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A Breath Of Fresh Air For Insurers In Rogue Employee Claims

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Commentary

'Course And Scope:' A Breath Of Fresh Air For Insurers In Rogue Employee Claims

By
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People sometimes do things at work that are not in their job descriptions. For example, the NCAA hoops tournament causes some employees to commit traveling from their tasks at hand. But checking a few scores on Yahoo never hurt anyone. At other times, however, employees play rough house while on the job and it causes real injury or damage (think sexual harassment). Fortunately for them, their employers in these instances often-times have a sixth man to pay the price. It's called insurance. And a flagrant foul is not an automatic bar to coverage. But getting coverage is also no lay-up. The insurer isn't always going to roll over like a 16th seed. By the way, I hope you are still alive in your office pool.

On one hand, when an insurer is confronted with a claim for coverage for injury or damage caused by a rogue employee, all of the usual rules apply. Coverage is tied to the insured's ability to satisfy the policy's insuring agreement and the insurer's inability to prove the applicability of any exclusions. But when the claim involves something that went awry at work, on account of an employee whose conduct was far afield from his or her job, insurers sometimes stop and ask a question even more fundamental than whether such claim is "covered" under the policy. That is, terms and conditions aside, need the insurer even be obligated to consider if coverage is owed to such an employee under a policy that was issued to cover its employer's business?

To put it in insurance language, is the employee seeking coverage as an "insured" under the employer's policy? In general, that answer depends on whether, at the time of the incident in question, the employee was *acting within the course and scope of his or her employment*. If not, he or she is not an "insured" and the coverage inquiry ends right there in round one, without ever reaching the final four considerations: insuring agreements, exclusions, conditions and endorsements.

An important collateral issue arises when the employer is seeking coverage for its liability for its employee's conduct. In that situation, the *availability* of coverage sometimes turns on the employee *not* being an insured. Not to mention that, in this context, there can be related *respondeat superior* issues concerning the employer's liability for the acts of its rogue employee.

It seems simple enough. A policy issued to a *business* provides coverage for its employees, but only for things they do that are related to *the business*. But like so many things in insurance coverage, it is sometimes easier said than done. The difficulty is that, while the conduct for which coverage is being sought is unquestionably not what the employee was hired to do, it still may have taken place at work, involved other employees, been facilitated by the work environment and/or been intertwined with work-related conduct. In other words, but for the employment relationship, the claim would not have come about.

What's more, it can be difficult for insurers to find concrete guidance on the issue from the available case law, notwithstanding that there is no shortage of it. Most insurance coverage decisions limit their reliance to other insurance coverage decisions. But courts addressing course and scope in the insurance context frequently also look to non-insurance decisions for inspiration, given that the concept arises in many other areas of the law, such as worker's compensation and *respondeat superior*. *See Scottsdale Insurance Company v. Flowers*, 513 F.3d 546, 566, n. 5 (6th Cir. 2008) ("The Kentucky cases which have considered the meaning of the phrase 'scope of employment' have done so in the context of *respondeat superior* liability. However, as the legal meaning of this phrase was incorporated into the insurance contract, it is appropriate to consider what Kentucky courts consider to be within the scope of employment, even if those decisions did not occur in the context of insurance contract interpretation.")

However, while course and scope decisions are aplenty, they are also frequently fact intensive, which limits their ability to serve as predictors. Not to mention that more than one court has observed that the term "scope of employment" is an "elusive" concept. *E.g. Oye v. Ohio State University*, 2003 Ohio App. LEXIS 5271. Policyholders will no doubt argue that "elusive" is a description that does not bode well for insurers when *contra proferentem* is in the house.

In addition, it is not uncommon for course and scope coverage decisions to turn on unique policy language. Therefore, while it is one thing to say, in passing conversation, that the principal issue is whether the employee was *acting in the course and scope of his or her employment* at the time that he or she committed the act in question, the controlling policy language in fact often times varies considerably. And the distinctions can be dispositive.

