EAGLE™

INTERNATIONAL ASSOCIATES

Presents

TIMELY TOPICS IN THE CRADLE OF LIBERTY

October 11, 2023

Courtyard Downtown Marriott
BOSTON

EAGLE INTERNATIONAL ASSOCIATES

MISSION STATEMENT

Eagle International Associates is an international network of independent law firms, adjusters and claims related service providers throughout the United States, Canada and Europe. Eagle members are dedicated to providing insurance companies and self-insureds with the highest quality legal and adjusting services for competitive and fair compensation. As members, we are committed to the highest ethical standards and act with professionalism and civility in all our endeavors. Eagle members exceed their clients' expectations for quality and service. At every opportunity, we promote the use of Eagle and its members and refer existing relationships through active participation in Eagle's meetings, programs and seminars.

DIVERSITY POLICY

Eagle International Associates, Inc. is of the strong belief that our organization is stronger, more valuable, and more effective through the inclusion of adjustors and attorneys of diverse gender, sexual orientation, racial, ethnic, cultural backgrounds, and all religious or non-religious affiliations. Eagle recognizes that the inclusion of such diversity is vital in order to achieve excellence and to serve its clientele effectively. Eagle is committed to a further understanding of its cultural filters and the absolute need to accept each person as a valued, talented, unique individual, which, when working with other Eagle members, will bring the organization and all its members genuine benefits and competitive advantage in the marketplace.

TIMELY TOPICS IN THE CRADLE OF LIBERTY

October 11, 2023

PROGRAM

11:30 am **Registration (Light Lunch)**

12:30 pm **Welcoming Remarks**
Matthew L. Schrader, Reminger Co., Eagle Vice Chair

Program Introduction
John Egan, Esq., Rubin and Rudman, Program Chair

12:40 pm **Analyzing and Mitigating Risk in Volatile Claims**

Moderators:
Alison M. Crane, Esq., Bledsoe Diestel, Treppa & Crane
Sloan L. Abernathy, Esq., Deutsch Kerrigan, L.L.P.

Panelists:
Cy McFarlin, Director, Claims Administration, Insurance Board
Chryl A. Resnik, National Liability Adjuster, Hanover Insurance
Vickie L. Story, Litigation Specialist, Allianz Global Corporate and Specialty Insurance Company

1:40 pm **Lithium-Ion Battery Litigation: An Overview on This Burgeoning Area of Claims and Litigation.**

Moderators:
Lindsey J. Woodrow, Esq., Waldeck & Woodrow, P.A.
Jason J. Campbell, Esq., Anderson Murphy & Hopkins LLP

Panelists:
Samuel L. Sharpless, Practice Leader for Mechanical and Electrical Engineering, Rimkus
Sanjay Shivpuri, Director and Senior Counsel, Complex Claims, Markel

2:40 pm **BREAK**

3:00 pm **Are We All Going to Lose Our Jobs? The Emerging Use of A.I. in the Insurance Industry**

Moderators:
Frank J. Deasey, Esq., Deasey, Mahoney & Valentini
David Vanalek, SVP, Chief Legal and Compliance Officer, Richmond National

4:00 pm **Navigating the Challenges of Eroding Limits Policies**

Moderators:
John E. Bordeau, Esq., Sanders Warren & Russell
Paul M. Finamore, Esq., Pessin Katz Law, P.A.

Panelists:
David Bryton, J.D., Vice President and Sr. Claims Counsel, Berkley Life Sciences and Berkley Technology Underwriters
Donna Hunt, AVP Designers and Contractors Professional, Ironshore -Liberty Mutual

5:00pm **Closing Remarks**

Cocktail Reception

6:00 pm **Dinner**

APPROVED CE / CLE CREDIT HOURS

4.0 General Adjuster - Florida and Texas
Legal General Credits:
4.0 Illinois
4.5 Wisconsin

THE OPINIONS AND VIEWS OF THE PANELISTS ARE THOSE OF THE PANELISTS ONLY, AND NOT THOSE OF THE PANELISTS' EMPLOYERS

TIMELY TOPICS IN THE CRADLE OF LIBERTY

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Boston 2023

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Sloan Abernathy is a partner at the New Orleans office of Deutsch Kerrigan, L.L.P., a defense litigation firm with offices in Louisiana and Mississippi. He practices insurance defense, primarily in matters of commercial transportation, premises liability, personal injury and professional liability. He is licensed in Louisiana and Tennessee. He has prevailed in trials and on dispositive motions across Louisiana. Before entering private practice, he clerked for a federal judge and then worked for several years as a felony prosecutor, earning invaluable experience in the courtroom and before juries. Outside of work, he and his wife try to wrangle their three young kids, and he plays piano for their church.

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John E. Bordeau is a partner on the management committee at Sanders Warren & Russell and has been with the firm since its doors opened in 1999. John is licensed in state and federal courts in Kansas and Missouri. His law degree is from the University of Kansas. His undergraduate degree is from Sacred Heart University in Fairfield, Connecticut. John has 27 years of litigation and arbitration experience. His practice focuses on professional liability, construction litigation, products, and complex personal injury litigation. John is an active member of CLM and DRI. John has been named a Super Lawyer every year since 2013. He is a certified instructor with CLM's continuing education program and presents regularly on claims handling and legal topics.

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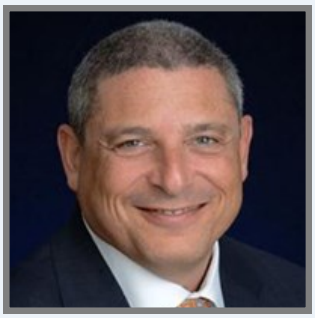

David Bryton is currently Vice President and Sr. Claims Counsel for Berkley Life Sciences and Berkley Technology Underwriters, which are operating units of WR Berkley Corporation. Effective November 1, 2023, he will assume the role of SVP, Chief Claims Officer of both units. David has been with Berkley since 2013 and is responsible for all aspects of the BLS/BTU claim department, including overseeing a team of adjusters and managing complex claim and coverage issues involving various lines of business, including products liability, errors and omissions, complex general and auto liability, cyber and tech E&O, and commercial property. In addition to his claim department responsibilities, David works closely with the units' underwriting leadership on all aspects of the business, including evaluating new accounts, renewal retention, drafting manuscript endorsements, and policy creation. Prior to joining Berkley, David served as Managing Claims Counsel at another Global 500 insurance company, and practiced surety law and commercial litigation for several years in Washington, D.C. David holds a B.A. in Political Science from SUNY Binghamton (now Binghamton University), and a JD with honors from The George Washington University Law School, where he was a member of The George Washington Law Review.

