

Short Circuit 251

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SPEAKERS

Anthony Sanders, IJers, Dan Knepper



Anthony Sanders 00:24

They shouldn't call it insurance. but "in case stuff." I give a company money in case stuff happens. If it doesn't, shouldn't I get it back? If I'd known you would keep the money, I would have got in an accident. If you're taking my money, at least spend it on some poor sick people. Don't buy a Mercedes Benz with it and park in front of Brooklyn Hospital where broke people walk by. Well that, heavily edited for family friendly audiences, was Chris Rock in the classic 2001 movie Down to Earth, where at one point one of the characters Chris Rock plays in the movie is talking about insurance. Now, there's some maybe economics that isn't working quite right in how he's describing insurance. And we're going to learn a little bit about that today and about the intersection of insurance and civil rights law. Stay with us, I promise, it's going to be interesting. And we have a special guest here, his first time on Short Circuit, one of my colleagues who knows all about the intersection of insurance and civil rights law, maybe not so much about parking a Mercedes Benz in front of Brooklyn Hospital. But we can get into that. I am Anthony Sanders, your host on Short Circuit, your podcast on the federal courts of appeals. We're recording this on Wednesday, December 21, 2022. Now, this time of year, every year at IJ, is when we accept applications for our summer fellowships, our Dave Kennedy summer fellows. If you are a 1L or a 2L in law school, you can apply to work here in the summer and learn all kinds of things about litigating for liberty. We have rolling applications although we accept them until January 27. So if you're interested, I would encourage you to apply as soon as you can. We're going to put a link up in the show notes for how to apply, but you can also find it on our webpage at ij.org. So encourage you to do that. I was a clerk when I was in law school. And it eventually led to where I am today. So I encourage you to apply if you're interested in what we do. Also, stick around to the end. You may have seen separately on our feed, but we have made a discovery here at Short Circuit. And that's that the 12 days of Christmas correspond to the 12 circuits that we cover. We don't cover the Federal Circuit, because the cases never really correspond to what we talk about. But we do cover all numbered 11 circuits and the DC Circuit and so that congruence of 12 and 12 has led us to write a parody song on the 12 days of Christmas that I hope you enjoy. And that will be at the end of our podcast. But before that much more insurable and interesting things: We have with us today Dan Knepper. So Dan is our general counsel here at IJ. He also wears a few other hats and titles. He knows anything about everything about the business of law, and a few other business questions as

well. So he and I have been talking for a while about coming on Short Circuit with something within his expertise. And then along comes this insurance case from the Sixth Circuit that also has to do with civil rights law. And then I will be talking about another case from the 11th Circuit in a little bit. So, Dan, welcome to Short Circuit.

D Dan Knepper 04:18

Thanks for having me, Anthony. And I want to start off to say, I believe that you were a summer clerk at IJ the year before I was a summer clerk at IJ.

A Anthony Sanders 04:29

That's right. I was 2003.

D Dan Knepper 04:31

And I was 2004.

A Anthony Sanders 04:33

Yes, yeah, down there on Pennsylvania Avenue. A much different place than today -- a much smaller place, but it was still quite a good time litigating for liberty. So Dan, what do you have for liberty in the hopper for us today?

D Dan Knepper 04:50

Anthony, there's a case out of the Sixth Circuit Court of Appeals, that's Safety Specialty Insurance Company versus Genesee County Board of Commissioners and then a couple of other defendants: Thomas A. Fox and Tammy Puchlak. Not sure I've got that name pronounced correctly, but it's that's what it looks like on paper.

A Anthony Sanders 05:09

We'll let it go.

D Dan Knepper 05:10

And when I first read it, I was like this just isn't that interesting. This is pretty straightforward. There's no coverage here. And then I started to kind of peel back the layers on this. And this was a pretty fascinating case, the way that it came together. And so while this case was decided in November, just a couple of weeks ago and I think it was filed in early 2020. If it's all right, I want to start a little bit earlier than that. And because a lot of this relates back to a case that was brought by our good friends at PLF, called *Rafaeli v. Oakland*, right? And so at root

what's happening in our Safety Specialty Insurance case is the county involved, Genesee, was sued as part of a class action lawsuit that sought to have monies kept by the county, related to tax sales on foreclosed homes, returned in some fashion, damages sent back to those homeowners. And the county sought to have the coverage for the lawsuit including the cost of the defense covered by their insurance company. The insurance company said no. This became an issue when in the PLF case, Rafaeli, the client there, somebody who was a victim of this regime, he owed \$8 in back taxes on his property taxes and the county of Oakland foreclosed on the home, sold the home for \$24,500, and then kept the \$24,492 difference. And see, well, that seems unfair. That seems wrong.