Indeed, the six decisions addressed in this commentary involved seven versions of the so-called course and scope policy language: Scope of employment; while performing duties; while acting on behalf of; while acting in the interest of; scope of duties; scope of job duties; and served or acted in an official capacity. While these phrases all sound the same, their examination under the judicial microscope reveals otherwise. Thus, the generic term "course and scope" is fine for chatting around the water cooler, but use that term at your peril when an actual claim is on the line. Remember — the cardinal rule of insurance coverage: Policy language is king.

Course and scope is simply not a coverage issue that comes with bright line rules, where the task is simply to determine in which camp the claim should be placed. For example: late notice (prejudice or no prejudice); trigger of coverage (continuous, injury-in-fact or manifestation); or the absolute pollution exclusion (it applies solely to traditional environmental pollution or broader than that). When it comes to course and scope, there is a sense that every case is one of first impression. Not to mention that the issue may be too fact intensive to make it a suitable candidate for summary judgment. For all of these reasons, it can be easy for insurers to make the call to eschew this gray area coverage issue.

Yet, while it may not be as neat and tidy as other coverage issues, some insurers are doing a full court press and pursuing course and scope as a defense. And as case law from the past couple of years reveals, many insurers have been rewarded for their efforts by successfully limiting the extent to which their policies provide coverage for rogue employees. Indeed, the significant amount of recent case law on the issue suggests that insurers are pursuing course and scope more vigorously than before.

Even if course and scope coverage decisions are more *sui generis* than others, and do not fit into conveniently defined boxes, they are nonetheless capable of providing general guidance on the issue. But caution: the issue has a lot of moving parts and must be considered with great care. It is rife with unintended consequences.

What follows is a review of recent course and scope decisions (with an emphasis on ones from the past two years), along with the lessons they provide for determining when it is a viable defense for insurers.

Interlocal Risk Financing Fund of North Carolina v. Ryals, 2007 N.C. App. LEXIS 2248.
Held: Rogue employee not an insured for sexual assault; Policy language at issue: Scope of employment.

While there is no such thing as a "typical" course and scope coverage decision, *Ryals* comes close. The course and scope issue arose out of the following underlying litigation. Lacey Ryals drove her car to an "after school party." Town of Apex police officer Jonathon Penny and other police officers arrived at the party and broke it up. Penny drove Ryals to her father's house and asked Ryals for a tour. While in Ryals's bedroom, Penny committed a sexual assault and battery against Ryals. Ryals brought an action against Penny for assault and battery and intentional infliction of emotional distress. *Ryals* at *1-*2.

The town sought coverage under a Police Professional Liability policy issued by the Risk Financing Fund. The Fund sought declaratory relief that its policy provided no coverage for any of the damages that Penny may incur in the underlying *Ryals* Action. *Id.* at *2. While course and scope decisions are unique, sexual assault is very likely the most common on-the-job rogue behavior that forces insurers to consider whether to pursue a course and scope defense.

The coverage question before the North Carolina appeals court was whether the policy provided coverage for "personal injury." *Id.* at *3. However, the court addressed an even more fundamental issue — whether Penny was an "insured" under the policy. The policy's Who is an Insured section defined "insured" to include "Your employees, but only for acts within the scope of their employment by you." *Id.*

Addressing whether Officer Penny was acting within the scope of his employment, the court set forth the following test: "To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment." *Id.* at *5-*6 (citation omitted). The court noted that, while normally a jury question, some acts are so clearly outside the scope of employment that summary judgment is proper. *Id.* at *6.

The *Ryals* Court held that the sexual assault was not within the scope of Penny's employment, and, as such, he was not an "insured" as defined under the policy. *Id.* at *8. In reaching this decision, the court relied upon, among other authority, *Medlin v. Bass*, 398 S.E. 2d 460 (N.C. 1990). In *Medlin*, a school principal sexually assaulted a student after summoning the student to his office. The North Carolina Supreme Court stated that, although the principal was exercising authority conferred upon him by the school in summoning the student to his office, he was advancing a completely personal objective in sexually assaulting the student. *Id.* The *Medlin* Court held that a sexual assault was "beyond the course and scope of [the principal's] employment as a matter of law." *Id.* at *7-*8, quoting *Medlin* at 464.

