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

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The Cover-age Story

Happy Valentine's Day: 50 Ways To Leave No Cover

By Randy Spencer

It's about time Maniloff gave me The Cover-age Story. As if it weren't bad enough that I have to do insurance jokes, which is barely one step above balloon animals, my column is relegated to a skinny little box on page 3. I was close to walking if I didn't get some better real estate in this rag.

Happy Valentine's Day. Guys, if you have not yet bought a gift you are getting really close to the point of having to stop at CVS for a Whitman's Sampler and a card that has been rejected as not good enough by 412 people. Not to mention that it no longer has a single sharp corner or an envelope that fits. Boys, take it from experience, this is not the way you want to go.

With Valentine's Day tomorrow it only seemed appropriate to use this Cover-age Story to share a love song. Paul Simon briefly attended Brooklyn Law School (it's true – lots of websites say so). Imagine if he had finished and then went the insurance coverage route. It would have only been a matter of time before someone with those songwriting skills, who spent his days cranking out disclaimer and reservation of rights letters, would have come up with this beautiful tune.

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Declarations: The *Coverage Opinions* Interview With Tom Baker

Coverage Opinions goes to school with Tom Baker, the William Maul Measey Professor of Law and Health Sciences at University of Pennsylvania Law School. Professor Baker is a preeminent scholar in insurance law. He is the author of countless scholarly articles and several books, including an insurance law case book used in law schools throughout the country. Professor Baker is currently the Reporter for the American Law Institute's Principles of Liability Insurance Project, which he discusses here. Rest assured, he responded to all questions without employing the Socratic Method, the irritating technique used by some law professors of answering a question by asking one.

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The Cover-age Story

50 Ways To Leave No Cover

The problem is all inside your head
she said to me
People paid for a liability policy

And now your desk has paper in piles
And people screaming about
upcoming trials

The answer is easy if you take it
logically
Just close those files and set yourself
free

I'd like to help you in your struggle
With those large loss reports that you
must juggle

There must be fifty ways
To leave no cover

Your notice was late Kate
And then you didn't cooperate

That's not an occurrence Terrence

It's impaired property Lee

You furnished alcohol Paul

You intended that Matt

We're just excess Bess

We reserved on Buss Gus

Your claim relates back Jack

You spilled pollution Lucien

It's a four corners state mate

That' not PD Bea

The plaintiff's your employee Dee

You're just not an AI Ty

You never gave notice Otis

Your payment was voluntary Jerry

An insured, a dog is not, Spot

You had knowledge of falsity Leigh

We just never intended to cover that Pat

You prejudiced us Russ

That relief's only declaratory Lori

You're not legally obligated to pay Jay

That's not trade dress Les

There's misrep. in your app. Kap

We defended but we don't have to
indemnify Guy

We'll just investigate Nate

Your claim's not first made Wade

There's other insurance Vince

You've got an uninsured share Claire

The damage is your own work Kirk

Wrong policy term Thurm

We forgot to reserve but we still didn't
waive Dave

It's TCPA Faye

Or call it a junk fax Max

It's not an accident Kent

We don't cover an assault Walt

We lost your file Kyle

And your file too Lou

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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.

The Cover-age Story

Your watercraft's not less than 26 feet Pete

Emotional injury is not BI Di

That's not a professional service Gervase

I just ignored my boss Ross

We don't cover recall Saul

The policy is void Boyd

That's mobile equipment Clint

That's not a suit Newt

And for no reason at all your claim's denied Clyde

There must be fifty ways
To leave no cover

A tribute to Paul Simon's classic "50 Ways to Leave Your Lover" may seem an odd choice for celebrating Valentine's Day. But despite a title suggesting otherwise, it is a love song. After all, the song is about a woman providing advice to her lover, on ways that he can leave his wife or another woman. I mean, how's that not a love song? That's as romantic as anything Karen Carpenter ever belted out

That's my time.

I'm Randy Spencer.

Randy.Spencer@coverageopinions.info

Coverage Opinions Contest: Three More Ways To Leave No Cover

If you add up these ways to leave no cover you'll see that there are only 47 listed.

Please submit one more way to leave no cover (only one is needed but feel free to submit as many as you want).

