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

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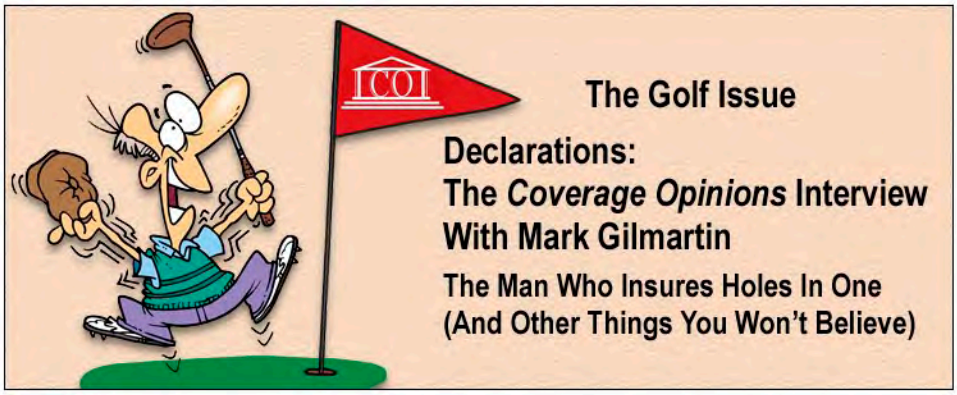
# The Cover-age Story




Mark Gilmartin sells insurance for one of sports' rarest of feats – a hole in one in golf. But that's just half the story. Mr. Gilmartin told CNBC's "Morning Call" program that he'll insure "pretty much anything you can dream up." And he wasn't kidding.

I'm an insurance guy -- and as curious as a cat. So when someone tells CNBC's national audience that he'll insure just about anything, this is someone that I need to speak to.

Mr. Gilmartin, age 50, is the co-owner and President of Reno-based Hole In One International and Odds On Promotions. What Hole In One International does is fairly self-explanatory. It is not unusual for a golf tournament, such as a charity or corporate event, to offer a large prize, say $25,000, a trip or a new car, to the first person to make a hole in one on a designated par 3. While the sponsor running the event wants to use the hole in one contest to generate excitement, and entice more players to participate, it always does not want to have to (and, no doubt in plenty of cases, can't afford to) write a huge check or give away a car.

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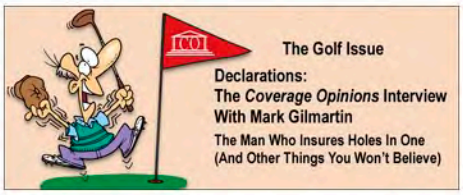
## In this issue:



## *Coverage Opinions* And The E*Trade Baby:

Pete Holmes is a great stand-up comic, the voice of the E*Trade baby, host of the "You Made It Weird" podcast (6 million downloads), and, coming this Fall, host of his own show on TBS, following Conan, called "The Midnight Show With Pete Holmes." And, no surprise here, he is a reader of *Coverage Opinions*. See page 7 for a picture of this very funny guy enjoying the last issue.
[FYI - Pete will be at Just For Laughs in Chicago this weekend.]

# The Cover-age Story




The sponsor has two choices. It can take its chances that nobody will make a hole in one (and secretly place hexes on the players as they approach the hole) or, for a nominal sum compared to the value of the prize, it can purchase an insurance policy for the risk of someone actually making a hole in one. If someone does, the prize is paid by Hole In One International. Now the organizer can sit back, relax and hope that someone actually does make a hole in one. Mr. Gilmartin's company also insures a close cousin of the hole in one contest – a putting contest, where a large prize is awarded to a person that sinks a 50 foot, or possibly much longer, put.

To understand Odds on Promotions, think Hole In One International -- without the golf. Some organizations may want to use a promotion, offering a large prize, as a means to generate interest in an event, as a sales tool, increase direct mail response rates, increase web traffic or whatever objective they may have. Odds On offers hundreds of promotions that they can choose from. The company has insured the PGA Tour, San Francisco Giants, Baltimore Orioles and many other names that you have heard of.

Just like Hole In One International, with Odds On Promotions there are no worries for the sponsor that someone may win, since the prize is insured. Odds on has awarded over $45,000,000 in cash and prizes since 1991. Some of the insured promotions offered by Odds On include a half-court shot, throw a Frisbee through the sunroof of a car, catch a record breaking fish, make a 7-10 split in bowling, serve a tennis ball through a target, run the table in pool, guess the Dow Jones Industrial Average on a particular day in the future and guess the number of jelly beans in a jar. And this list is just the tip of the iceberg (like, the tippy top). Not to mention that Mr. Gilmartin told me about a promotion that is out of this world (literally).

Mark, thank you for taking a break from insuring a cookie toss into a bowl of milk to satisfy my curiosity about your companies.

## How did you get into the hole in one insurance business?

My partner, Kevin Hall, and I played college golf at the University of Nevada together with Kirk Triplett (PGA & Champions Tour player). We were all sitting around one day brainstorming business ideas and came up with this one! Kirk headed off to play the Tour and Kevin and I started the business.

