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COVERAGE FOR CONSTRUCTION DEFECTS, GENERAL PRINCIPLES AND 'THE LAST WORD'

Marcus B. Snowden

Some may bill the Ontario Court of Appeal's recent decision in *Bridgewood Building Corp. (Riverfield) v. Lombard General Insurance Co. of Canada* (released April 5, 2006) as a significant blow to "general principles" of insurance law and the insurer's good cause in the ongoing saga of disputed coverage for building defect claims. At the risk of sounding somewhat less maudlin, this writer takes a slightly different view. There is much said and more written about the general principles of insurance.

This writer respectfully suggests Justice Stewart and, on appeal, Justice Moldaver on behalf of the Ontario Court of Appeal, merely remind us that underwriters have "the last word." This last opportunity before a dispute arises is the form of the policy wording chosen for a particular risk. As outlined below, this writer suggests both Justice Stewart and the Court of Appeal got it right in the *Bridgewood* case. Careful review suggests they got it right for the right reasons.

Just The Facts Please

Justice Stewart summarized the relevant facts in the reasons for judgement issued a little more than a year ago. Two general contractors, Bridgewood and the applicant in a companion proceeding, Beige Valley Developments Limited, constructed new homes containing defective concrete supplied by subcontractors. The faulty concrete "caused damage to the homes such that the footings and foundation walls would not support the weight of the structures." Foundations shifted, resulting in exterior cracks in brick and stone walls, and damage to framing and drywall. Deterioration was so bad that in extreme cases the concrete material "could be scooped out by hand."

All of this is described in brief detail in the first paragraph of Justice Stewart's reasons at first instance in the *Bridgewood case* [(2005), 26 C.C.L.I. (4th) 93 (Ont. S.C.J.)]. Justice Stewart went on to state that Bridgewood was incorporated in August of 2000 for the purpose of building and selling homes in a Brampton, Ontario project. The record is not clear on when Beige Valley was created, but it was in the same business of building and selling homes for a Woodstock, Ontario project. Both entities were insured by the same insurer, Lombard, under the same policy form for an identical $7 million in limits, at the same time as their respective residential projects were underway in the spring of 2002. Both had received faulty concrete provided by the now-bankrupt Dominion Concrete. This faulty concrete had been supplied through various subcontractors and was not something for which either general contractor was directly responsible.

Neither Bridgewood nor Beige Valley informed Lombard when, as Justice Stewart put it, they assumed responsibility for repairs to the homes impacted, in the early summer of 2003. As the judge later pointed out, this "assumption of liability" was more properly described as a statutory "obligation" under the Ontario New Home Warranty Plan ("the Plan") created and administered under the *Ontario New Home Act* ("the *Act*"). In very simple terms, if these two developers/builders did not carry out the warranty repairs, Justice Stewart was satisfied this would, "at a minimum, place their continued registration [under the Plan] in serious question."

The two policyholders eventually spent some $2 million in repair and relocation costs. Law suits from both homeowners and the Plan itself have so far been avoided because the two developers continue to meet their statutory obligations under the warranty program. When it was discovered in October of 2003, Lombard initially agreed, in writing, to cover all claims arising out of the damage described above. Lombard then reversed its decision and refused coverage, resulting in the two companion applications for declarations before Justice Stewart.

Policy Wordings

Without going into great detail here, suffice it to say the insuring agreement language, exclusions, conditions regarding notice and voluntary assumption of liability, and most other terms quoted by Justice Stewart, were largely in keeping with the pre-2005 Insurance Bureau of Canada ("the IBC") Form 2100. This form of the Commercial General Liability ("CGL") policy is known as the "plain language" form, sometimes referred to as the 1986–87 version of the advisory wording circulated for use by the IBC.

There is no need to review the property damage or occurrence portions of the insuring agreement language here; nor is there need to review most of the usual "business risk" exclusions. Why, one might ask, should we ignore these key areas of the policy wording? Because, as Justice Stewart noted at paragraph 20 of the trial level reasons for judgement:

> For the purposes of these applications, and due to these other unique factual circumstances, Lombard is not contesting that the expenses incurred by the Applicants constitute "property damage" or that they were caused by an "occurrence." In addition, and for these applications only, Lombard likewise is not purporting to advance any argument as to the possible applicability of the various "work" and "product" exclusions contained in the Policies. As a result, the "nuances" of those terms, as counsel for the Applicants describes them, do not apply.

