EAGLE INTERNATIONAL ASSOCIATES

Presents

BECAUSE I COULDN'T GO FOR 3: Defending and Winning Claims, When Winning Matters

September 11, 2019

Le Meridien Hotel, The Joseph
Columbus, Ohio

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.

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PROGRAM

12:15pm **Registration**

1:00 pm **Welcoming Remarks**
Mitchell A. Orpett, Esq., Tribler Orpett & Meyer P.C.
Chair, Eagle International Associates, Inc.

Program Introduction
Matthew L. Schrader, Esq., Reminger Co., LPA
Program Chair

1:15 pm **The First 90 Days – Triaging A New Construction Claim or Lawsuit**
Moderators:
Timothy B. Spille, Esq., Reminger Co., LPA
Daniel J. Ripper, Esq. Luther-Anderson PLLP
Panel:
Brian Jansen, risk Management (rM) and Compliance Leader, Woolpert, Inc.
Glenn Scheuer, CPCU, Complex Claims Unit Leader, Westfield Insurance
Kirk Wolf, Project Engineer (Civil), S-E-A

2:15 pm **A Different View of Construction Defects – Drone**
Ryan Siekmann, East Region Manager, S-E-A

2:45 pm **BREAK**

3:00 pm **Employment Law: By the Time You Read this Title, the Legal Landscape Has Likely Already Changed Again!**
Moderators:
Paul M. Finamore, Esq., Pessin Katz Law, P.A. (PK Law)
Perry W. Oxley, Esq. Oxley Rich Sammons Law Firm
Panel:
Todd M. Jackett, Claim Counsel, Bond & Specialty Insurance, Travelers
Patrick McManamon, Chief Executive Officer, Cannasure Insurance Services
Rita Thomas, Senior Vice President and General Counsel, HDT Global

4:00 pm **Don't Be The One To Pay The Price: Avoiding Bad Faith**

"We hate to lose, but when we do, rest assured we'll be back, and someone will pay the price." - Woody Hayes, Ohio State University, Football Coach 1951-1978

Moderators:

Shea Backus, Esq., Backus Carranza & Burden

John Egan, Esq., Rubin and Rudman

Panel:

Andrew J. Kielkopf, Esq., Corporate Litigation Counsel, Office of General Counsel & Compliance, Grange Insurance Company

Cy McFarlin, Claims Director, Insurance Board

Traci A. McGuire, Esq., Senior Vice President Corporate Claims, AmeriTrust Group

5:00 pm **Closing Remarks**

5:15 pm **Reception**

6:30 pm **Dinner**

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Shea Backus is a shareholder of Backus, Carranza & Burden in Las Vegas, Nevada. Shea earned her B.S. from University of California, San Diego and J.D. with a certificate in Indian Law from Sandra Day O'Connor College of Law at Arizona State University. Her litigation practice concentrates in commercial and civil litigation with an emphasis on general liability, professional liability, and construction. She is admitted to practice in the state and federal courts in Nevada, as well as some tribal courts. Shea also serves as an Assemblywoman in the Nevada State Legislature.

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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 over 35 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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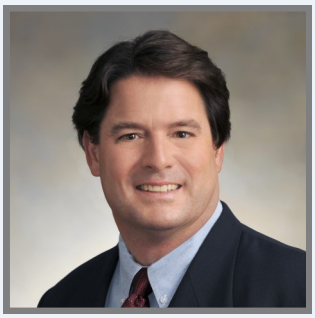

Paul M. Finamore is a member of the Maryland firm, Pessin Katz Law, P.A. He is an experienced trial lawyer who has practiced in state and federal courts throughout Maryland and the District of Columbia for over 30

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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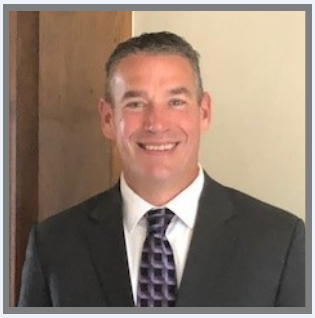

Todd Jackett oversees and manages claims under various public, private and non-profit company policies of insurance, including employment practices liability, directors and officers liability, fiduciary liability and miscellaneous professional liability. He is a designated handler of high exposure and complex claims. Todd collaborates with defense counsel and insured clients in managing claim files from inception to final resolution. Todd also conducts extensive investigations in order to determine coverage under the various policies of insurance. Todd joined Travelers in November 2011.