A Anthony Sanders 06:56
Just a little.

D Dan Knepper 06:58
Just a little. But this scheme, this regime was blessed by Michigan statute, and it's kind of how all the counties there operated. And so

A Anthony Sanders 07:09
And I said I should add -- just to break in Dan -- long time Short Circuit listeners may remember that we actually talked about this case and had the lead attorney for the case, Christina Martin, on July 30, 2020. It's Short Circuit 142. So we'll put a link up in the show notes to it. But that case, when it came out, we we talked a bit about the holding and this \$8 versus thousands of dollars discrepancy.

D Dan Knepper 07:38
And it was great timing on your part, Anthony, cuz that's right when this case was decided. And ...

A Anthony Sanders 07:41
We did it, I should say, right after the opinion came out.

D Dan Knepper 07:52
The Michigan Supreme Court had a couple different options, but they ruled that this type of you know, keeping the equity, keeping the excess in the amount of the property taxes was a taking. And one of the concurrences said well, maybe that should be looked at as kind of seizing the homeowners' equity and maybe not a constitutional issue. But in any case, the setup of holding that extra -- in this case \$24,000 -- was held to be unconstitutional. Now, I want to focus on a couple of key dates because I think it really helps put this Sixth Circuit decision kind of into the

right context. Until 2020, this was just practice. Until July 20, this is just practice in Michigan. It's what they did. They foreclosed on homes because of tax and kept the difference. In 2018, though, is when the Michigan Supreme Court granted the application to review this practice, right? That's when they said Alright, we're gonna take this, we're going to decide whether or not this is a constitutional practice. And then between then and in 2020, are when the class action lawsuits get filed. Right? And what you saw was it was several different class actions that said with their lead plaintiffs that said, hey, counties that foreclosed on our houses and kept the surplus, give us that money back. And just to drive this point home and the underlying district court case, filed as part of their counterclaim, Genesee County provided the letters that they sent to the insurance company putting them on notice that it was time to defend the suit. And one of them even said -- I thought this was great -- a number of other counties have been sued in identical lawsuits. This one attorney is representing several of them, we'd like to use him here. The machine had started to roll well before the decision had come down. And then in August of 2020, a second letter went from Genesee County to the insurance companies that said, so about that Rafaeli decision. Here it is. And just a few months later, our insurance company responds and says, we're going to reserve our rights here. Because we're not covering this, right? We're gonna deny coverage. And it listed its various reasons why not. Now there were two policies in place that the Genesee County sought to get coverage under: one was commercial general liability, and the other was a public officials and employment practices. I thought it'd be helpful to talk a little bit about what the district court did to help kind of frame how the Sixth Circuit eventually disposed of this.

A

Anthony Sanders 11:01

That'd be great, Dan, and maybe for for some listeners who aren't super familiar with commercial insurance practice and put putting your insurer on notice, give a little bit of background about like how that generally goes, if you're like a company, or trustee or a county or something like that.

D

Dan Knepper 11:21

Wow. Anthony, your question is timely and topical. In insurance policies will have an obligation to provide notice to the insurer in the event that you think a claim is likely to happen or will happen and you want them to cover something. And the notice provision is critical because the insurance company gets to decide how it wants to involve itself consistent with the overall terms of the policy. The reason it's timely and topical, Anthony, is because people who follow the news right now may have noticed that there's a pair of pretty high profile affirmative action cases in front of the Supreme Court, involving North Carolina and Harvard. And the Harvard forgot to provide notice to its insurance company. And so it's in a dispute with its insurance company for legal fees that are over \$20 million. And at least according to the press or the news reports around it, Harvard is arguing you had to know about it because it was in the news. Right? And I'm not sure Harvard is going to carry the day on that one. And so failure for them to provide notice could end up costing university like tens of millions of dollars. Right? So stay tuned.

A

Anthony Sanders 12:39

When I was a litigator for trust funds employee benefit plans, the moment there was any

whisper of some kind of lawsuit where your trustees might be sued, you got that letter off to the insurance company. You didn't wait for the lawsuit. You didn't wait let alone after that. You got that notice out.

