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

Effective Date:
November 14, 2012
Vol. I, Iss. 3

The Cover-age Story

Sweet Defective-Home Alabama: Supreme Court Addresses Allocation Between Covered And Uncovered Construction Defect Claims

You have just written the greatest reservation of rights letter ever. If Felix Unger handled claims, this is what his letter would look like. If there were a hall of fame for reservation of rights letters, you would soon get to see how you looked in bronze. Your letter compares the specific allegations in the complaint, to the policy language, and explains, with NASA-like precision, why this may result in no coverage being owed to the insured. You mail the letter, put a copy in the file, take a deep breath of satisfaction and move on to your next claim.

But the challenge with reservation of rights letters is not writing them. It is enforcing them. Because a reservation of rights letter is written in a sterile environment – at someone's desk – it can easily spell out, in black and white terms, those claims and damages at issue in the underlying suit for which coverage may not be owed. The underlying litigation, on the other hand, is likely proceeding in a manner that is anything but as neat and tidy.

It will frequently be the case that the underlying litigation is simply not capable of producing an outcome that makes it possible for the insurer and insured to compare its results, with the reservation of rights letter,

Continued on Page 2

In this issue:

Declarations: The *Coverage Opinions* Interview with Tom Segalla

Coverage Opinions sits down on the, er, couch with Tom Segalla, a founding partner of Goldberg Segalla, co-author of *Couch on Insurance* 3d and inaugural President of the American College of Coverage and Extracontractual Counsel -- a newly formed organization created by leading lawyers to improve the quality of the practice of insurance law. And Tom gives us his vote for best chicken wings in Buffalo.

Page 11

The Cover-age Story

and easily decide which claims and damages are covered and which are not. To the contrary, the underlying litigation may result in a verdict that does not specify the extent to which it represents this or that type of damage or the claims on which the relief is based. In this situation, often-times referred to as a "general verdict," the policyholder is likely to argue that, because the basis for the jury's verdict cannot be determined, it must be presumed that the entirety of the jury award represents covered claims and damages. Adding to the difficulty for insurers is that it cannot ask appointed defense counsel to seek special jury interrogatories which would go a long way toward solving this problem.

This issue is particularly problematic in construction defect claims, where the rule in many states is that no coverage is owed for the cost to repair or replace an insured's own defective work, but coverage is owed for damage to other property caused by the insured's defective work. While it is easy to state this rule, what happens if a verdict against a contractor-insured does not specify how much of the award is for the cost to repair or replace the insured's own defective work versus the cost to repair or replace property that was damaged by the insured's defective work.

Some courts have accepted the policyholder argument that, if the insurer created the problem of an inability to allocate between covered and uncovered claims, it must therefore bear the consequences. In other words, if it cannot be determined which portion of a verdict is covered and which is not, then all of the damages will be considered covered. Or the insurer may have a difficult burden to prove covered versus uncovered damages. See Butterfield v. Giuntoli, 670 A.2d 646 (Pa. Super. Ct. 1995); Herrera v. C.A. Seguros Catatumbo, 844 So. 2d 664 (Fla. Ct. App. 2003); TIG Ins. Co. v. Premier Parks, Inc., No. Civ.A.02C04126JRS, 2004 Del. Super. LEXIS 80 (Del. Super. Ct. March 10, 2004).

At the heart of these decisions is the placing of blame on the insurer for being aware that the underlying litigation may result in a verdict that does not enable a determination to be made between covered and uncovered claims and/or damages, yet it took no steps to prevent such outcome. In such situation, the fact that the insurer issued a world class reservation of rights letter, spelling out in detail its precise position on what is and what's not covered, is no protection against the consequences of failing to prevent a general verdict and the consequences that it causes.

Continued on Page 3

About The Editor

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The Cover-age Story

In Town and Country Property, LLC v. Amerisure Insurance Company (published), the Supreme Court of Alabama addressed covered versus uncovered damages in the construction defect context. The decision was a significant win for the insurer. And, true, the court addressed none of the problems just discussed concerning potentially penalizing an insurer that failed to take steps to prevent a verdict that did not allow for allocation between covered and uncovered claims. But despite this, insurers should not take away from Town and Country Property that allocation between covered and uncovered claims always works as it did there and there are no risks for an insurer of not addressing the issue pre-verdict.