Ryals is most noteworthy for its reliance on *Medlin*, in which the North Carolina Supreme Court concluded that the employee was not in the scope of his employment, *notwithstanding* that he was exercising authority conferred upon him by his employer when summoning the student to his office, which enabled him to commit the assault. As demonstrated by cases to follow, this is an important and sometimes dispositive issue in some course and scope decisions.

Selective Insurance Company v. Oglebay, 2007 U.S. App. LEXIS 16979 (4th Cir. 2007).
Held: Rogue employee not an insured for sexual assault; Policy language at issue: ISO's Scope of employment or while performing duties.

In *Oglebay*, the course and scope coverage issue arose as follows. Widmeyer Driving School employed Thomas Oglebay to teach driving instruction. Tracey Mayhew, a mildly mentally retarded adult, was enrolled at the school. Mr. Oglebay sexually assaulted Ms. Mayhew. In particular, after other students had left the school, Mr. Oglebay began to sexually abuse Ms. Mayhew. He continued his activity during driving sessions in a vehicle owned by Widmeyer and at Mr. Oglebay's personal residence. All contact between Mr. Oglebay and Ms. Mayhew occurred during the period of time that Ms. Mayhew was scheduled for driving instruction. *Oglebay* at *2-*3.

Litigation ensued against Widmeyer and Mr. Oglebay alleging various acts of abuse, sexual assault and rape. *Id.* at *3. Mr. Oglebay agreed to a consent judgment in the amount of $300,000, in exchange for an assignment of rights against Selective Insurance Company, which had issued a CGL policy to Widmeyer.

The Selective policy did not specifically identify Mr. Oglebay as an "insured." However, the definition of the term "insured" included "employees . . . but only for acts within the scope of their employment by you [named insured] or while performing duties related to the conduct of your [named insured's] business." *Id.* at *2. Importantly, this is the language contained in ISO's standard CGL terms and conditions. *See* Form CG 00 01 10 01, § II.2.a.; Form CG 00 01 12 04, § II.2.a. Thus, while course and scope decisions frequently vary in their relevant policy language, here is the one place where consistency can be found.

Selective took the position that it had no duty to defend or indemnify Mr. Oglebay and it filed a declaratory judgment action in the District Court of Maryland. *Id.* at *3-*4. The parties agreed that the intentional acts committed by Mr. Oglebay were not "within the scope of his employment." Therefore, the issue before the trial court was whether Mr. Oglebay's acts were committed "while performing duties related to the conduct" of Widmeyer, which the court concluded was broader than the phrase "scope of employment." *Id.* at *4-*5. Nonetheless, the District Court found in favor of Selective and the case made its way to the Fourth Circuit, which noted that Maryland courts had yet to interpret the "while performing duties" provision. *Id.* at *7.

The argument advanced by Ms. Mayhew was as follows:

> [T]he "while performing duties" provision must be construed more broadly than the "scope of employment" provision[.] . . . [B]ecause all of Mr. Oglebay's misconduct was committed during the time that Mr. Oglebay was supposed to be teaching Ms. Mayhew how to drive, such conduct was committed while Mr. Oglebay was performing duties related to the conduct of his employer. Essentially, Ms. Bone [Ms. Mayhew's mother] claims that Mr. Oglebay's tortious conduct is covered under the "while performing duties" provision because there is a temporal-spatial connection between his duties as a Widmeyer driving instructor and his tortious conduct.

Id. at *6-*7.

The Fourth Circuit rejected this "temporal-spatial" test advanced by Mayhew. In doing so, the court relied on its 2006 decision in *Federal Insurance Company v. Ward*, 166 Fed. App'x 24 (4th Cir. 2006) (Va. law) that it noted involved a nearly identical insurance policy provision. In *Ward*, the issue was whether an employee who was finishing her day's work and locking up the business' premises was acting "while performing duties related to the conduct of the employer's business" when she flicked her cigarette ashes into a wastebasket, resulting in a fire that destroyed the building. *Id.* at *7.

