

# COVERAGE OPINIONS



Judicial Opinions Today - Impact On Counsel's Opinions Tomorrow

**Tom Baker, the Reporter for ALI's Principles of the Law of Liability Insurance, was recently interviewed by Randy Maniloff of White & Williams for his popular insurance law newsletter, *Coverage Opinions*. This article is reprinted here with Mr. Maniloff's permission.**

**C**overage Opinions goes to school with Tom Baker, the William Maul Measey Professor of Law and Health Sciences at University of Pennsylvania Law School. Professor Baker is a preeminent scholar in insurance law. He is the author of countless scholarly articles and several books, including an insurance law case book used in law schools throughout the country. Professor Baker is currently the Reporter for the American Law Institute's Principles of Liability Insurance Project. Rest assured, he responded to all of the following questions without employing the Socratic Method, the irritating technique used by some law professors of answering a question by asking one.

Professor Baker holds undergraduate and law degrees from Harvard University. He began his career in 1986 as a law clerk on the First Circuit Court of Appeals followed by a four year stint at Covington & Burling. Since 1992 he has been a law professor, serving on the faculty of the University of Miami, University of Connecticut and, since 2008, Penn.

I'll be honest. When I first heard about the American Law Institute's Principles of Liability Insurance Project I did not pay much attention. It sounded like the stuff of law professors, academic mumbo jumbo, and nothing I needed to know about. Well I was wrong.

The ALI's Principles Project brings together a host of stakeholders in liability insurance – law professors, lawyers on both sides of the aisle, brokers, insurance company representatives and judges -- to produce a text that sets forth the law on several liability insurance issues. The finished work is the result of a painstaking process of debates and drafts by those involved. Of course, with so many different interests represented, the final product may not reflect everyone's beliefs. Compromise is certainly a part of the process. As the Reporter for the ALI's Principles of Liability Insurance Project, Professor Baker holds the top position. He is essentially the quarterback.

Here's why the ALI's Principles Project should matter to you, even if your involvement with liability insurance is not on the academic side. Mike Marick, of Meckler, Bulger, Tilson, Marick & Pearson, Chair of the DRI Insurance Law Committee, said it best in his From the Chair column in the January 29 issue of



Tom Baker

DRI's Covered Events: "[C]ourts across the country may well look to the work [the Principles Project] as an authoritative treatment of not only the prevailing state of the law, but also what the law should be. This could be particularly significant in instances where there is no law on an issue in a state, and the litigants and courts look to ALI's work as persuasive authority." Mike is correct. I personally believe that there is little doubt that the ALI's Principles of Liability Insurance will be cited by courts in coverage decisions.



**Randy Maniloff**

Counsel Anita Banks, Florida trial lawyer Larry Stewart, and Justice Jack Jacobs from the Delaware Supreme Court. We also have a liaison from the American Insurance Association, Craig Berrington, to mention just a few of the prominent lawyers and judges involved in the Project.

**Professor Baker, thank you for sitting down with *Coverage Opinions*. Can you please fill in the details of the Principles of Liability Insurance Project, such as how it came about, some of those involved and the mechanics of the process.**

Happy to do that. Given the ALI's influence in the field of contracts and torts, a liability insurance project was natural, since tort and contract law meet on a daily basis through liability insurance. ALI leaders believed that judges, lawyers, and perhaps even insurance regulators, would welcome a serious, authoritative effort to identify and work through the key principles of liability insurance law. As I'm sure you agree, it's a very important field from a practical perspective, and also a very interesting one.

The ALI asked me to make a proposal back in 2010. I asked Kyle Logue from the University of Michigan Law School to help me with the Reporter duties. The ALI assembled the Advisers. ALI Members volunteered for the Members Consultative Group. We have been engaged in the demanding, iterative process of drafting ever since. Our Advisers include ACE General Counsel Robert Cusumano, Amy Bach from United Policyholders, Covington & Burling partner John Buchanan, Allstate Corporate

### **What has been accomplished to date and what's on the horizon for the Project?**

We're making good progress. There will be four chapters, and we're nearly done with two. The first chapter addresses basic contract doctrines like interpretation and misrepresentation. It's been approved by the ALI Council and will be up for vote at the May 2013 Annual Meeting. The second chapter addresses settlement, defense, and cooperation duties. The first half of that chapter also goes to the Membership for vote in May. The second half will go through the Council and the Membership in the next cycle, culminating we expect in a vote at the May 2014 Annual Meeting. Chapter three will address the scope of insured risks: meaty topics such as trigger, allocation, and issues related to high profile exclusions and conditions. Chapter four will address advanced insurance contract issues like choice of law, remedies, bad faith, and enforceability.

