# Commentary

## Coverage Gone Mild:

## 6th Annual Look Back At The Year's Ten Most Significant Insurance Coverage Decisions

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While normally more fun than a barrel of monkeys, in 2006 insurance coverage was more like a couple of goldfish in a bowl. As hard to believe as it is, the heretics who claim that coverage can be a little bland enjoyed a rare I-told-you-so moment last year. Well, even a broken clock is right twice a day.

So how could this have happened? In 2006, the nation's highest state courts seemed to serve more decisions than usual addressing meat and potatoes coverage issues. Some years these courts pepper the basics with fusion cuisine. This wasn't one of them. Not to say that the buffet wasn't satisfying; the fare was simply claim vanilla. And since this annual insurance coverage year-in-review is usually cooked up with dish-isions selected from high court menus, it took a little extra foraging to find the tasty morsels. Thankfully, it wasn't a complete famine and there were still a few things to chew on. The coverage world didn't lay a complete egg.[1]

For the sixth January in a row I am grateful to *Mealey's Litigation Report: Insurance* for the opportunity to make the case for ten coverage decisions from the smorgasbord of the year gone by that are likely to play a significant part in setting the insurance coverage table in the years ahead.

The selection process operates throughout the year to identify coverage decisions that are most likely to impact a large number of subsequent claims. Those chosen usually, but not always, hail from state high courts and may (i) involve a frequently occurring claim scenario that has not been the subject of many, or clear-cut, decisions; (ii) alter a previously held view on a coverage issue; or (iii) involve a burgeoning coverage issue. The process is highly unscientific. There is no point system, blue ribbon panel or telephone voting, as in American Idol. Much like a dog show, the judging is very subjective, but does not want for hand-wringing to narrow the field to those you see here.[2]

The following are the ten most significant insurance coverage decisions of 2006 (listed in the order that they were decided):

- ***Peninsula Cleaners v. Hartford Casualty Insurance Company*** — Three years after *MacKinnon's* yellow jackets severely limited the absolute pollution exclusion, a California District Court (and others in 2006) demonstrated that insurers are not feeling the sting in every case.

- ***Contreras v. U.S. Security Insurance Company*** — Insurer had two choices and each was bad faith. Florida appeals court addressed whether insurers can get squeezed in the Sunshine State.

- ***French v. Assurance Company of America*** — Fourth Circuit made toast of a common interpretation of the "subcontractor exception" to the "your work" exclusion.

- ***Brannon v. Continental Casualty Company*** — Supreme Court of Alaska gave an insurer a chilly reception to its argument that the statute of limitations on an insured's action for brrreach of the duty to defend began to run from the time of the disclaimer. Two weeks later the Supreme Court of Nebraska did the same.

- ***Patrons Oxford Insurance Company v. Harris*** — High Court of Maine addressed a coverage issue as old as the state's crustaceans and still with no easy answers: The insured is presented with an opportunity to settle a case and turns to its insurer, which asserts that it has a coverage defense.

- ***Safeco Insurance Company v. Superior Court of Los Angeles County*** — A California appeals court addressed the burden of proof in an important contribution context. The result — more insurers can now share the burden of construction defect settlements.

- ***Guideone Elite Insurance Company v. Fielder Road Baptist Church*** — Don't Mess with the Duty to Defend. Supreme Court of Texas refused to consider facts outside the complaint to extinguish an insurer's duty to defend. Pennsylvania Supreme Court did the same in refusing to create a duty to defend.

- ***The Standard Fire Insurance Co. v. The Spectrum Community Association*** — A California appeals court added a sub-plot to insurance law's greatest work of fiction: the continuous trigger.

- ***Fiess v. State Farm Lloyds*** — In a long-awaited decision, the Supreme Court of Texas sang Mold Lang Syne to policyholders in many circumstances.

- ***Valley Forge Insurance Company v. Swiderski Electronics, Inc.*** — Face the fax: Supreme Court of Illinois transmitted an important win for policyholders in the most significant Telephone Consumer Protection Act coverage decision to date.

## The Ten Most Significant Insurance Coverage Decisions of 2006

***Peninsula Cleaners v. Hartford Casualty Insurance Company,*** **2006 U.S. Dist. LEXIS 3754.**
In 2003, following the California Supreme Court's decision in *MacKinnon v. Truck Insurance Exchange*, 73 P.3d 1205 (Cal. 2003), the absolute pollution exclusion looked down for the count in LaLa Land. In *MacKinnon***,** the court addressed the applicability of the absolute pollution exclusion to a claim by a landlord who hired an exterminator to eradicate yellow jackets in an apartment building. The tenant that requested the exterminator died — allegedly from pesticide exposure. The decedent's parents brought an action seeking damages for wrongful death. The landlord sought coverage from its CGL insurer. The insurer denied coverage on the basis of the absolute pollution exclusion.

The *MacKinnon* Court concluded that the insurer's interpretation of the pollution exclusion was unreasonable because any substance, under the proper circumstances, can act as an "irritant or contaminant." Having determined that the insurer's "broad interpretation of the pollution exclusion leads to absurd results and ignores the familiar connotations of the words used in the exclusion," the *Mackinnon* Court then asked what is the plain meaning of the exclusion. The court concluded that, because "discharge, dispersal, release or escape" are environmental terms of art and because the pollution exclusion was adopted to address the enormous potential liability resulting

from anti-pollution laws enacted between 1966 and 1980, the absolute pollution exclusion is limited to "environmental pollution."

Following *MacKinnon*, insurers were left to attempt to apply the exclusion solely to instances involving "environmental pollution," whatever that means. Even the *MacKinnon* Court, admittedly so, didn't provide much guidance on what would qualify as "environmental pollution." The court confessed: "To be sure, terms such as 'commonly thought of as pollution,' or 'environmental pollution,' are not paragons of precision, and further clarification may be required." *MacKinnon* at 1218. But despite the lack of guidance, this much seemed clear from the *MacKinnon* Court's opinion: the list of what would qualify as *environmental pollution* was going to be about as lengthy as the box office queue for a Mel Gibson movie.

Yet, despite the seemingly pessimistic outlook in 2003 for insurers attempting to apply the absolute pollution exclusion in the Golden State, courts since *MacKinnon* have not been afraid to define "environmental pollution" broadly, and not simply to situations that resemble Love Canal or properties that appear on CERCLA's National Priorities List, as policyholders would have courts believe. This trend continued in 2006.

In *Peninsula Cleaners*, the insured, a dry cleaner, was informed by the County of San Mateo's environmental arm of "responsibilities for reporting, investigating, and remediating . . . discharges," or potential discharges, "of waste to waters and/or soil of the State as the result of [its] operations[.]" *Peninsula Cleaners* at *2-*3. The discharged "waste" was perchloroethylene, a chemical used in dry cleaning.

Coverage was sought, litigation ensued and at issue was the absolute pollution exclusion — specifically the applicability of *MacKinnon* and whether the soil and groundwater contamination at issue is "commonly thought of as environmental pollution" or "traditional environmental pollution." *Peninsula Cleaners* at *10. The insured argued that, in order for contamination to be *commonly thought of as environmental pollution*, it must be intentional, or it must be an inherent byproduct of an industrial process with no outside force contributing to it. The insured also argued that "environmental pollution" must be catastrophic. The insured's arguments "rest[ed] heavily on a passage in *MacKinnon* observing that the use of several environmental law terms of art in the pollution exclusion 'reflects the exclusion's historical objective — avoidance of liability for environmental catastrophes related to intentional industrial pollution.'" *Id.*

The *Peninsula Cleaners* Court rejected these arguments and held that "the discharge, or potential discharge, of perchloroethylene resulting in soil and groundwater pollution at or from plaintiff's dry cleaning operation constitutes pollution 'commonly thought of as environmental pollution,' precluding insurance coverage under the pollution exclusion clause." *Peninsula Cleaners* at *15-*16.

The court's decision was based, in part, on its observation that four of the five cases cited with approval in *MacKinnon*, where a pollution exclusion was held to apply, involved groundwater contamination, which was also at issue in the County of San Mateo's directive to the dry cleaner. The *Peninsula Cleaners* Court also concluded that the pollution exclusion is not limited to only intentional or active polluters, and that pollution need not rise to the level of catastrophe to be *commonly thought of as environmental pollution*.

To be sure, *Peninsula Cleaners,* an unpublished Northern District of California decision, was far from a dagger through the heart of *MacKinnon* (citation to unpublished *federal* court decisions is permissible in California). Standing alone, it would not have been selected as one of the ten most significant insurance coverage decisions of 2006. Its place here is as a symbol of the willingness of courts applying *MacKinnon* to decline a rote interpretation that the pollution exclusion is applicable solely to environmental catastrophes and industrial pollution. Other courts in 2006 interpreting California law did the same.

In *Ortega Rock Quarry v. Golden Eagle Insurance Corporation*, 46 Cal. Rptr. 3d 517 (Cal. App. 2006), the court analyzed *MacKinnon* and determined to apply the absolute pollution exclusion to a claim involving the discharge of dirt and rocks by a quarry into a creek. In *Bechtel Petroleum Operations, Inc. v. Continental Insurance Co.*, 2006 Cal. App. Unpub. LEXIS 1896, the court analyzed *MacKinnon* and determined to apply the absolute pollution exclusion to claims involving bodily injury caused by dust containing

toxic substances. "[I]n the words of *MacKinnon*, [the claims] present a case of traditional environmental pollution." *Bechtel* at *38.[3]

***Contreras v. U.S. Security Insurance Company*, 927 So. 2d 16 (Fla. App. 2006).**

In *Contreras*, the Court of Appeal of Florida addressed what it called an issue of first impression in the Sunshine State — whether an insurer can be liable for bad faith when there is a policy limits demand to settle with one insured, but it will not secure a release for all insureds.[4] While this issue arises with some regularity, it has not been the subject of frequent decisions.[5] This rock-and-a-hard-place situation for the insurer arose under the following circumstances.

In 1992, Flor Torres Osterman, while walking in a residential area of Broward County, was struck and killed by a car driven by Arnold Dale. The car was owned by Deana Dessanti and Dale was driving it with her knowledge and permission. At the time of the accident, Dale was driving at a high rate of speed and had consumed alcoholic beverages. Dale was criminally charged. *Contreras* at 18.

