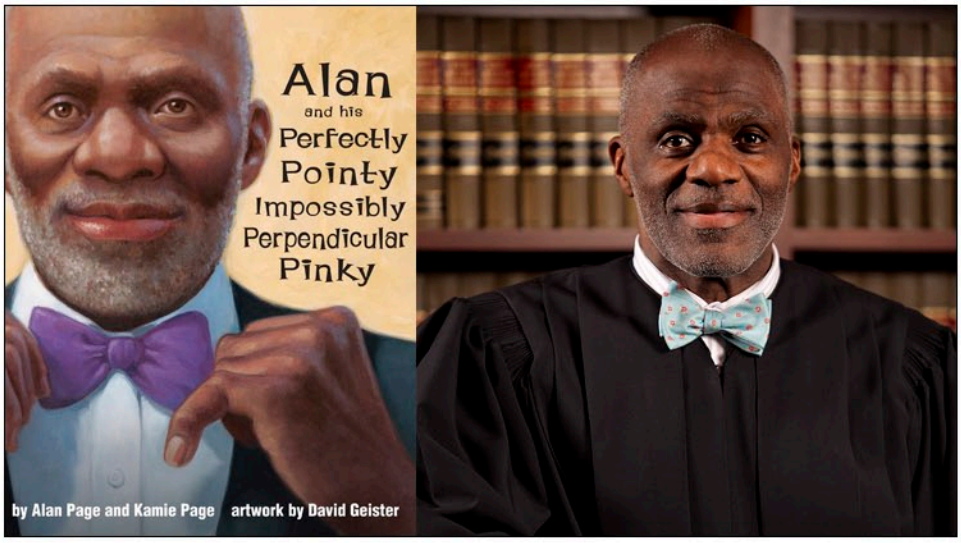
In this issue:

Coverage Opinions Football and Insurance Trivia

Many professional football stadiums these days are named for corporations. It takes a lot of money to purchase the naming rights to a stadium. Insurance companies have a lot of money. And they also operate in a market where name recognition is very valuable. So it is not surprising that two of the 31 stadiums in the National Football League are named for insurance companies (or maybe it's surprising that it's only two). What are the two insurance company-named stadiums in the NFL? Answer inside. [Sorry, no cash prize (or anything, for that matter) for being right.]

The Cover-age Story





Justice Alan Page

But there is still more to the story. Justice Page also has a third remarkable chapter in his life -- and one more yet to be written. He and his daughter also recently published a fantastic children's book. And the icing on this colossal cake -- the pinky on his left hand is guaranteed to make you say Whoa!

Coverage Opinions is all about insurance coverage. After all, when a one trick pony lawyer writes a newsletter it's not hard to figure out what the subject matter is going to be. Having said that, the Baseball Issue and Golf Issue of *Coverage Opinions* were two of the most popular. These issues strayed from the strict mandate of insurance coverage and looked at more general legal issues surrounding these games. So with football season upon us, and knowing how well-received the Baseball and Golf Issues of *CO* were, an issue devoted to legal aspects surrounding the gridiron was a foregone conclusion.

Once that was decided it became time to think about the subject of the interview for the Declarations column. Thinking. Football. The law. Football. The law. Needless to say it didn't take long to figure out the perfect interview for the *Coverage Opinions* Football Issue. So I could not have been more excited when Justice Alan Page graciously agreed to my request.

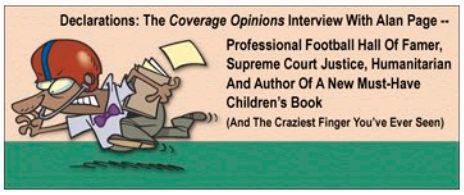
Continued on Page 3

About The Editor

Randy Maniloff

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

The Cover-age Story



I had never spoken to a Supreme Court Justice on the phone. Nor a member of the Professional Football Hall of Fame. A few hours before the start of football season I killed two birds with one stone during a 25 minute phone conversation with Alan Page. And of course I asked him about coverage (and I don't mean zone).

Alan Page: Football Player

A lot of accolades apply to Alan Page's career on the field as a defensive tackle (Minnesota Vikings: 1967 to 1978; Chicago Bears: 1978 to 1981). The awards and statistics (173 sacks, 23 opponent fumble recoveries, 28 blocked kicks) are remarkable. Just what you'd expect to see from a Hall of Famer that is ranked 34th on The Sporting News's all time greatest list. His college career was also exceptional, playing at Notre Dame (winning a National Championship in 1966) and being elected to the College Football Hall of Fame.

I had it in my head that anyone with such a career surely had football permanently embedded in their DNA. I imagined Justice Page with a big number 88 on the back of his robe. So I was all set to ask him about the upcoming season, the Vikings's prospects and jaw with him about his fantasy team. But none of this was to be the case. He explained that, while he loved playing the game, he's never enjoyed just sitting and watching it. His plans for the opening Sunday of the NFL season – bike riding.

