From the Chair

It is hard to believe, but it already is time for our Section to begin planning for our annual meeting in September. The annual meeting program will be moderated by Chair-Elect Mark Cooper and tentatively, the Section’s Annual Meeting is scheduled for Thursday, September 30, 2010 at the DeVos Place & Amway Grand Hotel in Grand Rapids. Please make a note of that date and plan to attend. Additional details will be provided as they become available.

Our Section co-sponsored and was well-represented at the “Sustainable Development and Other Emerging Issues in Construction Risk Management” breakfast roundtable on January 14, 2010 in Birmingham. Council members Deborah Hebert and Amy Iannone co-chaired on behalf of our Section, and Hal Carroll and Tim Casey presented at Roundtables on additional insured and construction insurance issues. Thanks to those of you who also attended.

There are also some upcoming Section events over the summer. Our Section is planning to send Mark Cooper to attend the annual Leadership Forum for State Bar Section Chairs and Chairs-Elect. I will be representing our Section at the Real Property Law Section summer conference, pursuant to their request for our Section to lead a Roundtable on insurance issues.

Our section continues to grow and now has over 425 members, including law students. We welcome your involvement, particularly with respect to our Committees, and in contributions to this Journal. Given our membership increase, and corresponding increase in our Section financial account, we are exploring options for presenting our own Section seminar, perhaps in coordination with the Institute of Continuing Legal Education, or with another State Bar Section.

Keep in mind that we have significant information about the Section on the State Bar website, www.michbar.org/insurance/, including Minutes of Council meetings and past issues of The Journal of Insurance and Indemnity Law. Our next council meeting will be May 11, 2010, in Grand Rapids.
Introduction

Captive insurance companies ("captive") are insurance companies that are formed for the specific purpose of financing the risks emanating from the parent owner or group of owners and their respective employees and affiliates or, in some cases, a group of unrelated entities and individuals. Captives have emerged over the last forty years as a practical alternative to commercial carriers for effectively managing particular risks. In addition to stabilizing premium payments and potentially lowering overall insurance-related costs, captives offer their owners increased flexibility, claims management authority, loss experience benefits, and potential tax benefits depending on the structure of the captive and parent(s).

However, captive ownership is not without its unique challenges and responsibilities. Specifically, captives sometimes are not licensed to transact the business of insurance by each state in which insureds are located. As a result, captives must be careful to avoid engaging in regulated activities and should likewise ensure that the policies issued do not impose any obligations that could transcend the "business of insurance" threshold of the particular state. It is for this reason that captives frequently write "indemnity only" insurance policies whereby the named insured on the policy, which is usually the captive owner(s), has the duty to defend a covered claim and the captive is only obligated to reimburse the insured for covered losses. To this end, it is important that the captive owner fully understand its duties to the insureds both under the policies and the applicable insurance laws of the jurisdiction where risk is located.

American Casualty Company v. Children’s Hospital Insurance Limited

On January 11, 2010, the Court of Appeals for the Fourth Appellate District of California issued an opinion that can serve as a valuable reminder that ignorance of the applicable insurance laws and regulations in the jurisdictions where risk is located can result in unintended and expensive consequences for captives and their owners. In American Casualty Company of Reading, Pennsylvania v. Children’s Hospital Insurance Limited, the appellate court affirmed the trial court’s ruling that American Casualty was entitled to equitable subrogation from both Children’s Hospital Insurance Limited ("CHIL"), a Bermuda captive, and Rady Children’s Hospital of San Diego ("Rady"), the sole shareholder of CHIL and named insured on the policies, for the cost of defending Eric Camera ("Camera"), formerly a registered nurse at Rady, in an action alleging sexual battery, battery, assault and negligence.

Summary of the Facts

The complaint alleged that on February 14, 2005, while Sonji Washington was in the hospital visiting her infant son, Camera approached her and “offered to assist her in injecting insulin, which she takes for diabetes.” The complaint further alleged that Camera sexually assaulted and molested Washington after he “injected her with an unknown substance” which caused her to “become drowsy and fall into a semi-conscious state.”
Rady and its employees, including employed registered nurses, were covered by a professional liability policy issued by CHIL. The CHIL policy included a duty to delegate the defense of any suit brought against an insured for covered damages and a duty to reimburse Rady, as the “Named Insured,” for all reasonable expenses incurred as a result of investigating or defending a covered claim. The policy covered claims against Rady and its employees arising from their provision of professional services and included a “Sexual Misconduct Endorsement” which specified that “where a claim of sexual misconduct is made by a patient (or a patient’s family member) of the Named Insured, the claim shall be deemed to arise from professional services.” With respect to other insurance, the policy provided that CHIL had no duty to defend a claim “[i]f other valid insurance applicable to the risk is available to the Named Insured....”9

Camera also was insured under a separate professional liability policy which he purchased from American Casualty. The policy provided, “[w]e will pay all amounts, up to the Professional Liability limit of liability stated on the certificate of insurance [$1 million per claim], that you become legally obligated to pay as a result of a professional liability claim arising out of a medical incident by you or by someone for whose professional services you are legally responsible.”10 As to a duty of defense, the policy stated, “[w]e have the right and duty to defend any claim that is a professional liability claim.”11 With respect to other insurance, the policy provided, “[i]f there is any other insurance policy . . . that applies to any amount payable under this Policy, such other insurance must pay first. It is the intent of this Policy to apply only to the amounts covered under this Policy which exceed the available limit of all deductibles, limits of liability or self-insured amounts of the other insurance, whether primary, contributory, excess, contingent or otherwise. This insurance will not contribute with any other insurance.”12

