

BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



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First some news and notes...

6th White and Williams Coverage College – I’ve been getting questions lately from people asking when is registration for the Coverage College. The Registrar’s office will open in about a week or so. As always, readers of *Binding Authority* will be the first to get the brochure and link to the registration site. We’ve put together an exciting program for 2012 and are looking forward to sharing it with you.

General Liability Insurance Coverage – Key Issues in Every State – I am excited to report that the 2nd Edition of “*Key Issues*” is in its Third Printing. And even six months after its release it is currently the # 1 selling insurance law book on Amazon.com (out of 100) (and also once again “Sold Out” on [Amazon](#) but will be back in stock soon). I can’t thank the *Binding Authority* community enough for making the book a success – both by buying it and spreading the word to others that it is a worthwhile purchase. Yes, I plug the book a lot – but, as I’ve said, not because I make any money from it. Nada. Zip. Not a single Peso, Shekel or Ruble. I just want the satisfaction of seeing the effort to write it pay off with a book that people use. Thank you for making that happen.

New Binding Authority Contest – If insurance coverage were an Olympic sport, what would some of the events be? My entry – Race to deny coverage for an AI tender. Not all of my *Binding Authority* contests work – but I think this one has potential. Our editor at Oxford University Press continues to be thrilled to supply copies of “*Key Issues*” for the best entries. So get your thinking caps on.

The Coverage Inkwell -- If you are not reading my colleague Josh Mooney’s coverage newsletter – focusing on Emerging Coverage Issues in Intellectual Property, Privacy and Cyber Liability -- you are missing a lot. Josh’s last issue addressed a significant and interesting decision from a California appeals court . A retailer marked down some high-priced jeans. The manufacturer sued the retailer for taking such step. The court found that a defense was owed to the retailer, under a CGL policy, on the basis that the retailer’s actions were inconsistent with the jeans’ identity in the marketplace as a

“premium” and “high end” brand of clothing, and thereby constituted product disparagement. Given how common large mark downs are by retailers, especially with clothing, this decision could open the door to unintended Part B coverage obligations for CGL insurers. Subscribe to *The Coverage Inkwell* by simply sending an email to Josh at MooneyJ@whiteandwilliams.com.

Illinois Federal Court: No Defect In Construction Of Sub-Contractor Exclusion

Michael Jackson was in the news this week with issues surrounding his missing mother, custody of his kids and allegations that the executors of his estate are trying to murder his mother. I thought news is when something out of the ordinary happens.

What does this have to do with insurance coverage? Well, more than you may think. This week’s stories reminded me of the little-known fact that, the reason why Michael was such a tortured soul, was that he spent years of regret for not pursuing a career in insurance coverage. It was only after his untimely and tragic death that this all came to light. When his Neverland Ranch was being cleaned out a folded up piece of loose leaf paper was discovered deep in the back of a desk drawer. On it were scribbled the lyrics of “Beat It” -- that Michael had long dreamed to sing:

We told you don’t you ever make a claim around here
Don’t wanna see your Acord, you better not mess up our fiscal year
There’s disclaimer in our eyes and our letter’s very clear
So beat it, just beat it

You better file somewhere else, better do what you can
You ain’t gonna see no money, in your lifespan
You wanna push back, but we’re the size of Hoover Dam
We tell you beat it, but you seem to have no attention span

Just beat it, beat it, don’t get on our balance sheet-it
Our bank account will not be depleted
Showin’ how funky and strong is our fight
It doesn’t matter if we’re not exactly right
We still won’t pay for your dog bite
Just beat it, beat it
Our money’s so well secreted

We're out to get you, better get another quote while you can
Don't wanna be uninsured, for your mini van
You wanna stay covered, and not end up as broke as Ed McMahon
So beat it, just beat it

We're here to show you that we're really not scared
If you get water in your basement that ain't no time to be unprepared
And if we finally pay your claim you'll have an uninsured share
So beat it, we need to stay a billionaire

Just beat it, beat it
We will not be defeated
We'll keep you off our balance sheet-it
Don't make us have to repeat it
Just beat it, beat it, beat it, beat it

[Reprised from my Top 10 Cases of 2009 article. Hey, it's the summer – the season for re-runs.]