As a former player, active in the players association and in the law and order business for many years, it made sense to ask Justice Page if he had a solution to the NFL's epidemic of its players getting into trouble off the field. His response was simple: What we see in sports isn't different from what we see in society generally. Until we fix society we won't fix sports.

Supreme Court Justice And Insurance

Justice Page attended the University of Minnesota Law School while still playing for the Vikings. He graduated in 1978. After graduation, and outside of football season, he worked for the Lindquist and Vennum firm in Minneapolis. In 1985 he was appointed Special Assistant Attorney General and then promoted to Assistant Attorney General. In 1992, he was elected to an open seat on the Minnesota Supreme Court, becoming the Court's first African-American member. He was re-elected in 1998, 2004 and 2010. Justice Page faces mandatory retirement in two years at age 70. More about this below.

The Minnesota Supreme Court has a well-developed body of case law addressing liability coverage issues. But that's not because the Court goes looking for them, or any type of case for that matter, Justice Page explained to me.

Continued on Page 4

Randy Spencer's Open Mic

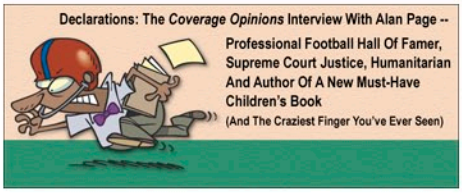
The *Coverage Opinions* Super Bowl Commercial

[Randy Spencer is on vacation. This Open Mic column ran in the January 30, 2013 issue of *Coverage Opinions* just a few days before Super Bowl XLVII. It is reprinted here as part of the Football Issue.]

While *Coverage Opinions* is not the official anything of the Super Bowl, it is not without a connection. It is running a commercial during this year's big game. I must say, it was harder to make this happen than I expected. First, there was some clause in Danica Patrick's contract with Go Daddy that prevented her from also serving as the *Coverage Opinions* Girl. It was unfortunate. She loved the script. She loved me. She was very disappointed. Plan B didn't fare any better. Who knew those Clydesdales could be so expensive. I thought I could get them for some oats – and worse case toss in some carrots if they played hardball. Not to be. They wanted money. Like they would know what to do with it.

Continued on Page 4

The Cover-age Story



He said that the Court follows a set of factors for deciding whether to take a case and it so happens that a number of coverage cases have come up that meet the criteria. Naturally I asked Justice Page whether he enjoys insurance coverage cases and gets excited when he knows that one is on the day's argument list. He explained that while he generally does not look forward to them, they have a way of becoming fascinating, even ones that look simple from the outset, once you get into them.

Humanitarian

In 1988 Alan Page used his induction into the NFL Hall of Fame to launch The Page Education Foundation with his wife Diane. The Foundation was formed with the goal of enabling more young people of color to reach the education system. This is accomplished by granting financial assistance to post-secondary students. In return, these students – Page Scholars -- actively foster positive attitudes toward literacy and learning among younger, school-age children of color through mentoring. Since its inception The Page Foundation has supported over 5,000 students.

In 2012-2013 Page Grants were provided to 503 students. These Page Scholars attend 47 colleges, universities and technical colleges across the state of Minnesota -- studying everything from auto mechanics and business to law and medicine. The Page Scholars in turn gave more than 17,700 hours of their time tutoring and mentoring thousands of younger children.

It's a simple concept. And that's precisely why it has succeeded. Justice Page's explanation for The Page Foundation's success is that they figured out what it did well and stuck to it. Pro athletes undertaking charitable endeavors are not unusual. But not all of them get it right. Here is what a recent article on ESPN.com had to say about that: "An 'Outside the Lines' investigation of 115 charities founded by high-profile, top-earning male and female athletes has found that most of their charities don't measure up to what charity experts would say is an efficient, effective use of money." The article goes on to paint what is not a pretty picture. That The Page Foundation celebrated its 25th anniversary this year says all that is needed about its success.

Alan And The Perfectly Pointy Impossibly Perpendicular Pinky

Surely every former professional football player (especially ones with long careers) lives with some type of injury from his playing days. Justice Page is no exception. But in his case the injury is hard to hide. The pinky on his left hand is, well… a picture worth's a thousand words. You can see it here on the cover of his new book Alan and the Perfectly Pointy Impossibly Perpendicular Pinky.