The Fourth Circuit conducted its analysis by identifying the discreet act in question, flicking cigarette ashes, and comparing it with her duties as an employee. The *Ward* Court concluded: "Indeed, because the act of smoking was not within the Employees' job description or needed to perform a job-related duty, the subsidiary act of flicking ashes also cannot be characterized as the exercise of a duty." *Id.* at *7-*8, quoting *Ward*.

The *Oglebay* Court observed that "using the more expansive temporal-spatial criteria rejected by the panel in *Ward* would result in coverage for a 'virtually limitless number of activities' beyond the anticipation of either the insurer or the employer simply because they 'coincide with a job-related duty.'" *Id.* at *8.

Upon rejecting the "temporal-spatial" test — and instead identifying the discreet act in question and comparing it with the employee's duties — the *Oglebay* Court held that, because Mr. Oglebay sexually assaulted Ms. Mayhew in lieu of performing his duties, the sexual assault of Ms. Mayhew, "even if committed during the time or at a place related to his employment as a driving instructor, was certainly not the performance of a duty related to the conduct of his employer's business." *Id.* at *10.

Ohio Government Risk Management Plan v. Harrison, 115 Ohio St. 3d 241 (2007).
Held: Rogue employee an insured for sexual harassment; Policy language at issue: While acting on behalf of.

In *Harrison*, the Ohio Supreme Court recently weighed-in on the course and scope issue. David Harrison, city of Wapokoneta Chief of Police allegedly used the police department's computer system to display and distribute offensive and pornographic photographs and e-mails. He also allegedly used hidden electronic devices owned by the department to audio record female employees, including Denise Kohler, while they were in the police-department restroom. Kohler filed suit against the city and Harrison. Harrison was named in the suit as both an individual and in his official capacity, asserting that he had acted in his official capacity as chief of police and under color of state law. *Id.* at 241.

Wapakoneta was insured under a liability policy issued by Ohio Government Risk Management Plan. The Plan filed a declaratory judgment action seeking a determination that it had no duty to provide coverage to Harrison for a defense or damages. *Id.* The operative policy language defined as "insured" as any employee "while acting on behalf of or in the interest of Wapakoneta." *Id.* at 247.

The trial court found in favor of the Plan. The Court of Appeals reversed on the basis that Kohler's claims arose from her employment with the Wapakoneta Police Department while Harrison was Chief of Police. Further, the court noted that it was alleged that Harrison's actions were taken in the course of his duties. And although Harrison's actions might not have been in furtherance of his official duties, he was able to take those actions only because of his position as chief of police. *Id.* at 241. The Ohio Supreme Court agreed to hear the appeal.

The Ohio high court rejected the Risk Management Plan's argument that conduct involving sexual harassment and sexually deviant behavior is "manifestly outside the scope of employment as a matter of law." *Id.* at 242. As noted above, in *Ryals*, the North Carolina appeals court cited to *Medlin v. Bass,* in which the North Carolina Supreme Court held that a sexual assault was beyond the course and scope of employment *as a matter of law*.

In declining to rule that sexual harassment and sexually deviant behavior is outside the scope of employment as a matter of law, the *Harrison* Court concluded that course and scope is a fact issue and it seemed to embrace the "temporal-spatial" test for purposes of determining it. While the *Harrison* Court did not use such term, it stated as follows:

> [W]e noted [in *Kerans v. Porter Paint Company* (Ohio 1991)] that federal courts have held that "where an employee is able to sexually harass another employee because of the authority or apparent authority vested in him by the employer, it may be said that the harasser's actions took place within the scope of his employment." *Kerans,* 61 Ohio St.3d at 490, 575 N.E.2d 428. We further noted that in *Shrout v. Black Clawson Co.* (S.D.Ohio 1998), 689 F.Supp. 774, the court had held that when the supervisor's harassment of an employee takes "'place during work hours, at the office, and was carried out by someone with the authority to hire, fire, promote and discipline the plaintiff,'" it will normally fall within the supervisor's scope of employment.

Id. at 243.

Turning to the nuts and bolts of the coverage issue, the Risk Management Plan maintained that it had no duty to defend Harrison because all of the allegations in Kohler's complaint involved conduct by Harrison that was outside the scope of his employment as it did not further Wapakoneta's interests. *Id.* at 247.

