

The Wisdom And Efficiency Of Having Separate Appellate Counsel Prosecute And Defend Your Insurance Coverage Appeals

by Edward M. Kay

We wish to caution our friends in the industry that now is certainly no time to try to “pinch pennies” and forego the wisdom and efficiency of having separate appellate counsel prosecute and defend your insurance coverage appeals. The thinking that “why not just have trial coverage counsel” do the appeal is a misguided thought in our practice. Former Illinois Appellate Court Justice Robert Cook, in an article entitled “Should the Trial Lawyer Handle the Appeal?” put it this way:

Some lawyers tell me that clients want their trial lawyers to handle the appeals because they don’t want to spend the money to familiarize another lawyer with the case. [D]on’t the clients want to win? Cost controls which substantially reduce the chances of success are not cost effective.

The point is, you are not saving money by having trial counsel handle your appeal because you are decreasing the odds that you will be successful in the appeal.

Many scholars and judges have noted that trial attorneys who prosecute their own appeals have tunnel vision. Having handled the case themselves, they become convinced of the merits of their cause. In other words, they lose objectivity and become “married” to the arguments they developed and the way those arguments were presented in trial court briefing. Separate appellate counsel bring no such biases to the table.

Moreover, coverage appeals cannot be done “on the cheap” by slapping an appellate caption on trial court briefing. This was recognized by the California Court of Appeals in the case of *In re: Shaban*, 105 Cal. Rptr. 2d 863 (Cal. App. 2001), wherein the Appellate Court had these observations on appellate practice and brief writing:

[A]ppellate briefs receive greater judicial scrutiny than trial level points and authorities, because three judges (or maybe seven) will read them, not just one judge. The judges will also work under comparatively less time pressure, and will therefore be able to study the attorney’s “work product” more closely. They will also have more staff (there are fewer research attorneys per judge at the trial level) to help them identify errors in counsel’s reasoning, misstatements of law and miscitations of authority, and to do original research to uncover ideas and authorities that counsel may have missed, or decided not to bring to the court’s attention.

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[A]ppellate practice entails rigorous original work in its own right. The appellate practitioner who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them into an appellate brief, is producing a substandard product. (105 Cal. Rptr. at 870-71)



Edward M. Kay

is a Clausen Miller partner and co-chairs the Appellate Practice Group. He is AV[®] rated (Preeminent) by Martindale-Hubbell and is a Fellow in the prestigious American Academy of Appellate Lawyers. Ed has been chosen as a Leading Illinois Appellate Attorney, a Super Lawyer and has over 30 years experience in trial monitoring and post-trial/ appellate litigation which he regularly brings to bear in significant cases nationwide. Ed has prosecuted over 500 appeals nationwide. ekay@clausen.com

In other words, according to the California Court of Appeals: “Appellate work is most assuredly not the recycling of trial level points and authorities.” (*Id.* at 870)

In *Litigation* magazine, Judge Laurence H. Silberman of the U.S. Court of Appeals for the District of Columbia Circuit, described the differences and required skills and temperament between trial and appellate lawyers. Judge Silberman stated:

Effective presentations to a federal court of appeals, or to any appellate court, require a blend of talents not necessarily found in the typical trial lawyer. Appellate advocacy is, in short, a specialty all to itself.

Clausen Miller has long recognized what the scholars and judiciary have said about appellate practice—it is indeed a specialty all to itself. This is why Clausen Miller has long been

a proponent of maintaining a separate Appellate Practice Group and its appellate attorneys routinely handle the firm’s coverage matters on appeal. Senior partners **Melinda Kollross**

and **Don Sampen** have successfully handled dozens of insurance coverage appeals nationwide for our friends in the industry over the past two decades:

CLAUSEN MILLER APPELLATE PRACTICE GROUP INSURANCE COVERAGE APPEALS NATIONWIDE

LIABILITY INSURANCE MATTERS

Case Name	Citation	Year
<i>Century Indemnity v. Viking Pump</i>	No. 518, 2014 (Del. S.Ct./NYCA) (insurance allocation, certified question to NY Court of appeals, case pending in Delaware Supreme Court)	2015-16 (pending)
<i>Illinois Emcasco v. Nationwide Mutual</i>	2015 IL App (1st) 140928-U (duty to settle and other issues)	2015
<i>Michigan Millers v. Asoyia, Inc.</i>	793 F.3d 872 (8th Cir.) (late notice, other issues)	2015
<i>Erie Ins. Co. v. Radtke,</i>	126 A.D.3d 757 (N.Y. App. 2d Dep’t) (business risk exclusions)	2015
<i>FSLM Associates LLC v. Arch Insurance Group</i>	122 A.D. 3d 493, 997 N.Y.S.2d 48 (NY App. 1st Dep’t) (application of exclusion)	2014
<i>Starr Indemnity v. Boys and Girls Club</i>	No. 13-3221 (7th Cir.) (settled) (application of exclusions)	2014
<i>Karen Manor Assoc. LLC v. Virginia Surety Co. Inc.</i>	116 A.D.3d 439 (N.Y. App. 1st Dep’t) (insured time period)	2014
<i>Auto-Owners Insurance Co. v. Yocum</i>	2013 IL App (2d) 111267, 987 N.E. 2d 494 (2d Dist.) (application of premiums and other issues)	2013
<i>Essex Insurance Co. v. Mondone</i>	106 A.D. 3d 1045, 965 N.Y.S. 2d 616 (N.Y. App. 2d Dep’t) (application of exclusion)	2013
<i>Vindas v. Toll Bros., Inc.</i>	No. 2011-08939 (N.Y. 2d App. Dept.) (settled) (duty to disclaim)	2012
<i>Robert Pitt Realty, LLC v. 19-27 Orchard Street, LLC</i>	101 A.D. 3d 404, 955 N.Y.S. 2d 563 (N.Y. App. 1st Dep’t) (additional insured and other issues)	2012

Case Name	Citation	Year
<i>Johnson Controls, Inc. v. Employers Insurance of Wausau</i>	No. 12 AP 001851 LV (Wis.) (PLA) (excess-umbrella duty to defend and other issues)	2012
<i>Northport Land Corp. v. Zurich N. Am. Ins.</i>	99 A.D.3d 683 (N.Y. App. 3d Dep't) (environmental coverage)	2012
<i>Penford Products v. C.J. Schneider</i>	808 N.W.2d 443 (Ia. App.) (arbitration issues)	2011
<i>Farmers Insurance v. Bacci Café</i>	No. 11-2781 (Ill. App. 1st Dist.) (308 petition) (duty to defend)	2011
<i>Northern States Power Co. v. Continental Insurance Co.</i>	805 N.W. 2d 734, 337 Wis. 2d 427 (Wis. App.) (claim preclusion issues)	2011
<i>Illinois Tool Works v. Commerce & Industry</i>	2011 Ill. App. (1st) 093084 (assignment issues)	2011
<i>In re: Heating Oil Partners, LP</i>	422 Fed. Appx. 15 (2d Cir.) (bankruptcy-related issues)	2011
<i>Markel v. Biro</i>	406 Ill. App. 3d 1204 (1st Dist.) (duty to defend)	2010
<i>Century Surety Co. v. Valet Chicago, Inc.</i>	399 Ill. App. 3d 1215 (1st Dist.) (assault/battery exclusion)	2010
<i>Colmore v. Royal Indemnity</i>	321 Fed. Appx. 595 (9th Cir.) (duty to defend)	2009
<i>BASF AG v. Great American Assur. Co.,</i>	522 F.3d 813 (7th Cir.) (advertising injury)	2008
<i>Gabriele v. Lyndhurst Residential Comm.</i>	No. 62,514 (N.J. S.Ct.) (petition for certification)	2008
<i>Stoneridge Development Co v. Essex Insurance</i>	No. 106675 (Ill. S.Ct.) (PLA response)	2008
<i>Essex Ins. Co. v. Wright</i>	862 N.E.2d 1194 (Ill. App. 1st Dist.) (spoliation of evidence)	2007
<i>Lexington Ins. Co. v. Chicago Hospital</i>	372 Ill. App. 3d 1093 (1st Dist., table) (arbitration issues)	2006
<i>Schultz v. Atlantic Mut. Ins. Co.</i>	853 N.E.2d 94 (Ill. App. 1st Dist.) (policy limits)	2006
<i>Sokol & Co. v. Atlantic Mut. Ins. Co.</i>	430 F.3d 417 (7th Cir.) (business risk exclusions)	2005
<i>Essex Ins. Co. v. Young</i>	796 N.Y.S.2d 204 (N.Y. App. 4th Dep't) (assault/battery exclusion)	2005
<i>Whitehead v. Continental Cas. Co</i>	2004 WL 1397628 (Ohio App.) (UM/UIM coverage)	2004
<i>Taco Bell Corp. v. Continental Cas. Co.</i>	388 F.3d 1069 (7th Cir.) (prior publication exclusion)	2004

LIABILITY INSURANCE MATTERS (cont.)

