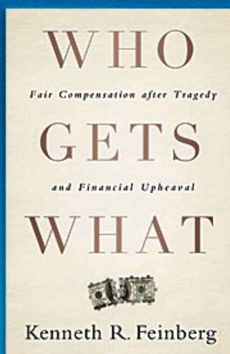
COVERAGE OPINIONS

Judicial Opinions Today - Impact On Counsel's Opinions Tomorrow

Effective Date:
April 10, 2013
Vol. 2, Iss. 8

The Cover-age Story



Declarations:

The *Coverage Opinions* Interview With Ken Feinberg, "Pay(ment) Czar"

Insurance Mediation, Compensation Funds And Having A Road Named After You

Ken Feinberg is known to many as the "pay czar." It is the unofficial title that was bestowed upon him to describe his role, following a 2009 appointment by the Obama administration, in overseeing the compensation of top executives of companies that received federal bailout assistance. I couldn't resist asking him what he thinks of the title. His answer left no room for doubt. He rejects it, calling it an "unfortunate description" of what he did as the Special Master for TARP Executive Compensation. He told me that czar "implies the idea of arbitrary imperial decrees concerning compensation based upon whim or bias. In fact, as Special Master, I actually governed as a type of mediator trying to resolve compensation disputes between individual corporate officials and the Department of the Treasury based upon a federal statute. Hardly a process of arbitrary decision making."

[Mr. Feinberg does find one redeeming feature in the title: thinking about how confused his Lithuanian grandfather would have been upon learning that his grandson had become a czar.]

Continued on Page 2

In this issue:

Cover-age Story
Declarations:
The *Coverage Opinions* Interview With Ken Feinberg, "Pay(ment) Czar"

Randy Spencer's Open Mic
Bad Bad Insurance Coverage - 3

The Masters Preview:
Getting Hit By A Golf Ball At A Professional Tournament - 7

Revisiting The "War Risk" Exclusion:
New York Federal Court: September 11th Was An "Act Of War" - 8

Georgia:
Insurer's Reservation Of Rights Letter Insufficient - 9

Washington:
Insurer In Bad Faith Despite "At Least Arguable" Policy Interpretation - 11

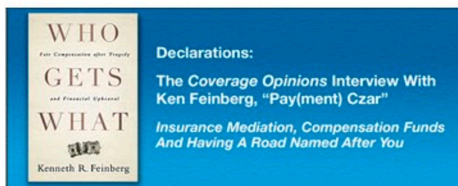
Late-r Notice:
Decisions To Come - 12

Coverage Opinions: Coming Soon: The Golf Issue

The last issue of *Coverage Opinions*, The Baseball Issue, was so much fun to write and so well-received, that I now have The Golf Issue on the horizon. I thought baseball gave rise to a lot of litigation and insurance issues. But baseball is playing with dolls compared to the dangers of the golf course. In the meantime, The Masters tees off tomorrow. If you are going, here's what you need to know about getting hit by a golf ball at a professional tournament. Page 7

COVERAGE OPINIONS
Judicial Opinions Today - Impact On Counsel's Opinions Tomorrow

The Cover-age Story



But there is another reason why Mr. Feinberg should reject the "pay czar" moniker. It is an unfairly limiting description of his accomplishments. It suggests that he is some sort of one-hit wonder. Hardly. You have to get to the third paragraph of his Time magazine bio to find out that he served as Chief of Staff to Senator Ted Kennedy.

Mr. Feinberg is Founder and Managing Partner of Feinberg Rozen, LLP which describes itself as "the nation's foremost law firm for mediation, arbitration, other forms of alternative dispute resolution, and negotiation strategy. From cases that affect only a few, to the largest, most complex disputes of our time, the firm consistently bridges the gap between parties by creating imaginative and satisfying solutions. Time and again, the firm is able to achieve settlements that are in every party's best interests, elminating the need for costly, protracted and uncertain litigation."

Mr. Feinberg is unquestionably an alternative dispute resolution expert, having handled numerous cases of serious visibility and heft, including Gulf Coast hurricanes, the $4 billion antitrust settlement between American Express and both MasterCard and Visa International, determination of the value of the original Zapruder film of the JFK assassination and determination of attorneys' fees in the settlement of labor and property claims arising out of the German and Austrian Holocaust settlements. *Coverage Opinions* readers are frequently involved in or affected by ADR -- especially mediation. So this is where I focused (and on a few other things) in the Q&A that follows.

While most of us have been involved in, or are familiar with, mediation and arbitration, there is a form of alternative dispute resolution that very few have seen first-hand. That's because the need for it does not arise very often (and that's a good thing). I am speaking of a compensation fund. More specifically, when tragedy strikes, and a pool of money becomes available, for one reason or another, to compensate those affected, someone needs to decide who gets what. Mr. Feinberg has become the go-to someone.