At the application hearing, therefore, the issues boiled down to these:

1. Were Bridgewood and Beige Valley "legally obligated to pay as damages" the repair and related costs?

2. Did the contractual liability exclusion apply? and

3. Did Bridgewood and Beige Valley breach the "voluntary payments" condition?

Well it takes no great mind to conclude on item #1: the Act and the Plan both mandated the warranties to be given and the performance required of general contractors/developers in rectifying major defects in residential construction. Indeed, the writer suggests this fairly answers items #2 and #3 above as well: the obligation was not a contractual liability but a statutorily imposed one. As a result, the payments made were not and could not reasonably be construed as "voluntary" from the policyholders' perspective.

Lombard's Arguments

One might then fairly ask what the arguments were before Justice Stewart? They can be summarized as follows:

1. Something more than mere warranty repair

work is required to bring a claim within the meaning of "legally obligated to pay as damages";

2. Aside from "work" or "product" exclusions, a CGL policy by its very nature is not a "performance bond" — this is a "general principle" of insurance law;

3. Public policy ought not to reward a party for shoddy work;

4. The Act and Plan warranties are liabilities "assumed in a contract"; and

5. The repair costs are "voluntary payments," because the policyholders cannot demonstrate they would have been liable for them if sued.

Justice Stewart noted some of the arguments overlapped or were intertwined with others and proceeded to dispense with each of them in a fairly compelling manner. Lombard appealed to the Ontario Court of Appeal.

Appeal Dismissed

Justice Moldaver wrote the reasons for judgement on behalf of an unanimous panel. One might fairly question what issues could be worthy of an appeal in light of the admissions made in the lower court as outlined above and the findings Justice Stewart made based upon them. As it turns out, one of the concessions made at first instance, much like the original agreement to cover the loss, was withdrawn.

Lombard argued on appeal mainly two points: the first was to repeat the "general principle" that CGL policies are not intended as performance bonds. The second was new and had been conceded before Justice Stewart: Gone was the "contractual liability" exclusion and in its place, Lombard argued the "your work" should apply, *even though it contained a clear "subcontractor exception" clause*. Readers are probably familiar with the base form of the "your work" exclusion in the pre-2005 IBC Form 2100. Justice Moldaver's focus on the exception clause was plain to see, as he quoted the exclusion wording twice in his reasons (both times italicizing the exception clause). The exception clause reads:

> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

The result: both arguments failed to impress. Justice Moldaver dismissed the appeals with costs.

Is There a "General Principle?"

What has everyone's attention, of course, is the Court of Appeal's refusal to blindly apply what has been referred to as the "general principle" of insurance law. Legend has it CGL policies are not performance bonds. With great respect, this writer has to ask what all the fuss is about?

Consider the following: in a construction defect case involving faulty concrete poured into foundations in the Ottawa area, following a remarkable three-day argument involving more insurers than Ottawa had coverage counsel, the Ontario Court of Appeal confirmed Justice Roy's reasons for finding coverage. Sound familiar? The *Alie* case is well-known for many points of coverage law. But the one point policyholders' counsel was quick to concede was the "general principle": In *Alie*, the trial was principally against the ready-mix contractor who poured the concrete and the supplier of the cement mix used for that purpose. From the court record, it does not

appear policyholders' counsel ever attempted to argue there was coverage to reimburse for the cost of the policyholders' own faulty work or product.

At issue was the resultant damage. The tear-out costs and associated expenditures, as it turns out, were covered. A defence and indemnity were owed. Consider now the plight of Bridgewood and Beige Valley: they were not the installing subcontractor or supplier of the faulty concrete. This was not their "work" or "product" at the time of installation.

In *Bridgewood*, Justice Moldaver concisely described the significance of the subcontractor exception to the "your work" exclusion and the interplay with the "general principle" at paragraph 12 of his reasons as follows:

> On a plain reading, clause (j) would seem to indicate that coverage will be provided if the "damaged work or the work out of which the damage arises" is performed on behalf of the insured by a subcontractor. And yet, Lombard says that that is not what it means… Upon further questioning… [Counsel for Lombard] conceded, correctly in my view, that if the effect of the "general principle" was as he would have it, exclusion (j) was redundant, i.e., there would be no need to exempt faulty work from coverage in every case. And, as the respondents quite properly point out, if exclusion (j) is redundant, so too are five other exclusionary provisions in the same policy.

Which leads to the question the writer poses for our readers: should the "general principle" really apply in this instance to limit or eliminate coverage for the homeowners' and Plan's warranty claims? Can underwriters really justify taking an off-coverage position when it would have been so easy to draft around the risk presented?

