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

Effective Date:
March 13, 2013
Vol. 2, Iss. 6

The Cover-age Story

There has long been a knock on law school that its curriculum is too heavy on the theoretical, too light on the practical, with the result being graduates that are ill-prepared for what actually goes on in a law firm. The criticism is fair. The absolute only thing I remember about my Tax Law class is that if I ever find four grand in a piano it is income. But we never talked about where on the tax form found piano money goes.

When discussion whether law school prepares students to practice law comes up I always think about it in terms of insurance coverage. After all, that's all I know. I'm just a one trick pony. Law school does not do much with insurance coverage. And as I see it, this lack of focus on insurance is Exhibit A in the failure of law school to prepare many students for actual practice.

Consider this. When it comes to law school curriculum, torts is cheer captain and insurance is on the bleachers. Now go ask a tort lawyer – one that has to make payroll every two weeks -- how enthused he or she would be to pursue a case (even a very strong one) against an uninsured defendant. The answer probably won't surprise you.

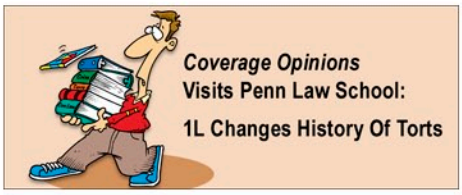
Continued on Page 2

In this issue:

Declarations: The *Coverage Opinions* Interview With Bill Wilson

Coverage Opinions goes one on one with Bill Wilson, founder and director of the Virtual University of the Independent Insurance Agents & Brokers of America (Big "I"). The Virtual University ("VU") has been voted most influential "person" in the insurance industry and its bi-weekly newsletter, VUpoint, was voted number one in the industry in a national poll. Subscribing couldn't be simpler. See for yourself inside. Bill talks about the VU and its newsletter. Oh, and one more thing, Bill played guitar with Styx. Come sail away with Bill Wilson on page 10.

The Cover-age Story



Even if the defendant is a large corporation, its uninsured status will likely bring with it collectability challenges for the plaintiff that do not exist when a place is set for an insurer at the settlement table. The all mighty torts would be a shadow of itself if not for the existence of insurance or the potential for it. But the study of insurance coverage is law school's chopped liver.

Coverage Opinions set out to see how hard it would be to incorporate insurance coverage into the study of torts. So I headed west – seventeen blocks – to the University of Pennsylvania Law School to meet with first year student Michael van den Berg. We'd never met and I knew almost nothing about him. I asked him to do one thing to prepare for our meeting – read Katko v. Briney. This is the famous 1971 Iowa Supreme Court "spring gun" case where a defendant, fed up with burglaries at his farmhouse, set up a gun to fire automatically if an intruder turned the doorknob to enter the room. Lo and behold the spring gun worked and a would-be burglar was seriously injured. The case even has its own Wikipedia page. Over the din of the lunch time crowd at New Deck Tavern, a popular bar and eatery across the street from the law school, I posed this question to Michael: As you saw, the Brineys got hit with a devastating judgment. What would have happened if they had insurance?

Michael's background in insurance coverage to be able to tackle this question: not a whole lot. But he did have one thing going for him. He had been a student in Professor Tom Baker's Torts class. As Professor Baker also teaches Insurance Law at Penn, he incorporates insurance within the context of the torts discussion. Over the course of one hour, and in between French fries, I gave Michael a primer in the basics of liability insurance coverage. And off he went to answer a real world legal question. [And off I went to pray that he didn't also feel the need to do a comparative study between American and Papua New Guinea insurance law.]

The kid was a quick study. An hour of Insurance Law 101 in a bar, followed-up by a couple of brief lessons on the phone, and he figured it out. Michael's conclusion – If the Brineys had insurance, they probably would not have incurred any financial liability. This is no small thing since they were forced to sell their property to satisfy the judgment. Michael in fact made the very astute observation that if the Brineys had insurance, the famous torts case of Katko v. Briney probably never arises. The verdict on the *Coverage Opinions* experiment: not only can the practical be incorporated into the law school curriculum, but it is easy and the result could be dramatic.

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

[For purposes of this analysis I assumed that the Brineys did not have an insurance policy. I was not able to locate any information one way or another. However, it seems unlikely that they were maintaining liability insurance, in 1967, on an unoccupied farm house, described by the court as dilapidated and with boarded up windows and doors.]

What follows is Michael van den Berg's analysis of how Katko v. Briney would have played out if the Brineys had purchased a homeowners insurance policy.