After being served with a copy of the complaint, Camera forwarded the complaint and a written request for defense and indemnification to both Rady and American Casualty. Rady initially failed to respond to its employee’s request for defense and subsequently failed to appoint an attorney for the defense. American Casualty accepted the defense subject to a reservation of rights and subject to the provision that its defense did not constitute a waiver of the “other insurance” clause.13

The action eventually was settled for $15,000, with Rady and/or CHIL paying $7,500 and American Casualty paying $7,500. Additionally, American Casualty paid $71,112.16 for Camera’s defense costs which were not reimbursed by CHIL.14

Summary of the Holding

In affirming the trial court’s holding, the appellate court noted three significant points.

... ignorance of the applicable insurance laws and regulations in the jurisdictions where risk is located can result in unintended and expensive consequences for captives and their owners.

First, the court held that Rady and CHIL improperly denied coverage of the claim under the policy. Even though Rady and CHIL questioned whether the claim actually was covered, the court found that the original complaint’s allegation regarding Camera’s negligent injection of Washington potentially constituted a professional service under the policy. Like Michigan,15 California requires a liability insurer to defend its insured when a claim creates any potential for indemnity.16 An insurer may not “deny an insured a defense at a time when it has reason to believe that there is potential liability under the insurance policy, and then rely upon the results of the underlying action and subsequent factors to prove that there was in reality no potential liability in the first instance.”17 In short, “the insurer must defend in some lawsuits where liability under the policy ultimately fails to materialize; this is one reason why it is often said that the duty to defend is broader than the duty to indemnify.”18

The court explained that any lack of clarity whether the sexual misconduct endorsement applied to Camera was immaterial because “in an action in which some claims are at least potentially covered by the policy and others are not, the insurer must defend the entire action. To defend meaningfully, the insurer must defend immediately.”19 Furthermore, the court identified an important consequence of an insurer’s wrongful denial of coverage or improper refusal to provide its insured with a defense. When the insurer has notice of the pending of the underlying action, “the insured is entitled to make a reasonable settlement of the claim in good faith and... then maintain an action against the insurer to recover the amount of the settlement.”20 CHIL was thus prohibited from subsequently challenging the reasonableness of the defense costs paid by American Casualty because it initially failed to fulfill its duty to defend.

Like Michigan, California requires a liability insurer to defend its insured when a claim creates any potential for indemnity.

Second, and of particular significance, the court found that CHIL had an affirmative duty to assume the active defense of Camera. The CHIL policy language provided vague references regarding CHIL’s duty to reimburse the named insured for the cost of defense and delegate the defense of any suit. However, the court found that the CHIL policy’s reimbursement

Continued on next page
language was insufficient to negate the presumptive duty to defend. California law provides that “unless the parties’ agreement expressly provides otherwise, a contractual indemnitor has the obligation, upon proper tender by the indemnitee, to accept and assume the indemnitee’s active defense against claims encompassed by the indemnity provision.”21 In short, “[a]n insurer’s implied duty to defend may not be waived absent an explicit provision to that effect.”22

Although it is unclear how many other jurisdictions would agree with its decision, the California court’s finding that the policy’s reimbursement language was insufficient to negate CHIL’s duty to defend raises serious regulatory issues for the captive. Specifically, if this presumed duty to defend is not expressly rebutted in the policies and the captive is actually found to be responsible for claims adjusting, then the captive may be subject to penalties for engaging in an insurance business without being authorized to do so. For example, under California Insurance Code Section 700(b), the unlawful transaction of the business of insurance in the state without a certificate of authority is punishable by one year in prison or a fine not exceeding $100,000, or both.

Finally, the court found that CHIL was responsible for the entire cost of Camera’s defense. Even though the CHIL policy included an “other insurance” provision, it applied only to other insurance carried by the “Named Insured” (i.e., Rady). Thus, the provision did not apply to the American Casualty policy covering Rady’s employee because he was only an “Insured” under the CHIL policy. Conversely, the American Casualty policy specifically stated that it did not apply if other insurance carried by the “Named Insured” (i.e., Rady). Thus, the provision did not apply to the American Casualty policy covering Rady’s employee because he was only an “Insured” under the CHIL policy.

Conclusion

The primary lesson that can be learned from the appellate court’s holding in American Casualty is that captive owners must understand that, despite the fact that they own and are insured by the captive, the captive must be operated in a manner that respects its separate status as an insurance company. Even though in most cases the captive is not subject to state regulation, the insured, or other entity responsible for providing the defense under the policy, will be held accountable for complying with the applicable insurance laws and regulations in the jurisdiction where risk is located. Thus, that entity should be aware that, despite the fact that they own and are insured by the captive, the captive must be operated in a manner that respects its separate status as an insurance company.

Even though the CHIL policy included an “other insurance” provision, it applied only to other insurance carried by the “Named Insured” (i.e., Rady). Thus, the provision did not apply to the American Casualty policy covering Rady’s employee because he was only an “Insured” under the CHIL policy.

