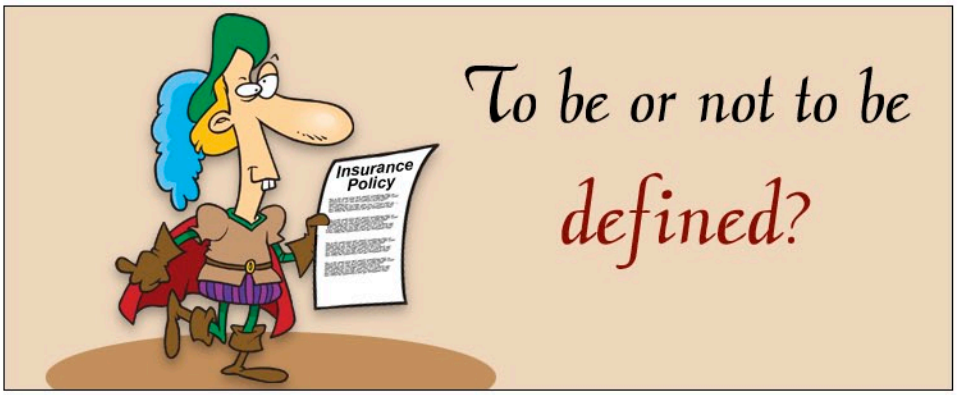
COVERAGE OPINIONS
Judicial Opinions Today - Impact On Counsel's Opinions Tomorrow

Effective Date:
January 30, 2013
Vol. 2, Iss. 3

The Cover-age Story



How Courts Address Undefined Policy Terms In Coverage Disputes

The Definition Dilemma For Policy Drafters

Hamlet, in the Cliffs Notes to *Hamlet*, ponders the choice between life and death by asking the introspective question "To be or not to be?" As much as any, this question has no one answer. For each person that asks such weighty question, their own complex response is sure to follow.

Insurance coverage has its own weighty and introspective question that provides no single answer. Namely, which terms in an insurance policy are to be or not to be defined? I know. Work with me here. Most insurance policies have thousands of words. Many of them are critically important to expressing the scope of coverage. But policies typically only define a dozen or two terms. ISO's current CGL form defines 22 terms, as well as the words "you," "your," "we," "us," and "our" in the preamble. So clearly many choices have to made by policy drafters over which terms to define. An examination of how some courts resolve coverage disputes, that are centered around the meaning of an undefined term, suggests that the answer to the question which terms in an insurance policy are to be or not to be defined, is just as illusive as Hamlet's.

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In this issue:

Declarations: The *Coverage Opinions* Interview With Donald Malecki

Coverage Opinions sits down with Don Malecki on the eve of his 53rd year in the insurance industry. In over a half a century in the property--casualty world Don has served as a broker, underwriter, risk manager, claims consultant, prolific author (including twelve books), editor, publisher, educator and expert witness in 500 cases. And he's still going. Don talks about his long career, how things have changed, his incredible insurance library, the role that history can play in coverage disputes and his best advice. Page 10

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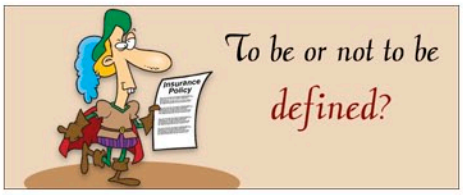

Of course, you may be thinking that all coverage disputes want for certainty in answer. But this is very much different. Take a simple example. The Nevada Supreme Court will soon decide in Century Surety Company v. Casino West, Inc. whether an absolute pollution exclusion applies to preclude coverage for the deaths of individuals from carbon monoxide poisoning from fumes that entered their room from a motel's pool heater. I do not know what the court's decision will be. Nonetheless I can still predict something with near certainty: the answer will be determined based on how the court concludes that Nevada should interpret the absolute or total pollution exclusion. Thus, I can comfortably predict that the court's decision will weigh two possible choices: interpret the exclusion literally – thereby applying it to hazardous substances of all shapes and sizes, including carbon monoxide. Or interpret the exclusion narrowly, limiting its applicability to so-called "traditional environmental pollution," which carbon monoxide is very likely not.

