UNLV | WILLIAM S. BOYD SCHOOL OF LAW

Scholarly Commons @ UNLV Boyd Law

Scholarly Works

Faculty Scholarship

1999

Recent Case Developments

Jeffrey W. Stempel
University of Nevada, Las Vegas -- William S. Boyd School of Law

Follow this and additional works at: https://scholars.law.unlv.edu/facpub

Part of the Civil Procedure Commons, Environmental Law Commons, Insurance Law Commons, Litigation Commons, Other Law Commons, and the Torts Commons

Recommended Citation
Stempel, Jeffrey W., "Recent Case Developments" (1999). *Scholarly Works*. 249.
https://scholars.law.unlv.edu/facpub/249

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

RECENT CASE DEVELOPMENTS

*Jeffrey W. Stempel**

UNDER FEDERAL EMPLOYEES' INSURANCE PROGRAM, CHANGE OF BENEFICIARY FORM INEFFECTIVE ABSENT SIGNATURE OF INSURED; WITNESS AFFIDAVITS IMMATERIAL

Hightower v. Kirksey, 157 F.3d 528 (7th Cir. 1998).

Pink Kirksey, a U.S. Postal Service employee, obtained a life insurance policy from Metropolitan Life under the Federal Employees' Group Life Insurance Act (FEGLIA). FEGLIA is a group life insurance program available to federal employees administered by the U.S. Office of Personnel Management, which purchases private life insurance policies under the program for the employees. Pursuant to FEGLIA and his coverage under the Metropolitan Life policy, Mr. Kirksey named his wife Maude beneficiary in a 1978 designation of beneficiary form.

Maude Kirksey died in June 1989. Under the terms of the policy, if a designated beneficiary predeceased the insured, the proceeds of the policy belong to any children of the decedent insured. When Pink Kirksey died in 1995, his daughter Charlene Hightower sought benefits but was opposed by Lessie Kirksey, sister of Pink Kirksey. To support her claim for benefits, Lessie Kirksey relied on a designation of beneficiary form dated July 19, 1989 naming her beneficiary in replacement of Mr. Kirksey's widow, Maude. Although two witnesses had signed the form, Mr. Kirksey

---

* Fonvielle & Hinkle Professor of Litigation, Florida State University College of Law. Professor Stempel is the author of LAW OF INSURANCE CONTRACT DISPUTES (1999) AND INTERPRETATION OF INSURANCE CONTRACTS: LAW AND STRATEGY FOR INSURERS AND POLICYHOLDERS (1994 and 1998 Supp.) both published by Aspen Law & Business. Portions of the case summaries were originally or simultaneously authored in substantially this format for the <http://www.aria.org.jri/>*Journal of Risk and Insurance*, <http://www.aria.org/jri//> of the <http://www.aria.org/>American Risk and Insurance Association, Box 9001, Mount Vernon, NY 10552–9001.

himself had not. The court ruled this omission to absolutely bar any effect of the form. The court consequently upheld Ms. Hightower's claim as daughter–beneficiary.

According to the court, the statute establishing the FEGLIA program requires that any beneficiary change form be signed by the insured. The statute, 28 U.S.C. § 8705(a), provides that a beneficiary designation be "in a signed and witnessed writing received before death in the employing office," and expressly provides that beneficiary designations in wills or other documents have no force or effect. *See Hightower*, 157 F.3d at 530. The Seventh Circuit Court of Appeals enforced the language literally, stating that both signature *and* witnessing were required to designate a beneficiary. In the absence of a valid change of beneficiary from the deceased wife to the sister, the policy was to be paid to the insured's children by default as provided in the statutory scheme. The court further ruled that the insured's intent to designate a beneficiary could not be legally established by affidavits of the witness or other extrinsic evidence of insured intent. Without a signature, the beneficiary change was a nullity.

In addition to basing its decision on the literal language of the statute, the court noted that the current language of Section 8705(a) was enacted in a 1966 amendment to the FEGLIA statute. Prior to the amendment, the statute "did not specifically require that insurance policies issued to federal employees covered by FEGLIA be signed and witnessed." *Id.* at 530. Prior to the 1966 amendment, courts had found "substantial compliance" with beneficiary designation procedures to be sufficient, a view in accord with the common law of life insurance beneficiary designation in most states. According to the Seventh Circuit, the "substantial compliance" precedents of FEGLIA were "no longer valid" because of the express language of the 1966 amendment.

The court reasoned that if Congress had wanted to adhere to the pre–1966 precedents, it would not have added the relatively clear words "signed and witnessed" to the statute. Other recent federal court decisions support this aspect of the *Kirksey* holding. *See, e.g.*, *Thomas v. Metropolitan Life Ins. Co.*, 111 F.3d 963 (D.C. Cir. 1997) (partially completed beneficiary change form ineffective absent insured's signature); *Ward v. Stratton*, 988 F.2d 65, 67 (8th Cir. 1993) (by adding requirement of signature in 1966 amendment, Congress intended to eliminate practice of permitting beneficiary change by less formal documentation such as unwitnessed holographic note); *Metropolitan Life Ins. Co. v. Sullivan*, 897 F.Supp. 65 (E.D.N.Y. 1995) (beneficiary designation completed by

HeinOnline -- 5 Conn. Ins. L.J. 840 1998-1999

insured's brother under power of attorney after insured's death invalid under 28 U.S.C. § 8705(a)).

