

# BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



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**February 22, 2012**

The 2<sup>nd</sup> edition of “**General Liability Insurance Coverage – Key Issues in Every State**” is now for sale on [Amazon.com](http://Amazon.com) – *and at a much nicer discount than the one from Oxford University Press*. It ships immediately from Amazon [ignore the note on Amazon stating that it ships in 1-2 months.] For those of you who bought it on Oxford, at a higher price, please note that I have no control over or involvement in (or even understanding of) the pricing. In fact, when I announced the book release, and gave the Oxford site, it was actually priced higher on Amazon (and not yet for sale). Please accept my apologies. I can only say that book pricing seems to make airline ticket pricing look simple to understand.

As I send this, “Key Issues” is the # 1 selling insurance book on Amazon.com – out of 100 in that category. John Grisham is sitting in Mississippi somewhere sweating (well, maybe not). Once again, Jeff and I extend our sincere appreciation for your support for the book.

## **The Hanging Chad Of Coverage Issues: *Any Insured Versus The Insured***

***Florida Federal Court Uses A Tiny Thing To Make A Big Decision***

Best quote ever from an insurance coverage case:

I remain troubled by the way the Court goes about reading insurance policies, which we constantly reiterate must be interpreted and construed like other contracts, but which hardly ever are because courts approach them, not as neutral arbiters of words on a page,

but in hopes there will be coverage. *Utica National Insurance Company v. American Indemnity Company, et al.*, 141 S.W.3d 198, 206 (Tex. 2004) (Hecht, J., dissenting).

This quote always comes to mind when I am considering the distinction between “any” insured and “the” insured. Because, despite the pessimism expressed by Justice Hecht, about courts’ unwillingness to treat insurance policies as contracts, many courts are perfectly willing to conclude that no coverage is owed – and sometimes for significant claims -- based on the difference between “any” and “the,” as these terms are used in a policy.

In a nutshell, this is the situation where a policy exclusion applies to the conduct of “any” insured – such as an exclusion for the “criminal act of *any* insured.” Just about all courts agree that “any” means “any,” and, as such, at least initially, coverage is precluded for an “innocent co-insured.” For example, if a child (an insured) assaults a neighbor, an exclusion for the “criminal act of any insured” would also preclude coverage for the parents (insureds), for a claim that they failed to prevent the assault. Because “any” insured – the child – committed the criminal act, coverage is also precluded for the parents – the innocent co-insureds -- even though they themselves did not commit any criminal act. However, if the exclusion had applied to the “criminal act of *the* insured,” then most courts would not preclude coverage for the parents, since the parents themselves did not commit a criminal act. In general, when an exclusion applies to the conduct of “the” insured, courts usually only exclude coverage for the insured that actually committed the act in question.

Of course, policyholders will likely respond that, even if they are forced to concede that, at least on its face, “any” does mean any, coverage nonetheless remains available for innocent co-insureds, because any other outcome would be inconsistent with the policy’s “Separation of Insureds” provision. A Separation of Insureds clause provides each insured with separate coverage, as if each were separately insured with a distinct policy, subject to the limits.

Insureds denied coverage, because their policy uses the term “any” insured and not “the” insured, may find themselves in utter disbelief that such seemingly innocuous words could have so much import. Their response may be that the insurer is simply exploiting a technicality. But courts that uphold the distinction do not see it that way. *See, e.g., Vanguard Ins. Co. v. McKinney*, 459 N.W.2d 316, 319–20 (Mich. Ct. App. 1990) (dismissing the insured’s argument that the distinction between “an” insured and “the” insured is “irrelevant semantics”).

I am constantly raising with clients the critical importance of identifying the “any” insured versus “the” insured issue in their claims. It has been a subject of *Binding Authority*, my annual “Top 10” Coverage Cases article, and it is the subject of an entire chapter in *Insurance “Key Issues”* (49 states and the District of Columbia have addressed this issue).

Earlier this month a Florida District Court – based on “any” insured principles -- determined that no coverage was owed for what may be a large claim, involving wrongful death. *Southern-Owners Insurance Company v. Wiggins* is addressed here for two purposes: (1) as a reminder of the importance of the “any” insured versus “the”

insured issue; and (2) to demonstrate that the “any” insured versus “the” insured issue arises even with other than the specific terms “any” insured and “the” insured contained in the exclusion.

*Wiggins* involved coverage for a lesser of property – “Giant Defendants” -- who were additional insureds under a CGL policy issued to Named Insured Sunshine Mart. While the facts are not set out in detail, it appears that the Giant Defendants were sued for wrongful death, arising out of the sale of liquor at a Sunshine Mart store, that was leased from the Giant Defendants.

At issue was the applicability of the policy’s Liquor Liability exclusion, which provided as follows:

This insurance does not apply to ... “Bodily injury” or “property damage” for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

*Wiggins* at 11 (emphasis added).

The first provision at issue was this: “This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.”

Essentially, the Giant Defendants’ argument was this: Look, we were just the landlord. We were not in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

But the *Wiggins* Court was not persuaded. The court closely examined the word “you” in the exclusion and noted that it referred to the “named insured” [Sunshine Mart]. Based on this, the court held:

The Giant Defendants contend that the use of the term “you” in the final sentence of the liquor liability exclusion is ambiguous. The Court does not agree. The use of the term “you” in the exclusion is consistent with how that term is defined in the preamble of the General Liability Form. When read in context, nothing in the Policy suggests that the term is used in the exclusion in an inconsistent manner. Thus, it is of no moment that the Giant Defendants are not in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. Sunshine Mart is in that business, and that is what counts.

*Id.* at 11-12.

The *Wiggins* Court also rejected the Giant Defendants' argument that the policy's Separation of Insureds clause dictated a different result:

Furthermore, it is of no moment that the severability clause operates to create separate insurable interests in each insured. The Policy's liquor liability exclusion plainly applies to bodily injuries for which *any insured* may be liable where the Named Insured is "in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages." The exclusion, therefore, acts to extinguish *all* of the Insurer's liability as to *any insured* where Sunshine Mart sells alcoholic beverages (which, according to the allegations of the state court action, it did). The language used in the liquor liability exclusion is clear, and it unambiguously applies the exclusion to the separate insurable interests of each insured.

*Id.* at 13.

The lesson of the "any" insured versus "the" insured issue is this:

***"From Small Things (Big Things One Day Come)"***

--Bruce Springsteen

The Essential Bruce Springsteen

Columbia Records, 2003

A copy of the Florida District Court's February 9, 2012 opinion in *Southern-Owners Insurance Company v. Wiggins* is attached.

Please let me know if you have any questions.

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