The same aspect of predictability applies to many coverage issues. I do not know how a court will resolve a late notice case. But I am almost positive that the decision will turn on whether the state at issue requires the insurer, seeking to disclaim coverage, to prove that it was prejudiced by the insured's late report. Take still another example. Does an exclusion that applies to "any insured" preclude coverage to an innocent co-insured? I don't know. But I am nearly certain that the court will reach its conclusion by deciding how to interpret any "severability of insureds" clause contained in the policy.

What I'm getting at is this. With most coverage issues, while you cannot predict with certainty how the court will rule, you can comfortably predict the method that the court will use to reach its decision. You may be surprised by the court's answer, but you probably won't be by the roadmap it used to reach it. But when a court is seeking to resolve a coverage dispute, that is centered around the meaning of an undefined term, it is virtually impossible to predict how it will respond. This is a much different type of uncertainty.

First, of course it is impossible to define every word in an insurance policy that could be important to expressing the scope of coverage. And what about if a word within a definition needs a definition. And courts acknowledge as much. Most respond to an undefined term by concluding that its plain and ordinary meaning, as set forth in a dictionary, should control. But that's not to say that, since a dictionary can be used in the place of a policy definition, the insurer that failed to define a term is no worse off.

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About The Editor

Randy Maniloff

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

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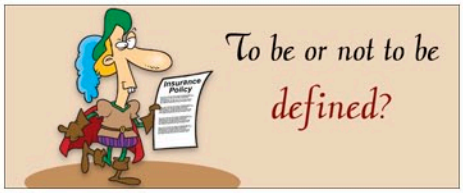
The Cover-age Story



Consider the following cases. *In doing so, take note that each one was decided within just the past month.* Let me repeat that – this many cases addressed the treatment of undefined policy terms within just the past month. That so many examples of these cases can be provided, from such a short period of time, speaks volumes about the role that the "to be or not to be defined" question needs to play in policy drafting. Further, that these examples demonstrate such a hodge-podge of responses by courts also speaks volumes about how difficult the task is for drafters.

For example, in Manner v. Schiermeier, No. SC 92408 (S.C. Jan. 8, 2013), while the court looked to a dictionary for guidance with an undefined policy term, the court was also quick to note that the insurer brought the problem onto itself by not defining the term at issue: "While the insurance policies at issue could have defined 'owned,' for purposes of the underinsured motorist endorsement, to include all those who have an insurable interest in the vehicle, they did not do so. The insurers chose to use the term 'owned' in the policies' underinsured motorist endorsement but not to define it." Courts that make such observation are likely on their way to ruling against the insurer – willingness to use a dictionary or not.

Another problem for insurers, that comes from a court going the dictionary route, is that defined terms can have more than one meaning (even within the same dictionary). Consider the court's conclusion in Sauer v. Crews, No. 12AP-320 (Ohio App. Ct. Dec. 31, 2012), finding against the insurer: "Century failed to do so [establish that the construction it favors is the only one that can fairly be placed on the language in question]. Because the policy does not define 'cargo,' the term's use creates an ambiguity and its meaning is open to interpretation. One possible definition of 'cargo' is undisputedly a very general term for items being transported. Another valid and commonly used definition of 'cargo' limits the term's usage to describing items in the stream of commerce. The policy provides no indication that it is using the term in the broader sense. Given the competing but valid interpretations, the trial court properly concluded the term is ambiguous and construed it against Century."

Resort to the dictionary can also prove problematic for insurers because courts have more than one dictionary to choose from and they may not all define the term at issue the same way. In Travelers Cas. and Sur. Co. v. Alabama Gas Corp., No. 1110346 (Ala. Dec. 28, 2012), the court needed to define the term "suit." It did so by looking at three dictionaries, which revealed that, not surprisingly, the term had more than one meaning.

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The *Coverage Opinions* Super Bowl Commercial

Coverage Opinions is the official insurance coverage newsletter of Super Bowl XLVII. Kidding. Kidding. The NFL would sue Mother Teresa faster than you can say help the poor if she claimed to be the official missionary of the Super Bowl. Those guys have no sense of humor when it comes to things like that.

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.

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This did not bode well for the insurer: "A contrary decision by us—and, in particular, a decision to focus solely upon those dictionary definitions of 'suit' that refer to 'court' proceedings to the exclusion of those that more broadly reference 'legal actions' and, especially, 'attempts to gain an end by legal process'—would put us at odds with the substantial body of sound precedent to the effect that the term 'suit' in CGL policies includes arbitration proceedings."