**It is inevitable that a process like this involves a lot of debate and disagreement. Can you describe one area where this has happened.**

A good part of the Project, maybe even most of it, involves writing clear statements of, and good justifications for, principles that any thoughtful and experienced insurance coverage lawyer would agree with, at least when there is not a real client with a real problem that requires arguing to the contrary. This

project wouldn't be worth doing, however, if there wasn't room for debate. One good example is the insurer's obligation to provide independent counsel when providing a defense under a reservation of rights. Some people think that an insurer should have to provide an independent counsel whenever there is a reservation of rights. I understand that view, because the reservation of rights means that the insurer's interests are not fully aligned with the policyholder's. Other people think that insurers almost never should have to provide independent counsel simply because of a reservation of rights, on the grounds that the defense lawyer's professional responsibilities provide sufficient protection to the insured. I understand that view as well, because I think that professional responsibility means something. We ended up in a middle position. The Project states the principle that, when providing a defense under a reservation of rights, the insurer's obligation to provide independent counsel depends on whether there are common facts at issue in the claim and the insurer's coverage defense, such that the defense of the claim could be handled in a way that advantages the insurer at the expense of the insured.

**I saw you speak (along with Douglas Richmond of Aon and Richard Neumeier of Morrison Mahoney) about the Principles Project at DRI's insurance conference in New York City in December. The audience, made up of serious coverage folks, was asked to raise their hand if they were familiar with it. There were many hundreds of people in the room and only a smattering of hands went up. How do you explain that a project this important is not on more people's radar?**

Until the DRI event, we had chosen to work in what entrepreneurs call "stealth mode." We wanted to have some good, serious work to talk about before people started paying attention. We chose the DRI conference as our first public event, and I thought it was a very successful one. We have high profile DRI members involved in the Project – like Doug and Richard, and Bill Barker from SNR Denton. DRI members are a natural audience for us. And so are *Coverage Opinions* readers, many of whom I expect are in the DRI. Mike Marick said he wants me back at the DRI event this year. We'd also like to do something similar with the ABA, perhaps with TTIPS and the Insurance Coverage Committee of the Litigation Section.

**When teaching Insurance Law what areas do your students find most interesting?**

These days, students think that health insurance will be the most interesting, because of all the attention around the Affordable Care Act. After a catastrophe like 9/11 or a hurricane, they think that property insurance will be the most interesting. Believe it or not, they thought that life insurance would be the most interesting back in the early days of insurers' troubles with AIDS and the life settlement market. No matter what they think coming into the semester, however, they realize by the end that liability insurance is the most interesting. Liability insurance is advanced torts and contracts, and even a bit of trial practice, all in one.

**When it comes to law school classes, Torts gets a lot of glory. But so many tort cases would not exist if there were not insurance dollars, or the possibility of insurance dollars, behind the defendant. That being the case, it seems like insurance law (especially liability insurance) should be a higher priority in law schools.**

You won't get any argument from me about that! The good news is that more schools are teaching insurance. We have today the largest group, ever, of law professors who specialize in insurance law – too many for a shout out in a short interview. So things are looking good.

**What is your favorite case to teach in your Torts class?**

My favorite case is *Sabia v. Norwalk Hospital*. It's a Connecticut medical malpractice case that settled and would have disappeared without leaving a trace, if Barry Werth hadn't written an amazing non-fiction book about it. The book is called *Damages*. *Damages* shows (not tells) just how completely tort law in

action depends on insurance. I can't recommend it highly enough, and not only for law students. *Damages* has a lot more to say to lawyers and law students than *A Civil Action*.

**What made you pursue academia?**

I have always admired professors who combined good teaching with serious research, but when I was in school I didn't think I would have anything special to contribute. Then, when I was practicing in the insurance coverage group at Covington and Burling, I realized that insurance was a huge, really important area that had a lot of room for a young academic to make a mark. So, after first taking a detour to work on the Iran-Contra investigation, I took a job teaching insurance and contracts at the University of Miami Law School. After that, I had a great opportunity to set up the Insurance Law Center at the University of Connecticut Law School. Then Penn Law and Wharton enticed me to Philadelphia. I love the freedom to keep learning and trying new things, and the unstructured time, though I recognize that would drive a lot of people crazy.

**What surprised you about academia?**

How many opportunities there are to remain connected to practice and how much that connection enriches my academic work. Everything I do outside the law school – from teaching risk management at Wharton, to consulting, to the Professional Liability Underwriting Society, to the ALI – becomes part of the “participant observation” research that informs my teaching and writing.

**I get to Penn's campus every now and then. Is there a food truck that I should not miss?**

Absolutely. Check out Magic Carpet at 34<sup>th</sup> and Walnut. Great vegetarian food, and classic art rock while you wait.