Katko v. Briney: What If The Brineys Had Insurance?

Michael van den Berg

University of Pennsylvania Law School
J.D. Candidate, 2015

Torts teaches that truth is often stranger than fiction. For that we can thank people like the players in Katko v. Briney, 183 N.W.2d 657 (Iowa 1971). Edward and Bertha Briney, Iowa farmers, inherited a parcel of land and dwelling from Mrs. Briney's parents. They lived elsewhere, but were annoyed by frequent break-ins and other nuisances at the abandoned farmhouse.

An exasperated Mr. Briney finally installed a trap: a loaded shotgun, set to fire at a door in the house should an intruder turn the knob. At Mrs. Briney's request, he aimed the gun low, so as to frighten, not injure.

Now comes Marvin Katko. He knew none of this. He had once entered the abandoned house to take some old bottles and fruit jars for his antiques collection. He returned to collect more. However, in the interim, the Brineys had installed their "spring gun." Katko twisted the doorknob; the shotgun fired, blowing away almost his entire lower leg. Katko sustained severe injuries, and had to be escorted from the house by his accomplice.

Although Katko did not contest that he was breaking and entering, the jury rejected the Brineys' claim of self defense and awarded Katko $30,000 (including $10,000 in punitive damages). To pay the judgment, the Brineys had to auction off a large portion of their farm at far below market value. Years later, a bitter Mr. Briney reminisced that if he had done one thing differently, it would be to aim "that gun a few inches higher." See Katko v. Briney at http://en.wikipedia.org/wiki.

How would Katko v. Briney have turned out had the Brineys had an insurance policy? Would they have suffered the same devastating financial consequences? The analysis of this question is undertaken based on the liability coverage part of an ISO Homeowners Form HO-3 and Iowa law, but not limited to case law in effect at the time of the incident in 1967.

Continued on Page 4

Randy Spencer's Open Mic

The Overrated Coverage Issue (And Other Overrated Things)

The Supreme Court of Washington just held (5-4) in National Surety Corp. v. Immunex Corp. that an insurer may not obtain reimbursement of defense costs following a determination that it had no duty to defend. I'm not saying that this is not an important decision. However, compared to the amount of commentary that has been written about reimbursement of defense costs, and amicus involvement, it is an overrated coverage issue. It is, however, one of the most interesting issues (which probably explains its popularity for commentary; and I stand guilty as charged). But as far as having practical impact, it is the Dave Winfield of insurance coverage.

First, many states – especially lately -- have rejected an insurer's right to seek reimbursement of defense costs. Second, even in a state where the right exists, it may have to be a situation where there was a finding of no duty to defend at all – not where there was only no duty to defend certain counts. [This is why the right has more bite in California, where Buss held that reimbursement (if feasible) applies to uncovered counts.]

Continued on Page 4

The Cover-age Story

Duty to Defend

The first issue to be addressed—and most critical, as will be demonstrated—is whether the Insurer would have a duty to defend the Brineys. Turning to the insuring agreement, the Insurer agrees to "[p]rovide a defense" should a claim arise against the insured, made because of "'bodily injury'…caused by an 'occurrence' to which this coverage applies."

It is indisputable Katko's claim against the Brineys was because of bodily injury. Therefore, the issue facing the Insurer, in deciding its duty to defend, would be whether the Brineys' conduct, that led to the shooting of Mr. Katko, qualified as "an occurrence."

The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: 'bodily injury.'" The Brineys will show that the conduct leading to the shooting of Mr. Katko was an "occurrence." Mr. Briney maintained throughout the entire suit that the shooting was "accidental," as he deliberately aimed the gun low so as to frighten, not injure. Although the complaint almost certainly alleged intentional conduct, the Iowa Supreme Court has held that the duty to defend may be triggered by extrinsic evidence. Here, such extrinsic evidence would be the Brineys' vehement claims that their conduct was not intentional. Claims of self-defense by a defendant, which would logically not be alleged in a plaintiff's complaint, have been held to qualify as extrinsic evidence when considering an insurer's duty to defend.