Still another challenge for insurers, that comes from whether policy terms are to be or not to be defined, is that it is impossible to predict which terms in the policy are most likely to need definitions. In American Zurich Ins. Co. v. Wilcox and Christopoulos, LLC, No. 1-12-0402 (Ill. App. Ct. Jan. 17, 2013) the court turned to the American Heritage Dictionary to define the term "for" as used in a policy exclusion. In Northstar Educ. Finance, Inc. v. St. Paul Mercury Ins. Co., No. A12–0959 (Minn. Ct. App. Jan. 14, 2013) the court called upon the American Heritage Dictionary to define the term "under" as used in a policy exclusion. It is very difficult to imagine that, when these policies were being drafted, anyone involved in that process saw a need to define the terms "for" or "under."

On the other hand, in Atlantic Cas. Ins. Co. v. GTL, Inc., No. CV 12–14 (D. Mont. Jan. 14, 2013) the court was confronted with the undefined terms "claim" and "offense" -- words that would seem to be well-suited for definitions in an insurance policy. But even without definitions the court didn't break a sweat addressing them. It looked to the dictionary and concluded that "their plain meaning in the context of an insurance contract is easy to discern."

Coverage Opinions Contest: Results Of The Haiku Contest

Thank you to all who entered the Insurance Coverage Haiku Contest. The response was phenomenal and I can't begin to tell you how hard it was to choose the three best. I read so many haikus, trying to figure this out, that I started to think in haiku. The winners are as follows (a copy of the 2nd edition of "General Liability Insurance Coverage: Key Issues In Every State" has been sent to each):

What, no insurance?
That is quite impossible.
Premium was paid.

--Anonymous

Your Work Exclusion,
You say you have subs, do you?
Coverage God smiles.

--Rick Piedra
FCCI Insurance Group
Sarasota, Florida

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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 newsletter. 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.

Contact Randy Spencer at
Randy.Spencer@coverageopinions.info

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Coverage Opinions Contest: - *Continued*

Coverage question
Exclusions limitations
Reservation rights

--Ronald R. Walker
Rockwood Casualty Insurance
Rockwood, Pennsylvania

Better Ingredients Make Better Exclusions: Washington Appeals Court: No Coverage For Papa John's For Text Messaging

As these things go, it was one of the quicker responses by the insurance industry to a deluge of unwanted exposure. Telephone Consumer Protection Act (TCPA or "junk fax") suits were filed in masse. Not long after, coverage litigation ensued and insurers were found to owe coverage is some states and not others. But in an effort to eliminate the exposure across the board, and hopefully bring an end to the coverage litigation, insurers, with haste, adopted by endorsement the Distribution of Material in Violation of Statutes exclusion (which was then incorporated into ISO's 12/07 version of its Commercial General Liability Form).

In general, the Statutory Distribution of Material exclusion precludes coverage for "bodily injury," "property damage" and "personal and advertising injury" "arising directly or indirectly out of any act or omission that violates or is alleged to violate" the TCPA, CAN-SPAM Act or any other statute, ordinance or regulation that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

TCPA litigation seems to have slowed down somewhat. Maybe because people are not violating the act as much (although plenty still are) or perhaps the diminished availability of insurance, thanks to the Statutory Distribution of Material exclusion, has taken the wind out of the sails of those lawyers that gamed it so well for so long. It's probably a combination of the two. But with electronic communication becoming the new norm, and the Statutory Distribution of Material exclusion having such broad scope – applying to any statute, ordinance or regu lation that prohibits or limits the sending, transmitting, communicating or distribution of material or information – it seems reasonable that such exclusion is going to continue to be relevant in coverage disputes. Translation: even if TCPA wanes, the Statutory Distribution of Material exclusion will not escape litigation over its interpretation.

This was demonstrated by the Court of Appeals of Washington in its decision in Oregon Mutual Insurance Company v. Rain City Pizza, LLC. Seattle PJ Pizza, LLC was the operator of 21 Papa John's pizza stores in Washington. PJ Pizza's owners gave a third-party marketing company certain lists of PJ Pizza's customers. The call lists were compiled from the names and telephone numbers of individuals who had ordered pizza from PJ's Papa John's stores. The marketing company used these call lists to send text messages to customers on behalf of PJ Pizza, advertising its Papa John's stores.