However, the Ohio Supreme Court pointed out that the specific policy language contained in the Public Officials Wrongful Act Liability policy issued by the Plan to Wapakoneta was different from how the Plan characterized it in general terms:

> [T]he Plan overlooks language in the policy indicating that an "insured" is not limited solely to those acting "in the interest of" Wapakoneta. Rather, an insured

> includes any employee "while acting on behalf of or in the interest of Wapakoneta. ["] The policy separated the phrases "while acting on behalf of["] and "in the interest of["] with the word "or." The words used in a contract are to be given their plain and ordinary meaning (citation omitted) and "or" is "a function word indicating an alternative between different and unlike things[.]" (citation omitted) That is, the policy's use of the disjunctive "or" indicates that the two phrases were not intended to have the same meaning and that if an employee's actions satisfy either one, then he is an insured.

Id. Based on the policy's use of two different phrases, the court concluded that while the language could be construed as limiting an insured to one acting within the scope of employment, it could also be construed to include an officer who acted in his official capacity or an officer who is simply on duty. *Id.*

As further support for its position, the *Harrison* Court was guided by how the policy limited the definition of an insured in its comprehensive general liability section: "within the scope of his duties." The court observed: "Had the Plan intended to limit the definition of an insured under the Wrongful Act endorsement to those acting within the scope of their duties, it could have simply employed that language as it did in other sections of the policy." *Id.*

It seems unlikely that the Ohio Government Risk Management Plan actually intended for its policy's Public Officials Wrongful Act and CGL sections to treat the scope of employment issue differently. But nonetheless, different definitions of "insured" appeared in the policy. And even though the claim at issue did not involve the CGL portion of the policy, that language made its way into the court's decision.

The *Harrison* Court also looked to the policy's grant of coverage in reaching its decision, which the court noted broadly defined "wrongful act" to include "*any matter claimed* against [an insured] solely by reason of their having served or acted in an official capacity." *Id*. (emphasis in original.) The *Harrison* Court observed that "The allegations in the underlying federal complaint related directly to Harrison's capacity as Wapakoneta's chief of police, and Kohler alleged that Harrison committed wrongful acts while he was acting in his official capacity and under color of state law." *Id.*

Overall, the *Harrison* Court noted that the policy contained four variations of what could loosely be described as course and scope language. While not all of it was directly relevant, never forget the Miranda rule of insurance: Anything an insurer says in its policy can and will be used against it in coverage litigation.

Gulf Underwriters Insurance Co. v. KSI Services, Inc., 416 F. Supp. 2d 417 (E.D. Va. 2006).

Held: Rogue employee an insured for embezzlement (but no coverage nonetheless); Policy language at issue: Acting within the scope of their job duties.

At issue in *KSI Services* was the availability of coverage for a bookkeeper for Merit Title, LLC who embezzled approximately $1.4 million from her employer. The bookkeeper was arrested, charged with felony embezzlement and plead guilty. KSI Services, whose money it was that was embezzled from an escrow account, sought coverage under Merit's Errors and Omissions policy for Merit's negligent supervision of the bookkeeper. *KSI Services* at 419. [The court wondered out loud if KSI could seek third-party beneficiary status under Merit's policy, but it did not answer the question as it had not been raised. *Id.* at 420, n. 3.]

The Gulf Underwriters E & O policy issued to Merit insured against "wrongful acts" committed by an "insured," which the policy defined as Merit, L.C., including its employees "insofar as they were acting within the scope of their job duties." *Id.* at 419-20. The Gulf policy also contained an exclusion for acts of dishonesty. *Id.* at 420.

While the court's description of the policy language is not a model of clarity, it described the issue before it as follows: "The Dishonesty [Exclusion] to coverage under the Policy makes clear that Gulf has no liability under the Policy for losses arising out of criminal conduct of an 'insured.' . . . The question, then, is whether Dean [the bookkeeper] was acting within the scope of her job duties when she committed the embezzlement at issue." *Id.*

The *KSI Services* Court observed that the question of what acts fall within an employee's duties has long been "grist for the litigation mill." *Id.* While noting that the results are not always uniform, the factors that courts in Virginia and elsewhere consider are as follows:

> (i) the extent to which the employee was motivated by a desire to serve the employer in engaging in the tortious conduct; (ii) whether the tortious conduct was committed during the time the employee was on duty; (iii) whether the tortious conduct was committed while the employee was on the employer's premises or on premises where the employee's duties would naturally cause the employee to go; and (iv) the extent to which the impetus for the tortious conduct was causally related to the employee's employment.

