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

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The Cover-age Story

Washing Their Hands: How Some Insurers Are Eliminating Much Construction Exposure (Bodily Injury and Property Damage)

It is not a secret that liability insurers face significant exposure for things that go wrong on construction projects. And they know this going in when issuing a policy to an insured that has construction operations. Risk of "bodily injury," especially serious injury, has always be present. And when it comes to "property damage," these days it seems like a contractor can't bang in a nail without a subsequent allegation that it did so negligently.

Here's how bad it has gotten. My 6 year old daughter recently built a house out of Legos. A month after the little Lego people moved in they discovered that a window was leaking. In no time flat Mr. and Mrs. Lego filed suit against my little one – and designated Bob the Builder as their expert. Our investigation revealed that the boy down the street was the one who installed the windows during an after-school play date. So we joined him in a third-party complaint. And now we're in a fight with this malfeasant Lego user's insurer to get my daughter the additional insured rights to which she is entitled. But the tike's insurer says otherwise. I told her to play Candy Land. That's gotta be safe – until the Plaintiffs' bar claims that it's the cause of childhood obesity.

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Declarations: The *Coverage Opinions* Interview with Barry Ostrager

Coverage Opinions checks in with Barry Ostrager of Simpson Thacher & Bartlett in New York City. Barry is routinely included on top 10 trial lawyers lists. For four decades he has been involved in the nation's most significant coverage cases. And, of course, his is the name on the spine of the book that you turn to so frequently for help with coverage matters.

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But does it need to be this way for insurers? No. A look at some recent judicial decisions, including one very recent, demonstrates that insurers – those who are inclined to do so – can issue liability policies to contractor-insureds and be protected against much of the risk – both bodily injury and property damage -- that is usually associated with construction projects.

Notwithstanding that "bodily injury" is an ever-present risk for insureds that have construction operations, some insurers have written endorsements that can eliminate much of that exposure. For an example of such endorsement, and a court that had no problem enforcing it, take a look at the Southern District of New York's opinion in Nautilus Insurance Company v. Barfield Realty Corp. (unpublished).

In Barfield, the court held that no coverage was owed to Barfield, a property owner, for bodily injury sustained on its premises by an employee of a company that was hired to undertake repairs. At issue was the applicability of an exclusion in Barfield's liability policy that extended, in relevant part, to bodily injury "arising out of work performed by any contractor or subcontractor whether hired by or on behalf of any insured, or any acts or omissions in connection with the general supervision of such work." Based on this exclusion, no coverage was owed to Barfield for bodily injury sustained on its premises by the employee of the company that was hired to undertake repairs.

While not as significant of an issue in Barfield as it will be in some other cases, the court noted that the "[e]xclusion is unmistakably applicable, even where the insured did not supervise the work, stating that coverage is not available for such persons 'whether hired by or on behalf of any insured.'"

Here is where an endorsement of this type has the ability to significantly reduce an insurer's exposure for construction related bodily injury. In its July 24, 2012 decision in James River Ins. Co. v. Keyes2Safety, Inc. (unpublished), the Northern District of Illinois held that no coverage was owed for bodily injury to an employee of a construction company that was NOT hired by the insured. The exclusion at issued applied to "bodily injury" sustained by any independent contractor/subcontractor, or any employee, "leased worker", "temporary worker" or volunteer to help of same.

The court rejected the insured's argument that the exclusion did not apply because the injured employee's employer was not hired by the insured, but, rather, by another contractor on the job site.

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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 eleven 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.

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In other words, the court rejected the insured's argument that what the exclusion "must have meant" is that it applied only to independent contractors and subcontractors of the insured and not just any independent contractor or subcontractor. According to the insured, the insurer's interpretation would render the bodily injury coverage meaningless, because "[i]ndependent contractors, subcontractors, and their employees are essentially the only individuals present on a construction site."

The insured is Keyes2Safety is correct. Independent contractors, subcontractors, and their employees make up a large group of the individuals that are present on a construction site – especially one that is secured to prevent access by the general public. Thus, an endorsement of this type has the ability to significantly reduce an insurer's exposure for construction related bodily injury.