A copy of the 2nd edition of "General Liability Insurance Coverage: Key Issues In Every State" will be given to the best three. The list will then be complete.

Please send responses to Maniloff@coverageopinions.info. Responses due by February 24.

Employees of *Coverage Opinions* and their immediate families are not eligible. No purchase necessary. Void where prohibited.

Indiana Federal Court: Insurer Intervention In Underlying Action To Resolve Coverage Issues

I have always found it surprising that one of the most important issues concerning insurance coverage often comes with no answer or less than definitive ones. Yet lots of obscure issues, that will probably arise a few times in a lifetime (maybe) – e.g., is bat guano a pollutant and is coverage owed for alienation of affections -- have been the subject of state supreme court decisions. It just seems out of whack.

The critical issue that wants for more guidance is how to resolve coverage disputes in advance of a trial

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Randy Spencer's Open Mic

About The Cover-age Story Artist Guest Columnist: Randy Maniloff

Since I gave Spencer The Cover-age Story he was kind enough to give me his space -- if you can call it that. Boy it sure is cramped in this little box.

I've been getting questions about the artist doing the cartoons that have appeared on the cover of *Coverage Opinions*. For five of the past six issues, plus this one, it has been the work of Canadian born artist Ron Leishman. Ron's cartoons have appeared throughout the world, including in greeting cards, newspaper editorials, advertisements, on billboards, and even the side of a building in Mexico and the length of a bus in Australia.

In 1975 Ron was the co-creator of Canadian comic book superhero Captain Canuck. According to Wikipedia, Captain Canuck -- a cross between Captain America and Flash Gordon – was the costumed agent of the Canadian International Security Organization.

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Indiana Federal Court:

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in the corresponding underlying litigation. It is routine for courts to state that, if an insurer has any doubts about coverage from the complaint, it should undertake its insured's defense, under a reservation of rights, and then file a declaratory judgment action to have the question of its coverage obligations determined. Talk about easier said than done.

After all, just because the insurer files a declaratory judgment action does not mean that the coverage issues will be decided in advance of the underlying action. In fact, there's a good chance that they won't. At the time the coverage litigation is filed the underlying action likely had a good head start. And what about if the answers being sought in the coverage action are dependent upon facts to be resolved in the underlying action. And don't forget that the involved judges may use the uncertainty about coverage as a tool to foster a settlement of the underlying action. And what about the insurer that defends under a reservation of rights and does not file a declaratory judgment action.

For so many reasons – these and others -- insurers are often called upon to respond to demands for coverage when there is uncertainty about their obligations. Yet despite how common this situation is, the amount of guidance that has been provided by courts is sparse by comparison. And the guidance that exists may be too fact specific to be of real use. Uncertainty about its coverage obligations can create substantial practical problems for insurers. Two of the significant ones are (1) how to respond to a pre-trial settlement demand (and then what happens if the insurer refuses to settle, because of its belief that no coverage is owed, and then there is an excess verdict); and (2) how to respond to a demand to satisfy a judgment and questions surrounding the filing of an appeal.

I offer no simple solutions here – because there are none. I can only share the potential solution that was recently tried, and rejected, by an Indiana federal court. At issue in Hughes v. Kore of Indiana Enterprise, Inc. was a class action suit brought under the Electronic Funds Transfer Act. Plaintiff alleged that Defendant failed to post a required notice on two ATMs that charged a fee for transactions. [This growing litigation is Son of Junk Faxes, but that's a story for another day.]

The defendant's insurer, Society, filed an action seeking a determination that it had no duty to defend or indemnify Defendant for any judgment obtained by Plaintiff in the ATM matter. Society also filed, in the underlying ATM action, a motion for permissive intervention, under the Federal Rules of Civil Procedure, "solely for the purpose of securing a stay" to permit a determination of the issues raised in the declaratory judgment action.

I spent $0.60 on PACER to learn Society's reason for seeking the stay. It was not a surprise. Society explained it like this in its brief in support of intervention:

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Randy Spencer's Open Mic

He patrolled Canada in the (then) futuristic world of 1993, where "Canada had become the most powerful country in the world."