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Jason J. Campbell is a partner at Anderson, Murphy Hopkins LLP in Little Rock, Arkansas. His practice is primarily concentrated on professional liability defense and products and premises liability defense. Jason has been recognized by Best Lawyers in America since 2011 and Mid-South Super Lawyers. He earned his B.S.B.A at the University of Arkansas, Fayetteville in 1997 and his J.D. from the University of Arkansas, Fayetteville, Leflar Law Center in 2001. He is also a graduate of the Litigation Management Institute held at Columbia University; the IADC trial academy; and the ABA Construction Forum Trial Academy. He has completed 40 hours of mediation training through the Arkansas Alternative Dispute Resolution Commission. He has taken over 50 cases to jury verdict and arbitration decision.

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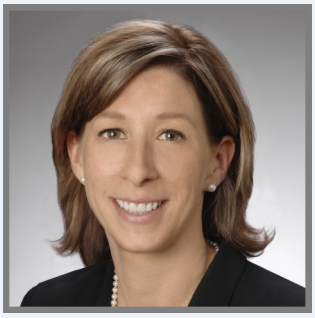

Alison M. Crane is a partner with Bledsoe, Diestel, Treppa & Crane, LLP in San Francisco, California. Her practice focuses on complex personal injury, wrongful death and business litigation, including products liability, industrial and construction accidents, unfair competition, and employment litigation. Alison graduated from Villanova University in 1995 and received her J.D. from Boston University School of Law in 1998. She is a member of the Judicial Nominations Evaluation Commission for the State Bar of California and serves as Chair of the Queen's Bench Mentorship Committee. She is also active in the American Inns of Court which promotes legal excellence, civility, professionalism, and ethics and the Association of Defense Counsel for Northern California and Nevada. Alison is the current Immediate Past Chair of Eagle International Associates.

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Frank currently serves as National Coordinating Counsel for a major insurer, defending catastrophic construction accidents involving cranes, tower cranes and other aerial lift devices. In this capacity, Frank has litigated catastrophic construction accidents in over 20 States around the Country. Frank is a frequent lecturer before construction industry associations and crane companies regarding best practices and safety in the workplace. Over the years, Frank has also represented excess and surplus lines carriers, evaluating excess exposure and defending their insureds in catastrophic injury cases.

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John Egan is a partner with Rubin and Rudman, LLP, a 75-lawyer general practice firm in Boston, Massachusetts. He is a trial attorney with 40-years' experience in a wide variety of product liability, toxic tort, asbestos, personal injury, property damage, fire, professional liability, housing and employment discrimination, insurance coverage and bad faith, and other claims. Has tried over 75 cases to verdict and has briefed and argued over 30 appeals. He received his B.A. from Bates College in Lewiston, Maine, and his J.D. from the Catholic University of America in Washington, DC. He is a member of the Massachusetts and District of Columbia bars, as well as the bars of the U.S. District Court for the District of Massachusetts, the First Circuit Court of Appeals and the United States Supreme Court. He is a member of the American, Massachusetts, and Boston Bar Associations, the Defense Research Institute, and is a founding member of Eagle International Associates.

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Paul M. Finamore is a member of the Maryland firm, Pessin Katz Law, P.A. He is an experienced trial lawyer who has practiced in state and federal courts throughout Maryland and the District of Columbia for over 30 years. His experience includes litigation of general and professional liability matters, including first and third party claims, as well as employment law.

Mr. Finamore has been recognized in Best Lawyers in America in the areas of Insurance Law as well as in Litigation – Insurance. He has an AV- preeminent peer rating in Litigation, Insurance, and Labor and Employment. He has also been recognized as a top attorney by Maryland SuperLawyers magazine annually from 2008 through the present. He is a three-time recipient of the Golden Gavel Award from the Westfield Group of Insurance Companies. He is also a member of the Federation of Defense and Corporate Counsel.

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Donna Hunt joined Ironshore in 2014 as Assistant Vice President of the Designers & Contractors Professional Liability (DCPL). The DCPL team focus is on providing underwriting and risk management services to architects, engineers and design-build contractors throughout the construction industry. Donna is both a licensed attorney and registered architect, provide a complement to Ironshore's underwriting, claim and risk management services and to all DCPL brokers and clients. Prior to joining Ironshore, Donna was with AIG/ Lexington for 10 years in various roles within the Architects & Engineers professional liability team ranging from the Manager of the A&E Claims Group to the Director of Risk Management Services. Prior to AIG Donna actively practiced as an attorney representing contractors, subcontractors, architects and engineers. In addition, Donna has over 40 years of construction industry practice and actively practiced as an architect in New York and Boston.

Donna received a Bachelor of architecture from Pratt Institute in Brooklyn, New York and her Juris Doctor (JD) from New England School of Law in Boston, MA. She is a licensed attorney and registered architect in the Commonwealth of Massachusetts. Donna is the past President of the Jefferson Society and a member of the American Institute of Architects (AIA) and Boston Society of Architects.

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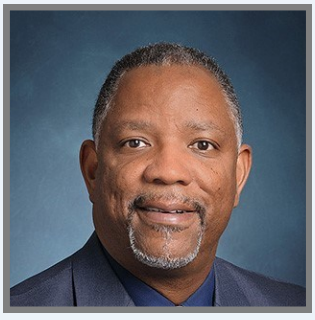

Cy McFarlin has served in the insurance industry for more than 20 years as an adjuster and claims manager for both personal and commercial lines. His specialties include general and professional liability, as well as auto and homeowners. Cy currently works as the Claims Director for the Insurance Board, based in Cleveland, Ohio. The Insurance Board provides an insurance program to approximately 4500 churches across the country in six denominations: United Church of Christ, Disciples of Christ, Presbyterian Church USA, Alliance of Baptists, Evangelical Lutheran Church in America, Reformed Church in America.

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Chryl A. Resnick is a National Liability Adjuster for Hanover Insurance Company. Chryl is starting her 14th year with Hanover where she handles mostly sexual assault, rape cases, sex trafficking cases, sexual harassment/Title IX cases and other types of abuse and neglect cases involving schools, colleges, universities, and various not for profit human service organizations. She also handles most of the durable medical equipment claims for the company and is responsible for overseeing Hanover's Life Sciences on the claims side, as well as coverage litigation. Prior to joining Hanover, Chryl was a Large Loss Adjuster with Great American Insurance Company handling all of the highest exposure liability litigated files for the company for 9 years. She received her law degree from the University of California Davis Martin Luther King Jr School of Law and practiced as an insurance defense lawyer for 4 years for Lord Bissell & Brook in Los Angeles. Chryl was born in Cape Town, South Africa and just a couple of years ago became a naturalized citizen of the US.