Nautilus Insurance Company v. Barfield Realty Corp., No. 11-7425 (S.D.N.Y. Oct. 16, 2012) and James River Ins. Co. v. Keyes2Safety, Inc., No. 11 C 901 (N.D. Ill. July 24, 2012) are available on the PACER System.

In recent years, insurers have confronted significant exposure for "property damage" in construction defect claims. Part of the cause of this is the continuous trigger. In general, courts historically adopted the continuous trigger by concluding that the policy requirement, that "property damage" must occur during the policy period, is more open-ended than insurers had intended. Insurers intended by this requirement that "property damage" must be discovered or become evident during the policy period. Many courts, however, failed to see that qualification in the policy language. Dissatisfaction with such decisions caused insurers to take a different tack -- adopting policy provisions that are designed to qualify and more specifically pin-point when "property damage" must take place for it to be covered. In essence, insurers have attempted to limit courts' discretion over trigger of coverage and take back control of the issue.

Insurers have used two principal methods in commercial general liability policies in an attempt to regain control in trigger disputes – Insurance Services Office's "Montrose Endorsement" and a variety of manuscript endorsements, in one form or another, that are generally referred to by such names as First Manifestation Endorsement, Claims in Progress Exclusion, Discovered Injury or Damage Exclusion or Prior Damages Exclusion (collectively "First Manifestation Endorsements").

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Having Sex In A Dinghy Triggers Permissive Vessel Coverage

I draft a lot of insurance policies for clients. There are several aspects to that process. And one of them invariably involves a discussion by the interested parties of conceivable claim scenarios, followed by an examination of how the policy will respond. But no matter how many heads are put together, there will always be actual claims that arise that nobody could have seen coming. The Sixth Circuit's October 16th decision in New Hampshire Insurance Company v. Carleton (unpublished) demonstrates this reality.

The coverage issue stems from the fact that there is an unwritten rule among boaters, that when boats are tied together, and then to a dock, people are allowed to cross over one boat to reach another. Included in this unwritten rule is that, when crossing a boat, you do not linger. While at a regatta in Michigan, William Carlton and Layla Dietz took advantage of this unwritten rule of the sea.

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The Montrose Endorsement does not eliminate the fundamental requirement of the Insuring Agreement that "property damage" must occur during the policy period. However, it qualifies that requirement by stating that, prior to the policy period, no insured knew that the "property damage" had occurred, in whole or in part. Further, if an insured knew, prior to the policy period, that the "property damage" had occurred, then any continuation, change or resumption of such "property damage," during or after the policy period, will be deemed to have been known prior to the policy period. In essence, by operation of these provisions, the policy on the risk at the time that the insured first obtains knowledge of "property damage" becomes the last policy that can be triggered. The Montrose Endorsement does not eliminate the continuous trigger by any means. It is still in play for all policies on the risk during the period of progressive "property damage" so long as the insured was not aware of it. But by addressing "known loss" as it does, the endorsement serves to establish an end-date to the continuous trigger for progressive injury or damage.

First Manifestation Endorsements vary in their language and scope, but are essentially designed to preclude coverage for "property damage" that took place before the policy period, even if the insured did not know that injury or damage had taken place and even if the injury or damage was continuous or progressive. In essence, coverage is limited to "property damage" that first takes place during the policy period.

And some endorsements even go one step further that the First Manifestation variety. Insurers have written endorsements requiring that, not only must the "property damage" first take place during the policy period – regardless of the insured's knowledge of it – but the insured's operations on the project must have also first commenced during the policy period. This creates a narrow window for the potential for coverage for "property damage" caused by construction defects.

Options exist for insurers to significantly reduce their exposure for the risks associated with construction projects. For commercial reasons, not all insurers will go down these roads. But some are in one form or another. Such policies may be issued to smaller size (read as, judgment proof) contractors, who need a liability policy to serve as their ducat to a job site, and are looking for the least expensive option. And since the general contractor is probably not reviewing their subcontractor's policy's terms and conditions, it may be the underlying plaintiffs that feel the biggest impact of these coverage limiting endorsements.