Dessanti's vehicle was insured by U.S. Security. Dale was an additional insured by virtue of his status as a permissive user. Shortly after the accident, an attorney for Carmen Maria Contreras, personal representative of the estate of her daughter, Ms. Osterman, sent a letter to the U.S. Security adjuster in which he demanded policy limits ($10,000 per person and $20,000 per accident). U.S. Security replied with a letter tendering policy limits, along with a general release discharging both Dessanti and Dale. The attorney for the estate rejected the offer of policy limits due to the inclusion of Dale on the release. He offered to accept policy limits for a release of Dessanti and U.S. Security, but not Dale. Due to the severity of Dale's conduct, the estate was not willing to settle the claim against him. *Id.*

Counsel for U.S. Security next sent a letter to the attorney for the estate that stated, in part: "[P]ursuant to Florida law U.S. Security Insurance Company is obligated to act in good faith to the named insured/owner Deana Dessanti and to the insured/driver Mr. Arnold Blair Dale. That is the reason that the release provided to you by Ms. Plasencia [U.S. Security adjuster] in her letter dated Aug. 13, 1992 included Mr. Dale. Please note that U.S. Security agrees that this case is serious, however, U.S. Security must act in good faith to all of its insureds. **Therefore you can understand why U.S. Security cannot enter into a release which operates to fully exonerate one insured while not releasing the second insured.** In closing, if you have any additional suggestions as to how this matter can be settled without U.S. Security standing in a position of bad faith to one of its insureds I and U.S. Security would be more than happy to hear your suggestions." *Contreras* at 19 (emphasis added by the court).

With the claim unable to be settled by U.S. Security, Contreras filed a wrongful death suit against Dessanti and Dale which was ultimately tried to a jury. You know where this is going. A verdict was returned against the two for $1,000,000, as well as for punitive damages against Dale in the amount of $110,000 (later remitted to $5,000). Dessanti filed for bankruptcy and her trustee in bankruptcy executed an assignment to Contreras of Dessanti's bad faith claim against U.S. Security. Contreras proceeded to trial on the bad faith claim. *Id.*

The trial court granted U.S. Security's motion for directed verdict, having been persuaded that the insurer was in a no-win situation: "It [the offer to settle with Dessanti but not Dale] immediately places the insurance company then in the Hobson's choice. If they don't agree to that, they're sued for bad faith, and if they do agree to it, they're sued for bad faith." *Contreras* at 20.

The Court of Appeal of Florida reversed. While the decision does not provide extensive analysis, the court seemed to focus on Florida law that the gravamen of what constitutes bad faith is, whether under all of the circumstances, an insurer failed to settle a claim when it had a reasonable opportunity to do so. *Id.* Applying this standard, the *Contreras* Court saw the issue this way:

> Clearly, U.S. Security did have an obligation to act in good faith towards both of the insureds. In an effort to fulfill its obligation of good faith, U.S. Security attempted to secure, in exchange for the policy limits, a release for both Dessanti and Dale. Because of the gravity of Dale's misconduct, Contre-

> ras was not willing to settle the claim against Dale. Having attempted to secure a release for Dale without success, U.S. Security fulfilled its obligation of good faith towards Dale. Once it became clear that Contreras was unwilling to settle with Dale and give him a complete release, U.S. Security had no further opportunity to give fair consideration to a reasonable settlement offer for Dale. Since U.S. Security could not force Contreras to settle and release Dale, it did all it could do to avoid excess exposure to Dale.
>
> Having fulfilled its obligation to Dale, U.S. Security thereafter was obligated to take the necessary steps before Contreras's offer expired to protect Dessanti from what was certain to be a judgment far in excess of her policy limits. Under the terms of its policy, had U.S. Security paid out its limits, its duty to settle or defend would have ceased.

*Contreras* at 21.

Notwithstanding the specific outcome of *Contreras*, the concurring opinion correctly noted that the decision in fact benefits insurers, as it clarifies that if an insurer is unable to obtain a release for all defendants, the insurer can still settle for one defendant without being in bad faith. *Contreras* at 22.

The absence of a rule that allows insurers to settle for one insured without being in bad faith to another insured would allow plaintiffs' attorneys to game the system, and leave insurers powerless to stop it. Anytime a plaintiff's attorney was representing a client with claims against two or more insureds — especially under a policy with insufficient limits, as if often the case with auto claims — he or she need only make a limits demand against one insured. If such a demand should obviously be accepted, but the insurer can not do so because it would mean committing bad faith against the non-settling insured, the plaintiff's attorney has now performed insurance alchemy — turning a policy with low limits into one with no limits. This is exactly what was achieved in *Contreras*. Unfortunately, it was necessary for U.S. Security to take one on the chin to get a decision that the court will not countenance such gamesmanship.

***French v. Assurance Company of America*, 448 F.3d 693 (4th Cir. 2006).**

The number of decisions in 2006 addressing coverage for construction defects — including at the state high court level — was staggering. And more are on the way, based on certified questions that are in the works. The question whether faulty workmanship or breach of contract constitutes an "occurrence" is the latest great debate in the coverage world. Indeed, three of the ten cases discussed in this commentary are related to construction defect. It is unfortunate that the situation has reached this point.

Consider this. When it comes to claims for latent injury and damage, such as asbestos and hazardous waste, they were never contemplated under the historic policies that were called upon decades later to respond. That being so, it is not surprising that questions such as trigger and allocation were viewed by courts as particularly vexing, with the result being the development of different schools of thought in response to the issues. But claims for coverage for construction defects and the damage they cause are much different. It is unquestionably contemplated that such claims will be made under commercial general liability policies, especially when the insured has the word "contractor" in its name. Thus, it is unfortunate and unnecessary that so much disparity and confusion is developing in case law over the treatment of such claims, especially those involving relatively similar facts and often-times identical policy language.

In *French*, the Fourth Circuit was confronted with routine facts in a construction defect coverage case. In 1993, the Frenches contracted with Jeffco Development Corporation for the construction of a single-family chalet in Fairfax County, Virginia. Pursuant to the construction contract, *and via a subcontractor*, the exterior of the home was clad with a synthetic stucco system known as Exterior Insulating Finishing System, and even better known as EIFS. A Certificate of Occupancy for the Frenches' home was issued in December 1994. In 1999, the Frenches discovered extensive moisture and water damage to the otherwise nondefective structure and walls of their home resulting from defects in the EIFS. The Frenches spent in excess of $500,000 to correct the defects in the EIFS and to remedy the resulting damage to the otherwise nondefective structure and walls of their home. *French* at 696.

The Frenches filed suit against Jeffco alleging multiple claims, including breach of contract, and sought damages to cover the costs to correct the defects to the EIFS and to remedy the resulting damage to the otherwise nondefective structure and walls. *Id.*

The Frenches' suit gave rise to claims by Jeffco for coverage from four commercial general liability insurers. Three of the CGL insurers agreed to defend Jeffco and one declined. Just before trial, the Frenches and Jeffco reached a settlement. The settlement included a confession of judgment by Jeffco and the assignment by Jeffco to the Frenches of Jeffco's rights under certain policies. The Frenches, as assignees of Jeffco's rights, brought suit against two of the insurers. *French* at 698-99.

Cross motions for summary judgment ensured and the District Court of Virginia, applying Maryland law, granted summary judgment for the insurers and denied the Frenches' motion for partial summary judgment. The District Court relied on *Lerner Corp. v. Assurance Co. of Am.*, 707 A.2d 906 (Md. Ct. Spec. App. 1998), in concluding that no coverage existed under the policies pursuant to the express exclusion of coverage for property damage expected or intended from the standpoint of the insured. *French* at 699.

The parties marched-on to the Fourth Circuit, which held that the District Court was half right:

> We hold that, under Maryland law, a standard 1986 commercial general liability policy form published by the ISO does not provide liability coverage to a general contractor to correct defective workmanship performed by a subcontractor. We also hold that, under Maryland law, the same policy form provides liability coverage for the cost to remedy unexpected and unintended property damage to the contractor's otherwise nondefective work-product caused by the subcontractor's defective workmanship. With respect to this last holding, we assume *arguendo* that no other policy exclusion applies.

*French* at 706. Thus, the Fourth Circuit held that the costs to correct the defective EIFS were not covered, but coverage was available for damage to the nondefective structure and walls of the Frenches' home that resulted from moisture intrusion through the defective EIFS.

On its face, there is nothing remarkable about the Fourth Circuit's decision. Courts addressing coverage for construction defects routinely draw a distinction between noncovered damage *to* an insured's work versus damage *caused by* an insured's work, for which coverage is available.

But the Fourth Circuit's decision in *French* was a little different. There, the EIFS was installed by a subcontractor of the insured-general contractor, Jeffco. In a situation like this, it is not uncommon for those involved in construction defect coverage matters to point to the involvement of a subcontractor as the basis to depart from the ordinary rule that coverage is unavailable for damage to an insured's work. As such, the argument is now often made that coverage exists to correct defects in a subcontractor's work. The asserted basis for this departure is the "subcontractor exception" to the "your work" exclusion, which provides as follows:

> l. Damage to Your Work
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
>
> 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.

However, the flaw in this argument is that the *subcontractor exception to the your work exclusion* is not called the *subcontractor exception to the occurrence requirement*. The *French* Court recognized this and concluded that, notwithstanding that the EIFS was defectively installed by a subcontractor, such defective application does not constitute an accident, and, therefore, is not an occurrence under the CGL policy. The court reviewed the history of the development of the CGL policy's "subcontractor exception" to the "your work" exclusion before arriving at this conclusion. Therefore, coverage was unavailable for the costs to correct the defective EIFS — *subcontractor or no subcontractor*.

In the interest of being fair and balanced, see *Great American Insurance Company v. Woodside Homes Corporation*, 2006 U.S. Dist. LEXIS 61453 (D. Utah), a 2006 decision that rejected this argument and held that negligent acts by an insured's subcontractor can constitute an "occurrence."

***Brannon v. Continental Casualty Company, et al.*, 137 P.3d 280 (Alas. 2006).**

I was initially reluctant to include *Brannon* in this year's edition of The Year's Ten Most Significant Insurance Coverage Decisions. The question when the statute of limitations begins to run on an insured's claim for breach of the duty to defend is subject to a recognized majority view. So when the Supreme Court of Alaska handed down a decision on this issue, adopting the majority position, I didn't give it much thought. Further, when the Supreme Court of Nebraska issued a decision just two weeks later, addressing the very same issue, and also adopting the majority view, it provided further confirmation that I was right to have dismissed *Brannon* for consideration as one of the year's ten most significant.