Although it stated that extrinsic information was irrelevant to the issue of valid beneficiary designation, the *Kirksey* court itself made use of a form of extrinsic information to buttress its view that the statute absolutely required the insured's signature to change beneficiaries. In particular, the *Kirksey* court noted that the Code of Federal Regulations applicable to the administration of FEGLIA required that the insured sign any beneficiary designation. *Hightower*, 157 F.3d at 531 (citing 5 C.F.R. § 870.902(a)). The Code of Federal Regulations is obviously not the statute itself but is formulated by the agency administering a statute. Although agency regulations may be overturned by judicial review if the regulation exceeds agency authority, or by legislative overruling if Congress disagrees with the regulation, the Code reflects the responsible agency's reading of the statute and understanding of the congressional intent underlying the statute. Under relevant U.S. Supreme Court precedent, the statutory interpretation of an agency charged with administering the statute is given considerable deference and normally takes precedence over competing interpretations whenever the agency's construction of the statute is "reasonable". *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S.Ct. 2778 (1985). Reading the express language of the FEGLIA statute as requiring, without exception, the insured's signature, was clearly a reasonable interpretation even if not the only possible interpretation.

The *Kirksey* court also found that strict construction of the statute made sense as a means of minimizing error or fraudulent claims. Consequently, the requirements of the statute do not permit "any exceptions, equitable or otherwise." *See Hightower*, 157 F.3d at 531 (citing Metropolitan Life Ins. Co. v. Christ., 979 F.2d 575, 578 (7th Cir. 1992)). In the instant case, of course, the Seventh Circuit's literalism may have made particularly good sense. A grieving insured in the month after his wife's death could have been pressured by a sibling to designate her as beneficiary and may have been vulnerable to such pressure, even at the expense of his child. Further, witnesses may be disinterested in that they do not stand to profit personally from a beneficiary change but may be allies of the would-be beneficiary. Consequently, some caution is required before permitting witness affidavits to take the place of a signature.

Even if the insured went so far as to prepare a beneficiary designation, the *Kirksey* case itself suggests some wisdom in requiring the insured to travel the last yard and sign the form to make a beneficiary designation

HeinOnline -- 5 Conn. Ins. L.J. 841 1998-1999

effective. For a large and far–flung insurance program such as FEGLIA, where the insured often is not well–known to those processing the policy, an absolute signature requirement may make particularly good sense both as an efficient rule of easy administrative application and as a check on error. For ordinary life insurance products sold "closer to home", through an agent and an individualized underwriting and administration process, permitting "constructive" change of beneficiary based on the totality of the circumstances may make more sense. However, the enthusiasm of the federal courts in enforcing the absolute signature requirement of FEGLIA suggests that courts would be receptive to state legislation or clearly written insurance policy provisions imposing similar requirements for beneficiary designation in non–FEGLIA life insurance.

WASHINGTON FINDS POLLUTION LIABILITY COVERAGE UNDER PERSONAL INJURY PORTION OF COMMERCIAL GENERAL LIABILITY POLICY

Kitsap County v. Allstate Insurance Co., 964 P.2d 1173 (Wash. 1998).

The standard commercial general liability ("CGL") policy is best known for the defense and indemnity coverage it provides for "bodily injury" and "property damage" (Part A of the standard CGL drafted by the Insurance Services Office). Part B of the CGL provides coverage for "personal injury" and "advertising injury". Personal injury is defined as matters such as false arrest, malicious prosecution, defamation, and "wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy."

In the early years of significant pollution liability claims, coverage litigation focused on the so–called "qualified" pollution exclusion (which was in effect from 1970 to 1985) which excluded coverage for pollution claims unless the release of the pollutant was "sudden and accidental". Courts split roughly in half regarding whether the qualified exclusion precluded coverage for gradual but unintended pollution. In response, the insurance industry adopted the "absolute" pollution exclusion found in today's CGL, which precludes coverage for any claim arising out of a contaminant discharge. Although courts have divided regarding application of the exclusion to events such as carbon monoxide poisoning and lead paint ingestion, the absolute exclusion has been very successful in

HeinOnline -- 5 Conn. Ins. L.J. 842 1998-1999

prompting courts to bar coverage for traditional environmental degradation claims.

The success of the current pollution exclusion to the bodily injury coverage in Part A of the CGL has driven policyholders to seek coverage for contamination claims under the personal injury provisions of Part B of the CGL, which provides coverage for "wrongful entry" type claims and in the past contained no pollution exclusion. In the typical CGL, the absolute pollution exclusion was first included only in the bodily injury and property damage section (Part A). The current standard CGL Part B now also excludes personal injury and advertising injury claims arising out of pollution discharges. However, policyholders holding occurrence policies predating the Part B pollution exclusion have, when faced with effluent liability claims by neighbors or the public, asserted that the claim alleges wrongful entry by the pollutants onto the property of the third party. For the most part, these policyholder attempts to obtain personal injury CGL coverage for this type of claim have been unsuccessful.