Town and Country Property involved the availability of coverage for a construction company insured for a $650,100 verdict against it. The Alabama high court held in an earlier decision in the case that, because faulty construction in and of itself did not constitute an occurrence, Amerisure was not obligated to indemnify the insured for that portion of the damages that represented the costs of repairing or replacing faulty work. However, the court also held that any damages that had been awarded to compensate for damage that the faulty construction later caused to personal property, or some otherwise non-defective portion of the claimant's property, would constitute "property damage" resulting from an "occurrence," and be covered under the Amerisure policy. This is the view in many states when it comes to what's covered and what's not for construction defect.

Following that earlier decision the Supreme Court remanded the case to the trial court to review the record and determine if any portion of the award could be characterized as damage to other than the insured's own work.

The trial court, following a review of the record, concluded that $257,500 in damages claimed by the claimant at trial represented the repair or replacement of faulty construction. Subtracting this amount from the $650,100 awarded by the jury, the court concluded that $392,600 represented covered damages.

On appeal to the Supreme Court, the court saw it much (much) differently (like, 653 times differently): "The only evidence of specific property damage caused by an occurrence identified by either the parties or the trial court and accompanied by evidence of a specific cost associated with repairing or replacing that damage concerns certain ceiling tiles. Amerisure concedes that there was testimony that nondefective ceiling tiles damaged by roof leaks had to be replaced at a cost of $600.

Continued on Page 4

CG 00 01-derful: ISO's Form Twice As Long

When I was a kid I used to roll my eyes when my parents talked about how much certain things cost when they were much younger. One of my father's favorites was to claim that, for the price of a tub of movie popcorn today, he could have bought the theater's entire stock when he was a youngster. And the price of a candy bar… whoa, don't even get him started on that.

I now frequently find myself doing the same thing -- making purchases and noting to my daughter how much less the item cost when I was younger. My daughter's usual response – rolling her eyes. This is how I know I'm getting old.

But inflation is not limited to things you buy. I recently had occasion to examine some very old standard forms setting out the terms and conditions of a commercial general liability policy. The first observation I made was how few pages were in my hands. For example, the 1955 specimen CGL policy was a mere 4 1/3 pages, soup to nuts.

Continued on Page 4

The Cover-age Story

The damage to the ceiling tiles is property damage caused by an occurrence, and, accordingly, T & C is entitled to damages in the amount of $600. The judgment entered by the trial court on remand is accordingly reversed, and the cause is again remanded for the trial court to enter a final judgment in favor of T & C for $600."

Again, Town and Country Property does not stand as a warning to insurers that they may face serious potential consequences for failing to take steps to prevent a verdict that did not allow for allocation between covered and uncovered claims. Although it could be that, if the law at the time of the trial in the underlying action, concerning the "occurrence" issue, was not settled, then Amerisure had no obligation to seek an allocated verdict. Be that as it may, the message here is that reservation of rights letters, no matter how well done, are not self-enforcing documents. Insurers must be conscious of whether they need to take measures to ensure that a verdict reached in an underlying action allows for the positions expressed in their reservation of rights letters to be enforced.
Town and Country Property, LLC v. Amerisure Insurance Company, No. 1100009 (Ala. Nov. 2, 2012) is available on Westlaw (or a court subscription service). Surprisingly, the Alabama Supreme Court does not make its opinions available for free on its website.

State Farm Is There – To Demonstrate The Right Way To Handle A Claim Under A Reservation Of Rights

The Cover-age story in this issue makes the point that reservation of rights letters, no matter how well done, cannot simply be placed in the file after they have been issued. Such letters are not self-enforcing and insurers often need to take steps to achieve the positions that are set out in them. The Cover-age story made this point in the context of an insurer attempting to achieve allocation between covered and uncovered claims.

In State Farm Fire & Casualty Company v. Wier (unpublished), this point is well demonstrated by an insurer in a different context. State Farm undertook its insureds' defense of a claim and issued a reservation of rights letter. Then, after the possibility came about of a change in the law, State Farm issued a follow-up reservation of rights letter, informing the insured of what State Farm's coverage position would be if there were to be a change in the law. Lo and behold, the law did change. This enabled State Farm to achieve a significant benefit – and one that it could not have if it had not issued the follow-up reservation of rights letter.

The Weir decision is lengthy and a lot can be said about it. But the points can

Continued on Page 5

Now consider the coming soon 2013 version of ISO's standard form CGL Policy – 15 1/2 pages.