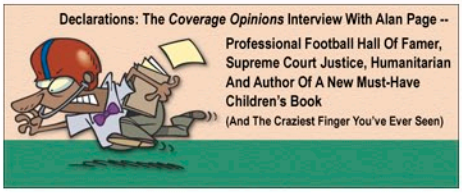
Randy Spencer's Open Mic

In the end, after looking at a ton of story boards, we settled on this one. An insurance coverage lawyer will be seen walking out of the courtroom. He is disheveled and looks like he just got beat up badly by a judge. Standing in the hallway is a young boy. The boy looks up at the downtrodden lawyer and nervously says to him "I just want you to know that I think you're the best ever." The boy timidly tries to hand the lawyer a copy of *Coverage Opinions*. But the lawyer, with much else on this mind, wants no part of it. Still, he takes it anyway after the boy insists. The lawyer spends a second looking at the cover of the magazine. It is clear from his now changed expression that he had an epiphany; all of the problems with his case have been solved. The young boy had begun to walk away. The lawyer calls out to him and says "Hey kid, catch" and tosses him his wrinkled tie. The boy catches it and says "You see, *Coverage Opinions* tells you what it means Joe."

That's my time.

I'm Randy Spencer.

The Cover-age Story



While the illustration on the cover of the book does not lack for accuracy, Justice Page's perpendicular pinky is even more breathtaking when viewed in an actual photograph. It's hard to look at, while at the same time you can't take your eyes off of it. Do a Google Image search of "Alan Page Perpendicular" and you'll see what I mean.

Alan and the Perfectly Pointy Impossibly Perpendicular Pinky was self-published earlier this year by The Page Education Foundation. Co-authored with his daughter, Kamie Page, a second grade teacher, and with spectacular artwork by David Geister, the book tells the story of Justice Page's visit to his former elementary school to read to the children. The children are warned to be on their absolute best behavior for this very special visitor. But one student, with a knack for asking inappropriate questions at inappropriate times, spots the perpendicular pinky and is transfixed. He knows he is supposed to sit quiet and listen. But his curiosity about the pinky is just too much and he shouts out "What happened to your pinky?" You'll have to read the book to see what came next. The book was inspired by the fact that being asked the question "What happened to your pinky?" is invariably asked anytime Justice Page reads to young children. And adults ask about it too.

Good question. What did happen to that pinky? It is the result of multiple dislocations over the course of a long football career. I asked Justice Page the most obvious question: can it be fixed? Yes, sort of, he told me. It can be straightened by being fused. But, in that case, it still wouldn't work any better. And while it's not painful now, Justice Page explained, there is no guarantee that it won't be after getting it straightened. That's all I'd need to know. Clearly getting the pinky straightened would do nothing but cause the loss of a great conversation piece. As I said to His Honor – Straightening the pinky would be the equivalent of hiring a construction company to straighten the Leaning Tower of Pisa.

Writing a children's book seems a world away from writing a supreme court opinion. The audiences could not be more different. I suggested this to Justice Page and he had the exact opposite response. In both cases the objective is the same, he explained -- tell a story in a way that is clear, interesting and understandable. In addition, in both a children's book and supreme court opinion every word must be thought about, be placed where it is for a reason and accidental words avoided.

Alan and the Perfectly Pointy Impossibly Perpendicular Pinky is a fantastic book. My seven year old daughter gave it two thumbs up (but did not believe me when I told her that I spoke to Alan on the phone).

If you have a young child he or she will love it. If you know a young child it would make a very special gift. And the book comes autographed by both authors and the illustrator. The book is available on The Page Education Foundation website.
Click Here

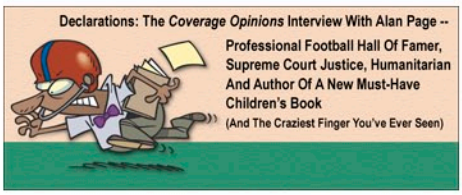
I asked Justice Page how it was possible that such a fantastic book, written by a celebrity, containing wonderful artwork and about a pinky that takes your breath away, could be such a secret. It is not for sale on Amazon. Simply put, Justice Page explained that he's busy on the Court and his daughter is a second grade teacher. So far they have not had the time to figure out the marketing and distribution aspects of this self-published book. As the saying goes, cream rises. It is only a matter of time before *Perfectly Pointy* gets the wide-spread distribution that it deserves.

The Next Chapter

Justice Page faces mandatory retirement from the Court in two years at age 70. But he doesn't seem like the retiring type. I asked him what's next. His response was not surprising. He'd like to teach. Specifically, a small group of first, second and third graders, focusing on writing. He explained that young people today need to learn how to communicate and think critically. A writing course, with a heavy reading component, would teach that.

Continued on Page 6

The Cover-age Story



Being able to express your thoughts on the written page, Justice Page told me, places you ahead of the game.

Ironically this 6'4" man with 173 career sacks in the National Football League, and 20+ years on the Minnesota Supreme Court, has a concern that he may be lacking what's needed to tackle teaching first, second and third graders: energy and courage.