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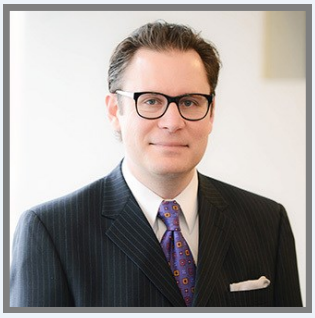

Matthew L. Schrader is a shareholder in Reminger Co., L.P.A.'s Columbus office. He has litigated and tried cases involving professional liability, medical malpractice, wrongful death, products liability and copyright infringement. Matthew has tried cases in both the state and federal courts throughout Ohio. He has also argued and briefed appeals in Ohio's appellate courts and the Fourth and Sixth Circuits. Matthew earned his B.A. from Xavier University, University Scholar in 1998 and his J.D. from the University of Dayton School of Law in 2001. For nearly 10 years, Matthew served as the Coach of and Advisor to the Mock Trial Team of the Capital University School of Law, where he also served as Adjunct Professor teaching second and third year law students trial advocacy and evidence. Matthew has acted as general counsel to one of central-Ohio's largest non-profit organizations, a health, wellness and addiction treatment facility, and a large auto parts distributor. He has spoken to audiences throughout the country on issues dealing with trial practice, jury selection, medical negligence, professional liability, claims management and employment issues. He is Rated AV® Preeminent™: Very Highly Rated in Both Legal Ability and Ethical Standards by Martindale Hubbell Peer Review and has been recognized as a Rising Star by Ohio Super Lawyers Magazine in 2011, 2014-2016 and as a Super Lawyer from 2017-2021. Matthew has also been selected as one of the Top Lawyers in Central Ohio by Columbus CEO Magazine from 2016-2021. Matthew is the current Vice Chair of Eagle International Associates.

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Mr. Sharpless' experience also includes major control system design responsibility in the chemical, paper, and film industries. He has extensive experience commissioning large-scale factory automation systems.

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Sanjay is on the Casualty Complex Claims team and handles the highest exposure casualty claims at Markel, including class actions, products liability, construction accidents, and trucking accidents. He has worked in the insurance industry since 2018. Before joining Markel, he practiced law for 19 years, including as a partner and first-chair trial attorney at a Chicago commercial litigation law firm. He graduated from Purdue University with a degree in Civil Engineering, and then went to law school at Chicago-Kent College of Law where he graduated with honors. He is based in Chicago, Illinois.

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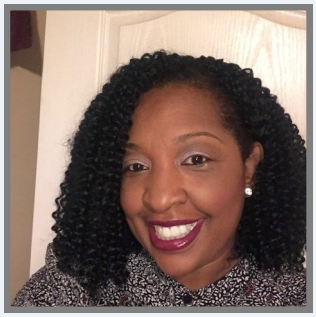

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THE RISING THREAT OF NUCLEAR VERDICTS

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The Rising Threat of Nuclear Verdicts

There has been a substantial rise in nuclear verdicts in the United States in recent years, and if you haven't been paying attention---you should be. The concept of nuclear verdicts has always been present to some degree, but in our current climate –socially, economically and politically—it seems as if the perfect storm has created an increased risk in your case becoming one of the dreaded verdict headlines. Though the issue has been studied by scholars and researched over the years by those like the Institute for Legal Reform,[1] those efforts have done little to quell the overall trend. This paper will discuss the basics of a nuclear verdict, some of the driving factors behind those verdicts, whether we are living in the era of "the new norm", and how defense counsel can fight against those verdicts from discovery forward.

I. What is Considered a "Nuclear Verdict"

It is generally accepted that any verdict in excess of $10,000,000 is considered a "nuclear verdict," but with current economic inflation, social inflation, social justice issues, the "me too" movement, political divides, etc., we are seeing verdicts well in excess of that number. Below are a few examples.

- $102.5 million in California was awarded to two women who successfully sued the Union School District for failing to stop a middle school teacher who sexually exploited them when they were underage.

- $38.8 million verdict in a wrongful death case arising out of a child being killed by a garbage truck.

- $29.5 million verdict in in a Nevada case involving an EMT's negligent treatment in responding to a peanut allergy resulting in brain damage.

- $200 million verdict in Nevada arising out of a coverage claim that Plaintiff was improperly denied health insurance coverage for a specific type of lung cancer treatment and later died.

- $336 million in a Texas case against Fed Ex arising out of allegations of racial discrimination. Of that, $365 million were allocated as punitive damages.

- $177 million verdict in Missouri arising out of sexual assault claims against a security guard hired by a hotel who was found to have sexually assaulted a woman staying at the hotel.

- $56 million after a Minnesota man was burned by hot water while attempting to power wash a floor at work.

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[1] *See* Nuclear Verdicts Trends, Causes and Solutions, U.S. Chamber of Commerce Institute for Legal Reform, September 2022 by Cary Silverman and Christopher Appel, Shook, Hardy & Bacon L.L.P.

- $77 million award for a Georgia man who has suffering a psychotic episode after being discharged from a medical facility and was later struck by vehicles driving on the highway where Plaintiff ended up during his psychotic episode.

The above are only a smattering of cases across the country outlining verdicts well in excess of $10 million in the last five years. As you can appreciate, cases where we are seeing nuclear verdicts can run the gambit of fact patterns and legal claims including the most obvious (wrongful death) to employment cases. While each instance may have fact specific issues like: unlikeable defendant, overly sympathetic plaintiff or surviving family, bad venue, unfavorable pretrial rulings, etc., we cannot ignore that these verdicts arguably well exceed what defense lawyers have traditionally relied upon to evaluate cases. Considering recent reporting, it is imperative that defense lawyers and those in the insurance industry be mindful of the risks associated with high exposure and volatile facts.

II. So, What are the Driving Factors?

We all appreciate that every case is different, each has its own good and bad, but with that, can we appreciate what the driving factors can be behind these nuclear verdicts? It is a complex question that is currently being studied and reviewed not only by the Plaintiff and Defense bar, but also by those deeply affected within the insurance industry. So, what are some of the practical things those in the front lines as claims adjusters and as defense counsel should consider as the driving factors which can lead to a nuclear verdict?

The reptile theory is not new, but it seems as if it has gained more and more traction over recent history, especially post-covid. The reptile theory is a discovery and trial strategy that can be effectively implemented by plaintiff's counsel to relate to the primal, inherent and sometimes subconscious instincts and fears of jurors. They use those inherent humanistic emotions to implore jurors to artfully relate to their own need to protect against harm by awarding significant sums to "compensate" a victim of a wrongful act. It has been hugely successful in the past, and continues to be used successfully today. The pandemic has undoubtedly given more life to the concept where the entire world has spent the previous three years in some element of fear and self-preservation. Knowing, understanding, and defending against reptile theory arguments will be imperative in the diminishment of nuclear verdicts.

Punitive damages have also been a substantial factor in the rise of nuclear verdicts. Assessing and evaluating punitive damages has never been a simple task, however, in the current climate, punitive damages can (and have shown to) take on a life of their own. I doubt that plaintiff's attorneys have become more skilled at arguing for punitive damages, but what is clear from looking at jury verdicts across the country is that with the right facts, jurors have little hesitation to monetarily punish a defendant for its conduct as an attempt to curb future similar behaviors. Humanization of corporate defendants, preparing favorable witnesses, and even in some instances taking responsibility for some, if not all, of the liability can be significant factors in reducing punitive damage awards. A focused consideration should be given on these issues early in discovery in order to establish strong likeability, both to the Court in cases where motion practice is required to bring a punitive claim, and to plaintiff to counteract anticipated arguments and theories counsel may argue.

