AMERICAN COLLEGE OF COVERAGE COUNSEL

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Law Student Practical Skills Writing Competition on Insurance Law Problem

American College of Coverage Counsel ("ACCC")

The American College of Coverage Counsel, established in 2012, is comprised of preeminent coverage and extracontractual counsel in the United States and Canada, representing the interests of both insurers and policyholders. The College is focused on the creative, ethical and efficient adjudication of insurance coverage and extracontractual disputes, peer-provided scholarship, professional coordination and the improvement of the relationship between and among our diverse members. Through its Board of Regents and its working committees, the College engages in a wide variety of activities designed to promote those goals, in addition to improving the civility and the quality of the practice of insurance law.

The Competition Assignment

Prepare a memorandum, not to exceed 20 single-spaced pages, for your selected client setting forth a legal analysis of the claims and a practical strategy for resolving them. In preparing your analysis, please confine your analysis for the most part to the cases included in the attached Law Syllabus for this problem. You may cite to other cases but please do so sparingly and only where the facts or holdings seem particularly apt.

When and How to Submit

If you plan to participate, please notify us of your intention to do so by sending an email to carol@americancollegecoverage.org no later than April 24, 2020.

When your memorandum is complete, you should submit it electronically in a single file, in Word or PDF format to carol@americancollegecec.org. The first page of your submission (which does not count towards the 20-page limit) should contain a separate cover page which sets out the following information: your name, your mailing address, your email address, your phone number, the name of the law school you are attending, and your year (first, second, third, or other (with explanation if other)). No identifying information should be included on any other pages.

The deadline for submission is Thursday, April 30, 2020, at 5:00 pm Eastern Time.

Upon receipt, your personal information will be anonymized by the staff of the American College of Coverage Counsel. Your submission will then be reviewed by one or more fellows in the ACCC who are serving as judges for the competition and who, because of the anonymization, will not know your identity or any of the information provided about you.

The submissions will be evaluated based on the creativity of the legal arguments, the persuasiveness of the writing, and the quality of the writing (including citation form according to the Bluebook).

There will be three winners of the competition, with the following prizes:

- First Place: Cash prize of $2,000; an invitation to attend the ACCC Annual Meeting in Chicago on September 9-11, 2020, funded by a travel stipend from the ACCC, to meet and network with ACCC fellows (for information about the Annual Meeting, see www.americancollegecec.org); and a plaque acknowledging the achievement.

- Second Place: Cash prize of $1,500; an invitation to attend the ACCC Annual Meeting in Chicago on September 9-11, 2020, funded by a travel stipend from the ACCC, to meet and network with ACCC fellows; and a plaque acknowledging the achievement.

- Third Place: Cash prize of $1,000; an invitation to attend the ACCC Annual Meeting in Chicago on September 9-11, 2020, funded by a travel stipend from the ACCC, to meet and network with ACCC fellows; and a plaque acknowledging the achievement.

The winners of the competition will be notified no later than Friday, June 12, 2020.

Honor Code Requirements

You are free to discuss this project with anyone, and to consult any sources of information in doing your research. However, the submission is to be your own work, and should not be written, reviewed, edited or in any other way improved by anyone else. You are not to cite any case or secondary source other than the materials provided herewith.

The Case: Act VI of *Romeo and Juliet*: The Trials of Friar Lawrence

The tragic denouement of Shakespeare's *Romeo and Juliet* is well known. Desperate to avoid an arranged marriage to County Paris, Juliet persuades Friar Laurence to give her a sleeping draught that renders her unconscious and, to all appearances, dead. Romeo, hearing the news of his beloved's death, sneaks into the Capulet Crypt at night where he encounters Paris and stabs him to death. Discovering the "corpse" of Juliet, Romeo takes poison and kills himself. Juliet awakens

minutes later and, shocked by the death of Romeo, attempts suicide with his vial of poison but, finding it empty, takes his dagger and stabs herself, dying in his arms.

