WHAT’S NEW & EXCITING?

One of the never-ending fascinations I find when I read an entire edition of the CGL Reporter cover-to-cover is the “compare and contrast” among cases dealing with the same coverage issues. How do the facts affect the outcome? How does the judge’s perspective drive the result? Some of the issues are classic, some are complicated, many are unprecedented. Whenever a coverage lawyer is asked by a client on the chances of winning or losing, weighing the nuances and possibilities is still a matter of judgment, depending on the whims of the decision maker or the way the wind is blowing.

Take for example the various issues that are affected by how a court looks at “causal connection.” Was the conduct complained of the proximate cause of the injury? Was there a “but-for” relationship between the conduct and the injury? How far does “arising out of” get stretched or limited? Are there intervening causes of the injury? Are the concurrent causes of the injury? What was the efficient proximate cause of the injury? What was the last proximate cause or the initiating cause? All fascinating questions. Here are a few cases that reflect the continuum:

- **Skolnik v. Allied Prop. & Cas. Ins. Co. (200)**—House guest’s injury not excluded by “controlled substance” exclusion because of separate and independent causes.

- **Griffith Energy Services, Inc. v. National Union Fire Ins. Co. (210)**—Fuel oil delivered to wrong house not subject to “wrong delivery of liquid products” endorsement because damage occurred before operation was completed.


- **State Farm Fire & Cas. Co. v. Easy PC Solutions LLC (1400)**—TCPA exclusion applied to conversion counts.


- **Selective Ins. Co. of America v. Zurich American Ins. Co. (1700)**—Conduct not deemed to be loading or unloading.

Another pair of contrasting cases arises in the context of reimbursement for property damage under homeowners insurance policies. Given the universal application of using “actual cash value” versus “replacement cost,” the issue of what costs are legitimately depreciated when calculating actual cash value makes a difference. See these cases for opposite results:

- **Shelter Mut. Ins. Co. v. Michael Goodner (950)**—No depreciation for labor costs.

- **Wilcox v. State Farm Fire & Cas. Co. (950)**—Depreciation applied to labor costs.

In the context of seeking reimbursement for payment of settlements or judgments, policyholders and their assignees have to deal with a
variety of issues concerning how to enforce either “pay and chase” or “post-loss assignment” issues. These cases reflect the variety of defenses raised by insurers and their effectiveness.

- **Brownstone Homes Condo Assoc. v. Brownstone Forest Heights LLC (170)**—Oregon joins the majority of jurisdictions validating an assignment to the judgment creditor.
- **Bioscience W., Inc. v. Gulfstream Property (950)**—Post-loss assignment valid without insurer consent.
- **21st Century Ins. Co. v. Superior Court (140)**—Post-lost assignment invalid without insurer consent.

In the most basic of coverage issues, was there an occurrence, or was the injury “intended or expected”? The results are as varied as the conduct.

- **Country Mut. Ins. Co. v. Bible Pork, Inc. (110)**—Running hog farm pursuant to regulatory authority constitutes an occurrence because insured did not expect injury.
- **Albert v. Mid-Century Ins. Co. (110)**—Intentional cutting of tress was not an occurrence.
- **Travelers Personal Ins. Co. v. Edwards (110)**—Refusal to relocate driveway is not an occurrence.

Which comes first: insurance or indemnity? I often refer to this disputed issue as the “dog chasing its tail.” The outcome is different jurisdiction by jurisdiction.

- **Cameron Int’l Corp. v. Liberty Ins. Underwriters, Inc. (525)**—Court upheld excess other insurance clause before indemnity.
- **Valley Crest Landscape Dev., Inc. v. Mission Pools of Escondido (530)**—Insurer allowed to pursue policyholder’s indemnity claim.

Another classic and basic issue relates to additional insured coverage and whether the issue of fault in the underlying suit can dictate whether the additional insured coverage is triggered. Two different results in the following cases:

- **F.H. Stoltze Land & Lumber Co. v. American States Ins. Co. (615)**—Employer’s policy does not cover additional insured because employer is immune from suit.
- **Liberty Surplus Ins. Corp. v. Exxon Mobil Corp. (615)**—Additional insured’s coverage not dependent on finding named insured at fault.
Finally, what edition would be complete without some pollution exclusion cases ... albeit not your garden variety pollution.

- **Country Mut. Ins. Co. v. Bible Pork, Inc.** (220)—Odors from hog farm not excluded.
- **Whitney v. Vermont Mut. Ins. Co.** (950)—Spraying home with toxic pesticides to eradicate bed bugs is excluded.
- **In re Liquidation of Legion Indem. (220)—Because exclusion did not include the words “mold” or “fungi,” it did not apply to mold damage.

**New Article**

In this release, we also have an article by **CGL Reporter** Board Member Harvey Nosowitz, “Allocation of Defense Costs Among Insurers,” which is a state-by-state survey of case law, typically in the context of long-tail claims. In it he provides the big picture and addresses exceptions and refinements, other insurance clauses, principal arguments, and trends. Be sure to check it out.

**Other Miscellaneous Cases**

- **Alfalfa Electric Coop., Inc. v. Mid-Continent Cas. Co.** (310, 1700)
- **Arch Ins. Co. v. Sunset Fin. Servs., Inc.** (1000)
- **Bratton v. Selective Ins. Co. of Am.** (1700)
- **Chiquita Brands Int’l, Inc. v. National Union Fire Ins. Co.** (400)
- **Christy v. Travelers Indem. Co. of Am.** (545)
- **Cincinnati Ins. Co. v. All Plumbing, Inc.** (180)
- **Cleaver-Brooks, Inc. v. Twin City Fire Ins. Co.** (1200)
- **Clemente v. New Jersey Transit** (760)
- **Crown Capital Securities LP v. Endurance Am. Specialty Ins. Co.** (545)
- **DeMarco v. Stoddard (545)**
- **First Am. Title Ins. Co. v. Spanish Inn, Inc.** (1950)
- **Gohagan v. Cincinnati Ins. Co.** (700)
- **Great W. Cas. Co. v. National Cas. Co.** (1700)
- **Houston Specialty Ins. Co. v. Meadows West Condo Ass’n** (950)
- **Illinois Municipal League Risk Mgmt. Ass’n v. State Farm Fire & Cas. Co.** (750)
- **Jackson Hop LLC v. Farm Bur. Mut. Ins. Co. of Idaho** (420)
- **Kaady v. Mid-Continent Cas. Co.** (170)
- **Lend Lease (US) Constr. LMB Inc. v. Zurich Am. Ins. Co.** (950)
- **Lynch-Ballard v. Lammico Ins. Agcy., Inc.** (1000)
- **Masood v. Safeco Ins. Co. of Oregon** (950)
- **Old Republic Ins. Co. v. Stratford Ins. Co.** (750)
- **Seahawk Liquidating Trust v. Certain Underwriter at Lloyds London** (950)
- **Sickler v. Auto Owners Ins. Co.** (120)
- **SRM, Inc. v. Great Am. Ins. Co.** (140)
- **Tower Ins. Co. v. Horn** (235)
- **Travelers Indem. Co. v. U.S. Silica Co.** (515)
Written by ABA Members of the ICLC

This supplement was written by the following members of the Insurance Coverage Litigation Committee (ICLC) of the Tort Trial and Insurance Practice Section (TIPS) of the American Bar Association, under the direction of Jill Berkeley, author and executive editor of CGL Reporter since 1986. TIPS uses royalties from subscriptions sales to seed a scholarship fund to increase diversity among participants in TIPS programs. Learn more.

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