But if the question when the statute of limitations begins to run on an insured's claim for breach of the duty to defend is so clear, why did both the Alaska and Nebraska Supreme Courts need to reverse (or vacate) lower court decisions. For this reason, and the fact that both supreme courts were addressing the issue as one of first impression, *Brannon* merits a place on this year's list of the most significant insurance coverage decisions.

*Brannon* started with a claim against a real-estate broker for breach of fiduciary duty. The broker sought coverage from its professional liability insurer. On August 13, 1997, the insurer, Continental Casualty Company, sent a letter citing nine policy exclusions in support of its disclaimer of coverage. In September 1997, the real-estate broker filed for bankruptcy. The trustee of the bankruptcy estate assigned the real-estate broker's claims against Continental, for refusal to defend, to the Brannons, the plaintiffs in the underlying action. On March 15, 2002, the Brannons filed a complaint against Continental. In August 2003, the real-estate broker confessed judgment to the Brannons for nearly $3 million. *Brannon* at 282-83.

Continental moved for summary judgment on the basis of, among other things, the statute of limitations. The trial court granted Continental's motion, holding that "the statute of limitations for breach of the duty to defend . . . should begin to run on the date the insurance company refuses to defend." *Brannon* at 283. Thus, because Continental denied a defense on August 13, 1997 and the Brannons did not file suit until March 15, 2002, the three year statute of limitations for contract actions had run. *Id.*

Noting that it was addressing an issue of first impression, the Alaska Supreme Court in *Brannon* succinctly summarized the competing arguments and majority rule as follows:

> The Brannons argue that we should hold that the duty to defend does not accrue until the underlying litigation is resolved — here, on August 28, 2003, when Pfleiger's [real-estate agent] confession of judgment was entered. A majority of the courts examining this issue have determined that a cause of action for breach of the duty to defend accrues "with the termination of the underlying litigation which the insurer refused to defend." Although insurance companies normally argue that breach of the duty to defend should be treated like any other breach of contract, numerous courts have reasoned that the duty to defend cause of action is distinguishable from other breach of contract causes of action because the duty to defend is ongoing.

*Brannon* at 284-85.

The *Brannon* Court borrowed a page from the California Supreme Court's playbook and adopted the rule of *Lambert v. Continental Land Title Insurance Company*, 811 P.2d 737 (Cal. 1991). *Lambert* held that, while a cause of action for refusal to defend accrues when the insurer refuses to defend, it is equitably tolled until the underlying action is terminated by final judgment. The *Brannon* Court stated that *Lambert* achieves the same result as the majority rule, but is more consistent with Alaska's existing contract case law, which has repeatedly held that a cause of action for breach of contract usually accrues when the agreement is breached. *Brannon* at 285. The *Brannon* Court also noted that the doctrine of equitable tolling is well-rooted in Alaska law. *Brannon* at 286.

In addition to remaining consistent with existing case law governing when a cause of action for breach of contract (non-duty to defend) usually accrues and considerations of equitable tolling, the *Brannon* Court also gave a nod to the rationale cited by many courts when adopting the majority rule: "[T]olling the statute of limitations during the pendency of the underlying litigation avoids requiring the insured to participate in two lawsuits at once. After the insurance company has denied the insured a defense, it would be potentially unfair to require the insured to file a lawsuit against the insurance company while simultaneously defending himself in the underlying lawsuit." *Id.*

Just two weeks after *Brannon* was decided, the Supreme Court of Nebraska issued *Dutton-Lainson Company v. The Continental Insurance Company*, 271 Neb. 810 (2006), 2006 Neb. LEXIS 91, addressing — also as a matter of first impression — when the statute of limitations begins to run for breach of the duty to defend. The *Dutton-Lainson* Court noted that "Courts that have addressed the issue of the statute of limitations for a duty to defend under an insurance contract have almost uniformly held that 'in an action by an insured against an insurer for refusal to defend, the insured's cause of action under general statutes of limitations accrues when judgment is obtained against the insured, as opposed to the date the insurer refused to defend, the date the insurer denies coverage, or the insured's payment of a compromise settlement.'" *Dutton-Lainson* at *28, quoting 17 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 236:102 at 236-94 to 236-95 (2000). After discussing several decisions that have adopted the majority view, including the California Supreme Court's in *Lambert*, the *Dutton-Lainson* Court joined the club, reversing the lower court, which had held that the statute of limitations began to run when the insurer denied a duty to defend.

***Patrons Oxford Insurance Company v. Harris, et al.*, 2006 ME 72, 905 A.2d 819 (Me. 2006).**

It is a frequently occurring scenario. An insurer is defending its insured under a reservation of rights. The insured is presented with an opportunity to settle the case within its limits of liability and would like to do so. The insurer has either not filed a declaratory judgment action to have its coverage issue(s) resolved or, if it has filed such an action, a decision will not come in time. The tension is thick. By settling, the insured can eliminate the uncertainties of trial and the risk of a verdict greater — and possibly much greater — than its coverage limits. The insurer also wants to eliminate the risk of an excess verdict, but is confronted with uncertainty over its coverage obligation and is entitled to limit such obligation to only claims that are within the confines of its policy.

Despite the frequency in which this coverage drama plays out, it has not been addressed by a significant number of courts — at least not as many as one would expect. Moreover, the decisions that have addressed the issue are not consistent, sometimes leave questions unanswered and may also create collateral issues. For example, this situation gives rise to questions whether an insurer can settle the underlying action and then seek reimbursement if it is determined that no coverage was owed. And what about if certain damages in the settlement may be covered while others are not.[6] On a related front, if a case being defended under a reservation of rights is headed to trial, questions sometimes arise whether the insurer (i) can intervene in the underlying action; (ii) can require the use of special jury interrogatories to have its coverage issue(s) resolved; and (iii) is estopped from litigating facts in a coverage action that were determined in the underlying action. And the list goes on.

Incidentally, last year's installment of the Ten Most Significant Insurance Coverage Decisions of the Year included *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 2005 Tex. LEXIS 418, in which the Texas Supreme Court addressed whether an insurer can settle a claim and then seek reimbursement from its insured if it is later determined that no coverage was owed. The *Frank's Casing* court held that, under the following circumstances, an insurer has a right to reimbursement if it has timely asserted a reservation of rights, notified the insured that it intends to seek reimbursement and paid to settle claims that were not covered: (1) when an insured has demanded that its insurer accept a settlement offer that is within policy limits, or (2) when an insured expressly agrees that the settlement offer should be accepted. *Frank's Casing* at *11. Despite issuing a decision that was obviously not on an impulse — it included a majority and three concurring opinions — on January 6, 2006, the Supreme Court of Texas granted rehearing in *Frank's Casing*.[7]

Back to *Patrons Oxford*, where the Supreme Judicial Court of Maine addressed coverage for an insured's settlement under the following circumstances. Preston Harris was the driver of a truck that hit Darrell Luce, Jr. The truck was owned and insured by David Ferguson, the father of Kurt Ferguson. Harris and Kurt Ferguson arrived at a party and were confronted by a hostile crowd that demanded that they depart or else be physically harmed. They quickly reentered the truck. The crowd physically ushered Harris into the driver's seat and Ferguson into the passenger's seat. In a panic, Harris drove away from the potentially violent crowd and hit Luce, pinning him against another vehicle. *Patrons Oxford* at 822.

Luce brought suit against Harris. Patrons Oxford undertook Harris's defense, subject to a reservation of rights, as there was a question whether Harris had permission to operate the truck.[8] Patrons Oxford filed a motion to intervene in *Luce v. Harris*, as well as a declaratory judgment complaint. Luce and Harris filed a stipulation for entry of judgment, with Luce agreeing not to collect a judgment from Harris personally. Luce would attempt to collect a judgment only from Patrons Oxford through Maine's reach and apply statute, if coverage was found. The parties also agreed that the trial court would determine Luce's damages. Judgment on the stipulation was entered and the court awarded Luce $ 32,704.68. *Patrons Oxford* at 823.

Following a bench trial, the court in the declaratory judgment action held that "Harris was an insured under the Ferguson policy because the emergency situation and the threat of bodily harm made it reasonable for Harris to believe that he was entitled to operate the vehicle to escape the potentially violent situation, despite being intoxicated and not possessing a valid driver's license." *Id.* at 823-24. The trial court noted that, given the exigency of the situation, there was no time for "extended colloquy" between the two men regarding who should drive. *Patrons Oxford* at 824. This decision was affirmed by the Maine high court. *Patrons Oxford* at 825.

Turning to the heart of the decision, Patrons Oxford argued that it was denied due process because it did not have a meaningful opportunity to litigate Harris's liability or Luce's damages. Noting that it has not previously addressed the tensions that exist between an insurer that reserves the right to deny coverage and the impact of that decision on the insured, the Supreme Judicial Court of Maine went on to do so.

First, the court noted that it agreed "with those courts that have held that 'an insurer who reserves the right to deny coverage cannot control the defense of a lawsuit brought against its insured by an injured party.'" *Patrons Oxford* at 825-26 (citations omitted).[9] On the other hand, the court was not unsympathetic to an insurer that possesses a coverage defense. Nor was the court unmindful of the risk faced by an insurer that "an insured being defended under a reservation might settle for an inflated amount or capitulate to a frivolous case merely to escape exposure or further annoyance." *Patrons Oxford* at 827, quoting *United Services Auto. Assoc. v. Morris*, 741 P.2d 246, 253 (Ariz. 1987).

Taking all of these factors into consideration, the *Patrons Oxford* Court set forth the following rules addressing the competing interests between an insurer with a coverage defense and a policyholder with a desire to protects its interests through settlement of an action pending against it:

> [A]n insured being defended under a reservation of rights is entitled to enter into a reasonable, noncollusive, nonfraudulent settlement with a claimant, after notice to, but without the consent of, the insurer. The insurer is not bound by any factual stipulations entered as part of the underlying settlement, and is free to litigate the facts of coverage in a declaratory judgment action brought after the settlement is entered. If the insurer prevails on the coverage issue, it is not liable on the settlement. If the insurer does not prevail as to coverage, it may be bound by the settlement, provided the settlement, including the amount of damages, is shown to be fair and reasonable, and free from fraud and collusion. The issues of the fairness and reasonableness of the settlement, as well as whether it is the product of fraud and collusion, may be brought by the insurer in the same action in which it asserts its coverage defense. If the claimant cannot show that the settlement and the damages or the settlement amount are reasonable, the claimant may

> recover only that portion which he proves to be reasonable. If the claimant cannot prove reasonableness, the insurer is not bound. Likewise, if the settlement is found to be the product of fraud or collusion, the insurer is not bound.