So ends Act V of *Romeo and Juliet.* However, recent Ecclesiastical court documents unearthed in the vaults of the Vatican reveal that Shakespeare began (but never completed) an Act VI. In Act VI, the reconciliation of the feuding Capulet and Montague families collapses under the pressure of litigation in the courts of Verona. The Duchy of Paris and Lord and Lady Capulet have sued the Montagues, claiming that their negligent supervision of Romeo contributed to the death of their children. Additionally, the Capulets have brought wrongful death and malpractice claims against Friar Laurence, alleging that his advice to Juliet failed to meet Fourteenth Century standards for post-marital counseling and led to Juliet's death.

The Verona Mutual Insurance Company has agreed to provide a defense to Lord and Lady Montague under their Palazzo Owners Policy but have done so under a reservation of rights in light of an exclusion for the intentional or criminal acts of "any insured." Verona Mutual also contends that the deaths of County Paris and Juliet are subject to a single "occurrence" limit.

The Superior Insurance Company of St. Benedict has denied coverage to Friar Laurence, contending that his advice to Juliet to take poison was not "professional services" within the scope of his Benedictine vows and was, in any event, subject to an exclusion in his professional liability policy for "bodily injury arising out of the use, sale, manufacture, delivery, transfer or possession by any person of a Poison or other Noxious Substance."

In light of your reputation as the foremost insurance coverage attorney in Quattrocento Verona, all of the parties have tentatively sought to engage you to advise them with respect to the prospect for pursuing or defending against these claims. Please choose a client and respond to the corresponding questions set forth below:

1. ***Capulet v. Montague*** **(choose Montague or Verona Mutual)**
   a. Does the Verona Mutual policy provide coverage for the Capulets' negligent supervision claims against the Montagues?
   b.. Do the deaths of County Paris and Juliet Capulet, which occurred a few minutes apart in the same general area constitute one or two "occurrences" in light of the fact that different instrumentalities were the immediate cause of the two deaths?
   c. How do you recommend that Lord and Lady Montague (or Verona Mutual if you have selected them) proceed to obtain the most favorable result?

2. ***Capulet v. Friar Laurence*** **(choose Friar Laurence or Superior Order)**

a. Did Friar Laurence's advice to Juliet to take a "sleeping draught" constitute the rendering of or failure to render "professional services" with the scope of his professional liability policy with the Superior Insurance Company of St. Benedict?

b. Did Juliet's use of a "sleeping draught" or Romeo's use of poison defeat any otherwise applicable E&O coverage in light of the policy's exclusion for bodily injury arising out of the "use or prescription of a Poison or other Noxious Substance"?

c. How do you recommend that Friar Laurence (or Superior Order if you have selected them) proceed to obtain the most favorable result?

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STIPULATED FACTS

In preparing your analysis, you should also consider the following stipulated facts:

1. Romeo and Juliet were 17 and 15 at the time of their deaths.

2. Romeo was a resident of his parents' household until he was banished from Verona a few days before the events in question.

3. Friar Laurence has confessed to authorities that the "sleeping potion" that he gave to Juliet contained nightshade (Atropa Belladonna), which the Verona Drug Administration has classified as a "controlled substance."

4. The insuring agreement for the Verona Mutual policy provides that:
   If a claim is made or suit is brought against an insured because of bodily injury or property damage caused by a covered occurrence, we will:
   a. Pay up to your limit of liability for damages for which an "insured" is found to be legally liable …
   b. Provide a defense at our expense even if the suit is false, groundless or fraudulent.

5. The term "occurrence" is defined as:
   an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

6. The Verona Mutual coverage is subject to numerous exclusions, including one stating that the policy does not apply to:
   bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which in fact are intended by an insured person. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

7. "Insured person" is defined in pertinent part as the named insured as well as residents of the named insured's household.

8. The Verona Mutual policy contains a "separation of insureds" clause requiring that the rights of each insured be considered separately.

9. The Verona Mutual's policy limits are $500,000 "each occurrence" for bodily injury and property damage claims and $ million in the aggregate.

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LAW SYLLABUS

I. *Capulet and Paris v. Montague* Issues

A. Is Negligent Supervision An "Occurrence"?

Until recently, most courts have declined to treat allegations of negligent hiring, training or supervision as a separate "occurrence." As a result, there was no coverage for such claims if the immediate/direct cause of injury was excluded. There has, however, been a recent trend towards allowing coverage.