However, the Insurer would certainly see things differently. The Insurer would point to language in the policy that coverage does not apply to bodily injury "expected or intended by an 'insured.'" The Insurer will point to McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117 (Iowa 1984), in which the Supreme Court of Iowa held that, where it was undisputed that McAndrews had committed an intentional act -- even in self-defense -- the intentional act exclusion applied and the insurance company had no duty to defend. The Insurer will argue that the Brineys' claim of self-defense is similar to that in McAndrews. The Insurer's arguments, however, will ultimately fall short. The Brineys have a provision in their insurance policy that was not present in McAndrews: a self-defense exception to the expected or intended exclusion, which eliminates the exclusion should the insured use "reasonable force" to protect person or property. Based on Am. Econ. Ins. Co. v. Simon, 662 N.W.2d 373 (Iowa Ct. App. 2003), the Brineys will argue that, allowing McAndrews to control here, would render their self-defense exception meaningless.

Continued on Page 5

Randy Spencer's Open Mic

Lastly, the insured has to be financially able to repay the defense costs. Many are unlikely to be. So while reimbursement of defense costs is not without some applicability, the stars need to be aligned just right for the insurer for it to have a practical impact.

Speaking of overrated, here are some other things that I have long advocated as being overrated. Your overrated things are welcome and I'll publish some in a future column.

Café du Monde, New Orleans
(caramel colored water; and funnel cake with a French name is still, well, funnel cake)

Rocky Horror Picture Show
(thankfully it's shown at midnight so you can sleep through it)

CATS (the musical)
(mother of all overrated things)

Fireworks
(ooooh, aaaaah)

Mack & Manco Pizza, Ocean City, NJ
(sorry, nostalgia (and a new name) doesn't make pizza taste good)

That's my time. I'm Randy Spencer.

Contact Randy Spencer at
Randy.Spencer@Coverageopinions.info

The Cover-age Story

Therefore, the question becomes one of "reasonableness": was the Brineys' use of force so unreasonable that the self-defense exception does not apply? Although the Brineys ultimately lost on this issue, the duty to defend is considered at the time the suit is filed. From this perspective, it was not so apparent that the Brineys' trap was prima facie unreasonable, such that the Insurer would not have a duty to defend. From the Brineys' statements, it appears that they intended to frighten away intruders, not maim them. The case law furthers the Brineys' position. Most notably, the Supreme Court of Iowa held in United Fire & Cas. Co. v. Shelly Funeral Home, Inc., 642 N.W.2d 648 (Iowa 2002) that the "intentional act" exclusion must be determined from the per spective of the insured. Since the Brineys did not intend to injure Mr. Katko, his injury was not expected or intended from their vantage point. Therefore, the Insurer would have had a duty to defend the Brineys.

Duty to Indemnify

While the Insurer would have to defend the Brineys, it is highly unlikely that they also would have had to indemnify them. Here, the Insurer would get the benefit of the actual outcome of the litigation, in which the Supreme Court found the Brineys' trap unreasonable. This determination would have disqualified the "reasonable" self-defense exception to the expected or intended exclusion. The Katko Court quoted the Restatement of Torts, noting that the value of human life greatly outweighs that of chattel, such that protecting chattel with lethal force is inherently unreasonable.

Since the self-defense exception does not apply, the Insurer will successfully argue that the expected or intended exclusion precludes any obligation to indemnify the Brineys. Therefore, it would seem that, even if they had insurance, the negative financial consequences from the lawsuit (except their defense costs) would still have befallen the unfortunate Brineys.

The Other Outcome of Katko v. Briney

But if the Brineys had insurance would the case have ever gotten to this point? Once the Insurer assumed the duty to defend, settlement would be an ever-present possibility. While insurers do not settle every case, most do not go to trial. Despite the Brineys' vehement claims about the legitimacy of their spring gun trap, the insurer would have likely been concerned about a verdict against them (and rightly so as it turns out). Facing defense costs, the possibility of an adverse verdict (larger than the settlement amount), insurability of punitive damages in Iowa, and maybe even a coverage dispute as well, there is a real possibility that the Insurer may have settled the case for the Brineys before it ever went to trial. If so, the Brineys would never have had to sell their land at a bargain price, or reminisce bitterly in their later years that they should have aimed the shotgun a few inches higher. So if the Brineys had insurance the case probably never goes to trial and Katko v. Briney never takes place. The lesson is, as I learned from Professor Baker in Torts: always buy insurance.

Contest Results: Three More Ways To Leave No Cover

Thank you to everyone who entered the "Three More Ways To Leave No Cover" contest. [If you are a new subscriber to *Coverage Opinions*, check out the February 13th issue for an explanation.] The number of entries was overwhelming and there were so many that were fantastic. It was practically impossible to choose three that stood out from the rest. I agonized over it. [I really did.]