## What is the usual reaction from people when they hear what your company does?

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## About The Editor

### Randy Maniloff

*Randy J. Maniloff* is an attorney in the Philadelphia office of White and Williams, LLP. He concentrates his practice in the representation of insurers in coverage disputes over primary and excess obligations under a host of policies. Randy is the co-author of "General Liability Insurance Coverage: Key Issues In Every State" (Oxford University Press, 2nd Edition, 2012). For the past twelve years Randy has published a year-end article that addresses the ten most significant insurance coverage decisions of the year completed. Randy has been quoted on insurance coverage topics by such media as The Wall Street Journal, The New York Times, USA Today, Dow Jones Newswires and Associated Press. For more biographical information visit www.whiteandwilliams.com. Contact Randy at Maniloff@coverageopinions.info or (215) 864-6311.

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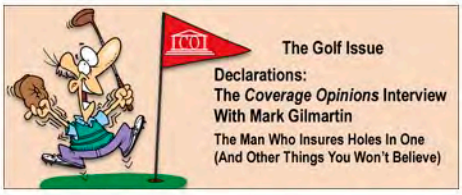
## The Cover-age Story




Most people have heard of "hole in one insurance," but the majority has no idea of the wide variety of games, contests, and promotions containing insured prizes that we offer through Odds On Promotions.

### What is a typical hole in one prize, the biggest prize you've ever insured and the most unusual one?

Typical is a car or cash. Biggest is $10,000,000. Most unusual is a trip on the Virgin Atlantic (trip into space), but there are many other unique prizes offered as well.

### What are the odds of a good golfer, say, an 18 handicap, getting a hole in one on a 165 yard hole?

13,600 to 1

### Can you provide an example of the underwriting factors and price of a typical policy for an amateur event?

Underwriting is dependent upon the length of the hole, the cash value of the prize, the number of attempts and and the status of the contestants (amateur or professional).

[Mr. Gilmartin gave me this example: A $25,000 prize, for a hole in one on a 165 yard hole, with 100 amateur attempts, results in a $495.00 premium.]

### How does insuring a pro tournament change the underwriting calculus?

Professionals are 5 times more likely to make a hole in one than amateurs.

### How is verification of a hole in one handled?

Sponsors must provide independent witnesses (depending upon the value of the prize) and a full investigation is conducted if a claim is made.

### Are your companies insurers or are the risks passed on to insurers?

The prize reimbursement program is insured by Everest National Insurance Company (A.M. Best rated A+).

[Editor's Note: Wise move to use an insurer. See Golf Marketing Worldwide, LLC v. Connecticut Insurance Department, 36 Conn. L. Rptr. 731 (2004) (concluding that a company that, in return for a fee, pays for a prize promised to a person that makes a hole in one, is engaged in the business of insurance and requires an insurance license).

### I mentioned some of the promotions that Odds On insures. What's something is the more unusual category?

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## Randy Spencer's Open Mic

### Gerber Spits Up On Its Life Insurance Policy

Enough! Enough! Enough already of the commercial for the Gerber Life College Plan. I want to throw my TV every time it comes on. The only thing stopping me is that I love my TV too much. You've seen it. In fact, you've seen it 467 times. Some parents are sitting around having coffee, their cute toddlers are playing close by, and one parent asks, "So, has anyone actually started saving for college yet?" "No no, you've got time," another parent responds. "Oh no, we've actually started," a goody two-shoes mom chimes in. And, in response to how she even knew where to start, two-shoes explains that she learned about the Gerber Life College Plan.

Gerber has been around for 85 years. The Gerber Baby could be the most famous baby in the world. You hear Gerber and you instantly think – baby. So the fact that Gerber Products Company started a company in 1967, called Gerber Life Insurance Company (which uses its iconic baby as its logo), that markets life insurance and college saving plans, seems a shrewd move to extend its brand. No matter how you look at it, Gerber is all about parenting.

So this is why I found it quite ironic when late last month a Michigan federal court concluded that a Gerber Life Insurance Company

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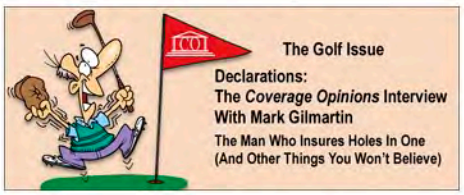
# The Cover-age Story




We cover all kinds of unique promotions through Odds On Promotions. For example, I am writing a contract now for a "$1,000,000 Find an Alien" promotion. Be the first to find a bona fide alien and win. Obviously a publicity stunt, but one that works and accomplishes the goals of the sponsor. **[I suggest a clause in that contract stating that residents of Roswell are not eligible.]**

## In the interview you did with CNBC you stated that you'll insure "pretty much anything you can dream up." So of course I have to ask you what is the most unusual thing you've ever insured?

"Cow Patty Bingo." Set a cow onto a grid (chalked) pasture and sell each grid location to raise money for charity. If the cow drops its first patty on the secret preselected winning grid number, the contestant owning that grid number wins the insured prize.