D Dan Knepper 12:58

Absolutely. Absolutely. And it's one of those things where there are good reasons why it has to happen. It's also -- my tax law professor covered insurance in law school -- and he often reminded us that insurance companies don't make money by paying claims. Right?

A Anthony Sanders 13:18

That's what Chris Rock says.

D Dan Knepper 13:19

That's right. That's right. And so you want to follow your insurance policy to the letter -- all of a sudden you're in a fight for coverage that could have easily been avoided if you had provided notice, as you were supposed to under the policy. Right. So the fight between the county and the insurance company wasn't about who was insured. That was obvious, right? The county had the insurance policies. It was whether there was any -- there are two real fronts on this one. It was whether there was any kind of the wrongful act under which it should be insured. And then it was whether there were any exclusions that applied. Now commercial general liability, I have always understood it to be slip and fall insurance, right? It's the type of thing where there's some type of physical act or something along those lines. And honestly, neither the district court, nor the court of appeals is going to end up spending a whole lot of time on the commercial general liability. It just doesn't have a real say in how this comes out. The public officials and employment practices policy, though, it covered underlying lawsuits. And so you had a much stronger argument in my view from the county, that coverage was appropriate here. However, there were a couple of exclusions that ended up being very relevant. And both sides here are throwing five, ten, fifteen arguments why insurance should apply or not apply. But really there were two that jumped out. One, is there was an exclusion for a violation of property rights. And it explicitly caught out things involving eminent domain, which were front and center in the underlying Michigan Supreme Court decision. And then a second exclusion that related to tax collection, right? So things that related to the counties' way they collect taxes or handle their taxes were excluded from the policies coverage, right? Also the insurance companies, they ended up seeking declaratory judgment against both the county and against the lead plaintiffs, the named plaintiffs in the underlying class action lawsuits. And at first when I read this, I thought maybe they had to do this because they wanted to make sure they didn't get dismissed for failing to name parties. But the real reason the insurance companies did this was because they were hoping to stop the argument here. Right? If they got a declaratory judgment against the plaintiffs, then they wouldn't necessarily be fighting this fight over and over again, they would be able to say, You know what, this has been decided it's over, it's done. And now we can walk away knowing we don't have to have this fight over and over again. So now, just to recap where we are, we're at the end of 2020. These counties in Michigan, six months prior, had been doing something they'd been doing for a long time. And six months later, Genesee County now knows that they are performing unconstitutional takings. They were

being sued under class actions. And the insurance companies were fighting their coverage. I can't imagine that that was a fun holiday party at Genesee County that year. The insurance company seeks declaratory judgment. The named plaintiffs response was kind of hilarious. It was a page and a half that could fairly be summarized as: "What? Why are we here?" And the county comes back and says, no, no, no, no, no, no, no, no, no. First of all, there's two things going on here. No exclusion applies. And even if there is an exclusion that might apply, your obligation to defend us is far broader, right? Your obligation is to pay out any claims. Step up and do what you're supposed to do. You can kind of understand where the counties are coming from. They bought an insurance policy that in their minds, this is what it's there for. Right? Yeah, we followed all -- we provided notice -- now step up and do what you're supposed to do. And in February of 2022, the district court ended up ruling and it granted the insurance company's motion versus the counties. We'll talk about what that means. They denied the insurance company versus our class representatives. Apparently, the argument of "What?" was very persuasive. And they denied the county's claims that coverage is appropriate. There were two things that happened with the named plaintiffs that I thought were convincing in the Sixth Circuit ended up agreeing with it. The first is that those plaintiffs, the named plaintiffs, weren't residents of this county, like there was there was a sufficient amount of distance between those plaintiffs and the policy that the court had a tough time wrapping them into this dispute. Part of the problem here is that this case doesn't come up in the ordinary insurance kind of kind of setup, where the county is seeking coverage because of a bad act that perhaps the named plaintiff had to have performed where. This is the county did it all, like these guys just lost their houses. Right. They lost their houses and they lost a surplus to the county's tax collection scheme. And so the court had a really tough time trying to find the adequate, in its view, we'll call it nexus even though that's not the term of art, between the named plaintiffs in the case such that they agreed with the class, the named class plaintiffs, that they didn't belong in the lawsuit. As for, as mentioned above, they spent about a hot minute on saying Commercial General Liability doesn't apply. And then when it gets to the the other policy, it says, you know, yeah, this is supposed to cover lawsuits. It seems like there might be some application here. But boy, this exclusion around tax collection and eminent domain, it really seems to fall on all fours. And the county tried as much as it could to say, no, no, no, no, no, no, no. Tax question is the process of collecting taxes. Like what we're talking about here occurs down the chain, right? It occurs down the line and it is not really related to tax collection at all, to which our court said quote, unquote, that's unconvincing. And eventually decided with the insurance company. So everybody appeals to the Sixth Circuit at that point. And again, when I first read this, I was surprised that the insurance companies were really doubling down trying to pull in these these named plaintiffs. I understood it to really be about efficiency and hoping to stop the fight, to stop future fights down the line. It was pretty clear why the county appealed. They got their lunch handed to them. And the Sixth Circuit, in a relatively brief opinion, affirmed it. They say, we reviewed it de novo. Yeah, those named plaintiffs don't don't even live in the counties that are being sued. There's no real connection to it in the lawsuit; we're letting them go. Insurance companies are gonna have to fight this one another time. However, insurance companies, you're going to win. And they didn't even bother looking at the eminent domain exclusion. They focused only on, they say, all it takes is one exclusion. And the one exclusion that's relevant here is there's the exclusion on tax collection, and try as the counties might provide all kinds of different reasons why, you know, look, there's many different claims out there, they should at least defend us. The Sixth Circuit said, every single thing in this lawsuit turns on the fact that you were seizing people's homes, you were selling them, and you were keeping the proceeds. That the only act in question here. That one exclusion is sufficient to cover everything here. And the insurance companies have no obligation to defend you or to pay or to cover these claims. So stepping back for just a minute, I really, you know, enjoyed watching kind of the interplay between the public interest litigation that needed to happen to