Venue and judicial appointments continue to be a significant factor in determining value of cases as well as the potential for a nuclear verdict. Defense counsel should be aware of "hellhole" venues and determine if the case warrants removal or seek to change venue. Likewise, consideration should be given to the judicial officer assigned to the case and an evaluation should be completed on that particular jurist's experience with the important issues involved (both in practice prior to becoming a judge and experience since appointment).

III. Are Nuclear Verdicts the "New Norm" or Still Considered Outliers?

How many of us have rhetorically (or actually) said to ourselves and others: *this case ten years ago had a value of $10-15k, why do we now accept that it has a value of $20-30k?* There are some concrete issues that have absolutely changed the value of cases, especially since the global COVID-19 pandemic, including the cost of health care, the overall cost of living, inflation generally and supply chain issues. Those hard numbers will be difficult to defend against, but what are some of the less concrete factors we should be aware of in evaluating cases?

We have all seen the advertisements from plaintiff's lawyers on their websites, social media and TV and radio ads boasting about any nuclear verdict they obtained. I would suggest it has gone farther than that and has bled directly into settlement discussions. How many times have we all heard from a plaintiff's lawyer (or saw on their website)… "well, I had a similar case and I just settled it for $X million." That becomes not only the threshold in their minds, but it becomes their next client's expectation as well. Becoming aggressive—especially in mediations—to determine the differences (factually, legally and impression-wise) in the nuclear case vs. the one you are defending is imperative in tamping down those expectations.

What does that mean for those within the insurance industry? Obviously nuclear verdicts have an impact on insurance pricing for clients, an impact on claim resolution and evaluations and whether the claim should settle pre-suit or move towards litigation. In cases where large damages are a consideration, it is important to get appropriate experts involved early on. Those experts can determine whether a liability and/or damages defense exists, and if so, what things need to be preserved to maintain those defenses and what other avenues/experts, etc. need to be implemented best defend the claim. Likewise, consideration of obtaining counsel to investigate or monitor the claim early on becomes exceedingly important. Hiring defense counsel with expertise in the subject matter of the litigation, experience with Plaintiff's counsel and knowledge of the venue/judge who will hear the case can provide guidance on the liability issues and can properly evaluate the exposure.

IV. So How Do We Fight Nuclear Verdicts?

We all know the saying, "the early bird gets the worm." While it may be cliché to use, it rings true for a reason. Defending against these massive verdicts needs to start in the claims handling process. Identifying those cases with sympathetic claimants, potential for large damages and those cases with potentially unlikeable defendants and/or corporate defendants. If you can identify the possibility of a case that could result in the theories directed towards nuclear potential, it is imperative that the right experts and defense counsel is retained early on in the

process to conduct the site investigation, interviews, data and document collection, etc. so that if the claim does go into litigation, the foundation has been set for a successful defense.

If the claim proceeds to litigation, timely responding to demands and setting expectations becomes critical to a case. Having defense counsel respond not only with a rejection of any demand, if appropriate, but also with a request for additional information along with a possible analysis of the defenses and theory of damages can help in setting expectations—if not for plaintiff's counsel, then for plaintiff. Think of it in a similar way to how a defense counsel would work to set expectations with a jury: should a number be introduced as to how the defense views damages, should evidentiary issues be raised early, issues with the foundation or admissibility of expert opinions can also help set the stage early on.

In those cases where the matter is proceeding towards trial, jury consultants and running mock trials can be critical in evaluating the defenses theories on both liability and damages, but also in evaluating exposure and whether the case should really be tried. Reputable jury consultant companies keep more up to date on all of these issues than your local defense lawyer can and they can become a critical component to avoiding potential nuclear verdicts.

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LITHIUM BATTERY CLAIMS AND

LITIGATION ON THE RISE

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Lithium-Ion Battery Litigation
An Overview on This Burgeoning Area of Claims and Litigation

> [Lithium-ion batteries] (LIBs) serve as the predominant form of rechargeable batteries used in portable consumer electronics today, powering devices ranging from smartphones to laptop computers to cameras to cordless power tools. An LIB cell stores and releases electricity through chemical means. The cell consists of four basic components: a cathode, an anode, electrolyte, and separators. After manufacture, one or more cells are "packed" inside a casing, sometimes with protective circuitry. The casing makes the cell usable as a battery, or, in the case of multiple cells in a single casing, as a battery pack.[1]

"In 1991, defendant Sony Corporation invented lithium ion batteries…."[2] But it was not until the late aughts that claims for personal injury and property damage began to filter into the courts as defective batteries overheated, caught fire, or exploded.[3] Think back to 2016 and the catastrophic recall and halting production of the Samsung Galaxy Note 7. That phone/battery alone resulted in a number of fires, explosions, and ultimately lawsuits surrounding those claims. The Samsung battery was not alone during that era, however. In 2017, over 500,000 hoverboards were recalled after burning down homes, catching fire underfoot while in use, or exploding while charging. Fast-forward to 2023, and hundreds of new products every year utilize lithium-ion batteries and we are seeing a corresponding increase in claims surrounding losses including personal injury, wrongful death, property damage, and coverage concerns. Despite the known risk, these batteries are desirable as they are relatively inexpensive, small, rechargeable, and extremely powerful. The batteries power everything from toys to electric vehicles and toothbrushes to vape pens.

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[1] *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2017 U.S. Dist. LEXIS 57340, at *62 (N.D. Cal. Apr. 12, 2017).
[2] *Id.*
[3] *See Messier v. Dell Comput. Corp.*, No. 04-cv-28-JD, 2007 U.S. Dist. LEXIS 32887, at *1 (D.N.H. May 3, 2007) (laptop); *Messier v. United States Consumer Prod. Safety Comm'n*, 741 F. Supp. 2d 572, 574 (D. Vt. 2010) (laptop); *Allstate Ins. Co. v. Hewlett-Packard Co.*, No. 8:08CV39, 2010 U.S. Dist. LEXIS 71686, at *2 (D. Neb. July 16, 2010) (laptop); *Inan v. Samsung Telcoms. Am.*, No. 1:09cv158, 2010 U.S. Dist. LEXIS 157016, at *3 (N.D.W. Va. Oct. 8, 2010) (cellphone).

While fire and explosion cases are the most common, other areas of claims and litigation have been exposed depending on the circumstance of the loss. These newer areas are continuing to develop and it is important for those in claims and legal to become familiar with potential areas of exposure and coverage. Below discusses some of those newer areas of claims and coverage as well as the need for retention of experts in the industry.