## How competitive is the hole in one and prize insurance business and how does your company distinguish itself from others?

It's quite competitive. There are many insurers in the space but few that offer the levels of experience (25 years), service, and ancillary benefits that we do. For example, each hole in one contest receives free contest tee signs, free contest tee markers, free hole in one prizes for the non-target holes, a free golf club for everyone in the event. On the Odds On Promotions side of the business, we offer many contest supplies such as signage, logoed dice, etc. and many turnkey promotions such as interactive kiosks, prize vaults, etc. which enable customers to offer exotic promotions which accomplish their goals (whatever they may be) all within their budget and in a turnkey environment. Most importantly, all of our contracts are insured through an A+ rated insurance company!

## What is your favorite hole in one story?

There are many, but my favorites have to be: Hole in one: A $10,000 hole in one was made at a memorial tournament for a boy that passed away. Best part, it was made by his father. Divine intervention! Putting: http://www.youtube.com/watch?v=t8cxi24ofbc (due to the cameraman's reaction) Odds On Promotions: http://www.youtube.com/watch?v=dvibaluf4da (you'll see why)

## Have you even had any very nervous miniature golf course owners want to insure the free game hole?

We have covered mini golf holes in the past. The price is a bit more expensive and the number of attempts has to be limited, but "anything" is insurable under the right circumstances!

## Randy Spencer's Open Mic

policy was ambiguous. But get this. What part of the policy was held to be ambiguous? The word "parents."

At issue was the determination of the rightful beneficiary of a Gerber Life insurance policy. Gerber admitted it owed the proceeds and interpleaded them into court. The question before the court was to whom they should be paid. The relevant language defined the beneficiaries as "the parents of the proposed insured." The court concluded that the word "parents" was ambiguous because, despite the numerous types of parents that have been recognized in the law (nearly two dozen, according to Black's Law Dictionary), the policy did not contain any adjective modifying "the parents." Thus, in the case before the court, parents could have meant biological, custodial, step, or all of these.

So Gerber's policy was found to be mushy and needs a new formula. Don't be rattled, Gerber. It will be easy to re-write your policy – just get Miss Perfect Parent from your College Plan commercial to do it.

That's my time.

I'm Randy Spencer.

Randy.Spencer@Coverageopinions.info

## Note To Readers: Thank You And Much More To Come!

*Coverage Opinions* is now eight months old, this is the 18th issue and it is received by over 16,000 people in every facet of the property-casualty industry (and lots tell me that they forward it on to colleagues). Readers include adjusters, insurance company executives, in-house counsel, outside counsel, brokers, MGAs, underwriters, risk managers, insurance regulators, consultants, expert witnesses, trade association personnel and members of the insurance media.

I am very happy with how *Coverage Opinions* has come together in such a short period of time. Selecting cases for analysis, that are important to as large a portion of the diverse readership as possible, has been challenging, yet fun. Working with Randy Spencer is no day at the beach but I put up with his demands because his Open Mic column has been so well-received. Interviewing some of the insurance industry's leading figures has been exciting (and intimidating, I'll be the first to admit). A recent issue of *Coverage Opinions* has made its way into two professors' course materials for 1L Torts at Duke Law School. That's pretty cool since I could have never gotten into a fancy law school like Duke. And it has been neat to see *Coverage Opinions* mentioned in The Boston Globe, The Philadelphia Inquirer, Law360 and The Wall Street Street Journal. I have some new bells and whistles for *Coverage Opinions* that are in the works.

Now, I know this will sound corny, but it is absolutely sincere. There has been nothing more satisfying about bringing *Coverage Opinions* to life than simply knowing that people read it. To those who've sent e-mails saying that they enjoy the publication – thank you. To those who've sent suggestions – thank you. To those who've sent cases they want to see discussed – thank you. These notes provide a lot of the energy that it takes to keep it going. To every person that reads *Coverage Opinions* – whether one article or cover to cover – thank you. I sincerely appreciate it.

Randy

## Make An Ace – Bring A Case: Hole-In-One Prize Disputes

If you are reading this then you know very well that legal disputes are always possible – even when it wouldn't seem that that could be the case. Despite how simple the concept of a hole-in-one may seem – one swing of a golf club and the ball goes in the hole – it too has not been immune from clashes over whether a prize, promised for making the rare ace, must be awarded. Not at all. Consider these situations where judicial intervention was required to determine if a prize was owed for making a hole in one– whether under an insurance policy or otherwise. Incidentally, I asked Mr. Gilmartin about hole in one prize controversies and his response was that "[m]ost all controversies stem from the individual purchasing the coverage not attending the event (or assigning the responsibility) to verify that the yardage and witness requirements within the contract are met."