*Patrons Oxford* at 828-29.

While insurers do not like to be told that they are bound by settlements to which they did not consent, the Supreme Judicial Court of Maine did not leave insurers empty-handed either. The court's decision provides insurers with avenues to challenge both coverage and the fairness and reasonableness of the settlement. Moreover, holding that insurers are not bound by any factual stipulations entered as part of an underlying settlement is important, especially if it also means that insurers are not bound by any facts that are determined at the trial of an underlying action that is subject to a reservation of rights.

The effect of *Patrons Oxford* is that insurers will be forced to decide just how strongly they feel about their coverage defenses. An insurer that asserts a reservation of rights at the outset of litigation, but now faces the prospect of a stipulated judgment, finds itself in a rubber-meets-the-road coverage situation. If the insurer does not feel confident that it can prevail on the coverage question, it may determine that its interests are better served by abandoning the reservation of rights and taking over the insured's defense of the underlying action. This is especially so if the court is going to have wide latitude on whether a settlement is "reasonable." On the other hand, an insurer that feels strongly about its coverage defenses can allow the stipulated judgment to proceed, secure in the knowledge that it remains free to litigate its coverage obligation — and avoid all liability — as well as having the fall-back position of a hearing to determine the fairness and reasonableness of the settlement, if coverage is determined to be owed.

Did the *Patrons Oxford* Court answer every question that can arise in this situation? Probably not. But the court deserves high marks for recognizing and balancing the many competing interests that can arise when an insured has an opportunity to settle a case that its insurer asserts is subject to a coverage defense.

***Safeco Insurance Company of America et al. v. The Superior Court of Los Angeles County*, 44 Cal. Rptr. 3d. 841 (Cal. App. 2006), *rehearing denied* 2006 Cal. App. LEXIS 1212, *review denied* 2006 Cal. LEXIS 10468.**

In *Safeco Insurance Company of America v. The Superior Court of Los Angeles County*, the Court of Appeal of California, without specifically saying so, addressed an inherent difficulty in certain construction defect coverage situations. In a state that employs a continuous trigger, an insured may have several insurers over a number of years that are obligated to provide a defense and potential indemnity. Some may agree to defend and others may not. Then, the defending insurers may agree to a settlement, perhaps even early-on in the case, simply for economic reasons, given what construction defect defense bills sometimes look like. Having proceeded in this manner, the settling insurers may not have developed much in the way of the likely complex facts at issue at the construction project.

The settling insurers may then bring an action for contribution against a recalcitrant insurer. But if the settling insurers, unaware of the facts at issue on account of the settlement, are obligated to prove the existence of coverage under the recalcitrant insurer's policy, then much of the reason for undertaking an early compromise in the first place may be lost.

Without actually explaining this back stage situation, the Court of Appeal of California took on this issue in *Safeco*. The court was asked to determine whether a settling insurer seeking equitable contribution from a nonparticipating coinsurer for the costs of the defense and settlement must establish *actual coverage* under the recalcitrant coinsurer's policy. In reversing the trial court's ruling, the appellate court held that, once the settling insurer has made a prima facie showing of coverage under the nonparticipating insurer's policy — *the same showing of potential coverage necessary to trigger the nonparticipating insurer's duty to defend* — the burden of proof then shifts to the nonparticipating insurer to prove the absence of actual coverage. *Safeco* at 842.

The relevant facts are simple. Thirteen construction companies purchased commercial general liability insurance from either Safeco Insurance Company of America or American States Insurance Company.

The same thirteen insureds later purchased additional CGL policies from Century Surety Company.

In 17 separate lawsuits, the insureds were sued for property damage allegedly arising from their work during the policy periods covered by the Safeco, American States and Century. In each case, Safeco and American States provided a defense under a reservation of rights (as well as indemnity in the cases that settled). However, Century rejected all tenders and refused to participate or contribute to any defense or eventual settlement, relying on an "other insurance" provision in its policies to support its position that its policy provided coverage only in excess to the insured's other insurance. *Safeco* at 843.

Safeco and American States sued Century for equitable contribution and declaratory relief, alleging that Century had breached its duty to defend the mutual insureds, thus obligating Century to reimburse the insurers for its equitable share of the costs of defense and settlements of the underlying actions. On a motion for summary adjudication, the trial court resolved the "other insurance" issue in favor of Safeco. *Id*.

Safeco moved for summary judgment for its remaining claims. In response to the motion, Century argued that Safeco had the burden to prove for each settlement that (1) Century had a duty to defend based on a potential for coverage; and (2) there was in fact actual coverage under the Century policies. Safeco disagreed, contending that it only had the burden of proving that Century had a "potential for coverage" triggering a duty to defend. *Id*.

The trial court denied Safeco's motion, reasoning:

> In most of the [underlying] cases, the complaints are very general . . . . [A]s to all of the causes of action there is an issue as to whether the alleged damages took place during a period of time when Century's policies were in effect. Without the possibility of coverage there is no duty to defend. *Even if there was a showing of possible coverage so that there was a duty to defend, [Safeco] would not be entitled to contribution until [it] established as a matter of law that there was coverage. This they have not done.*

*Safeco* at 843. (internal citations omitted).

Safeco filed a petition for a writ of mandate challenging the trial court's ruling. The appeals court stayed proceedings and issued an order to show cause to address the trial court's finding that, assuming there was a showing of possible coverage, Safeco would not be entitled to contribution until it established as a matter of law that there was actual coverage under Century's policies. *Safeco* at 844.

The *Safeco* Court cited several cases in support of its conclusion that, when a duty to defend is shown, nonparticipating coinsurers are presumptively liable for both cost of defense and settlement and that the recalcitrant coinsurer waives the right to challenge the reasonableness of defense costs and amount paid in settlement. "[A]ny other rule would render meaningless the insured's right to settle." *Safeco* at 845. What these prior cases did not address, however, was who has the burden to prove coverage under the recalcitrant coinsurer's policy. *Id.*

The court expressly rejected Century's argument that its liability for a share of the settlement depended on the settling insurer's ability to prove actual coverage of the settled claims under Century's policies, i.e. it was Safeco's burden to prove that Century had a duty to indemnify their mutual insureds. *Safeco* at 845. Rather, the court determined that when a duty to defend is established, the nonparticipating coinsurers are presumptively liable for both the costs of defense and settlement, *and the burden shifts to the nonparticipating coinsurers to prove the absence of actual coverage under its policies*. *Id*.

In arriving at its conclusion, the court distinguished between an insurer's duty to indemnify and its decision to enter into a settlement. An insurer's duty to indemnify arises only after liability is established and claims are found to be actually covered under an insurer's policy. Alternatively, by settling, parties forego their right to have liability established by a trier of fact, and the settlement becomes presumptive evidence of the insured's liability. In such instances, although a nonparticipating coinsurer waives its right to challenge the reasonableness of the settlement, it retains its right to raise other coverage defenses as affirmative defenses in a contribution action, more specifically, that there was no actual coverage under

its policy. *Safeco* at 845. "[W]hich means, of course, that the recalcitrant coinsurer has the burden of proof on those issues." *Id.*

Accordingly, since Century's duty to defend existed and the settlements reached in the underlying actions were by law presumptively reasonable, the court held that the burden of proof was on Century to establish that there was no coverage under its policies, not on Safeco to prove that coverage existed. *Safeco* at 846. The court concluded that it was declining Century's invitation to adopt a rule that would encourage insurers to disavow their responsibilities to coinsurers.

***Guideone Elite Insurance Company v. Fielder Road Baptist Church*, 197 S.W.3d 305, 49 Tex. Sup. J. 877 (2006).**

There may be no insurance coverage issue that arises more frequently than the duty to defend. It is one that must be confronted in virtually all claims arising under liability policies — commercial general liability and otherwise. Yet, even with the duty to defend being the subject of a litany of black letter rules, probably more than any other coverage issue, disputes still arise with regularity. And for good reason.

In situations where coverage is questionable, an insurer is nonetheless usually obligated to undertake its insured's defense, possibly at great expense. However, an insured that has triggered a duty to defend by a thread may still face a significant problem — he likelihood of no coverage for any damages that may be awarded in the underlying claim. Likewise, the plaintiff has a problem too — the prospect of an uncollectible judgment. However, notwithstanding the absence of coverage, the insurer, looking down the road at an expensive defense, now has an incentive to settle the case to turn off that spigot. Thus, it is not infrequent that the real benefit for insureds (and plaintiffs) who can trigger an insurer's duty to defend is that it creates coverage that would not otherwise exist.

Given how frequently duty to defend situations arise, and the consequences riding on them, any decision by a state's highest court that addresses the fundamental rules governing the duty to defend is significant. After all, while there are a lot of duty to defend cases, most of them make no new law. Rather, they simply involve the application of the state's existing rules to a particular set of facts.

In *Fielder Road*, the Supreme Court of Texas was asked to create an exception to its eight-corners duty to defend rule. "The eight-corners rule provides that when an insured is sued by a third party, the liability insurer is to determine its duty to defend solely from terms of the policy and the pleadings of the third-party claimant. Resort to evidence outside the four corners of these two documents is generally prohibited." *Fielder Road* at 307. In most states, this same procedure is called the four-corners rule — based on the four corners of the complaint. Presumably because everything is bigger in Texas, they call it the eight-corners rule.

In June 2001, Jane Doe filed a sexual misconduct lawsuit against Fielder Road Baptist Church and Charles Patrick Evans, an associate youth minister. Doe alleged that Evans was employed by the church from 1992 to 1994. A GuideOne commercial general liability policy issued to the church from March 31, 1993 to March 31, 1994 provided coverage for bodily injury to any person arising out of sexual misconduct which occurs during the policy period. *Fielder Road* at 307.