Here are the three entries that I selected as the winners. A copy of the 2nd Edition of General Liability Insurance Coverage – Key Issues In Every State has been sent to each entrant.

You have limited tort Mort

Debbie Kenney
The Motorists Insurance Group
Columbus, Ohio

Continued on Page 6

Contest Results: Three More Ways To Leave No Cover - *Continued*

Your limits don't stack Mack

Scott Patterson
Zurich North America
Owings Mills, Maryland

No binding by voice mail Gail

Connie Higginbotham
EPIC
Roseville, California

Coverage Opinions Sponsors Temple Law School SPIN Auction

Coverage Opinions is a sponsor of the Temple University Law School SPIN Auction. Temple's Student Public Interest Network (SPIN) works to support Temple Law students who volunteer for public interest efforts. SPIN was formed in 1992 after a second-year Temple Law student was forced to turn down a summer public interest job because the organization was unable to pay him for his work. Ever since, SPIN has sought to ensure that future students would not have to forgo an opportunity to do valuable community work and gain the rich experience it offers.

There is both a live and on-line auction. If you are in Philly, stop by the live auction on March 21st from 5 to 7 PM at 30 South 17th Street. Everyone else please check out the on-line auction at http://www.temple.edu/law/spin/auction.html. It runs from March 18th to March 24th. Thank you for supporting this great organization.

Colorado Supreme Court: Pollution Exclusion Precludes Coverage For Restaurant Grease

The Emotional Coverage Issue

What is it about the pollution exclusion that seems to bring out the emotion in policyholders and insurers? When I wrote my *Binding Authority* newsletter from 2008 to 2012, cases about the pollution exclusion generated by far the most reader responses. And people were not exactly ambivalent when describing their views as to the applicability of the exclusion. Also consider that such disputes are generally not hidden away as ones that will only impact the parties in the case. To the contrary, when a pollution exclusion coverage dispute gets to a state high court you can expect to see amicus parties lined up on both sides.

Ironically, pollution exclusion cases, while there are a lot (a real lot), are relatively few compared to others. After all, it takes a very specific factual situation for a claim to arise – pollution. This relative infrequency makes pollution exclusion disputes less significant than ones that can have implications in many more claims scenarios. For example, a case addressing the standard for determining an insurer's duty to defend, and the extent that "bodily injury" includes emotional injury, will affect many more claims down the road than one addressing the pollution exclusion. But where are the amicus parties in these cases? Where is the raised dander from the losing side here?

My belief as to why pollution exclusion cases bring out the emotion in policyholders and insurers is that each side is so convinced of its position. In general, the typical pollution exclusion dispute looks like this. Courts have consistently applied the pollution exclusion to bar coverage for suits against a CGL policyholder involving traditional "smokestack" or "dumping" pollution. However, courts have divided over whether the exclusion applies to non-traditional pollutants. This is where the parties' emotions come out.

For insurers, the pollution exclusion of course applies to non-traditional pollution. Just look at its clear language, stating that the exclusion applies to any claim involving a chemical or irritant—in other words, any hazardous substance. End of story. For policyholders, such a broad interpretation would lead to absurd results, such as the popular example given that, based on the insurers' broad interpretation, and without some limiting principle, the pollution exclusion would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano.

Thus, as policyholders see it, the exclusion's applicability is limited to traditional environmental pollution. Policyholders also sometimes point to drafting history to support their position. Insurers counter that there is nothing in the language of the pollution exclusion that states that it is limited to traditional environmental pollution.

Continued on Page 7

Colorado Supreme Court:

- *Continued*

The Colorado Supreme Court addressed the scope of applicability of the pollution exclusion in Mountain States Mutual Casualty Company v. Roinestad, No. 10SC853 (Colo. Feb. 25, 2013). The case had everything you would expect to see when the pollution exclusion is at issue before a supreme court, including amicus parties supporting both sides.

At issue was the applicability of the pollution exclusion under the following circumstances. Hog's Breath Saloon & Restaurant dumped substantial amounts of cooking grease into a sewer, creating a five to eight foot grease clog and consequent build-up of poisonous hydrogen sulfide gas. Two individuals were overcome by the gas while cleaning the large grease clog in a sewer. Hog's Breath was found liable for the injuries.