Very shortly thereafter a class action was filed in Washington state court against PJ's owners, as well as other pizza businesses that they owned, alleging violations of federal and state laws by the unlawful transmission of text messages to advertise pizza products. The suit also included a count for violation of Washington's not thin enough crust law.

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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.

Better Ingredients Make Better Exclusions: - *Continued*

Oregon Mutual sought a declaration that it owed no duty to defend its insureds on the basis of the Statutory Distribution of Material exclusion. The trial court denied Oregon Mutual's motion for summary judgment – concluding that the exclusion did not apply because it covered only acts or omissions of the defendants and there were no allegations that the defendants (other than Seattle PJ Pizza and one of its owners) participated in the text messaging campaign. To put it another way, the crux of the insureds' argument, accepted by the trial court, appears to have been that, if the actual text messaging was performed by a third-party marketing company, then it was not performed by the insureds, and, thus, the Statutory Distribution of Material exclusion does not apply.

The Washington appeals court – placing great emphasis on the word "any" in the exclusion -- reversed. "The policy language states 'any' act or omission and therefore does not limit the acts to those of a particular actor; rather, it applies to any acts that violate the statutes, which would include those committed by someone other than the insured. The additional language barring coverage for injuries 'arising directly or indirectly out of any act or omission' is consistent with this interpretation as it contemplates the situation where the insured may be responsible for an act or omission committed by another, such as negligent supervision or vicarious liability, which is what is alleged against the defendants here. Here, at the very least the claims alleged injuries arising indirectly from the violation of statutes prohibiting the transmission of information -- the complaint alleges that the defendants were responsible for the injuries caused by the text messages because they negligently allowed them to be sent and/or were vicariously liable for their transmission. Thus, the claims are precisely those to which the exclusion applies."

Given that it is not unusual for companies to outsource to third-parties their mass marketing campaigns, the Washington appeals court's decision, that "any" means "any," as used in the Statutory Distribution of Material exclusion, is an important one for the breadth of such exclusion.

Oregon Mutual Insurance Company v. Rain City Pizza, LLC, No. 67471-4-I (Wash. Ct. App. Jan. 14, 2013) is available on the Washington Courts website.

Insurer Between A Rock And A Hard Case: Demand To Settle For Limits -- But Not For All Insureds

It is the proverbial "damned if you do and damned if you don't" situation for insurers. An insurer is presented with a policy limits demand to settle for one insured – and it should be accepted based on liability and damages considerations -- but the settlement offered will not secure a release for all insureds. The dilemma is hard to miss. If the insurer accepts the settlement offer, and secures a release for one insured, then the insured that is not released can be expected to allege that the insurer acted in bad faith, by exhausting the policy without consideration of its interests. If the insurer does not accept the settlement offer, because what's proposed does not secure a release for all insureds, then the insured who did not obtain the settlement that had been offered to it, can be expected to allege that the insurer acted in bad faith. This insured will invariably argue that the insurer is liable for any resulting excess verdict because the liability and damages justified the insurer settling the claim.

This issue arose before the California District Court in Harp v. Converium Insurance (North America), Inc. While the case makes no new law on the multiple insureds and limits settlement dilemma issue, it is an issue that arises with some regularity, there is not a lot of law on it and the states that have addressed it have not done so consistently. For these reasons, I selected Harp for discussion here – to demonstrate how one state handles the issue and to compare it to another state's approach.

In Harp, the District Court stated that, under California law – as in just about every state – there is an implied duty for liability insurers to accept a reasonable settlement offer within policy limits.

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Insurer Between A Rock And A Hard Case:

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If an "insurer fails to accept a reasonable settlement offer within policy limits, it may be held liable for the entire judgment, even if the judgment exceeds policy limits." However, the Harp court also noted that, under California law, "the implied covenant of good faith and fair dealing prohibits an insurer from accepting a settlement demand that would exhaust its policy limit without obtaining releases for all its insureds."

So California law addresses the multiple insureds and limits settlement dilemma by not allowing an insurer to accept a policy limits settlement demand unless it will result in a release for all insureds. Hence, the law protects the insureds that do not have a settlement opportunity. But the rule in Florida is different, where the protection extends to the insureds that have the opportunity to settle and be released from a case. In Contreras v. U.S. Security Insurance Company, 927 So. 2d 16 (Fla. Ct. App. 2006), the court concluded that an insurer was in bad faith for refusing to accept a limits settlement demand that would have secured a release for one insured, even though it would have left no coverage for another insured that was not be included in the release.