There has been no shortage of efforts by insurers, within the past few years, to use manuscript endorsements that are designed to limit their exposure for construction risks. The most common example has been First Manifestation or Claims in Progress Exclusions, and the like, that are essentially designed to preclude coverage for “bodily injury” or “property damage” that took place before the policy period, *even if the insured did not know that injury or damage had taken place* and even if the injury or damage was continuous or progressive. In essence, coverage is limited to “bodily injury” or “property damage” that first takes place during the policy period. These endorsements are designed to eliminate the continuous trigger in construction defect claims – something that the Montrose Endorsement does not, nor was intended to, do. Insurers have had mixed results with courts concerning these endorsements.

Another common example are endorsements that preclude, limit, or otherwise alter coverage to an insured that uses a subcontractor, but does not secure an indemnity/hold harmless agreement from the subcontractor, nor get itself named as an additional insured on the sub's policy. Insurers have fared well with courts concerning these endorsements.

Insurers have also been using a variety of endorsements to limit the extent of coverage available to an additional insured.

This week the Northern District of Illinois addressed an endorsement in the construction genre. I've seen this endorsement in use in various policies, but case law interpreting it is sparse.

In *James River Ins. Co. v. Keys2Safety, Inc.*, the Illinois federal court addressed coverage under the following circumstances.

The McClier Corp., a general contractor, entered into a contract with DMB Services/Cotton JV for drywall work at the Kennedy King College construction site. Larry Gibson, an employee of DMB Services/Cotton JV, was injured when installing drywall, allegedly falling from purportedly defective scaffolding. Several months prior to Gipson's accident, McClier had entered into a contract with Keys2Safety ("K2S") to provide site safety at the Kennedy King construction site. Gipson brought suit against K2S, among others, alleging that they were negligent in various ways causing Gipson's injuries. *Keys2Safety* at 2.

K2S sought coverage from James River Ins. Co. under a CGL policy. The policy contained an exclusion titled "Injury to Independent Contractors and Subcontractors—Exclusion," which stated that:

[t]his insurance does not apply to 'bodily injury', 'personal and advertising injury' or 'property damage' sustained by any independent contractor/subcontractor, or any employee, "leased worker", "temporary worker" or volunteer to help of same.

Id. at 2-3.

James River argued that the Injury to Independent Contractors and Subcontractors Exclusion applied to exclude coverage to K2S. Nobody disputed that Gipson was an employee of DMB Services/Cotton JV and that DMB Services/Cotton JV was a subcontractor working at the Kennedy King construction site. Therefore, James River argued that, under the plain terms of the policy, the injury at issue was excluded from coverage. *Id.* at 5.

Hold the phone said K2S. DMB Services/Cotton JV was not a subcontractor of K2S. K2S argued that, what the exclusion "must have meant," is that it applied only to independent contractors and subcontractors **of K2S** and not *any* independent contractor or subcontractor. According to K2S, James River's interpretation would render the bodily injury coverage meaningless, because "[i]ndependent contractors, subcontractors, and their employees are essentially the only individuals present on a construction site." *Id.* K2S argued that, if there is no coverage to K2S, then the "bodily injury" insurance coverage is illusory. James River responded that coverage would exist for any individual who was not an independent contractor, subcontractor or employee of same. *Id.* The court rejected K2S's argument: "The policy need not provide coverage against all possible liabilities; if it provides coverage against some, the policy is not illusory." *Id.* (citation and quotes omitted).

The court held that no coverage was owed to K2S:

K2S and Mustapha's attempt to appeal to what the exclusion in this case “must have meant,” *i.e.*, that it applied only to independent contractors and subcontractors of K2S and not *any* independent contractor or subcontractor, is unpersuasive in light of the Seventh Circuit's direction that where terms of an insurance policy are clear and unambiguous, they must be applied as written. As to this point, it is important to note that had K2S wanted, it could have amended the language of the exclusion to expressly state what K2S says it means.

Id. at 6-7.

It is hard to argue that there isn't some merit to K2S's argument that independent contractors, subcontractors, and their employees make up a large group of the individuals that are present on a construction site. Thus, the Independent Contractors and Subcontractors Exclusion certainly limits coverage for K2S. But, having found the language of the exclusion to be ambiguous, that was not a relevant factor. Instead the court took its direction from a higher court and applied the exclusion as written because it was unambiguous.

A copy of the Northern District of Illinois's July 24 decision in *James River Ins. Co. v. Keyes2Safety, Inc.* is attached. Please let me know if you have any questions.

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