Coverage Opinions Penalty Flag

Wow! Did I ever cough up the ball. Unfortunately, typos sometimes get into *Coverage Opinions*. I work hard to avoid them but they are inevitable. *Coverage Opinions* is a one-man operation. I wish I had a team. Not only would they provide help putting together the newsletter, but then I'd have someone to blame for typos. The September 4th issue of *Coverage Opinions* had mistakes. But not just any mistakes – mistakes in the title of The Cover-age Story. And not just one, but two. A typo buried on page 9 is one thing. But two mistakes in the title of The Cover-age Story is just not acceptable. Fifteen yards and an automatic first down.

NFL Highlights Film: The Best Of Football Litigation

A substantial amount of litigation surrounds the National Football League, its players and fans. There are hundreds of NFL-related judicial opinions on Westlaw. And no doubt this tells just part of the story. Surely plenty of cases are filed that never reach the point of a reported decision. [I will do you a favor here and not use trite football expressions to demonstrate that the game and litigation are both an aggressive battle between offensive and defensive opponents. Just in case you did not know that, they are.]

And all this makes sense. The National Football League is a big, really big, business. And it has one of the highest of all profiles. So it is not surprising that there is a lot of NFL-related litigation. In addition, the NFL is, understandably, very protective of its brand and image. The NFL would sue Mother Teresa if they caught her wearing a knock-off Saints jersey. I wouldn't even chew gum outside the league's 280 Park office.

Now simply because the NFL is exciting does not guarantee that all of the litigation surrounding it will be. Lots of it is not. While the NFL's product may be tossing a ball, the league itself is a business. So much of the litigation in which the league finds itself is, well, about business. There are NFL-related cases involving licensing, intellectual property, antitrust, use of players' likenesses, collective bargaining, labor and draft issues, stadium issues, taxes, workers' compensation, player eligibility, banned substances and broadcast issues, and so on. And, of course, there is the recently-settled litigation over head injuries suffered by players.

The subject of National Football League-related litigation makes for a long and varied list. But along with the necessary dry commercial litigation involving the NFL are plenty of very interesting and eyebrow-raising cases. Granted football does not offer what baseball does to create fun and interesting litigation – a ball that enters the stands at lightning speed. Nonetheless there are still plenty of cases to keep readers' interest. Below is a brief description – in no particular order -- of some judicial opinions in interesting cases involving professional football. [Space constraints make it impossible to provide all of the details. While I have to punt there, if anything piques your interest just hand me off a note and I'll pass you the full case.]

Stoutenborough v. National Football League (6th Cir. 1995): Hearing impaired individuals failed to establish that the "blackout rule," which prohibited live local broadcast of home football games that were not sold out, violated the Americans with Disabilities Act, because non-hearing impaired individuals could listen to the game on the radio.

Brown v. National Football League (S.D.N.Y. 2002): Player's suit for damages, from being struck in the eye by a referee's penalty flag weighted with B.B. pellets, did not implicate the collective bargaining agreement between the players' union and

Continued on Page 7

NFL Highlights Film:

- Continued

teams. [Procedure for filing a Notice of Appeal: throw a red challenge flag in the player's eye.]

National Football League v. Coors Brewing Company (2nd Cir. 1999): Court declined to lift a preliminary injunction that prevented National Football League Players, Inc. and Coors Brewing from using the phrase "Official Beer of the NFL Players" to promote Coors's products. [By the way, *Coverage Opinions* is the official insurance coverage newsletter of the National Football League. Kidding. Kidding Mr. Goodell. It was a joke.]

Hackbart v. Cincinnati Bengals, Inc. (10th Cir. 1979): A professional football player intentionally struck by another player has the right to pursue a tort action. The court rejected the trial court's decision that the only remedy a player has, for receiving an unlawful blow during a game, is retaliation.

Jaguar Cars, Ltd. v. National Football League (S.D.N.Y. 1995): Addressing jurisdictional issues in case by automobile manufacturer, Jaguar, alleging that the Jacksonville Jaguars's use of the name Jaguar was trademark infringement in violation of the Lanham Act. [It probably didn't help the football Jaguars that its president wrote to Jaguar Cars, Ltd. seeking its sponsorship of the proposed team. Really.]

Mayer v. Belichick (3rd Cir 2010): Jets season ticket holder could not maintain fraud and racketeering claims against the New England Patriots and head coach Bill Belichick for surreptitiously videotaping the Jets coaches and players on the field to steal their signals and coaching instructions. [Did the Pats really need such elaborate efforts to beat the Jets?]

Cox v. National Football League (S.D.N.Y. 1995): Addressing whether Miami Dolphins player, subjected to racial harassment by Buffalo Bills fans, could recover attorney's fees for suit against National Football League, because such suit brought about changes in the NFL's security guidelines.

Louie v. National Football League (S.D.N.Y. 2002): Rejecting fan's claim that the NFL's Super Bowl ticket lottery system violated the Americans with Disabilities Act because it disenfranchised disabled customers their right to obtain available accessible seats.