### Cobaugh v. Klick-Lewis, Inc.

(Pa. Super Ct. 1989): Amos Cobaugh was playing in a golf tournament and arrived at the ninth hole to find a Chevrolet Beretta, along with a sign stating that a hole in one would win the car, courtesy of Klick-Lewis Buick. Cobaugh made a hole in one and attempted to collect the prize. There was just one problem. The Klick-Lewis dealership had offered the car as a prize for a charity golf tournament two days earlier. It had simply neglected to remove the car and sign prior to the hole in one. Mr. Cobaugh was denied the car. He sued to compel delivery.

The Pennsylvania appeals court concluded that offer, acceptance and adequate consideration existed and Mr. Cobaugh was entitled to the car. "By its signs, Klick-Lewis offered to award the car as a prize to anyone who made a hole-in-one at the ninth hole. A person reading the signs would reasonably understand that he or she could accept the offer and win the car by performing the feat of shooting a hole-in-one. There was thus an offer which was accepted when appellee shot a hole-in-one. . . . In order to win the car, Cobaugh was required to perform an act which he was under no legal duty to perform. The car was to be given in exchange for the feat of making a hole-in-one.

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## Make An Ace – Bring A Case: - *Continued*

This was adequate consideration to support the contract." The court also rejected various arguments by the car dealer that the contract was voidable because of mistake.

### Wright v. Spinks

(Ind. Ct. App. 2000): Joe Spinks participated in a golf tournament to raise money for a mayor's re-election campaign. The tournament offered a $10,000 prize for hitting a hole in one on hole number one. In addition to paying his entry fee, Spinks purchased a mulligan that was being offered by the tournament organizer as a further fundraiser. A mulligan is a do-over shot that a golfer can take (in a non-serious setting) when a preceding shot was poor.

You can see where this is going. Spinks teed off on the first hole. He then used his mulligan and this time made a hole in one. He was not awarded the 10Gs because the hole in one came on a mulligan. Off to court went Spinks and the mayor. The court held that Spinks was entitled to the prize because he was not advised that he could not use a mulligan to attempt to make a hole in one on the first hole.

### Grove v. Charbonneau Buick-Pontiac

(N.D. 1976): Lloyd Grove participated in a golf club's annual tournament. An auto dealer offered to give a car to the first entrant who made a "hole in one on Hole No. 8." The golf course had only nine holes. A round of golf is completed by playing the course twice – but from a different tee area during the second time. Grove made a hole in one on the eighth hole. However, since he did so during his second go around, his hole in one was made on the 17th hole.

In a lengthy opinion, the North Dakota Supreme Court, after looking in vain for guidance from the Rules of Golf and an article in Golf Digest magazine, held that the phrase "hole in one on Hole No. 8" was ambiguous as it could have more than one meaning. It could mean the actual, physical designation of the hole, identified by the number on the flagstick, or it could refer to the hypothetical number given to a hole because of the sequence in which it is played.

### Golf Marketing, Inc. v. Atlanta Classic Cars

(Ga. Ct. App.): Atlanta Classic Cars sponsored a golf tournament and offered to provide a Mercedes Benz 500 SL to the first person to make a hole in one at the eleventh hole. Jeff Wright aced the eleventh hole. ACCI had insured the prize with Golf Marketing, Inc. ACCI awarded Wright the $81,000 car and the next day informed GMI that the prize had been awarded and demanded reimbursement. GMI refused on the basis that it had allegedly halted business with ACCI the day before the tournament. The trial court did not buy this.

GMI also argued that ACCI failed to supply sufficient proof of the hole in one. ACCI submitted attesting statements from Wright, his three playing partners and the tournament director. However, because the prize had a value between $50,001 and $100,000, the contract also required ACCI to submit attesting statements from two persons, over eighteen years of age and independent in nature, who witnessed the hole in one. ACCI did not submit such "independent" attesting statements to GMI as proof of the loss.

Notwithstanding that ACCI did not submit this verification, the court concluded that the prize was still owed. The Proof of Claim section of the contract stated, in all capitals, that appropriate forms will be furnished to the client subsequent to an event and claim. Such forms that GMI was to furnish included those applicable to the independent witness requirement. However, GMI had made the affirmative decision not to send such forms to ACCI because it was maintaining that the policy had been rescinded and GMI had no intention of paying the claim. The court concluded that, because the policy was not rescinded, GMI's failure to provide the independent witness forms resulted in a waiver of strict compliance with the proof requirement.

### Harms v. Northland Ford Dealers

(S.D. 1999): As part of a promotion during a golf tournament, a Ford dealer offered a Ford Explorer to the first person to make a hole in one at the eighth hole. Jennifer Harms did so from the amateur women's tees. She was denied the prize because,

## Make An Ace – Bring A Case: - *Continued*

according to the dealer, to be eligible to win, all amateurs, male and female, were required to tee off from the amateur men's tees.

Putting aside how it got there, the court concluded that the prize was owed. While it was not disputed that Harms "hit from a point under the minimum distance dictated by [the dealer's] insurer, . . . she was following the tournament rule that required amateur women to tee from the red markers, not the yellow or the blue, as with the amateur men and the professionals. None of the participants knew of the minimum yardage requirement. Yet only amateur women stood ineligible to win the car if they followed the tournament rules." [Issues between the Ford dealer and golf course remained unresolved.]