Returning to Justice Stewart's reasons in the Lower Court for a moment, the following passage should bring some sense to the court's analysis for those readers not fully on side up to this point. Justice Stewart made the following observation about underwriting this particular risk at paragraph 39:

> It is apparent on the material before me that Lombard specifically targeted this insurance programme to builders/vendors of new homes. It therefore must be taken to have considered the implications of the…warranty as part of the circumstances relevant to the underwriting of the risk. I therefore consider that if Lombard had wanted to ensure that coverage would not be extended to possible exposure to claims as a result of the… legislative scheme, it was open to it to use clearer and more precise language to effect that objective.

Justice Moldaver, in concluding remarks on the appeal, adopted what he describes as the "interpretative aid" approach to applying general principles in the context of insurance coverage disputes. Put briefly, this approach treats such principles at a lower level of importance than the policy wording itself. General principles are called upon only to aid in the interpretation where there is some doubt about the insuring intent. Justice Moldaver's reasons for rejecting Lombard's concerns about using the general principles in this way were threefold.

The first two reasons were:

1. The original rationale for the business risk doctrine as altered for general contractors by the subcontractor exception clause; and

2. The practical business reality that the market for bad workmanship is not good. As Justice Moldaver put it in paragraph 20 of the reasons, general contractors who "make a habit of hiring incompetent subcontractors will soon find themselves out of work."

The final reason echoes Justice Stewart's original analysis above and is worth quoting from paragraph 21 of the reasons since it is described as the "most important":

> Third, and most important, if insurance companies do not wish to indemnify general contractors for the shortcomings of their subcontractors, they need only say so in clear and unambiguous language in their policies.

In other words, underwriters, you have "the last word."

For digital copies of the trial and appellate rulings, send an e-mail request to the author at msnowden@blaney.com. ■

CONCURRENT CAUSATION EXAMINED BY ONTARIO COURT OF APPEAL

W. Colin Empke

On December 6, 2005, the Ontario Court of Appeal released its decision in *McLean v. Jorgenson* (2006), 30 C.C.L.I (4th) 165 (Ont. C.A.). This case required the Court of Appeal to consider the issue of concurrent causation.

The underlying action involved a snowmobile accident in which the plaintiff was injured while assisting in a snowmobile repair. The plaintiff was lifting the rear end of the snowmobile, while one of the defendants was revving the engine in an effort to start it. The track shredded and flew backwards, striking the plaintiff's leg, which had to be amputated.

One of the issues before the Court of Appeal was whether or not the defendants' homeowner's insurance policy was required to respond, despite the presence of an exclusion for injury arising from the "ownership, use or operation of any motorized vehicle." The automobile insurer was TD General Insurance Company ("TD"). It argued the snowmobile was not a motorized vehicle. The court ultimately rejected this argument and ordered TD to defend. That decision required a review of extrinsic evidence, which is discussed later in this article.

The next issue was whether certain allegations in the statement of claim fell within the coverage of the homeowners policy, issued by Germania Farmer's Mutual ("Germania"). It was alleged the homeowners:

- allowed a dangerous activity to be carried on at the premises;
- put the plaintiff in a situation of danger;
- encouraged the plaintiff to participate in a dangerous activity; and
- took no steps to prevent an injury

It was argued that these allegations fell outside the reach of the automobile exclusion in the Germania policy. The Court of Appeal confirmed that the decision in *Derksen v. 539938 Ontario Ltd.* stands for the proposition there can be concurrent actions in tort, which may result in more than one insurer having an obligation to defend or indemnify. Recall that in *Derksen*, both the automobile insurer and the commercial gen-

eral liability carrier were obliged to respond in a case involving both the negligent clean-up of a work site and the negligent operation of a vehicle.

In *McLean*, the Court of Appeal took the opportunity to further consider what will properly be characterized as a "concurrent cause of action." It noted that each cause of action must be "non-derivative" of the other: each must be capable of standing independently.

In the circumstances of the *McLean* case, the Court of Appeal noted the statement of claim did not properly plead any causes of action unrelated to the ownership, use or operation of the snowmobile. There was no "true" concurrent cause of action. Having reviewed the substance of the pleadings, the court was satisfied all of the allegations were inseparable from the use or operation of the snowmobile. The Germania homeowner's policy was not obliged to respond, as the exclusion for motorized vehicle-related accidents was triggered by the pleadings.