Hog's Breath sought coverage under a commercial general liability policy issued by Mountain States. Mountain States maintained that Hog's Breath's conduct fell within the policy's pollution exclusion. The trial court agreed with Mountain States, concluding that "the pollution exclusion clause was unambiguous and that the dumping of substantial amounts of cooking grease into the sewer constituted a discharge of a pollutant under the policy's pollution exclusion clause." The Court of Appeals reversed, holding that "the terms of the pollution exclusion clause were ambiguous and that its application to cooking grease a common everyday waste product could lead to absurd results and negate essential coverage."

The Supreme Court of Colorado, while acknowledging the Court of Appeals's concern about absurd results, reversed. The court's decision was based on several reasons. First, based on the language of the exclusion, "cooking grease becomes a contaminant when discharged into a sewer in quantities sufficient to create a clog." Second, a city ordinance prohibited the discharge of solid or viscous pollutants in amounts which will cause obstruction to the flow of the sewer and result in the presence of toxic gases, vapor or fumes in a quantity that may cause acute worker health and safety problems.

Lastly, the supreme court rejected the arguments that the reasonable expectations doctrine served as a basis for coverage and that the exclusion was only applicable to traditional environmental pollution. "The pollution exclusion clause in the policy says nothing about federal environmental protection laws, or 'traditional' pollution, however that term might be defined. Instead, it uses general language to exclude coverage for discharges of waste or substances that irritate or contaminate. Pollution exclusion clauses have been construed broadly in Colorado since at least the 1990s. Based on the language of the policy, there is no reason to believe that an ordinary person would understand the pollution exclusion clause to apply only to 'traditional' pollution, nor would prevailing law limit the exclusion in such a way."

The Colorado Supreme Court clearly handed insurers a significant win with its broad interpretation of the pollution exclusion. That the court precluded coverage for cooking grease, a common everyday waste product, as well as its disposal, a common everyday occurrence, will likely cause an emotional response from policyholders. They will likely see the decision as one that can also serve to preclude coverage for other common everyday occurrences involving a substance, that happens to be hazardous, that did not go as planned.

It remains to be seen, however, if there is a line to be drawn over the applicability of Hog's Breath, as the court was certainly influenced by the fact that Hog's Breath did not just discharge *some* cooking grease into the sewer, but enough to "create a five- to eight-foot clog that led to a dangerous buildup of toxic gas conduct that violated a city ordinance prohibiting the discharge of a pollutant in an amount that creates an obstruction to the sewer flow."

Colorado Court of Appeals Provides Novel Solution To Complex Problem: Allocation Between Covered and Uncovered Claims

Complex Problem? Legalize Pot. Result: Novel Solution.

It is one of the most challenging coverage issues of them all and one that I have long been addressing

Continued on Page 8

Colorado Court of Appeals Provides Novel Solution To Complex Problem: - *Continued*

with clients – not to mention that it has had its share of discussion in *Coverage Opinions*. It goes like this. No matter how well a reservation of rights letter may be written, specifying what's covered and what's not, the underlying litigation may result in a verdict that does not specify the extent to which it represents this or that type of damage or the claims on which the relief is based. In this situation, often-times referred to as a "general verdict," the policyholder is likely to argue that, because the basis for the jury's verdict cannot be determined, it must be presumed that the entirety of the jury award represents covered claims and damages. Adding to the difficulty for insurers is that it cannot ask appointed defense counsel to seek special jury interrogatories which would go a long way toward solving this problem.

Some courts have accepted the policyholder argument that, if the insurer created the problem of an inability to allocate between covered and uncovered claims, because it took no action to prevent it, it must therefore bear the consequences. In other words, if it cannot be determined which portion of a verdict is covered and which is not, then all of the damages will be considered covered. Or the insurer may have a difficult burden to prove covered versus uncovered damages.

The Colorado Court of Appeals's decision in Shelter Mutual Insurance Company v. Vaughn, No. 12CA0654 (Colo. Ct. App. Feb. 28, 2013) offers a solution for insurers that are confronted with this challenge.

In Vaughn, the court addressed coverage for Stephen Vaughn, for a claim for injuries that he caused when he struck a referee at Vaughn's son's YMCA basketball game. Shelter Mutual (presumably under a homeowners policy) defended Vaughn under a reservation of rights. Before trial the plaintiff dropped his assault and battery claim and proceeded only on negligence. The jury found Vaughn negligent and awarded damages.

Shelter Mutual filed a declaratory judgment action seeking a determination that the judgment was not covered because the referee's injuries were caused by Vaughn's intentional actions. Vaughn assigned his rights under the policy to the referee. The referee, as assignee, argued prior to trial in the coverage action that issue preclusion prevented Shelter Mutual from claiming that Vaughn acted intentionally, given the jury's verdict of negligence in the underlying trial. "Issue preclusion, also called collateral estoppel, bars relitigation of issues actually litigated in and necessary to the outcome of a prior action." The argument that issue preclusion applied was rejected.