There are many reasons why the form has bulked up so much. Obviously the world is more complex since the days of Rock Around The Clock. Not to mention lots more lawyers. But putting that aside (and some variation for differences in printing between the two versions), I asked myself a simple question: Yes, the form has lots more pages, but more than it could? Using the Consumer Price Index inflation rate as a guide, the answer is -- No. Not even close. Thanks to a nifty calculator I found on the internet, and converting pages to dollars, an item that cost $4.33 in 1955 would cost $37.39 in 2012 dollars.

That's too bad, just imagine how much more fun insurance coverage would be if ISO's standard CGL policy were 37+ pages.

That's my time.

I'm Randy Spencer.

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State Farm Is There: - Continued

be made by simply paraphrasing the court's summary at the beginning of its opinion. John Wier and Richard Pyorre, former State Farm agents, were sued by State Farm for allegedly taking trade secret customer information in anticipation of their termination and using it to solicit customers to switch insurance companies. The agents happened to be insureds under State Farm policies and they tendered their defense to State Farm under a CGL policy. [Defending the people that you are suing – now that's a good neighbor. On a serious note, State Farm's need to defend the people that it was suing likely resulted in the need for some unique claims handling procedures.]

State Farm defended the agents under a reservation of rights pursuant to the "advertising injury" provision. Then the California Supreme Court granted review in Hameid v. National Fire Insurance of Hartford. At issue in Hameid was whether an insured's use of a competitor's customer list to solicit the customers gave rise to a duty to defend under the "advertising injury" provision of a CGL policy.

Based on the possible decision in Hameid, State Farm sent the agents a supplemental reservation of rights letter, in which (based on "Buss") the company reserved the right to seek recovery of defense costs if the Supreme Court changed the existing law, resulting in there being no duty to defend.

The California Supreme Court did eventually change the law, holding in Hameid that using a competitor's customer list to solicit those customers did not give rise to a duty to defend as "advertising injury." The high court held that the term "advertising injury," in the CGL policy, required "widespread promotion to the public," rather than individual solicitation.

Based on that decision, State Farm stopped providing a defense and brought suit against the agents for recoupment of defense costs. However, State Farm only sought recoupment of those defense costs expended after the date of the supplemental reservation of rights letter. The California Court of Appeal held, based on the Supreme Court's decision in Hameid, that State Farm did not have a duty to defend the agents in the trade secrets case. Further, the appeals court held that State Farm was entitled to recoupment of defense costs. This was no small amount. State Farm was seeking over $350,000 from each of the agents – and this was just from the time of the supplemental reservation of rights letters.

The aspect of the court's decision, related to the ins and outs of California recoupment law, is not important here. After all, the substantive issue in Weir, involving recoupment in the context of a pending change in the law, is a unique situation. It is not one that I can imagine coming about too often.

Instead, the point of Weir is that State Farm undertook its insureds' defense under a reservation of rights. But it did not just issue the letter and leave it at that.

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.

To the contrary, State Farm became aware that the California Supreme Court granted review in Hameid. It was also aware that, if the Hameid decision went a certain way, State Farm would have no duty to defend. Then, under Buss, this would give rise to a right to reimbursement of defense costs -- if State Farm issued an appropriate follow-up reservation of rights letter. So it did. As a result, when the law did in fact change,

Continued on Page 6

State Farm Is There:

- Continued

State Farm achieved a significant benefit in the way of recoupment of certain defense costs. This could not have been achieved if State Farm only had the benefit of the initial reservation of rights letter – no matter how well it had been prepared.

Credit to State Farm for having a very real understanding that handling a claim, that involves providing a defense under a reservation of rights, does not end when the letter is issued. The moral of the story for insurers defending under reservations of rights is simple.

State Farm Fire & Casualty Company v. Wier, No. A127243 (Cal. Ct. App. Oct. 26, 2012) is available on the California Court of Appeal website.

