
**Insurance Section**

FROM THE CHAIR: Much to report, so let's go - pedal to the metal.

1. ***Charleston*** is around the corner, pull the trigger, sign up, you will be glad you came.
2. The ***Litigation Management College*** is June 4-8 to be attended by in-house members in leadership positions and top-flight coverage lawyers. The College includes an interactive mock bad faith deposition exercise which is invaluable and unique.
3. Schedule for ***I3*** the evening of 11/8/17 thru midday on 11/10/17. I3 will be in Manhattan, at the Sheraton basically inside the Theater District.
4. With great sadness we report that our fabulous ***Insurance Coverage Section Newsletter*** has been given a 21 gun farewell salute, its offspring, the FDCC eNewsletter, has consumed the time and energy to generate that publication. Many thanks to all the Chairs and Vice-Chairs that carried on the tradition. Time marches on.
5. Finally, Jennifer Johnsen, with Gallivan, White and Boyd, provided the following write up on the recent ***Harleysville*** decision from the South Carolina Supreme Court that is garnering plenty of attention:

**South Carolina Supreme Court Issues Opinion Addressing Content of Reservation of Rights Letters.**

On January 11, 2017, the South Carolina Supreme Court issued a lengthy decision that addresses, for the first time in South Carolina, the content of reservation of rights (ROR) letters, as well as time on risk allocation for damages awarded under a general verdict and coverage for punitive damages. For attorneys handling coverage matters in South Carolina and insurers issuing policies and defending litigation in South Carolina, a close review of the entirety of the opinion is a must. This summary, however, focuses primarily on the Court's holdings with regard to RORs.

The Court issued its decision in the case of *Harleysville Group Ins. v. Heritage Communities, Inc. et al.*, No. 2013-001281 (S.C. Jan. 11, 2017) http://www.sccourts.org/opinions/HTMLFiles/SC/27698.pdf. *Harleysville* arises out of two construction defect lawsuits involving condominium developments constructed between 1997 and 2000. After construction was complete and the units were sold, the purchasers became aware of certain construction deficiencies and filed suit against the developer and several of its subsidiary companies.

During the period of construction, the Heritage entities were insured under CGL and excess liability policies issued by Harleysville. Heritage was uninsured after its last policy lapsed in 2001. After receiving notice of the lawsuits, Harleysville agreed to defend under a ROR and did so through trial. In each case, the jury returned a general verdict in favor of the plaintiffs, awarding both actual and punitive damages. Harleysville then filed a declaratory judgment (DJ) action seeking a declaration that it had no duty to indemnify Heritage for the verdicts. In the alternative, Harleysville sought an allocation of which portion of the juries' verdicts constituted covered damages and whether those portions were subject to a time on risk allocation.

The DJ action was referred to a Special Referee. After staying the matter pending the South Carolina Supreme Court's decision in *Crossmann*, 717 S.E.2d 589 (2011), the Special Referee determined that Harleysville failed to properly reserve its rights to contest coverage. As such, he found that coverage was triggered under the policies because the general verdicts included some covered damages. While the Special Referee presumed that the verdict included certain non-covered damages, he determined it would be improper and speculative to allocate the general verdicts. As such, he concluded that all of the actual damages were covered under the policies, subject to Harleysville's time-on-risk. In addition, he held that the punitive damages were also covered under the policies. The parties filed cross-appeals.

The Court began its analysis with a review of the ROR letters. The letters, sent in 2003 and 2004, explained that Harleysville would provide a defense, identified the insured entities and the lawsuit, summarized the allegations, and identified the policy periods for the policies. In addition, the letters contained 9-10 pages of policy provisions, including the insuring agreement, exclusions and definitions. However, the Court noted the letters did not contain a discussion of the various provisions or an explanation of why Harleysville was relying on them. Except for the claim for punitive damages, the letters did not specify the particular grounds upon which Harleysville disputed coverage. Finally, the letters advised the insureds of potential uninsured exposure for punitive damages and recommended that the insureds consider retaining personal counsel. Of importance to the Court, the letters did not advise the insureds of the need for an allocation of damages between covered and non-covered losses, nor did they reference any potential conflicts of interest or notify the insureds of Harleysville's intent to pursue a DJ action.

The Court affirmed the finding that Harleysville properly reserved its rights as to punitive damages, but failed to properly reserve rights to contest coverage for the general verdict. In doing so, the Court noted that a ROR must provide the insured with sufficient information to understand the reasons the insurer believes the policy may not provide coverage. A generic denial of coverage with a verbatim recitation of all or most of the policy provisions (through a cut and paste method) is not sufficient. Instead, the insurer must alert the insured to the potential that coverage may be inapplicable; that conflicts may exist between the insurer and the insured; and that the insured should take steps necessary to protect its potentially uninsured interests.

Having found that Harleysville's reservation was not sufficient, the Court engaged in a lengthy discourse of the requirements of a proper reservation:

- A reservation must be unambiguous.
- Before undertaking the defense, the insurer must specify *in detail* any and all bases upon which it might contest coverage.
- The ROR must give fair notice to the insured that the insurer intends to assert defenses to coverage or to pursue a DJ at a later date.
- Because an insurer has the right to control the litigation, an insurer has a duty to inform the insured of the need for an allocated verdict as to covered and non-covered damages.

In the Court's view, one of the primary deficits in RORs was the lack of notice to the insured of the need for an allocated verdict between covered and uncovered claims. Unfortunately, the Court does not expressly state who has the burden of seeking the allocation. Some of the language in the opinion seems to place the burden on the insured: "…in no way did the letters inform . . . [the insureds] that they should protect their interests by requesting an appropriate verdict." Other language, however, seems to place the burden on the insurer: ". . . an insurer typically has the right to control the litigation and is in the best position to see to it that the damages are allocated . . ." If the burden does, in fact, rest with the insurer, this decision should provide strong ammunition in support of an insurer's motion to intervene -- which, in the past, South Carolina courts have generally disfavored.

REGARDS TO ALL, C. MICHAEL JOHNSON