Carleton wanted to show Dietz his boat, the Tiburon. To reach it, they had to cross a dingy that was tied to it. But despite the "no linger rule," Carleton and Dietz did, well, linger. They had sex on the dinghy (after meeting shortly beforehand when Carleton helped an intoxicated Dietz stand up after tripping). In a sad turn of events, Dietz was reported missing the next day and her body was found two days later in the harbor near where Carleton's boat was docked.

For purposes of Dietz's claim against Carleton, his policy included coverage for bodily injury arising out of his permissive use of a private pleasure vessel that he did not own or rent. Reversing the District Court, the Sixth Circuit held that, notwithstanding the no linger rule, coverage was owed, as the dinghy qualified as a vessel for which Dietz had implicit permission to use. I think it's safe to say that the drafters of the permissive vessel coverage did not see this one in their crystal ball.

That's my time. I'm Randy Spencer.

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Michigan and Texas: Insurers Benefit From Broad Interpretations of TCPA and Inverse Condemnation Exclusions

It is common knowledge that when an exclusion contained in an insurance policy applies to claims "arising out of" certain prohibited conduct, the exclusion is likely to be given a broad interpretation. In general, the phrase is defined to mean such things as "origi nating from," "having its origin in" or "growing out of." When that's the case, a claim need only have an incidental relationship to the conduct described in the exclusion for it to apply.

Despite these general rules, insurers can sometimes be cautious about how far "arising out of" can take them. In particular, they can be unwilling to assert an "arising out of" exclusion when a complaint alleges causes of action that do not specifically match the subject of the exclusion. This lack of a hand in glove fit was the situation in GM Sign, Inc. v. Auto Owners Insurance Company (Michigan Court of Appeals; unpublished) and City of College Station, Texas v. Star Insurance Company (Southern District of Texas; unpublished). and City of College Station, Texas v. Star Insurance Company (Southern District of Texas; unpublished). But in both cases the insurers successfully argued that the exclusions at issue, because of their "arising out of" (or similar) components, were broad enough to include all of the causes of action alleged against the insured.

At issue in GM Sign was the breadth of the TCPA exclusion that insurers have adopted to address Telephone Consumer Protection Act ("junk fax") claims. The relevant portion of the exclusion precluded coverage for "property damage ... arising directly or indirectly out of any action or omission that violates or is alleged to violate" the TCPA or "any statute ... other than the TCPA ... that prohibits or limits the sending, transmitting, communicating or distribution of material or information."

Relying on the scope of language that was similar to "arising out of," the court held, despite the insured's arguments to the contrary, that the exclusion precluded coverage for claims for common law conversion and the Illinois Consumer Fraud and Deceptive Practices Act: "[T]he common law tort and Illinois consumer protection claims asserted in GM Sign's complaint arise from the same conduct that underlies GM Sign's TCPA claim. All three causes of action, regardless of their labels, originate in or flow from the same acts."

A similarly analyzed result was reached in City of College Station where the court held that claims for more than just inverse condemnation were precluded by the policy's inverse condemnation exclusion. Relying on the broad interpretation of "arising out of" the court concluded: "[A]lthough in the underlying lawsuit … labeled its other claims as violation of substantive due process, equal protection, estoppel, and a tortious interference with … contracts, the core or nucleus of the underlying dispute … is the City's refusal to grant … zoning requests. In other words, these are derivative claims and do not constitute justiciable causes of action apart from [the] … inverse condemnation claim."

GM Sign, Inc. v. Auto Owners Insurance Company, No. 301742 (Michigan Ct. App. Oct. 11, 2012) is available on the Michigan Court of Appeals website.

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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.

Michigan and Texas:

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City of College Station, Texas v. Star Insurance Company, No. 11-2023 (S.D. Tex. Oct. 12, 2012) is available on the PACER System.