I. Burgeoning Areas of Exposure and Coverage

a. *What happens if the injury or damage arises out of a leased space?*

In instances where the person injured or the property damaged is covered by a lease agreement, issues can arise out of whose policy, the lessor or lessee, covers the loss. In many of these cases, the damages can be large and involve innocent third parties. For example, areas of New York have considered restrictions on leases which would disallow renters to store their personal e-bikes/scooters inside the building.[4] Building owners may try and include such a restriction within their lease agreement, but the impact on whether a breach of that term may result in an exclusion of coverage for any future losses becomes a considerable concern. Additionally, though outside of the technical lithium-ion battery realm of claims, many have argued that any such widespread restrictions are discriminatory and result in direct harms to those who cannot afford vehicles or who choose to use e-bikes for convenience or accessibility reasons.[5] Additional coverage concerns can arise in instances where neither the lessor nor the lessee are the negligent party, rather a third person is responsible for the use, maintenance or storage of the lithium-ion battery which resulted in damages.

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[4] The New York City Fire Code was updated in 2022 to place some restrictions on the number and type of electronic transportation devices that can be stored in newer buildings. This change and others have come in the wake of hundreds of lithium-ion battery fires across the city every year, causing significant property damage, personal injury, and death. FC Section 309.3.

[5] Limitations in lease agreements may also conflict with existing programs such as New York City's "Bikes in Buildings Program."

b. *Product Liability Claims Have Increased Substantially With the Fast Growing Market*

Because of the stratospheric rise in the number of products and demand for lithium-ion batteries, production facilities and manufacturers have popped up all over the world. Jurisdictional issues can become a significant concern in cases where a small manufacturer in South Korea or China manufactures a defective battery which is then sold, through one avenue or another, in the United States. Obtaining jurisdiction to sue the manufacturer for a defective product has been an ongoing battle in many states with mixed success for Plaintiff's seeking jurisdiction based on the manufacturer's participation in the supply chain.[6] Investigation early into where the manufacturer is located and whether they have been involved in cases within the US where jurisdiction has been established is a first and significant step in determining exposure for any given loss.

Along with the design and manufacturing issues, warning labels on new and poorly regulated manufacturers often lack the necessary forceful language that is required to warn of dangers – and thereby avoid liability. Proper and detailed warning labels are critical and improper warnings can increase exposure significantly. Consideration of the warning information provided to the consumer, and the sufficiency of that warning is an important first step when evaluating the exposure on a claim. Consider a Mississippi state court case, *Dilworth v. LG Chem*, wherein Dilworth alleged she was severely injured when a vape pen exploded in her

[6] *See Eisenhauer v. LG Chem, Ltd.*, No. 4:21-CV-964 RLW, 2022 U.S. Dist. LEXIS 109428, at *24 (E.D. Mo. June 21, 2022) *and see Williams v. LG Chem, Ltd.*, No. 4:21-cv-00966-SRC, 2022 U.S. Dist. LEXIS 53107, at *19 (E.D. Mo. Mar. 24, 2022). The Court denied the defendant's, LG Chem, Ltd.'s Motion to Dismiss for Lack of Personal Jurisdiction finding that Plaintiff had plausibly alleged sufficient contacts with the forum state even if Plaintiff did not allege that LG Chem, Ltd., sold their batteries directly to consumers in the forum state. The Court embraced a theory of personal jurisdiction based on a "slightly more complex supply chain." *But see Heit v. LG Chem, Ltd.*, No. 21-cv-00771-HFS, 2023 U.S. Dist. LEXIS 22812, at *4 (W.D. Mo. Feb. 10, 2023). Granting LG Chem, Ltd.'s Motion to Dismiss for Lack of Personal Jurisdiction on the same facts.

pocket. Dilworth claimed she purchased the battery from a local store, where it was sold with no warning and no instructions for use.[7]

c. *Cases of Storage of Large Amounts of Lithium-Ion Batteries are Often Large Loss*

Storage issues have had a huge impact on large loss cases.[8] The majority reported appear to arise out of e-scooters and e-bikes when multiple bikes are stored at home or at a facility. When multiple bikes are charging at a single location, it can result in an overloaded station and cause fires.

II. Coverage Issues to Consider

Exclusions including chemical contamination can result in a direct denial of coverages when there is a lithium-ion fire. Considerations should be given to whether the damages result from the lithium itself, or the resulting damage—primarily fire or flood. Business interruption for large loss cases can also have a role in considering potential recovery exposures.

III. Retention of the Appropriate Expert

Early retention of experienced and competent experts in lithium-ion claims and litigation is essential.[9] One of the most common and critical concerns for exposure is when the battery failure results in overheating which then can cause an explosion and/or fire. These types of fires spread quickly, often in a matter of seconds, and can cause significant injury or damage. In July 2021, a massive fire in a 70,000 square foot warehouse in Illinois storing over 100 tons of lithium ion batteries caught fire.[10] In response, and not knowing that lithium ion batteries can

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[7] *Dilworth v. LG Chem, Ltd.*, 355 So. 3d 201, 211 (Miss. 2022).
[8] Babwin, Don. Batteries Exploding in Burning Abandoned Illinois Building. Associated Press. June 30, 2021. https://apnews.com/article/il-state-wire-illinois-business-7d163bdb2323fe920d42ccdf265594f9
[9] *See Gopalratnam v. Hewlett-Packard Co.*, Civil Action No. 13-cv-618-pp, 2017 U.S. Dist. LEXIS 40386, at *53 (E.D. Wis. Mar. 21, 2017).
[10] *Supra* note 8.

explode when coming into contact with water, firefighters promptly responded to the loss and began spraying it down with water.[11] The result, a fire that lasted over two weeks.[12]

Documenting any loss scene is critical to evaluating a lithium-ion battery claim. It is important to bring in educated and experienced experts and attorneys to assist in documenting and capturing a complete picture that can be fully vetted. It is not enough to simply have the item or battery photographed, here, context is key. Make sure that the entire scene is documented by photos, videos and notations.[13] Consider where the battery was located, how it was being charged, what items surrounded the battery, what type of charging cords were being utilized, etc. If anything appears to be missing, make note to determine its existence to ask for an inspection at a later date.

Important questions to ask during the investigation can include whether the battery/device has been certified by a safety testing lab like Underwriters Laboratories (UL), whether the charger was compatible with the battery, whether the charging cable utilized was approved or recommended by the manufacturer.[14] The behavior of the battery can also provide insight into its failure. Inquire of the claimant about the battery like its overall condition, any visible damage, whether it had been taking longer to charge than typical and whether it routinely get hot. All can be signs of an impending failure.

Going beyond the mere scene of the claim, experts should consider what internal safety standards are being implemented at battery manufacturers and distributers and standards for the companies handling the lithium and quality control utilized.

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[11] *Id.*
[12] *Id.*
[13] Experts should use the National Fire Protection Association's Guide for Fire & Explosion Investigations or another similar standardized protocol.
[14] Underwriters Laboratories provides product certifications and publishes standards for consumer products. They are considered the standard for product safety testing in the lithium-ion battery market.