Bossier v. National Football League (E.D.La. 2003): Rejecting fraudulent joinder argument in a case brought by an individual that was injured while punting in the NFL Experience at Super Bowl XXXVI. When light rain created unfavorable conditions for punting, wood chips were spread over the kicking area. [Shocking that that didn't solve the problem.]

Bouchat v. Bon-Ton Department Stores (and several hundred others) (4th Cir. 2007): An amateur artist faxed a sketch for a proposed Baltimore Ravens logo to the team. He said that if they used the logo he wanted a letter of recognition and autographed helmet. The Ravens adopted a logo that had a remarkable resemblance to the artist's sketch. Years of litigation ensued. [So much for that helmet.]

Sims v. Jones (N.D. Tex. 2013): Court denied class certification to Super Bowl ticketholders who were denied or delayed access to the game or moved to lesser quality seats because temporary seats were not ready by game time. [Several decisions addressing this nightmare situation.]

O'Connell v. New Jersey Sports and Exhibition Authority (N.J. Super. Ct. App. Div. 2001): Addressing responsibility of New York Giants and stadium owner for injury sustained when a Giants fan slipped on snow and ice in the stadium. He was en route to the bathroom and pushed while waiting to pass a fight that had broken out in the seats. [Naturally. Giants fans. Hooligans!]

Gallagher v. Cleveland Browns Football Company (Ohio 1996): Addressing claim by on-field video cameraman injured when a Houston Oilers receiver and Cleveland Browns defender collided while going for a ball that had overthrown the end zone. [This is The Fortune Cookie (1966) with Jack Lemmon and Walter Matthau. Great law, insurance and football movie.]

Continued on Page 8

NFL Highlights Film:

- *Continued*

Coniglio v. Highwood Services, Inc. (2nd Cir. 1974): The court held that it was not a violation of the Sherman Antitrust Act for a professional football team to require a person wishing to purchase season tickets to also purchase tickets to preseason games. [Such practice may not be a violation of the Sherman Act, but it is a violation of morality.]

The number and variety of cases involving the National Football League provides a clear statement that litigation surrounding the game is extensive. This observation was also made by one court nearly 40 forty years ago -- before every other case on this list was decided: "Whatever else might be said about professional football in the United States, it does seem to breed a hardy group of fans who do not fear litigation combat." Coniglio v. Highwood Services, Inc. (2nd Cir. 1974).

Coverage Opinions Trivia: The Answer

The National Football League stadiums named for insurance companies:

MetLife Stadium – New York Giants; New York Jets

Sun Life Stadium – Miami Dolphins

NFL Insurance, Ltd. (In Liquidation): Boys, Stick To Football

I knew that there were some coverage cases involving the National Football League. There's the on-going coverage litigation for the concussion cases. And there was an interesting coverage decision a few years back that grew out of the well-publicized case filed by (The) Ohio State University player Maurice Clarett challenging the NFL's draft eligibility rules. In that case a New York appeals court concluded that the employment practices exclusion, in an errors and omissions policy, was not applicable.

But what I didn't know was that nearly 30 years ago the teams of the National Football League formed a Bermuda insurance company – NFL Insurance Ltd. (clever) – for purposes of self-insuring its workers' compensation risks. And let's just say it didn't end well for the teams . A find like this, when you are writing the football issue of an insurance newsletter, is manna. It was as incredible as David Tyree's helmet catch in Super Bowl XLII.

N.F.L. Ins. Ltd. (In Liquidation) v. B&B Holdings, Inc. involves a lot of interpretation of the Bermuda Companies Act. But at its core the case is about the cost of insurance being substantially higher than the teams could have imagined. Wait, where have I heard that before? Right. Like the cost of a beer at an NFL game. A full discussion of the case would be about as exciting as the NFL draft after the first two rounds. But here's the two minute drill.

In 1984, teams of the NFL created N.F.L. Ins. Ltd., a "captive" mutual insurance company in Bermuda. The plan was to self-insure their players and employees for employment-related injuries. NFLIL contracted with various insurers to act as "fronting" companies. The fronting insurers wrote the policies for the various teams' workers' compensation insurance plans. NFLIL then reinsured the primary layer of risk of the policies issued by the fronting companies to the participating members of the captive – the teams. The members paid premiums directly to the fronting company. The fronting company then passed on to NFLIL the premium received, less a deposit held by the fronting company, reimbursement for amounts paid by the fronting company to reinsure risk in excess of the primary layer, commissions and certain taxes. The reinsurance agreements obligated NFLIL, within certain limitations set forth in the agreements, to reimburse the fronting companies for claims paid to injured employees of the participating teams.

Here's where the Wow, insurance is more expensive that we imagined part comes in. NFLIL was originally capitalized with a reserve fund of $250,000, which was subsequently increased to $314,000. By 1987 the reserve fund had $432,000 and a members' deficit of $1,504,955. In 1988 the members contributed $1,998,834 to keep the insurer solvent. But it was then determined that the insurer had a deficit of $3,692,000. In 1989 it was decided that the members would need to contribute $4,734,871 in new capital in order to remedy NFLIL's deficiency. But only $595,773 of that

Continued on Page 9

NFL Insurance, Ltd. (In Liquidation): - *Continued*

amount was actually paid by the member teams.