Id. at 420-21. However, the court stated: "While there is some general agreement that these are the relevant factors to be considered, there is less agreement on the relative importance of each factor." *Id.* at 421.

The *KSI Services* Court predicted that the Supreme Court of Virginia would reject the "employee motivation" test for purposes of determining what acts fall within an employee's duties. This test being the extent to which the employee was motivated by a desire to serve the employer in engaging in the tortious conduct. *Id.* Instead, the court concluded that the Supreme Court of Virginia would adopt the "totality of the circumstances" test:

> Under the totality of the circumstances approach, an employee's subjective motivation for committing the tort is relevant, but not essential to a finding that the employee was acting within the scope of employment. Rather, the inquiry is a more objective one, focusing chiefly on whether the tortious or intentional wrongful conduct was sufficiently related in time, place, and causation to the employee's duties to be attributable to the employer's business.

Id.

Dismissing the employee motivation test, the *KSI Services* Court observed that it "might yield the anomalous result of excluding from an employee's scope of employment many routine work activities essential to employee productivity, such as using the restroom or getting a drink of water, because these activities are never performed with the intent to further the employer's interest." *Id.* at 424, n. 16. The court made this observation in the course of soundly rejecting the Fourth Circuit's unpublished decision, just three weeks earlier, in *Federal Ins. Co. v. Ward*, 2006 U.S. App. LEXIS 1753 (4th Cir.) (Court held that an employee's act of flicking cigarette ashes into a trash can were outside the scope of employment because it was not performed with the intent to further the employer's interest or from an impulse to carry out the employer's business.) (discussed herein, *supra*)

Based on the "totality of the circumstances" test, the *KSI Services* Court's decision was an easy one. Because Dean "could not have committed any of the acts of embezzlement at issue without the facilities and attributes of her office as bookkeeper" and because Dean "used the access and authority inherent in her office to accomplish her embezzlement scheme," she acted within the scope of her employment when committed the embezzlement at issue. *Id.* at 424. Having concluded that Dean was an "insured," the *KSI Services* Court held that the Dishonesty Exclusion precluded coverage for Merit's negligent supervision of her. The District Court's decision in *KSI Services* was affirmed, albeit not addressing the scope of job duties aspect of the case. 2007 U.S. App. LEXIS 10076 (4th Cir.).

The *KSI Services* Court's decision prevented insurance from remedying significant financial consequences on innocent parties (Merit was forced out of business). Nonetheless, the decision is actually beneficial to policyholders (just not those before the court). The court's adoption of the objective "totality of circumstances" test — focusing on whether the wrongful conduct was related in time, place, and causation to the employee's duties – is likely to result in more rogue employees qualifying as "insureds" than under the subjective "employee motivation" test.

This is a point that was not lost on the Fourth Circuit in *Ward*, which noted that, [u]nder th[e] temporal interpretation, a virtually limitless number of activities would be covered merely because they coincide with

a job-related duty. By this rule, neither [the insurer], nor [the insured] could ever anticipate the breadth of acts subject to coverage." *Ward* at **16.

Integrated Health Professionals, Inc. v. Pharmacists Mutual Insurance Co., 422 F. Supp. 2d 1223 (E.D. Wash. 2006).

Held: Rogue employee not an insured for sexual assault (but coverage available); Policy language at issue: Acts within the scope of their employment.

Integrated Health Professionals provided health care services to persons in their homes. Raymond Hughes worked for Integrated and provided in-home services to Sara Hendershott, a minor who suffered from cerebral palsy and respiratory disease. Mr. Hughes molested Sara in her home while working for Integrated. Sara's mother brought an action against Integrated on her behalf. Pharmacists Mutual issued a Business Owner's Liability Policy to Integrated, including an endorsement adding coverage for Home Health Care Services. Pharmacists Mutual disclaimed coverage and Integrated filed a declaratory judgment action. *Pharmacists Mutual* at 1225.