Scott Geromette, an associate in the Insurance Department of Honigman Miller Schwartz and Cohn LLP, is a graduate of the Ohio State University Moritz College of Law and Columbia University. His experience includes representing captive insurance companies and their owners in a variety of insurance and self-insurance arrangements. He has worked with risk retention groups and captives domiciled in the United States as well as offshore captives and segregated portfolio companies domiciled in the Cayman Islands and Bermuda. He can be reached at (313) 465-7398 or at sgeromette@honigman.com.

Endnotes
1 Premiums charged by commercial insurance companies include amounts to cover profit margins and overhead, which depending on the size and structure of the company can be quite significant.
The flexibility benefits are three fold. First, depending on the laws of the particular domicile, captives can write many different types of risk. Second, the closely held nature of captives allows insurance coverage determinations and the underwriting process generally to occur much quicker as compared to commercial companies. Finally, captives can adapt to the ever-changing insurance market by reinsuring more risk or writing only excess coverage when the market is soft while retaining larger portions of risk when the market hardens.

In a traditional insurance relationship, the commercial insurance company primarily has a financial stake in the claims management process and often controls defense and settlement decisions. Captives often leave claims decisions to the insured.

Unlike with commercial insurance, where claims experience is better than anticipated, the excess premium may be used to reduce future premium payments.

Although many captives are formed to reinsure particular risks, much of the discussion and analysis herein addresses issues specific to captives that issue policies directly to the insured.


7 Id. at 2.

8 Id.

9 Id. at 5.

10 Id.

11 Id.

12 Id.

13 Id. at 6.

14 Id. at 7.

15 See Polkow v. Citizens Ins Co of America, 438 Mich 174, 178 (1991) (“If the allegations of a third party against the policy holder even arguably come within the policy coverage, the insurer must provide a defense.”)


20 Pruyn v. Agricultural Ins Co, 36 Cal App 4th 500, 515 (1995); see also Detroit Edison Co, 102 Mich App at 144 (“The general rule is that the insurer’s unjustified refusal to defend makes it bound to pay the amount of any reasonable, good faith settlement made by the insured in the action brought against him by the injured party.”)


22 Interstate Fire and Cas Co v . Stuntman Inc, 861 F.2d 203, 205 (9th Cir. 1988).
Dicing an onion can make you cry. Taking apart an insurance policy may make you cry harder. And, like the onion, every policy has separate parts. Together they add up to a coherent whole, but to understand the whole policy, you have to handle each part separately.

Each type of insurance policy has its own unique structure. A liability policy is structured differently from a property policy for example, although they do have many similarities. Even within the same type of policy, one insurer may organize the parts in one order, while another might choose a different order.

Despite this, all policies of any particular type must do the same thing – define the coverage it provides, so it is possible to navigate the intricacies of any insurance contract by following a few steps.

The natural tendency for many practitioners is to jump into a coverage analysis by fast forwarding right to the exclusion section of a policy. This compulsion should be avoided if one wants to accurately understand what coverage is provided under the policy. A better way to approach any question of coverage is to examine the policy by thinking of the onion and follow the steps in “DICE.” DICE is an acronym for four steps to successful analysis of the policy.

D – Declarations
I – Insuring Agreement
C – Conditions
E – Exclusions

D is for Declarations. The Declarations of a policy are the page or pages most often found right at the beginning of the insurance documents. The Declarations provide the “who,” “what,” “when,” and “where” of the policy.

The declarations page will tell you the name and address of the “named insured” on the declarations. This may seem obvious, but there are important differences between having the status of a “named insured,” as opposed to being an “insured” by definition, or being an “additional insured.” The differences between how much and what kind of coverage there is for each of these three types of “insureds” can be complicated and it is important to be aware which category a particular person fits into. The named insured, identified in the declarations, is usually the one who pays for the policy and who, logically enough, has the most coverage. Coverage for an “additional insured” is typically limited in some fashion depending on the particular endorsement used to add the person or entity as an “additional insured.”

The declaration page will also set out the effective dates of the policy. The temporal scope of coverage is tied to the effective dates of the policy. Most policies that provide coverage for “bodily injury” or “property damage” require that the “bodily injury” or “property damage” occur during the policy term. Claims made policies have similar requirements that revolve around when the claim is made or when the claim is reported. The declaration page will also describe the location and number of buildings specifically insured if the policy is a property insurance policy. They also may list items of personal property or equipment specifically covered by a special coverage form. The declarations page will also list any additional interests to the proceeds of insurance such as mortgagors, security interests, etc.

Of course, the declaration page will also describe the policy limits – how much coverage there is. There is usually more than one limit, depending on the type of property loss or liability claim.

The declarations page will also tell you what forms and endorsements are part of the policy. Every policy is made up of “forms”: usually a base policy and the various endorsements that may be added. Many types of coverage are added to the basic policy by endorsement. For example, common endorsements to an auto policy would likely include additional endorsements for uninsured/underinsured motorist coverage, no fault benefits, or some type of rental fee reimbursement. Endorsements are usually listed by their designation which is either a series of numbers or letters or combination of both numbers and letters. Other endorsements are used to limit coverages, or to define the “additional insureds” referred to above.

I is for “Insuring Agreement.” The policy form will have one or more provisions, often in a separately titled section, that describe the broad grant of coverage that is being made. Other forms or endorsements, or coverage parts may expand...
or narrow the coverage provided by the base policy form. Different types of policies and endorsements have different grants of coverage. In a liability policy, the insuring agreement section will begin with a description of the types of claims or occurrences it covers.