The dilemma for insurers – a Hobson's choice as described in Contreras – when faced with a limits settlement demand, that will not result in a release for all insureds, is a serious one. Insurers have a choice to make, and if a court concludes that they chose wrongly, the consequences can be severe (these are excess verdict situations). Yet, in this situation, no matter which choice the insurer makes, it paid its limits and was acting to protect someone's interests. Under such circumstances the insurer does not deserve to be penalized for choosing wrongly. Thus, insurers need the benefit of clear rules on this issue. Unfortunately, as Contreras demonstrates, an insurer needs to take one on the chin to produce such guidance.

Insurers See Red – Insureds See Delicious: Washington Supreme Court Says Policy Arbitration Clauses Are Unenforceable

W.C. Fields once famously quipped: "All things considered, I'd rather be in arbitration."

Insurance policies sometimes contain clauses that require any dispute under the policy to be resolved by arbitration. Given the complexity and uniqueness of every case in litigation, it certainly cannot be said that insurers will fare better, in every case, if arbitration is the method of resolution. But, using an all things considered analysis, insurers generally prefer arbitration over the traditional court system.

But there are states that have statutes that purport to prevent insurers from requiring that a dispute under a policy be resolved by arbitration. How many states have statutes to this effect is unclear, but at least one-third (more about this below). Washington is one such state. And after the Supreme Court's recent decision in Washington Department of Transportation v. James River Ins. Co., such statute makes arbitration provisions in policies unenforceable.

The case involved a dispute whether James River owed coverage to the Washington DOT, as an additional insured, under policies issued to a company performing work on a highway project. James River attempted to initiate an arbitration proceeding against the DOT pursuant to a binding arbitration provision in the policies. The DOT filed an action seeking a declaration that the arbitration clauses were void.

The issue that ultimately made its way to the Washington Supreme Court was whether a Washington statute rendered the arbitration requirement in the policies void. The statute provided, in relevant part, as follows: "No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, shall contain any condition, stipulation, or agreement (b) depriving the courts of this state of the jurisdiction of action against the insurer[.]"
In general, the parties' competing arguments, centered around the meaning of the term "jurisdiction"

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Insurers See Red – Insureds See Delicious:

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contained in a nearly 100 year old statute, were as follows. The DOT argued that "the legislature intended to prohibit mandatory binding arbitration clauses in insurance contracts because such agreements deprive Washington policyholders of the right to bring an original action against the insurer in the courts of this state." James River argued that the statute "is a forum selection provision" and "the legislature intended to prohibit forum selection clauses in insurance contracts that designate a forum outside the state as the sole forum for actions against the insurer because such agreements deprive Washington policyholders of the right to bring an action against the insurer in the courts of this state." Putting aside how it got there, the Washington high court held that the statute is "properly interpreted as a prohibition on binding arbitration agreements."

Having concluded that the statute prohibits binding arbitration agreements in insurance policies, the court was required to examine whether the McCarran–Ferguson Act shielded the statute from preemption by the Federal Arbitration Act. The court described the issue as follows: "Generally, when a state enacts a statute of general applicability prohibiting arbitration agreements, the statute may be inconsistent with the FAA, and if so, the FAA arguably preempts that state law. However, there is an exception to this general rule when the state statute was enacted 'for the purpose of regulating the business of insurance' within the meaning of the McCarran-Ferguson Act." The court held that, because the Washington statute regulated the "business of insurance," the McCarran–Ferguson Act shielded it from preemption by the FAA.

If a statute, that prevents insurers from requiring that a dispute under a policy be resolved by arbitration, were unique to Washington, then James River may not have appeared in *Coverage Opinions*. But such statutes are not unique to Washington. The Washington DOT's brief in the case (kindly sent to me by the Washington Attorney General involved), cited a 2005 Connecticut Insurance Law Journal article, stating that nearly one-third of states have provisions prohibiting binding arbitration of insurance disputes. However, an Insurance Law360 article reporting on the case cited an attorney who stated that around 26 states place a restriction of some type on the enforcement of arbitration clauses. It is possible that these two sources are using different definitions of what is a restriction on the enforcement of an arbitration clause. Thus, they may both be correct. But the point is that Washington is not an outlier by having the arbitration prohibition statute that it does. Thus, James River has the potential to encourage policyholders, in other states, to seek to invalidate arbitration statutes and persuade other legislatures to adopt such statutes.