A Lesson Before Denying: Florida Federal Court Provides Cautionary Tale For Policy Drafting

Insurance policies almost always contain definitions of certain terms. In some cases -- a lot of definitions. Then, in some cases, no matter how many definitions the policy employs, a court will conclude that it still was not enough. These courts hold that, if the insurer meant for a term to have the definition if it advancing, the insurer should have specifically defined it as such (this is a story for another day). Since policyholders often argue that coverage is owed, on the basis that a policy is ambiguous, then it goes without saying that insurers must endeavor to draft policies that are as clear as possible. Consider that in a coverage dispute that turns on the meaning of a single clause, or even a single word for that matter, in a 20 page policy, the language of all 20 pages will be argued by the policyholder to be relevant to the interpretation of the few specific words at issue. Policyholders sometimes attempt to argue that a policy is ambiguous on the basis that the interpretation an insurer is advancing is not supported by another aspect of the policy – even if that other specific aspect is not in play in the dispute. In other words, policyholders sometimes attempt to argue that a policy is ambiguous based on the existence of an internal inconsistency.

If consistency is the goal, then the use of definitions – which, by definition, ensure that a term has the same meaning every time it is being used -- can be very helpful to achieve this. But having an arsenal of definitions is only half the story. To achieve the benefit of having defined terms, the insurer must use them at all appropriate points throughout the policy.

For a case of what could have been for an insurer, when using defined terms, take a look at Great American Fidelity Insurance Company v. JWR Construction Services (unpublished), where a Florida federal court concluded that an exclusion did not apply despite the insurer unquestionably believing that it was intended to do so. [Some of the following case summary is based on information contained in the declaratory judgment complaint and was not included in the court's opinion.]

In JWR Construction Services, the court addressed coverage for JWR, a general contractor, for claims arising out of its use of Chinese drywall to construct condominium units. In general, the policies at issue provided coverage for Loss because of a Pollution Condition arising from Contracting Services. There is much more to the coverage grant but this suffices to make the point. The insurer argued that no coverage was owed on account of an exclusion that applied to Loss "based upon or arising out of the costs to repair or replace faulty workmanship, construction, fabrication, installation, assembly or remediation if such faulty workmanship, construction, fabrication, installation, assembly or remediation was performed in whole or in part by an Insured."

The court's response (on reconsideration) to the applicability of this exclusion was succinct: "The Court held that this exclusion did not apply because JWR did not construct or install the drywall that triggered the Gulf Reflections class action; rather, its subcontractor did. Great American contends the Court's construction of the term 'insured' was unduly narrow and because it did not include JWR's subcontractors was clearly erroneous. The Court disagrees."

But it seems that the court's conclusion could have easily been different.

Continued on Page 7

A Lesson Before Denying: - *Continued*

The court did not see it this way because the exclusion applied only to the work performed by an Insured, which did not include subcontractors. But it appears that Great American's intent could have been accomplished using the policy language in hand. The policy provided coverage for Loss arising from Contracting Services. Contracting Services were defined as "any contracting services stated in the Declarations (general contracting) …performed by or on behalf of the Insured at a Job Site."

So if the policy provided coverage for Loss arising from Contracting Services, and Contracting Services were defined as services performed by "or on behalf of" the Insured, then use of the term Contracting Services, in the exclusion, could have likewise extended it to encompass faulty workmanship performed by "or on behalf of" the Insured (i.e., JWR's subcontractors).

While not at issue in JWR Construction Services, another lesson to keep in mind when it comes to drafting insurance policies – where every word of the policy may be argued by the policyholder to be relevant to the interpretation of the few specific words at issue -- is the following. The general nature of a liability policy, of any kind, is to use an insuring agreement that provides a non-specific grant of coverage for a certain type of risk. Then, exclusions are employed to remove any coverage not intended by the more general grant. The result of this is a document that focuses on the availability of coverage for a wide-variety of claim scenarios.

Now turn to a policy endorsement – especially one for an exclusion. Here the thought process at the time of the drafting is different. In this situation the drafter of the endorsement has a very specific risk/claim scenario in mind when putting pen to paper. But even though the exclusionary endorsement has a narrow purpose, one that is not addressed in the policy's terms and conditions, or that is intended to amend the policy's terms and conditions, it cannot exist in a vacuum. It cannot be divorced from the general terms and conditions of the policy to which it will be attached. Thus, when drafting an exclusionary endorsement, no matter how narrow its focus, care must be taken to ensure that, wherever applicable, it employs the same language and definitions that are contained in the policy's general terms and conditions. To do otherwise runs the risk of creating an internal inconsistency that will likely be argued by a policyholder establishes ambiguity.

Great American Fidelity Insurance Company v. JWR Construction Services, No. 10-61423 (S.D. Fla. Nov. 2, 2012) is available on the PACER system.