It is very important to review any exclusion carefully and to read the exclusion in its entirety. Not all exclusions apply in every circumstance.

The insuring agreement will also contain a promise to indemnify the insured for the loss. For example, a commercial general liability (“CGL”) policy may provide coverage for the insured’s legal liability to pay damages for “bodily injury,” “property damage,” “personal injury” and “advertising injury.” Another important promise typically included in the grant of coverage in a liability policy is the insurer’s promise to defend the insured against claims and suits. These promises to defend and indemnify are generally the core of any liability policy.

Liability policies also often provide many types of supplementary payments in addition to promises to indemnify or defend. Supplementary payments may include medical payments or the interest taxed against the insured in a lawsuit.

Property protection policies usually set out the types of property that are covered and the types of perils for which loss will be paid as part of the insuring agreement. Auto Physical Damage coverage in an automobile insurance policy might provide that the insurer “will pay for loss or damage to [the automobile scheduled on the declarations] and its equipment caused by (1) fire or lightning; (2) theft….” or other specified causes.

C is for Conditions. The “conditions” section of a policy sets out the obligations of the insured that must be met to preserve coverage. The conditions to coverage may all not be in the same location in the policy, although there may be a separate section that sets out the conditions under that heading. Different conditions may apply to different types of coverage. The insured’s failure to comply with the conditions of the policy can jeopardize coverage.

Common general conditions found in policies include the obligations of an insured to notify the insurer promptly of the loss, assist and cooperate in the defense, and provide a statement under oath. In a liability policy, there will also typically be a condition that explains how the policy will apply if another policy covers the loss. A separate provision will state that the bankruptcy of the insured will not release the insurer of its responsibilities. Additional conditions commonly found in property forms include how losses are settled or how the mortgage gets paid on buildings that sustain damage.

E is for “Exclusions.” Exclusions in the policy narrow the grant of coverage provided by the insuring agreement. Exclusions limit coverage for many reasons. Common exclusions address the types of risk that are traditionally not insurable, such as business risks, criminal acts, fraud or intentional conduct. Other exclusions address matters that are better insured by other types of insurance. A general liability (GL) policy, for example, will exclude liability for automobile accidents. Some exclusions address what is known as the “moral hazard” which is the hazard that a party will act irresponsibly or recklessly because they have acquired insurance coverage.

It is very important to review any exclusion carefully and to read the exclusion in its entirety. Not all exclusions apply in every circumstance. Many exclusions set out exceptions describing when the exclusion will not apply. Some endorsements that provide additional coverage may also remove certain exclusions entirely from the policy.

D is for Definitions. As we approach the end of the process, we can add another D and make our acronym past tense DICED. This D is for the definitions section that is found in most policies. This is where most – but not all – of the policy’s important terms are defined, subject, of course, to the endorsements.

A thorough coverage analysis requires a complete review of the entire policy and declarations, but it helps to think of the policy in terms of its components and the role that each one plays. To get a good start on your analysis, remember to just DICED it up.
The Art of Persuasion

By James A. Johnson, johnsonajmf@hotmail.com ©2010

Introduction

When summary judgment or declaratory relief does not resolve a dispute and the case cannot be settled you will have to try the case. Moreover, you need to try some good cases, because you send a message to the adversary – “we have the ability to try cases.” This is great leverage in settlement. The following are suggestions on how to make a persuasive opening statement to a jury, the bench or in arbitration.

... the selection of facts and the order in which they are presented suggest the desired conclusion. Let the facts argue for you without the use of conclusory language.

The Opening Statement

Opening statement is the first opportunity to persuasively communicate with the jury uninterrupted. We are dealing with the modern jury, a sophisticated group of citizens, with preconceptions and expectations for compelling presentations. Effective communication requires that the case be framed and positioned to fit the evidence and meet modern juror's preconceptions and to enhance and overcome others. It does not matter if your case is complex or simple – follow these time-honored techniques in both state and federal court.

Opening statement is an awesome opportunity to inoculate the jury and deliver a detailed narrative personalizing the client together with stating the client's cause that epitomizes your theory. The opening statement, if properly presented, should persuade and in some instances, move the jury to tears. It is an opportunity, almost too good to be true, and is so important that it should never be waived. MCR 2.507 (A) provides, in pertinent part:

“Before the introduction of evidence, the attorney for the party who is to commence the evidence must make a full and fair statement of that party's case and the facts the party intends to prove. Immediately thereafter or immediately before the introduction of evidence by the adverse party, the attorney for the adverse party must make a like statement.”

In Michigan, Massachusetts and New York the court has the power and may enter judgment on the opening statement or directed verdict for failure of counsel to disclose all of the essential factual elements necessary to establish a cause of action. Moreover, the Michigan Court Rules require an opening statement by both parties and it can only be waived with the consent of the court and opposing counsel.

Goals

Theoretically the purpose of opening statement is to assist the jury to understand the testimony which will be introduced during the trial as it bears upon the salient issues. The rule of primacy teaches that what is heard first tends to be the most difficult to dislodge. The goal of the plaintiff's lawyer is to take full advantage of the law of primacy. At the beginning of opening statement the jury is highly attentive and eager to learn what the case is all about. Do not waste precious minutes to lecture the jury about the purpose of opening statement. Instead give them the theme of the case that will remain with them and shape their understanding throughout the trial. For example, “This is a case about a broken promise.”