Washington Department of Transportation v. James River Ins. Co., No. 87644-4 (Wash. Jan. 17, 2013) is available on the Washington Courts website.

Hawaii Federal Court: Insurer Is Macadamia Nuts Not To Send Its Reservation Of Rights Letters By Certified Mail

The Hawaii District Court's decision in MF Nut Company, LLC v. Continental Casualty Company is long and fairly complex. While the substance of the opinion is not unworthy of attention, the reason for its inclusion here is simply to address a narrow factual point, but one that can have wide-ranging legal implications. Thus, I will summarize the substantive coverage issue very briefly – and not even attempt to do it justice – in an effort to get to the point to be made.

At issue in MF Nut was a timing one under a claims made policy. MF Nut, a macadamia nut farm in Hawaii, hired seasonal laborers to supplement its workforce. Over time 41 employees filed claims with the EEOC, alleging national origin discrimination and retaliation for engaging in protected activity in violation of Title VII of the Civil Rights Act. MF Nut tendered the claims to Continental Casualty Company. Continental undertook the defense – allowing MF Nut to use counsel of its choice – and did not indicate that it was doing so under a reservation of rights.

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Hawaii Federal Court:

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The EEOC ultimately determined that it had reason to believe that MF Farms had engaged in illegal discrimination. The EEOC sent MF Nut (and another involved party) a conciliation proposal that included a near $13 million payment. Don Ho-ly cow! Continental disclaimed coverage and withdrew its defense. The basis for the disclaimer was that all of the claims were an interrelated wrongful act. And since one claim was made prior to the effective date of the policy, all of the claims were deemed to have been made prior to the effective date.

MF Nut filed a declaratory judgment action seeking coverage. Among other arguments, MF Nut maintained that Continental waived any defenses to coverage when it defended MF for two years without a reservation of rights – despite knowing at the time of tender that the first EEOC charge was filed prior to the effective date of the policy. MF alleged that it detrimentally relied on Continental's defense and that Continental was now estopped from withdrawing its defense and/or denying its indemnity obligation. When all was said and done the MF Nut Court concluded that all of the EEOC charges constituted "interrelated wrongful acts" as broadly defined by the Policy. And because the first EEOC Charges were filed prior to the beginning of coverage, the later EEOC Charges, despite being filed within the policy period, were deemed to be a single claim first made prior to the policy period.

As those involved with "claims made" policies know, "timing" issues are often at the center of coverage disputes. MF demonstrates the benefit that a broadly worded definition of "interrelated wrongful acts" can have – allowing 41 separate claims, filed over a wide period, to all be deemed to have been filed at the time of the first claim (a seeming challenge for such a large number).

But this is not why MF Nut appears in this issue of *Coverage Opinions*. You see, despite MF's argument, that it was defended for two years, without a reservation of rights, Continental maintained that it did in fact issue a timely reservation of rights. However, it was addressed to an MF executive that the Continental claims representative knew no longer worked there. And, more importantly, it was not sent via certified mail. Thus, Continental had no knowledge whether anyone at MF Nut ever received it. The court ultimately concluded that there was no evidence that Continental provided a reservation of rights that was received by MF Nut.

Now, for various reasons, the court still held that, despite defending MF Nut without a reservation of rights, Continental was not estopped from disclaiming coverage. The whys of that decision are not important here. So while Continental's defense, without a reservation of rights, was, in the end, a "no harm, no foul" situation, it is clear that a lot of effort in the case was devoted to the estoppel issue. Therefore, it also seems that a lot of time and expense could have been saved if Continental had simply sent the reservation of rights letter by Certified Mail, Return Receipt Requested. That's it. That's the point that I wanted to make by including MF Nut here. Send your RORs via Certified Mail/RRR.

[It is also important to have a system in place that keeps track of the green cards that are returned, proving acceptance of the delivery. Sending a letter via Certified Mail, Return Receipt Requested, but not connecting the green return card to the letter, could moot the effort of sending the letter certified in the first place.]

MF Nut Company, LLC v. Continental Casualty Company, No. 11-4 (D. Hawaii Jan. 15, 2013) is available on the PACER system.

