BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow

White and Williams LLP

LexisNexis® Top Blogs 2011 Insurance Law Community

Randy J. Maniloff
maniloffr@whiteandwilliams.com

May 19, 2012

Binding Authority **Contest**: Not long ago there was a short story in *Business Insurance* about Keith Fisher, a British butcher, who serves as the head judge of Bacon Connoisseurs' Week, a national bacon competition. He can apparently distinguish between 50,000 types of cured meat. British Pig Executive, a UK trade association for which Mr. Fisher serves as a board member, has taken out a $1.5 million policy on his taste buds. [I'm kinda dubious that there are really 50,000 types of cured meat out there. More about that below.]

These stories, about insurance policies taken out on unusual risks, are nothing new in the media. A Google search reveals that insurance policies have supposedly been taken out on such things as Liberace's hands, Tom Jones's chest hair and Michael Flatley's legs. These seem like policies half-designed for a real purpose (akin to disability) and the other half just to generate media attention – which they seem to do.

So here's the contest – give me your best idea for a talent or attribute that is so unusual or unique that it would be advisable for an insurance policy to be taken out on it. [Let's keep it G-rated folks.] It need not be something related to a celebrity's talent or trademark characteristic. In fact, a really good entry would involve a policy covering something unusual or unique about the insurance industry itself. Copies of the 2nd Edition of "**General Liability Insurance Coverage – Key Issues in Every State**," courtesy of our kind editor at Oxford University Press, will be given to the three best entries. [Bonus -- A fantabulous Oxford University Press pen will be given to the first person who can verify that there are (or are not) 50,000 types of cured meat in existence.]

District Court Makes Illi-noise Whether Policy Language Can Alter A Long-Standing Duty To Defend Rule

Court Prevents Insurer From De-fending For Itself

This is the first issue of *Binding Authority* in a little over a month. That's a long time between issues, as the publication schedule in 2012 has generally been an issue every 7 to 10 days. But, simply put, there have not been any cases that have met the publication criteria. And *Binding Authority's* long-standing promise to it readers has been to never send an issue just for the sake of it. No irrelevant e-mails. Period. Apparently, according to those I live with, I save my irrelevant comments for home.

As someone who reads a lot of coverage cases, it is unusual for me to pick up a new decision and say – "Gee whiz, I've never seen that issue addressed before." Seeing a new take on an issue, sure. Unique policy language, of course. But coming across an entirely new issue is not typical. However, that's what happened when I read last Friday's Northern District of Illinois's decision in *Philadelphia Indemnity Insurance Company v. Chicago Title Insurance Company*.

Chicago Title is complicated and involves lots of issues. But for purposes of discussing the one that matters here, we can skip over most of that, including even the facts. At issue was this – Chicago Title had a duty to defend an insured in an underlying action. It is well-settled under Illinois law – and the law in most places – that if an insurer has a duty to defend one count of a complaint, it has a duty to defend all counts of the complaint. The court referred to this as Illinois's default rule for purposes of duty to defend. *Chicago Title* at 9-10. So far, nothing controversial.

But here's the rub – The Chicago Title policy contained a provision that discussed certain duty to defend issues, and then went on to state: "[Chicago Title] will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured under the policy." *Id.* at 3.

In other words, at issue was this – Did Chicago Title's policy language, which limits the duty to defend to solely potentially covered claims, trump Illinois's long-standing rule that if an insurer has a duty to defend one count of a complaint, it has a duty to defend all counts of the complaint?

The court held that it did not, stating that Chicago Title could not "contract around" its duty to provide a complete defense, so long as one count of a complaint is potentially covered. *Id.* at 15. Put another way, a policy cannot "undo a default rule imposed by law." *Id.* at 19. As such, Chicago Title had a duty to provide its insured with a complete defense.

The rationale for the *Chicago Title* court's decision was this. The Illinois Supreme Court, in *Maryland Casualty v. Peppers* (1976), adopted these duty to defend rules: (1) "If the complaint alleges facts within the coverage of the policy or potentially within the

coverage of the policy the duty to defend has been established." (2) "This duty to defend extends to cases where the complaint alleges several causes of action or theories of recovery against an insured, one of which is within the coverage of a policy while the others may not be." *Id.* at 14. What's more, the *Chicago Title* court noted, other Illinois cases have used this same 2-step process for determining if an insurer has a duty to defend. *Id.*

The *Chicago Title* court concluded that (here's the money paragraph):

[f]or both of these propositions, the court made no reference to the policy language, instead citing a large number of Illinois cases and secondary sources. This strongly indicates that, like courts in Ohio, Illinois courts impose the complete defense rule *as a matter of law*, turning to the policy language only to determine whether any facts in a complaint bring a case within the scope of coverage.

Id. (emphasis added). "No case that Chicago Title has cited or that the Court has found suggests that the duty to provide a complete defense arises based on the terms of an insurance policy rather than as a matter of law. The Court therefore concludes that Chicago Title may not contract around this duty." *Id.* at 15.

As an unpublished federal District Court opinion, *Chicago Title* is certainly not the last word on the ability of insurers to draft, and uphold, policy language that conflicts with case law. But with more and more manuscript forms and endorsements in use, insurers may face challenges – freedom of contract notwithstanding – in upholding such policy provisions, if they conflict with coverage rules that are deemed to exist as a matter of law or fundamental principle, as opposed to having been created based on policy language.

A copy of the Northern District of Illinois's May 11th decision in *Philadelphia Indemnity Insurance Company v. Chicago Title Insurance Company* is attached.

Please let me know if you have any questions.

Randy

White and Williams LLP

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