Extrinsic Evidence Rule Re-Examined

An important ancillary issue before the Court of Appeal was the admission of extrinsic evidence during the duty to defend application. Since the Supreme Court of Canada decision in *Monenco* and the Ontario Court of Appeal in *Innopex v. Halifax*, such extrinsic evidence has been discouraged and, in large measure, refused, except in very limited circumstances.

In the *McLean* case, TD had no obligation to defend unless the insureds could demonstrate the existence of an auto policy insuring the snowmobile. Typically, this is not a controversial issue. The allegation in the statement of claim says the insured is the owner or operator of the vehicle and the insured has a "pink card" showing that to be the case. In the *McLean* situation, the facts were not quite so clear. TD took the position that it did not insure the snowmobile (as discussed above), but also alleged that the snowmobile itself was not owned by the defendants. If the snowmobile was not owned by the defendants, TD would have no obligation to respond.

To prove the existence of coverage, the insureds were required to establish two facts: that all of their vehicles were insured with the auto carrier and that the snowmobile met the definition of "newly acquired automobile." Proof of these two facts would demonstrate the snowmobile was an insured vehicle within the meaning of the TD policy.

The insureds submitted an affidavit to provide evidence on these two issues. They submitted proof that all of their automobiles were insured with TD. They submitted evidence that the snowmobile had been acquired by one of them during the term of the policy, such that it met the definition of "newly acquired automobile." The Court of Appeal considered this evidence to be without controversy. It was evidence based largely on documentary evidence. These were also facts that could not be expected to be found in the statement of claim. The Court of Appeal clearly thought it necessary to afford the insureds the opportunity to demonstrate their status as insureds pursuant to the TD policy. The Court of Appeal ruled that this evidence was "not controversial, affected only coverage and did not affect the issues of liability in the litigation." For this reason, it was admissible in accordance with the principles laid out in the *Monenco* decision. Indeed, the Court held that to

refuse admission of this evidence would be contrary to the interests of justice.

Recall that TD also disputed whether the insureds actually owned the snowmobile. If TD were able to prove the insureds did not own it, TD would have no obligation to defend nor indemnify the insureds. In support of its position, TD had a statement the plaintiff had given to an insurance adjuster. The plaintiff had suggested the snowmobile was owned by someone other than the insureds. Note, however, that the plaintiff's statement of claim did not name this other person, but alleged only that the insureds were the owners of the snowmobile. TD sought to admit this statement into evidence during the duty to defend application. The Court of Appeal ruled it inadmissible.

In the court's view, the question of true ownership of the snowmobile was a disputed factual issue central to the liability questions to be decided in the underlying litigation. In order to prove liability and obtain damages, the plaintiff had the onus of establishing that the defendants were the owners of the snowmobile. Having failed to name the "other person" as a defendant, the plaintiff would achieve no recovery unless he could show the insureds were the owners.

The statement of claim alleged the insureds were the owners. TD sought to prove a contrary set of facts to support its position on the insurance coverage issue. The coverage issue related to ownership overlapped with the liability issues in the underlying action. In such circumstances, the court refused to consider TD's evidence in the duty to defend application. To do so would result in the making of preliminary findings affecting the outcome of the underlying litigation, which is exactly what was prohibited by the Supreme Court of Canada in the Monenco case.

See *McLean v. Jorgenson* (2006), 30 C.C.L.I (4th)165 (Ont. C.A.). ■

INSURED ENTITLED TO 15 DAYS' NOTICE OF TERMINATION OF COVERAGE BY CO-INSURED

Jay A. Stolberg

On November 28, 2005, the Ontario Court of Appeal released a decision in which it obliged an insurer to provide 15-days' notice to a co-insured of the termination of coverage requested by another co-insured.

In *Transportaction Lease Systems Inc. v. The Guarantee Company of North America* (2006), 77 O.R (3d) 767 (C.R.), a lessee cancelled all but theft and fire coverage on a leased vehicle after intending to store the vehicle for the winter. The insurer advised the lessor of the deletions approximately four weeks later. Ten days after the cancellation, the lessee drove the vehicle and was involved in an accident. The vehicle was damaged and the issue was whether the deletion of the property damage coverage was effective against the lessor.

The Court of Appeal found the lessee and lessor had both been named insureds under the policy. In the absence of evidence to the contrary, their interests were held to be several. Justice Laforme, with Justice Blair concurring, noted that Statutory Condition 11(2), which allows an insured to cancel coverage at any time upon request, did not address the situation where there was more than one insured. Justice

Laforme found the section to be ambiguous in this situation and a consent requirement was read-in. He concluded that coverage affecting a co-insured could not be terminated without the co-insured's consent. The consent could be either express or implied.

