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Harleysville v Heritage Communities Reservation of Rights Best Practices

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The Construction Litigation Practice Group at Richardson Plowden has reviewed the recent Harleysville decision and has developed "best practices" for Reservation of Rights letters. The Harleysville opinion may be overruled or amended in the future; however, until that occurs, these recommendations represent what we think the courts will require in Reservation of Rights letters.

Under the Harleysville opinion, the Court seems to expect Insurers to identify any and all possible coverage defenses, which may be difficult when first evaluating coverage, particularly in complex construction defect cases. It may be impossible for an Insurer to fully and completely reserve all rights under current South Carolina law.

We recommend that Insurers evaluate Reservation of Rights letters that have been issued in current litigation and, where circumstances warrant, update and/or supplement them in an effort to comply as best as possible with the best practices identified below. Based upon the Harleysville opinion, those best practices include:

1. Send the ROR letter as quickly as possible following Insurer's investigation.

2. Be as specific as possible – include detailed explanations of applicable exclusions and endorsements, to the extent Insurer is able to do so. Common exclusions that may be identified include your work exclusions, punitive damages exclusions, EIFS exclusions, etc.

3. Do not use the "cut and paste" method – when the ROR letter includes policy excerpts, explain what they mean as applied to the specific case.

4. Advise the Insured that Insurer intends to litigate coverage issues in a declaratory judgment action and be specific, to the extent possible, about the issues you intend to litigate – it may not be enough to state that the Insurer "may" litigate coverage issues.

5. Advise the Insured that there is a conflict of interest between the Insurer and Insured as it relates to coverage issues and advise the Insured that they may/should retain personal counsel to address issues of coverage.

6. Advise the Insured that a jury verdict may include both covered and non-covered damages and include examples of non-covered damages that are specific to the case.

7. Advise the Insured that the Insurer will seek contribution from the Insured if the Plaintiff(s) seeks uncovered damages – either as part of settlement discussions or as part of a jury award.

8. Advise the Insured that the Insurer may hire separate counsel to intervene in the litigation to protect the Insurer's rights.

9. Include a "full reservation of rights," but recognize that it may not be enough – Insurers needs to update and/or supplement the ROR when Insurer learns new information about covered and non-covered damages.

In summary, when drafting your ROR, do not be overly ambiguous or vague. While it is unlikely that the Insurer can foresee all coverage defenses that may arise, be as specific as possible and reserve the right to supplement the ROR as circumstances warrant. Be sure to supplement the ROR as discovery in the underlying case develops. When you include policy excerpts in the ROR, the Insured should be able to ignore the policy language and still understand the Insurer's position on coverage issues. Finally, do not withhold any policy information from the Insured.

All cases are different. The attorneys of Richardson Plowden & Robinson, PA are here to assist you with any questions you may have regarding RORs and the Harleysville opinion.

If you have questions about this opinion and how it might affect you and your business, we encourage you to contact a member of our Construction Litigation Team at one of the three office locations listed below.

We look forward to being of service to you.