Who Gets What is the title of Mr. Feinberg's 2012 book in which he discusses his role in assigning compensation in five scenarios involving a common fund: Agent Orange, September 11th Victim Compensation Fund, Hokie Spirit Memorial Fund (Virginia Tech), the Gulf of Mexico oil spill and compensation for Wall Street executives (a variation of the others). [Mr. Feinberg's involvement in the administration of high profile funds does not end there. The list also includes the Penn State claims arising out of the Jerry Sandusky sex abuse scandal,

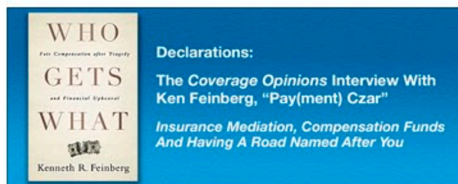
Continued on Page 3

About The Editor

Randy Maniloff

Randy J. Maniloff is an attorney in the Philadelphia office of White and Williams, LLP. He concentrates his practice in the representation of insurers in coverage disputes over primary and excess obligations under a host of policies. Randy is the co-author of "General Liability Insurance Coverage: Key Issues In Every State" (Oxford University Press, 2nd Edition, 2012). For the past twelve years Randy has published a year-end article that addresses the ten most significant insurance coverage decisions of the year completed. Randy has been quoted on insurance coverage topics by such media as The Wall Street Journal, The New York Times, USA Today, Dow Jones Newswires and Associated Press. For more biographical information visit www.whiteandwilliams.com. Contact Randy at Maniloff@coverageopinions.info or (215) 864-6311.

The Cover-age Story



donations from the Aurora, Colorado movie theater shooting and the $800 million fund in the In Re SEC v. AIG settlement.]

What makes *Who Gets What* so compelling is two-fold. First, because it is relatively short, at 200 pages, it never gets bogged down with impertinent details. No doubt the book could have been 600 pages. But if it were you would only remember 200. Those are the ones that Mr. Feinberg wrote.

Second, because each of the five compensation scenarios examined is unique in countless ways, the discussion never takes on a sense of redundancy. While the scenarios are of course unique factually, it is much more than that. The compensation funds are also unique in the rules or guidelines (or, in some cases, none) that governed Mr. Feinberg's task. For example, when it came to the September 11th fund, Mr. Feinberg was required to consider traditional tort principles when making his decisions. And for purposes of executive compensation, TARP had many regulations that needed to be considered. But the Virginia Tech situation was quite different – the "who" and "what" of "who gets what" came with no binding instructions.

In the September 11th situation, who got what differed widely, as the process factored-in victim income and the existence of life insurance. But for the Virginia Tech victims, an equal amount of compensation was awarded for each life lost – whether student or wage-earning faculty member. And the massive number of Gulf Coast oil spill victims had their own unique issues – damages for lost jobs and wages, reduced business income and other hard to prove losses.

The discussion of each settlement fund includes an examination of the policy issues that led to the decisions over who should be eligible to receive compensation and what amount is appropriate. One tool that Mr. Feinberg effectively uses to address these weighty policy matters is to respond to the questions and comments provided to him by fund participants (usually dissatisfied ones).

Mr. Feinberg rejects the "pay czar" title and surely he would also reject the title of "payment czar." But at least it comes one step closer to describing the full scale of his accomplishments.

Mr. Feinberg is a graduate of the University of Massachusetts and NYU Law School. He served as a clerk for the New York Court of Appeals, the state's highest court, and spent time in the U.S. Attorney's office and served as Chief of Staff to Senator Ted Kennedy. He was a founding partner of the Washington office of the Kaye Scholer law firm. In 1992 he started his own law firm that is now Feinberg Rozen, LLP. Mr. Feinberg is an adjunct professor of law at Georgetown University,

Continued on Page 4

Randy Spencer's Open Mic

Bad Bad Insurance Coverage

Last week a California appeals court held that no coverage was owed to Leroy Brown for water damage caused by a broken pipe in his home. Apparently the insurer and court were not afraid to say no to the baddest man in the whole damn town. This got me to thinking. If Leroy Brown were involved in a coverage case, then maybe other people, famous for having a part in a song, have also been involved in a coverage dispute that went so far as a reported opinion. It turns out that the answer is yes. And a lot. Look at how busy some of your favorite folks from songs have been.