Declarations:

The *Coverage Opinions* Interview With Donald Malecki

Donald Malecki

Coverage Opinions sits down with Don Malecki on the eve of his 53rd year in the insurance industry. In over a half a century in the property--casualty world Don has served as a broker, underwriter, risk manager, claims consultant, prolific author (including twelve books), editor, publisher, educator and expert witness in 500 cases. And he's still going. Don talks about his long career, how things have changed, his incredible insurance library, the role that history can play in coverage disputes and his best advice.

Don, thank you for taking the time to speak with *Coverage Opinions*. I know it is impossible to summarize a 53-year career in just a few words, but please try. What are some of the highlights?

During my senior year at Syracuse University, I was employed by the Fireman's Insurance Company of Newark, N.J. It provided a solid foundation in insurance. This was followed by a one-year training program with Continental Insurance Company, including taking courses at the College of Insurance in New York City.

I then became an editor of the Fire, Casualty & Surety Bulletins (FC&S) at the National Underwriter Company in Cincinnati, where I learned how to research and write for that publication and others. This provided a great foundation for my later work.

My "baptism by fire" in risk management came when I was hired by a firm in California, owned in part by the esteemed Dave Warren and Donn McVeigh. I worked on a huge bank in Phoenix and the City of Anaheim.

Shortly thereafter, I wrote my first textbook used in the CPCU curriculum, and was influenced by such insurance giants as the late James Donaldson, William Rodda, and Ronald Horn, who was a professor at various colleges. That one book led to another and the number of published books stands at twelve and counting.

Still working with some nice, knowledgeable partners and staff, still in demand and continuing to have the opportunity to meet (and sometimes help) others around the world is quite an achievement for someone who will be 80 years young this year

Of course this question has to be asked. How have things changed in the P&C world in the half a century in which you've been a participant and observer?.

Well, I still have the L.C. Corona typewriter and some carbon paper, but it is rather unlikely I will ever put them to use again. When I started in the business, the SMP (special multi-peril package) concept was one year old. Umbrella policies, which I underwrote, offered many broad coverages. In fact, virtually all policies were broader than today and rating them was much simpler. Policy revisions were infrequent and not being pushed so hard by today's aggressive litigation. Directors and officers liability insurance was unheard of back then, and so too were many of the E&O and professional liability policies and cover ages we see today. "Cyber" insurance was not even a gleam in the eye of insurance underwriters.

Another interesting observation was that the industry was divided and everyone knew his or her place. Members of stock company-related organizations, such as the Big I, viewed members of mutual company-related organizations, such as the PIA, as mortal enemies. Nowadays, producers handle insurance from both stock and mutual companies.

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Declarations: - *Continued*

I know you have amassed a huge collection of insurance policies and documents over your career. What are some of the most interesting things in your library?

My insurance library includes old and new insurance company underwriting and claims manuals. It also has over 500 subject categories of documents packed with old articles, speeches, correspondence dealing with coverage questions and old policies and endorsements of all kinds. This includes the original umbrella policies of Lloyds, INA and many other industry pioneers. I have Best's P&C magazines since 1958 (which is when I was taking insurance courses in college), Business Insurance, including the first copy produced in 1968 and National Underwriter magazine since 1966.

We have been very successful in locating old documents that are germane to current issues particularly those involved in litigation. I am certainly not Indiana Jones, but insurance archeology is a passion minus the whip and hat.

You've talked to me about the importance that history should play in insurance coverage disputes. Can you please describe that?

When I talk to insurance people about history, they are not usually interested in that subject. What they may not know, however, is that insurance history, like all history, has a tendency to repeat itself. In fact, not knowing history can be harmful. Many of the old provisions that have been held to be ambiguous and, thus, eliminated, are often resurrected by agents and brokers. One example is the product liability batch clause that was introduced in the standard liability policies of the National Bureau of Casualty and Surety Underwriters in 1941, for purposes of serving as an aggregate limit. It was explained as being troublesome and eliminated. Apparently, those still using that same language are not aware, as drafters of those provisions, of the potential problems they have created for themselves.

You have been retained as an expert in 500 cases. To what do you owe that success?

The first thing I would like to say is that I have turned down just as many cases, if not more, than I have accepted. I used to keep a list of the ones that I also turned down, to prove that I do not take all of them offered.