kind of uncover what, in my mind, runs counter to, you know, it is just textbook that if someone happens to foreclose on one of your debts and there's excess, there's more money than is needed to pay that debt, that money goes back to goes back to you. And to see the public interest lawsuit that forced Michigan and brought it to the Michigan Supreme Court to say yeah, no, that should apply here, too. It's a taking, it's equity, however you want to fashion it, like, the county shouldn't get to hang on to \$24,492 extra for an \$8 tax bill. And as that process was unfolding, and then you can understand when the Michigan Supreme Court said, yeah, we're gonna hear this case. Like, I'm tickled that class action counsel said, Let's go fix this for all the people who have been wronged and maybe make a little money ourselves. But watching kind of that dynamic unfold over time through the lens of this insurance case, I thought was pretty fascinating. And not necessarily obvious from the from the six or eight or 10 pages or whatever in the decision.

A

Anthony Sanders 23:13

Yeah. And we've seen..so we had, in addition to that Short Circuit I mentioned earlier about the underlying Michigan Supreme Court case, there's been litigation elsewhere in the Sixth Circuit, including in Ohio, because Ohio, your home state, Dan, Ohio municipalities and counties are guilty of this as well. And we did one case that was at the preliminary stage, but the Sixth Circuit sent it back down to continue on a similar question. And there's been other cases about Michigan counties doing this. So it's definitely a big and ongoing issue. But there is a huge amount of fuel added to, you know, if not all the fuel you need, in Michigan at least on this question from the Michigan Supreme Court. And so now we're watching the fallout from that. And it's interesting that it's not just takings litigation, but it's insurance litigation. And, you know, I'm sure there's other aspects of this controversy that are radiating outwards.

D

Dan Knepper 24:22

Yeah. I think that's right. And, you know, I wonder what the room was like when this policy got renewed in whatever, it was 2018. You know, and you kind of walk through the policy, you look at the exclusions and you get to like the tax collection or the eminent domain, you know, exclusions and people are barely paying attention their eyes are glazing over because it's an insurance policy and then all of a sudden, they become hugely relevant provisions that are going to determine, you know, determine whether or not the county is on the hook or if the insurance compan is on the hook for these those types of things, to watch how those provisions change in import over time.

A

Anthony Sanders 25:10

So one question on that is, the little I know -- a little bit more than the just these cases we're talking about -- is that exclusions for property, basically, property rights litigation, and eminent domain, especially, I think, is kind of standard for an insurance policy for a municipality or a county. Why is that? Is it just because it can be such a big amount of money? Or is that something they're not worried about as much when it comes to land? Like, why would you exclude that and of course, you don't exclude like the lawsuit against the cop for police brutality, the underlying cases, which we talk about here all the time, where those are generally covered by these policies?