Millers' Indemnity Underwriters v. Maggie May Patten, 238 S.W. 240 (Tex. Ct. App. 1922)

Bille Jean Dowling v. Harleysville Ins. Co., 602 A.2d 871 (Pa. Super. Ct. 1992)

Rhiannon Moller v. State Farm, 566 N.W.2d 382 (Neb. 1997)

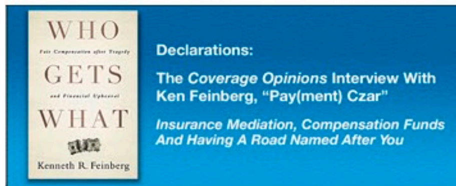
Roxanne Hicks v. Auto Club Group Ins. Co., 815 N.W. 2d 473 (Mich. 2012)

Western World Ins. Co. v. Sharona Corp., 353 N.W.2d 221 (Minn. Ct. App. 1984)

Continued on Page 4

COVERAGE OPINIONS
Judicial Opinions Today - Impact On Counsel's Opinions Tomorrow

The Cover-age Story



University of Pennsylvania, Columbia University and NYU. He is also the author of *What is Life Worth?*, where he provides a more detailed discussion of the September 11th victim compensation process.

Ken, thank you very much for taking the time to speak with Coverage Opinions. Let me start with the obvious question: What is your secret to getting entrenched parties, fighting over huge amounts of money, to shake hands and avoid protracted litigation?

There is no secret in securing settlements among litigants (or would-be litigants) waging war in the courtroom. By the time I am approached and asked to mediate, the parties recognize the need for settlement and seek a lifeline in the form of a credible neutral who will explain the advantages of resolving the dispute. Knowledge of the facts and law, determination, creativity, doggedness—all help in getting the parties to "yes."

Are there aspects of a mediation of an insurance coverage dispute that differ from mediations of other commercial disputes?

When it comes to mediating insurance coverage disputes, my experience is that the issues almost always involve insurance policy disputes and the language of the insurance policy. What do the insurer and the insured intend in drafting the language? How can you integrate conflicting sections of the same insurance policy? Insurance mediation requires careful reading of the policy itself.

Would you approach a dispute between insurers differently than one between a policyholder and insurer?

I approach a dispute between insurers the same as I would involving an insurer and a policyholder. When it comes to insurers, one important question quickly arises before the mediation even begins—are the right people in the room representing the insurer with authority to settle the dispute? Too often, insurers send lower level representatives (or outside lawyers) who lack real authority to resolve the dispute. This poses problems for the efficiency and success of the mediation.

You are clearly a public figure and have achieved fame. Are there advantages and challenges to being a mediator under those circumstances?

I find that very important elements of any mediation are the credibility and reputation of the mediator. To the extent that I have mediated countless disputes-usually with success—this cannot help but

Randy Spencer's Open Mic

Lola Ferguson v. State Farm, 2011 WL 4946349 (D. Alaska Oct. 18, 2011)

Fernando v. Chubb Group of Ins. Cos., 2012 WL 4754148 (La. Ct. App. Jan. 18, 2012)

Jimmy Corn v. Protective Life Ins. Co., 1998 WL 51783 (D. Conn. Feb. 4, 1998)

Mandy Allen v. Zurich Am. Ins. Co., 2012 WL 3061598 (W.D. Okla. July 26, 2012)

Allison v. State Farm, 266 Fed. Appx. 627 (9th Cir. February 12, 2008)

Owners Ins. Co. v. Daniel, 2012 WL 6163139 (M.D.Ga. Dec. 11, 2012)

Diane Jack v. St. Paul Ins. Co., 1994 WL 14580 (Ark. Ct. App. Jan. 12, 1994) (ok, some artistic license there)

Vintage Plastics, LLC v. Mass. Bay Ins. Co., 2012 WL 1142722 (N.D. Okla. April 4, 2012) (plaintiff represented by Casey & Jones) (yes, that one's a stretch)

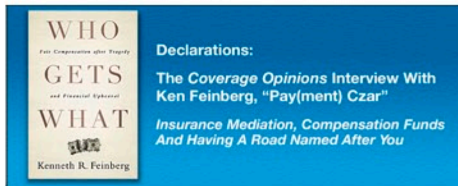
I disclaim all liability for any songs that get stuck in your head.

That's my time.

I'm Randy Spencer.

Randy.Spencer@Coverageopinions.info

The Cover-age Story



usually with success—this cannot help but be an advantage in attempting to resolve the dispute at hand. Every mediator carries with him or her a reputation, a style, and an approach to mediation which should be well known by the mediation participants.

How do you know when a settlement is just not achievable – at least not that day?

You would be surprised how rare it is to conclude that a settlement cannot be achieved in mediation. Indeed, when the mediation process looks bleakest, when the participants seem miles apart, more often than not, during the course of the mediation, differences begin to diminish, and the parties gradually recognize that they have a major stake in the success of the process. It is human nature.