The purists will argue that counsel should speak to the jury in a professional and dispassionate manner. They believe what the jury wants to hear at the commencement of the trial is an explanation of what the lawsuit is about. With this view, they outline the elements of the case so that the jurors will have a better understanding of what to expect and what to look for as the evidence unfolds. Finally, the purists insist that the opening statement should not be argumentative. Attorneys who adhere to this view are right in general and wrong in particular. An effective opening statement should subtly border on final argument. Counsel should create a scene in opening statement that is indelibly fixed in the minds of the jurors. A lawyer who fails to argue his client's case in opening statement consistent with the cannons of ethics and within the rules of procedure and evidence, is simply not doing his or her job.

The advocate should use every phase of trial to persuade. Persuasion is an art practiced in its most subtle form in the opening. To the trial judge, argument is triggered more by tone than content. If you think you have crossed the line, lower your voice and backup one step. The key is the selective use of language and choice of words. Language is crucial to your case. The use of the right word, the right phrase and the right sentence can accomplish, in a perfectly subtle manner, the creation of the proper subconscious mood of feeling that no amount of emotional appeal can equal. Also, the selection of facts and the order in which they are presented suggest the desired conclusion. Let the facts argue for you without the use of conclusory language. Cadence, rhythm, tempo and even your demeanor are effective persuasion techniques. A big pause per-
mits the impact of what you just said sink in. A pause with a gesture, like taking off your glasses, forces the jury to think about your last statement and eager to hear what is coming next. A moment of complete silence is even more powerful.

Impact Phrases

Impact words and phrases should be used in opening statement. They provide a word picture story and evoke images in the minds of the jurors. For plaintiff lawyers, impact words like “collision” and “mangled” should be used instead of “accident” and “crushed” which are appropriate for defense lawyers. An impact phrase such as “He is a prisoner in a wheelchair” is attention-grabbing that goes right to the heart, mind and viscera of the jurors. And impact phrases have a lasting effect. At the commencement of the trial, the jury is at the peak of attention, and that is when plaintiff and defense counsel should present an attention-getting statement of the theory of the case. But, be careful. Do not over do it. Be selective. Use the right impact phrases that also appeal to reason. Here’s a sampling:

“You can guard against the high percentage of risk but you can't guard against risk itself.”

“This is a case about risk, rules and responsibilities.”

“This is a case about faulty construction claims that are not covered by insurance.”

“Accidents don’t just happen….they are caused….by people.”

“This is a case about a liability insurance policy that is designed to cover only damages arising from an accidental event.”

“This lady is the mother of a boy who was killed at a railroad crossing.”

“It is too late once the ball has been snapped for the coach to send in a different play.”

“This is a case about a broken promise.”

“This is a case about a liability insurance contract that does not cover the named insured for its own liability arising out of faulty workmanship, breach of contract or breach of warranty claims.”

“This is not a case about justice…..This is a case about injustice.” – “Only you through your verdict can do justice.”

“This is a case about a contractor’s business risks that are not covered by insurance.”

When you deliver your opening statement do not engage in a lifeless, dull recitation of each witness’s testimony. A tedious prediction of who will testify to what fact or event is not necessary. Allow the jury the joy of discovery during the evidence. A simple narrative permits the relevant connections to be made because they will occur naturally, as the story unfolds. The opening statement should be presented as a continuous persuasive story with a simple theme – the theory of the case. Create a theme that is carefully defined and artfully articulated that tells a human interest story. The first paragraph of the opening statement should develop the theme of your case and disclose your overall position in capsule form. Here is an example:

Ladies and gentlemen of the jury, this is a case about a broken promise. John Smith entered into an agreement with XYZ Insurance Company and paid his premiums religiously for five years. Mr. Smith bought a promise when he purchased his automobile liability policy to protect him from this very type of loss. He relied on his paid-for promise and rightfully so, with piece of mind, knowing that when he put his trust in the hands of XYZ Insurance Company, he would be secure, safe and protected. This lawsuit was filed because an unknown hit and run driver rear-ended Mr. Smith’s car and then sped off out of sight. Nobody knows where that pickup truck is to this very day. Because of the collision, John suffered a ruptured lumbar vertebrae or what is commonly called a broken back. He will have this injury for the rest of his life. After promptly notify- ing XYZ Insurance Company of the collision and knowing that he had uninsured motorist coverage that provides protection for this very type of situation, XYZ refused to honor its promise. A promise made is a debt unpaid.

If you represent the defendant you can easily arrange the persuasion techniques in favor of the defendant.

Preparation

Patrick Henry said it best “I have but one lamp by which my feet are guided, and that is the lamp of experience.” How does the young lawyer get experience? One way is to take the advice of the proverbial drunk, wrapped around a street light post who responded to an inquiry by a neatly dressed young
Michigan Supreme Court

Inadvertent Increase in Policy Limits

*Estate of Couture v Farm Bureau General Ins Co, et al*, Order of Supreme Court dated January 22, 2010

The Supreme Court reversed the August 6, 2009 judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion and reinstated the declaratory judgment entered by the trial court. See *The State Bar of Michigan Journal of Insurance and Indemnity Law*, Volume 2 No. 4, October 2009 for a discussion of the underlying Court of Appeals decision.