Second, my success is attributable, in part, to three lawyers. Two from Houston and one from Kentucky. Early on, they put me through their fact witness and expert witness classes and taught me the ropes, including how to breath in depositions.

Third, I realized that in the event of a coverage dispute, it is up to the court to decide whether coverage applies or not. Most courts, however, have permitted me to testify on the genesis of policy language and its evolution.

One difference between other experts and myself is that I am a prolific writer and, therefore, subject to attack on what I have written. I have written hundreds of articles and have managed to remain a desired expert. What I have to sometimes explain, via depositions and trials, is that my opinions as expressed in articles change over time in response to legal and policy changes. What I may have said ten years ago is not necessarily imbedded in concrete today.

There must be some claims you will never forget. Can you share a couple of those.

Out of over 500 cases, I have only testified 55 times in court. I also can remember that only five of the judges were ones I would not care to meet again. I probably have outlived them anyway.

I remember the 1999 case of Great Lakes Dredge & Dock Company v. Commercial Union Assurance Company and the Honorable Joan Gottschall of the U.S. District Court. My testimony was like two friends who were drinking coffee and discussing matters. Another memorable case was the Dow Corning Corporation case before the U.S. Bankruptcy Court in 1996 in Michigan. The judge referred to me as "the father of many of the insurance policies' forms—or at least many of clauses and paragraphs therein—which are in litigation here." He must have thought I was a lot older than I was at the time.

What keeps you going after all these years and what things are keeping you most busy.

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Declarations: - *Continued*

I believe insurance is a continuous learning classroom and have worked so hard to learn all I can. I now enjoy helping others through speaking engagements, open discussions and writing articles and books. The word "retirement" is not in my vocabulary.

What is the best advice that you can give someone starting out in the P&C business?

What I tell people is to continue to learn and increase your knowledge of the subject matter, not only your job but everyone else's. Don't believe everything you read on the internet. A lot is misleading. Do your own research and ask others when there is no other alternative. Attend seminars and workshops and meet others for purposes of networking, even if you have to foot the bill. View matters as an investment. Also work toward CPCU and other designations.

What do you enjoy doing when you are not sitting in front of a computer?

My main hobby is my kids and grandkids. I love helping them in their work and play activities. Personally, I like to golf. I started it late in life so I will never turn pro. I combined my interest in golf and hired a pro for my granddaughter who, at the time, was 13. She is now 16 and will be playing varsity at her all-girl school. I am hopeful she will earn a college scholarship for her level of play.

Late-r Notice: A Look At Decisions To Come

Pennsylvania: The S&A Pollution Exclusion And Regulatory Estoppel

In most states, interpretation of the Sudden and Accidental Pollution Exclusion turns on the meaning of the term "sudden and accidental" as used in the exception to the exclusion. Insurers have taken the position that only an abrupt discharge meets the language of the exception restoring coverage. Policyholders argue that a discharge that had been gradual but unintended satisfies the exception and mandates coverage. Courts nationally have been addressing this issue for years and their answers go both ways

In Pennsylvania, the issue has had a consideration not seen in most other states. For purposes of resolving the "sudden and accidental" issue, the question has arisen whether a court may consider "regulatory estoppel" (and trade usage of terms). By regulatory estoppel, it is meant that, as stated by the Pennsylvania Supreme Court in 2001 in Sunbeam Corp. v. Liberty Mutual Ins. Co. (a case with thirteen amicus parties): "[H]aving represented to the insurance department, a regulatory agency, that the new language in the 1970 policies –'sudden and accidental' -- did not involve a significant decrease in coverage from the prior language, the insurance industry will not be heard to assert the opposite position when claims are made by the insured policyholders."

This issue is now before the Western District of Pennsylvania in Wiseman Oil Co. v. TIG, where a federal Magistrate Judge recommended that, for purposes of resolving the meaning of the sudden and accidental pollution exclusion, the court do so "(a) with reference to both regulatory estoppel and trade usage and (b) in accord with other guidance as to these considerations set forth in the Sunbeam decision."

Up next are possible objections to the Magistrate's Recommendation or the issue of regulatory estoppel being a part of Wiseman Oil Co. v. TIG.

Wiseman Oil Co. v. TIG, No. 011–1011 (W.D. Pa. Jan. 22, 3013) is available on the PACER system.