After a bench trial in the coverage action the court held that Vaughn's actions were intentional and therefore excluded under the policy. This finding was not challenged. Instead, the case went to the Court of Appeals on a challenge to the trial court's finding that issue preclusion did not bar Shelter Mutual from asserting that Vaugh's actions were intentional.

Characterizing it as an apparent matter of first impression in Colorado, the Court of Appeals held that issue preclusion did not bar Shelter Mutual from asserting that Vaugh's actions were intentional.

Examining the various requirements for a party to establish issue preclusion (a discussion beyond the scope here), the crux of the court's argument was two-fold. First, "[N]o privity existed between Shelter and Vaughn in the underlying trial because their interests were not aligned. Vaughn had an interest in denying all liability, whether based on negligence or intentional conduct. Shelter had an interest in proving that if Vaughn was liable, it was for intentional acts because that would release Shelter of the duty to indemnify Vaughn. Shelter's reservation of rights placed Vaughn on notice that the insurer and the insured had divergent interests."

The court's other main reason for concluding that issue preclusion did not bar Shelter Mutual from asserting that Vaugh's actions were intentional was that "Shelter did not have a full and fair opportunity to assert its own interests in the underlying trial because Shelter's interest conflicted with Vaughn's interest. While Shelter and Vaughn shared an interest in proving that Vaughn was

Continued on Page 9

Colorado Court of Appeals Provides Novel Solution To Complex Problem: - *Continued*

not liable in negligence for Miller's injuries, Shelter also had an interest in proving that if Vaughn was liable, his acts were intentional or criminal, because intentional and criminal acts were excluded from coverage by his insurance policy."

While the Colorado Court of Appeals's decision in Vaughn does not address allocation between covered and uncovered claims per se, it is easy to see how the decision – by allowing an insurer to relitigate, in a coverage forum, the very issue resolved in the underlying case -- offers a solution for insurers that are confronted with this challenge. The insurer can allow the underlying case to proceed to trial as it will, even if it could result in a verdict that does not allow for a determination of allocation between covered and uncovered claims. Then, in a subsequent coverage action, the insurer can address the allocation issue, without being bound by the results of the first action.

Supreme Court Of Indiana Defines "Care, Custody Or Control" Of Insured Under Molestation Exclusion

In a closely watched case, the Supreme Court of Indiana in Holiday Hospitality Franchising v. Amco Insurance Company, No. 33S01-1206-CT-312 (Mar. 6, 2013) addressed the meaning of "care, custody or control" of the insured under a molestation exclusion. While some molestation exclusions preclude coverage for molestation, without any qualification, plenty also limit the exclusion to abuse or molestation by anyone of any person while in the "care, custody or control" of the insured. As a supreme court decision, addressing the "care, custody or control" issue in the context of a hotel, where the situation is not as apparent as, say, a school, Holiday Hospitality should have some legs.

The case arose as follows. A minor was a guest at a Holiday Inn Express. During his stay he was molested by a Holiday Inn Express employee who entered his locked room at night. A suit for damages was filed. The Holiday Inn was insured under a commercial general liability policy issued by Amco. Amco disclaimed coverage, among other reasons, on the basis of the policy exclusion for bodily injury arising from "[t]he actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of the insured." Coverage litigation ensued.

Putting aside some history, the case made its way to the Supreme Court of Indiana on the question whether the minor was in the care, custody or control of the Holiday Inn at the time of the molestation. Noting that the phrase was written in the disjunctive, the court observed that only one of the three terms had to be satisfied for the exclusion to apply.

Examining "custody," the court concluded that the minor was not in the custody of the Holiday Inn. While there was no explanation for this, it seems obvious.

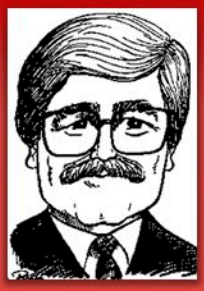
As for "control," the court imagined that the minor was, to some extent, under the Holiday Inn's control, as the hotel probably had the power to exercise authority over him, if, for example, he smoked a cigarette in a non-smoking room or made loud noises that disturbed other guests. But because no such rules were present in the record, the court did not rule on this issue.