GuideOne provided a defense to the church and filed a declaratory judgment action seeking a determination that it had no duty to defend or indemnify. GuideOne learned during discovery in the coverage action that, despite what the complaint alleged, Evans in fact ceased working for the church on December 15, 1992, *before* the GuideOne policy went into effect. The trial court granted GuideOne's motion for summary judgment, declaring that GuideOne had no duty to defend. The court of appeals and Supreme Court of Texas both disagreed. *Id.*

Without saying so expressly, the Supreme Court of Texas was receptive to a "very narrow" exception to the eight-corners rule — "permitting the use of extrinsic evidence only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim." *Fielder Road* at 308. However, the court noted that GuideOne was seeking to broaden the exception to include "mixed" or "overlapping" extrinsic evidence — relevant to both coverage and the merits of the underlying action. The Supreme Court of Texas declined to do so: "We likewise [same as the Fifth Circuit] reject the

use of overlapping evidence as an exception to the eight-corners rule because it poses a significant risk of undermining the insured's ability to defend itself in the underlying litigation." *Fielder Road* at 309. "[I]f GuideOne knows these allegations to be untrue, its duty is to establish such facts in defense of its insured, rather than as an adversary in a declaratory judgment action." *Fielder Road* at 311.[10]

The court provided scant support for its decision that the use of overlapping extrinsic evidence poses a significant risk of undermining the insured's ability to defend itself. The court focused on hypothetical situations presented by amicus parties. "One amicus suggests that the Church here might have a coverage-related incentive to prove that Evans was at least apparently employed by the Church during GuideOne's policy term in order to secure insurance coverage. This proof, once obtained by the third-party claimant through discovery, would undermine the insured's defense to those claims." *Fielder Road* at 309, n.3. Compare that with the argument advanced by another amicus, that the court should adopt a "true-facts exception" to the eight-corners rule because ignoring the truth invites fraudulent and collusive pleadings that are designed to create a duty to defend. *Fielder Road* at 311. The court did not see the use of fraudulent allegations designed solely to trigger a duty to defend as a pervasive problem in Texas. *Id.*[11]

While GuideOne's frustration in this situation is understandable, the Texas Supreme Court's decision cuts both ways. Surely there will be situations in which a policyholder argues that it is entitled to rely upon true facts to create a duty to defend that does not otherwise exist based solely on the four- or eight-corners rule. While policyholders will likely argue that *Fielder Road* is not a two way street and that a true-facts exception should exist under these circumstances, the Pennsylvania Supreme Court did not see it that way in a 2006 decision that addressed extrinsic evidence that had been used to create a duty to defend:

> The Superior Court premised its coverage determination on reports submitted by two experts on behalf of Kvaerner stating that torrential rains may have caused the damages complained of by Bethlehem. The court held that these reports create uncertainty as to the cause of the damage and perhaps set forth an "occurrence" as required by the policies to trigger coverage, thus making summary judgment improper.
>
> The Superior Court erred in looking beyond the allegations raised in Bethlehem's Complaint to determine whether National Union had a duty to defend Kvaerner and in finding that the Battery's damages may have been the result of an "occurrence." In doing so, it departed from the well-established precedent of this Court requiring that an insurer's duty to defend and indemnify be determined solely from the language of the complaint against the insured. We find no reason to expand upon the well-reasoned and long-standing rule that an insurer's duty to defend is triggered, if at all, by the factual averments contained in the complaint itself.

*Kvaerner Metals v. Commercial Union Insurance Company*, 908 A.2d 888 (Pa. 2006), 2006 Pa. LEXIS 2064, *18-*19 (citations omitted).

While the absence of a true-facts exception to the four- or eight-corners rule is likely a win some — lose some situation for both insurers and policyholders, it at least brings predictability to the issue. And given that duty to defend decisions sometimes need to be made quickly, as the clock may be ticking on the deadline to answer the complaint, this is one coverage issue that is well-served by predictability.[12]

***Standard Fire Insurance Company v. Spectrum Community Association*, 46 Cal. Rptr. 3d 804 (Cal. App. 2006), *review denied by* 2006 Cal. LEXIS 12875.**

What's the difference between a John Grisham novel and the continuous trigger? Answer: Nothing. They are both legal fiction. See *Public Serv. Co. v. Wallis & Cos.*, 986 P.2d 924, 938 (Colo. 1999) ("[T]he continuous trigger theory is a legal fiction permitting the law to posit that many repeated small events occurring over a period of decades are actually only one ongoing occurrence. In cases where property damage is continuous and gradual and results from many events happening over a long period of time, it makes sense to adopt this legal fiction for the purposes of determining what policies have been triggered."); *EnergyNorth Natural Gas, Inc. v. Underwriters at Lloyd's*,

848 A.2d 715, 718 (N.H. 2004) ("Under the continuous trigger theory, however, *it is assumed 'without substantiation*, that once property damage begins it always continues and that property damage results when property is first exposed to hazardous materials.'") (citation omitted and emphasis added).

And just as Mr. Grisham's bibliography grows annually,[13] so too do efforts to expand the continuous trigger beyond the narrow purpose for which it was conceived — to respond to the difficulty of determining when bodily injury or property damage takes place in the context of a latent injury. Consider this. In 2006 alone, All-the-World's-a-Continuous-Trigger thinking was evident in the following non-asbestos and non-hazardous waste contexts: *Coregis Insurance Company v. City of Harrisburg, et al.*, 2006 U.S. Dist. LEXIS 20340 (M.D. Pa.)(Court rejected city's argument that a continuous trigger theory of liability should apply to cases of malicious prosecution); *Steadfast Insurance Company v. Purdue Frederick Company, et al.,* 2006 Conn. Super. LEXIS 1970 (Court determined that the injuries caused by the ingestion of a pharmaceutical drug did not involve a continuous trigger); *Fidelity and Guaranty Insurance Underwriters, Inc. v. Nationwide Tanks, Inc.*, 2006 U.S. Dist. LEXIS 9854 (S.D. Ohio)(Court rejected policyholder's argument that a continuous trigger should apply to damage to an above-ground storage tank); *Suter v. Gen. Accident Insurance Company*, 2006 U.S. Dist. LEXIS 48209 (D.N.J.)(Court rejected a continuous trigger to bodily injury claims involving defective heart valves); *Pharmacists Mut. Ins. Co. v. Urgent Care Pharm.*, 413 F. Supp. 2d 633 (D.S.C. 2006) (Court adopted the use of a continuous trigger to claims for injury caused by a drug administered by injection); *Maryland Casualty Company v. Hanson*, 902 A.2d 152 (Md. 2006) (Court adopted a continuous trigger to claims for lead paint poisoning); and a host of claims involving coverage for construction defect.[14]

As for the applicability of the continuous trigger to construction defect claims, that issue has been addressed by several states, with some taking the bait and others not. For those that have, a more nuanced issue then sometimes arises: when does the trigger period begin if damage allegedly took place prior to the underlying plaintiff having an interest in the property. While not an issue that comes up in every case, it does appear with some regularity, given the frequency of property transfers.

In California, when it comes to the fundamental question whether construction defect is governed by a continuous trigger, that horse left the barn long ago. In *Standard Fire Insurance Company v. Spectrum Community Association*, the California appellate court was presented with a collateral issue: whether an insurer under an occurrence-based commercial general liability policy can avoid providing a defense to an insured condominium complex developer on the basis that the plaintiff homeowners association could not have been damaged during the policy period *because the homeowners association did not exist*. Upon review of past precedent, the court, emphatically, rejected such a notion.

The owners and occupants of the Spectrum Condominiums filed 67 separate construction defect lawsuits against the developers of a project seeking damages for bodily injury caused by mold infiltration, diminution in the value of their condominium units and loss of use of those units. The homeowners association also filed suit, naming several defendants which were insured under a commercial general liability insurance policy issued by Standard Fire Insurance Company for the period of August 6, 1991 to June 26, 1992. *Standard Fire* at 806-07.

The insureds tendered their defense of the construction defect litigation to Standard Fire, which agreed to defend these entities and persons under a reservation of rights. Standard Fire brought a declaratory relief action in which it sought a judgment declaring that it had no duty to defend or indemnify in connection with the construction defect litigation. *Standard Fire* at 807.

Standard Fire filed a motion for summary judgment arguing that none of the plaintiffs in the underlying construction defect litigation had owned any interest in the project during the August 6, 1991 to June 26, 1992 policy period and that the Association was not even formed before the termination of the policy period. Thus, Standard Fire contended that there could be no potential for coverage under the policy for any of the construction defects because none of the plaintiffs could have suffered any damages during the policy period. *Standard Fire* at 807.

The Association filed a cross-motion for summary judgment, seeking a judgment that Standard Fire's policy provided coverage for defense and indemnity with respect to the Underlying Action. In support of its motion, the Association argued that it was undisputed that damage to the project occurred during the policy period and, thus, the policy afforded coverage for the underlying construction defect action. Further, they contended that the fact that the plaintiffs did not own any interest in the project at the time the damage occurred was irrelevant. The court denied the Association's motion for summary judgment and granted Standard Fire's. *Standard Fire* at 807-08.

Upon review of the applicable past precedent, the California appellate court agreed with the Association's argument that the trial court's ruling was inconsistent with established precedent, namely *Garriott Crop Dusting Company v. Superior Court*, 270 Cal. Rptr. 678 (Cal. Ct. App. 1990) and *Century Indemnity Company v. Hearrean*, 120 Cal. Rptr. 2d 66 (Cal. Ct. App. 2002), which the court concluded were properly decided and dispositive on the insurance policy interpretation issues. The court held that all that was required to trigger coverage under Standard Fire's policy was that damage to the project occurred during the policy period, and thus Standard Fire had a duty to provide a defense with respect to the underlying action. *Standard Fire* at 809.

In *Garriott*, the City of Bakersfield brought an action against a crop dusting company for contaminating adjacent land owned by the city. In a separate declaratory relief action involving approximately 20 insurance carriers, the carrier that had provided coverage from 1967 through 1970 asserted it was not obligated to defend or indemnify the insured because there was no "occurrence" under the provisions of the policy. The trial court granted a motion for summary judgment on the basis that the city could not have been damaged during the policy periods because it did not purchase the property until 1985. The appellate court reversed, reasoning:

> [U]nder the terms of the insurance policies . . . , the event triggering coverage is one that causes 'physical injury to or destruction of tangible property' during the policy period. Nowhere do the policies say to whom that property must belong, save that it must not belong to the insured. In other words, the policies themselves do not expressly require that the eventual claimant own the property at the time the property is damaged for coverage to ensue; they merely require that the damage, the 'physical injury to . . . tangible property,' take place during the policy period. The question raised by the policy language is not when the [c]ity was damaged; it is, instead, when the property now owned by the [c]ity was damaged.

*Standard Fire* at 814 (quoting *Garriott* at 682).

