COVERAGE OPINIONS
Judicial Opinions Today - Impact On Counsel's Opinions Tomorrow

Declarations:

The *Coverage Opinions* Interview With Bill Passannante

Coverage Opinions finds out what's on the mind of Bill Passannante of Anderson, Kill & Olick in New York City, a member of the firm's executive committee and co-chair of its Insurance Recovery Group. Bill reflects on his involvement in some landmark coverage cases, talks about common mistakes that insurers and their counsel make when handling claims and reveals what the term "e-mail" really stands for.

When you told me that you grew up in Greenwich Village my immediate reaction was -- nobody grows up in Greenwich Village! What was that like? Can you give me a little more about your background and what led you to law school and then insurance coverage.

I grew up in lower Manhattan. My mother worked three jobs while finishing college (with a 4.0 average!) at night, and raising three boys. She raised three professionals: a medical doctor; an MBA accountant; and me, the lawyer. Greenwich Village in the sixties was very different from the Village of today. Yes, it was the Woodstock generation, but lower Manhattan was a family neighborhood. Remember, this is before the enormous run-up in real estate values which priced most families with children out of the area. We did have quite a connection to the area as my Uncle (after whom I was named) was the New York State Assembly Member for lower Manhattan for almost 4 decades.

I have wanted to be a lawyer from when I was old enough to speak, though since I have always had a good grasp of numbers, I took a detour as an Econometrician (a mathematical economist) for a few years to fund law school tuition. I met Gene Anderson by happenstance, and at that first late night meeting he (literally) threw a client file at me and told me to talk to him about solving the client's problem in the morning. That was my first step on the path to a practice as an insurance recovery lawyer.

You have been involved in some landmark coverage cases and have represented some of the country's biggest companies in their pursuit of coverage. What are some of the highlights of your career?

Well, we are just getting started, and look forward to hopefully many more to come.

On the non-insurance front, one highlight was working on several white collar criminal matters with Rudy Giuliani when he was my law partner at Anderson Kill prior to his becoming Mayor of New York City. Those were very interesting matters and working with Rudy on white collar cases was a memorable experience.

On the insurance side, one advantage in practicing at Anderson Kill is that the

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insurance recovery practice is not just "cases," it is a mission for each client. Our insurance recovery practice, in concert with its focus on representing solely policyholders, has a theme: Understanding the 'lore' and history of insurance is as important as the 'law' and gives life to many arguments. These qualities lead many of our lawyers to specialize and work extraordinarily hard to build better arguments and better ideas in coverage matters. I have been privileged to represent many clients in matters that were resolved before ever being filed in court. A select few of my cases, which did end up in court with public filings include the following.

Just a couple of weeks ago we prevailed for a client in the Appellate Division here in New York in a matter for Alfa Laval regarding obligation under law to pay to defend asbestos claims. (Travelers Cas. & Sur. Co. v. Alfa Laval Inc., Index No. 650667/09 (App. Div. 1st Dep't, Nov. 13, 2012)).

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In a different area of insurance, D&O liability insurance, we prevailed in a matter for Princeton University involving the advancement of defense costs. (Trustees of Princeton University v. National Union Fire Ins. Co. of Pittsburgh, PA., 83 N.Y.S.2d 437, appeal dismissed, 11 N.Y.3d 847 (Nov. 24, 2008)).

For Weyerhaeuser Company we won a ruling that no overt legal threat is required to activate environmental liability insurance. (Weyerhaeuser v. Aetna, 123 Wash.2d 891 (1994)), which resolved the case involving 34 insurance companies as to *all but one* company against whom we conducted several jury trials.

Similarly, we prevailed for a client in a case in Delaware involving summary judgment to advance defense costs in a white collar D&O case. (HLTH Corp. v. Agricultural Exc. & Sur. Ins. Co., 2008 WL 3413327 (2008), appeal as to certain insurance companies, Axis Reinsurance Co. v. HLTH Corp., No. 565, 2009 (2010)).

Years ago, in a case in front of then Judge Michael Mukasey (subsequently U.S. Attorney General), our client won summary judgment that insurance company duty to defend was triggered by lead paint claim. (Lefrak Organization, Inc. v. Chubb Custom Ins. Co., 942 F. Supp. 949 (1996)).