However, policyholders seeking to find "back door" coverage for pollution claims via the personal injury section of the CGL recently received a shot in the arm in *Kitsap County v. Allstate Insurance Company*, in which the Washington Supreme Court held certain pollution claims against the policyholder County constituted covered wrongful entry and invasion of the right of occupancy under the personal injury provisions of the applicable liability policies.

The declaratory judgment action over coverage began in the Federal District Court for the Western District of Washington, which certified to the Washington Supreme Court the question:

> Whether the claims against Kitsap County constitute "personal injury" under each of the subject liability insurance policies.

The court responded by answering "yes to the question insofar as it relates to policies that provide coverage for a personal injury arising from a 'wrongful entry' and/or other invasion of the right of private occupancy" but answered "no as it relates to policies that provide coverage only for a personal injury arising from a 'wrongful eviction'." *Allstate Ins. Co.*, 964 P.2d at 1175.

The claims arose out of suits by the owner and residents of a mobile home park who alleged that their property and health were damaged by odors and other contamination from a waste disposal site once owned by

the County. The claims sounded in trespass and nuisance. The County tendered defense of the suits to 19 insurance companies that had written liability coverage for the County in 23 separate policies over a 30–year period. The insurers agreed to defend subject to a reservation of rights, prompting the County to assume its own defense. The actions were settled and the County then sought coverage.

The policies at issue contained varying language that in different degrees provided coverage for "wrongful entry", "wrongful eviction", and "other invasion of the right of private occupancy." One policy also provided coverage for a "violation of property rights". The personal injury provisions of the policies also provided coverage for the usually included personal injury components of false arrest, malicious prosecution, and defamation.

The Washington Supreme Court noted that some cases refuse to find coverage under the personal injury provisions because the structure of the policy and these provisions suggest that personal injury coverage is designed to cover a species of intentional torts and not duplicate coverage for bodily injury claims. The court also noted that some decisions favoring insurers found a policy's absolute pollution exclusion to apply to the personal injury section of the policy as well as to the bodily injury coverage. However, concluded the court, where there is no clearly attached pollution exclusion, the "wrongful entry" and "invasion of property" language is susceptible to construction in favor of the policyholder. Thus, under the rule of contra proferentem, a provision capable of reasonable construction against the insurer and in favor of coverage is so construed. In particular, the court rejected the view that the "intentional tort" nature of personal injury coverage required a finding that any physical injury claims were the exclusive province of the bodily injury section of the policy (that contained a pollution exclusion). The court found that:

> no rule of law that we are aware of that prevents an insurance company from providing overlapping coverage in any policy that it issues. By the same token, we know of no authority for the proposition that an insured must elect which coverage it chooses if it has been furnished with overlapping coverage in a policy. . . . If the claims against Kitsap County constitute "personal injury" as that term is defined in any policy, then coverage is available under that policy, notwithstanding the fact that additional coverage may be provided to the insured by other provisions in the policy.

HeinOnline -- 5 Conn. Ins. L.J. 844 1998-1999

Id. at 1180.

The Washington Supreme Court directly disagreed with *County of Columbia v. Continental Insurance Co.*, 634 N.E.2d 946 (N.Y. 1994), a New York high court case limiting personal injury coverage to intentional torts and similar causes of action. The Washington Supreme Court also noted that some insurers had placed pollution exclusions in the personal injury segments of their liability policies. To the court, this suggested that the liability policies could have been more clearly drafted to preclude coverage, thus bringing about sufficient ambiguity to support a reading of the "wrongful entry" and "property invasion" terms that was favorable to the policyholder. The court also rejected insurer arguments that Washington law envisioned a separate tort of wrongful entry that was distinct from mere damage to property from the introduction of something from outside the property.

As a matter of contract construction, the court rejected the insurer suggestion of applying the canon of construction "ejusdem generis" (which advocates construing a set of related terms similarly) because the wrongful entry provisions were followed by a catchall "or other invasion of property" clause that made it inappropriate to limit coverage solely to things similar to wrongful eviction. Finally, the court agreed with the County that a nuisance claim was essentially a claim for wrongful entry or invasion of the right of use of private property.

The *Kitsap County* holding is certainly debatable and many would regard it as a victory for hyperliterally broad construction rather than a reasonable reading of the liability policy as a whole. However, the decision was a unanimous one from a court noted for its insurance opinions. *Kitsap County* may breath new life into policyholder efforts to obtain pollution coverage through the personal injury provisions of the CGL or similar liability policies.

TEXAS SUPREME COURT IN 5–4 DECISION RULES FOR POLICYHOLDER CONTRACTOR IN POLLUTION–RELATED CASE

Kelly–Coppedge, Inc. v. Highlands Ins. Co., 980 S.W.2d 462 (Tex. 1998).

Kelley–Coppedge, Inc. ("KCI"), an oil and gas pipeline contractor, struck an existing oil pipeline while laying pipe along an easement. Some

1600 barrels of crude oil spilled, giving rise to a claim by the property owner against KCI. KCI notified Highlands, its commercial general liability ("CGL") insurer, as well as mitigating damage and resolving the claim by paying cleanup costs. Highlands denied coverage, asserting that the claim was barred under the pollution exclusion of KCI's liability policy.

