

# BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



White and Williams LLP

Randy J. Maniloff

maniloffr@whiteandwilliams.com

May 20, 2011

***Binding Authority* Caption Contest Number 2.** I was in California last week and needed to provide coverage advice to one of the most famous people in the world. Thankfully I had a copy of [“General Liability Insurance Coverage: Key Issues In Every State”](#) with me. A quick look at “Key Issues” and the problem was solved one, two, three. See for yourself in the attached photo. Best caption for this photo, submitted by end of the day on May 27, wins a copy of “Key Issues.”

## **Is Emotional Injury “Bodily Injury?”: Emotions For Summary Judgment Keep Answering The Question**

The question whether emotional injury is “bodily injury,” for purposes of a commercial general liability, or other type of liability policy, is the most underrated of coverage issues. A huge body of law exists addressing the question and a lot of Shekles can be riding on the outcome – not to mention that the answer often-times surprises people. In the past month alone there have been at least four coverage decisions issued nationally addressing whether emotional injury is “bodily injury.” And it has been like this all year with numerous new decisions addressing the issue. But when one of these decisions is handed down -- nobody seems to notice.

Now compare all of this to construction defect. These days, if a traffic court in the middle of Montana issues an opinion addressing whether faulty workmanship is an “occurrence,” claims professionals reassess their pendings, insurance underwriters ask if new endorsements are needed, brokers get antsy and contractors start lobbying for new legislation to address the decision. But a decision addressing whether emotional injury is “bodily injury,” even from a high court, stays nameless and faceless and disappears into the bowels of Lexis.

Indeed, *Binding Authority* is as guilty as anyone for neglecting this issue. I believe this is the first ever issue of *BA* to examine whether emotional injury is “bodily injury.” [I’ll check with the archivist on Monday. He’s gone for the day.] [Having said that, the issue was not ignored in “Key Issues,” where Emotional Injury as Bodily Injury has its own chapter.]

Incidentally, having just declared that the question whether emotional injury is “bodily injury” is the most underrated of coverage issues, I can’t stop there with doling out awards. After all, we live in a nobody-is-a-loser and everyone-gets-a-trophy society. So if I don’t give out more awards, all of the other coverage issues’ mothers will write to complain. So here goes:

**Most overrated coverage issue:** An insurer's right to reimbursement of defense costs

**Most important coverage issue:** Is extrinsic evidence permitted to determine duty to defend?

**Most complex coverage issue:** Deciding which insurance you need when standing at the rental car counter

**Most boring coverage issue:** Choice of law

**Most interesting coverage issue:** "Any" insured vs. "the" insured

**Most misunderstood coverage issue:** Insurability of punitive damages

**Most money-at-stake coverage issue:** Number of occurrences

**Most contentious coverage issue:** Insured's right to independent counsel

**Most famous coverage issue:** [Trigger](#)

**Biggest bust coverage issue:** Y2K

Congratulations to all of the winners!

Getting back to whether emotional injury is "bodily injury," for purposes of a commercial general liability, or other type of liability policy, the issue is often seen as simple and clear-cut. The vast majority of courts that have addressed whether emotional injury qualifies as "bodily injury," under a policy that defines such term as "bodily injury (or bodily harm), sickness or disease," have determined that it does not. A common rationale for this conclusion is that the term "bodily" suggests something physical and corporeal. A notable exception to the majority rule is the New York Court of Appeals, which held that emotional injury does qualify as "bodily injury." New York's highest court reasoned that the term bodily injury was ambiguous and declined to rewrite the definition to read "bodily sickness" and "bodily disease." *Lavanant v. Gen. Accident Ins. Co. of Am.*, 595 N.E.2d 819, 822 (N.Y. 1992).

While the emotional injury as "bodily injury" issue is often considered in this yes/no, majority/ minority context, it is frequently not always so simple. For example, while a substantial majority of courts have concluded that emotional injury does not qualify as

“bodily injury,” many of those same courts have also held that emotional injury, that is accompanied by physical manifestation, qualifies as “bodily injury.”

Then, in jurisdictions that have held that “bodily injury” encompasses emotional injuries that are accompanied by physical manifestation, a subsequent concern can arise – how to define what constitutes adequate “physical manifestation.” Is loss of sleep a physical manifestation of emotional injury? How about loss of hair? Crying? Shaking? Knot in stomach? Fragile fingernails? All of these issues have been addressed by courts.

The emotional injury as “bodily injury” issue also often arises in the context of automobile claims – for purposes of determining if a person who witnessed an accident is entitled to his or her own “each person” limit of liability, as a separate person who sustained “bodily injury.” Ordinarily folks that are involved with general liability and professional liability claims see an Auto claim and immediately declare that it does not impact them. “Oh, no, Auto, that’s not me.” While that is often the case, it is not so here. Decisions addressing whether emotional injury is “bodily injury,” for purposes of an Automobile policy, are often cited by courts that are addressing the issue in the general liability and professional liability contexts.

Most issues of *Binding Authority* address a coverage issue in the context of a specific recent decision. Today is an exception (And it might be the first one. Again, archivist is gone for the day.) But since decisions addressing whether emotional injury is “bodily injury” are handed down frequently, yet don’t get a lot of attention, despite often-times being more core complex than the well-known majority/minority view – especially on account of the “physical manifestation” issue -- it was high time to make mention of it here. I’ll follow this up in a future issue of *BA* and address it in the context of an actual case.

If you have any questions, please let me know.

Randy

Randy J. Maniloff  
**White and Williams LLP**  
1800 One Liberty Place | Philadelphia, PA 19103-7395  
Direct Dial: 215.864.6311 | Direct Fax: 215.789.7608  
[maniloffr@whiteandwilliams.com](mailto:maniloffr@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.