### United States v. Krilich

(7th Cir. 1998): Andy Sarallo aced a hole that was the subject of a hole in one contest. His foursome jumped up and down and shouted for joy. Andy won his choice of a 1931 Cadillac or a check for $40,000. But there's more to this tale. Andy's father was mayor of Oakbrook Terrace, Illinois. The mayor's support was needed for a bond offering to finance an apartment complex to be built by Robert Krilich. A pay-off to the mayor was needed to gain his support. So Krilich sponsored the contest, palmed one of Andy's golf balls and pulled the ball out of the hole. By doing the pay-off in this way, Krilich was able to shift the cost to the National Hole–In–One Association, which provided insurance. [I couldn't make that story up.]

## Coverage Opinions And The E*Trade Baby:

Pete Holmes, stand-up comic, voice of the E*Trade baby, host of the "You Made It Weird" podcast (6 million downloads), and, coming this Fall, host of his own show on TBS, following Conan, called "The Midnight Show With Pete Holmes," enjoying the last issue of *Coverage Opinions* [FYI - Pete will be at Just For Laughs in Chicago this weekend.]

## U.S. Open Preview: What You Need To Know About Getting Hit By A Golf Ball At A Professional Tournament

[Re-printed from April 10 issue]
The U.S. Open [it was The Masters at the time of the April 10 issue] tees off next week. If you are going, here's what you need to know about getting hit by a golf ball at a professional tournament.

I don't play golf, but I'm a big fan of the sport. Despite that, I've never heard of a professional golfer named Dow Finsterwald. And I'm ashamed that I haven't. While he was before my time, he was no short-time, fleeting pro. He won 11 tournaments between 1955 and 1963, including the 1958 PGA Championship. He played on four Ryder Cup teams and served as non-playing captain for the 1977 U.S. Ryder Cup team. In 1958 he was honored as PGA Player of the Year. He is fifth on the list for consecutive cuts made (72). And he's probably a whiz at getting a golf ball through the moving blades of a wind mill.

On June 29, 1973, Finsterwald was playing in the Western Open at Midlothian Country Club located not far from Chicago. On that date Alice Duffy and a companion were in attendance as spectators. Shortly after arriving they watched Arnold Palmer tee off at the first hole. The women then walked toward the first green, stopping at a concession stand set up between the first and eighteenth fairways. While watching play on the first hole, Ms. Duffy was hit by Dow Finsterwald's tee shot on eighteen. Ms. Duffy lost all sight in her right eye and was forced to wear a prosthetic shell over her eye for cosmetic purposes.

[I did some checking. Here is how the 1973 Western Open turned out.

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## U.S. Open Preview:

- *Continued*

Billy Casper won (-12). Arnie finished 7th (-8). Dow Finsterwald made the cut, but it wasn't his tournament any more than it was Alice Duffy's. He came in 76th place at +11.]

Litigation was filed against the club, PGA of America, Western Golfers Association and Mr. Finsterwald. The litigation went on as long as the pro tees. The accident took place in 1973. There is a second Appellate Court of Illinois decision from 1985. And who knows if that was really the end. Those who think that golf moves slowly will likely see this timeline as par for the course.

The trial court in Duffy v. Midlothian Country Club granted summary judgment for the defendants. In a 1980 opinion the Appellate Court of Illinois reversed, holding, among other things, that a material question of fact existed as to whether defendants fulfilled their duty to plaintiff as a business invitee. The case went to trial and a jury awarded Ms. Duffy $498,200, which was reduced by 10% for her own negligence.

In a 1985 opinion in the case the Appellate Court of Illinois upheld the award. The decision is heavy on the legal. The court concluded that the doctrine of secondary implied assumption of the risk (plaintiff implicitly assumes the risks created by the defendant's negligence) is abolished by the introduction of comparative negligence. Thus, plaintiff's assumption of the risk will not operate as an absolute bar to recovery in a negligence action, but, rather, merely aid in the apportionment of damages.

It appears that an important part of plaintiff's case was the testimony of Tim Mahoney as an expert witness. Mr. Mahoney earlier submitted an affidavit that "he was a member of the Midlothian Country Club and had played golf for thirty-five years. He won the 1973 Western Open Pro-Am Tournament held in conjunction with the Western Open, and he attended the 1973 Western Open. Mahoney indicated that he was aware of the club's preparations for the tournament. He stated that concession stands were placed in areas in which balls had regularly landed in the past, and that the fairways were so close together that the spectators located between the fairways are within range of balls likely to be hit by golfers. He further stated that the spectators would not be able to see the player hitting the ball as the shrubbery and hills interfered with visibility."

The take-away from Duffy v. Midlothian Country Club is that, while many courts have adopted a special standard for spectators that are hit by a foul ball at a baseball game (the so-called Baseball Rule), making it much more difficult from them to establish negligence on the part of the stadium operator, here the court applied no such special Golf Rule. Instead, the court judged the case based on the ordinary standard that "the owner of a business premises has a duty to the invitee to exercise ordinary care in the use and maintenance of his property. More specifically the owner has a duty to discover dangerous conditions existing on the premises and to give sufficient warning to the invitee to enable him to avoid harm."