Indiana And The Pollution Exclusion: As Predictable As The Globetrotters Versus The Washington Generals

In a decision that can hardly be seen as a surprise following the Indiana Supreme Court's decision this year in Flexdar, the Indiana Court of Appeals held in State Automobile Insurance Company v. DMY Realty Company (published) that absolute pollution exclusions did not preclude coverage for contamination of soil and groundwater by perc and TCE. While these substances are unquestionably solid, liquid, gaseous or thermal irritants or contaminants, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, Indiana adheres to the most unique of rules when it comes to the applicability of the absolute/total pollution exclusion. Indiana's pollution exclusion jurisprudence has evolved such that, for it to apply, the exclusion must specifically state what the pollutant is that is sought to be excluded from coverage. It is not good enough – even for TCE and perc-- to have the typically used pollution exclusion that applies to any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. The Indiana Supreme Court's 2012 decision in Flexdar did nothing to change this. The court stated: "Applying basic contract principles, our decisions have consistently held that the insurer can (and should) specify what falls within its pollution exclusion. … Where an insurer's failure to be more specific renders its policy ambiguous, we construe the policy in favor of coverage."

Indiana's case law concerning the pollution exclusion has made it easy to predict the outcome of coverage disputes – and that should still be the case after the Supreme Court's recent decision in Flexdar. It has traditionally been a safe bet that insurers, when relying on a generally worded pollution exclusion, would be on the losing end of the dispute. However, Insurers writing in Indiana are not without a remedy. They can, and have, adopted pollution exclusions that expand, and specifically identify, those substances that qualify as a "pollutant." If Flexdar means what it says, then it should be just as predictable that these broader worded pollution exclusions will apply.

State Automobile Insurance Company v. DMY Realty Company, No. 49A05-1109-PL-486 (Ind. Ct. App. Oct. 23, 2012) is available on Westlaw.

Significant Win For Legion-heirs: 11th Circuit Provides Coverage For Bacteria – Despite Fungi And Pollution Exclusions

In a closely watched decision, the Eleventh Circuit held in Westport Insurance Corp. v. VN Hotel Group (unpublished) that coverage was owed for wrongful death caused by the contracting of Legionnaires' Disease from the inhalation of bacteria at an outdoor spa at a hotel. The outdoor spa that is referenced in the Eleventh Circuit's decision is a spa tub as described by the lower court. This is an important point.

At issue in the coverage dispute was the applicability of separate exclusions for pollution and fungi/bacteria.

The fungi/bacteria exclusion applied to "'[b]odily injury' ... which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any 'fungi' or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage." The court concluded that the term "building" modified the term "structure," and, as such, structure was to be narrowly construed.

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Significant Win For Legion-heirs: - *Continued*

Taking this approach, the court held that an outdoor spa did not qualify as a "structure," and, as such, the fungi/bacteria exclusion did not apply.

Ok. Plan B. The policy at issue also contained a pollution exclusion. But this too was held to be not applicable. In one of those instances where a belt and suspenders approach to policy drafting can have an unintended consequence, the court held that "[b]ecause the Policy includes a separate exclusion provision for bacteria, the legionella bacteria cannot be considered a pollutant under the terms of the policy." This decision was tied to the rule of policy construction that "courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect."

The conclusion of VN Hotel Group is readily apparent. If spa tubs – which are often the source of Legionnaires' Disease -- are not structures, then so-written fungi/bacteria exclusions will not apply. And if the existence of that fungi/bacteria exclusion, despite its inapplicability, then causes the pollution exclusion to fall (and Florida law would have likely been favorable to insurers for such non-traditional pollution claim), insurers must return to the drawing board if -- as Westport clearly did here -- they desire to avoid exposure for many Legionnaires' Disease claims.

Westport Insurance Corp. v. VN Hotel Group, No. 11-14883 (11th Cir. Oct. 25, 2012) is available on the 11th Circuit's website.

Alabama Federal Court: Underwriters Write It Right For Adjuster Addressing Construction Defect Claim

It is sometimes the case that, even though an underwriter does an excellent job of assessing a risk, and determining exactly what the insurer's appetite is for it, and at the appropriate price, the policy that is ultimately issued does not sufficiently capture the underwriter's intent. When this happens, and a claim is made that should not be covered, the handling adjuster is left to have to explain that it is not covered because it does not fall within the intended scope of the policy. But this is often a difficult road for the insurer, as the general rule is that the intent of the policy is what's expressed in the policy language -- and not the underwriter's head and sometimes not the policy application or underwriting submission. If this results in the claim being covered, the underwriter's work was for naught and the insurer is left to write a check that it never intended. While insurers are in the business of paying claims, they are not in the business of paying claims for which they did not receive any premium.

