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Insurance Coverage Decisions: Issued Today - Impact Tomorrow
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***Binding Authority* Caption Contest #2. And the winner is….**

Thank you to everyone who entered the second *Binding Authority* Caption Contest. The response was fantastic and so were the entries. But one entry really nailed it. It is attached. The winner has asked to remain anonymous – no doubt to prevent a sea of paparazzi from camping outside their house. I still have a couple more books that I'd like to give away so hopefully another contest is on the way – as soon as I can think of an idea for one.

[By the way, yesterday the California Court of Appeal issued a lengthy published opinion in *Kaiser Cement and Gypsum Corp. v. Insurance Company of the State of Pennsylvania* that addressed the extent to which continuously triggered primary policies (for asbestos claims) must be exhausted before an excess insurer is obligated to drop down. For those of you involved with such issues, it a worthwhile opinion.]

June 4, 2011

Cu-miss: United States Supreme Court Passes On Chance To Address CGL Coverage Issues

"General Liability Insurance Coverage: Key Issues In Every State" really dodged a bullet this week. Consider this potential catastrophe. The premise of "Key Issues" is that the treatment of insurance coverage issues varies widely from state to state. So if you are handling claims on a national basis, and don't have a 514 page book at the ready, providing a detailed statement of the law for 20 issues, for all 50 states, then man you are just playin' with fire. But earlier this week something happened that could have brought it all tumbling down.

On Tuesday the United States Supreme Court could have gone where it has never gone before – addressing insurance coverage under a general liability insurance policy. And not just any issues. The granddaddy-of-them-all Court could have addressed the standard for determining an insurer's duty to defend (the number one most important CGL coverage issue) and interpretation of the pollution exclusion (at the top of many people's list of favorite issues). Thankfully the court declined the invitation to do so by denying a petition for writ of certiorari in *Seattle Collision Center, Inc. v. American States Ins. Co.*, 79 USLW 3578 (U.S. May 31, 2011) (No. 10-1189). If the United States Supreme Court gets into the business of interpreting coverage issues under CGL policies – eliminating the state-by-state differences -- then "General Liability Insurance Coverage: Key Issues In Every State" becomes the Betamax. Not to mention that I'm Googling MBA schools.

Imagine if the United States Supreme Court addressed insurance coverage issues. I can see the confirmation process now for a new Justice: U.S. Senator to candidate: "Madam, Please tells your views on *Roe v. Wade* and *Montrose*."

Granted I'm taking literary license when describing what the high court could have done with the duty to defend and pollution exclusion in *Seattle Collision Center, Inc. v. American States Ins. Co.* [But no literary license was taken with the playin' with fire part.] But given that CGL issues are so unbelievably far outside the scope of the U.S. Supreme Court's mandate, the simple fact that the court was asked to hear a case, whose resolution was tied to the duty to defend standard and interpretation of the pollution exclusion, is worth looking at.

By the way, when I went on Westlaw to get the Petition for Cert. brief in *Seattle Collision Center v. American States*, this little box popped up stating that the document was outside my firm's subscription and there is an extra charge to access it. But because no expense is spared to bring you *Binding Authority*, I clicked Yes to whether I still wanted it. I have no idea what that cost. But I'm sure I'll find out from someone when the bill comes in.

Here is what *Seattle Collison Center, Inc. v. American States Ins. Co.* is all about [taken from Seattle Collision Center's Brief in Support of its Petition for Cert.]. Seattle Collision Center was sued in Washington state court, by a neighboring landowner, under the Washington Model Toxic Torts Act, for an alleged release of "perc" onto the neighbor's property. Collision Center sought coverage from certain CGL insurers, including American States (Safeco). Safeco denied coverage based on the Absolute Pollution Exclusion. Collision Center and another insurer resolved their own coverage dispute and settled the underlying claim. This settlement still left Collision Center with certain unpaid defense costs, for which Collision Center alleged were owed by Safeco.

In coverage litigation between Collision Center and Safeco, the Washington District Court and Ninth Circuit Court of Appeals both concluded that Safeco had no duty to defend Collision Center on account of the Absolute Pollution Exclusion.

Collision Center's argument, against the applicability of the Absolute Pollution Exclusion, was that the complaint in the underlying action sought consequential damages, *i.e.*, natural resource damages – which differ from remediation damages. Thus, Collision Center argued that the damages sought were within the exception to the Pollution Exclusion for liability for damages for "property damage" that the insured would have in the absence of a request or demand that it test for or clean up pollutants or in the absence of a claim or suit by or on behalf of a governmental authority for damages for testing or cleaning up pollutants [I'm paraphrasing the Pollution Exclusion here].

In general, Collision Center argued that the lower courts erred for two reasons.

First, Collision Center and Safeco both submitted non-Washington cases to support their position on the applicability of the exception to the Pollution Exclusion for natural resource damages. The District Court, while recognizing that no Washington court had addressed the issue, concluded that the Pollution Exclusion precluded coverage for <u>both</u>

remedial action damages and natural resource damages. However, Collision Center argued that, under Washington law, when Washington courts have not ruled on a particular legal issue on which coverage depends, there is a "legal uncertainty," which works in favor of providing a defense to the insured. Thus, Collision Center argued that the District Court improperly substituted its own view of Washington law concerning the interpretation of the Pollution Exclusion for consequential damages (natural resource damages), instead of simply concluding that, on account of the "legal uncertainty," a defense was owed.

Second, the Ninth Circuit held that the complaint in the Underlying Action sought only past and future remedial action damages. In other words, the Ninth Circuit concluded that the complaint in the Underlying Action didn't even seek consequential damages (natural resource damages) – which was Collision Center's only argument to avoid applicability of the Pollution Exclusion, since Collision Center conceded that the exclusion applied to remedial action damages. This, Collision Center argued, was in error -- because the Ninth Circuit's decision was made based on the federal pleading standard, requiring the pleading of facts to establish a claim for natural resource damages or other consequential damages "plausible on its face." Instead, according to Collision Center, the Ninth Circuit should have used Washington's less stringent "under any set of facts" pleading standard when determining whether the complaint in the Underlying Action sought consequential/natural resource damages. Collision Center argued that if the Ninth Circuit would have used Washington's less stringent "under any set of facts" pleading standard, it would have determined that the complaint in the Underlying Action sought consequential/natural resource damages.

Collision Center made interesting arguments but it was swimming against an incredibly strong tide in hopes of having its petition for writ of certiorari granted. The U.S. Supreme Court accepts only a fraction of cert. petitions filed (1.1% in 2009 – thank you Wikipedia). And even if the court granted cert., the case would no doubt be decided without the high court actually addressing the coverage issues – at least not in any detail. But given the rarity of such common CGL issues even appearing in the Supreme Court's mailroom, it seemed like something that was worth mentioning here.

Please let me know if you have any questions.

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