The KCI policy, like the standard CGL, contained a pollution exclusion that barred coverage arising from a discharge of contaminants "[a]t or from any premises, site or location which is or was at any time owned or occupied by" the policyholder. 980 S.W.2d at 464. Highlands took the position that while laying pipe, KCI "occupied" the property on which the spill took place. KCI prevailed before the trial court while the intermediate appellate court accepted the insurer's position. The Texas Supreme Court rejected the insurer's view in a 5–4 decision, holding that occupation of property within the meaning of the CGL's pollution exclusion requires more than mere temporary, transitory presence on the property on which a pollution discharge takes place.

The majority at one point suggested that to "occupy" land, an entity must have something close to "exclusive control" of the premises but need not be constantly physically present. However, the court stopped short of using an exclusive control definition of occupancy and required only that the entity "keep or hold the property for use" to be an occupier. The court majority cited a federal district court case giving a similar reading to the "occupancy" requirement on the ground that the insurer's broad construction of this term did not fit with the language and structure of the pollution exclusion. *See United States Fidelity & Guaranty Co. v. B & B Oil Well Service, Inc.*, 910 F. Supp. 1172 (S.D. Miss. 1995). The *KCI v. Highlands* court observed:

> We agree with KCI that if the [insurer] was correct that any presence, no matter how transitory, constitutes occupancy under section f.(1)(a), then section f.(1)(d) is rendered meaningless. Subparagraph (a) applies to releases at or from premises owned or controlled by the contractor. Subparagraph (d) broadens the scope of the exclusion to include releases at or from premises owned by a third party at which the contractor is performing operations, but only if the contractor brings the pollutants onto the site. By negating coverage for a contractor's entire operations at a job site, the [insurer's] interpretation leaves section f.(1)(d)

HeinOnline -- 5 Conn. Ins. L.J. 846 1998-1999

> nothing to exclude. Under the [insurer's] interpretation, there would be absolutely no reason to include (d) since (a) already excludes all the contractor's operations, whether or not the contractor owns or controls the premises on which it is performing operations. Under that reading, a contractor's off–premises coverage is completely eliminated.
>
> * * *
>
> In short, we agree . . . that to "occupy" means "to hold or keep for use," and we concluded that KCI's interpretation of the word "occupy" . . . is the only reasonable interpretation [and that the pollution exclusion] unambiguously does not apply to exclude coverage for KCI's cleanup costs.

Highlands Ins. Co., 980 S.W.2d at 467.

The four dissenting justices argued for a broad reading of "occupy" to include any type of presence, however brief. But the dissenters also argued that the it was reasonable under the circumstances to view KCI as an "occupier" of the land as they were granted a contractual right to wide–ranging use of the land and worked on the property for 19 days with workers and equipment. According to the dissent:

> Based on any of the preceding definitions [of occupancy used by in other cases], KCI clearly "occupied" the easement.
>
> * * *
>
> Based on the plain, ordinary, and generally accepted meaning of occupied, a person or thing occupies a space if it is there. One may occupy a vehicle, a hotel room, or even an airplane seat or bathroom for a short period of time without ever possessing or controlling it. The term occupy and its cognates are routinely defined as indicating physical presence or proximity in the automobile insurance context.

Id. at 469.

The dissent also disagreed with the majority regarding the relation of subparagraph (d) of the exclusion (the subcontractor exception) to the

HeinOnline -- 5 Conn. Ins. L.J. 847 1998-1999

entire exclusion, finding that the subcontractor exception was not rendered meaningless if "occupy" is read broadly because:

> The policy indemnified KCI for any vicarious liability it might incur for pollution–related damages caused by a KCI subcontractor who did not bring the pollutants to the site, but it excluded it for any damages for which KCI was directly responsible.

Id. at 469.

The textual analysis of both the majority and the defense is impressive but the majority decision is more persuasive because of factors in addition to text. The Court's decision provides a more reasonable interpretation of the CGL and the exclusion that better comports with the intent and purpose of the pollution exclusion. The exclusion was designed to eliminate coverage for Superfund–type land mediation costs imposed on landowners or lessees and to bar coverage for policyholders releasing contaminants as a part of business operations. KCI did not pollute by discharging contaminants—it negligently damaged a pipeline, which consequently resulted in despoiling of land. Thus, the KCI tort liability does not fit the notion of pollution underlying the exclusion, a factor that argues for a narrow reading of the "occupy" term in the exclusion under the facts of the case.

In addition, it is hornbook insurance law in Texas and elsewhere that the terms of an exclusion are strictly construed against the insurer because, to state the obvious, exclusions narrow coverage. Indeed, any term drafted by the insurer (which usually is every word in the policy) is construed against the insurer under the doctrine of contra proferentem (ambiguous words are construed against the contract drafter) unless the words are sufficiently clear. Although the majority labored to find "occupy" a facially unambiguous term as did the dissent, the diametrically opposed interpretations of the same word given by the Justices suggest that both camps of the Texas court were being unrealistic to suggest the absence of ambiguity. It might more realistically be said that both the "temporary presence" and the "keep or hold for use" interpretations of the term "occupy" are reasonable. But if there are competing reasonable constructions of a term, the term is construed against an insurer that drafted the policy. Consequently, the contra proferentem principle could easily have been applied to the case and supports the majority holding.