Case Name	Citation	Year
<i>In re Silicone Implant Ins. Coverage Litigation</i>	667 N.W.2d 405 (Minn.) (trigger of coverage)	2003
<i>Legros v. Atlantic Mut. Co.</i>	2002 WL 31867719 (Minn. App.) (umbrella endorsement)	2002
<i>Atlantic Mut. Ins. Co. v. American Academy of Orthopedic Surgeons</i>	734 N.E.2d 50 (Ill. App.) (intentional acts exclusion)	2000
<i>Decker v. Atlantic Mut. Ins. Co.</i>	1997 Ohio App. LEXIS 1829 (UM/UIIM coverage)	1997

FIRST PARTY PROPERTY INSURANCE MATTERS

Case Name	Citation	Year
<i>State of Wisconsin Local Gov't Property Insurance Fund v. Lexington</i>	No. 15-1973 (7th Cir.) (arbitration)	2016 (pending)
<i>Weitz Co. v. Lexington</i>	786 F.3d 641 (8th Cir.) (late notice, subrogation)	2015
<i>United States Dredging Corp v. Lexington Insurance Co.</i>	952 N.Y.S. 2d 60 (N.Y. App. 2d Dep't) (fortuity, covered loss)	2012
<i>Bleznak Black, LLC v. Allied World Nat'l Assur. Co.,</i>	2012 N.J. Super. Unpub. LEXIS 879 (N.J. App. Div.) (Madoff investment losses)	2012
<i>Universal Mortgage v. Wurttembergische</i>	651 F.3d 759 (7th Cir.) (employee dishonesty)	2011
<i>Traynor v. Lexington Ins. Co.</i>	420 Fed. Appx. 674 (9th Cir.) (suit limitation provision, punitive damages)	2011
<i>Landmark American v. Moulton</i>	440 Fed. Appx. 788, 2011 WL 3962636 (11th Cir.) (rescission, misrepresentation)	2011
<i>Hickory Props. v. Am. Zurich Ins. Co.</i>	409 Ill. App. 3d 1148 (Ill. App. 1st Dist.) (“building” definition)	2011
<i>City of Elmira v. Selective Ins. Co. of N.Y.</i>	83 A.D.3d 1262 (N.Y. App. 3d Dep't) (law and ordinance coverage)	2011
<i>Council Tower Ass'n v. Axis Specialty Ins.</i>	630 F.3d 725 (8th Cir.) (“collapse”)	2011

Case Name	Citation	Year
<i>Aztar Corp. v. U.S. Fire Ins. Co.</i>	224 P.3d 960 (Az. Ct. App.) (business interruption)	2010
<i>Terminal Freezers v. U.S. Fire</i>	345 Fed. Appx. 305 (9th Cir.) (application of exclusions)	2009
<i>Nussbaum Diamonds v. Hanover Insurance</i>	883 N.Y.S.2d 509 (N.Y. App. 1st Dep't) (jeweler's block policy)	2009
<i>ANC Rental Corp. v. Lexington Ins. Co.</i>	http://www.4dca.org/opinions/Pcas/Nov2007/11-21-07/4D07-1256.pca.pdf (Fla. App.) (business interruption)	2007
<i>Zahran v. Frankenmuth Mut. Ins. Co.</i>	1995 U.S. App. LEXIS 9553 (7th Cir.) (bad faith)	1995

FIDELITY/SURETY

Case Name	Citation	Year
<i>RBC Mortgage Co. v. National Union Fire Ins. Co.</i>	812 N.E.2d 728 (Ill. App. 1st Dist.) ("direct" loss)	2004

As this impressive array of reported insurance coverage decisions illustrates, savvy insurers choose separate appellate counsel to prosecute and defend their coverage appeals in state and federal reviewing courts nationwide.