In 1996 Ron stated Toonaday.com, a free website where subscribers can make requests and receive a fresh cartoon every day. Toonaday is still going strong seventeen years, and 6,500 cartoons, later. Ron also runs ToonClipart.com, where all of his cartoons can be viewed and licensed. And he can also prepare cartoons to your unique specifications. Check out Ron's work.

Introducing Randy Spencer's Open Mic Page

Please check out the new Randy Spencer's Open Mic page at the *Coverage Opinions* website, where all of the past Open Mic columns are easily accessible.

http://www.coverageopinions.info/RandySpencer.html

Indiana Federal Court:

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"The parties will expend considerable time and effort and will ask the jurors to put considerable time and effort into resolving an issue of federal statutory law [the ATM claim]. Insofar as there is no coverage for this claim, the ability to recover any significant judgment against the defendant is suspect. In the same way, Society as the insurer cannot reasonably be expected to participate in settlement discussions where it has a viable defense to indemnification. The uncertainty of the existence of coverage hinders efforts to settle the case."

The Indiana federal court was unmoved and rejected Society's motion to intervene. Beside the fact that Society failed to comply with the Intervention rule, requiring a pleading that sets out the claim or defense for which intervention is sought (and the motion to stay does not qualify), the court declined intervention on the basis that Society "fails to comply with the spirit of Rule 24(c) because it does not intend to become a party to this litigation or to assert any claim or defense. . . . Although Society compares the facts and law at issue in this action with those in its pending Declaratory Judgment Litigation, it does not seek to assert its Declaratory Judgment claims in this case." The court found it irrelevant that Society's claims in the DJ shared common questions of law and fact with those asserted in the ATM case, if Society did not seek to assert those claims in the ATM case. Therefore, Society was not entitled to intervene in the ATM action solely for the purpose of staying this case.

The court also concluded that Society's motion to intervene was not timely. In general, the court recounted the procedure of the case and concluded that Society was aware, for a while, of its need to have the coverage issues resolved. The ATM case was simply too far along for the court to allow Society's motion to put the brakes on it "for an indefinite amount of time while Society litigates its later-filed Declaratory Judgment Litigation." As one that has been involved in a fair number of motions to intervene filed by insurers, I can tell you that timeliness is often a hurdle that insurers face. [An issue for another day.]

Hughes v. Kore of Indiana Enterprise, Inc., No. 11-1329 (S.D. Ind. Jan. 25, 2013) is available on the PACER System.

Alaska Supreme Court: Insurer Between A Rock And A Hard Case: Demand To Settle For Limits -- But Not For All Insureds (Part II)

I've been to Alaska one time, for ninety minutes, and still managed to offend one person and annoy another during this short period. On a flight to Hong Kong several years ago the plane stopped in Anchorage for fuel. I deplaned and set off to purchase and mail a post card. During that simple transaction the sales clerk took real umbrage when I asked her if I could use U.S. currency. I mean, the place was so incredibly far away that it just seemed like special money would be required. She did not agree. I did not ask her about the stamps.

Then I decided to head outside and feel the Alaska air. It was winter and I wanted to see for myself if all this talk about Alaska being so cold was really true. But there was no way to get outside (while staying in the terminal) without all sorts of hassles and finding someone with a key to a certain door, yada, yada, yada. [This was pre-9/11 when you could ask to do something like this without being detained and causing the airport to shut down.] They finally figured out how to get me outside. I stepped out and took a long deep breath, sucking that cold and clear Alaska air into my lungs. Except it didn't feel very cold -- certainly no colder than Philadelphia in the winter. I made this point to my minder. He shot me a you're a moron-look and dismissively commented that perhaps I'd feel differently during my second minute outside. And off I went to Hong Kong, where you can only imagine how many friends I made.

The January 30 issue of *Coverage Opinions* addressed the "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

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Alaska Supreme Court:

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-- but the settlement offered will not secure a release for all insureds.

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.

Ordinarily I would not address the same subject in back-to-back issues. But the discussion in the January 30 issue did not report on any new law that had been made on the issue. It simply compared how two states addressed the situation. California: not allowing an insurer to accept a policy limits settlement demand unless it will result in a release for all insureds. Florida: insurer 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.