HeinOnline -- 5 Conn. Ins. L.J. 848 1998-1999

Furthermore, although the dissent presents its position well, it may be charitable to call such a broad definition of "occupy" reasonable. Recall that the dissent states that one occupies a bathroom with even a brief visit. Although this is true in a dictionary sense, it seems not to be the notion of "occupy" applicable to a liability insurance policy. For example, if a KCI employee visits a bathroom at the jobsight and negligently causes a toilet backup, does it make sense to treat KCI as a polluter and deny coverage for what appears to be mere negligence that does not take place on anything resembling KCI's property?

If even transitory presence is enough occupancy to invoke the broadly drafted absolute pollution exclusion, there could be considerable potential for absurd results in the context of liability insurance. For that reason, the dissent's invocation of automobile insurance precedents seems inapposite to construing the CGL as there may be good reasons to construe "occupy" broadly in the auto context but not in the CGL context. In addition, the term "occupy" is part of the automobile policy coverage provisions and not part of an exclusion, a segment of the policy normally construed against the insurer.

Because *KCI v. Highlands* was a 5–4 decision in which both majority and dissent focused heavily on policy text rather than other interpretative factors, presumably the Texas court would enforce a broad definition of "occupy" if it were specifically defined in the policy. Liability insurers for contractors may accordingly rewrite their policies in response to the *KCI v. Highlands* decision.

"PROFESSIONAL SERVICES" WITHIN MEANING OF ATTORNEY MALPRACTICE POLICY INCLUDES BREACH OF FIDUCIARY DUTY FOR FAILING TO DISCLOSE CONFLICT OF INTEREST EVEN IF BREACH DID NOT OCCUR DURING ACTUAL PERFORMANCE OF PARTICULAR LEGAL SERVICES FOR CLIENT

In re Estate of Corriea; Avianca, Inc. et al., 719 A.2d 1234 (D.C. 1998).

Beginning in 1980, Avianca, S.A. retained attorney Mark Corriea to represent it in aircraft leasing, corporate financing, and government relations matters. By 1985, the relationship had soured sufficiently that

HeinOnline -- 5 Conn. Ins. L.J. 849 1998-1999

Avianca sued Corriea in United States District Court for breach of fiduciary duty, fraudulent misrepresentation, and violation of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). Avianca prevailed in the suit, obtaining summary judgment against Corriea, with the trial court finding that Corriea had violated his fiduciary duty as counsel to Avianca because he had "allowed his professional judgment on behalf of his clients to be adversely affected by acquiring and maintaining interests potentially or actually in conflict with those of his clients." 719 A.2d at 1235.

The gravamen of the Avianca claim was that Corriea failed to disclose to it that he had financial interests in companies with which he was conducting transactions on behalf of Avianca. Corriea consequently stood to profit from the completion of these transactions even if the arrangements were not in the best interests of Avianca. As a result, the federal trial court found that Corriea lacked the independent judgment and freedom from adverse incentive required of attorneys. The Avianca–Corriea litigation spawned subsequent insurance coverage litigation in the District of Columbia courts (not to be confused with the United States Courts operating in the District of Columbia), with Corriea's malpractice insurer unsuccessfully attempting to avoid coverage.

The insurer, INAPRO, argued that Corriea could not have malpractice coverage because his liability to Avianca resulted from failure to disclose conflicts rather than the negligent provision of legal services such as the drafting of defective documents, failure to meet a statute of limitations, or shoddy prosecution of a claim. The D.C. Court of Appeals rejected this argument, noting that the INAPRO policy covered "professional services," which were defined in the policy as

> services rendered for others as an attorney, notary public, title insurance agent pursuant to a written agency agreement with a licensed title insurance company, and an administrator, conservator, executor, guardian, trustee, or in any similar fiduciary capacity, provided that such services are connected with and incidental to the insured's profession as an attorney.

Id. at 1237.

Reversing the District of Columbia Superior Court, the Court of Appeals found that Corriea's activities fell clearly within the zone of professional services coverage since his failure to inform his client of the

HeinOnline -- 5 Conn. Ins. L.J. 850 1998-1999

conflict of interest was clearly connected with and incidental to his legal activity on behalf of Avianca.

The Court of Appeals also found that coverage was not precluded because the federal trial court in the underlying action had ordered disgorgement of Corriea's fees and entered a judgment in favor of Avianca of $1.4 million, an amount apparently larger than Avianca's actual out-of-pocket losses in connection with the challenged transactions. The Court of Appeals ruled that despite any disproportionality, the disgorgement remedy was compensatory and not a fine or penalty, which was excluded under the INAPRO policy. The court ruled that the presence of some degree of punishment of the wrongdoer in a civil remedy does not make the damage award an uninsurable fine. Disgorgement in particular has long been a popular remedy against attorneys who overcharge, breach a fiduciary duty, or perform services incompetently. Although disgorgement may overcompensate the former client, the remedy is viewed as more compensatory than punitive in that it is designed to reverse the transaction, prevent unjust enrichment of the attorney, and provide an easily applied damages formula that does not require courts to apply a micrometer to the degree of value that may have been conferred through legal services tainted with malpractice or ethical violations. Unlike a true punitive damages award, which has no fixed limit (but must be proportional to the wrongdoing and the defendant's wealth), fee forfeiture is limited to the total amount of fees.