It is customary for a professional golfer that hits a spectator with a ball to give the spectator an autographed glove. That's a nice gesture. If it's you, accept it. But make clear that it is not a release of any other claims.

## Golf Balls And Courtrooms: A Fairway To Measure Things

Proving things in court is all about precision. The most miniscule hiccup in a chain of custody can keep evidence from being admitted. The Rules of Evidence are full of safeguards to keep unreliable information from reaching the fact finder. Some jurors demand DNA and fingerprint evidence before being satisfied that a defendant is guilty.

But despite courtrooms being environments where exactitude is demanded, one aspect seems to have room for leeway – the practice of describing something visually as being "the size of a golf ball." The prevalence of something being described, in a judicial setting, as the size of a golf ball is overwhelming. There seems to be no limit on what can be described using this form of measurement. Judicial decisions comparing every one of the following to the size of a golf ball can be found.

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## Golf Balls And Court-rooms: - *Continued*

The term is particularly popular when there is a need to describe the size of a medical problem. Bruises, lumps, hemorroids, cysts, contusions, blood cloths, abscesses, lymph nodes, tumors, bladder stones, boils, blisters, lacerations, pimples, skull fractures, welts, growths, moles and cancers have all been compared in judicial proceedings to the size of a golf ball.

The term is also quite popular when describing crack cocaine. "Hey, have you seen my crack anywhere. I'm smoking a Titleist 3." And, of course, hail is so frequently compared to the size of a golf ball that you wonder if there is even such a thing as hail that is not the size of a golf ball.

In a not too long ago Virginia criminal case – involving indecent exposure -- the size of a golf ball was used to describe a hole that had been cut in the crotch of a pair of shorts. I'm not going there.

But despite the seeming precision that comes from using a golf ball to describe something's size, it is apparently not always precise enough. That's when resort is had to something being the size of half a golf ball. And if you need to describe something that is bigger than a golf ball, and state by how much so – just testify that it was smaller than a baseball, tennis ball, softball or football.

And, of course, my favorite one of them all -- Fils v. City of Chicago (Ill. Ct. App. 2012). A police officer described entering a house to execute a search warrant and seeing a white substance on the kitchen table. How much powder did the officer testify to seeing? Somewhere between the size of a golf ball and a watermelon. What a witness.

## Is There Liability Fooore Hitting Someone With A Golf Ball?

Obviously, a lot can go wrong when a golfer, especially an amateur – even a very good one – hits a golf ball. You've just teed off. But despite how expensive your clubs, hideous your shorts, the number of lessons you've taken and cute your club head covers, you hit a slice – I'm talking worse than Original Ray's -- that beans someone standing on the adjacent fairway. And, to make matters worse, the other three guys in his foursome are plaintiffs' lawyers – and one has his initials and ESQ on his license plate. Oh boy. Now what?

Hopefully you have homeowner's insurance and any suit brought against you will be covered. [Of course, if you are a terrible golfer, the insurer may claim that the bad shot was no accident!] But is there a viable suit that can be brought against you? You clearly caused someone to be injured – maybe seriously so. But are you legally liable?

There are many judicial opinions addressing liability for golfers that cause bodily injury. However, because they are so different factually, and with tort law varying from state to state, it is difficult to set forth across the board rules. But, in general, there is a high burden placed on a person injured by a golf ball seeking to establish liability against the golfer. The majority rule is that it must be established that your conduct was reckless or intentional. "Application of a recklessness or intentional conduct standard to a cause of action involving a golfing injury should not convert a golf course into a free-fire zone. But application of a recklessness standard in a golf setting will affect the analysis of the probability of harm and the defendant's indifference to that harm." Schick v. Ferolito (N.J. 2001). See also Shin v. Ahn (Cal. 2007) ("[T]he primary assumption of risk doctrine should be applied to golf. Thus, we hold that golfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.").

There are lots of cases in this area – and, as you would expect, some with really great facts. But I'm running out of room. I'll save them for a future issue.

## California Federal Court: Insurer May Not Be Able To Enforce Montrose Endorsement

In general, insurers have had mixed results in construction defect cases when it comes to enforcing the Montrose (known loss) endorsement. Some courts have interpreted them narrowly and applied a strict "sameness" test

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## California Federal Court:

- *Continued*

between the "property damage" that existed pre-policy inception date and that which took place during the policy period, for which coverage was being sought. In other words, it is the "property damage" itself that must be known by the insured prior to the policy period and not the cause of the "property damage." [Of course, at least with the Montrose endorsement, construction defect cases are not what ISO had in mind when it put pen to paper.]

Likewise, First Manifestation endorsements have not always been interpreted as insurers have advocated. Just as in the case of Montrose endorsements, some courts have narrowly interpreted First Manifestation endorsements. Responding to insurers' efforts to disclaim coverage for "property damage" that took place during the policy period, on the basis that such damage first existed prior to the policy inception date, some courts have also applied a strict test of sameness between the two.