It has been said that a good settlement leaves both sides a little unhappy. Do you believe that?

Yes, I do believe that "a good settlement leaves both sides a little unhappy." Mediation is a form of compromise and a recognition that disputing parties are risk averse. Whatever the mediation result, the parties are "a little unhappy," but this unhappiness is almost always tempered by the relief that goes with the certainty of settlement.

The most entrenched parties that I have ever seen are those in Congress. Do you believe that your skills could be applied to break some of the political deadlocks that exist today?

I do not believe that my mediation skills can be applied to members of Congress currently engaged in political deadlock. First, it would be presumptuous of me to suggest that Congress could use the services of an effective mediator. Our elected representatives have the obligation and responsibility to represent their constituents and seek to govern. Second, mediation can only be successful if the mediation participants themselves seek some sort of meaningful compromise and resolution. I do not see this at the present time. Finally, in the political world of Washington, the substantive merits and possible policy solutions give way to political realities and political advantage. I doubt very much that a reasonable approach on the merits can be secured by a mediator in confronting such political challenges.

I know it is difficult to answer this briefly, but how has your life been affected by your work with the September 11th Victim Compensation Fund?

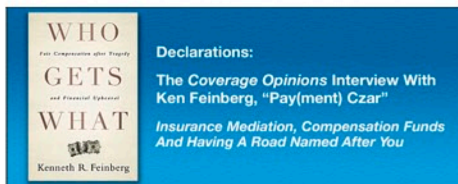
Like most Americans, my life was altered by 9/11 and the 9/11 Victim Compensation Fund. I became more involved in compensation and claims issues and reduced the size of my law firm. I also became a better listener (and probably became more fatalistic) as a result of my 9/11 work.

The 9-11 Fund involved an impossible task – placing a value on someone's life and also having to do so in the context of a comparison to someone else's. Are there lessons from such a unique experience that can be applied to a mediation of a commercial dispute, between two large parties, where it's "just about money."

First of all, the 9/11 Fund did not place a value on someone's life, at least insofar as such valuation requires an administrator to evaluate the moral integrity of any victim. Maybe a rabbi or priest could do that; I could not. I did what judges and juries do every day in every court throughout our nation—to compensate based upon the economic loss suffered as a result of the death or injury of the victim, adding compensation for pain and suffering and emotional distress. I do not see this process having any particular precedential value for resolving commercial disputes. The 9/11 Fund was unique; I doubt it will ever be replicated.

Continued on Page 6

The Cover-age Story



Your work on compensation funds has obviously left you with many indelible memories. Can you share something that you will never forget from an ordinary mediation.

I remember one mediation wherein the participants agreed in advance to mediate with businessmen only, one for each side, without lawyers being present. It was an insurance coverage dispute involving massive environmental liabilities. No in-house or outside lawyers! The dispute settled after two days for hundreds of millions of dollars. Very creative.

There is a road named after you in your hometown of Brockton, Massachusetts called Attorney Ken Feinberg Way. Are you allowed to speed on it without getting a ticket?

The road is too small and narrow for speeding.

When your children were younger and did something bad would you say to them: Go to your break-out room!

No, when my children were small, I tried to mediate between and among them in an effort to resolve their disputes. My wife told me: "mind your own business—I'll take care of it!"

Kenneth Feinberg

Coverage Opinions is a bi-weekly (or more frequently) electronic newsletter reporting and providing commentary on just-issued decisions from courts nationally addressing insurance coverage disputes. Coverage Opinions focuses on decisions that concern numerous issues under commercial general liability and professional liability insurance policies. For more information visit www.coverageopinions.info.

The views expressed herein are solely those of the author and are not necessarily those of his firm or its clients. The information contained herein shall not be considered legal advice. You are advised to consult with an attorney concerning how any of the issues addressed herein may apply to your own situation. Coverage Opinions is gluten free but may contain peanut products.

The Masters Preview: What You Need To Know About Getting Hit By A Golf Ball At A Professional Tournament

The last issue of *Coverage Opinions*, The Baseball Issue, was so much fun to write and so well-received, that I now have The Golf Issue on the horizon. I thought baseball gave rise to a lot of litigation and insurance issues. But baseball is playing with dolls compared to the dangers of the golf course. In the meantime, The Masters tees off tomorrow. If you are going, here's what you need to know about getting hit by a golf ball at a professional tournament.

I don't play golf, but I'm a big fan of the sport. Despite that, I've never heard of a professional golfer named Dow Finsterwald. And I'm ashamed that I haven't. While he was before my time, he was no short-time, fleeting pro. He won 11 tournaments between 1955 and 1963, including the 1958 PGA Championship. He played on four Ryder Cup teams and served as non-playing captain for the 1977 U.S. Ryder Cup team. In 1958 he was honored as PGA Player of the Year. He is fifth on the list for consecutive cuts made (72). And he's probably a whiz at getting a golf ball through the moving blades of a wind mill.