Prior to joining Travelers, Todd practiced law for one of Travelers' Ohio panel counsel firms, Reminger Co., L.P.A. In private practice, he represented, defended and counseled companies, organizations and individuals in various areas, including employment practices, directors and officers liability, contractual matters, corporate and professional responsibilities and general commercial matters. He represented various professionals, including attorneys, in a wide variety of legal matters, including defending clients before disciplinary boards. Todd also conducted diversity and harassment training for various corporate clients.

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Brian Jansen is Woolpert's risk Management (rM) and Compliance Leader for the Buildings Sector. Brian is a registered Professional Engineer and Attorney in the State of Ohio. With over 25 years of experience at

Woolpert ranging from survey field crew, project engineer, to legal counsel, Brian is uniquely familiar with the challenges facing architectural, engineering, and geospatial consulting firms. Brian's day to day responsibilities include contract reviews, insurance alignment, claims processing, and firm licensing.

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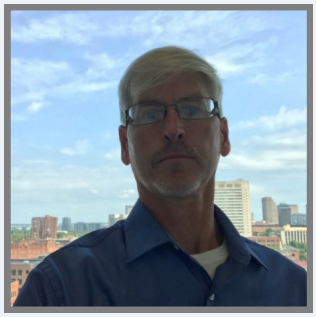

Andrew J. Kielkopf is Corporate Litigation Counsel, in the Office of General Counsel & Compliance, for Grange Insurance Company, a Property & Casualty Insurance Company which is licensed to write Polices in 16 States, including, Ohio, Michigan, Pennsylvania, Indiana, Illinois, Kentucky and Georgia. Mr. Kielkopf's has been an employee of Grange since February 2014. Mr. Kielkopf's primary focus as Corporate Litigation Counsel is to manage, direct and, in Ohio, represent Grange, in all matters which include Extra-contractual allegations. In addition, Mr. Kielkopf is tasks with assisting Grange Representatives with responding to discovery directed to "corporate" Grange and preparing Representatives who may testify on behalf of Grange.

Prior to becoming a Grange employee, Mr. Kielkopf was a Partner / Managing Partner at the law-firm of Gallagher, Gams, Pryor, Tallan & Littrell, a Columbus Insurance Defense law-firm, where he practiced law for approximately 18 years. Mr. Kielkopf obtained his undergraduate degree from The Ohio State University in 1986 and graduated from Capital Law School in 1993. Mr. Kielkopf is licensed to practice law in the State of Ohio.

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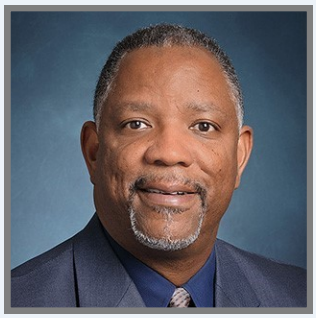

Cy McFarlin served in the insurance industry for more than 20 years as an adjuster and claims manager for both personal and commercial lines. His specialties include general and professional liability, as well as auto and homeowners. Cy currently works as the Claims Director for the Insurance Board, 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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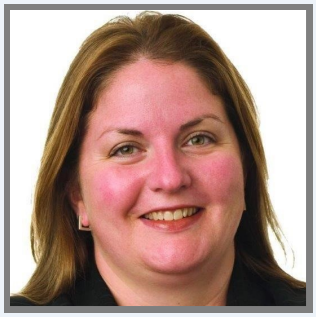