D

Dan Knepper 25:55

So it's a great question. And I don't have an answer to this specific question. You know, I have chatted with insurance brokers, who have explained the process and such. At one point in time, the insurance policy said, we're going to cover these losses. And then over time, lawsuits happen, things happen. And insurance companies start to whittle it away, right? And so we're going to cover these losses except for environmental, we're going to cover these losses except for eminent domain, we're going to cover these losses except for whatever. And you can go and buy, sometimes, you can go buy extra, they're more expensive, you can go and buy that coverage if you need it or not. But those exclusions kind of evolve based off of circumstances over time experienced by the insurance company. But I don't know if that's what happened specifically with this exclusion or not.

A

Anthony Sanders 26:53

It's, I mean, I'm just speculating here, the kind of claim you get in property rights is something where the city has time to think about and know what it's doing, perhaps, a distinction we've talked about here before, whereas, you know, that what your police officers can do is a little harder to control sometimes. And so that's something you're more likely to get insurance for, I guess. Well, speaking of what police officers do, we're going to now turn to a another insurance case. This is a very different kind of insurance case. But it does involve, as I said, the police and also exclusions. So in the 11th Circuit, we have the case North American Company for Life and Health Insurance versus Caldwell. Actually the underlying facts are very sad. And so we'll just talk about those briefly here. So there was a fellow, Mr. Caldwell, who bought a couple insurance policy or he and his family bought a couple insurance policy. So one he bought in November, the policy started on November 9, 2018. And then there was another policy bought in the summer of 2020. Now they both had a million dollar death benefit if you die, which is what a life insurance policy is. So that would go to the beneficiaries, his family. But then it has an exclusion, which is pretty common in life insurance policies, for suicide. So it says suicide, if the insured commits suicide while sane or insane, within two years from the policy date, our liability is limited to an amount equal to the total premiums paid. So you just get what you paid in. You don't get the million bucks. Now on October 8 2020, so that's a little less than two years for the first policy and way less than two years for the second policy. Justin was having problems. He and his wife were going through...that's Mr. Caldwell, the man we're talking about here. He was having problems. He called his parents in the middle of the night to say goodbye, his wife wanted a divorce, you know, who knows what else was going on in his life. The court doesn't get into too much detail. But then he told his wife that he was quote, waiting for the police to come and kill him. And then she called the police, said that he was suicidal, that he's waiting to die by law enforcement, and what she said was wanted to commit suicide by cop. Police then arrive. They tried negotiating with them. I mean, to their credit, they tried to talk him down. At one point there's there's some conflict and they fired some non-lethal rubber bullets. It says then he reached a truck outside, and he grabbed his rifle, spun around and lifted it to shoot at the officers. So they shot. And lo and behold, they killed him. And so he's dead. And the beneficiaries, his wife and someone else, claim on the life insurance policy for this million dollar for each policy. And the company, the insurance company, unsurprisingly, says that this is a suicide and so we're not going to pay. So the court's short discussion in this case, which gets pretty interesting in terms of interpretation of the meaning of language, is whether this is a suicide. And so they turn to some case law, about, you know, what suicide can mean,

what the taking of a life can mean, and there's not a lot of case law, there's nothing on point about suicide by cop, as it's called. But there is some case law about how it's the intent of yourself to take your own life, it doesn't have to be you yourself is the one who physically takes your own life, which kind of makes sense. I mean, we've all heard of like, assisted suicide, right? That's when someone helps you take your own life. They go to the dictionary, they quote quite a lot of dictionaries, including including Bryan Garner's legal dictionary, which some of our listeners may be familiar with, and that suicide is a broad term that includes someone else being involved. And they even cite Black's Law Dictionary that says slang, suicide by cop, a form of suicide in which the suicidal person intentionally engages in life threatening behavior to induce a police officer to shoot the person. There's some other citations after that, and in terms of what suicide by cop used, you know, more generally, in our linguistic community, you might say, but at the end of the day, it is fairly convincing that this exclusion would include what happened to the policyholder, and therefore, there is no insurance for his heirs. It's very sad underlying facts, but not very surprising analysis of what this exclusion means. Now, one interesting thing is that Dan and I were talking about before we started recording, is that there's only the first two years this exclusion. So if he had waited a couple more months to do this, at least on the one policy, it would have been paid. It's just it was in the first two years.