1. Cases Finding Coverage

.*American Employers Ins. Co. v. Doe*, 165 F.3d 1209 (8th Cir. 1999)(Minnesota law) (negligence claims against employers are a separate causative occurrence and must be considered separately from the excluded conduct of employees).

Liberty Surplus Insurance Corporation, et al. v. Ledesma & Meyer Construction Company, Inc., 418 P.3d 400 (Cal. 2018)(finding coverage for negligent hiring of supervision of employee who intentionally assaulted claimant).

Mork Clinic v. Fireman's Fund Ins. Co., 575 N.W.2d 598 (Minn. App. 1998)(claims of negligent supervision against the insured medical clinic were covered despite intentional sexual assault by an employee physician)

Silverball Amusement Co. v. Utahl Home Fire Ins. Co., 842 F.Supp. 1151 (W.D. Ark. 1994), *aff'd per curiam*, 33 F.3d 1476 (8th Cir. 1994)(allegations that the insured failed to properly supervise an employee who sexually abused children were held to constitute an "occurrence").

USF&G v. Open Sesame Child Care Center, 819 F.Supp. 756 (N.D. Ill. 1993)(insurer must provide coverage for allegation that day care operator negligently hired employees who committed sexual assaults)

Westfield Co. v. Kette, 672 N.E.2d 166 (Ohio App. 1996)(negligent supervision claims against the wife of a child molester were covered under their homeowner's policy).

2. Cases Barring Coverage

Allstate Ins. Co. v. Steele, 74 F.3d 878 (8th Cir. 1996)(Minnesota law)(negligent supervision claims against parents "resulted from" their son's intentional sexual assault).

Century Sur. Co. v. Glen Willows, Inc., 924 F.Supp. 76 (S.D. Tex. 1996) (allegations that landlord was negligent in not providing better security to protect tenants failed to allege an "occurrence" since the plaintiffs would not have suffered any bodily injury but for the assailant's assault)

Continental Cas. Co. v. HSI Financial Services, Inc., 466 S.E.2d 4 (Ga. 1996)
Hagen v. 675 So.2d 963 (Fla. DCA5 1996).

Mt. Vernon Fire Ins. Co. v. Creative Housing Limited, 668 N.E.2d 404 (N.Y. 1996)(even though the insured's negligence in supervising an employee might have been a proximate cause of the plaintiff's injuries these allegations were "related to" the actual cause, which was the excluded assault and battery);

Winnacunnet Cooperative School District v. National Union Fire Ins. Co. of Pittsburgh, 84 F.3d 32 (1st Cir. 1996)(New Hampshire law).

B. Self-Defense Cases

1. Cases Finding Coverage

Automobile Ins. Co. of Hartford v. Cook, 6 N.Y.3d 702. 843 N.E.2d 1156 (2006)

2. Cases Barring Coverage

Delgado v. Interinsurance Exchange of the Automobile Club of Southern California, 47 Cal.4th 302, 97 Cal. Rptr.3d 298, 211 P.3d 1083 (2009)

Royal Ins. Co. v. Pinette, 765 A.2d 520 (Me. 2000),

C. Separation of Insureds Language

In recent years, many insurers have modified exclusions to apply to "any" insured. The literal effect of such exclusions is to preclude coverage to insureds who may be sued on other theories, including negligent supervision, so long as another insured did something that is subject to a policy exclusion. Other courts have found that this approach is unreasonable and in conflict with the policy's "separation of interests" that requires that the interests of each insured be considered separately.