The Southern District of Alabama's decision in Evanston Insurance Company v. Lett (unpublished) demonstrates a situation where the underwriter make a decision about the extent of risk that it was willing to take. An appropriate endorsement was drafted to reflect this. And when the claim came in, the adjuster was in possession of the right tool to achieve the underwriter's intent.

Lett involved a claim against Lett Roofing for the defective construction of a roof on a church. The general liability policies at issue included a Classification Limitation Endorsement stating that the coverage applied only to those operations described under the description and/or classification on the declarations. The declaration pages listed "Roofing—Residential," and nothing more, under the heading "Description of Hazards / Insured Classification(s)."

The underwriter of the policies clearly made a decision that the only amount of Lett's risk it was willing to bite off was for its residential roofing operations. The court concluded that the policies were adequately drafted to express this underwriting intent: "The pleadings in the underlying case, and all other facts before the undersigned, show that Kiker and Lett Roofing seek coverage under the Evanston policies for Lett Roofing's operations in installing a roof on St. Catherine Church in Mobile, Alabama. This is not a roofing job for a home or a dwelling, and cannot reasonably be characterized as a residential roofing operation within the narrowing scope of the Classification Limitation Endorsement.

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Alabama Federal Court:

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Defendants have articulated no argument under which the 'Roofing-Residential' limitation on covered operations could plausibly, or even colorably, be viewed as allowing coverage for the insured's operations of installing a roof on a church."

While the Lett decision makes the interplay between underwriting and policy drafting look easy, the task is far from easy. The other lesson from Lett is that underwriters looking at construction risks can consider the nature of insureds' operations and limit coverage as they see fit.

Evanston Insurance Company v. Lett, No. 11-0383 (S.D. Ala. Oct. 15, 2012) is available on the PACER system.

Seven Mississippi Rush: State's High Court Allows Excess Insurer to Get Two Hands On Negligent Defense Counsel

The last issue of *Coverage Opinions* discussed the Southern District of Illinois's decision in ACE American Insurance Company v. Sandberg, Phoenix & Von Gontard, P.C. (unpublished), which held that an excess insurer can sue its insured's defense counsel, who had been retained by the primary insurer, alleging that, because counsel mishandled the defense, it resulted in an unnecessarily large settlement, that increased the excess insurer's liability.

In Great American E&S Insurance Company v. Quintairos, Prieto, Wood & Boyer, the Supreme Court of Mississippi (published) addressed this issue and reached the same conclusion. Ordinarily I would not have addressed a case involving the same situation in back-to-back issues. However, because Quintairos is a decision from a state high court, it cannot be overlooked.

If you missed it, here is the introduction of the excess insurer versus defense counsel issue that was contained in the October 17th *Coverage Opinions*. It is not entirely surprising that an excess insurer would desire to pursue a malpractice action against a defense counsel. In general, defense counsel is chosen by the primary insurer. Unlike the primary insurer, who may have a long-standing panel relationship with defense counsel, the excess insurer may not know defense counsel from Adam. Given this lack of a personal relationship, and that counsel was hired by the primary insurer, the excess insurer may not be getting the same frequency of status reports as the primary insurer. Likewise, the excess insurer may not be as involved in the case's day-to-day activities as the primary insurer. In addition to reporting deficiencies, defense counsel also may be painting too rosy of a picture of the insured's potential to avoid liability or significant damages. Defense counsel may not be making the excess insurer aware of the true potential for an unfavorable outcome. Because of this, the excess insurer may not be monitoring the case as closely as it otherwise would,if the case on its radar as one having a chance of impacting its policy.

For all these reasons, a higher than expected verdict or pre-trial settlement demand may come as more of a surprise to the excess insurer than the primary insurer. And, insurance companies do not like surprises. What's more, if defense counsel commits malpractice, or fails to accurately report on the problems in a case, it may be a "no harm, no foul" situation for the primary insurer. After all, the claim may have exhausted the primary policy's limits no matter what defense counsel did. Therefore, the consequences of defense counsel malpractice, overly optimistic reporting or deficient reporting, can be much greater for the excess insurer than the primary insurer.