In a case involving a liability insurance dispute related to a corporate merger we won summary judgment for Quest Diagnostics. (St. Paul Fire Ins. Co. v. MetPath, Inc., 38 F. Supp.2d 1087 (1998)).

Our representation of the non-profit United Policyholders in many *amicus curiae* briefs on cutting-edge insurance questions in courts around the county has helped by making sure that the perspective of policyholders is heard by courts making the law.

Even this short list of reported cases shows that there is a need for the solutions we provide.

I saw your presentation in December 2011 in NYC at the DRI Insurance Coverage and Practice Symposium, in which you described fifteen common mistakes that you believe insurers and their counsel make. It was one of the best seminar presentations I've ever seen. What are some of the most important of those mistakes?

Thanks. We have seen quite a few. Here's two mistakes from that list:

Assert "Prejudice" On Account of Late Notice Without Basis

In order to rely upon the defense of "late notice" most states require that there be a showing of prejudice to the insurance company on account of the delay in providing notice. In one case involving long-term historical environmental damage the insurance company asserted that: (1) it lost the opportunity to interview employees; (2) it never was provided the names of certain witnesses; (3) it was denied access to the premises; and (4) certain witnesses were dead.

At trial, the policyholder presented evidence that: (1) the insurance company did not seek to interview any employees as part of its claims investigation; (2) the policyholder provided information containing the names of certain witnesses; (3) the policyholder did not deny the insurance company access to the premises; and (4) some of the witnesses whom the insurance company asserted were deceased actually were not, and in fact testified at trial.

Deny A Claim That Your Client is Advertising as A Covered Claim at the Same Time.

Anderson Kill maintains a database of insurance company advertising materials, which includes advertisements spanning over a century. Claims and underwriting do not communicate perfectly with each other, or with marketing. One of our policyholder clients saw advertisements depicting *their very claim* as an example of a *covered* claim, while at the same time the insurance company was denying coverage for that claim. Marketing, underwriting and claims don't com municate perfectly.

During your DRI presentation you told the audience what the term "e-mail" stands for in your practice. Can you share that here.

'E-mail' stands for EVIDENCE-mail. Or, if one prefers it may stand for EXHIBIT-mail.

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This is something we repeat to young lawyers, and to clients not familiar with the trial process. Lawyers usually appreciate the importance of words, particularly of the words they write. For a number of reasons, mostly revolving around the supposedly informal 'chatty' nature of email, texting and social media communications, many people seem to believe incorrectly that such communications disappear the way an informal *and unrecorded* conversation 'disappears' after being spoken. Trial lawyers know that they do not. 'E-mail' stands for EVIDENCE mail.

I'm sure that you have many fond memories of Gene Anderson (who passed away in 2010). Can you share some things that he taught you.

Gene was a partner, mentor and friend, and an inspiration to many at Anderson Kill. He was one of those leaders who was interested more in the personal and professional advancement of those he worked with than some of the other measuring sticks. Two of the many things Gene taught: (1) work hard; and (2) do the right thing. Working hard was clear from the outset when he "caught" me leaving the office at 7:30 p.m. and asked if I was "working half-a-day". Work hard.

Doing the right thing was something he always did. One client shared a story (of many similar anecdotes): *"The September 11 attacks made our offices (near the Trade Center site) completely unusable. I called various partners at Midtown firms, hoping someone would have space for our insurance team. Only Gene Anderson agreed. He did it with these exact words which I remember well – 'Whatever you want, the answer is yes.' Our team moved into offices at Anderson Kill. We were accepted by Gene and everyone and Anderson Kill provided all services free of charge. We stayed until we could move back into our offices, a full six months later. Gene would visit with the assistants telling others in the area 'You'd better treat them nice.' And when we finally returned to our offices Gene sent my assistant a big bouquet of flowers."* Do the right thing.

What are your thoughts on possible coverage disputes involving Hurricane (or not a Hurricane) Sandy?