Michigan Court of Appeals

Attorney Fees Not Awarded Because Suit Was Not Frivolous nor Brought for an Improper Purpose and Claim was Reasonably in Dispute

*Auto-Owners Insurance Company v Ferwerda Enterprises, Inc., et al.*


This case was remanded to the Court of Appeals from the Supreme Court. A summary of the Supreme Court opinion is found in *The State Bar of Michigan Journal of Insurance and Indemnity Law*, Volume 3 No. 1, January 2010. On remand, the Court of Appeals held:

1. Since the trial court explicitly stated that the underlying lawsuit brought by the insurer was not frivolous and that there was law supporting the insurer’s position, attorney fees were not properly awarded to the insured.

2. The insurer did not bring the lawsuit for an improper purpose and, therefore, an award of attorney fees was not warranted.

3. The *Griswold* rule (which awards penalty interest to an insured whether or not a claim was reasonably in dispute) only applies to an insurance carrier’s failure to pay direct losses under a first party claim. Conversely, penalty interest on a third party claim cannot be awarded under MCL 500.2006(4) if the claim is “reasonably in dispute.” Since the claim was reasonably in dispute, no award of attorney fees is warranted.

Michigan Court of Appeals—Unpublished

Judgment for Damages to Other’s Property Does not Trigger Coverage Under CGL Policy Because Damages Were Not Pled in Complaint

*Ahrens Construction, Inc v Amerisure Insurance Company*

Unpublished per curiam opinion of the Court of Appeals, February 9, 2010 (Docket No. 288272)

Ahrens was a subcontractor insured under an Amerisure CGL policy. General Contractor, Miller-Davis, hired Ahrens to build a roof on a pool house. Following project completion, the roof trapped condensation and had to be rebuilt by Miller-Davis, which sued Ahrens for breach of contract.

Ahrens tendered the lawsuit to Amerisure, which denied a defense because the lawsuit sought damages for Ahrens’ defective workmanship, which is not an “occurrence” under the policy. Subsequently, the trial court entered judgment against Ahrens in the breach of contract action, which included damages that were not part of Ahrens’ defective work and were not specifically pled in Miller-Davis’ complaint.

Ahrens sued Amerisure, alleging that Amerisure had a duty to defend the underlying suit because some of the damages awarded to Miller-Davis resulted from an “occurrence” under the policy – specifically, the damage to property of others that resulted from the insured’s defective workmanship as opposed to damages to the defective workmanship itself.

Applying the rule that damages arising solely from faulty workmanship are not considered as resulting from an “occurrence” under a CGL policy, the Court of Appeals held in favor of Amerisure. Specifically, the Court found that since the complaint sought damages solely related to Ahrens’ breach and failure to construct the roof and did not contain any allegations concerning expenses for other property, the complaint did not trigger the defense obligations under the Amerisure CGL policy. Even if the final judgment included expenses for damage to other property, since the allegations in the complaint (which is what determines the insurer's defense obliga-
Dispute Over the Use of Confusingly Similar Names Not Considered “Advertising Injury”

General Casualty Company of Wisconsin v TDC International Corporation

Unpublished per curiam opinion of the Court of Appeals, February 2, 2010 (Docket No. 289180)

The issue in this case was whether insurance coverage for “advertising injury” required the insurer to defend its insured in a lawsuit challenging the insured’s use of the term “EZ Moving & Storage” as being similar to a competitor’s use of the term “EZ Moving/Moving & Storage.” The Court of Appeals found that there was no duty to defend the lawsuit because it did not allege an “advertising injury” as defined under the policy. Specifically, the Court held that infringement of trade dress, which is an “advertising injury” under the policy, is a product’s total image and overall appearance involving features such as size, shape, color or color combinations, texture, graphics or sales techniques. However, since the crux of the lawsuit involves the use of confusingly similar names and not an infringement of the underlying trade dress, there is no advertising injury as defined by the policy and no coverage.

No Coverage for Third Party Claim of Sexual Assault Because of Exclusion

Mother of John Doe v Citizens Insurance Company of America, et al.

Unpublished per curiam opinion of the Court of Appeals, January 26, 2010 (Docket No. 288776)

Citizens issued a homeowners insurance policy to Hand and Boyle, who were sued by Doe for negligence, false imprisonment and negligent supervision arising out of the sexual assault of Doe by Hand, a minor. Citizens denied coverage for the lawsuit based upon the “sexual molestation” exclusion in the policy. Hand and Boyle argued that “sexual molestation” is not defined in the policy and, therefore, cannot serve as a basis to exclude coverage. This argument was rejected by the Court of Appeals because Michigan law instructs a court to interpret undefined policy terms in accordance with their “commonly understood meaning”, which in this case would include the sexual assault committed by Hand.

The Court also rejected an argument that “sexual molestation” only refers to actions of an adult committed on a child. Finally, the Court held that intent to injure or that injury be reasonably foreseeable is not necessary to apply the “sexual molestation” exclusion because the exclusion does not include an element of intent - just that the molestation act occur.

Previously Fully Disclosed Felony Conviction at Time of License Application

King v State of Michigan, et al.

