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## Avoiding the Casserole Theory of Insurance Coverage

By Andrew B. Downs

A casserole is a dish where a variety of ingredients are combined and cooked together. Wikipedia tells us casseroles are a "staple at potlucks and family gatherings." Over the next few weeks of the holiday season, you may find yourself preparing or eating one.

What does this have to do with insurance? And why is a coverage lawyer with mediocre barbecue skills talking about cooking? Much of the success of a casserole is determined by combining the *right* ingredients. Policyholders, insurers and courts all risk falling into the trap of combining contractual provisions that don't belong together in analyzing coverage under insurance policies. Definitions in other contracts don't govern the interpretation of the insurance policy unless the policy says so.

The dangers of the casserole theory are illustrated by a recent coverage case from the federal Fourth Circuit Court of Appeals, responsible for federal appeals from Maryland to the Carolinas. That case, *Interstate Fire and Cas. Company v. Dimensions Assurance, Ltd.*, 2016 WL 7099822 (4th Cir. 2016), involved coverage for a nurse under a hospital's professional liability policy. The nurse was a temp. The nurse was supplied by an agency under a contract between the agency and the hospital that stated the nurses from the agency were employees of the agency and not the hospital. The hospital, however, possessed all the rights of control which under the common law definition of "employee" would make the nurse an employee of the hospital as well as the agency.

The nurse, the hospital, and various other medical professionals were sued for medical malpractice. The hospital's professional liability insurer refused to defend or indemnify the nurse. The agency's insurer did defend and indemnify her and then sought to recover from the hospital's insurer. The appellate court found the nurse did qualify as a "protected person" under the hospital's policy with the hospital's policy being primary. In doing so, the Fourth Circuit avoided falling into the casserole theory trap that the hospital's insurer advocated – that the agency contract should be used to interpret and limit the coverage provided by the policy issued to the hospital and its employees.

The applicable section of the hospital's policy defined protected persons to include employees but did not define employees. After concluding the nurse satisfied the common law control standard for employee status, the court rejected the hospital's insurer's effort to apply the different employee definition in the agency contract. The court held the agency contract, to which the nurse and the insurers were not parties, could not determine the interpretation and scope of the entirely separate insurance contract between the hospital and its insurer.

*Interstate* isn't a controlling case in Washington, Oregon or California, but it serves as a reminder that in analyzing coverage, each contract stands on its own. If one contract incorporates the provisions of another, then both need to be considered. If the liability created or the nature of the policyholder's interest is governed by another contract, it too needs to be considered. But, coverage under an insurance policy depends on the terms of the policy – unless the policy language authorizes it, the policyholder cannot, by its contracts with third parties, modify the coverage provided to other insureds.

Back to the casserole – when is a separate contract the right ingredient in coverage analysis?

- When the separate contract creates a right on the part of the policyholder which is an essential element of the policyholder's claim to coverage. For example, a contract

conveying assets that operates to create an insurable interest. Another example is an agreement to name a party to a contract with the policyholder as an additional insured under the policy.

- When that separate contract bears on the nature or extent of the policyholder's liability to a claimant.
- When the policy expressly incorporates the separate contract.

But, simply because the separate contract is part of the big picture story surrounding the claim does not mean it is relevant to the coverage determination. Insurance coverage ultimately turns on the application of the policy language to the facts giving rise to the claim. Just because some other contract is part of the casserole, does not mean it is relevant to the coverage determination.

Happy Holidays!