At issue was the potential applicability of an exclusion for "the willful violation of statute, ordinance, or regulation relating to Home Health Care Services by . . . an insured." The policy defined "insured" to include "your employees . . . for acts *within the scope of their employment* by you[.]" (Emphasis in original.) Thus, the court characterized the pivotal issue as whether Mr. Hughes's acts of sexual abuse were within the scope of his employment.

If so, Hughes was an "insured" when he committed sexual assault, meaning that the claims arose out of *an insured's* willful violation of statute. In that case, the exclusion would eliminate coverage for Integrated under the Home Health Care Services endorsement. But if Mr. Hughes's acts of sexual abuse were not within the scope of his employment, then he was not an insured when he committed them. Under that scenario, the claims did not arise out of *an insured's* willful violations of state law and the exclusion would not apply to eliminate coverage for Integrated. *Id.* at 1225-26.

In deciding the issue, the Eastern District of Washington discussed the fact that "scope of employment" arises in both the insurance coverage context and agency law. The *Pharmacists Mutual* Court concluded that "unless an insurance policy actually defines the term 'scope of employment' more broadly than its agency-law definition, the agency-law definition should be applied when interpreting the policy." *Id.* at 1228.

Turning to Washington's treatment of the issue under agency law, the court stated:

> The term "scope of employment" has a well-established meaning within the field of agency law. The test for determining whether an employee is, at a given time, in the course of his employment, is whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment or by the specific direction of his employer, or, as sometimes stated, whether he was engaged at the time in the furtherance of the employer's interests.

Id. at 1229.

The *Pharmacists Mutual* Court concluded that Mr. Hughes's acts of sexual abuse were not within the scope of his employment. Therefore, he was not an "insured" within the meaning of the policy. And since he was not an insured, the exclusion for "the willful violation of statute, … relating to Home Health Care Services by . . . *an insured* (emphasis added)" did not apply. Therefore, the claims against Integrated were covered by the Home Health Care Services endorsement. *Id.*

State Automobile Mutual Insurance Company v. Security Taxicab, Inc., 144 Fed. App'x 513 (6th Cir. 2005).

Held: Rogue employee not an insured for sexual assault; Policy language at issue: Acts within the scope of employment or while performing duties related to the conduct of the employer's business.

Security Taxicab involved a course and scope issue under the following circumstances. Jessica Hale and Rachel Riley were mentally handicapped young women who live with their respective parents and legal guard-

ians. Both women worked with other special-needs individuals at Creative Enterprises Workshops in Paducah, Kentucky. Each day they worked, the women were transported from their homes to Creative Workshops and back again in a van owned and operated by Security Taxicab. *Security Taxicab* at 514.

One day the regular driver for Security called in sick. In his place, Security sent an employee named Karl Kraus who, unbeknownst to Security, had a history of violent felony sex offense convictions and was listed on the Kentucky Sex Offender Registry. While transporting Jessica and Rachel from their homes to Creative Workshops, Kraus deviated from the regular route into a remote wooded area where he falsely imprisoned and sexually assaulted Rachel. On the way back that afternoon, Kraus falsely imprisoned and sexually assaulted Jessica before delivering her to her home. *Id.*

Security was insured under a policy issued by State Auto. Putting aside various procedural issues, the question that eventually reached the Sixth Circuit was whether false imprisonment was covered under the State Auto policy, which contained an exclusion for injuries "arising out of a criminal act committed by or at the direction of any insured." *Id.* at 515.

The policy defined "insured" to include Security's employees, "but only for acts within the scope of their employment by [Security] or *while performing duties related to the conduct of [Security's] business.*" *Id.* (emphasis in original.) There was no dispute that the false imprisonment, in conjunction with the sexual assaults, qualified as a "criminal act." Thus, if Kraus was an "insured" when he falsely imprisoned Rachel and Jessica, the Criminal Acts Exclusion would apply.