The Court of Appeals also reversed the Superior Court finding that Corriea's conduct was committed with dishonest purpose or intent. Because a determination of dishonesty involves an evaluation of the defendant's state of mind, the Court of Appeals found this determination inappropriate for summary judgment and remanded to the Superior Court for further factfinding on the issue. In addition, Corriea had filed an affidavit in opposition to summary judgment denying any dishonest motive, thereby emphasizing the conflicting issue of fact regarding his state of mind. Although the matter of fiduciary duty and breach could be decided as a matter of law, the issue of dishonesty was too fact-intensive to be determined without a trial on the issue. Because the dishonest purpose prohibition is contained in a policy exclusion, the Court noted that the insurer on remand must prove dishonest intent by the attorney in order to avoid coverage.

HeinOnline -- 5 Conn. Ins. L.J. 851 1998-1999

POLICYHOLDER'S FAILURE TO IDENTIFY ERROR IN DRAFTING PRENUPTIAL AGREEMENT IS NOT FAILURE TO DISCLOSE POTENTIAL MALPRACTICE CLAIM AND DOES NOT PRECLUDE COVERAGE FOR LAW FIRM

Shaheen, Cappiello, Stein & Gordon, P.A. v. The Home Ins. Co., 719 A.2d 562 (N.H. 1998).

In 1984, Deborah Coffin retained Dorothy Bickford and the law firm of Shaheen, Cappielo, Stein & Gordon to represent her in formulating a prenuptial agreement. A draft of the prenuptial agreement prepared by Coffin's Connecticut lawyer contained a provision providing for the distribution of certain property to the spouse who contributed the funds to buy the property. "Inexplicably, this provision was omitted from the final agreement." *Id.* at 564. Sure enough, the subsequent marriage foundered and in Fall 1990, Coffin sought legal advice from the Shaheen firm, filing for divorce in December 1990.

At or shortly after the initiation of the divorce action, the Shaheen firm was aware that the final prenuptial agreement did not contain the provision for property division based on spousal contribution toward purchase. However, the firm informed Coffin that she had a plausible argument for such a property division even in the absence of such an express prenuptial provision. "Coffin expressed confidence in [Firm partner] Stein and his legal abilities, and approved the firm's continuing representation in her divorce action." *Id.* at 564.

In November 1991, approximately a year after the divorce action began, the Shaheen firm applied to renew its professional liability policy with Home Insurance and was asked in the application whether any lawyer in the firm was "aware of . . . any incident, act or omission which might reasonably be expected to be the basis of a claim or suit arising out of the performance of professional services for others." *Id.* at 564. The firm did not disclose the Coffin prenuptial omission "because the firm believed that no claim would arise pending resolution of the interpretation of the prenuptial agreement." *Id.* at 564.

In August and September of 1992, the firm's arguments on behalf of Coffin proved unsuccessful, and the presiding marital master concluded that the marital home would be divided according to the equitable division principles generally governing marital property. In practical effect, this meant that Deborah Coffin would be required to split assets down the

HeinOnline -- 5 Conn. Ins. L.J. 852 1998-1999

middle, even if her funds had purchased the property originally. According to the court, the potential malpractice claim accrued at that time.

The Shaheen firm informed the insurer in October 1992, a time found reasonable by the court. The insurer sent a reservation of rights letter to the firm in March 1993 and in late 1993 indicated it would close its file since no claim had been made.

A malpractice action was eventually brought against Bickford, who had subsequently left the firm but was part of tail coverage purchased by the firm. Home declined to defend, eventually denying coverage in an April 1994 letter. The firm filed a declaratory judgment seeking a judicial determination of coverage and prevailed both at trial and before the New Hampshire Supreme Court.

The high court accepted the expert testimony proferred by the firm that a reasonable attorney would not have reasonably expected a malpractice claim to result from the Coffin prenuptial agreement problem as of late 1991 in view of the firm's belief that it could prevail for its client and the client's apparent satisfaction with her representation at that time. The court rejected the insurer's attempts to exclude the expert testimony, finding that it involved technical or specialized knowledge for which expert opinion could be helpful to the court. Thus, the court's use of the expert testimony was not an abuse of discretion.

As to the adequacy of the Shaheen firm's disclosure to the insurer, the court found no need to disclose until the adverse ruling in the Coffin divorce, or perhaps not even until Coffin revealed inclination to make a claim. The court's narrow holding was simply that the firm had no obligation to disclose when it renewed coverage in November 1991. The policy stated that the insured was to give notice when it became aware of a problem that could "reasonably be expected to be the basis of a claim." Applying the reasonableness yardstick, the court noted that the determination was a question of fact for the trial court. The Supreme Court accepted a commentator's view that the proper inquiry poses the question:

> [I]s it more likely than not that an incident will lead to a claim? Certain circumstances are clear–cut, as in the cases of blown statutes of limitations or the late filing of a Subchapter S election. Most cases are less clear–cut, however, and require that the attorney exercise his professional judgment in evaluating the possibility that an adverse development will give rise to a claim.

HeinOnline -- 5 Conn. Ins. L.J. 853 1998-1999

Id. at 566 (quoting RONALD E. MALLEN LEGAL MALPRACTICE: THE LAW OFFICE GUIDE TO PURCHASING LEGAL MALPRACTICE INSURANCE § 5.14, at 32 (2d ed. 1997)).