Holy Mau: Virginia Supreme Court: Pollution Exclusion Applies To Chinese Drywall

Chinese drywall -- litigation over the smell of a rotten egg rolls on. But at some point it won't. While Chinese drywall is a big problem, it differs from many mass torts in certain ways. First, Chinese drywall was not in use for a long time, and certainly not when compared to some products, such as asbestos and silica, that produced injury and damage. Second, it would seem that builders stopped using the trouble-ridden drywall after they learned of its problems. Third, even if the damage is latent, the latency period is short. All of this is to say that Chinese drywall does not have the factors that have allowed some mass torts to drag on indefinitely. So, presumably, at some point, the litigation will stop.

But until that happens, there are important coverage issues that will need to be addressed, with the pollution exclusion being one of them. It is likely that the applicability of the pollution exclusion, to Chinese drywall, is more important in states that interpret the exclusion broadly, applying it to a wide variety of hazardous substances. States that limit the applicability of the pollution exclusion to so-called "traditional environmental pollution" are unlikely to conclude that the exclusion precludes coverage.

In Travco Insurance Company v. Ward, the Virginia Supreme Court addressed the applicability of a pollution exclusion, in a homeowners policy, to damages caused by the installation of Chinese drywall during construction of a home.

The pollution exclusion applied to "loss caused by: Discharge, dispersal, seepage, migration, release or escape of pollutants unless the

Holy Mau: - *Continued*

discharge, dispersal, seepage, migration, release or escape is itself caused by peril insured against under Coverage C." Pollutants were defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or claimed."

The Virginia Supreme Court held that the pollution exclusion served to preclude coverage: "It is beyond dispute that the sulfuric substance emanating from the drywall is gaseous. It is described as such in Dr. Hejzlar's affidavit and Ward's answer to the federal declaratory judgment complaint, as well as in his state court complaint and discovery responses. As for the nature of the sulfuric gases, Ward asserted the presence of 'odorous fumes in the residence,' described the gas as 'toxic,' and alleged that it caused 'skin rashes,' 'lesions,' 'sinus congestion,' and 'nosebleeds.' These properties plainly place the sulfuric gases from the residence within the definition of 'irritant or contaminant' contemplated by the policy and commonly understood. Furthermore, reduced sulfur gas is a pollutant per the relevant state and federal regulations."

Yes Travco is a first-party property case. However, based on the language of the exclusion, and the nature of the court's analysis, it is hard to argue that it won't be considered as guidance by courts nationally addressing the applicability of the pollution exclusion to general liability policies. The third-party coverage issue is relevant to claims brought against parties that distributed or installed Chinese drywall.

Travco Insurance Company v. Ward, No. 120347 (Va. Nov. 1, 2012) is available on the Virginia Supreme Court website.

Indiana Federal Court: Good News, Bad News For Insured: Not Guilty. But Still No Coverage

It is not unusual to see the following insurance coverage scenario. An insured pleads or is found guilty of a crime, such as a shooting, battery or sexual assault. Its insurer then argues that no coverage is owed for the subsequent civil action filed against the insured, because the criminal verdict establishes proof of the insured's intent, or other conduct, that is sufficient to negate coverage. This coverage issue has been litigated throughout the country. And as if often the case when "intent" related issues are in play, there is no real consensus.

A related, but much more unusual issue, came before the Northern District of Indiana in State Farm Fire & Casualty Company v. Pipchok (unpublished). Here, David Pipchok was found not guilty of sexually molesting a minor. The minor's parents filed a civil action against Pipchok. Pipchok sought coverage under his homeowner's policy. State Farm denied coverage on the basis that its policy precluded coverage for intentional acts.

The Indiana federal court noted that "[i]f the factual basis of the claims rests entirely upon proof of intentional conduct, and a reasonable investigation does not produce evidence that the insured acted in any other manner, the insured's actions fall outside the definition of occurrence and are specifically excluded by the intentional act provision."

After setting out this standard, the court stated that, under an Indiana statute, it is undisputed that the parents' claim for "child molestation requires proof of an intentional act -- the intent to arouse or satisfy the desire of either a child or the other older person. The very definition demands proof of intentional conduct and removes the cause of action from the definition of occurrence as defined by the contract."

