Special Report: Coverage for Dummies: The Top Ten

By Randy J. Maniloff and Jennifer Wojciechowski

Reading a lot of insurance coverage cases makes you realize that some people do really dumb stuff. Their not-to-be believed behavior causes injury, a lawsuit is filed and then comes the inevitable insurance claim. The results are mixed, but more often than not courts do not allow these tomfools to pass the buck.

In past years I'd come across one of these bizarre cases, shake my head in disbelief, maybe send it to a colleague under the heading -- *You won't believe this one* -- and then move on to whatever it was I was doing. But this year, instead of dismissing these curiosities, I collected them, with the idea of using them for a new segment in the annual insurance coverage Top Ten. In no particular order (except the first one happens to be my favorite), here are ten decisions from 2008 that demonstrated that mom was right – you won't be happy until you poke an eye out.

1. General liability coverage not available to a motivational speaker for injuries sustained by a program participant when, at the repeated urgings of the speaker, the participant attempted to break a board with her hands. Ouch. *Reese v. Alea London Ltd.*, 2008 U.S. Dist. LEXIS 29951 (D.S.C.) (Participant Exclusion and Professional Services Exclusion precluded coverage).

2. Coverage owed under a homeowner's policy to an insured who miscalculated the force needed to throw someone in a swimming pool and the person instead landed on the pool's step and sustained serious injury. *State Farm Fire & Casualty Co. v. Superior Court*, 164 Cal. App. 4th 317 (2008) (coverage owed because the insured was only intending to get the person wet).

3. No coverage owed under a general liability policy for an insured who injured an old friend by saying hello to him using his "signature greeting" – placing him in a headlock and squeezing while simultaneously asking how he was doing. *Sanford v. Century Surety Company*, 2008 U.S. Dist. LEXIS 25729 (S.D. Miss.) (coverage precluded because the injury was not caused by an accident and the assault and battery exclusion applied).

4. Homeowners coverage not available for injuries sustained by a party guest when the host used gunpowder as a propellant to fire a potato gun (and another guest was killed). *Kiser v. Coffee*, 2008 Ohio App. LEXIS 4350 (coverage precluded because injury was reasonably expected to result from an intentional or criminal act).

5. No coverage owed to an insured restaurant for injuries caused by the explosion of a gas grill at a tailgate party at a Jimmy Buffet concert. Just because it is called a "gas grill" does not mean that you pour gasoline on it when it does not light. *United States Liability Insurance Co. v. Harbor Club, Inc.*, 2008 Mass. Super. LEXIS 152 (injuries did not arise out of the ownership, maintenance or use of the policy's designated premises).

6. Defense owed to a middle school student, under his parents homeowners policy, for injuries that he caused to a teacher's aide when she was struck by a garbage can that he threw during a food fight in the cafeteria. Son, it's called a food fight for a reason. *Medrano v. State Farm Fire & Casualty Co.*, 863 N.Y.S.2d 480 (A.D. 2008) (defense owed because the allegations of negligence in the complaint implied that the injuries were unintentional).

7. No coverage owed to an insured minor, under his parents' homeowners policy, for kicking his friend twice in the groin after learning that his friend's sister did not like him. Yup, that should make the sister like him now. *American National Property and Casualty Company v. Hanna*, 2008 U.S. Dist LEXIS 17986 (coverage precluded because the injury was not caused by an accident).

8. Choice of law will determine if coverage is owed to insured corporations for injury and death caused by violent offenders that they hired to sell magazines door-to-door. *Nautilus Insurance Company v. Reuter*, 537 F.3d 733 (8th Cir. 2008) (coverage dependent upon interpretation of "occurrence," which is based on a choice of law determination to be resolved on remand).

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9. No coverage owed to an insured whose hand became stuck in a sliding glass patio door during an altercation. Insured shot the glass only in an effort to free his hand (insured's version) and the bullet ricocheted, hitting a women inside the house in her chest. *Shelter Mutual Insurance Company v. Wheat*, 2008 U.S. App. LEXIS 193 (10th Cir.) (coverage precluded because the injury was not caused by an accident).

10. Defense owed to a karaoke singer, under a homeowners policy, for injuries caused by an ice cream scoop that flew out of her hand while dancing and waving it (at least that's the singer's version of the incident). *Nationwide Mutual Fire Insurance Company v. Kim*, 2008 Ga. App. LEXIS 1241 (defense owed because of the negligence allegations – which the court acknowledged were suspicious).

The sad thing is that there will surely not be any problem finding ten cases, just like these, for the 2009 edition of this commentary.

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The Ten Most Significant Insurance Coverage Decisions of 2008

(listed in order that they were decided)

By Randy Maniloff

D. Jere' Webb v. Gittlen – Supreme Court of Arizona put the heat on insurance agent's, making their E&O policies insurance of last resort. Supreme Court of Florida raised the temperature as well.

Elacqua v. Physicians' Reciprocal Insurers – New York Appellate Division: Tough medicine for insurer that failed to address an insured's right to independent counsel. If the decision made it there, it can make it anywhere.

Auto-Owners Insurance Company v. Pozzi Window Company – Supreme Court of Florida was a pane for general contractors seeking coverage under the "subcontractor exception" to the "your work" exclusion.

Metropolitan Life Insurance Company v. Glenn – United States Supreme Court found dual-role ERISA claims administrators/insurers are presumed to have a conflict of interest, but left the impact of such a conflict "painfully opaque." [Case summary prepared by Elizabeth Venditta, Chair of the White and Williams Life, Health, Disability and ERISA Practice Group.

Allstate Insurance Company v. Wagner-Ellsworth – Supreme Court of Hannah Montana gave emotional injury a second identity -- bodily injury. District of Columbia Court of Appeals did the same.

Indian Harbor Insurance Company v. Valley Forge Insurance Group – Fifth Circuit: Valley Forge demonstrated how insurers can save a lot of Washingtons on additional insured claims.

Ulico Casualty Company v. Allied Pilots Association – You can't create coverage by cliché. Supreme Court of Texas explained what the common refrain about waiver and estoppel really means.

Don's Building Supply, Inc. v. OneBeacon Insurance Company – Supreme Court of Texas shot down the manifestation trigger for construction defect claims.

Collins Holding Corporation v. Wausau Underwriters Insurance Company – Supreme Court of South Carolina provided a simple solution to the duty to defend conundrum for faux-negligence causes of action.

Whole Enchilada, Inc. v. Travelers Property Casualty Company – Pennsylvania District Court took a bite out of FACTA litigation.