D

Dan Knepper 32:55

The dates kind of jumped out at you. Because, you know, the two year exclusion is a scenario you see, one I think it was November and then the 23 months later, right, the precipitating event happens. And you think, yeah, a month later, there's probably only one insurance policy at question, right? I believe it's generally a function of state law. But in any case, that's my understand is, that's how a lot of life insurance policies are written.

A

Anthony Sanders 33:29

I think, in the past when, you know, you read a Victorian novel about an insurance policy, right? That's some kind of classic story is that, you know, I remember this kind of idea that you can't - there's all kinds of penalties from suicide under the common law, like you can't inherit if, you know, the person you would have inherited from committed suicide. And there's all kinds of, you know, other penalties traditionally under the law. But in the modern times, they're usually this limit, but there is a two year limit. It also makes you think, I mean, that this guy obviously had some serious problems and probably wasn't thinking first and foremost about the insurance policy in what he did. Right? I think that might have just been accidentally what the facts were because if he really did just want to look after his heirs with that million bucks, he could have waited a couple months. I think, unsurprisingly, there's some other stuff going on in his life. So this is going to sound kind of weird and different from the very morbid facts we just talked about. But one thing that I thought was interesting about this case, because there's not a lot of case law on what this type of situation means, they really got into some linguistic interpretation as to what suicide is. And the same methods that you saw here in looking at -- okay, how was it discussed in dictionaries? How was it discussed in, you know, non-legal sources? -- is the kind of methods and tools we see used when people are doing originalist research, right? What did the First Amendment mean, in 1791? Well, we'll look at some dictionaries from the time, we'll look at how that was talked about on the floor of Congress, we'll look at how it was discussed in different kinds of sources, whether it's books or newspapers. I mean, they didn't do this, but there's a whole corpus linguistics field now where they look at how many times a certain word

was mentioned within a decade in newspapers and in what context. And so it shows you that, you know, something that we think is commonplace in interpreting a policy, a legal document, in this case, an insurance policy written today, it's really not that mysterious when you apply it to the Constitution and it was 200 years ago. It just seems kind of like wow, either that's really weird and that's what these, you know, weird conservative scholars do, libertarian scholars do, or, you know, oh, yes, that's high and mighty stuff that we get up to when you know, an originalist on his high horse might say about the Constitution. And whereas, no, it's just research, linguistic, it's just legal interpretation. It just happens to be at a point in the past, that, of course, is going to be harder to do because it's more removed from our linguistic community today.

D Dan Knepper 36:47

It was the last paragraph of the opinion, to kind of your point, is the one that kind of crystallized this for me, which is were the court says, you know, there are probably a lot of different varieties of suicide by cop, right? And we're not deciding all of them. But what we have here is, as I understand the decision to say, we've got kind of a joint stipulation by the parties as to what went down, right? And like, the effects are that this gentleman, obviously struggling with some stuff, had broadcast that he was going to commit suicide by cop. And I think that that made the court's kind of grappling with the question at hand, whether this is suicide, to be a little bit easier, because if there is such a thing as suicide by cop, one where the parties agree what happened..

A Anthony Sanders 37:48

Is this, yes.

D Dan Knepper 37:49

That's right. That's right. Yeah.

A Anthony Sanders 37:50

I'm tempted to say something a little cheeky, like, pay attention to what the Supreme Court does in case what you've been doing is deemed unconstitutional. But ultimately, I thought what happened in at least in the first case, was pretty standard. I don't think the counties did anything wrong. They follow the letter of the policy, they thought they had this covered...

A Anthony Sanders 37:50

Yeah. I mean, he tells his wife he wants to get the cops there so he will die. He evidences that after they get there. It seems to be that there's no argument by the beneficiaries. And they'd have every reason to make that argument that no, he was just, you know, a little bit off that day, didn't really want to die. But there are all kinds of situations where someone is killed by a cop, and maybe they did something reckless or maybe they, you know, it's unclear if they did

something reckless, that absolutely might not be suicide by cop. So I thought that was an important qualification that Judge William Pryor put there in the last paragraph. So, well, Dan, this has been a wonderful tour of the insurance world, anything else you want our listeners to leave with about insurance, whether they're buying their own life insurance policy, their own company's policy, they work down at City Hall, they're thinking through their E and O, you know, dotting the i's, crossing the t's, what should they come away with?