Yet, despite being more affected by the malpractice, it would appear, on its face, that the excess insurer has a harder road to travel if it wishes to sue defense counsel, since it was probably the primary insurer that hired counsel. In other words, the excess insurer has no privity with defense counsel. That is certainly the rationale used by some courts to preclude excess insurers from bringing malpractice actions against defense counsel.

In Quintairos, the alleged malpractice at issue arose as follow: The estate of a former resident sued a nursing home for negligent care.

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Seven Mississippi Rush:

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The nursing home's primary insurer retained defense counsel. After counsel failed to timely designate an expert witness, the settlement value of the case greatly increased. As a result, the nursing home's primary insurer paid its policy limits. The excess insurer then defended the nursing home and ultimately settled the case. The excess carrier sued defense counsel for malpractice—both directly and under a theory of equitable subrogation.

The Mississippi Supreme Court held that, under the doctrine of equitable subrogation, "when lawyers breach the duty they owe to their clients, excess insurance carriers, who—on behalf of the clients—pay the damage, may pursue the same claim the client could have pursued. Holding otherwise would place negligent lawyers in a special category of protection. And we note that the path we follow today is not novel. As the Supreme Court of Texas noted in a similar case, 'subrogation permits the insurer only to enforce existing duties of defense counsel to the insured.'" However, the Mississippi Supreme Court also held that the excess insurer could not maintain a direct claim for malpractice against defense counsel. Simply put, there is no attorney-client relationship that exists between the excess insurer and defense counsel. The court explained it: "Great American would have us hold that an attorney employed by a primary insurance simply by providing an excess carrier with courtesy copies of its settlement evaluations --establishes an attorney-client relationship. For us to accept Great American's view would require us to ignore the realities of real-world litigation, which often involves several defendants with common interests."

Great American E&S Insurance Company v. Quintairos, Prieto, Wood & Boyer, No. 2009-CT-1063 (Miss. Oct. 18, 2012) is available on the Supreme Court of Mississippi website (but good luck finding it).

Ohio Supreme Court: Faulty Workmanship Is Not An "Occurrence" (Much Ado About Nothing In Many Cases)

Until recently, the question whether faulty or defective workmanship qualifies as an "occurrence" had been unsettled under Ohio law. You could find decisions that went both ways. But no more. In Westfield Ins. Co. v. Custom Agri Sys., Inc. (published), the Supreme Court of Ohio held that claims of defective construction/workmanship, brought by a property owner, do not qualify as "property damage" caused by an "occurrence" under a commercial general liability policy.

The court held: "We agree that claims for faulty workmanship, such as the one in the present case, are not fortuitous in the context of a CGL policy like the one here.In keeping with the spirit of fortuity that is fundamental to insurance coverage, we hold that the CGL policy does not provide coverage to Custom for its alleged defective construction of and workmanship on the steel grain bin. Our holding is consistent with the majority of Ohio courts that have denied coverage for this type of claim. The majority view is that claims of defective construction or workmanship are not claims for 'property damage' caused by an 'occurrence' under a CGL policy."

While the Ohio Supreme Court made clear that faulty workmanship does not qualify as having been caused by an "occurrence," the court's opinion was silent on the question whether consequential property damage, to something other than the insured's work, caused by the insured's defective construction/workmanship, would qualify as an "occurrence." This question was not before the Ohio Supreme Court in Custom Agri Sys., as it did not exist under the facts at issue. Nonetheless, it is certainly a foreseeable outcome that consequential property damage, to something other than the insured's work, caused by the insured's defective construction/workmanship, will qualify as having been caused by an "occurrence." This is the vast majority view nationally, as well as the majority view of Ohio courts that have addressed such issue.
On one hand, the Ohio high court's decision, that claims of defective construction/workmanship do not qualify as "property damage" caused by an "occurrence," is ho-hum.

