Ten Minute Mysteries:

A *Highly* Interactive Continuing Education Session!

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LANCER INSURANCE COMPANY v. GARCIA HOLIDAY TOURS, ET AL

Garcia Holiday Tours operates a commercial bus company in South Texas. It contracted with the Alice Independent School District to provide a bus and driver for a field trip to Six Flags Fiesta Texas in San Antonio. The trip was for members of the Alice High School band, several of whom observed the driver coughing during the trip. Upon their return, the driver was hospitalized after being diagnosed with an active case of tuberculosis.

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The passengers were tested for the disease after learning of the driver's diagnosis, and several tested positive for latent TB. These passengers subsequently sued the driver and bus company, asserting that they were negligently exposed to the disease as a result of being confined on the bus with the infected driver during the band trip. The bus company notified Lancer Insurance Company, its commercial auto insurance carrier, but Lancer refused to defend the claim, maintaining that such claims were not covered under the policy. Left to defend itself, the bus company proceeded to trial where a jury found it and the driver liable and awarded collectively over $5 million in damages to the passengers who had contracted the disease.

The bus company and driver sued Lancer seeking coverage.

Who wins and why?

1. ***Lancer wins because tuberculosis is not a "bodily injury."***
2. ***Lancer wins because spreading tuberculosis is not an "accident."***
3. ***Lancer wins because the bus is not a "covered auto" under a business auto policy.***
4. ***Lancer wins because the injuries do not result from "ownership, maintenance or use of a covered auto."***
5. ***Garcia Holiday wins because the bus condition contributed to the accident.***
6. ***Garcia Holiday wins because it is owed a defense; we cannot tell if there is an obligation to indemnify.***

FRENCH KING REALTY INC. vs. INTERSTATE FIRE AND CASUALTY COMPANY

French King owns the French King Restaurant. A Kidde HDR 50 dry chemical fire suppression system was installed in the kitchen in 1974. In 2005, Interstate issued a commercial lines insurance policy to French King, effective until April 3, 2006. The policy contained a protective safeguards endorsement (PSE) added to the commercial property coverage conditions, that provided, in pertinent part, that:

- As a condition of this insurance, you are required to maintain the protective devices or services listed in the Schedule above [e.g., ANSUL SYSTEM OR EQUIVALENT].

- The following is added to the EXCLUSIONS section of . . . CAUSES OF LOSS -- SPECIAL FORM[:] . . . We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you: 1. Knew of any suspension or impairment in any protective safeguard listed in the Schedule above and failed to notify us of that fact; or 2. Failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order.

As of February 11, 2002, Kidde Fire Systems advised that it would "no longer support the installation, inspection, service, recharge or repair of dry chemical systems protecting kitchen appliances and ventilation." A fire inspector sent a letter in 2003, warning that the fire suppression system at the restaurant was not in accordance with current NFPA requirements and not in accordance with the manufacturer's UL listing on the system. Finally, in June, 2005, French King was advised that the system previously had been "red tagged" as of June 10, 2004, and, as a result, could not be issued a certificate of inspection until French King had the system fixed.

The restaurant burned in October, 2005. Interstate refused to pay.

Who wins and why?

1. ***Interstate wins because there must have been a misrepresentation on the application.***
2. ***French King wins because conditions like that are not enforceable legally.***
3. ***French King wins because the phrase "maintain" is ambiguous. It can mean "keep in place" or can mean "keep working." So, French King did not violate the condition or part two of the exclusion.***
4. ***Interstate wins because French King violated part one of the exclusion.***

ALLSTATE INSURANCE V. CAMPBELL

On the evening of November 18, 2005, a group of teenage boys, including Dailyn Campbell, Jesse Howard, and Corey Manns, stole a lightweight Styrofoam target deer typically used for shooting or archery. The boys fastened a piece of wood to the target so that it could stand upright. Along with Carson Barnes, they then placed it just below the crest of a hill in Hardin County on County Road 144, a hilly and curvy two-lane road with a speed limit of 55 miles per hour. They put the target on the road after dark – between 9:00 and 9:30 p.m. – in a place in which drivers would be unable to see it until they were 15 to 30 yards away. The boys then remained in the area so that they could watch the reactions of motorists.