The heart of the case was whether the minor was in the "care" of the Holiday Inn at the time of the molestation. The court, over a dissenting opinion, concluded that he was: "It is undisputed that R.M.H. was molested by Forshey while R.M.H. was a guest at Holiday Inn Express, staying in a room rented to the mother of R.M.H.'s friend. It is further undisputed that R.M.H. was in that guest room, behind a door locked by an electronic key provided by Holiday Inn Express, when Forshey entered and molested him. It is also undisputed that at this time—because of R.M.H.'s status as a guest—Holiday Inn Express owed him a duty of care by law."

In some cases, it is difficult to dispute that the person molested was in the care, custody or control of the insured at the time of the molestation, such as a school student or child in a daycare. But then there are situations where the insured may not see it so clearly, as was the case here. Holiday Hospitality is likely to be looked at by other courts nationally that are called upon to address "care, custody or control" in the context of the molestation of an insured's business invitee.

Declarations:

The *Coverage Opinions* Interview With Bill Wilson



Bill Wilson

Bill Wilson is Associate Vice-President of Education and Research for the Independent Insurance Agents & Brokers of America (Big "I"), the nation's largest trade association of independent insurance agents. He is also founder and director of the Big "I"'s Virtual University ("VU"). The VU has been voted most influential "person" in the insurance industry. The VU's bi-weekly electronic newsletter, VUpoint, was voted number one in the industry in a national poll. Bill also played guitar with Styx. Come sail away with Bill Wilson.

The Virtual University is an insurance research library containing between 8,000 and 9,000 pages of content, including coverage, agency management, sales and customer service. The VU also offers its immensely popular "Ask an Expert" service. As many as 20 or more questions per day are sent to the service, where 50+ nationally recognized insurance coverage, agency management and technology experts are in place to provide responses, usually within three to five business days. The VU also offers at least six nationwide webinars annually. Its 2-hour national webinar on certificates of insurance had about 7,000 people participate.

The VU also publishes VUpoint, a bi-weekly electronic insurance newsletter. It is free and not restricted to member agencies.

Most newsletters have six articles, addressing such things as personal and commercial lines coverage, agency management, sales, customer service and technology. Some issues are solely devoted to a specific topic. VUpoint has over 16,000 subscribers in about 70 countries.

Subscribing to VUpoint is easy. Just click here

Tell me about the background of the VU and did you ever imagine that it would grow as large as it has?

Well, like most good ideas the concept began in a bar where somehow all things seem possible. This was around 1997 at an annual conference we hold for the education directors of our state affiliates around the country. I ran the idea by several people and got positive feedback. So I spent the next year outlining a framework for the VU components and setting up a pretty rudimentary (and incredibly ugly) web site which I pitched to our CEO and VP of Education. They bought into it. I joined the Big "I" staff and created the initial launch in 1999 with a budget basi cally of me and $139 for a copy of Microsoft FrontPage.

As for our growth, frankly, I had hoped for even greater penetration into the trenches of our member insurance agencies. I speak at state Big "I" conventions several times a year and, after more than a decade, I'm still amazed at how many agents are not aware of the VU—and that it's FREE as part of their membership benefits. And these are typically agency owners and managers at these conventions…a very small percentage of producers and customer service reps are aware of the VU. How to reach this audience is a mystery that I'm still unraveling.

What is the source of the content on the Virtual University?

On the insurance coverage side, I write or edit most of the articles. Many of them come from our "Ask an Expert" service. When I see the same basic question or claim situation come up repeatedly, I figure it's time to add the issue to the library in the form of an article. In addition, sometimes issues arise that are not that common but they're very important from the standpoint of potentially catastrophic uncovered losses that agents should be aware of. We also get contributions from some very insurance-geeky folks at our state associations and we reciprocate when they post VU content on their web sites.

For other types of content like agency management, sales, customers service, etc., we rely on contributions from our VU volunteer faculty or third parties interested in

Continued on Page 11

Declarations:

The *Coverage Opinions* Interview With Bill Wilson

- Continued

wider distribution of their intellectual property. We're blessed with some of the very best people in the country as faculty members who are also prolific writers and educators, along with very generous professionals from other fields. We've never paid a penny for content and we have great content thanks to several dozen people who believe in and support the independent agency system.

How do you logistically handle 50+ VU faculty members answering what could be two-dozen "Ask an Expert" questions per day? What checks and balances are used to ensure accuracy and consistency in answers?