The court reached this decision notwithstanding the not guilty verdict: "Although Pipchok was found not guilty at his criminal trial, this is not dispositive of the issue of intent. The policy holder's admission or denial of the act is not the determining factor when deciding whether the policy holder's actions were intentional. . . . Here, the relevant criminal statute explicitly requires proof of intent. Any conduct that requires proof of an intentional act is not an accident and is not covered by the homeowner's insurance policy regardless of the policy holder's innocence or alleged frame of mind at the time the act was committed."

Continued on Page 9

Indiana Federal Court:

- *Continued*

Just as where an insured pleads or is found guilty of a crime, and then the insurer argues that such fact establishes that no coverage is owed, the "not guilty" version of this scenario is also likely to lead to mixed results nationally. "Intent" related coverage issues seem to have a way of not producing consensus results on a nationwide basis.

A copy of State Farm Fire & Casualty Company v. Pipchok, No. 11-419 (N.D. Ind. Oct. 30, 2012) is available on the PACER system.

Michigan Federal Court: Chrissie Hynde's Favorite Coverage Issue: Pretenders Defense Costs

The Eastern District of Michigan's decision in AMI Entertainment Network, Inc. v. Zurich American Insurance Company (unpublished), that no coverage is owed for pre-tender defense costs, is not at all groundbreaking. This is certainly the majority rule nationally. The court held: "Here, the Court finds that the above cited policy language is clear and unambiguous on the conditions of notice and in the voluntary payment clause. This language must be enforced as written. In this case, AMI incurred over $1.3 million in defense fees and costs before it provided notice of the Underlying Lawsuit to Zurich. AMI failed to comply with two contractual provisions in the subject policy: the notice and the voluntary payment provisions. Therefore, Zurich is not liable for the pre-notice defense fees and costs incurred by AMI because AMI voluntarily paid the defense fees and costs."

But while this Michigan federal court decision is not surprising, it serves as a reminder that pre-tender defense costs is an underrated issue; and late notice is one that is overrated.

As a starting point, even when a claim is reported months after it should have been, that is oftentimes not late enough to serve as a breach of the policy's notice requirement. What's more, even when a claim is sufficiently tardy, to qualify as having formally breached the policy's notice requirement, the insurer must usually prove that it was prejudiced by the insured's delayed notification in order for such breach to serve as a basis to exclude coverage. And prejudice is frequently difficult for insurers to establish. For these reasons, insurers have had a difficult go at it when attempting to disclaim coverage for defense and indemnity on the basis that their insured did not provide notice of a claim in a timely manner.

But insurers' fortunes have been significantly different when they are not seeking to completely disclaim coverage for defense and indemnity on account of late notice. Rather, the insurer is only asserting that is has no obligation to reimburse its insured for defense costs incurred by the insured prior to the time that the insured placed the insurer on notice of the claim. And unlike their unimpressive results in disclaiming all coverage for defense and indemnity on the basis of late notice, insurers have done remarkably well in avoiding any obligation to pay for pre-tender defense costs.

The difference between late notice and pre-tender defense costs, even within the same state, can be dramatic. For example, New Jersey sets a very high burden on insurers seeking to disclaim coverage for defense and indemnity on the basis of late notice -- requiring a likelihood of appreciable prejudice. But when the issue is pre-tender defense costs, New Jersey law takes a one-hundred-and-eighty-degree turn, holding that an insurer is only obligated to pay for that portion of the defense costs arising after it was informed of the facts triggering the duty to defend -- and no showing of prejudice is required.

Late notice and pre-tender defense costs seem remarkably similar. So why have insurers been so much more successful when it comes to pre-tender defense costs? In general, some courts are unwilling to saddle an insurer with an obligation to pay for defense costs that it had no ability to control. Other courts conclude that the duty to defend does not arise until the insurer receives notice. And some courts talk about the policy's prohibition against the insured making voluntary payments.

Pre-tender defense costs can be no small issue. While a claim that is reported late by three or four months may offer no basis to an insurer for a late notice disclaimer, a significant amount of defense costs may have been incurred during this

Continued on Page 10

Michigan Federal Court:

- *Continued*

pre-notice period -- especially since litigation can be very active in the initial stages. Even a claim that is only a few weeks late in being reported could have rung up some meaningful defense costs during the pre-notice period. For this reason, the question whether coverage is available for pre-tender defense costs arises in numerous claim contexts -- many more than whether late notice serves as a basis for disclaiming all coverage for defense and indemnity.

