AMERICAN COLLEGE OF COVERAGE COUNSEL

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2023 Law Student Practical Skills Writing Competition on Insurance Law Problem

American College of Coverage Counsel ("ACCC")

The American College of Coverage Counsel (ACCC), established in 2012, is the preeminent association of U.S., Canadian, and Bermudan lawyers who represent the interests of insurers and policyholders. The ACCC's mission is to advance the creative, ethical, and efficient resolution of insurance coverage and extracontractual disputes; to enhance the civility and quality of the practice of insurance law; to provide peer-reviewed scholarship; and to improve the relationships among the members of our profession.

The Competition Assignment

The submission will be in the form of a double-spaced memorandum of points and authorities in support of or in opposition to a motion for summary judgment totaling no more than 3,000 words. See more details below.

When and How to Submit Brief

If you plan to participate, please notify us of your intention to do so by completing the **ACCC 2023 Student Writing Competition Intent to Participate Form** online by no later than February 10, 2023. Click here to complete the form.

When your memorandum is complete, you should submit it electronically as a single document in PDF format to info@americancollegecoverage.org. The first page of your submission (does not count towards the 20-page limit) should contain a separate cover page with the following information: Your name(s), mailing address(es), school and personal email addresses, cell phone number(s), name of the law school you are attending, and your year (1st, 2nd, 3rd, or other (with an explanation if other). No identifying information should be included on any other pages.

The deadline for submission is Friday, March 10, 2023, at 12:00 noon Eastern Time.

Upon receipt, your personal information will be redacted by American College of Coverage Counsel staff. Your brief will then be reviewed by Fellows of the ACCC who serve as judges for the competition and who, because of the redaction, will not know your identity or any information provided about you.

All submissions will be evaluated based on quality of legal arguments, persuasiveness, and quality of writing (including citation form according to the Bluebook). You must use the policy and case law accompanying this assignment.

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 May 10-12, 2023, funded by a travel stipend from the ACCC, to meet and network with ACCC fellows (for information about the Annual Meeting, see www.americancollegecoverage.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 May 10-12, 2023, 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 May 10-12, 2023, funded by a travel stipend from the ACCC, to meet and network with ACCC fellows; and a plaque acknowledging the achievement.

Winners of the competition will be notified no later than Friday, March 31, 2023.

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 brief 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 Facts

1. Vibrant Insurance Company (a Pennsylvanian corporation with its principal place of business in Philadelphia, Pa.) issued a standard Comprehensive General Liability Policy to Blue Star Co. Key language is quoted below.

2. Suit was brought in New Jersey against Blue Star Co. ("Blue Star")(a Texas corporation with its principal place of business in Dallas, Texas) by Blu Star Co. ("Blu")(a New Jersey corporation) for trademark infringement, including claims of infringement of trade slogans. An item you should assume to be potentially covered by the policy coverage for "advertising liability."

3. Blue Star hired its own local counsel (required by the jurisdiction) and additional intellectual property counsel to answer the suit and file a mirror-image counterclaim for infringement

against Blu. The suit was a "bet the company" case for both litigants. In other words, the loser might be prevented from doing business.

4. After answering and filing the counterclaim, Blue Star realized it might have coverage under the Vibrant policy, which was issued in Texas by an agent in Texas. Notice was given three months after suit was filed, but nothing significant in the defense occurred during that time.

5. Vibrant hired outside counsel to analyze the coverage and defense obligations. Counsel concluded there was a duty to defend and that a reservation of rights, noting potential coverage issues should be sent to the insured. Counsel also recognized that the insured might be entitled to "independent counsel" to defend the case.

6. Vibrant did not select and hire counsel to defend the case. Normally, Vibrant would pay counsel it selected directly.

7. Two years into the litigation, Vibrant finally sent a reservation of rights letter. One of the defenses reserved dealt with whether the conduct was malicious or not, raising a potential disqualifying conflict of interest. In the letter, Vibrant offered to defend through independent counsel. However, Vibrant conditioned its offer by (a) refusing to pay anything for attorney's fees associated with the counterclaim, and (b) refusing to pay for any counsel in addition to the local counsel already hired.

8. The insured Blue Star continued to defend through its previously selected firms. It submitted bills to Vibrant. Vibrant insisted it was entitled to have the fee bills audited by an independent auditing service for reasonableness. Neither the auditing service nor the insurance company used licensed attorneys with intellectual property litigation experience to review the bills. Vibrant paid only 10% of the overall fees incurred by the insured in the case prior to suit being filed against Vibrant.

9. The underlying suit was tried to a jury and resolved in favor of Blue Star.

10. Blue Star has now filed suit against Vibrant in federal court to recover the attorneys fees incurred in the Blue vs. Blu litigation and for bad faith, violations of the Texas Insurance Code, sections 541.060 and 542 (prompt payment of claims).

<u>Stipulated Insurance Policy Language</u>

1. The insuring agreement to the policy states:

   We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" and "advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

However, we will have no duty to defend the insured against any "suit" seeking damages for "personal injury" and "advertising injury" to which this insurance does not apply.

2. The Supplementary Payments section states:

   1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

      a. All expenses we incur.

      . . . .

      d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

Details of Competition Submission

Both Blue Star and Vibrant want to file motions for partial summary judgment.

Blue Star wishes to have the court rule as a matter of law:

a. Vibrant breached its duty to defend by failing to timely pay defense costs, including

   (1) failing to pay defense costs directly to the firm/s as they were incurred and

   (2) failing to clearly communicate in a timely fashion whether they intended to defend through carrier selected counsel or independent counsel.

b. Because Vibrant breached the duty to defend, Blue Star claims that under better reasoned authority it is entitled to recover attorneys fees actually paid without having to show that the costs were reasonable.

c. The costs of prosecuting the counterclaim where that counterclaim is a mirror image factually and legally of the defense to the Blue Star allegations. In other words, establishing that Blue Star first used the slogan, and identifying in which states it was used, was (a) a defense to the claims of Blu and (b) established Blue Star's right to recover damages.

Vibrant wants to file a motion for partial summary judgment to have the court rule as a matter of law:

a. Vibrant did not breach the duty to defend because it acquiesced in Blue Star's selection of counsel and paid what it determined were reasonable costs of defense.

b. Vibrant is only required to pay reasonable costs of defense, not costs of prosecution of affirmative claims.

c. Blue Star is required to establish the reasonableness of the attorney's fees for which it seeks recovery, and Vibrant can contest reasonableness.

The contestant may pick one of two scenarios:

1. Represent Blue Star in preparing a motion for partial summary judgment on the grounds noted above.

2. Represent Vibrant in preparing a motion for partial summary judgment on the grounds noted above.

As stated above, submission must be in the form of a double-spaced memorandum of points and authorities in support of the motion for partial summary judgment, including addressing anticipated opposition from the other party, totaling no more than 3,000 words. The memorandum should identify your position as to each issue, and the insurance policy provisions and case and/or statutory authorities upon which you rely.

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