The *Standard Fire* Court also found *Hearrean* to be controlling in the instant case. There, one of two insured-developers purchased a hotel in 1988 and made extensive improvements before selling the hotel in 1991. The plaintiff in the construction defect litigation purchased the hotel in 1994 and later filed suit asserting that the co-developers had negligently and defectively constructed the improvements. The insurers had issued several general liability policies to either one or both of the co-developers between 1983 and 1993. The insurers brought a declaratory relief action arguing that there was no coverage on the basis that the plaintiff purchaser of the hotel could not have suffered any damage during the policy periods.

The trial court granted summary judgment in favor of the co-developers, and the appellate court affirmed. The court noted that the insurance policies provided coverage for property damage occurring during the policy periods, and that the "clear implication of the complaint is that there existed — at least potentially — a covered event, i.e., a continuing and progressively deteriorating process which began with the defective design and construction . . . within the pertinent policy period." Citing *Garriott*, the court held that "the question is not when the current property owner was damaged, but rather when the property was damaged." Further, the court stated:

> In our case, the trigger of coverage, the continuous and progressive injury to the hotel property caused by defective design and construction, occurred during the policy period and activated [the insurer's] defense and indemnity obligations. To require the claim of the third party, [the plaintiff hotel purchaser], to arise during the policy

> period, 'would unduly transform [an occurrence-based CGL policy] into a "claims made" policy. . . . The insurance industry's introduction of "claims made" policies into the area of comprehensive liability insurance itself attests to the industry's understanding that the standard occurrence-based CGL policy provides coverage for injury or damage that may not be discovered or manifested until after expiration of the policy period.'

*Standard Fire* at 815 (citing *Hearrean* at 72).

In an effort to discredit the Association's arguments, Standard Fire countered that *Garriott* and *Hearrean* were wrongly decided and contradicted the general rule of occurrence based policy interpretation as stated in *Remmer v. Glens Falls Indemnity Company,* 295 P.2d 19 (Cal. Dist. Ct. App. 1956) and approved by the California Supreme Court in *Montrose Chemical Corporation v. Admiral Insurance Company*, 913 P.2d 878 (Cal. 1995), that the time of the occurrence of an accident within the meaning of an indemnity policy is not when the wrongful act was committed, but *the time when the complaining party was actually damaged*. *Standard Fire* at 809-10.

However, the appellate court concluded that Standard Fire's reliance on *Remmer* and *Montrose* was misplaced. The court determined that, unlike Standard Fire's interpretation, the *Remmer* court actually based its decision not upon who suffered damage, but on the fact that the particular cause of action at issue was for damages which clearly occurred after the policy period expired. Unlike *Remmer*, the Association sought compensation for damage that allegedly occurred at least in part during the policy period. Further, the court found that *Montrose* "does not compel a conclusion that when damage initially occurs during the policy period of an occurrence-based CGL policy there can be no potential coverage just because the plaintiff does not come knocking on the door until after the policy period has ended. To hold otherwise would be to transform the policy into a 'claims-made' policy." *Standard Fire* at 813.

The court also reviewed a litany of cases cited by Standard Fire in an effort to show that *Garriott* and *Hearrean* should not control the outcome. *See A. C. Label Company v. Transamerica Insurance Company*, 56 Cal. Rptr. 2d 207 (Ca. App. Ct. 1996); *FMC Corporation v. Plaisted & Companies*, 72 Cal. Rptr. 2d 467 (Ca. App. Ct. 1998); *American Cyanamid Company v. American Home Assurance Company*, 35 Cal. Rptr. 2d 920 (Ca. App. Ct. 1994). However, upon review, the court found such cases distinguishable from *Hearrean*, *Garriott*, and, more importantly, the instant case. In the cases cited by Standard Fire, the insured had no involvement with causing the alleged damage until after the expiration of the policy periods covered by the particular occurrence-based liability policies. However, here, it was alleged that the insureds were responsible for causing damage to the property they were in the process of developing for third party sales. As such, the court determined that, unlike the cases cited by Standard Fire, Standard Fire had the chance to consider the potential construction defect liabilities arising out of the project before issuing the policy. As the court stated, "it is the existence, during the policy period, of the damage, not the complaining party, that is determinative." *Standard Fire* at 818.

Based on the aforementioned reasoning, the court rejected Standard Fire's argument that there can be no coverage under the occurrence-based CGL policy just because the Association did not exist, or own any of the damaged property, during the policy period. The court concluded, "the critical question is when the property damage occurred, not when the Association came into existence." *Standard Fire* at 806.

On one hand, there is nothing significant about the California appellate court's decision in *Standard Fire*. After all, it followed *Garriott* and *Hearrean.* Yet, despite the existence of these cases, insurers often assert, presumably based on an intuitive reaction, that a policy simply can not be triggered if the underlying plaintiff was not in a position to have sustained damage during the policy period. Based on the proliferation of construction defect litigation, in conjunction with the adoption of a continuous trigger, this issue is sure to keep coming up, giving rise to further confrontations between precedent and insurers' intuition. While *Standard Fire* reached a pro-policyholder decision, it is likely to be just as useful for insurers in some cases — when they are trying to convince other insurers to come to the cost sharing party.

***Fiess v. State Farm Lloyds*, 2006 Tex. LEXIS 806.**
It was not an easy decision to include the Texas Supreme Court's opinion in *Fiess* as one of the year's ten most significant. The case involves first-party property coverage. And unlike relatively standard CGL policies, first-party property forms are often subject to variation. For this reason, it's always questionable just how much influence a first-party property coverage decision will have on courts down the road.

But *Fiess* had a lot going for it. The case involves coverage for mold. And on that subject, the Texas Supreme Court's views are entitled to much weight (more so than, say, the Supreme Court of Vermont, or some other cool weather state[15]). Second, the District Court decision in the case, finding no coverage, was rejected by several subsequent courts. With this split on the issue, additional guidance was sorely needed. But it would take a long time for that to come, as the Fifth Circuit chose to certify the issue to the Supreme Court of Texas, which was in no hurry to rule. Thus, all together, the time from the District Court's decision to that of the Texas Supreme Court, including the Fifth Circuit detour along the way, was 39 months — one month longer than the gestation period for an Alpine black salamander (which has the longest gestation period of any animal). And none of this was going unnoticed, as evidenced by the boatload of amicus activity in the case.

But in the end, the real value of *Fiess*, and its reason for inclusion here, is that while the court's decision addressed coverage for mold vis-à-vis the "ensuing loss" clause contained in a Texas Department of Insurance-prescribed Homeowners Form, its applicability may not be so narrow.

At issue in *Fiess* was coverage for flooding caused by Tropical Storm Allison. The Fiesses removed drywall damaged by the flood and discovered black mold growing throughout their house. Subsequent testing determined that the mold was stachybotrys, which made the house dangerous to inhabit. The State Farm Lloyds examiner concluded that, while the flooding caused some of the mold damage, a significant percentage was caused by pre-flood roof leaks, plumbing leaks, heating, air conditioning and ventilation leaks, exterior door leaks and window leaks. *Fiess* at *27-*28.

State Farm paid the Fiesses approximately $34,000 for mold remediation necessitated by the pre-flood leaks, but maintained that it was not obligated to pay for mold damage caused by the flood, as the policy explicitly excluded all damage caused by flooding. The Fiesses brought suit. *Fiess* at *28. The dispute was over the interpretation of the following policy exclusion contained in a Texas Homeowner's Form HO-B policy:

> We do not cover loss caused by:
>
> (1) wear and tear, deterioration or loss caused by any quality in property that causes it to damage or destroy itself.
> (2) rust, rot, mold or other fungi.
> (3) dampness of atmosphere, extremes of temperature.
> (4) contamination.
> (5) rats, mice, termites, moths or other insects.
>
> *We do cover ensuing loss caused by* collapse of the building or any part of the building, *water damage*, or breakage of glass which is part of the building if the loss would otherwise be covered under this policy.

*Fiess* at *2-*3 (emphasis added).

At issue before the Supreme Court of Texas was the following Certified Question from the Fifth Circuit: "Does the ensuing loss provision . . . when read in conjunction with the remainder of the policy, provide coverage for mold contamination caused by water damage that is otherwise covered by the policy?" *Fiess* at *2.

The Fiesses argued that the court must disregard how the policy provision starts ("We do not cover loss caused by mold") because of how it ends ("We do cover ensuing loss caused by water damage"). *Fiess* at *10. The court declined to do so, relying on *Lambros v. Standard Fire Insurance Co.*, 530 S.W.2d 138 (Tex. Civ. App.–San Antonio 1975, writ ref'd), which held that "water damage must be a consequence, i.e., follow from or be the result of the types of damage enumerated in [the exclusion]." *Fiess* at *12, quoting *Lambros*.

The *Fiess* Court concluded that the "ensuing loss" clause provides coverage only if one of the relatively

common and usually minor excluded risks (rust, rot, mold, humidity, wear and tear, etc.) leads to a relatively uncommon and perhaps major loss: building collapse, glass breakage or water damage. *Fiess* at 17. The majority criticized the dissent for a construction that would operate to create broader coverage, as more exclusions were added to a policy containing an ensuing loss clause. Fiess at *21.

The *Fiess* Court stated that:

> [T]he upshot of the dissent's construction would be that the more risks *excluded* in a policy containing an ensuing-loss clause, the *broader* coverage would become. Paragraphs 1(f), 1(g), and 1(h) of the HO-B policy contain roughly 22 exclusions, and each has an ensuing-loss clause listing 3 intervening risks (building collapse, water damage, and glass breakage). According to the dissent, if any one of the 22 exclusions combines with any one of the 3 intervening risks to cause any of the 22 excluded losses, the loss is no longer excluded. This would mean there are only about 1,452 possible ways to turn exclusions into coverage. Thus, the more exclusions that are added, the broader coverage gets. This cannot possibly be a reasonable construction.