AMI Entertainment Network, Inc. v. Zurich American Insurance Company, No. 12-12972 (E.D. Mich. Oct. 22, 2012) is available on the PACER System.

Colorado Appeals Court: "Rip and Tear" Damages Are Covered

When it comes to coverage for construction defect, the rules can often be easier said than applied. For example, it is easy to state the general rule that no coverage is owed for the cost to repair or replace an insured's own defective work, but coverage is owed for damage to other property caused by the insured's defective work. However, application of this rule can be challenging. One such challenge results when property is damaged not by the insured's defective work, but, rather, because it is unavoidable that the insured's defective work cannot be repaired or replaced without damaging other property. These are so-called "rip and tear" damages.

The Colorado Court of Appeals had occasion to address coverage for "rip and tear" damages in Colorado Pool Systems, Inc. v. Scottsdale Insurance Company (published). At issue was coverage for a swimming pool contractor for the costs associated with the demolition and replacement of an improperly constructed pool.

Turning to coverage for the cost of demolishing and replacing the pool, the court provided a predictable answer. No. "This damage resulted solely from plaintiffs' obligation – necessarily expected – to replace defective work product."

The court next addressed coverage for damage to a deck, sidewalk, retaining wall and electrical conduits. These were the "rip and tear" damages – property that was necessarily damaged by having to repair or replace the damaged property. With citation to decisions nationally, the court reversed the trial court and concluded that the "rip and tear" damages were the result of an "accident" and covered. The court reached this decision even though such damages were solely caused by the non-covered replacement of the insured's defective work and the ripped and torn property was not itself initially damaged.

A copy of Colorado Pool Systems, Inc. v. Scottsdale Insurance Company, No. 10CA2638 (Colo. Ct. App. Oct. 25, 2012) is available on Westlaw

Declarations:

The *Coverage Opinions* Interview With Tom Segalla

Coverage Opinions sits down on the, er, couch with Tom Segalla, a founding partner of Goldberg Segalla, co-author of *Couch on Insurance* 3d and inaugural President of the American College of Coverage and Extracontractual Counsel -- a newly formed organization created by leading lawyers to improve the quality of the practice of insurance law. And Tom gives us his vote for best chicken wings in Buffalo.

Tell me about your background. Where did you grow up? What drove you to pursue a legal career?

Grew up in Norman Rockwell Country in Northwestern Connecticut and found my way to the University of Miami, Coral Gables, Florida on a full academic scholarship. After graduating with a BBA in personnel/industrial management, I went to work at Uniroyal in their Union Relations Department. That rekindled a long desire to go to law school

How did you first become involved with insurance coverage?

I found corporate tax law boring and after 1½ years started doing general defense litigation which led to my starting to do insurance coverage in the late 1970's. Some would say "coverage" is more boring than "tax" -- not to me!

What kinds of work are you doing these days?

I am primarily doing expert work in the bad faith and insurance coverage areas. Clients have retained me in over 40 jurisdictions, both nationally and internationally. These cases run the gambit from first party and third party property and casualty matters.

You've been at it for 40 years and have no doubt seen it all when it comes to insurance coverage. What are some of your most memorable cases?

From a pure volume in the number of cases and the diverse issues raised, the Katrina related hurricane cases have provided the most challenging in recent years. In these cases, I was retained as both a bad faith and property coverage expert and saw many of the issues go to the Supreme Court of Louisiana. Many of the issues involved in these cases will undoubtedly have an impact on the issues that will be litigated as a result of "Sandy."

Congratulations on being the inaugural President of the American College of Coverage and Extracontractual Counsel. Tell me about the American College. How did it come about and what are its objectives?

As you can imagine, I am honored and proud to have been selected as the inaugural President of such an esteem group. The idea of the American College of Coverage and Extracontractual Counsel ("ACCEC") was something that Ned Currie, of Currie, Johnson, et al. in Jackson, MS brought to a group of us at the Federation of Defense and Corporate Counsel. His question was simple -- why don't we have an organization that recognizes the best of the best in the insurance coverage and extracontractual arena? The answer to that question led to the selection of 8 attorneys from the insurance company side and 8 attorneys from the policyholder side. We have 16 founding Regents of the ACCEC. They are listed on our website www.americancollegecec.org. The goal is to promote higher professional standards and better methods in the field of insurance and extracontractual law, and the encouragement of uniformity and cooperation in these fields. The bottom line is that we want to improve civility, diversity and quality of the practice of insurance law

Tom Segalla

What are some of the activities planned for the ACCEC?