1. Cases Avoiding "Any Insured" Exclusions

Hanover Ins. Co. v. Ngoclien Thi Crocker, 688 A.2d 928 (Me. 1997)

Property Casualty Company of MCA v. Conway, 666 A.2d 182 (N.J. App. Div. 1995)

Shamban v. Worcester Ins. Co., 710 N.E.2d 627, 630 (Mass. App. Ct. 1999)

Worcester Mut. Ins. Co. v. Marnell, 496 N.E.2d 158 (Mass. 1996)

2. Cases Enforcing "Any Insured Exclusions

Allstate Ins. Co. v. Stamp, 588 A.2d 363 (N.H. 1991)

Amick v. State Farm Fire and Cas. Co., 862 F.2d. 704, 706 (8th Cir. 1988) (Minnesota law)

Bryant v. Allstate Ins. Co., 592 F.Supp. 39, 41 (E.D. Ky. 1984)

Chacon v. American Family Mut. Ins. Co., 788 P.2d 748, 752 (Colo. 1990)

Interstate Fire & Cas. Co. v. Roman Catholic Diocese of Phoenix, 761 F.3d 953 (9th Cir. 2014)

Johnson v. Allstate Ins. Co., 687 A.2d 642, 644-645 (Me. 1997)

McAllister v. Millville Mutual Ins. Co., 640 A.2d. 1283, 1289 (Pa. Super. 1984)

Spezialetti v. Pacific Employers Ins. Co., 759 F.2d. 1139, 1141-42 (3rd Cir. 1985)

Travelers Ins. Co. v. Blanchard, 431, So.2d. 913, 915 (La. Ct. App. 1983

Woodhouse v. Farmers Union Mutual Ins. Co., 785 P.2d. 192, 194 (Mont. 1990)

D. Number of "Occurrences"

Courts are divided with respect to whether separate injuries should each be treated as a separate "occurrence" or not. While the modern view is to apply a "cause" test, courts are split as to whether the focus of this "cause" test should be the cause of the claimants' injuries or the cause of the insured's liability.

The most common meaning of "cause" is a physical one, that is to say that event that is the immediate cause of the plaintiff's injuries. For instance, the Fifth Circuit ruled in *H.E. Butt Grocery Co. v. National Union Fire Ins. Co. of Pittsburgh*, 150 F.3d 526 (5th Cir.

1998) that two separate sexual assaults by a store employee were separate "occurrences" for the purposes of applying a self-insured retention. Even though the claims were based on the insured's negligent failure to supervise the employee, the court declared that the "immediate cause" of the underlying injuries were the intervening intentional tort of the employee and therefore that each separate assault was a separate "occurrence."

In recent years, however, courts have increasingly defined "cause" as the act or omission of the insured that forms the basis for the liability claims against it. *See* Restatement of Law, Liability Insurance, Section 38.

1. Assault Cases Finding One "Occurrence"

Travelers Ind. Co. v. Olive's Sporting Goods, 297 Ark. 516, 764 S.W.2d 596 (1989)(claims against sporting goods store by individuals who were injured after a person to whom the store had sold a gun went on a shooting spree arose out of the same "occurrence," which is to say the insured's sale of the gun).

RLI Ins. Co. v. Simon's Rock Early College, 54 Mass. App. Ct. 286 (2002(the "cause" of injuries to student who were shot by a fellow student was the insured College's failure to keep Wayne Lo from using his gun to shoot them).

Bomba v. State Farm Fire & Cas. Co., A-5972-03T1 (N.J. App. August 25, 2002) (as the claims against the insured were based upon their negligence in allowing their son access to gun, the underlying injuries all shared the same "cause").

2. Assault Cases Finding Multiple "Occurrences"

In two cases, courts have focused on the nature of the insured's liability in finding that multiple shooting incidents all arose out of the same "occurrence."

American Ind. Co. v. McQuaig, 435 So.2d 414 (Fla. App. 1983)(in a case where a homeowner engaged in a shoot-out with the police, injuring three officers with successive shotgun blast, each shotgun blast was a separate "occurrence").

Koikos v. Travelers Insurance Company, 849 So.2d 263 (Fla. 2003)(allegations that a restaurateur was negligent in failing to prevent an incident in which an aggrieved patron successively shot several patrons been held to allege multiple "occurrences").
State Farm Lloyds, Inc. v. Williams, 916 S.W. 2nd 781 (Tex. App. - Dallas, 1997)(an incident in which the plaintiff separately shot and killed various family members was held to involve multiple "occurrences").