When an Ask an Expert ("AAE") question is posted on our web site, I get an email alert. Most of them I can answer myself (or I simply link to an existing VU article) and do so whenever possible within minutes or at least within 24 hours. If a question warrants soliciting several opinions, I forward it to the faculty members with expertise in that area, so I don't send CGL questions to technology gurus. That keeps the service manageable on both ends. On average, I only send out a half dozen or so questions a day via this Q&A framework. Whenever I get enough faculty responses to reply with a substantive answer, I post them on the web site and the questioner gets an email alert that they have an answer waiting. This can take 3-5 working days though the response time is usually on the lower end of that time frame.

As for quality control, when all of the faculty responses are pretty much in agreement, you know we've probably nailed it. But we often don't agree on whether a claim is covered or not. Imagine that. In those cases, I allow each response to stand on its own merit. If a faculty member takes exception to one or more of those responses, believe me, they let me know and I circulate that to everyone I sent the question to. If warranted, I also follow up with the person who posed the question. This is all done anonymously so no individual is associated with a particular response.

We have been remarkably successful in getting initially denied claims paid. I realize that this adversely affects many of your peers in that these claims never move to litigation, but there seems to be plenty of work still to go around. We've also had insurance companies tell their agents to submit the coverage conundrum to our service and if we say it's covered, they'll pay the claim. It hurts when we have to say it's NOT covered, but that does lend credibility to our objectivity.

What are the most common topics for Ask an Expert questions?

At least 80%, and probably 90%, of all Ask an Expert questions are coverage related, usually either seeking an interpretation of a policy provision or seeking our assistance on a claim that is facing an initial denial.

I am aware that you once played guitar with Styx. Can you talk about your prior life as a rock star. [And by the way, thanks, now I can't get Come Sail Away out of my head.]

My Styx experience was in their early days of playing fraternity parties and school dances. I got to sit in on a couple of cover songs so now I can tell people that I used to "play with Styx." But I saw that they weren't going anywhere so I entered the lucrative field of insurance nerdism. These days I'm relegated to doing my nostalgic "VU Top 20 Musical Countdown" seminar that combines music and insurance and, in fact, does feature "Come Sail Away" and my many stories about Styx, Joe Walsh (another story), and my once legendary 1960 Pink Rambler Ambassador (a GREAT story for a bar sometime).

Thanks Bill. You are a renegade. You certainly don't have too much time on your hands. When it comes to newsletters, you've shown me the way. OK, I'll stop.

Late-r Notice:
A Look At Decisions To Come

Supreme Court Hears Ewing Construction – Now The (Long) Wait Begins

Second Biggest Question Ever About A Ewing In Texas

The last time there was a question about a Ewing in Texas, where the answer was eagerly anticipated, it involved J.R. There is once again a question about a Ewing in Texas where the answer is eagerly anticipated. This time it involves C.D.

In late February the Supreme Court of Texas heard oral argument in Ewing Construction Company v. Amerisure Insurance Company. At issue were certified questions from the Fifth Circuit concerning, under what circumstances, the contractual liability exclusion, contained in a CGL policy, serves to preclude coverage for a contractor for claims for property damage allegedly caused by its construction defects. Putting aside various details, the Texas high court is set to address whether the contractual liability exclusion applies broadly – to liability assumed by an insured arising from its express and implied promises to complete a contract in a good and workmanlike manner. In other words, the typical promises that contractors make in construction contracts. Or does the contractual liability exclusion apply narrowly, as some courts have held, solely to an insured's assumption of liability of another, such as in a hold harmless or indemnity agreement?

If the Ewing court adopts the broader interpretation – thereby applying the contractual liability exclusion to preclude coverage for a pedestrian CD claim -- and other courts follow suit, the decision would have a significant impact on construction defect claims.

Ewing is probably the most closely watched coverage case in the country right now. But despite how eagerly anticipated it is, the decision may be a long time off. The Texas Supreme Court has been known to take a while to issue some opinions. For example, the Texas Supreme Court's 2008 decision in Fairfield Ins. Co. v. Stephens Martin Paving, addressing whether Texas public policy prohibited insurance coverage of exemplary damages, came three years and three months after oral argument. In other words, it took longer for the court to issue its decision than to attend law school from start to finish, sit for the bar exam and get the results.

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.

The views expressed herein are solely those of the author and are not necessarily those of his firm or its clients. The information contained herein shall not be considered legal advice. You are advised to consult with an attorney concerning how any of the issues addressed herein may apply to your own situation. Coverage Opinions is gluten free but may contain peanut products.