Unpublished per curiam opinion of the Court of Appeals, January 21, 2010 (Docket No. 288290)

King was convicted of felony OUIL third offense in 2000. In 2004 he applied for and obtained a resident insurance producer license from the State of Michigan Office of Financial and Insurance Services (OFIS) after fully disclosing his prior felony conviction. He sold insurance from 2004 until March 2008 when the OFIR unilaterally notified him that his producer license would be revoked due to the previously disclosed felony conviction. OFIS claimed that the staff who reviewed King’s application in 2004 were using outdated review standards. Plaintiff filed a declaratory action seeking an injunction to prevent OFIS from rescinding his license.

The Court of Appeals summarized the issue as follows: “whether defendants (OFIS) could rescind plaintiff’s (King) license after the agency had already granted the license when the agency was fully cognizant of plaintiff’s prior OUIL felony conviction when it issued the license in 2004.” The Court of Appeals answered this question in the negative for the following reasons:

1. OFIS already granted King the license and it would be a waste of judicial resources to conduct an analysis of how to interpret the previous 2004 statute that the OFIS is now basing its license revocation upon.

2. The current statute only prohibits the commissioner from issuing a license to a convicted felon, but does not prohibit a convicted felon from being licensed. Nor does the current statute require a convicted felon’s license be revoked.

3. Equity favors permitting King to maintain his license since he pursued a career based upon the license for five years after it was issued to him.
Under Consideration

By Kathleen Lopilato, Auto Owners Insurance Company

from the Legislative and Regulatory Affairs Committee

Insurance Commissioner – Restrictions on Lobbying

HB 5632 was referred to the Committee on Economic Development on December 18, 2009. This proposed law would prohibit the Insurance Commissioner from working or lobbying for an insurer, non-profit health care corporation, non-profit dental care corporation or third party administrator for 2 years after leaving office.

Regulation of Insurance Policy Forms

On January 26, 2010, the Office of Financial and Insurance Regulation (OFIR) rescinded Order 97-010-M, and OFIR now requires the filing of all policy forms purchased for personal, family or household purposes prior to use. The commissioner’s order cites Rory v Continental Insurance Co, 473 Mich 475 (2005), in which the Michigan Supreme Court said it was the responsibility of the commissioner to review clauses for legality and thus policy holders lost their last line of defense in the court system. The commissioner determined that action was required to protect the public from unreasonable discretionary health insurance clauses that have spread to the property casualty market.

Creation of No Fault Task Force

On January 14, 2010, a senate bill was referred to the Committee on Economic Development and Regulatory Reform to create the “Make Insurance Affordable and Accessible Task Force” (MIAA) within OFIR. The task force is to be composed of:

- One member of the senate appointed by the senate majority leader,
- One member of the senate appointed by the senate minority leader,
- One member of the house of representatives appointed by the speaker of the house,
- One member of the house of representatives appointed by the minority leader,
- And six members, appointed by the governor:
  (a) three members representing the general public, at least one of whom shall reside in a county with a population of 900,000 or more.
  (b) one member representing automobile insurers with 15% or more of the automobile insurance market in this state.
  (c) one member representing automobile insurers with less than 15% but more than 5% of the automobile insurance market in this state.
  (d) one member representing automobile insurers with 5% or less of the automobile insurance market in this state.

The Art of Persuasion. . .

Continued from page 9

...Meticulous preparation yields divi-

phony hall. The drunk answered: “Practice! Practice! Practice!” The opening statement must be prepared and re-

hearsed in advance. Meticulous preparation yields divi-

dends.

About the Author

James A. Johnson is a trial attorney, licensed in Michigan, Massachusetts, Texas and U.S. Supreme Court Bars. He can be reached at johnsonjajmf@hotmail.com or (248)-351-4808.

Endnotes

1 Vida v Miller Allied Industries, Inc. 79 NW 2d 493 (1956); Island Trans Co v Cavanaugh, 54 Mass App 650, 654; 767 NE 2d 609, 612 (2002); Commonwealth v Lowder 731 NE 2d 510, 518 (Mass 2000), People v Kurtz, 414 NE 2d 699 (N.Y. 1980).

2 MCR 2.507(A)
Truth or Consequences: Are Consequential Damages Covered by a Liability Insurance Policy under Michigan Law?

By Elaine M. Pohl, Plunkett Cooney, epohl@plunkettcooney.com

The insuring agreement of a standard commercial general liability insurance policy provides that the insurer “will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.” Such a policy typically defines “property damage” as:

(a) Physical injury to tangible property, including all resulting loss of use of that property; or

(b) Loss of use of tangible property that is not physically injured.

Thus, in order to find coverage for “property damage” there must be physical injury to or the loss of use of tangible property. But what do Michigan courts say when an insured gets sued for consequential damages such as lost profits or other types of economic loss? Are those kinds of damages covered by the insured's liability policy?

In *Fitch v State Farm Fire & Casualty Co*, the underlying plaintiff sued the insured for defamation and intentional infliction of emotional distress. The Michigan Court of Appeals considered a policy definition of “property damage” similar to the definition quoted above and held that the damages alleged against the insured in the underlying action for “economic loss, business loss, loss of potential business and business opportunity” did not constitute covered “property damage.” The underlying claims did not “stem from physical damage to or destruction of tangible property” and the definition of “property damage” was “too narrow to encompass [the] claimed economic and business losses.”