II. *Capulet v. Friar Lawrence* Issues

A. "Professional Services" Coverage

For whatever reason, professional liability insurers have rarely included a definition of "professional services" in their policies. In the absence of an express definition, courts have generally interpreted this coverage as only extending to claims involving the particular training or expertise of a given profession. St. Paul Mercury Ins. Co. v. Chilton-Shelby Mental Health Center, 595 So.2d 1375, 1377 (Ala. 1992)("professional services" claims require evidence that the insured had failed to act upon the exercise of some "learned" profession) and Pekin Ins. Co. v. L.J. Shaw and Company, 291 Ill. App. 3rd 888, 895 (1997)("Professional services" requires that liability be imposed based on acts taken in the course of the insured's professional training, skill, experience or knowledge). In short, professional liability insurance does not apply to all claims involving professionals, only to acts involving the particular knowledge or training of a particular profession.

The following cases have considered the applicability of professional liability insurance to claims against priests and other clergymen:

In Re Diocese of Duluth, Minnesota, No. 15-0972 (D. Minn. Bkrptcy March 2, 2017)

Jane v The Ordinary Mut. Ins. Co., 32 Cal. App. 4th 643 (1995)

Maryland Cas Co v. Vonnahmen, 102 F.3d 277 (7th Cir. 1997)

Mork Clinic v. Firemen's Ins. Co. 575 N.W.2d 598 (Minn. App. Ct. 1998)

B. "Controlled Substances" Exclusion

There are relatively few cases interpreting "controlled substances" exclusions.

1. Cases Upholding Exclusion

Where a teenager overdosed on Methadone that he stole from his friend's mother while watching video games at her house, the Indiana Court of Appeals ruled in Forman v. Penn, No. 33A01-1007-CT-343 (Ind. App. Mar. 14, 2011) that allegations that the insured negligently exercised supervision and control over her drugs and failed to care for him after discovering that he could not be awakened were subject to an exclusion in Western Reserve's homeowner's policy for claims "arising out of the use, sale, manufacture, delivery, transfer or possession by any person of a Controlled Substance."

2. *Cases Avoiding Exclusion*

The Massachusetts Appeals Court ruled in MPIUA v. Gallagher, 75 Mass. App. Ct. 58 (2009) that an exclusion in a homeowner's policy for injuries "arising out of the use, sale, manufacture, delivery, transfer or possession by any person of a Controlled Substance. . ." precluded a wrongful death action against a homeowner who was alleged to have negligently left prescription drugs in an area where the decedent could access them despite knowing of his fragile emotional state. Despite the fact that the Propoxyphene had been legitimately obtained by the insured pursuant to a prescription, the court held that the exclusion's exception for "the legitimate use of prescription drugs by a person following the orders of a licensed physician" did not apply since it was the decedent's own use of the drug that resulted in his suicide and any causal contribution by the insured was decidedly remote.

In Flomerfelt v. Cardiello, 202 N.J. 432 (N.J. 2010), the New Jersey Supreme Court held that an exclusion for claims "arising out of the use…transfer or possession" of controlled substances did not entirely eliminate coverage for a lawsuit brought by an individual who claimed to have suffered injuries as the result of ingesting alcohol and drugs at a party at the insured's house. Reversing a contrary opinion of the appellate division, the Supreme Court declared that a finder of fact could conclude that alcohol ingestion was the cause of the injuries without respect to the drugs that the plaintiff had also ingested and that, therefore, the insurer had at least a duty to defend.

Even though a homeowners policy contained an exclusion for bodily injury arising out of the use of controlled substances except where they involved the legitimate use of prescription drugs, the Appellate Court ruled in *Skolnik v. Allied Property & Cas. Ins. Co.,* 50 N.E.3d 1143 (Ill App 2016) that the insurer was obliged to defend a wrongful death lawsuit filed by the girlfriend of a methadone patient who died as a result of a drug overdose at the insured's home. Although the court ruled that the drug use was excluded from coverage, it found that the exclusion did not apply to allegations that the insured had been negligent in waiting several hours to call an ambulance or provide care for the decedent.

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