*Fiess* at *21.[16] The debate between the majority and dissenting opinions went on, but the detail is somewhat beyond the scope of this brief write-up.[17]

Lastly, the *Fiess* Court stated that its decision was consistent with most other jurisdictions. In so saying, the court noted that ensuing loss clauses are "common in all-risk policies, and while rarely identical they share more similarities than differences." *Fiess* at *22. In support, the court went on to cite approximately 25 decisions from around the country, with many having nothing to do with mold and containing different language than in the Texas HO-B form. E.g., *Ames Privilege Assoc. Ltd. Partnership v. Utica Mut. Ins. Co.*, 742 F. Supp. 704, 708 (D. Mass. 1990) ("These are perils which are excluded by the policy [Loss caused by wet or dry rot, deterioration, settling and cracking of walls, floors, roofs or ceilings]. They cannot be, at the same time, perils which are not excluded, and for which the defendant would be liable for any ensuing loss."); *Weeks v. Co-Operative Ins. Cos.*, 817 A.2d 292, 296 (N.H. 2003) ("[T]he exception to the exclusion operates to restore coverage if the damage ensues from a covered cause of loss. 'Reasonably interpreted, the ensuing loss clause says that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the policy will remain covered. The uncovered event itself, however, is never covered.'") (citation omitted).

While *Fiess* may have adopted a majority view, the decision demonstrates that the "ensuing loss" issue is not without much debate and arises under myriad circumstances. Therein lies the significance of *Fiess* — given its thoroughness, it has the potential to influence future "ensuing loss" cases in states other than Texas and involving losses other than mold.

***Valley Forge Insurance Company v. Swiderski Electronics, Inc.*, 2006 Ill. LEXIS 1655.**

*Swiderski Electronics* is the first decision by a state high court to address the availability of coverage for violation of the Telephone Consumer Protection Act, or so-called "junk faxes" or "blast faxes." If the case had been decided by any one of 49 state supreme courts, it would have been a noteworthy, but far from significant decision. The fact that *Swiderski Electronics* hails from the Supreme Court of Illinois is extremely significant in the world of junk fax coverage litigation. Here's why.

First, Illinois is far and away the capital of TCPA litigation. According to Walter Olson, Senior Fellow of the Manhattan Institute Center for Legal Policy (and editor of Overlawyered.com), writing in *The Wall Street Journal's* "Rule of Law" column, a Cook County judge has presided over more than 100 TCPA cases seeking class-action status (according to Crain's *Chicago Business*).[18] A Lexis search performed at the time of this writing of all District Court decisions containing the phrase "telephone consumer protection act" returned 127 hits. Twenty-eight were from an Illinois District Court. TCPA is Illinois's official state tort, along with the cardinal as the official state bird and the monarch butterfly serving as the official state insect. A decision from any other state supreme court addressing coverage for TCPA claims would have an impact, but nothing like one from the Land of Lincoln.

Second, *Swiderski Electronics* rejected the 2004 decision by the Seventh Circuit's Judge Easterbrook in *American States Insurance Co. v. Capital Associates of Jackson Co. Inc.*, 392 F.3d 939 (7th Cir. 2004) (addressing Illinois law), *rehearing denied* 2005 U.S. App. LEXIS 1352 (7th Cir. 2005). Until *American States* came along in late 2004, insurers had been consistently losing TCPA coverage actions. *American States* fixed the jam and became a frequently relied upon source of authority for insurers (as well as judges) in support of the argument that coverage for TCPA claims is unavailable under commercial general liability policies. *American States* isn't dead (at least outside of Illinois), but insureds will certainly argue that it no longer has the sway it once did.

The facts of *Swiderski Electronics* resemble most TCPA coverage cases. Without permission, Swiderski Electronics sent a fax advertisement to various individuals, including Ernie Rizzo, operator of Illinois Special Investigations, a private investigation firm, with information on the sale, rental and service of various types of electronic equipment. Mr. Rizzo filed a putative class action seeking damages from Swiderski Electronics for violation of the Telephone Consumer Protection Act and conversion of fax machine toner and paper. *Swiderski Electronics* at *2.

Swiderski Electronics tendered the *Rizzo* suit to its primary insurer, Valley Forge Insurance Company, and its excess insurer, Continental Casualty Corporation. The insurers disclaimed coverage and shortly thereafter sought a declaratory judgment from the state court that they had no duty to defend or indemnify Swiderski Electronics against the *Rizzo* suit. Swiderski Electronics filed a counterclaim seeking a declaration that coverage was owed. The parties filed cross motions for summary judgment on the duty to defend and the trial court granted Swiderski Electronics's motion, finding that the insurers had a duty to defend Swiderski Electronics under the policies "advertising injury" provision. The Illinois Appellate court affirmed and the Supreme Court of Illinois agreed to hear the insurers' appeal. *Swiderski Electronics* at *3-*8.

Just as the facts of *Swiderski Electronics* resemble most TCPA coverage cases, so too does the issue: Does a claim alleging violation of the TCPA on account of an insured sending an unsolicited fax advertisement give rise to coverage under the "advertising injury" portion of a commercial general liability policy, specifically, for *written publication of material that violates a person's right of privacy*.

The typical competing arguments are as follows. The insurers contend that written publication of material that violates a person's right of privacy is applicable only when the *content* of the published material reveals private information about a person that violates the person's right of privacy. Insureds argue that "right of privacy" includes one's interest in *seclusion*, or being left alone. *Swiderski Electronics* at *9. Thus, as in most TCPA coverage cases, the Illinois Supreme Court was left to determine whether "right to privacy," as used in the definition of "advertising injury," means secrecy or seclusion.

Putting aside for the moment how it got there, the Illinois high court sided in favor of Swiderski Electronics:

> [T]he "material" that Swiderski allegedly published, advertisements, qualifies as "material that violates a person's right of privacy," because, according to the complaint, the advertisements were sent without first obtaining the recipients' permission, and therefore violated their privacy interest in seclusion. The language of the "advertising injury" provision is sufficiently broad to encompass the conduct alleged in the complaint. To adopt the insurers' proposed interpretation of it — *i.e.*, that it is only applicable where the content of the published material reveals private information about a person that violates the person's right of privacy — would essentially require us to rewrite the phrase "material that violates a person's right of privacy" to read "material *the content of which* violates a person *other than the recipient's* right of privacy." This we will not do.

*Swiderski Electronics* at *24-*25 (emphasis in original).

The court rejected the insurers often asserted argument in TCPA coverage cases — that the term "privacy" must be interpreted in conjunction with the other policy provisions surrounding it. For example, the Valley Forge policy's "advertising injury" provision

also encompasses injuries that arise out of "[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; [t]he use of another's advertising idea in your 'advertisement'; [and] [i]nfringing upon another's copyright, trade dress or slogan in your 'advertisement.'" The *Swiderski Electronics* Court responded: "However, just because these types of 'advertising injury' appear to involve harm caused by the content of the advertisement involved does not compel us to conclude that injury that arises out of 'written *** publication *** of material that violates a person's right of privacy' includes only injury that stems from the disclosure of private information." *Swiderski Electronics* at *25-*26.

The *Swiderski Electronics* Court discussed in detail many TCPA coverage decisions that go the other way, including Judge Easterbrook's in *American States,* which was decided under Illinois law. In *American States*, the Seventh Circuit criticized the District Court "for not recognizing the difference between secrecy and seclusion and for not addressing which type of privacy interest the policy covered." *Swiderski Electronics* at *33, discussing *American States*.

As aptly put by the Court in *American States*: "[T]he question is not how the word 'privacy' was used in the debates that led to § 227(b)(1)(C) [TCPA] or in its implementing regulations, but what the word means in this insurance policy. To say, as the district court did, that § 227(b)(1)(C) protects privacy, and then stop the analysis, is to avoid the central question in the case: whether *the policy* covers the sort of seclusion interest affected by faxed ads." *American States* at 942 (emphasis added).

Describing the decision in *American States*, the *Swiderski Electronics* Court stated: "'[TCPA] condemns a particular means of communicating an advertisement, rather than the contents of that advertisement,' while the 'advertising injury' provision of the insurance policy, which referred to 'publication,' dealt with informational content." *Swiderski Electronics* at *34. Focusing on the term "publication" in the policy, the *American States* Court concluded that publication matters is a secrecy situation, but is irrelevant in a seclusion situation.

The *Swiderski Electronics* Court was not persuaded to follow *American States*. Addressing the *American States* Court's conclusion that publication matters is a secrecy situation, but is irrelevant in a seclusion situation, the *Swiderski Electronics* Court stated:

> This may very well hold true as a general matter in the realm of privacy law. We believe, however, that relying on this proposition as a basis for interpreting the insurance policy language "publication of material that violates a person's right of privacy" is inconsistent with this court's approach to interpreting insurance policy provisions. Affording undefined policy terms their plain, ordinary, and popularly understood meanings is of central importance to this approach, and doing so here yields the conclusion, as set forth above, that Rizzo's TCPA fax-ad claim potentially falls within the coverage of the policies' "advertising injury" provisions. Accordingly, we decline to follow *American States*[.]

*Swiderski Electronics* at *41-*42.

*Swiderski Electronics* has brought some clarity to the availability of coverage in Illinois for violation of the Telephone Consumer Protection Act. And if any state needed clarity, this one was it. At least outside of Illinois, *American States* is still likely to be asserted by insurers as persuasive authority, as other courts are free to adopt Judge Easterbrook's cogent recognition that to address what the term "privacy" means in the TCPA is to ignore the real question: what the term means in the insurance policy. Further, the *Swiderski Electronics* Court signaled that its decision would have been different if the definition of "advertising injury" stated, as it sometimes does, "*making known* to any person or organization written or spoken material that violates a person's right of privacy."

## Endnotes

1. There also seemed to be more state high court decisions than usual in 2006 addressing very fact specific coverage situations. These decisions may be important or interesting in their own right, but are less

likely to be influential on courts in the years ahead. Even the Hurricane Katrina coverage cases — the one coverage issue in 2006 that caught the attention of the main stream press — resulted in kiss your sister-like decisions. In the closely followed case of *Leonard v. Nationwide Mutual Insurance Co.*, 438 F. Supp. 2d 684, 693 (S.D. Miss. 2006), Judge L.T. Senter, Jr. of the Southern District of Mississippi, after hearing evidence in the first Hurricane Katrina coverage trial, held that "The provisions of the Nationwide policy that exclude coverage for damages caused by water are valid and enforceable terms of the insurance contract. . . . The Nationwide policy provides coverage for damage caused by a windstorm, including damage caused by water that enters an insured building through a breach in the walls or roof caused by the wind. . . . The provisions of the Nationwide policy that purport to exclude coverage entirely for damages caused by a combination of the effects of water (an excluded loss) and damage caused by the effects of wind (a covered loss) are ambiguous." Judge Senter's decision came on the heels of earlier similar rulings in *Elmer and Elexa Buente v. Allstate Insurance Company, et al.*, 422 F. Supp. 2d 690 (S.D. Miss. 2006) and *John and Claire Tuepker v. State Farm Fire & Casualty Company*, 2006 U.S. Dist. LEXIS 34710 (S.D. Miss 2006). Judge Senter's decisions in *Leonard*, *Buente* and *Tueker*, as well as other less publicized ones, were, well, down the center. However, the Eastern District of Louisiana's late 2006 decision in *In re Katrina Canal Breaches Consol. Litig. v. Encompass Insurance Company, et al.*, 2006 U.S. Dist. LEXIS 85779, addressing coverage for flooding caused by the New Orleans levee breaches and ruling that flood exclusions that do not distinguish between naturally occurring and artificial floods are ambiguous, was much more one-sided. While the decision is potentially enormous in dollar terms (even with State Farm, the largest insurer involved, winning), it is not a decision that is likely to impact future coverage cases — the test for inclusion as one of the year's ten most significant. Even if the decision is upheld by the Fifth Circuit, the court did not eliminate the flood exclusion for naturally occurring floods, which most floods are.