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Ohio Supreme Court:

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After all, even if the Supreme Court had held that faulty or defective workmanship did qualify as having been caused by an "occurrence," coverage for repair or replacement of an insured's defective work is very likely precluded on the basis of the "your work" exclusion.

Then why so much fuss about this decision – and the "occurrence" issue in general (and boy does it ever get a lot of fuss). Answer – the "subcontractor exception" to the "your work" exclusion. By holding that faulty or defective workmanship does not qualify as having been caused by an "occurrence," the court's analysis ends at the policy's insuring agreement and has no reason to reach the exclusions. And by not reaching the policy's exclusions, the court specifically has no opportunity to reach the "your work" exclusion. And by not reaching the "your work" exclusion, the court has no ability to reach the "subcontractor exception" to the "your work" exclusion. Thus, policyholders do not have the chance to argue that coverage is restored for "property damage" to their own work, that would otherwise be excluded by the "your work" exclusion, if the cause of the damage to the insured's work was the operations of the insured's subcontractor.

Westfield Ins. Co. v. Custom Agri Sys., Inc., No. 2012-4712 (Ohio Oct. 16, 2012) is available on the Supreme Court of Ohio website.

Late-r Notice:
A Look At Decisions To Come

Le Trigger Continue -- Pennsylvania Supreme Court To Visit France

The Pennsylvania Supreme Court has agreed to hear an appeal in Pennsylvania National Mutual Insurance Company v. St. John – a decision that sets up an opportunity for the court to address something that it has not for a long time: the continuous trigger.

The Pennsylvania high court has agreed to decide whether the continuous trigger, adopted by the Pennsylvania Supreme Court in 1993 in J.H. France, applies to cases involving continuous, progressive property damage. In addition, the court will answer when manifestation of property damage takes place – "only after the injured party has the ability to ascertain the source of injury or damage is traceable to something out of the ordinary and usual course of events for which another may bear responsibility" or earlier, based on the existence of property damage that is not accompanied by such knowledge.

While St. John involves a unique situation -- property damage on account of cows that were sickened by the effects of negligence by a plumbing and heating company – the court's decision is poised to have a broad impact on coverage disputes in Pennsylvania, as it is likely to have applicability in the construction defect arena.

Pennsylvania National Mutual Insurance Company v. St. John, No. 959 MAL 2011 (Pa. Oct. 1, 2012) is available on the Pennsylvania Supreme Court website.

Declarations:

The *Coverage Opinions* Interview With Barry Ostrager

Coverage Opinions checks in with Barry Ostrager of Simpson Thacher & Bartlett in New York City. Barry is routinely included on lists of the top 10 trial lawyers in the country by various organizations. For four decades he has been on the insurer side of some of the nation's most significant coverage cases, including successfully serving as lead trial counsel for Swiss Re in the dispute over coverage for the World Trade Center. He recently secured a win for Travelers before the United States Supreme Court in Travelers v. Bailey, which addressed asbestos bankruptcy issues. And, of course, his is the name on the spine of the book that you turn to so frequently for help with coverage matters. Handbook on Insurance Coverage Disputes, co-authored with Tom Newman, is soon to be published in its 16th edition.

To many you are a quintessential insurance coverage lawyer. But your practice is so much more varied than that, involving some of the highest-profile commercial disputes in the country.

I consider myself to be a general commercial litigator. While I have had the privilege of litigating some of the highest profile insurance coverage cases of the past several decades, I have also conducted numerous trials and appeals involving all manner of commercial disputes including the highly publicized arbitration between Andersen Consulting and Arthur Andersen which led to the creation of the highly successful and publicly traded Accenture company. I have also handled other international arbitrations, securities litigation, anti-trust litigation, and various contract disputes, many of which involved hundreds of millions of dollars and, in a couple of cases, billions of dollars.

But of course you enjoy coverage cases more than any other, right?

The insurance coverage work I do represents approximately 30 percent of my present practice. I particularly enjoy arguing important appeals and, recently, I have served as an arbitrator in insurance coverage disputes both in London and New York.

