

# BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



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**Please see below for End of Year Note to *Binding Authority* Readers.**

December 27, 2011

## **A Lesson As Old As The State's Crustaceans: Maine High Court Teaches The Challenge That Insurers Face In Duty To Defend Cases**

For me to win an argument with my wife is not unlike an insurer in a duty to defend case. For both myself and insurers, the odds are stacked against us. The challenge that insurers and I both face are owed to the rules that govern each of our skirmishes. They are remarkably similar. Consider this comparison:

- An insurer typically must defend if there is *any potential* that the facts ultimately proved could result in coverage. My wife wins the argument if there is *any potential* that she is right.
- An insurer typically must defend *all claims* even if only one claim is potentially covered. My wife wins the *entire argument* even if she is only correct about one thing out of ten.
- An insurer typically must defend claims even if they are groundless, false or fraudulent. My wife wins the argument even if her version of the story is entirely baseless.
- In deciding whether an insurer must defend, any ambiguity in the policy is typically construed against the insurer. In an argument between my wife and me, anything in my story that she can't understand is deemed to be wrong.

- Consideration of the duty to defend is sometimes limited to the four corners of the complaint. In an argument between my wife and me, it is only permissible to consider her version of the facts.
- In some states, an insurer must defend if extrinsic evidence alleges a covered claim. In an argument between my wife and me, she wins if her mother has anything to add.

But there is one difference between the two situations. If an insurer defends, and it is later determined that a defense is not owed, it can sometimes cease defending. In my case, if I'm later proven correct, it is too late.

Last week the Supreme Judicial Court of Maine issued a decision that demonstrates just how challenging – perhaps impossible in this particular case -- duty to defend cases can be for insurers. The substance of the case itself does not offer anything in the way of lessons. It is discussed here simply to illustrate how difficult duty to defend cases can be for insurers.

The facts are as follows, taken verbatim from the opinion for convenience:

“Mitchell is a lobster fisherman working in the waters off Matinicus Island. In September 2008, Victor Ames sued twenty-three people, including Mitchell, numerous other lobster fishermen on Matinicus Island, and certain state officials. Ames alleged generally that a group of Matinicus Island lobster fishermen had conspired to prevent him from fishing for lobster in the area. Among other things, Ames’s second amended complaint included a cause of action against Mitchell for conversion based on Mitchell’s alleged participation in a ‘fishermen’s group’ that ‘destroyed, converted, molested and rendered useless’ Ames’s lobster traps and fishing gear near Matinicus Island.” *Mitchell* at 2.

Mitchell sought coverage for the *Ames* action under the liability section of his Allstate homeowner’s policy, which contained a fairly typical liability insuring agreement and definitions. Allstate disclaimed coverage. Mitchell succeeded in defending himself and then sued Allstate to recover the \$13,625 that he incurred in attorneys fees and costs. *Id.* at 2-4.

The trial court concluded that no coverage was owed because the claim for conversion failed to allege property damage that would fall within the policy’s coverage and that the intentional acts exclusion applied. *Id.* at 4. Mitchell clawed his way to the Supreme Judicial Court.

The Maine high court first set forth the state’s standard for determining if an insurer must defend. This is “four corners,” subject to the proviso that an insurer must defend if there is any potential that facts ultimately proved could result in coverage. *Id.* at 5-6.

The *Mitchell* court turned to the applicability of the policy’s Intentional Acts exclusion:

The policy exclusion at issue here will apply to Ames's conversion claim against Mitchell if the complaint limits the potential liability to circumstances where either (a) Mitchell *intentionally* interfered with property that he knew belonged to Ames, or (b) Mitchell *intentionally* acted in a way that could reasonably be expected to result in the interference with Ames's property.

*Id.* at 7 (emphasis in original).

The court then addressed whether a defense was owed to Mitchell for the claims in the Ames complaint that one or more members of the fishermen's group had converted lobster traps or fishing gear that belonged to Ames.

First, the *Mitchell* court held that "Ames could demonstrate a conversion by proving that Mitchell exercised dominion or control over lobster fishing gear by simply possessing gear in which Ames had a property interest and right of possession." *Id.* at 9. This, however, the court held would not bring the claim within Mitchell's liability coverage because the "simple exercise of possessory control over Ames's property would not establish physical injury to or destruction of that property." *Id.* In other words, the "property damage" requirement would not have been satisfied.

However, not to be deterred, the *Mitchell* court next addressed another potential scenario that could trigger a defense:

Second, however, Ames could establish a conversion that involved damage to his property. For instance, Ames could prove on this complaint that other individuals cut Ames's lobster traps, that Mitchell found and took the traps without knowing that they belonged to Ames, and that Mitchell damaged the traps in this process. Mitchell could have intentionally 'exercise[d] a dominion or control over the goods' in such a way that he accidentally interfered with Ames's rights ... by taking, damaging, and holding property in which Ames has a property interest and right to possession. Because Ames could potentially establish a conversion resulting in property damage without proving that Mitchell *intended* to damage Ames's property, ... Ames's conversion claim could result in covered liability.

*Id.* at 10 (emphasis in original).

Based on this theoretically potential fact scenario, the *Mitchell* court concluded that the liability alleged in the complaint had the potential to result in covered liability, and, therefore, Allstate had a duty to defend.

An insurer has little hope of prevailing in a duty to defend case if all it takes to trigger a defense is for a court to imagine a fact scenario that alleges a potentially covered claim. The *Mitchell* court's fanciful duty to defend analysis is akin to me saying that if I were a foot taller, if I were 20 years younger, if I had a great jump shot and if I had saved Mark Cuban's life by donating rare bone marrow to him, I'd be playing for the Dallas Mavericks.

A copy of the Supreme Judicial Court of Maine's December 22<sup>nd</sup> decision in *Mitchell v. Allstate* can be accessed here:

[http://www.courts.state.me.us/opinions\\_orders/opinions/2011%20documents/11me133mi.pdf](http://www.courts.state.me.us/opinions_orders/opinions/2011%20documents/11me133mi.pdf)

Please let me know if you have any questions.

Randy

### **End of Year Note to *Binding Authority* Readers:**

This is probably the last issue of *Binding Authority* for 2011 (unless the Indiana Supreme Court issues its long-awaited opinion in *Flexdar*). As this is the season for Thank Yous, please allow me a couple here. Cue the soppy music... First, thank you so much for your support for *Binding Authority*. Putting it together can be a time-consuming endeavor. Your very kind notes, telling me that you find the newsletter informative and entertaining, are what keeps it going. Thanks too for passing *Binding Authority* along to others. Second, please accept a heartfelt thank you for the support that you gave in 2011 to *General Liability Insurance Coverage: Key Issues in Every State*. The book had a great year and that could not have happened without the *Binding Authority* readers. The Second Edition is currently in production and Oxford University Press is set to publish it in early February. All the best to everyone for 2012.

**Happy, Merry, *et al.***



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