On June 29, 1973, Finsterwald was playing in the Western Open at Midlothian Country Club located not far from Chicago. On that date Alice Duffy and a companion were in attendance as spectators. Shortly after arriving they watched Arnold Palmer tee off at the first hole. The women then walked toward the first green, stopping at a concession stand set up between the first and eighteenth fairways. While watching play on the first hole, Ms. Duffy was hit by Dow Finsterwald's tee shot on eighteen. Ms. Duffy lost all sight in her right eye and was forced to wear a prosthetic shell over her eye for cosmetic purposes.

[I did some checking. Here is how the 1973 Western Open turned out. Billy Casper won (-12). Arnie finished 7th (-8). Dow Finsterwald made the cut, but it wasn't his tournament any more than it was Alice Duffy's. He came in 76th place at +11.]

Litigation was filed against the club, PGA of America, Western Golfers Association and Mr. Finsterwald. The litigation went on as long as the pro tees. The accident took place in 1973. There is a second Appellate Court of Illinois decision from 1985. And who knows if that was really the end. Those who think that golf moves slowly will likely see this timeline as par for the course.

The trial court in Duffy v. Midlothian Country Club granted summary judgment for the defendants. In a 1980 opinion the Appellate Court of Illinois reversed, holding, among other things, that a material question of fact existed as to whether defendants fulfilled their duty to plaintiff as a business invitee. The case went to trial and a jury awarded Ms. Duffy $498,200, which was reduced by 10% for her own negligence.

In a 1985 opinion in the case the Appellate Court of Illinois upheld the award. The decision is heavy on the legal. The court concluded that the doctrine of secondary implied assumption of the risk (plaintiff implicitly assumes the risks created by the defendant's negligence) is abolished by the introduction of comparative negligence. Thus, plaintiff's assumption of the risk will not operate as an absolute bar to recovery in a negligence action, but, rather, merely aid in the apportionment of damages.

It appears that an important part of plaintiff's case was the testimony of Tim Mahoney as an expert witness. Mr. Mahoney earlier submitted an affidavit that "he was a member of the Midlothian Country Club and had played golf for thirty-five years. He won the 1973 Western Open Pro-Am Tournament held in conjunction with the Western Open, and he attended the 1973 Western Open. Mahoney indicated that he was aware of the club's preparations for the tournament. He stated that concession stands were placed in areas in which balls had regularly landed in the past, and that the fairways were so close together that the spectators located between the fairways are within range of balls likely to be hit by golfers. He further stated that the spectators would not be able to see the player hitting the ball as the shrubbery and hills interfered with visibility."

Continued on Page 8

The Masters Preview:

- Continued

The take-away from Duffy v. Midlothian Country Club is that, while many courts have adopted a special standard for spectators that are hit by a foul ball at a baseball game (the so-called Baseball Rule), making it much more difficult from them to establish negligence on the part of the stadium operator, here the court applied no such special Golf Rule. Instead, the court judged the case based on the ordinary standard that "the owner of a business premises has a duty to the invitee to exercise ordinary care in the use and maintenance of his property. More specifically the owner has a duty to discover dangerous conditions existing on the premises and to give sufficient warning to the invitee to enable him to avoid harm."

It is customary for a professional golfer that hits a spectator with a ball to give the spectator an autographed glove. That's a nice gesture. If it's you, accept it. But make clear that it is not a release of any other claims.

September 11th: Revisiting The "War Risk" Exclusion

New York Federal Court Holds That September 11th Was An "Act Of War"

In the immediate aftermath of the September 11, 2001 attacks, there was intense political pressure on the insurance industry not to invoke the "war risk" exclusion contained in any responsible party's liability policy. The message to the industry was: don't even think about it. In addition to this pressure, a consensus among some insurance commentators was that the "war risk" exclusion was inapplicable anyway.

The conclusion by some that the "war risk" exclusion was inapplicable to the September 11th attacks was generally based on the Second Circuit's 1974 decision in Pan American World Airways v. Aetna Casualty and Surety Co., where the Court of Appeals held that a war risk exclusion did not preclude coverage for the hijacking and destruction of an airplane by the Popular Front for the Liberation of Palestine.

The court's rationale was that "English and American cases dealing with the insurance meaning of 'war' have defined it in accordance with the ancient international law definition: war refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character." Further, the Pan Am court concluded that "[t]he cases establish that war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty. Under international law war is waged by states or state-like entities."

