

BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



Randy J. Maniloff
maniloffr@whiteandwilliams.com

April 15, 2012

Save the Date -- The 6th White and Williams Coverage College will be held on Thursday October 4, 2012 at the Pennsylvania Convention Center in Philadelphia. The official "Save the Date" announcement will soon be going out from the firm. But since some *Binding Authority* subscribers are not on the firm distribution list, I wanted to give the date here. Over the past few years the White and Williams Coverage College has been bringing together about 500 insurance professionals, from over 130 companies and 17 or so states for a day of insurance education on a number of important topics. For those of you unfamiliar with the Coverage College, here is the [2011 brochure](#). The 2012 brochure is being worked on as we speak. Attendees often say after the College – *I learned a lot and it was a lot of fun*. When we hear that we know that we achieved our two main objectives.

"Key Issues" Update – Oxford just informed me that the 2nd edition of "[General Liability Insurance Coverage – Key Issues in Every State](#)" is about to go into its Third Printing. Again, Jeff and I offer our sincere thanks to the *Binding Authority* community for playing such a large part in making that happen.

At A Loss For Words: 7th Circuit Defines "Loss" Without Needing Any Words From the Policy

***Posner: No Coverage For the Return Of Money That The Insured Was
Never Entitled To***

When it comes to questions, of all shapes and sizes, about what's covered and what's not, the amount of discrepancy that exists between courts can be staggering (and thank goodness for that). But there is one aspect of insurance coverage that is consistent from state to state and issue to issue – courts set out to resolve coverage questions by, first and foremost, interpreting the words of the insurance policy. Whether they followed through with that promise is likely tied to whether you agree with the outcome. But, putting some

other factors aside, that the policy language is king is the blackest of all black letter rules when it comes to insurance coverage. See *White v. Standard Life & Accident Ins. Co.*, 103 N.W. 735, 736 (Minn. 1905) for a 107 year old case saying so. [And I'm sure I could have found an even older case if I had the energy.]

But there are still some exceptions to this. There are some rules that dictate insurance coverage that are not based on the policy language. For example, the "known loss" doctrine. Until recently (with the introduction of the "Montrose" language in the CGL insuring agreement), "known loss" did not exist in policy language. There was no "known loss" exclusion or condition. In very general terms, it is simply a fundamental principle, adopted by courts, that insurance coverage does not exist for losses that have already taken place. In other words, insurance does not apply to losses that are no longer fortuitous.

Last week the Seventh Circuit, with Judge Posner writing for the court, addressed another fundamental principle that dictates insurance coverage without regard to the language of the policy at issue: An insured cannot obtain insurance coverage for having to return money that it was never entitled to keep in the first place. This issue arises frequently. But, because there is no specific policy language to point to, that says so, it can sometimes be more difficult to convince policyholders that no coverage is owed for this reason.

Ryerson, Inc. v. Federal Insurance Company is a brief decision, and so will be this discussion of it. What the decision lacks in words it makes up for in impact.

Ryerson sold a group of companies to EMC Group for \$29 million. EMC claimed that Ryerson concealed certain information about a problem that Ryerson had been having with its largest customer. After the sale, this customer problem became EMC's problem. EMC sued Ryerson for fraudulent concealment intended to induce EMC to buy the company. *Ryerson* at 2. Three years into the litigation, the parties settled, with Ryerson returning \$8.5 million of the sale price to EMC. *Id.* at 2-3.

Ryerson sought insurance coverage for this \$8.5 million payment from Federal Insurance under an Executive Protection Policy. The policy provided coverage for: "all LOSS for which [the insured] becomes legally obligated to pay on account of any CLAIM . . . for a WRONGFUL Act [elsewhere defined in the policy to include a 'misleading statement' or 'omission'] . . . allegedly committed by" the insured. *Id.* at 3.

Federal argued that "loss" did not include restitution paid by the insured, as distinct from damages, which are expressly denoted in the policy as a covered loss. *Id.*

The Seventh Circuit agreed:

Ryerson received \$29 million from EMC for the subsidiaries, and agreed to give back \$8.5 million to settle EMC's fraud claims against it. The refund represented a return of part or maybe all of the profit that Ryerson had obtained by inducing EMC to overpay. If Ryerson can obtain reimbursement of that amount from the insurance company, it will

have gotten away with fraud. It will get to keep \$29 million (\$20.5 from EMC after the settlement and \$8.5 million from Federal) even though, if EMC's claim that Ryerson agreed to settle was not completely meritless, some portion of the \$29 million was proceeds of fraud.

Id. at 3-4. "If disgorging such proceeds is included within the policy's definition of 'loss,' thieves could buy insurance against having to return money they stole. No one writes such insurance." *Id.* at 4.

While Judge Posner's specific decision is tied to the fraud aspect of the Ryerson-EMC deal, his discussion goes well beyond the fraud context for purposes of its implications for insurance coverage. Posner makes clear that "loss," for purposes of an insurance policy, does not include amounts that a party is obligated to re-pay because it was never entitled to have them in the first place.

You can't, at least for insurance purposes, sustain a "loss" of something you don't (or shouldn't) have.

Whether a claim for restitution is based on fraud or on some other deliberate tortious or criminal act, or at the other extreme of the restitution spectrum merely on an innocent mistake or the rendition of a service for which compensation is expected but contracting is infeasible (as when a physician ministers to a person who collapses unconscious on the street); and whether the plaintiff is seeking the return of property or the profits that the defendant made from appropriating it, a claim for restitution is a claim that the defendant has something that belongs of right not to him but to the plaintiff.

Id. at 4-5.

A copy of the Seventh Circuit's April 12 decision in *Ryerson, Inc. v. Federal Insurance Company* can be accessed here:

<http://www.ca7.uscourts.gov/tmp/HA1FG754.pdf>

Please let me know if you have any questions.

Randy



Randy J. Maniloff

1650 Market Street | One Liberty Place, Suite 1800 | Philadelphia, PA 19103-7395

Direct 215.864.6311 | Fax 215.789.7608

maniloffr@whiteandwilliams.com | whiteandwilliams.com

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. The term "Binding Authority" is used for literary purposes only and is not an admission that any case discussed herein is in fact binding authority on any court. If you do not wish to receive future emails addressing insurance coverage decisions, please send an email to the address listed above with "unsubscribe" in the subject line. No animals were harmed in the drafting of this e-mail.