In Anderson v. Century Surety Company, No. 12-1057 (E.D. Cal. May 14, 2013), the court's opinion reads like those where the Montrose endorsement may be subject to a strict "sameness" test between the "property damage" that existed pre-policy inception date and that which took place during the policy period for which coverage is being sought.

Anderson involved coverage for a company that owns a mobile home park, for claims that it allegedly failed to maintain the park, causing flooding in the common areas and plaintiffs' individual spaces. Plaintiffs filed their complaint in November 2006. Century insured the park owner from April 2007 to April 2009. More flooding took place in the fall and winter of 2007-08. A second amended complaint was filed in July 2009.

Century denied coverage on the basis that, based on its policy language, all of the property damage was deemed to have taken place before its policies incepted. The Century policies contained Montrose (i.e., known loss) language, as well as a provision stating that: "All 'bodily injury' or 'property damage' arising out of an 'occurrence' or series of related 'occurrences' is deemed to take place at the time of the first such damage or injury even though the nature and extent of such damage may change; and even though the damage may be continuous, progressive, cumulative, changing, or evolving; and even though the 'occurrence' causing such 'bodily injury' or 'property damage' may be continuous or repeated exposure to substantially the same general harmful conditions."

The court ruled that it could not determine, at the summary judgment stage, whether Century was obligated to defend. This was because the court could not determine "whether the damage that occurred during the 2007–08 rainy season is an 'occurrence' that is separate from the original property damage which Plaintiffs suffered, or is part of a 'series of related occurrences' that began around September 2006."

The insured presented an expert who opined that Plaintiffs' properties were damaged prior to April 10, 2007 [Century policy inception] by flooding caused by "accidental and … improper preparation of the lots and roads causing negative slope and localized ponding of water, accidental omission of drainage along masonry walls damaging the masonry walls, failure to install adequate size and number of drains during park expansion causing park wide and localized water ponding and property damage, and failure to maintain the 'greenbelt' around the park." This, the expert concluded, was different than the damage after April 10, 2007, which he testified was "'caused by ... failure to maintain one of the road drains responsible for water runoff for the park,' and this failure caused 'new and different damage.'"

## Kim Kardashian And Insurance Coverage: California Federal Court Addresses The Biggest Issue In "Personal And Advertising Injury"

Cases addressing coverage for "implied disparagement" have been frequent of late and it is the most talked-about issue in the "personal and advertising injury" arena today. The case to garner the most attention is Travelers Prop. Cas. Co. v. Charlotte Russe Holding, Inc., in which the California Court of Appeal in 2012 held that a retailer's price markdown caused significant and

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## Kim Kardashian And Insurance Coverage:

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irreparable damage to and diminution of a manufacturer's trademark and that was enough to implicate "personal and advertising injury" coverage for disparagement of goods. The court stated: "Versatile's [manufacturer] pleadings alleged that the People's Liberation brand [of jeans] had been identified in the market as premium, high-end goods; and that the Charlotte Russe parties [retailer] had published prices for the goods implying that they were not. It therefore pled that the implication carried by the Charlotte Russe parties' pricing was false. That is enough." Given how commonplace deep discounting in retail stores is, the potential consequences of Charlotte Russe are readily apparent.

In Hartford Cas. Ins. Co. v. Swift Distribution, Inc., issued just four months after Charlotte Russe, the California Court of Appeal distinguished Charlotte Russe from a case involving underlying patent and trademark claims from an insured's copycat product. But more than just distinguishing Charlotte Russe, the Swift court was harshly critical of it. On February 13, the Supreme Court of California agreed to hear an appeal in Swift Distribution.

The Northern District of California just issued a decision in Tria Beauty, Inc. v. National Fire Ins. Co., No. 12-5465 (May 20, 2013) that once again weighs in on the issue of coverage for "implied disparagement." Tria Beauty, Inc. and Radiancy, Inc. are both in the beauty products business. Tria Hair produces a laser hair-removal device for use at home and the Tria Skin Perfecting Blue Light, a light-based acne treatment product. Radiancy produces "no!no! Hair" and "no!no! Skin," products that compete with Tria Hair and Tria Skin. Tria sued Radiancy for false advertising, unfair competition and trademark infringement.

Radiancy counterclaimed against Tria, and its celebrity spokesperson, Kim Kardashian, alleging that Tria made false and misleading statements in advertisements about *Tria's own* products that damaged Radiancy. Among others, Radiancy challenged Tria's advertising claims that: "The Tria Hair product is equivalent to professionl laser hair removal" and "The Tria Hair product is the 'first' and 'only' at-home laser hair removal device cleared by the FDA."

Tria sought coverage under its commercial general liability policies on the basis that it allegedly published material that disparaged a good, product or service. Remember, Tria only made statements that its own products were superior. Its insurers rejected Tria's request for a defense and Tria filed a declaratory judgment action. While the court granted the insurers' motions for summary judgment, the court found for Tria on the implied disparagement issue.