The court turned a deaf ear to the insurer's argument that the policyholder was given too much discretion under the trial court's ruling. The court noted that "[b]y using the phrase 'reasonably be expected,' Home Insurance apparently requires that its insureds exercise professional judgment at several critical junctures." 719 A.2d at 566. Having chosen this language, Home could not complain when the attorney insureds enjoyed the benefit of prevailing professional sentiment as to the bounds of reasonableness in anticipating a client's malpractice action.

The *Shaheen* case suggests that professional liability insurers may wish to revise their notice and disclosure provisions to require applicants to disclose any incidents that "might" result in a claim. However, this broader language may overinundate the insurer with details of minor arguable errors by counsel. In addition, *Shaheen* suggests insurers may need to give more serious thought to proferring expert testimony favorable to the insurer's coverage position. It appears that Home made no attempt to counter the expert testimony submitted by Shaheen but instead only attempted to exclude the testimony. When the attempt at exclusion failed, the insurer was left with a factual record highly favorable to the policyholder and no contrary evidence from the insurer.

FAMILY MEMBERS LACK AUTOMATIC CONSTRUCTIVE PERMISSION TO USE FAMILY CAR; UNDERAGE SON'S JOYRIDING OUTSIDE SCOPE OF AUTO INSURANCE COVERAGE

Close v. American Economy Ins. Co., 583 N.W.2d 794, (N.D. 1998).

The lure of a Fall jaunt in the countryside near Devils Lake was simply too much for 15-year-old Dominic Ebertz, who on Oct. 12, 1992 skipped school, took the family van (which had been insured by American Economy for only 12 days), and went joyriding with friends throughout the day, concealing his activities from his parents. The adolescent prank took a sour turn when Dominic and friends fled an off duty police officer, colliding with another vehicle and seriously injuring passenger Clifford Close.

HeinOnline -- 5 Conn. Ins. L.J. 854 1998-1999

Dominic's father, the policyholder, sought coverage for the accident but was rebuffed by the insurer. The North Dakota Supreme Court agreed with the insurer, finding that Dominic was uncovered because he was using the vehicle without his father's permission.

The automobile policy in question specifically stated that the insurance did "not provide Liability Coverage for any person . . . [u]sing an 'auto' without a reasonable belief that person is entitled to do so." 583 N.W.2d at 794. Although "person" was not defined in the policy, the Court gave the term its ordinary meaning as including without restriction any human being. The policyholder argued that "person" should not be construed to include a "family member", an argument accepted by the trial court but rejected by the Supreme Court.

Although there are decisions reading the "driving without permission" exclusion as not applying to family members, the North Dakota Court found these a clear minority. The court stated that a majority of courts have concluded that the "any person" language unambiguously includes a "family member", barring coverage where the family member uses the insured automobile without the permission of the policyholder. *See id.* at 796. The court found the majority reasoning "sound", both for linguistic reasons (the "any person" language was unambiguous) and also for reasons involving the structure of the insurance agreement and public policy.

The Ebertz's automobile insurance specifically exempted family members from the "business pursuits" exclusion of the policy but made no such exemption to the "any person" permission requirement exclusion, buttressing the literal reading of the "any person" exclusionary language. In addition, the court noted that excepting family members from the permission requirement would violate public policy by mandating coverage for car thieves, albeit car thieves in the family, and by providing liability coverage for intentionally wrongful acts.

UNEXPECTED DEATH RESULTING FROM INSURANCE FRAUD SCHEME MAY BE "ACCIDENTAL" IF NOT INTENDED BY PERPETRATORS

Fox v. Country Mutual Ins. Co., 964 P.2d 997 (Or. 1998).

Perhaps adolescent boredom is even more acute in Oregon than in North Dakota. Unfortunately, it also proved more tragic in the *Fox* case.

HeinOnline -- 5 Conn. Ins. L.J. 855 1998-1999

Like the joyriding in *Close v. American Economy*, discussed above, the irresponsibility took a wrong turn. In 1990, Vincent, a high school student, "decided to wreck his pickup truck intentionally in order to collect the insurance proceeds." *Id.* at 999. William Fox, a classmate and friend of Vincent, agreed to accompany Vincent, although Fox's involvement in the matter was subject to conflicting evidence. Fox either agreed to be in the truck at the time of the arranged crash or, having agreed to serve as a lookout, was unable to leave the car when Vincent refused to stop. In any event, Fox was unexpectedly killed in the resulting crash.

The Fox estate sued Vincent for wrongful death and settled the action. Fox then sought uninsured and underinsured motorist ("UM") coverage under the Fox family's own auto policy. The insurer denied, claiming the loss was expected or intentionally caused and hence was not a covered "accident" under the policy. The policy provided that the insurer

> will pay damages which an insured is legally entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by an insured and caused by an accident.

Id. at 999, n.3.