Justice Laforme then made reference to Statutory Condition 11(1), which provides that an insurer can terminate coverage by providing 15-days' notice to the insured. Noting that the section did not "directly" apply, Justice Laforme held that the 15-day notice period in section 11(1) should apply by "analogy" to a termination of coverage by one co-insured.

Accordingly, the majority's decision held that 15-days' notice and the co-insured's consent was required for a valid termination against the co-insured. The co-insured's failure to respond to the notice could constitute implicit consent. As 15-days' notice of the termination of the coverage had not been provided to the lessor, the termination was held to be invalid and the lessor was found entitled to the coverage.

Justice Borins wrote a separate opinion agreeing that consent was required and was not provided in the case. However, Justice Borins held that the consent requirement arose not out of Statutory Condition 11(2), but from the fact that the interests of the insured's were severable. Each held a separate and distinct interest in the policy, which could not be extinguished without its consent. Justice Borins disagreed with the majority's notice requirement, holding that it could lead to practical problems when making a determination of whether the notice was received.

In addition to the implications for coverage under automobile policies where there is more than one named insured, the decision may affect cancellations under fire insurance policies, which contain similar Statutory Conditions. As a result of the reasoning in the *Transportaction* case, where there is more than one named insured under a fire policy, 15-days' notice and the consent of the other insured may be required where one insured purports to cancel the policy unilaterally. In situations involving mortgage clauses, this situation is addressed in the standard wording. In situations involving additional named insureds, insurers should take care to ensure cancellations of coverage are carefully reviewed and the implications of this case are addressed.

See *Transportaction Lease Systems Inc. v. The Guarantee Company of North America* (2006), 77 O.R (3d) 767 (C.R.). ■

SOUTH OF THE BORDER

W. Colin Empke

American jurisprudence in insurance coverage matters can be very influential in Canadian courtrooms. From time to time, we will briefly review U.S. cases of interest.

Liability Due to Rancid Penut Butter Not Covered

Rancid peanut butter afforded the 7th Circuit Court of Appeal the opportunity to consider four issues:

- when the duty to indemnify exists;
- the definition of "property damage";
- the application of the impaired property; and
- product recall exclusions.

The insured, Sokol, was a food-manufacturing company. It prepared packets of peanut butter, which it sold to a cookie company for inclusion in a cookie-mix box. The cookie company discovered the peanut butter was rancid, so it retrieved its boxes and replaced the peanut butter. It then sought its costs from Sokol. Before the cookie company could instigate a lawsuit, Sokol settled the demands. Sokol then requested reimbursement from its Commercial General Liability ("CGL") insurer. The insurer denied the claim.

The insurer's first argument went as follows:

(a) there was no lawsuit seeking damages;

(b) without a lawsuit, there was no duty to defend; and

(c) without a duty to defend, there could be no duty to indemnify.

The court rejected this argument. It noted that the two duties of an insurer (to defend and to indemnify) are often intertwined, but are separate and distinct duties. Sokol's settlement of the matter before a lawsuit was started did not extinguish the duty to indemnify. The insuring agreement reimburses for "sums the insured becomes legally obligated to pay as damages," which includes settlements of potential lawsuits.

The insurer then argued there was no "property damage." The court accepted this argument. The peanut butter did not harm the cookie mix because it was packaged separately. The packets were simply removed from the boxes. Sokol argued there was property damage to the boxes of cookie mix because they had to be opened and resealed. The court refused to accept that opening and closing a box could constitute injury to the box. There was no "loss of use" of any property because after replacement of the peanut butter, the cookie mix was sent to market. The expenses associated with the delay in sending the mix to stores were associated with replacement of the peanut butter, not loss of use of the cookie mix.

The insurer also relied on the "impaired property" exclusion, and the court agreed. The peanut butter was Sokol's product and it was incorporated into the product of another. The peanut butter was defective. Assuming that "property damage" did exist, the impaired property exclusion was applicable. The damage caused by the rancid peanut butter could not be characterized as sudden and accident such that it fell within the exception for "loss of use of other property arising out of sudden and accident physical injury to your product."

Lastly, the court noted that the "product recall" exclusion was applicable on its face. The peanut butter was withdrawn from the market due to defect. Such expenses were not covered.

See *Sokol and Company v. Atlantic Mutual Insurance Company*, 2005 WL 3159561 (7th Cir.).