About five minutes after the boys placed the target in the road, Robert Roby drove over the hill. Roby took evasive action, but ultimately lost control of his vehicle, which left the road, overturned, and came to rest in a nearby field. This accident caused serious injuries to both Roby and his passenger, appellee Dustin Zachariah.

Allstate's policy said

> We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. This exclusion applies even if… such bodily injury or property damage is of a different kind or degree than intended or reasonably expected…

Allstate refused to defend or indemnity Campbell.

Who wins and why?

1. ***Campbell wins. The prank was intentional, but having someone swerve off the road was not.***
2. ***Allstate wins. The intentional act of putting a fake deer in the road is so tied up with the car accident that the intent for one has to be transferred or inferred to the other.***
3. ***We don't know who wins. Allstate at least has to provide a defense. The facts will have to determine what was intended and we won't "infer or transfer" intent from one act to the other.***
4. ***Allstate wins. Putting the Styrofoam deer in the roadway was an intentional act, and the exclusion applies, no matter what else happened.***

ASH GROVE CEMENT CO. v. LIBERTY MUTUAL INS. CO.

Ash Grove operates cement plants on the east shore of the Willamette River near Portland. The EPA listed the Site on the National Priorities List in December 2000, and sent out approximately 70 general notice letters informing potentially responsible parties ("PRPs") that they might be liable for costs incurred by the EPA for actions taken at the Site. EPA sent additional general notice letters in 2006.

On January 18, 2008, the EPA sent a letter to Ash Grove pursuant to section 104(e) of the Superfund law known as "CERCLA." The letter said, in part:

> EPA is now seeking information from current and past landowners, tenants, and other entities believed to have information about activities that may have resulted in releases or potential threats of releases of hazardous substances to the Site. This information will be used for the purposes of determining the need for response, or choosing or taking any response action at the Portland Harbor Superfund Site…Pursuant to the authority of Section 104(e) of [CERCLA], you are hereby requested to respond to the Information Request attached to this letter…EPA is authorized to commence an action to assess civil penalties of not more than $32,500 per day for each day of noncompliance against any person who unreasonably fails to comply with an Information Request.

Liberty Mutual's policies from the 1960's and 70's provided coverage for:

> all sums which the insured shall become legally obligated to pay as damages because of property damage to which this policy applies, caused by an occurrence and the company shall have the right and duty to defend any suit against the insured seeking damages on account of ... property damage, even if any of the allegations of the suit are groundless, false or fraudulent.

Liberty Mutual refused to reimburse Ash the approximately $750,000 it spent in responding to the EPA.

Who wins and why?

1. ***Liberty Mutual wins. General liability policies cannot ever cover environmental matters.***
2. ***Liberty Mutual wins. There was no suit, so there was no triggering of the policies.***
3. ***Liberty Mutual wins. Ash waited too long to make a claim under the policies.***
4. ***Ash wins. The letters were adversarial enough to be "suits."***

NAUTILUS INSURANCE v. STEINBERG

Frances Steinberg and Morton Rudberg were the insured parties under a commercial property insurance policy issued by Nautilus Insurance Company. The policy covered a building they owned in Dallas. Among the policy's provisions was coverage for "vandalism," which was defined as "willful and malicious damage to, or destruction of, the described property." The vandalism coverage provision also contained a "theft" exclusion, which stated:

> We will not pay for loss or damage caused by or resulting from theft, except for building damage caused by the breaking in or exiting of burglars.

On March 26, 2007, Leonard Dwayne Heard climbed onto the roof, opened up the air conditioning units located there, and removed copper pipes and electrical wiring. While he was still on the roof, Heard was found and arrested by Dallas police officers. The arresting officer listed “theft” as the offense on the incident report. Heard was indicted, however, for felony criminal mischief. He pleaded guilty to and was convicted of that offense.