Expert retention in lithium-ion cases early is a critical component to successfully defending a liability claim, investigating other potential at-fault parties, and in identifying coverage issues. It is imperative that your expert be knowledgeable within this specific area of expertise and that they be provided the proper guidance and direction to fully investigate and document the issues.

IV. **Conclusion**

You should expect to see more issues arising out of the use, manufacturing and storage or lithium-ion batteries. This is an increasing area of claims and coverage concern on the cutting edge of technology, the law, and global trade.

ARE WE ALL GOING TO LOSE OUR JOBS?

The Emerging Use of A.I.
In the Insurance Industry

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ARE WE ALL GOING TO LOSE OUR JOBS?

THE EMERGING USE OF A.I. IN THE INSURANCE INDUSTRY

Whether we like it or not, the use of A.I. in all facets of our life is here to stay. Its uses have become more extensive in all aspects of business, including the insurance industry. The purpose of this presentation will be to explore the different forms of A.I.; its potential uses within the insurance industry and its impact, if any, on future staffing within the insurance industry.

WHAT IS ALGORITHMIC A.I.?

Essentially, Algorithmic A.I. is an extended subset of machine learning that tells a computer how to operate on its own based on pattern recognition. These Algorithms are set of instructions or rules that enable machines to learn, analyze data, and make decisions based on that knowledge. These Algorithms can perform tasks that would typically require human intelligence, such as recognizing patterns, understanding natural language, problem-solving and decision making. The use of Algorithmic A.I. can help sharpen decision-making, make predictions in real time and potentially save companies hours of time by automating key business workflows.

WHAT IS GENERATIVE A.I.?

Generative A.I. is a type of artificial intelligence technology that can produce new and various types of content, including text, imagery, audio and synthetic data. Generative A.I. goes beyond some of the limitations contained in traditional A.I. and strives to create entirely new documents or data that resembles human-created content. The main difference between traditional A.I. and Generative A.I. lies in its capabilities and applications. Traditional A.I. systems are primarily used to analyze data and make predictions while Generative A.I. goes a step further by creating new data similar to its training data. The difference is that traditional A.I. is most

proficient in recognizing patterns while Generative A.I. excels at pattern creation. Traditional A.I. can analyze data and tells you what it sees but Generative A.I. can use that same data to create something entirely new.

WHAT ARE LARGE LANGUAGE MODELS (LLMs) AND WHAT CAN THEY BE USED FOR

A. What Is Chat GPT?

Chat GPT is an artificial intelligence (AA) Chatbot that uses natural language processing to create human-like conversational dialogue. The language model can respond to questions and compose various written content, including articles, social media posts, essays, codes and emails.

B. BARD.

Bard is Google's experimental, conversational, A.I. Chat Service. It is meant to function similarly to Chat GPT with the biggest difference being that Google's servers will pull its information from the Web.

C. What Is CLAUDE?

Claude is an A.I. Chat Bot designed to be helpful, honest and harmless. It is available in there versions, Claude 1, Claude 2 and Claude Instant. The difference between the three versions is that Claude 1 utilizes sophisticated dialogue, creative content generation and detailed instructions. Claude 2 features these features together with academic features while Claude Instant provides casual dialogue, text analysis, summarization and document Q&A.

D. Uses of Generative A.I. in the Underwriting/Claims Process

Subject to strict security and controls, any of the large language models identified above can power the underwriting process in connection with formulating applications and submission for insurance; collection of data from a perspective policyholder and performing an analysis of the risks involved in underwriting a policy for the perspective policyholder. This is accomplished by

the Generative A.I. digesting large amounts of information; creating summaries of underwriting files and obtaining demographic, social, economic and crime statistics for neighborhoods where an underwriting risk may occur.

Additionally, Generative A.I. can be utilized to create insurance policy language. However, there are potential issues with respect to permitting Generative A.I. generating insurance policy language. The prime example is whether the policy language generated by A.I. is enforceable either for the risk to be insured or the location of the perspective policyholder. Thus, any policy language generated by A.I. must be reviewed to determine if it is valid and enforceable.

E. What Risks Are Current Prevalent With A.I. Use?

One of the most prevalent problems in utilizing Generative A.I. is what is known as an A.I. hallucination. This occurs when a LLM generates false information. Hallucinations occur when a LLM deviates from external facts or contextual logic. For example, a firm in New York recently filed a brief utilizing Chat GPT to create the brief. Chat GPT created the brief and supported the brief by case law which didn't exist. Opposing counsel discovered this and brought it to the attention of the Court who has sanctioned the Plaintiffs firm for lack of candor to the Court. The challenge is determining whether the information generated by the LLM is true or false because the LLM is designed to produce fluent, coherent text. As a result, utilizing the hallucinations of a LLM will create problems if the information provided is the result of an A.I. hallucination. It goes without saying, that selection of A.I. vendors who utilize training models to minimize hallucinations is critically important.

Another major risk is the use of A.I. tools by staff that expose confidential or proprietary information of insureds, clients, etc. Accordingly, all companies should prepare an A.I. acceptable use policy that is reviewed and acknowledged by all employees in an organization. Further, great

care should be used in selecting A.I. vendors who prioritize information security systems that encrypt and do not store confidential documents or other customer information. Such vendors should also not use such information to train their LLM, as that creates further risk for organizations.

Despite such risks, the promise of generative A.I. is compelling, and worth the efforts to place safeguards and other governance tools in place, just like the use of any other technology.

USE OF GENERATIVE A.I. IN THE CLAIMS PROCESS

Generative A.I. can also be utilized in the claims process specifically with respect to summarizing large volumes of written material for the claims team, preparing common correspondence or memos, or providing an analysis of claim value, settlement value or verdict value based on the information available in the LLM's database. A.I. may also provide an analysis of a claim based on similar claims in a specific jurisdiction. However, once again, the analysis is based entirely on the information contained within the database and, therefore, the database must be consistently updated to provide an accurate analysis of a specific claim.

A. Does The Emergence of Generative A.I. in the Insurance Industry Mean Changes in Staff?

This is the $64,000 dollar question that may trouble people within the insurance industry and the simple answer is a resounding **"NO"**. There will always be the need for the human element in utilizing products generated by A.I. A.I. will expediate the underwriting and claims process but will not eliminate the need to review, analyze and ensure that the information provided by the LLM is accurate and update-to-date. While the staffing model for an insurance company or law firm may change based on the utilization of Generative A.I., the input of the human element cannot be eliminated. The perfect example of the need for the human element is the reference to the New

York law firm who utilized Generative A.I. to produce a brief which was then field with the Court. While the brief may have been factually accurate and logically sound, it relied upon false information in the form of caselaw which did not exist. The review of the information provided by Generative A.I. to that law firm must be reviewed and analyzed by persons not LLMs.