Florida Supreme Court Interprets Phrase "Arising Out Of"

Municipalities have commenced lawsuits against gun manufacturers in order to recover costs associated with gun violence. Predictably, the gun manufacturers have turned to their insurers for a duty to defend. One such manufacturer is Taurus Holdings Inc. It faces lawsuits in Florida alleging: failure to make guns safe; failure to warn about dangers of guns; and negligent supervision, marketing, distribution and adver-

tising. Taurus approached its insurers. The Florida Supreme Court was required to determine the coverage issues.

All of the policies issued to Taurus contained a "products-completed operations hazard" exclusion that excluded coverage for "all bodily injury occurring away from premises you own or rent and arising out of your product or your work."

Taurus alleged the phrase "arising out of" was ambiguous. It advocated a narrow interpretation of the phrase "arising out of," such that the exclusion was limited to claims related to injury "caused by" guns. This is an argument in favour of direct and immediate causation, sometimes called "proximate cause." Taurus argued the underlying claim alleged damages associated with negligent marketing and not merely damages caused directly by guns, thereby requiring a duty to defend.

The Florida Supreme Court reviewed the law respecting the interpretation of the phrase "arising out of." It concluded the phrase is unambiguous. It has a broader meaning than "caused by" or "resulted from" — which are terms associated with the principle of proximate cause, which would require a direct and immediate connection between the injury and the guns. Instead, "arising out of" means "originating from," "growing out of" or "flowing from." It requires a causal connection, but not necessarily a proximate connection. The Florida Supreme Court noted that this broader interpretation of the phrase was appropriate whether it was found in an insuring agreement or an exclusion clause.

Utilizing a broad view of the phrase "arising out of," the court concluded that the "products-completed operations" exclusion was not limited solely to defective product claims. It must apply to any claims "arising out of" Taurus's product — the guns. The underlying action made allegations concerning the off-premises conduct of Taurus arising out of its firearms products. The bodily injuries alleged originated in the products. The exclusion was applicable. We note that the court recognized Taurus had the opportunity to purchase "products-completed operations" coverage, but had elected not to do so. Had it purchased such coverage, it would have been entitled to a defence in this matter.

See *Taurus Holdings v. United States Fidelity and Guaranty Company*, 2005 WL 2296481 (Fla.).

Temperature Change Exclusion Applies Both Indoors and Outdoors

First-party property-damage policies frequently exclude property damage caused by or resulting from "changes in temperature." One manner in which policyholders avoid application of this exclusion is to note that the policy does not distinguish between indoor or outdoor temperatures and is therefore ambiguous. This argument has been successful in a number of jurisdictions (see *Blaine Constr., Co. v. Ins. Co. of N. America*, 171 F.3d 343 (6th Cir., 1999).The ambiguity can be avoided if the policy wording contains terms that make it clear that both indoor and outdoor temperature fluctuations are meant to be excluded. This was the conclusion in Providence *Washington Insurance Co. v. Volpe*. A law firm suffered a failure of its computer system when the server overheated due to a broken cooling fan. The firm sought recovery of its losses from its insurer. The insurer denied, relying on the change in temperature exclusion.

The law firm pointed to other jurisdictions

where the courts found the exclusion ambiguous. The court noted, however, that the exclusion in question carved an exception for damages caused by failure of an air conditioning system. Since such an exception must necessarily refer to damaged caused by indoor temperature changes, the exclusion must apply to both indoor and outdoor conditions. The ambiguity was overcome and the exclusion was applicable. The insurer was entitled to summary judgement.

See *Providence Washington Insurance Co. v. Volpe*, 2005 WL 2860021 (E.D. Pa.).

Delay in Reserving a Specific Coverage Defence May Create Waiver

Reservation of rights letters are routine in matters involving questions of insurance coverage for particular losses. Such letters routinely reserve the insurer's rights to assert additional coverage defences as they are discovered. Care must be taken in preparing them, however. This was demonstrated in *Olin Corp. v. Ins. Corp. of North America.*

In 1984, Olin notified its insurers of potential environmental liabilities. The insurers issued a reservation letter setting out coverage defences and denying coverage for punitive damages. It was not until 1993 that the insurer asserted a late notice defence.

Recently, Olin was successful in its motion for partial summary judgement against the insurer. The court held that the insurer's failure to assert the coverage defence in its initial reservation letter must be taken as waiving the right to rely on the late notice defence. The court was concerned with passage of time together with the insurer's failure to assert a coverage defence it should have been aware of at the time it first reserved rights.

See *Olin Corp. v. Ins. Corp. of North America*, 2006 WL 509779. ■

EXPECT THE BEST

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