Thereafter, NFLIL became the subject of a winding-up proceeding in the Bermuda Supreme Court and liquidators were appointed. The liquidators calculated the members' deficiency, on the date the winding-up proceeding was commenced, to be in excess of $14 million. In 1991, the liquidators issued a call on the participating teams in the aggregate amount of $14,508,708.

The liquidators filed an action to recover the deficiencies in the reserve fund. The liquidators' argument was that teams were directly liable for NFLIL's operating deficits, and, therefore, indebted to its creditors. The court's analysis of this question is eye-glazing and there is no need to discuss it here. In general, the court held that the teams were not required to make additional contributions to NFLIL as that would eviscerate the limited liability characteristics of the company in contravention of the clear intent underlying the Bermuda Companies Law. If you are interested in reading more drop me a note or the case can be found at 1993 WL 78090.

9th Circuit: Certificate Of Insurance Case Not Like The Usual

The Case That Every Broker Should Read

We all know that when a case is about a Certificate of Insurance the issue is usually whether the Certificate is sufficient to create additional insured rights when the policy itself does not. And most of the time the answer is no. In Multicare Health System v. Lexington Insurance Company, No. 12-35436 (9th Cir. Aug. 28, 2013) the Ninth Circuit addressed a different issue surrounding a Certificate of Insurance.

The facts are simple. Medical Staffing Network contracted with a hospital to provide the hospital with temporary nursing staff. Pursuant to the contract, Medical Staffing gave the hospital a Certificate of Liability Insurance issued by USI Insurance Services on behalf of Lexington Insurance. The Certificate stated that Medical Staffing had a professional liability policy that provided up to $5 million of coverage. However, the Certificate did not state that the professional liability policy was subject to a $1 million self-insured retention.

The hospital became liable for a $785,000 malpractice award that resulted from a suit against a Medical Staffing nurse on contract with the hospital. The award was within Medical Staffing's self-insured retention. But Medical Staffing went bankrupt and did not pay it. The hospital sued Lexington and USI, alleging that the failure to include the $1 million self-insured retention on the Certificate was a material misrepresentation on which the hospital relied to its detriment.

The Ninth Circuit, over a dissenting opinion, held that the complaint did not contain sufficient facts to state a claim for affirmative misrepresentation. And the court did not allow leave to amend. The court's decision was based on several rationales.

First, "the defendants were not in a fiduciary or quasi-fiduciary relationship with the hospital. They were not in any relationship with the hospital at all. They issued a Certificate of Liability Insurance to Medical Staffing, not the hospital. Staffing gave the Certificate

Continued on Page 10

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.

9th Circuit: - *Continued*

to the hospital as proof that it had insurance. The complaint alleges no facts indicating that including the self-insured retention on the Certificate was necessary to prevent a partial statement of facts from being misleading."

Second, the court did not believe "that the Washington Supreme Court would find a duty to disclose a self-insured retention amount on a certificate that summarizes insurance policies and does not contain a column for retention or deductible amounts. This is especially true in light of the fact that the hospital could have asked Medical Staffing for a copy of its insurance policy."

Lastly, the court applied common sense. "Anyone with medical, auto, homeowners, commercial or other liability or casualty insurance knows that many policies have deductibles and self-insured floors below which there is no coverage. The Certificate expressly states that 'the insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies' and that the Certificate is 'issued as a matter of information only.'"

The dissenting judge's views are worthy of review if you are involved with COIs. In general, the judge concluded that "a factual question exists at this stage of the proceedings regarding whether industry standards mandate that a $1 million self-insured retention added by endorsement should appear in the space designated for 'Exclusions Added by Endorsement/Special Provisions.' . . . Of course, if Defendants can show that industry practice is to the contrary (i.e., this box is not used in such a manner, or a self-insured retention is never so disclosed), then the hospital's claim may not survive summary judgment. At this early stage, however, the hospital need only provide plausible factual allegations, not evidence to prove the merits of its claim."

Yes, the insurer and broker beat back this challenge to an allegedly deficient Certificate of Insurance. But it was not a unanimous decision -- and one case a definitive statement of the law does not make. This may be something to consider when issuing a COI.

Florida Appeals Court: Policyholder's Interesting Take On Avoiding The "Your Product" Exclusion

Ironically, despite all of the disagreement that exists between policyholders and insurers over coverage for construction defects, the two sides generally agree that coverage is not owed for the cost to repair or replace an insured's defective work or product. Where they disagree (especially in the "your work" context) is how to achieve this result: because such damage was not caused by an "occurrence" or the "your work"/"your product" exclusion?