The Tria court expressly followed Charlotte Russe and held that the disparagement policy language at issue covered implied disparagement claims based on statements made by Tria about its own products. The Tria court explained: "The question raised by the conflicting authorities is whether the policy language included coverage for claims that sounded in disparagement in the broader sense of injurious falsehoods, as opposed to a narrower category of claims that met the pleading requirements for trade libel. This turns on an ambiguity in the policy term 'disparages,' which must be resolved by construing the language in a way that is consistent with Tria's objectively reasonable expectations, and in case of doubt, against the insurers."

## Room For Improvement: Follow-up On Indiana's Decision In Hammerstone

### Call To Indiana Coverage Counsel

The Cover-age Story of the April 24th issue of *Coverage Opinions* addressed the Indiana Court of Appeals's April 8 decision in Hammerstone v. Indiana Insurance Company. At issue was this. An umbrella policy specified that it was subject to a $2,000,000 limit for products-completed operations, but it also contained an endorsement that stated: "This insurance does not apply to bodily injury or property damage included within the products-completed operations hazard." The court looked at this situation and concluded that the policy was ambiguous and interpreted it in favor of providing $2,000,000 in coverage for products-completed operations.

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## Room For Improvement:

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I stated in the article: "You may be wondering about this -- What did the underwriting file say about the availability of coverage for products? There may have been evidence in there that stated very clearly whether products coverage was intended under the umbrella policy. In some states, even if a court concludes that policy language is ambiguous, such finding does not lead to an automatic determination that coverage is owed. Rather, once there is a finding that a policy is ambiguous, consideration then turns to extrinsic evidence to determine the intention of the parties. I did not examine this issue in depth. Instead I reached out to counsel for Indiana Insurance and asked for an explanation of it. Counsel did not immediately respond."

I also looked briefly at Indiana law on the issue and concluded that the answer was not immediately apparent. With a deadline looming to get the issue type-set, I let it go at that. In response to the article I received an e-mail from reader John Black, an insurer's product manager for general liability. Mr. Black was quite critical that I published the article without providing more information about the important extrinsic evidence issue. I called Mr. Black on the phone, thanked him for his note and told him that I had two words in response: You're right. [Mr. Black is OK with me mentioning him by name here.]

Mr. Black is right. I should have obtained more information about the extrinsic evidence (or not) issue in Hammerstone before publishing the article. While it is not feasible to try to answer every question, about every case, that I write about, this is one where I should have. I have since obtained more information about the case. I plan to do a follow-up article addressing the extrinsic evidence aspect (or not) of Hammerstone. But if a reader – from Indiana or elsewhere – wants to do so, please let me know. I'd be happy to publish it. If I get no takers on this offer I'll take a shot at it.

*Coverage Opinions is a bi-weekly (or more frequently) electronic newsletter reporting and providing commentary on just-issued decisions from courts nationally addressing insurance coverage disputes. Coverage Opinions focuses on decisions that concern numerous issues under commercial general liability and professional liability insurance policies. For more information visit www.coverageopinions.info.*

## Late-r Notice:
### A Look At Decisions To Come

**Liquidated Damages For Violation Of TCPA Are Not An Uninsurable Penalty**

The Late-r Notice column in the March 27th issue of *Coverage Opinions* addressed oral argument that had just taken place before the Illinois Supreme Court in Standard Mutual v. Lay. At issue was the question whether damages available under the Telephone Consumer Protection Act for sending out unsolicited fax advertisements - $500 per occurrence – were meant to compensate for any harm. The lower court had ruled that the damages awarded were a penalty to the sender, in the nature of punitive damages, and, hence, uninsurable as a matter of Illinois law and public policy.

It sure didn't take long for the Boyz from Illinois to see it differently. For several reasons the Illinois high court reversed in a May 23rd decision. "The harms identified by Congress, e.g., loss of paper and ink, annoyance and inconvenience, while small in reference to individual violations of the TCPA are nevertheless compensable and are represented by a liquidated sum of $500 per violation." "Congress intended the $500 liquidated damages available under the TCPA to be, at least in part, an incentive for private parties to enforce the statute. This added incentive is necessary because the actual losses associated with individual violations of the TCPA are small." "[T]he fact that Congress provided for treble damages separate from the $500 liquidated damages indicates that the liquidated damages serve additional goals than deterrence and punishment and were not designed to be punitive damages."

TCPA is a do-do bird issue, or getting close to it, on account of the frequent lack of insurance dollars, to fund any damage award or settlement, because of the commercial general liability policy exclusion for Distribution of Material in Violation of Statute. Nonetheless, Lay may be a significant decision in other coverage areas. It is not unusual for a statute to allow for liquidated damages that are more than the actual amount of harm sustained by the aggrieved party. I would expect to see Lay cited by policyholders in such cases, in support of their argument that the liquidated damages are not penal, and, therefore, not excluded from coverage in a state that disallows coverage for punitive damages.