Applying these definitions to the case at hand, the Pan Am court held that "the loss of the Pan American 747 was in no sense proximately caused by any 'war' being waged by or between recognized states. The PFLP has never claimed to be a state. The PFLP could not have been acting on behalf of any of the states in which it existed when it hijacked the 747, since those states uniformly opposed hijacking." Further, "[t]he hijackers did not wear insignia. They did not openly carry arms. Their acts had criminal rather than military overtones. They were the agents of a radical political group, rather than a sovereign government."

Based on Pan Am, it was concluded by some that the "war risk" exclusion was likewise inapplicable to the events of September 11th because al Qaeda was not a state; nor did it have any significant attributes of sovereignty. In the end, insurers did not invoke the "war risk" exclusion. And going forward the focus turned to the insurability of losses arising out of terrorist attacks.

That was all nearly twelve years ago. Now cut to March 20, 2013, when the Southern District of New York decided In re September 11 Litigation, No. 21 MC 101 (S.D.N.Y. Mar. 20, 2013). At issue was a claim by the owner of a property, located one block south of the World Trade Center, against the Port Authority, various entities involved with the World Trade Center and the airlines whose planes were hijacked, seeking cleanup and abatement expenses to remove pulverized dust that infiltrated into its building following the collapse of the Twin Towers.

Specifically before the court, following some procedural steps that I

Continued on Page 9

September 11th:

- Continued

omit, was whether the "act of war" exception to CERCLA liability constituted a defense to the plaintiff's claims. Following a lengthy opinion, the court held that it did.

In reaching its conclusion the court addressed Pan Am head on and decided that it was distinguishable: "[N]othing in the cases approaches the catastrophe of 9/11, nor was the Popular Front for the Liberation of Palestine equal in organizational scope or destructive intent to al Qaeda, nor was the destruction of an airplane at an airport by that group the equivalent of the destruction of the World Trade Center and the damage to the Pentagon. Al Qaeda launched an attack on the most important commercial and political symbols of the United States—an attack that Congress and the President treated as an act of war against the United States. The events of September 11 were unique, and Congress, the President, and the American public treated 9/11 as unique."

Moving on from Pan Am, the court's conclusion, that CERCLA's "act of war" exception was applicable, can be summarized as follows: "The terrorist attacks of September 11, 2001, were unique in our history. The terrorists who carried out the attacks were recruited, organized, trained, and financed by an extra-national terrorist organization, al Qaeda. Al Qaeda, although not a nation-state, operated in the interstices of nations, infiltrating and occupying large areas of Afghanistan and Pakistan, and operating also in Yemen, Somalia, and other countries of Asia and Africa. Al Qaeda's leadership declared war on the United States, and organized a sophisticated, coordinated, and well-financed set of attacks intended to bring down the leading commercial and political institutions of the United States, and cause havoc, devastation, and many deaths. Congress and the President responded by recognizing al Qaeda's attacks as an act of war and, pursuant to Congressional Resolution, sent our military forces, in coalition with the military forces of other nations, to wage war against those who perpetrated the attacks and the collaborating Taliban government. Two Presidents, several Congresses, and the U.S. Supreme Court have characterized the military and political response of the United States to the attacks of September 11 as a 'war.'"

In simple terms, while September 11th may not have fit traditional definitions of "war," the court's decision, that CERCLA's "act of war" exception was applicable, was based on its unwillingness to treat "war" as a static concept. The court was not willing to be tied to how war was addressed by cases involving the Civil War and Spanish-American War. As Judge Cardozo stated in MacPherson v. Buick Motor Company, 217 N.Y. 382, 391 (1916), his landmark decision that forever changed the law of products liability: "Precedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day."

If there is another wide scale attack in this country, the challenge for insurers will likely be that, as with September 11th, demands will be made on them to provide immediate answers to coverage questions. As In re September 11 Litigation demonstrates, the facts that will determine coverage under the circumstances will not likely be immediately available, and, for that matter, may not be available for significant periods of time.

Georgia Appeals Court: Insurer's Reservation Of Rights Letter Insufficient

Hoover Was Not Decided In A Vacuum

In the 2012 installment of my "Top 10 Coverage Cases of the Year" article I included Hoover v. Maxum Indem. Co., 730 S.E.2d 413 (Ga. 2012). This Georgia high court decision was selected as a 2012 best-of as it made the point – one that I have long been advocating – that a letter may not be a reservation of rights letter simply because it says (even many times) that it is. Some courts have taken issue with the content of such letters – concluding that, while a letter with the words "reservation of rights" may have been issued, the notice provided to the insured in such letter, of the reasons why coverage may not be owed for some claims or damages, was not sufficiently specific to be adequate.