Traci McGuire is Senior Vice President of Claims and is in transition to take over the role of Chief Claims Officer. Currently, Traci works in tandem with the CCO to manage AmeriTrust's Claim Department and is focused on litigation management and supervision of claims professionals. The Claim Department resolves all claims for both the Admitted and Non-Admitted operations nationwide. Traci joined the company in 2012 as a Claims Attorney managing a book of professional liability claims. Thereafter, she served in various roles of claims management, including oversight of the Specialty, Complex and Coverage groups, as well as the Vice President of Casualty Litigation. Prior to joining AmeriTrust, Traci was a litigation partner at Kegler, Brown, Hill & Ritter in Columbus, Ohio for 13 years and specialized in business litigation and medical malpractice defense. Traci received her Bachelor's and Master's Degrees in Speech Communications from Miami University in Oxford, Ohio. Thereafter, she received her Juris Doctorate from The Ohio State University College of Law. Traci enjoys serving as an author, speaker or panelist for industry events. Her activity includes Selecting The Right Expert For Your Case (panelist, Magna Legal Services, 2018); Liability Limitations in Contract (presentation, DRI Construction Law Seminar, 2018); Risky Business – Dealing with Difficult Professionals As Insureds/Clients (panelist, CLM 2017); Defense Counsel Challenges in Complying With Carrier Guidelines (presentation, CLM 2015), How To Negotiate and Drive Early, Favorable Settlements (presentation, 2015); Women Lawyers: Defeating Public Speaking Fears (Article, Woman Advocate, ABA Journal, 2009).

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Patrick McManamon is a pioneer in the cannabis insurance industry. The founder and CEO of Cannasure Insurance Services, LLC (Cannasure), is a highly recognized insurance thought leader in all sectors of the cannabis industry ranging from dispensaries, cultivators, processor/manufactures, testing laboratories, landlords and ancillary businesses.

What started out as a request for general liability insurance for a dispensary in 2009, Patrick spearheaded Cannasure to be the premier insurance solution provider in the marijuana industry. The firm is exclusive to the cannabis industry as a wholesale broker and MGA that facilitates insurance coverage placements, develops product/programs, underwrites and services standard, alternative risk as well as risk management placements.

Patrick serves as Chairman of the National Cannabis Insurance Association's (NCIA) insurance and finance committees. In addition, Patrick is a founding member of NCIA of Ohio. Patrick is also an active member of ArcView Group (Cannabis Investment and Market Research).

Prior to Cannasure, Patrick was the President of McManamon Insurance, third-generation insurance group located in Westlake, Ohio, where he guided the growth of the company in the emerging markets. Patrick is a graduate of the University of Dayton with a degree in Political Science. Patrick is married with three children and when not supporting his kids at their events he spends his free time supporting local organizations such as Ohio City Lax (Urban Lacrosse) and the House of Champions (non-profit organization helping kids succeed academically).

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Mitch Orpett is the Chair of Eagle and its attorney representative for the State of Illinois. He is a founding member and former managing director of Tribler Orpett & Meyer, P.C., a Chicago law firm serving the insurance and business communities. He was one of six lawyers who formed the firm in 1984. His practice is devoted to the defense of various professional and casualty claims and to the resolution of insurance and reinsurance disputes. He has been active in litigation, arbitration and other methods of alternative dispute resolution and has served both as advocate and arbitrator. He has been listed in all editions of Euromoney Publications' Guide to the World's Leading Insurance and Reinsurance Lawyers and in Who's Who Legal, Insurance & Reinsurance. He has also been named as an Illinois "Super Lawyer" and to the Illinois Network of Leading Lawyers, in recognition of his work as an insurance and reinsurance lawyer.

Mitch has devoted more than 40 years of service to the profession, holding numerous leadership positions in the American Bar Association, among others. He was elected to the ABA's Board of Governors and served for many years on its policy-making body, the House of Delegates. He was the chair of the ABA's Section Officers Conference, in which capacity he represented the approximately 240,000 members of the sections and divisions of the American Bar Association. Previously, he was chair of the ABA's 30,000 member Tort Trial and Insurance Practice Section and of the ABA's Standing Committee on Continuing Education of the Bar. He was also vice chair of the ABA's Presidential Commission on the Unintended Consequences of the Billable Hour (United States Supreme Court Justice Stephen G. Breyer, honorary chair).

Mitch is a graduate of the University of Illinois, where he earned his bachelors and masters of arts degrees. He is a graduate of that institution's College of Law.

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Perry W. Oxley is the Managing Partner at Oxley Rich Sammons in Huntington, WV, that employs an innovative approach to the practice of law that is marked by case-specific preparation, explorative thinking, and creative execution. Mr. Oxley has extensive trial experience for defendants in a wide array of practice areas including general litigation, insurance defense, torts, products liability, medical malpractice, and health care law. He graduated from the West Virginia College of Law in 1996 and has tried over twenty jury cases to verdict. Mr. Oxley has received various awards throughout his career including the Martindale Hubbell AV rated award, being accepted into America's Top Civil Defense Litigators, and being brought onto the Litigation Counsel of America.