I've been looking at some of your cases, and even based on just a very partial list, you've been involved in litigation over many billions of dollars – including successfully going to verdict five times in cases over the billion dollar threshold. I did some math and this all adds up to an amount that surpasses the GNP of some countries. What are some of your biggest and most important cases and single best piece of litigation advice.

The best piece of litigation advice is that the harder you work the more successful you will be in trial work. As for the most important cases I have handled, I previously mentioned the Andersen Consulting case which resulted in Andersen

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Consulting receiving an alimony free divorce from Andersen Worldwide and Arthur Andersen notwithstanding a $14 billion liquidated damages claim by Andersen Worldwide. Another multi-billion arbitration I won was on behalf of Hanwha, a Korean "chebol" or conglomerate which the Korean Government unsuccessfully sued to rescind the purchase by Hanwha of a controlling interest in a major life insurance company. Among my favorite cases were the Gray Development and Al Saleh cases, two recent jury cases in which the plaintiffs recovered large jury awards after long trials. And I would be remiss if I didn't mention a $370 million trial verdict I obtained for JP MorganChase against Motorola.

I need a scorecard to keep track of the number of times you've been included on a list of the top 10 trial lawyers in America. How do you find new challenges to keep yourself going?

Trial practice is endlessly rewarding because every case has a unique fact pattern and a different cast of characters.

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Declarations: - *Continued*

I've been lucky enough to have a diverse practice and so I look forward to the challenge every case presents.

Very few lawyers get the opportunity to argue a case before the U.S. Supreme Court, and you've had that privilege twice. What is that experience like?

Arguing before the United States Supreme Court is at once terrifying and indescribably gratifying. You prepare for a U.S. Supreme Court argument like no other appellate argument because both the oral argument and the resulting decision are so closely scrutinized by both the bar and the academic community.

What's keeping you busy these days, especially in the coverage world?

Presently I am preparing for what I think may be the last appeal in the litigation arising out of the Johns-Manville bankruptcy. I have been intermittently working on aspects of this case for literally 30 years.

When you look back on your career I bet there are some cases that stand out as unforgettable even if they didn't involve vast sums of money.

Yes, when I was a young lawyer I represented Madison Square Garden and had the great good fortune to be involved in a whole series of cases involving the New York Knicks, the New York Rangers, and Madison Square Garden Boxing. The contract cases involving professional boxers included disputes with Muhammad Ali, Earnie Shavers, and many lesser known fighters. I have some memorabilia from my involvement in a trial with Muhammad Ali and that experience was very special at the time and something I fondly recall.

I sometimes think that you work in my office from how frequently I hear people say – "Have you seen Ostrager?" Your book is legendary in the insurance coverage world. That must be really satisfying.

A lot of people have helped me develop the Handbook on Insurance Coverage Disputes. I, of course, would be lying if I didn't admit that it is enormously gratifying to know that 300 courts have cited this treatise.

How did you get involved with insurance coverage?

Believe it or not, before I became a partner at Simpson Thacher a lawyer at another firm referred a case to me involving the representation of various syndicates at Lloyd's in a dispute with the ABC television network. I learned all about the London market and, thereafter, one of my partners introduced me to the General Counsel of Travelers because I then knew something about insurance coverage law and everything developed from that point on.

Tell me about your background. Who were your sports heroes when you were a kid?

I grew up in the boroughs of New York City and I was an avid Willie Mays and New York Giants fan. I think the Giants left New York for San Francisco in 1957.

You've been a successful racehorse owner and involved with thoroughbred breeding for a long time. How did you get into that?

I can't claim to be "successful" in my thoroughbred involvements, but the people in the sport and participating in the sport is something that is very important to me. I became interested in thoroughbred breeding and racing as a result of work I did in college as a "stringer" for various newspapers that covered thoroughbred racing.

How come there hasn't been a Triple Crown winner since Affirmed in 1978?

The Triple Crown is a very grueling series of races for relatively young horses. There are three grueling races in a five week period and only truly extraordinary horses can successfully meet the challenge posed by this schedule. Also, because the fields in the Kentucky Derby and the Preakness tend to be large, the best horse doesn't always win these races because it is easy for a horse to be "shut off" or "blocked" by other horses in a large field.