In a nutshell, the Georgia Supreme Court in Hoover described a sufficient reservation of rights letter as follows: "In order to inform an insured of the insurer's position

Continued on Page 10

Georgia Appeals Court:
- Continued

regarding its defenses, a reservation of rights must be unambiguous. If it is ambiguous, the purported reservation of rights must be construed strictly against the insurer and liberally in favor of the insured. A reservation of rights is not valid if it does not fairly inform the insured of the insurer's position."

Hoover, it turns out, has been no shrinking violet since it was decided. Its presence has been felt in several recent decisions where the adequacy of an insurer's reservation of rights has been at issue. Most recently Hoover was on full display in Facility Investments, LP v. Homeland Insurance Co. of New York, No. A12A2377 (Ga. Ct. App. Mar. 29, 2013). Facility was sued for professional negligence arising from the care of a patient at its nursing home. Homeland agreed to defend Facility, under a reservation of rights, pursuant to a Long-term Care Organization's Professional and General Liability policy. The policy excluded coverage for dishonest, fraudulent, criminal or intentionally malicious acts, errors or omissions, and willful violations of law, statutes, rules or regulations. Homeland reserved its rights under these provisions, but not to pursue claims for breach of contract, recoupment, allocation or contribution.

The plaintiffs in the underlying case developed evidence of fraud with respect to the nursing home patient's medical chart. Plaintiffs' counsel demanded payment of the policy's $1 million limit, noting that, based on evidence of fraud, the underlying plaintiffs were entitled to punitive damages. If not paid within 30 days, plaintiffs indicated they would seek to enforce a verdict in excess of the Policy limit. Facility sent a letter to Homeland requesting that Homeland settle the action within the Policy limit. Discovery had revealed significant charting problems, which Facility believed were likely to inflame a jury. Facility opined that there would be a judgment in excess of the Policy limit.

Homeland offered to settle the case for an amount up to the Policy limit, but noted that, under the terms of the policy, Facility was obligated to determine a fair and proper allocation of all amounts attributable to covered and uncovered losses. Homeland asked Facility to contribute fifty percent of the settlement amount. This was based on Homeland's opinion that a significant portion of the claimed loss was not covered under the Policy due to Facility's fraudulent charting. "Homeland noted that in the event the parties could not reach an agreement with respect to allocation, it was still obligated to make an interim payment of the amount of the loss that the parties agree is not in dispute. Homeland stated for the first time that it would pursue recoupment/contribution in the event that Facility did not pay its share for the uncovered losses."

Facility declined to contribute to a settlement, or otherwise allocate between covered and uncovered losses. Homeland sent another letter indicating its reservation of rights to pursue claims for breach of contract, recoupment, allocation and contribution. Homeland settled the underlying action and then filed suit to recover from Facility the portion of the settlement amount attributable to uncovered losses, based on the uncovered loss allocation provision.

Putting aside various decisions by the trial court, the Georgia Court of Appeals held that, while Homeland reserved its rights under the uncovered loss allocation provision in its letter to Facility the day before it settled the case, that was not enough. Citing Hoover, the court held "Here, Homeland defended Facility in the underlying case, knowing that the plaintiffs asserted claims for losses that were not covered under the Policy. Homeland undertook defense of the case subject to a reservation of rights letter, which specifically reserved its rights with regard to losses or defense expenses arising out of allegations of fraud. However, this letter did not provide Facility with any notice that Homeland intended to settle an uncovered claim and sue for reimbursement/contribution under the uncovered loss allocation provision. Thus, Homeland did not unambiguously reserve its rights under that provision, and any attempt to reserve additional Policy defenses based on boilerplate language in the letter was ineffective." The court also cited Hoover's pronouncement that "[a] reservation of rights is not valid if it does not fairly inform the insured of the insurer's position."

Continued on Page 11

Georgia Appeals Court:
- Continued

Having concluded that Homeland defended and settled the underlying suit, with knowledge of the uncovered claims, and without specifically reserving its rights with regard to the uncovered loss allocation provision, the court held that Homeland waived any right to seek reimbursement for uncovered amounts of the settlement.

The number of instances in which Hoover has been addressed, in the short time since it was issued, suggests that reservation of rights letters in Georgia, and perhaps elsewhere, may be subject to scrutiny whether they "fairly inform the insured of the insurer's position."

Washington Federal Court: Insurer In Bad Faith Despite Asserting "At Least Arguable" Policy Interpretation

The question whether a particular claim is covered, under the terms and conditions of a certain insurance policy, generally involves a comparison between the facts and policy – and perhaps resort to case law for guidance on how to interpret policy provisions. An insurer engaging in this process might or might not reach a decision that is ultimately upheld by a court. But when so doing the insurer is usually safe in the knowledge that, even if its decision is ultimately rejected by a court, the insurer did not act in bad faith. In general, the standards for establishing that an insurer acted in bad faith are quite high. Thus, an insurer that chooses wrong, among competing policy interpretations, was likely still acting reasonably, and, therefore, will not likely be held to have acted in the requisite egregious manner to constitute bad faith.