A

Anthony Sanders 39:26

Except they violated the Constitution.

D

Dan Knepper 39:27

Well, sorry, with respect to their insurance policy. Yes, no, they should not have violated the Constitution.

A

Anthony Sanders 39:41

Yeah, so what you're saying is you can do everything right under your insurance policy. But there still might be a problem.

D

Dan Knepper 39:48

I think that's right. Well, so you know, one of the things that came to the front of mind as I was reading the decision and watching kind of the circumstances change around the counties as compared to the world that existed when they signed that policy and the world that existed when the Michigan Supreme Court said what you're doing is unconstitutional -- it called into mind a little bit the import of force majeure clauses after March of 2020, right?. Like force majeure clauses had largely been, you know, read and make sure that it's got, you know, reasonable or whatever in there, and you just kind of move on. And all of a sudden, the circumstances around had changed just really dramatically, whether it was shut down orders or all those things. And the way that those words operated would turn out to be very, very different. And so I think, just like with any other contract, when you look at your insurance policy, you look at a contract. You're trying to make sure you're putting it into the right context and think about the way that it might operate. You can't see the future, but it's important to think about how those clauses and how those exclusions may come to play.

A

Anthony Sanders 41:00

Yeah, we've talked about a couple of those cases here on Short Circuit over the last couple of years. And from what I've seen, and also we've discussed quite a few of them in our Short Circuit newsletter, it's almost 100%, that damages from the pandemic have not been covered by the by those policies. Is that right?

D Dan Knepper 41:21

The weight of it is going in that direction for sure. I think there are a handful of ones that have survived the motion to dismiss claim because of how a particular clause is worded or something along those lines. But, that's what I'm seeing as well.

A Anthony Sanders 41:36

Well, Dan, it's been great. Thanks for coming on Short Circuit. And you know, if insurance comes our way, or perhaps even a different subject in the future. I think you used to do some FERC lawsuits; we haven't done a lot of FERK here. But that might be a reason to get you back on.

D Dan Knepper 41:53

I'm happy to. If you've got something that's super boring, Anthony, an underlying topic or something that's not that exciting., you think of me.

A Anthony Sanders 42:03

That's right, we will. Also if Ohio State, you know, has something interesting happened to them. We might get you on for that too.

D Dan Knepper 42:13

That'll work.

A Anthony Sanders 42:14

All right. Well, thank you all for listening. So now, to close out, we're going to turn to the 12 Days of Short Circuit Christmas, so each day corresponds to a different circuit. The 12th day is for the DC Circuit. And singing the refrain is IJ's Trace Mitchell, and the rest in order of their appearance are Sam Gedge, Erika Smith Eweing, Christie Hebert, Wesley Hottot, Tori Clark, Andrew Ward, Jeff Rowes, Anya Bidwell, John Wrench, Diana Simpson, Short Circuit's own John Ross, and making a return appearance, Sheldon Gilbert. Merry Christmas everyone. And Happy New Year.

I IJers 43:02

On the 1st day of Short Circuit Christmas my federal reporter gave to me

I IJers 43:02

On the 2d day of Short Circuit Christmas my federal reporter gave to me

- I Ijers 43:02
Two Calabresi tort rules
- I Ijers 43:02
And a thesaurus under Judge Selya's pine tree.
- I Ijers 43:02
On the 3d day of Short Circuit Christmas my federal reporter gave to me Et al.
- I Ijers 43:06
[Yeah, you know how the song goes. Let's skip to the 12th, i.e. D.C. Cir., verse & you can see all of them at once]
- I Ijers 43:06
Twelve vacatur granted
- I Ijers 43:06
Eleven judges named Pryor
- I Ijers 43:06
Ten library courtrooms
- I Ijers 43:06
Nine en banc reversals
- I Ijers 43:06
Eight qualified immunities



- I IJers 43:06
Seven Chicago professors
- I IJers 43:06
Six Sutton Stanzas
- I IJers 43:06
Five Judge Hos
- I IJers 43:06
Four ex-prosecutors
- I IJers 43:06
Three Jersey convictions
- I IJers 43:06
Two Calabresi tort rules
- I IJers 43:06
And a thesaurus under Judge Selya's pine tree.
- I IJers 43:12
A thesaurus under Judge Selya's pine tree