2. One final note on the selection process: Two insurance blogs that I read to monitor coverage developments are valuable resources and worthy of your time (I promise). In last year's Top 10 Coverage Cases of the Year article I plugged Marc Mayerson's blog — Insurancescrawl.com. I once again direct your attention to this excellent blog that provides law review-like analysis of major coverage decisions. This year I must also give a shout-out to David Rossmiller's blog at www.insurancecoverageblog.com. See for yourself the superb job that this reporter-turned-lawyer does of providing daily news and commentary from the coverage world. If after a week you start saying to yourself — How does he do this everyday? — you will not be alone.

3. Both *Ortega Rock Quarry* and *Bechtel* cited to *Garamendi v. Golden Eagle Insurance Company*, 127 Cal. App. 4th 480 (2005), *review denied* 2005 Cal. LEXIS 6676, in which a California appeals court held that the pollution exclusion served to preclude coverage for claims for injuries caused by the repeated long-term exposure to silica dust. The *Garamendi* court stated: "[U]nder *MacKinnon* the mere fact that silica, like almost anything else, may be an irritant or contaminant under some circumstances is not dispositive. But unlike the residential use of a pesticide for the purpose of killing insects, the widespread dissemination of silica dust as an incidental by-product of industrial sandblasting operations most assuredly is what is 'commonly thought of as pollution' and 'environmental pollution.' *Garamendi* at 486. While there are reasons offered by insureds why *Garamendi* should be limited because of certain unique circumstances, the courts in *Ortega Rock Quarry* and *Bechtel* did not do so.

4. The issue does not appear to have been one of first impression in Florida, despite what the court said. See: *Harmon v. State Farm*, 232 So. 2d 206 (Fla. App. 1970) and *Farinas v. Florida Farm Bureau Gen. Ins. Co.*, 850 So. 2d 555 (Fla. App. 2003), *review denied* 871 So. 2d 872 (Fla. 2004).

5. See Frederick T. Hawkes and Alfred J. Saikali, "Florida's New Good Faith Duty on an Insurer Not to Settle," 78 *Fla. Bar J.* 42 (2004). At note 3 the authors set out a lengthy string cite of decisions that have addressed the issue — only a handful of which are recent and many pre-dating 1980.

6. The issue of how to distinguish between covered and uncovered damages in a settlement was the subject of some discussion last year in *Perdue Farms v.*

*Travelers Casualty & Surety Company*, 448 F.3d 252 (4th Cir. 2006). Further, the principal decision in *Perdue Farms* was itself important and the case was considered for inclusion as one of the year's ten most significant coverage decisions. The Fourth Circuit held that an insurer was not entitled to reimbursement of defense costs for non-covered claims: "Under Maryland's comprehensive duty to defend, if an insurance policy potentially covers any claim in an underlying complaint, the insurer, as Travelers did here, must typically defend the entire suit, including non-covered claims. Properly considered, a partial right of reimbursement would thus serve only as a backdoor narrowing of the duty to defend, and would appreciably erode Maryland's long-held view that the duty to defend is broader than the duty to indemnify." *Perdue Farms* at 258 (citation omitted). Thus, the *Perdue Farms* Court was "unwilling to grant insurers a substantial rebate on their duty to defend." *Id*.

7. A press release from Anderson, Kill & Olick announcing the Texas Supreme Court's decision to grant rehearing in *Frank's Casing* noted that the decision had been named one of the ten most significant coverage decisions of 2005 by *Mealey's Insurance*. Thanks for the plug, guys. Anderson, Kill submitted an amicus brief on behalf of United Policyholders in support of Frank's Casing's position. See "Texas Supreme Court Grants Rehearing on its Decision in Frank's Casing," posted at http://www.insurance-broadcasting.com/011806-6.htm.

8. The specific policy provision at issue was an exclusion that provided, "We do not provide Liability Coverage for any 'insured' . . . [u]sing a vehicle without a reasonable belief that that 'insured' is entitled to do so." *Patrons Oxford* at 823.

9. The *Patrons Oxford* Court's conclusion that an insurer who reserves the right to deny coverage cannot control the defense of a lawsuit brought against its insured by an injured party was in the context of an insured's ability to settle a case without the insurer's consent. It will likely be an easy leap for policyholders to assert that the court's decision also means that an insurer who reserves the right to deny coverage cannot select defense counsel. On this issue, see *Twin City Fire Insurance Company v. Ben Arnold-Sunbelt Bev. Co. of South Carolina*, 433 F.3d 365 (4th Cir. 2005), in which the Fourth Circuit (South Carolina law) addressed this argument in detail in a December 27, 2005 opinion — handed down too late for consideration in last year's edition of The Year's Ten Most Significant Insurance Coverage Decisions. The *Ben Arnold* Court rejected the notion that a reservation of rights letter creates a *per se* conflict of interest that must be remedied through the insured selecting counsel at the insurer's expense.

10. This is a bit more complicated than the Texas Supreme Court admits, in light of its decision in *Northern County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685 (Tex. 2004).

11. Justice Hecht concurred, but only in the judgment. He felt that a duty to defend existed for reasons unrelated to the dates of employment: "If the Church is correct that it did not employ Evans within the policy period, then Doe's claim against the Church for vicarious liability would fail. But that is clearly not Doe's only claim. She claims that the Church knew or should have known of Evans' sexual misconduct from 'approximately early 1992 to 1994' and should have warned her and her family. She also claims that Evans was the Church's apparent agent, that the Church breached its fiduciary duty to her, and that the Church made misrepresentations to her. Whether those and other claims have merit, legally or factually, they assert liability against the Church that may not depend on the period of Evans' association with the Church and thus invoke the duty to defend. GuideOne concedes that if it has a duty to defend any of Doe's claims, it has a duty to defend them all." *Fielder Road* at 314-15 (Hecht, J., concurring).

12. Another duty to defend decision of significance in 2006 was *Hartford Accident and Indemnity Company v. Beaver*, 2006 U.S. App. LEXIS 25659 (11th Cir.), in which the Eleventh Circuit reversed the District Court and concluded that an insurer was obligated to defend against a putative class action in which the allegations of the lead plaintiff did not trigger a duty to defend. Rejecting Hartford's argument that its duty to defend should remain inchoate unless and until a class has been certified, the court stated: "Hartford would have us ignore this basic truth about class action litigation: the fight over class certification is often the whole ball game." For a more detailed look at this decision, see Marc Mayerson's blog post at http://www.insurancescrawl.com/archives/defense.

13. Ironically, Mr. Grisham's latest effort, "The Innocent Man: Murder and Injustice in a Small Town," is his first foray into non-fiction. But you get the point.

14. One state appellate court in 2006 that rejected a continuous trigger in the context of a construction defect claim was *DeLuca Enterprises, Inc. v. Assurance Company of America,* Superior Court of Pennsylvania, No. 2815 EDA 2005 (September 22, 2006), in which the court stated, "Although our courts recognize that a 'multiple trigger' approach may be appropriate in certain instances, the use of that approach has been limited to cases involving a long period of latency between the time of the exposure to factors causing injury and the time when an injury manifests, specifically, cases involving toxic torts." Kudos to my colleagues Tony Miscioscia and David Edwards who were on the winning side of this one.

15. I mean no disrespect to the Vermont Supreme Court. I'm just going by the numbers. A Lexis search undertaken at the time of this writing of Vermont state and federal courts for "mold w/20 insurance or policy" returned four hits, with three coming from the Second Circuit and involving non-Vermont appeals and only one having something to do with mold (but not insurance). Compare that to the same search for Texas state and federal courts, which returned 111 hits. Now, when the search term is "ski lift" . . . .

16. Then, revealing that Justice Hecht isn't the only witty member of the Texas Supreme Court, Justice Brister added, "It is true that some combinations are unlikely, such as wear-and-tear followed by glass breakage that causes mice. But with 1,452 to choose from, no doubt plenty of options remain." *Id.*, n.31.

17. For a look at how the decision may affect future mold claims in Texas, written by a Texas policyholder attorney, see John F. Melton, "*Fiess v. State Farm Lloyds* — Mold Coverage — Texas Supreme Court says Texas Insurers, Homeowners, and Texas Department of Insurance Misread Policy," *Policyholder Advocate*, October 2006, Published by Policyholders of America.

18. Walter Olson, "Rumpelstiltskin, LLP," *The Wall Street Journal*, July 29, 2006. Much as I'd like to, it is beyond the scope of this article to address the insanity of TCPA litigation and the opportunity that it has afforded people to game the system. For that, the reader is directed to Mr. Olson's superb commentary. I'll simply add exactly what I said in last year's edition of The Year's Ten Most Significant Insurance Coverage Decisions, written in the context of a discussion of *Hooters of Augusta, Inc. v. American Global Insurance Company*, 2005 U.S. App. LEXIS 26765 (11th Cir.): "Tort reform advocates are fond of pointing out that the asbestos system is run amok because most of the plaintiffs are *not truly injured*. Not truly injured. It doesn't get more *not truly injured* than plaintiffs in an underlying TCPA suit. But as long as insurance dollars are available to fund statutory damages under the TCPA, there is no reason to expect this make-believe tort to go away anytime soon. Speaking of which, ISO has responded to this license to print money by adopting Form CG 00 67 03 05, which excludes coverage for advertising injury arising out of violation of the TCPA, CAN-SPAM Act of 2003 or any statute, ordinance or regulation that prohibits or limits the sending, transmission, communication or distribution of material or information." ■