But in 2010, in American Best Food, Inc. v. ALEA London, Inc., the Washington Supreme Court departed from the general rule that, when it comes to an insurer weighing how to interpret a policy provision, being wrong, but reasonably so, is not bad faith. The court adopted a standard that an insurer acts in bad faith if its breach of the duty to defend was unreasonable, frivolous or unfounded. While bad faith tests vary throughout the country, Washington's adoption of one based on an insurer acting "unreasonably" stands out. The American Best Court held that an insurer's failure to defend, based upon a questionable interpretation of law, was unreasonable and, therefore, the insurer acted in bad faith as a matter of law. American Best set the bad faith bar about as low as it can go.

When American Best was decided I advocated that it was a Washington-thing and did not amount to some sort of sea change in the law of bad faith. And I still believe this. But despite its uniqueness to Washington, the picture of what could be, if American Best took hold elsewhere, warrants a discussion of the Washington District Court's recent decision in Tim Ryan Construction, Inc. v. Burlington Insurance Company, No. C12-5770 (W.D. Wash. Mar. 22, 2013).

At issue in Tim Ryan was whether Burlington breached its duty to defend by not providing a defense to Tim Ryan Construction as an additional insured under a policy issued to a TRC subcontractor. The issue was tied to the not uncommon dispute over the applicability of an additional insured endorsement – to what extent was a claim based solely on the named insured's negligence. Anyone that handles construction defect claims knows that these can be challenging issues.

Putting aside the technicalities of the coverage arguments, the court concluded that Burlington's interpretation of the language of the additional insured endorsement was "at least arguable." Nonetheless, this was not enough, under American Best, to prevent a finding that the insurer's breach of the duty to defend was in bad faith. "Though the Court concurs with Burlington's argument that the facts of this case differ from American Best Foods, it disagrees that the factual variance compels a different outcome. Not having presented or found any Washington case law which addresses substantially similar AIE [additional insured endorsement] language; relying on an interpretation of its policy language about which not only TRC disputed but also Illinois courts hold conflicting views (albeit with slightly different language), and which the Court finds arguable, Burlington's refusal to defend TRC without first defending under a reservation of rights and seeking declaratory relief was unreasonable and constitutes bad faith as a matter of law."

Continued on Page 12

COVERAGE OPINIONS
Judicial Opinions Today - Impact On Counsel's Opinions Tomorrow

Washington Federal Court:

- Continued

It is very difficult to imagine that these circumstances would have led too many other states to conclude that the breach of the duty to defend was committed in bad faith.

Late-r Notice:
A Look At Decisions To Come

Rhode Island's Peculiar Punitive Damages Coverage Situation

On March 28th Rhode Island's Superintendant of Insurance issued an Insurance Bulletin that states the following: "Punitive Damages are not insurable under Rhode Island law. The Department will, therefore, reject any form filing that includes insuring of punitive damages."

The Bulletin goes on to state that there is no statute on the books in Rhode Island and the state's Supreme Court addressed this issue in 1987 in Allen v. Simmons when it held that a wrongdoer may not shift punitive damages to an insurer. Therefore, the Superintendant continued, until such time as a statute is enacted, specifically permitting an insurer to cover punitive damages, or the Supreme Court revisits Allen v. Simmons, forms which provide coverage for punitive damages will not be approved for use in Rhode Island.

The Rhode Island Superintendant's punitive damages pronouncement is curious for a couple of reasons. First, it is unusual to see a directive from a state insurance superintendant or commissioner that addresses the ins and outs of what's covered and what's not under a general liability policy (admittedly, the directive may have been aimed in a different direction, such as auto, and simply have CGL as a consequence).

Second, I do not believe that Allen v. Simmons states that punitive damages cannot be insurable. The court held that punitive damages did not fit within the auto policy's insuring agreement at issue before it because they are not awarded as damages to compensate the plaintiff. Further, in 2004, in Town of Cumberland v. R.I. Interlocal Risk Management Trust, the Rhode Island Supreme Court rejected a reading of Allen v. Simmons that insurance policies cannot insure for actions that are contrary to public policy.

An insurance company that chooses to insure punitive damages has presumably given this decision a lot of thought. By precluding the insurer from offering such coverage the public policy that is being most affected is the freedom of an insurer and its insured to contract. The Rhode Island Superintendant made an offer to the Rhode Island legislature and Supreme Court to permit insurers to cover punitive damages. We'll see if they accept.