This conundrum for insurers was just addressed by the Alaska Supreme Court. Since this is a state high court, addressing an important and challenging issue, that it characterized as unsettled, and that does not come with a lot of guidance even nationally, the decision warranted discussion here, despite being in the just been there done that category.

In Williams v. Geico Casualty Co., the Alaska Supreme Court addressed coverage for an intoxicated driver and passenger of an truck that ran over, and killed, a drunk individual that was lying in the middle of a road. The estate of the decedent filed suit against the driver and passenger.

The driver of the truck was insured under a Geico policy that had a liability limit of $50,000 per person. Geico undertook the defense of the driver and the passenger. There were ultimately numerous settlement offers made but no settlement was achieved. The driver and passenger eventually each confessed judgment for nearly $4.7 million.

The settlement negotiations, and some other companion issues in the case, are complex – too much for the discussion here. But the gist of it, for purposes of making the point here, is as follows. The estate of the decedent argued that Geico had a duty to offer a $50,000 settlement for the release of the driver only or to offer two $50,000 settlements for the release of the driver and passenger, and failure to do so was a breach of the insurance contract and was in bad faith. [Geico disputed that it owed a second $50,000 limit under the policy.]

The Alaska Supreme Court, referring to the situation as an unsettled area of the law, responded to this situation as follows: "We have not directly addressed how an insurer should handle multiple insureds. Other jurisdictions have utilized two different approaches. The first is that the insurer should seek to release all insureds, but if it cannot, then it ought to seek to settle on behalf of one. In these cases, the insurer's obligations to other insureds are extinguished by reaching policy limits, even if the other insureds are exposed to personal liability. The second approach requires an insurer to seek release of all insureds; where a settlement cannot be reached the insurer must file a declaratory action to determine what coverage is owed."

The Alaska Supreme Court adopted the later approach: "An insurer has a duty to defend its insureds; seeking a settlement to the benefit of one insured while leaving others open to liability could cause unfairness. Further, the latter approach avoids a potential bad faith claim by an insured who was unprotected and efficiently adjudicates the rights and duties of the insurer and the insured." Therefore, the court held that "Geico did not have a duty to settle for [the driver's] release while leaving [the passenger] open to liability and therefore it was not in breach of contract nor did it commit the tort of bad faith.

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Alaska Supreme Court:

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We affirm the superior court's holding that Geico did not breach its duties when it offered to settle for only one policy limit for the release of both [the driver and passenger]."

Williams also supports the principle that an insurer, that refuses a demand to settle within limits, because of the existence of a coverage defense, will be protected against liability for any subsequent excess verdict. [But this issue is beyond the scope of this brief summary.]

Williams v. Geico Casualty Co., S-14089 (Ala. Jan. 25, 2013) is available on the Alaska Supreme Court website.

New York Federal Court: Duty To Defend Does Not Include Paying For Insured's Affirmative Claim

On one hand, an insurer has a duty to defend potentially covered claims asserted by a plaintiff against its insured. On the other hand, a defense to such claims may include the insured's assertion of its own claims back against the plaintiff. If an insured's assertion of its own claims, is for purposes of defeating or minimizing its own liability, then, so the argument goes, the insurer should pay or contribute to this cost. After all, any reduction in the insured's liability, that comes from this effort, benefits the insurer.

While it may be easy to see both sides of this argument, a New York federal court recently saw only one. The court concluded that, even if the insured's assertion of claims benefits the insurer, the insurer need not abandon its position that its defense obligation still only attaches to claims asserted against its insured.

In Hester v. Navigators Insurance Company, the Southern District of New York addressed this issue under the following circumstances. David Hester, of the television show "Storage Wars," has as a catch-phrase "YUUUP." Tremaine Neverson is a rap musician who also uses the catch-phrase "YUUUP" during performances. [You couldn't make this yuuup.]

Hester received a cease and desist and demand letter from Neverson concerning Hester's use of the trademark. It was no fan letter for sure. About two months later Hester preemptively sued Neverson, seeking a declaration that Hester's use of the trademark did not infringe upon Neverson's rights, as well as damages for Neverson's tortious interference with Hester's relationship with his television network. Putting aside some procedural steps, Neverson counterclaimed for cancellation of Hester's trademark. Eventually the case was settled and all claims were dismissed by both parties.