We had an inaugural meeting in New Orleans, LA on October 25, 2012. We are in the process of planning our first educational event in May 2013 in Chicago and are excited about bringing our members together for this event.

Continued on Page 12

Declarations: - *Continued*

Where do you see the organization in three to five years?

We anticipate with this timeframe, we will become a proactive organization that promotes our goals and purpose. From a pure numbers standpoint, I would expect that we will be in the neighborhood of 500 members as we approach the 5 year benchmark. We have already begun the process to add new members.

Co-authoring Couch on Insurance is obviously an incredible achievement and I can only imagine the satisfaction you get from seeing it cited repeatedly by courts. How did your involvement come about?

I raised my hand on the occasion when the publishers contacted me in the late 1990's looking for a co-author that was a practicing attorney who had a practical stand to the analysis of coverage issues and the ability to litigate. Those who've known me for years know me as one to raise his hand on numerous occasions. Raising my hand to be a co-author for Couch on Insurance 3d was certainly one of the best things that I have done during my career. To be candid, it is an ego stroke every time I read a case and Couch pops up.

As a writer myself I am always curious about what's behind the scenes to get a book on the shelf. Co-authoring Couch is no doubt a large and complex undertaking. How does it come together?

I had to be willing to read 300-400 pages of Couch text from April to October of every year, edit that text and insert the practical "Observations" in the text. My co-author Lee Russ was responsible for collecting the text from various sources and I assisted in editing the text to insure that it had a practical stand for the readers. It was a long haul, but worth it. I was able to accomplish this with partner support, enabling wife and no children.

The last two Coverage Opinions interviews have also been of prominent coverage lawyers and they both told me about very interesting hobbies (Jerry Oshinsky is an actor/director and Barry Ostrager is a racehorse owner and involved with thoroughbred breeding). I'm expecting you to tell me that you race Formula 1 cars. What keeps you busy when you are not in the office?

Aside from being known as a prolific writer and presenter, there is not much time left for insurance coverage otherwise keeping busy. With that said, my secret passion is refinishing primitive country antiques. Again to some, it may be as boring as tax law or insurance coverage, but to me the same type of refinement is required.

Who has the best chicken wings in Buffalo?

Neil Goldberg would kill me if he knew that I even ate a chicken wing. With that said -- for traditional chicken wings, it is a toss-up that is debated by all Western New Yorkers -- either the Anchor Bar or Duff's. I vote for the Anchor Bar. But for barbeque wings there is only one – LaNova!

Late-r Notice:
A Look At Decisions To Come

All The Way To Reno: Coverage For Carbon Monoxide Poisoning

[I know that the Nevada Supreme Court is located in Carson City, but there is no REM song called All the Way to Carson City]

In Century Surety Company v. Casino West, Inc., the Supreme Court of Nevada (on Certification from the Ninth Circuit) will answer whether an absolute pollution exclusion applies to preclude coverage for the deaths of four individuals from carbon monoxide poisoning from fumes that entered their room from a motel's pool heater. The decision will likely answer (after a long-time coming) how Nevada interprets the absolute pollution exclusion. Is the state in the camp that interprets the exclusion literally – thereby applying it to hazardous substances of all shapes and sizes? Or will the exclusion be interpreted more narrowly – limiting its applicability to so-called "traditional environmental pollution?" This decision will be important for many Nevada cases to comes. But the decision is unlikely to influence other states, as the issue is quite well-settled nationally.

Continued on Page 13

Late-r Notice: - *Continued*

Where the case could have a wider impact is on the question whether the claim is precluded by the Indoor Air Quality Exclusion. Here the Ninth Circuit noted that there did not appear to be any published decisions construing the issue. The District Court had concluded that "[t]he indoor air quality exclusion was ambiguous, because, while it was 'reasonable to consider carbon monoxide' within its ambit, it was also reasonable to construe the exclusion 'as applying only to ongoing air quality issues that result from biological organisms, asbestos or silica.'"

Century Surety Company v. Casino West, Inc., No. 10-17309 (9th Cir. April 6, 2012) is available on the Ninth Circuit website.