Nautilus denied coverage; the insureds sued.

Who wins and why?

1. ***The insureds do. There was no “theft,” because that wasn’t what Heard was charged with.***
2. ***The insureds do. Even though the pipes were cut and loose, the items he attempted to steal were still on the building when he was caught. No “theft” actually happened.***
3. ***The insureds do. It was vandalism, not theft.***
4. ***Nautilus does. There was sufficient evidence of an attempted theft to justify using the exclusion, if they can show he really meant to take them***.

DONNELL V. AMERICAN FAMILY MUTUAL INSURANCE COMPANY

American Family Mutual Insurance Company issued an insurance policy to Jerry Donnell (Donnell) to cover his personal and real property from loss. More than sixteen months after a June 20, 2011 lightning strike to his home, Donnell filed suit against American Family.

American Family moved to dismiss the suit, saying it was barred by the one-year limitations period found within the insurance contract. Donnell disagreed, arguing a "conformity to state law" provision in the policy reformed the one-year limitations period to comply with Iowa's ten-year limitations period on contract claims. Donnell also

claimed the provision was unconscionable, unreasonable, and contrary to his reasonable expectations.

Who wins and why?

1. ***American Family wins. The provisions of the policy are enforceable.***
2. ***American Family wins. There's no way to adjust the loss more than 16 months after the damage happened.***
3. ***Donnell wins. State law, and the policy's "conformity" clause, mean that the year limitation is not enforceable.***
4. ***Donnell wins. It's possible to figure out what happened and a one-year clause is unfair to insureds.***

WILSON MUT. INS. CO. V. FALK

The Falks are owners and operators of a dairy farm in West Bend, Wisconsin, located in Washington County. In early 2011, the Falks spread liquid cow manure onto their farm fields for the purpose of fertilization. In an attempt to safely apply the manure, the Falks obtained a nutrient management plan prepared by a certified crop agronomist and approved by the Washington County Land and Water Conservation Department.

In a letter dated May 23, 2011, the Wisconsin Department of Natural Resources ("DNR") informed the Falks it had received several well contamination complaints from the Falks' neighbors. The DNR investigated the matter and concluded that manure from the Falks' farm leeched into and contaminated wells owned by the injured parties. The contamination made the injured parties' private wells unusable and the water undrinkable. The injured parties alleged that manure, nitrates, and bacteria, including E. coli, seeped into their wells. Additionally, Addicus Jante, a minor, claimed that he contracted bacterium avium from drinking the contaminated water and, as a result, was hospitalized and underwent surgery.

Wilson Mutual sold farmowner policies to the Falks, the first insuring the period from April 10, 2010, to April 10, 2011, and the second insuring the period from April 10, 2011, to April 10, 2012. The policies were identical in all material respects.

The Wilson Mutual policy excluded general liability coverage for both "bodily injury" and/or "property damage" "which results from the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of `*pollutants*' into or upon land, water, or air." The policy stated:

> "We" [Wilson Mutual] do not pay for a loss if one or more of the following excluded events apply to the loss, regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded event.
>
> "Pollutant" is defined earlier in the policy as: "any solid, liquid, gaseous, thermal, or radioactive irritant or contaminant, including acids, alkalis, chemicals, fumes, smoke, soot, vapor, and waste. `Waste' includes materials to be recycled, reclaimed, or reconditioned, as well as disposed of."