Hester sought coverage from his insurer, Navigators, for the cost of filing the preemptive suit against Neverson. Navigators, which acknowledged a defense for Hester for the Neverson counterclaim, was only willing to pay Hester 50% of his defense costs from the date of the counterclaim. Navigators took the position that half of Hester's counsel fees were for the defense of the counterclaim.

Hester filed suit against Navigators for all reasonable defense costs that he incurred related to the counterclaim, which, according to Hester, included more than just the fees incurred after the counterclaim was filed. The competing arguments were described by the court as follows: "When did Navigators's duty to defend Hester under the Policy arise? Hester argues it arose upon his receipt of Neverson's threatening Cease & Desist Letter, or at least when Hester filed his preemptive lawsuit against Neverson in what Hester believed would be the most effective manner of defending his rights in "YUUUP!" Navigators counters that it arose only when Neverson counterclaimed against Hester—in other words, only when Hester was facing a formal claim for damages in a civil proceeding before a court."

After concluding that the Neverson cease and desist letter was not a "suit" that triggered a defense obligation, the court held that no authority existed that Hester's proactive "defensive" lawsuit triggered Navigators's duty to defend.

The takeaway from Hester is that the court's decision, that Navigators was not obligated to pay for the preemptive suit, was based solely on a strict interpretation of policy language. The decision did not turn on whether Hester's preemptive suit

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New York Federal Court: - *Continued*

did in fact serve a defensive purpose with respect to the Neverson counterclaim. This gives insurers the argument that, even if the insured's proactive claims benefitted the insured, and, hence, the insurer, the insurer still has no such obligation to pay for them. [The court also held that it could not rule that Navigators's (arbitrary) decision, that 50% of Hester's defense costs, from the date of the counterclaim, were for the defense of the counterclaim, was reasonable. It ordered further briefing from the parties.]

Hester v. Navigators Insurance Company, No. 12-4033 (S.D.N.Y. Jan. 23, 2013) is available on the PACER System.

California Federal Court (Issue Of First Impression): Insurer Need Not Continue To Defend During Appeal Of Declaratory Judgment Action

Courts have long instructed insurers that have a doubt about their duty to defend to undertake their insured's defense and file an action seeking a judicial determination of their obligation. Now take an insurer that complies and then obtains a judgment that it has no duty to defend. Having done what it was supposed to do, the insurer should now be permitted to cease defending. Right? But what happens if the insured appeals the decision that the insurer has no duty to defend. Must the insurer continue to defend during the pendency of the appeal? If so, then what did the insurer gain by winning in the first place. And if the insurer does not defend during the pendency of the appeal, and the decision is reversed, causing a determination that the insurer breached its duty to defend during the appeal period, then the same question arises -- what did the insurer gain by winning in the first place?

The North District of California's decision in National Union Fire Ins Co. v. Seagate Technology provides guidance on this issue. And guidance would be useful here. After all, the court described the issue as one of first impression in the Ninth Circuit, and made it clear that, even on a national basis, authority was scarce. While Seagate addressed the issue in the context of a unique circumstance – California's Cumis statute – the decision is instructive in more typical situations.

In Seagate, National Union obtained a ruling that, with effect from 2007, it had no duty to defend Seagate, in underlying litigation. As a result, National Union ceased defending. In 2012 an appeals court ruled that the trial court erred in concluding that National Union's duty to defend terminated in 2007. At this point, National Union was obligated to pay defense costs from 2007 to 2012. And it did so. But, pursuant to the Cumis statute, it applied rates the insurer pays to attorneys it retains, i.e., essentially panel counsel rates. Seagate argued that, based on the appellate court ruling, National Union's decision to cease defending in 2007, after the ruling that it had no duty to defend, was now a breach of the duty to defend. According to Seagate, National Union, having breached the duty to defend, could not rely on the Cumis statute's panel counsel rate provision. Instead it must pay the defense bills at the full rate. This was no small difference -- $20 million.