The difficulty for a policyholder to obtain coverage for the cost to repair or replace its own defective product was on display in Liberty Mutual Fire Insurance Company v. MI Windows & Doors, No. 2D12-2793 (Fla. Ct. App. Sept. 4, 2013). While the policyholder was ultimately not successful in avoiding the application of the "your product" exclusion, it made an interesting argument. And the trial court even bought it. While the victory was short lived, it may give other policyholders, confronting the "your product" exclusion, something to think about.

MI, a manufacturer of windows and doors, sold windows and doors to All Seasons, which agreed to install them in five condominium projects under construction along the Alabama coast. In two of the condominiums, the doors were installed with no change. In the other three, All Seasons manufactured and installed transoms running atop sliding-glass doors. This change weakened the structural integrity of the doors. Storms slammed the Alabama coast causing damage to each condominium. The five condominium associations sued MI and All Seasons. MI settled the lawsuits and sued Liberty Mutual, its liability insurer, to recover the consequential damages and the cost of repair ing and replacing the defective doors or windows at each condominium.

The trial court held that the "your product" exclusion did not apply to the doors with transoms, because

Continued on Page 11

Florida Appeals Court:

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such doors were significantly changed by others after the sale, contributing to the consequential damage suffered. In other words, the trial court held that the doors were so materially changed by the addition of the transoms that they were no longer MI's product, and, hence, the "your product" exclusion did not apply. This was no small claim: "The court found that there was $3,484,600 worth of damages covered by the policy, $1,925,700 of which was for replacement of the transom doors. Because the policy had a $1,000,000 per-occurrence limit, the court awarded MI $2,000,000 in damages."

The Florida Court of Appeal reversed: "The addition of transoms to the sliding glass doors did not fundamentally change the nature and function of those doors. This is far different from stamping steel into a washer or baking paint onto a jalousie. Common sense dictates that the doors were not 'made into something else.' The doors retained their identity after being hung on transoms. They continued to operate as sliding glass doors. Thus, the doors remained MI's product, and the 'your product' exclusion precludes any damages awarded to replace them."

While MI's argument did not prevail, the Florida appeals court did not reject it conceptually. While noting the "dearth of applicable case law" (even nationally), the court seemed open to the concept that, when an insured's product is materially changed, to the point of becoming a new product, is altered, loses its identity, or is made into something else, the "your product" exclusion may not apply.

While this argument will not be available in most "your product" exclusion cases, it certainly gives policyholders something to consider in the right case.

[The court also suggested that the "your product" exclusion could have been avoided by arguing that the doors and windows were not "your product," because "your product" excludes real property, which the doors and windows may have been when incorporated into the condominiums. This would have opened up the "your work" can of worms; but the court's point is well taken.]

Pennsylvania Superior Court: Policyholders Finally Get Some Relief Over PMA v. Aetna

The Pennsylvania Superior Court just gave policyholders what they have long sought – a way to avoid the impact of PMA v. Aetna (at least in certain claims scenarios). [A case well-known to those that deal with Pennsylvania coverage cases. See Coverage Opinions (August 14, 2013) for more about PMA v. Aetna.]

The Pennsylvania appeals court decided in Mutual Benefit Ins. Co. v. Politopoulos, No. 421 MDA 2012 (Pa. Super. Ct. Sept. 6, 2013) (published) that the Employer's Liability exclusion did not preclude coverage to an insured that was not the employer of an injured party. This is contrary to the Pennsylvania Supreme Court's 1967 decision in PMA v. Aetna, to which insurers have long cited to maintain that the Employer's Liability exclusion (even when it says employee of "the" insured and not "any" insured; and there is a separation of insureds clause) precludes coverage for all insureds, even if the injured plaintiff is not an employee of the insured seeking coverage.

Politopoulos involved an employee of a restaurant that fell on a loose step. She filed suit against the property owner for negligent maintenance of the property. The owner sought coverage as an insured under its restaurant-tenant's policy. Under PMA v. Aetna, because the injured person was an employee of the named insured restaurant, no coverage would be owed to the property owner, also an insured, notwithstanding that the injured person was not employed by the property owner.

Since the Politopoulos court recognized that it was bound by PMA, it found a way to distinguish it. It did so by concluding that PMA involved a "severability" clause while the policy before it involved a "separation of insureds" clause. Further, here the owner was a named insured while PMA involved an insured under an omnibus clause. The Politopoulos court maintained that it was not rejecting PMA. The court was well aware that it had no ability to overturn a Pennsylvania Supreme Court decision:

Continued on Page 12

Pennsylvania Superior Court: - *Continued*

"Our opinion as to the soundness of PMA is irrelevant; in matters of Pennsylvania law, we serve only one master." The court concluded: "[T]he language we find dispositive is materially distinct from that in PMA, and it is for that reason alone—not any mis givings about PMA—that we reach this result."