The District Court concluded that the false imprisonment was committed while Kraus was "performing duties related to the conduct of [Security's] business." Therefore, he was an "insured" at the time of the occurrence and the Criminal Acts Exclusion applied. *Id.* at 516. In reaching this decision, the District Court held that, in order to give full effect to the phrase "performing duties related to his employment," the phrase must be construed as adding to and expanding upon the phrase "within the scope of employment" and not as synonymous with it. *Id.* at 518.

Looking at it that way, the District Court concluded that Kraus encountered the women during the course of his employment and that the assaults occurred while Kraus was transporting them to and from Creative Workshops, while he was "on duty" and performing tasks on behalf of his employer. As such, the lower court determined that the acts occurred while Kraus was "performing duties related to the conduct of [Security's] business," and, therefore, he qualified as an insured. Accordingly, the District Court held that the Criminal Acts Exclusion precluded coverage. *Id.*

The Sixth Circuit affirmed. In doing so, it rejected the argument that the principles applied in *respondeat superior* cases, to determine if an employer is vicariously liable for an employee's acts, should apply. Such principles provide as follows: "Where deviation from the course of his employment by the servant is *slight and not unusual,* the court may, as a matter of law, find that the servant was still executing his master's business. On the other hand, if the deviation is *very marked and unusual,* the court may determine that the servant was not on the master's business at all but on his own." *Id.* (emphasis in original).

The Sixth Circuit pointed out that, using the *respondeat superior* test would lead to an anomalous and absurd result as the policy would provide coverage if the employee committed a serious crime, but then arguably would not provide coverage if the employee committed a more minor crime. *Id.* at 519-20. The Court held:

> Under the plain language of the State Auto insurance policy viewed as a whole, it is clear that the parties intended to exclude coverage of criminal acts committed by employees. Kraus only had access to Appellants [the women] as a result of his employment and during the course of his employment. The false imprisonment and sexual assaults occurred while Kraus was in the process of delivering Appellants to and from their homes and Creative Workshops, and he actually did, according to the facts before us, deliver the young women as expected.

Id. at 520. Thus, the *Security Taxicab* Court held that, because the false imprisonment committed by Kraus

occurred while Kraus was "performing duties related to the conduct of [Security's] business," the Criminal Acts exclusion applied and State Auto had no further liability under its policy. *Id.*

Conclusion

While a review of several recent course and scope coverage decisions does not lead to bright line rules, guidance can be found nonetheless. First, and most importantly, not all course and scope policy language is created equal. While different versions may sound alike, courts have shown that they are not afraid to parse the language and make distinctions that may seem hair-splitting, but are, in fact, far from it.

For example, while an employee's rogue behavior may not have been committed within the scope of his or her employment, the same behavior, within the same policy, may have been committed while performing duties related to the conduct of his or her employer's business. Further, a rogue employee's behavior may not have been committed while acting on behalf of his or her employer, but, within the same policy, it may have been committed in the interest of the employer. A further reason why course and scope coverage decisions do not lend themselves to easy answers is that the "insured" issue arises in two distinct contexts: an insured's effort to satisfy the grant of coverage and an insurer's effort to prove the applicability of a policy exclusion.

When satisfaction of the insuring agreement is at issue, the "temporal-spatial" test (or similar "totality of the circumstances" test) — examining whether the inappropriate conduct coincided with a job-related duty — is more likely to result in a conclusion that the miscreant employee was an insured. Thus, having satisfied that aspect of the insuring agreement, coverage may be available for injury or damage caused by an employee's inappropriate conduct.

But when coverage is sought by an employer, for its liability for its employee's conduct, and at issue is an exclusion for such inappropriate conduct committed by *an or any insured*, the party seeking coverage is now less likely to advance the temporal-spatial test. In this context, a determination that a bad seed employee was an insured at the time in question will result in the applicability of the exclusion and, hence, the unavailability of coverage.

Thus, an insurer advancing the temporal-spatial test in one context may face a "be careful what you wish for" outcome in another context. For this reason, to avoid the risk of an air-ball, the course and scope issue should be examined by insurers from the big-picture perspective. ■

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