The court held that National Union did not breach the duty to defend when it relied on the trial court's decision and ceased defending in 2007. Looking to a Fourth Circuit decision for guidance, the court held that National Union "was entitled to the benefit of the (erroneous) ruling that there was no longer a duty to defend. To hold that [National Union] was committing a breach of contract all along would convert a final judgment under Rule 54(b) into a provisional one and directly conflict with the principle that absent a stay, a party must comply with a judgment pending appeal. Although [National Union] cross-appealed and chiefly lost, the cross-appeals did not challenge the basic victory that it had already won before Judge Ware." "Reinstatement [of the duty to defend] does not require an additional finding of wrongful breach, however." The court observed that "[d]uring the pendency of the appeals, Seagate should have been aware that it was retaining expensive counsel at a risk to itself. If Seagate had wanted to change this calculus, it should

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California Federal Court (Issue Of First Impression): - *Continued*

have made a motion for stay pending appeal."

While Seagate arose in the context of California's Cumis statute, it also makes a general statement that, absent a stay, an insurer can cease defending after a trial court decision that it has no duty to defend. While the duty to defend will be applied retroactively if the decision is reversed on appeal, the insurer's obligation at that point should be payment of past defense costs, but without exposure for any consequences that may otherwise accompany a finding of a breach of the duty to defend.

National Union Fire Ins. Co. v. Seagate Technology, No. 04-1593 (N.D. Cal. Jan. 25, 2013) is available on the PACER System.

Late-r Notice:
A Look At Decisions To Come

Pennsylvania: Is Emotional Injury "Bodily Injury?"
180 Degree Change Could Be On The Horizon

The question whether emotional injury qualifies as "bodily injury," for purposes of a liability policy, has long been debated. It is an issue of no small import, especially with respect to whether a defense is owed when a complaint is filed against an insured. Courts generally answer the question in one of three ways. The vast majority of courts that have addressed the issue, under a policy that defines "bodily injury" as "bodily injury (or bodily harm), sickness or disease," have determined that it does not. A notable exception to the majority rule is the New York Court of Appeals,which held in Lavanant v. Gen. Accident Ins. Co. of Am. (N.Y. 1992) that emotional injury does qualify as "bodily injury." But while a substantial majority of courts have concluded that emotional injury does not qualify as "bodily injury," many of those same courts have also held that emotional injury, that is accompanied by physical manifestation, qualifies as "bodily injury."

Pennsylvania courts have been the least generous of any state (or close to it) when it comes to coverage for emotional injury as "bodily injury." Pennsylvania federal courts have held that even allegations of physical manifestation of emotional harm do not qualify as "bodily injury." This was recently the decision once again from the Eastern District of Pennsylvania in State Automobile Mutual Insurance Company v. Angellilli, No. 11-3425 (E.D. Pa. Jan. 29, 2013).

But Pennsylvania could go from being the least generous of any state to the most (even as generous as New York). Currently before the Pennsylvania Supreme Court in Lipsky v. State Farm Mut. Auto. Ins. Co. is the following question: "Whether a claim for emotional distress without physical injury is covered by a liability insurance policy which provides coverage for 'bodily injury' defined as 'bodily injury to a person and sickness, disease or death which results from it.'"

To demonstrate how complex this issue can be, note that in the Superior Court's decision in Lipsky, all three judges on the Pennsylvania appeals court addressed differently whether emotional injury qualified as "bodily injury."

Declarations:

The *Coverage Opinions* Interview With Tom Baker

Coverage Opinions goes to school with Tom Baker, the William Maul Measey Professor of Law and Health Sciences at University of Pennsylvania Law School. Professor Baker is a preeminent scholar in insurance law. He is the author of countless scholarly articles and several books, including an insurance law case book used in law schools throughout the country. Professor Baker is currently the Reporter for the American Law Institute's Principles of Liability Insurance Project. Rest assured, he responded to all of the following questions without employing the Socratic Method, the irritating technique used by some law professors of answering a question by asking one.

Professor Baker holds undergraduate and law degrees from Harvard University. He began his career in 1986 as a law clerk on the First Circuit Court of Appeals followed by a four year stint at Covington & Burling. Since 1992 he has been a law professor, serving on the faculty of the University of Miami, University of Connecticut and, since 2008, Penn.