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ERODING LIMITS POLICIES:

Explanation and Considerations For Claims Handling

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Eroding Limits Policies: Explanation and Considerations for Claims Handling By:
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With Special Credit to:
Mitch Orpett

I. What are Eroding or Cannibalizing Limits Policies

Eroding limits policies represent a fundamental shift in the nature of insurance purchased. Your own Errors and Omissions policy may include such a clause. Insurers commonly refer to these as "Defense Within Limits" policies, however, more descriptive labels include: "cannibalizing limits," "wasting limits," "burning limits," "reducing limits," "Pac-man," "self-consuming" and "self- liquidating" policies. The policies gained popularity in the 1980s and remain in use and common today.

Specifically, in 1986, the Insurance Services Office (ISO) proposed comprehensive general liability policies be offered on a "claims made" basis and include a "diminishing limits" clause. Under this clause claims expenses, including attorney fees incurred in defending a claim or lawsuit, reduce the limits of the policy otherwise available for indemnifying the insured. Around that time, the author, in an article published by the American Bar Association's Tort and Insurance Practice Section (TIPS),1 wrote:

> Because every defense dollar spent brings the insured closer to having his aggregate reduced, that inured would seem to have a clear financial interest in the costs of defense. Given [case law's] clear concern with the competing financial interests of insurer and insured, an argument can be made that, by applying defense costs so as to reduce an insured's available policy limits, insurance companies will completely forfeit the right to control the defense of that insured. . .This possibility is something which insurers should study carefully before blindly accepting the ISO defense cost provisions as a panacea for their legal expense dilemma. Adopting such provisions may cost them more in the short and long term than does any lawyer under the current system.[1]

During this same time period, diminishing limits policies were already being utilized in professional liability policies. The effort to expand their use into the CGL arena has not been as successful or well received as was likely anticipated by ISO, yet they are still frequently utilized to limit exposures of insurers in professional liability and other niche markets.

The issues raised and the conflicts created between insurers and insureds in the eroding limits arena brings with it concerns that a court, at any time, could interpret these policies and issue a ruling that would dramatically alter the landscape for how such policies are enforced. If, for instance, it were determined diminishing limits policies are against

[1] "Controlling the Defense: The Insurer's Hollow Crown" (1986). TIPS is now known as the Tort Trial and Insurance Practice Section

public policy or create an inherent conflict of interest that cannot be waived, the potential consequences for insurers and for the attorneys retained by insurers to represent insureds would be far reaching and profound.

II. Eroding Limits Provisions & Public Policy

The "Hollow Crown" is not the only source to question whether policies with eroding limits create an inherent conflict of interest between insurer and insured and between insurer-retained defense counsel and insured. At least one commentator noted:

> There is an inherent conflict between the insured and the insurer in every case where payment of loss plus payment of defense costs could exceed the limits of liability, since every dollar spent on defense of the claim is a dollar that will not be available for settlement or satisfaction of judgment. This is no problem as long as the insured and insurer are fully agreed (and continue to agree) on the merits of settling versus defending including issues of timing and resources invested in the process.[2]

Courts have also addressed this same concern, some even going so far as to consider whether eroding limits policies might be against public policy altogether. The Supreme Court of Appeals of West Virginia considered the question. The decision was ultimately limited to policies issued pursuant to a statute specifically governing liability policies issued to municipalities.

In *Gibson v. Northfield Ins. Co.,* 219 W.Va. 40, 631 S.E.2d 598 (2005), the estate of someone killed by a city-owned vehicle brought a lawsuit against the insurer of the City after taking an assignment of the City's rights to coverage. The estate claimed that the insurance policy in question was void as against public policy to the extent that it held defense costs to be part of the limits of the policy. The court considered the provision in light of a governing statute and held it was contrary to the legislative intent. The court limited its ruling to policies of insurance issued to municipalities, stating:

> [O]n a more general note, we believe that the inclusion of a defense within limits provision in a governmental entity's insurance policy offends traditional notions of fairness. Governmental entities purchase liability insurance to protect their employees and to protect [public funds]. The quiet inclusion of a defense within limits provision into a governmental entity's liability policy subverts that intent by using the liability coverage to pay the insurance company's litigation expenses and attorney fees, rather than protecting the governmental entity and its employees and making injured third parties whole against their losses.

Despite the narrow scope of this particular decision, the court's analysis is not unique to

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[2] Munro, Defense within Limits: The Conflicts of "Wasting" or "Cannibalizing" Insurance Policies, 62 Mont.L.Rev. 131, 148 (2001).

municipal insureds and could easily be expanded to insureds under professional liability policies or even insureds generally.

In *Illinois Union Insurance Co. v. North County Ob-Gyn Medical Group,* S.D. California, 2010 U.S. Dist. Lexis 50095, at *6 (S.D. Cal. May 18, 2010), the court held policy language attempting to reduce coverage limits by defense expenses could not be enforced because the insured could not have known that its policy limits would be eroded by defense costs. There are, however, many policy provisions reducing coverage limits that have been upheld by various courts.[3]

One of the most instructive decisions on this issue came in the federal district court in *NIC Ins. Co. v. PFP Consulting, LLC*, CIV.A. 09-0877, 2010 WL 4181767 (E.D. Pa. Oct. 22, 2010), which held that the determination of whether an eroding limits clause in an insurance policy is against public policy is a matter better addressed and resolved by the Pennsylvania state courts and not the federal courts. Attorneys and insurers alike should remain cautious when making general and overly broad pronouncements about the enforceability of eroding limits in policies of insurance. Indeed, it appears a state specific analysis of the issue is required when examining the enforceability of these policies from a public policy standpoint.

III. Reservation of Rights Letters

Insurers should exercise extreme caution when communicating with their Insureds about the terms, conditions and effects of an eroding limits policy. As a lawsuit proceeds and coverage dollars erode, the timing of the reservation of rights letter is critical. In *Lexington Ins. Co. v. Swanson*, 2007 WL 1585099 (W.D.Wash. 2007), an insured sought to invalidate the insurer's coverage defenses based, in part, on the claim the insurer's control of the defense under an eroding limits policy created a conflict of interest. The argument presented was that a conflict arose because, while the insured would likely wish to settle the claim in order to avoid the potential excess and personal exposure, the insurer's interest would be to defend the lawsuit in order to avoid liability entirely, without having to face any exposure beyond its policy limits, thereby paying the same amount whether or not the settlement offer was accepted but saving money if settlement were rejected and the case successfully defended.

The district court agreed with argument and issues a ruling in favor of the moving party based on the fact that the insurer had controlled the defense of the litigation for nearly two years before issuing a reservation of rights. In the eyes of the court, this raised a

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[3] See, e.g., Continental Ins. Co. v. Bangerter, 37 Cal. App. 4th 69 (Cal. App. 1995); California Dairies, Inc. v. RSUI Indemnity Co., 2010 U.S. Dist. Lexis 64049 (E.D. Cal., June 25, 2010) (Loss means damages, settlements, judgments, and defense expenses); Weber v. Indemnity Insurance Co. of North America, 345 F. Supp. 2d 1139 (D. Haw. 2004) (Defense expenses include the attorney's fees, legal costs, and expenses spent to defend the underlying suit).

presumption that the insured was prejudiced. The insurer was therefore precluded from asserting contract defenses to coverage. The court did, however, note that this ruling applied to coverage defenses, not to the limits themselves. Consequently, the insurer was barred from litigating its defenses to coverage, but could still rely on the policy's spend-down provision to dispute the applicable policy limit without a timely reservation of rights.