Note that the "separation of insureds" clause at issue in Politopoulos is the same one that appears in the ISO standard CGL policy. In the days ahead, those involved in Pennsylvania coverage will be analyzing Politopoulos to determine its reach.

More On ISO's Just-Filed CGL Data Breach Exclusions

As discussed in the Late-r Notice column in the last issue of *Coverage Opinions*, there has been much chatter of late about insurance for losses that a business sustains from cyber liability – especially data breaches. Think of a computer network that has been hacked or somehow failed, with the result being customers' personal information, which should have been confidential (credit card, medical, social security, etc.), now being revealed in some manner.

If cyber risks are real, and I believe they are, then cyber policies will take hold in the market. That's just how our economy works. But until cyber policies are in wide-spread use, efforts will be made by companies to find coverage for cyber losses under the policies that they do have at their disposal, namely, commercial general liability. That's just how common sense works.

Insurance Services Office, Inc. does not believe that such cyber claims should be covered under a commercial general liability policy. But ISO can't ignore the fact that, under its CGL policy, coverage is provided for personal and advertising injury, which is defined, in part, as the offense of an oral or written publication, in any manner, of material that violates a person's right of privacy. Data breach + personal information being revealed = no surprise that attempts have been made to obtain coverage, for such losses, under a provision that addresses violation of the right of privacy.

It is for this reason that ISO recently filed data breach exclusions for certain of its policies. Putting aside some different formats, a necessity on account of ISO's wide-ranging products and forms, a CGL exclusion (with a May 2014 date) has been filed titled "Exclusion – Access or Disclosure of Confidential or Personal Information and Data-Related Liability – with Limited Bodily Injury Exception."

Looking at the personal and advertising injury aspect of the exclusion, it precludes coverage for such injury "arising out of any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, pro cessing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information." The exclusion then goes on to explain that it "applies even if damages are claimed for notification costs, credit monitoring expenses, forensic expenses, public relations expenses or any other loss, cost or expense incurred by you or others arising out of any access to or disclosure of any person's or organization's confidential or personal information."

The exclusion is certainly written in broad terms. But then again so was the Total Pollution Exclusion. And we know how that worked out in about half the states. Like all new exclusions, ISO's Data Breach exclusion can be expected to be tested on several fronts.

First, even when the exclusion is raised in a situation where it clearly applies, efforts will be made to pick it apart to create an ambiguity. That's just how coverage disputes work. Second, as the world of data breach emerges, and no doubt hacking and technology are ever-evolving, situations may arise that were not contemplated by the exclusion – because they didn't exist at the time that the exclusion was drafted. That's just how new exposures work. Third, ISO's new exclu sions, and their Impact statements, can be expected to be used by policyholders seeking coverage for data breaches under policies that do not yet have the new exclusion. That's just how policyholder counsel works.

Late-r Notice:
A Look At Decisions To Come

Colorado Supreme Court To Address Construction Defect Statute

A few years ago the Colorado legislature responded to its displeasure over a judicial decision, limiting coverage for construction defects, by essentially using the old playground tactic -- taking the ball and not sharing it. A few other state legislature's did the same thing in response to similar decisions in their own backyards.

More specifically, in 2010, the Colorado General Assembly enacted An Act Concerning Commercial Liability Insurance Policies Issued to Construction Professionals. The Act was passed in direct response to the Colorado Court of Appeals 2009 decision in General Security Indemnity Co. v. Mountain States Mutual Casualty Co., which held that a claim for damages arising from defective workmanship, standing alone, does not qualify as an "occurrence."

The Act addresses several issues relevant to coverage for construction defects, most notably declaring that, in general, in a liability policy issued to a construction professional, work that results in property damage, including damage to the work itself or other work, is an accident.

In October 2012 the Colorado Court of Appeals stated in Colorado Pool Systems, Inc. v. Scottsdale Insurance Company that "the statute's applicability is uncertain because the pertinent events—the negotiation and execution of the policy, the faulty workmanship and resulting damage, and the denial of coverage—all occurred before the statute's effective date." Thus, the court was required to determine whether the statute applied retroactively.

The Colorado Pool Systems court held that, while statutes are presumed to apply prospectively, here that presumption was overcome – and it was intended apply to retroactively -- as the legislature stated that the Act "applies to all insurance policies currently in existence or issued on or after the effective date of this act." (emphasis added by court).

However, the Colorado Constitution forbids any law that is retrospective in its operation. And the Colorado Pool Systems court concluded that, if applied, the Act would retroactively change the coverage provided under the policy, which would retroactively alter the reasonableness of Scottsdale's actions in refusing to defend and indemnify.

On September 3rd the Supreme Court of Colorado granted Certiorari in Colorado Pool Systems to address whether the Court of Appeals erred when holding that the Act was unconstitutionally retrospective as applied to Colorado Pool's CGL policy.