I'll be honest. When I first heard about the American Law Institute's Principles of Liability Insurance Project I did not pay much attention. It sounded like the stuff of law professors, academic mumbo jumbo, and nothing I needed to know about.

Well I was wrong.

The ALI's Principles Project brings together a host of stakeholders in liability insurance – law professors, lawyers on both sides of the aisle, brokers, insurance company representatives and judges -- to produce a text that sets forth the law on several liability insurance issues. The finished work is the result of a painstaking process of debates and drafts by those involved. Of course, with so many different interests represented, the final product may not reflect everyone's beliefs. Compromise is certainly a part of the process. As the Reporter for the ALI's Principles of Liability Insurance Project, Professor Baker holds the top position. He is essentially the quarterback.

Here's why the ALI's Principles Project should matter to you, even if your involvement with liability insurance is not on the academic side. Mike Marick, of Meckler, Bulger, Tilson, Marick & Pearson, Chair of the DRI Insurance Law Committee, said it best in his From the Chair column in the January 29 issue of DRI's Covered Events: "[C]ourts across the country may well look to the work [the Principles Project] as an authoritative treatment of not only the prevailing state of the law, but also what the law should be. This could be particularly significant in instances where there is no law on an issue in a state, and the litigants and courts look to ALI's work as persuasive authority." Mike is correct. I personally believe that there is little doubt that the ALI's Principles of Liability Insurance will be cited by courts in coverage decisions.

Professor Tom Baker

Professor Baker, thank you for sitting down with *Coverage Opinions*. Can you please fill in the details of the Principles of Liability Insurance Project, such as how it came about, some of those involved and the mechanics of the process.

Happy to do that. Given the ALI's influence in the field of contracts and torts, a liability insurance project was natural, since tort and contract law meet on a daily basis through liability insurance. ALI leaders believed that judges, lawyers, and perhaps even insurance regulators, would welcome a serious, authoritative effort to identify and work through the key principles of liability insurance law. As I'm sure you agree, it's a very important field from a practical per spective, and also a very interesting one.

The ALI asked me to make a proposal back in 2010. I asked Kyle Logue from the University of Michigan Law School to help me with the Reporter duties. The ALI assembled the Advisers.

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Declarations: - *Continued*

ALI Members volunteered for the Members Consultative Group. We have been engaged in the demanding, iterative process of drafting ever since. Our Advisers include ACE General Counsel Robert Cusumano, Amy Bach from United Policyholders, Covington & Burling partner John Buchanan, Allstate Corporate Counsel Anita Banks, Florida trial lawyer Larry Stewart, and Justice Jack Jacobs from the Delaware Supreme Court. We also have a liaison from the American Insurance Association, Craig Berrington, to mention just a few of the prominent lawyers and judges involved in the Project.

What has been accomplished to date and what's on the horizon for the Project?

We're making good progress. There will be four chapters, and we're nearly done with two. The first chapter addresses basic contract doctrines like interpretation and misrepresentation. It's been approved by the ALI Council and will be up for vote at the May 2013 Annual Meeting. The second chapter addresses settlement, defense, and cooperation duties. The first half of that chapter also goes to the Membership for vote in May. The second half will go through the Council and the Membership in the next cycle, culminating we expect in a vote at the May 2014 Annual Meeting. Chapter three will address the scope of insured risks: meaty topics such as trigger, allocation, and issues related to high profile exclusions and conditions. Chapter four will address advanced insurance contract issues like choice of law, remedies, bad faith, and enforceability.

It is inevitable that a process like this involves a lot of debate and disagreement. Can you describe one area where this has happened.