In addition to general liability coverage, the Wilson Mutual policy also included an endorsement for "Farm Chemicals Limited Liability" and an "Incidental Coverages" section. The Farm Chemicals Endorsement reads, in relevant part:

> Farm Chemicals Limited Liability. "We" pay those sums which an "insured" becomes legally obligated to pay as damages for physical injury to property if:
>
> 1. The injury is caused by the discharge, dispersal, release, or escape of chemicals, liquids, or gases into the air from the "insured premises". The injury must be caused by chemicals, liquids, or gases that the "insured" has used in the normal and usual "farming" operation; and
> 2. The chemicals, liquids, or gases have not been discharged, dispersed, or released from an aircraft.
>
> . . .
>
> Physical injury does not include indirect or consequential damages such as loss of use of soil, animals, crops, or other property or loss of market.
>
> This coverage does not apply to physical injury to property arising out of "farming" operations that are in violation of an ordinance or law.
>
> This coverage does not apply to any loss, cost, or expense arising out of any requests, demands, orders, claims, or suits that the "insured" or others test for, monitor, clean up, remove, contain, treat, detoxify, neutralize, or in any way respond to or assess the effects of pollutants, chemicals, liquids, or gases.

<u>Who wins and why?</u>

1. ***The Falks win. The pollution exclusion is overly broad, ambiguous, and unenforceable.***
2. ***The Falks win. The extension of coverage under the Farm Chemicals Limited Liability Coverage cannot be reconciled with the exclusionary language of the main form.***
3. ***The Falks win. Manure is not a pollutant.***

4. ***The Falks win. They did everything they could and the loss wasn't their fault.***
5. ***Wilson Mutual wins. Liquid cow manure is a pollutant and pollution coverage is excluded.***
6. ***Wilson Mutual wins. The leeching was so severe it had to be in violation of the law, so the exclusion applies.***

MICHIGAN MILLERS MUTUAL INS. CO. V. DG&G COMPANY, INC.

DG&G Company operates a cotton gin in Parma, Missouri. In the fall of 2005, DG&G received some 50,000 bales for eastern Missouri producers. When DG&G received the cotton from various producers for ginning, the producers retained title, using the cotton as collateral for Commodity Credit Corporation loans. DG&G dried and then re-moisturized the cotton during the ginning process, packaged the finished bales in polyethylene bags supplied by Federal Compress & Warehouse Company, and delivered the bales to Federal Compress.

Federal Compress employees testified that the cotton showed no damage when it arrived at their warehouses. It was "great-looking" and "pretty, white, [and] clean." In late December 2005, Federal Compress employees noticed mold, mildew, and hardened spots on a substantial number of bales. A cotton broker's employee inspected the bales and observed "obvious moisture and water."

Moisture testing revealed that DG&G-ginned bales had an average moisture content of 12.6 to 12.8%, well in excess of the industry standard. The Memphis Cotton Exchange's Trading Rules provide that "unmerchantable cotton" includes cotton "containing moisture in excess of 7.5%." DG&G acknowledged that the National Cotton Council of America recommends no more than 7.5% moisture. An expert testified that the damaged cotton was "unmerchantable" because, in his experience, a moisture level in excess of 9 to 10% renders cotton unmerchantable.

Michigan Millers insured DG&G with, among other things, a standard commercial general liability policy. When various parties filed lawsuits against the insured, DG&G, Michigan Millers defended under a reservation of rights. Michigan Millers then filed this lawsuit to obtain a declaration that it did not have a duty to defend or indemnify DG&G from the various claims for damage to the cotton because of the CGL policy's exclusion for "'[p]roperty damage' to . . . [p]ersonal property in the care, custody or control of the insured."

DG&G argues that the damage happened when the rot and mildew appeared at Federal's warehouse, not while the cotton was in DG&G's care, custody, and control. Michigan Millers argues that at least some property damage occurred at the DG&G's gin when DG&G added so much excess moisture that the cotton was "not merchantable" when it left the gin, so the exclusion is applicable.

Who wins and why?

1. ***DG&G wins against Michigan Millers, at least for now. DG&G gets a defense because the exclusion may not be applicable.***
2. ***DG&G wins against Michigan Millers because the damage happened at Federal's warehouse, not during the ginning. Michigan Millers has to defend and indemnify.***
3. ***Michigan Millers wins. It does not owe a defense or an indemnity. The damage happened during DG&G's ginning, not at Federal's warehouse.***
4. ***Michigan Millers wins. The claim is over cotton that DG&G had and it doesn't matter when the damage happened.***