Is the situation different when the alleged consequential damages are caused by (or, as the *Fitch* court expressed it, “stem from”) covered “property damage”? In *Dimambro-Northend Associates v United Construction, Inc.*, two construction contractors were awarded contracts for work on a sewer system. The insured was one of the contractors performing the sewer system work, including tunnel work. A fire occurred, which damaged the insured’s equipment as well as a portion of the tunnel. It also caused a delay to the other contractor’s portion of the work. The other contractor sued the insured seeking “delay damages’ including lost profits, increased labor costs, overhead costs and the like.” It claimed that, although it finished its portion of the work on time, it was unable to “connect up” and complete its portion of the project due to the fire and the resulting delay.

Michigan’s Court of Appeals held that lost profits should be covered by the policy “as a consequential loss.

The insurance policy at issue contained a definition of property damage identical in all relevant respects to the definition quoted above. The Michigan Court of Appeals explained that the fire resulted in physical injury to or destruction of tangible property—the tunnel and the insured’s own equipment. Following the reasoning of a Second Circuit case, *Aetna Cas & Surety Co v General Time Corp*, 704 F2d 80, 83 (2nd Cir 1983) (New York law), Michigan’s Court of Appeals held that lost profits should be covered by the policy “as a consequential loss.”

The Michigan Court of Appeals’ reliance on *General Time* is interesting because the insurance policy at issue in that case specifically included “all direct and consequential loss” in its definition of “property damage.” The *Dimambro* court found the *General Time* case instructive even though it recognized that the policy at issue in *Dimambro* (like most standard liability policies) did not contain a similar inclusion of consequential loss in the definition of “property damage.” The *Dimambro* court also noted, albeit without much discussion, the policy language providing that the insurer would pay for those sums that the insured must pay as “damages because of property damage.”

Cont...
suring agreement in which the insurer agrees “to pay on behalf of the insured all sums which the insured . . . shall become legally obligated to pay as damages because of . . . property damage . . . should be interpreted as covering all direct and consequential loss.” In *Guardsman*, the plaintiff in the underlying action against the insured asserted claims for breach of implied and express warranties and sought damages for “replacement costs, lost profits and loss of goodwill” resulting from the underlying plaintiff’s use of the insured’s defective lacquer on office furniture products for sale. The insured sought coverage for the award of lost profits against it and the court stated that under Michigan law “lost profits are covered, in certain circumstances, as a consequential loss.” The Sixth Circuit followed the Michigan Court of Appeals’ decision in *DiMambro* and found “nothing to suggest that Michigan’s Supreme Court would rule otherwise.”

... if lost profits are caused by “property damage,” they may well be covered as “damages because of ‘property damage’” under Michigan law.

Analysis of this issue under Michigan law is not particularly well-developed. However, pursuant to *DiMambro*, and as interpreted by the Sixth Circuit in *Guardsman*, if lost profits are caused by “property damage,” they may well be covered as “damages because of ‘property damage’” under Michigan law. While the Michigan Supreme Court has not addressed the issue, these cases seem to be supported by a plain reading of the standard policy language, which provides coverage for damages “because of ‘property damage,’” subject to the other terms and conditions of the policy. In addition, a review of case law from other states demonstrates that other courts also follow this reasoning. See, e.g., *Parker Hannifin Corp v Steadfast Ins Co*, 445 F Supp 2d 827, 828 (ND Ohio 2006) (costs of retrofit program were damages “because of ‘property damage’”); *Central Armature Works, Inc v American Motorists Ins Co*, 520 F Supp 283, 289 (DDC 1980) (lost profits stemming from loss of use of a shredder were covered)). See also *General Ins Co of Am v Gauger*, 13 Wash App 928, 538 P2d 563 (1975) (lost profits resulting from defective crop recoverable); *National Union Fire Ins Co of Pittsburgh, Pa v Puget Plastics Corp.*, 532 F3d 398 (5th Cir 2008) (Texas law) (lost profits covered as damages “because of” damage to water heaters); Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Disputes* § 7.03 (9th ed. 1998) (If a court determines that consequential damages follow a direct physical injury to tangible property, or a loss of use of tangible property, consequential damages may constitute property damage (citations omitted)).

It is important to note that the language in a given policy will be the most critical component of any analysis of this issue. It is also important to be mindful of the fact that, if consequential economic losses such as lost profits are covered as “damages because of ‘property damage,’” there must be a sufficient causal connection between those consequential damages and the covered “property damage.” Michigan courts have not analyzed this “because of” requirement specifically, including how close a connection the alleged consequential damages must have to the “property damage.” Issues such as whether a Michigan court would use the “proximate cause,” “but for cause,” or some other causation standard remain to be addressed. Further, under Michigan law the insured has the burden to demonstrate coverage under a policy’s insuring agreement and, therefore, bears the burden to demonstrate the sufficiency of this required causal connection.

Elaine M. Pohl is a senior attorney in Bloomfield Hills office of Plunkett Cooney. She is a member of the firm’s Insurance Coverage Practice Group, primarily advising insurance companies on complex insurance coverage questions and representing them when disputes arise.

Endnotes
2  Id. (emphasis added).
4  Id. at 310.
5  Id.
6  Id. at 316.
7  Id. at 315 (emphasis added).
8  141 F3d 612, 617 (6th Cir 1998).
9  Id. (emphasis added).
10 Id. (citing *Dimambro-Northend*).
11 Id.
Insurance & Indemnity Law Section 2009 - 2010 Officers and Council