A good part of the Project, maybe even most of it, involves writing clear statements of, and good justifications for, principles that any thoughtful and experienced insurance coverage lawyer would agree with, at least when there is not a real client with a real problem that requires arguing to the contrary. This project wouldn't be worth doing, however, if there wasn't room for debate. One good example is the insurer's obligation to provide independent counsel when providing a defense under a reservation of rights. Some people think that an insurer should have to provide an independent counsel whenever there is a reservation of rights. I understand that view, because the reservation of rights means that the insurer's interests are not fully aligned with the policyholder's. Other people think that insurers almost never should have to provide independent counsel simply because of a reservation of rights, on the grounds that the defense lawyer's professional responsibilities provide sufficient protection to the insured. I understand that view as well, because I think that professional responsibility means something. We ended up in a middle position. The Project states the principle that, when providing a defense under a reservation of rights, the insurer's obligation to provide independent counsel depends on whether there are common facts at issue in the claim and the insurer's coverage defense, such that the defense of the claim could be handled in a way that advantages the insurer at the expense of the insured.

I saw you speak (along with Douglas Richmond of Aon and Richard Neumeier of Morrison Mahoney) about the Principles Project at DRI's insurance conference in New York City in December. The audience, made up of serious coverage folks, was asked to raise their hand if they were familiar with it. There were many hundreds of people in the room and only a smattering of hands went up. How do you explain that a project this important is not on more people's radar?

Until the DRI event, we had chosen to work in what entrepreneurs call "stealth mode." We wanted to have some good, serious work to talk about before people started paying attention. We chose the DRI conference as our first public event, and I thought it was a very successful one. We have high profile DRI members involved in the Project – like Doug and Richard, and Bill Barker from SNR Denton. DRI members are a natural audience for us. And so are *Coverage Opinions* readers, many of whom I expect are in the DRI. Mike Marick said he wants me back at the DRI event this

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Declarations: - *Continued*

year. We'd also like to do something similar with the ABA, perhaps with TTIPS and the Insurance Coverage Committee of the Litigation Section.

When teaching Insurance Law what areas do your students find most interesting?

These days, students think that health insurance will be the most interesting, because of all the attention around the Affordable Care Act. After a catastrophe like 9/11 or a hurricane, they think that property insurance will be the most interesting. Believe it or not, they thought that life insurance would be the most interesting back in the early days of insurers' troubles with AIDS and the life settlement market. No matter what they think coming into the semester, however, they realize by the end that liability insurance is the most interesting. Liability insurance is advanced torts and contracts, and even a bit of trial practice, all in one.

When it comes to law school classes, Torts gets a lot of glory. But so many tort cases would not exist if there were not insurance dollars, or the possibility of insurance dollars, behind the defendant. That being the case, it seems like insurance law (especially liability insurance) should be a higher priority in law schools.

You won't get any argument from me about that! The good news is that more schools are teaching insurance. We have today the largest group, ever, of law professors who specialize in insurance law – too many for a shout out in a short interview. So things are looking good.

What is your favorite case to teach in your Torts class?

My favorite case is Sabia v. Norwalk Hospital. It's a Connecticut medical malpractice case that settled and would have disappeared without leaving a trace, if Barry Werth hadn't written an amazing non-fiction book about it. The book is called *Damages*. *Damages* shows (not tells) just how completely tort law in action depends on insurance. I can't recommend it highly enough, and not only for law students. *Damages* has a lot more to say to lawyers and law students than *A Civil Action.*

What made you pursue academia?

I have always admired professors who combined good teaching with serious research, but when I was in school I didn't think I would have anything special to contribute. Then, when I was practicing in the insurance coverage group at Covington and Burling, I realized that insurance was a huge, really important area that had a lot of room for a young academic to make a mark. So, after first taking a detour to work on the Iran-Contra investigation, I took a job teaching insurance and contracts at the University of Miami Law School. After that, I had a great opportu nity to set up the Insurance Law Center at the University of Connecticut Law School. Then Penn Law and Wharton enticed me to Philadelphia. I love the freedom to keep learning and trying new things, and the unstructured time, though I recognize that would drive a lot of people crazy.

What surprised you about academia?

How many opportunities there are to remain connected to practice and how much that connection enriches my academic work. Everything I do outside the law school – from teaching risk management at Wharton, to consulting, to the Professional Liability Underwriting Society, to the ALI – becomes part of the "participant observation" research that informs my teaching and writing.

I get to Penn's campus every now and then. Is there a food truck that I should not miss?

Absolutely. Check out Magic Carpet at 34th and Walnut. Great vegetarian food, and classic art rock while you wait.

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