Both the trial court and the Court of Appeals found for the insurer, reasoning that it was indisputable that Fox intended to ride off the road in Vincent's truck. Even if these facts were uncontested (which they were not), the Supreme Court found it indisputable that Fox never intended to cause himself injury. According to the Court, it

> must view the event from the perspective of Fox, not Vincent. This is a first–party claim for recovery of damages for personal injury to Fox under a policy that his parents purchased from defendants. This is not a claim for coverage to protect Fox against liability claims asserted against him by a third party. The purpose of UM coverage is not protection from liability, [the UM portion of the auto policy] resembles an accident policy for the victim of the uninsured motorist."

Id. at 1000 (quoting Davis v. State Farm Mut. Auto Ins. 507 P.2d 9,11 (Or. 1973).

HeinOnline -- 5 Conn. Ins. L.J. 856 1998-1999

Reviewing Oregon precedent on intentionally caused injury, the *Fox* Court concluded that the fortuity requirement for insurance is satisfied so long as the insured did not intend injury even if the conduct that led to injury was volitional on the part of the insured. *Id.* at 1004.

The Fox holding is surely correct, although many modern courts at the urging of insurers appear to have narrowed their concept of fortuity. However, if the position of some insurers equating intentional conduct with intentional injury were accepted, absurd results would be in the offing. For example, a driver planning to commute to work acts intentionally. It would be ludicrous to suggest that an accident during rush hour is excluded because the policyholder's commute was a planned event.

Negligence often occurs during the course of intentional activity and lawsuits alleging negligence are surely covered under a liability policy. Similarly, UM benefits, although more in the nature of first–party coverage, are designed to provide compensation to the policyholder when a negligent tortfeasor is uninsured or underinsured. Consequently, even injuries resulting from reckless or stupid conduct are not barred from coverage unless the injury itself was intended. Under *Fox* and most cases on this point, a loss is sufficiently fortuitous, accidental, unexpected, and insurable if it was not the product of a specific design to cause harm to self or others.

CIVIL LIABILITY MAY BE IMPOSED ON INSURERS WHO CLOAK AGENTS WITH INDICIA OF APPARENT AUTHORITY EVEN ABSENT ACTUAL AUTHORITY WHERE RELIANCE INDUCED

Almerico v. RLI Ins. Co., 716 So.2d 774 (Fla. 1998).

J.R. Pliego was the owner of J.R. Insurance Agency and a licensed insurance agent who sold insurance to the Collado family for several years, arranging an umbrella policy for the Collados with American Mutual Fire Insurance Company. When American stopped writing umbrella coverage, Grace Collado requested that Pliego arrange substitute coverage. Pliego eventually arranged for umbrella coverage with RLI. After 18–year–old Daron Collado was involved in an auto accident giving rise to substantial claims involving death and serious injury, RLI sought to rescind coverage on the basis of omitted or incorrect information in the application. The

HeinOnline -- 5 Conn. Ins. L.J. 857 1998-1999

Collados asserted that RLI was constructively aware of full and accurate information because Pliego was aware of the information in question.

RLI took the position that Pliego was an agent or broker for the Collados while the Collados asserted that Pliego was RLI's agent. The trial court found for the Collados while the intermediate appellate court found for RLI, setting up the Florida Supreme Court's review and determination of Pliego's agency.

The Supreme Court held that Pliego was RLI's agent because he was clothed in apparent authority from RLI. Applying general agency law principles, the Court set forth a three-factor test for determining the existence of agency by apparent authority:

> 1) whether there was a representation by the principal;
> 2) whether a third party relied on that representation;
> 3) whether the third party changed position in reliance upon the representation and suffered detriment.

716 So.2d at 777.

The court also observed that an intermediary may have dual agency, representing the applicant/policyholder for some purposes and the insurer for other purposes. According to the court:

> Under the circumstances presented here, there appears to be a complex, interwoven relationship between RLI, Poe [another intermediary], Pliego, and the Collados which precludes a finding that, as a matter of law, Pliego was at all times acting as the agent of the Collados and not as RLI's agent in his transactions with the Collados. Indeed, there is evidence that Pliego may have been acting in the dual roles of RLI's insurance agent and the Collados' insurance broker. Further, if a fact–finder reached that conclusion, then the actual knowledge that Pliego possessed about the Collados' insurance matters while wearing his hat as an RLI insurance agent and dealing with them in that capacity may be imputed to RLI as his principal.

Id. at 782.

HeinOnline -- 5 Conn. Ins. L.J. 858 1998-1999

The court's review of the record found no evidence from the insurer to suggest that the Collados were aware of any limitation on Pliego's actual authority to act on RLI's behalf. Based on state common law and statute (Fla. Stat. Ann. § 626.342(2)), the court concluded that binding apparent authority could exist if the agent was sufficiently cloaked in indicia of agency "to induce a reasonable person to conclude that there is an actual agency relationship." Unable to decide this issue on the record before it, the court remanded to the trial court for further factfinding.

The *RLI* opinion appears to place Florida in accord with the majority of states on the question of apparent authority and agency, including possible dual or divided agency. However, prior to this decision, the leading cases appear to have been those of intermediate appellate courts. The *RLI* decision thus provides a modern Florida Supreme Court precedent on the issue of agency that resolves the doctrinal question in an essentially mainstream fashion but one that may provide significant benefit to applicants aggrieved by unclear or misleading insurer–agent relations.

HeinOnline -- 5 Conn. Ins. L.J. 859 1998-1999