I predict that what we call the "invisible seven-digit exclusion" will be apparent in abundance. Because so much damage and loss was sustained – and so much money is at stake -- the motivation on the part of insurance companies to deal sharply on claims will be immense. Some areas in which we can predict disputes are: (1) so-called "flood" exclusions, particularly where damage is sustained on account of other causes of loss such as wind or fire; (2) valuation of lost business income and contingent business income; (3) civil authority coverage; (4) application of "hurricane deductibles" to this "superstorm"; and (5) concurrent causation issues.

You are a prolific speaker and writer on coverage issues, including being an editor of The Policyholder Advisor from Juris Publishing. Can you describe the book and the process for putting it together?

The Policyholder Advisor newsletter is our regular newsletter on insurance recovery topics. Many of our lawyers write for the newsletter and the topics can be very diverse within the area of insurance recovery. Such as: captive insurance, property losses, business income calculations, product liability losses, professional liability issues, D&O issues, and many more.

When we had been publishing for just about a decade, we were approached by an independent legal publishing house – Juris Publishing – who asked if we had considered putting the newsletter together in book form. I along with Bob Horkovich edited and revised the articles for content and style. We gathered and rearranged them into subjects for chapters, and actually put together a reorganized and updated several-hundred-page book. As you know from your personal experience with *General Liability Insurance Coverage – Key Issues in Every State* it takes a tremendous amount of very time-consuming work to go from manuscript to finished bound

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published a second edition shows that you must enjoy self-inflicted punishment!

What keeps you busy when you are not in the office?

I have three wonderful children, so high school and college theater productions, academics and sports events keep my wife and I quite involved. I also try to do some distance running pretty regularly, although travel and trial schedules do make it difficult!

I am privileged to be involved in the alumni association of a highly academically competitive Jesuit High School – Regis High School -- the only tuition-free private all-scholarship school in the United States. The school has a remarkable history of which I am a beneficiary. It was founded in 1914 by the generosity of an anonymous benefactor and initially supported solely by the generosity of her family, later also by its alumni and friends. My involvement is my way of doing my part to maintain that generous tuition-free legacy. The graduates of the school are extraordinarily generous.

Where can I get the best slice of pizza in New York?

This is one of those statements that will cause more violent disagreements than an insurance claim, but clearly John's Pizza on Bleecker Street (278 Bleecker Street, between 6th Avenue & 7th Avenue) has the best extra-thin-crust coal-oven pizza in New York City. The lines can be long and they don't take reservations. If live jazz music and a cheesy calzone (a folded-over stuffed pizza) is your style, then the best is Arturo's (106 West Houston Street (pronounced 'How-ston' by New Yorkers, not 'You-ston' as out-of towners pronounce it) on the corner of Thompson Street).

Late-r Notice:
A Look At Decisions To Come

Pennsylvania Supreme Court to Address Proving Late Notice Prejudice

The Pennsylvania Supreme Court has agreed to hear an appeal in Vanderhoff v. Harleysville Insurance Company to answer what circumstances constitute prejudice to an insurer arising from an insured's failure to timely inform the insurer of the involvement of a phantom vehicle in an uninsured motorist claim. Much of the insurer's argument goes to the loss of its ability to undertake certain types of investigations that are done in phantom vehicle cases.

Under Pennsylvania law, for purposes of an occurrence based third-party liability policy, an insurer seeking to deny coverage, for late notice of a claim, must prove that it suffered prejudice. This is the Brakeman rule, which also applies to uninsured motorists claims involving phantom vehicles.

The Pennsylvania Supreme Court agreed to answer the following questions: "(1) What constitutes 'actual prejudice' to relieve an insurance company of its obligation to pay insurance benefits to an insured? (2) Should 'actual prejudice' involve proof by an insurance carrier that it suffered a real material impairment of its ability to investigate and defend an uninsured claim? (3) What constitutes a reasonable basis for a trial court finding that prejudice exists in a late report of a phantom vehicle?"

While Vanderhoff is an uninsured motorist case, it seems quite likely that the court's pronouncements will also apply to proving prejudice in the context of late notified claims under occurrence based third-party liability policies, especially if the insurer's prejudice argument is based on the impairment of its ability to investigate.

Vanderhoff v. Harleysville Insurance Company, No. 375 MAL 2012 (Pa. Nov. 14, 2012) is available on the Supreme Court of Pennsylvania website.