While the *Swanson* court was willing to enforce the policy's maximum limits as written, insurers face two essential roadblocks when litigating eroding limits clauses. First, they must combat the argument that the clause violates public policy, is ambiguous or otherwise unenforceable. Second, they must address the claim that the insurer, because of its conduct in the face of conflicts of interest created by the eroding nature of its policy, is or should be estopped from contesting coverage in any manner. In the face of these threats, a third possibility, rejected by *Swanson* but easily imagined, is because of the conflict of interest and the conduct of the insurer, the insurer will remain liable for defense fees and expenses in addition to indemnity limits. This is particularly foreseeable where an insured claims that it should be entitled to extra- contractual damages due to a failure to settle and/or an excess verdict.

IV. Settlement Demands and Responses

Public policy leans heavily in favor of resolving cases through settlement. Courts routinely grant motions to approve settlement agreements in cases involving burning limits policies. Cases in which a settlement is threatened or an insured is confronted with personal exposure due to a refusal of an insurer to settle, present a significant incentive for a court to issue a broad ruling against the enforceability of eroding limits clauses generally. These cases would also severely restrict the control an eroding limits insurer may exercise in defending a lawsuit. Moreover, it is just these kinds of claims that make for tempting targets for extra-contractual claims and extra-contractual rulings. Thus, in a decision upholding the Depositors Economic Protection Corporation Act against an equal protection challenge, the Rhode Island Supreme Court noted the likely impact that "defense within limits" policies would have in the absence of settlement given the alternative would allow the policies to deplete by payment of attorney's fees and litigation expenses, thereby leaving no limits left to satisfy a judgment. *Rhode Island Depositors Economic Protection Corp. v. Brown*, 659 A.2d 95 (1995).

A similar decision was reached in a case approving the settlement of a class action alleging fraud, where the court expressly considered the fact that the applicable insurance policy was "self-consuming" and, therefore, defense costs and expenses would continue to reduce the amount of coverage available to satisfy any judgment. *Scholes v. Stone, McGuire & Benjamin*, 839 F. Supp. 1314 (N.D. Ill. 1993). These issues are legitimately seen as real and not merely vague and horrible hypotheticals. Courts recognize that, when an insurer believes that a claim has little merit, it may wish to defend the claim through trial and, in doing so, the insured's coverage limits will be completely or significantly eroded. The courts further recognize that, in contrast, the insured will want its insurer to make a substantial and early offer to a claimant in order to obtain a dismissal and

protected them from an uninsured excess verdict liability.

In *Biomass One, L.P. v. Imperial Casualty & Indemnity Co*., 968 F.2d 1220 (9th Cir. 1992), an insurer paid $1.9 million in legal fees and costs defending a professional liability claim under a $2 million policy. In that case the court found the policy language of an eroding limits policy to be ambiguous and therefore the legal fees did not erode the available indemnity limits. The decision, however, would not appear to be a significant threat to well-written eroding limits policies. As the *Biomass One* court noted, the policy in question did not contain any single and unambiguous statement that the limits of coverage were subject to defense fees and expenses. The lesson of the decision is that any eroding limits policy must be carefully and precisely drafted to avoid any potential for ambiguity upon review.

IV. Defense Counsel Considerations

All defense lawyers representing insureds will remember that they represent and owe a duty of utmost loyalty to that insured. Accordingly, there are a number of challenges that defense counsel face when presented with an eroding limits policy.

For instance, while defense counsel cannot get involved in a coverage dispute with the insurer they must nevertheless remain attentive to the existence and implications of an eroding limits policy on the defense of their client. An eroding limits policy puts the burden on defense counsel to make certain they communicate early and often with the insured regarding specifically the cost of defense and the impact on the available insurance limits. These issues are readily apparent in cases involving policies where the insured has the right to consent to any settlement. Early and thorough communication should include developing a budget and comprehensive case evaluation at the onset.

Discovery disclosure issues also present unique challenges for defense counsel in the eroding policy limits arena. For example, when preparing answers to interrogatories and initial case disclosures pertaining to applicable insurance, defense counsel must determine how to handle disclosure of available insurance and the potential impact such a disclosure could have on the posturing of the defense.

Furthermore, defense counsel should be aware that governing rules of professional responsibility might require them to continue representing an insured even after the exhaustion of liability insurance limits. In most states, when an attorney seeks to terminate the representation of a client in litigation, that attorney may only do so after taking reasonable steps to avoid foreseeable prejudice to the client. Further, an attorney, after having appeared for a client in court, may only withdraw from such representation in compliance with the applicable rules of that particular court. These ethical obligations apply regardless of who was paying for the defense prior to exhaustion of the policy limits. As such, when the insurance company retaining the defense counsel claims that its policy limits have been exhausted under an eroding limits provision and stops paying for the insured's defense, the defense counsel may find themselves unwittingly providing pro bono services to the insured.

Defense counsel must also consider the inherent conflict of interest that could be found between the attorney and the insured when it comes to the financial self-interest of the attorney. Specifically, an attorney may desire to be paid as much as possible for representation of the insured, while the insured will likely desire maximum insurance protection at all times. Not disclosing this potential conflict and discussing it with the insured from the outset of a claim can put defense counsel at risk.

V. Issues for the Insurer

Insurers issuing eroding limits policies should be careful to make sure their insured are fully appraised of the existence of such provisions and their effect. Identifying the risk as a potential conflict of interest is likely the clearest way to avoid a problem later on. It is important to remember that the duty of the insurer to address this issue is separate and distinct from the obligation of the attorney and therefore the insurer cannot depend on the attorney to explain this potential conflict.

In addition, insurers should communicate with the insured regarding the potential for an excess verdict and the impact that will have on the insured. Because every defense dollar diminishes the insured's protection, the insurer issuing eroding limits policies should make certain that a system is in place both to control litigation costs and the costs incurred by attorneys representing their insureds. Such policies further emphasize the need to keep the insured current on up to date defense costs and the amount of remaining coverage.

VII. Conclusion

Eroding limits policies can create a number of different conflicts between the insurer, insured and defense counsel. These policies are a potential breeding ground for bad faith exposure. One cannot overlook the potential conflicts that arise nor fail to implement planning to protect against them. Recognizing the potential for conflict and developing strategies and protocols to protect against them and effective manage litigation and the insured's expectations are critical. Continued communication directed to the issue of the eroding limits is essential when managing litigation involving eroding limits policies. Failure to address the issues presented by eroding limits policies is a dangerous game that will inevitably lead to problems. Those problems are rarely those of the insured.