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Daniel J. Ripper is a partner in the law firm of Luther-Anderson, PLLP in Chattanooga, Tennessee and has been in practice since 1992. He is licensed in all state and federal courts in both Tennessee and Georgia, as well as the Sixth and Eleventh Circuit Courts of Appeal and the United States Supreme Court. Dan received his BA from the University of Notre Dame in 1989 and his JD from the University of Tennessee in 1992. Since that time, he has represented corporations and other businesses as well as individuals in a variety of civil and criminal cases. His practice primarily focuses on the defense of insureds in auto, product and legal malpractice matters along with the frequently associated coverage disputes. He also represents professionals before licensing and disciplinary boards and individuals in significant criminal matters. He has extensive trial experience, both jury and non-jury. He is a member of the Tennessee Bar Association, the Georgia State Bar and the American Bar Association.

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Glenn Scheuer has been in the insurance claims industry over 30 years with the last 22 years at Westfield, primary handling or supervising commercial casualty exposures with an emphasis on complex Construction Defect matters. At present he either handles or supervises CD claims in nearly all of Westfield's operating territory, in addition to supervising 4 Complex Claim Specialists and 3 dedicated CD Specialists. He resides in Cincinnati, OH with his wife Linda and is an embattled, yet hopeful, lifelong Reds and Bengals fan.

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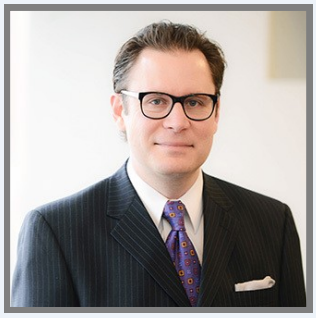

Matthew L. Schrader is a shareholder in Reminger Co., L.P.A.'s Columbus office. He has litigated and tried cases involving professional liability, medical malpractice, wrongful death, products liability and copyright infringement. Matthew has tried cases in both the state and federal courts throughout 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 2017-2019. Matthew has also been selected as one of the Top Lawyers in Central Ohio by Columbus CEO Magazine from 2016-2019.

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Ryan Siekmann is one of four National Account Executives for S-E-A, reporting directly to the VP of Sales. Responsible for S-E-A achieving corporate sales and revenue targets as well as coaching and developing new sales representatives and providing the overall direction for company revenue growth.

Responsible for establishing the overall direction of the Imaging Sciences Group and developing new markets for which our technology and expertise can provide a unique service offering. S-E-A is the forensic engineering industry leader for 3D scanning technology, post processing and data acquisition, animations and litigation graphics, as well as UAV services.

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Timothy B. Spille: Tim is a litigation, insurance coverage, construction, and small business lawyer representing clients in state, federal, and appellate courts throughout Ohio, Kentucky and Indiana. He defends construction defect and damage, breach of contract, landslide, and warranty claims. As a small business and business litigation lawyer, Tim advises his clients about entity organization, collection matters, mechanic's and materialman's liens, and contract disputes. He serves as general counsel for a number of well -known Greater Cincinnati and Northern Kentucky companies. Tim is also a seasoned insurance coverage litigator, having successfully defended clients regarding coverage issues involving a duty to defend or indemnify, PIP and medical payment claims disputes and UM/UIM claims.

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Rita Thomas is Senior Vice President, General Counsel and Secretary of HDT Global, an industry-leading producer of state-of-the-art, deployable solutions, including shelters, generators, heaters, air filtration devices, robotics and other engineered technologies used by the U.S. and allied militaries worldwide.

Ms. Thomas has served as Senior Vice President, General Counsel and Secretary for HDT Global since October of 2010, having independently provided legal services to the Company from October of 2009 to October of 2010. She has 28 years of experience in corporate in-house legal environments, more recently with Agilysys, Inc., then a publicly traded value added solution provider of computer systems, where she was employed from December of 2000. Ms. Thomas has extensive experience in various legal disciplines, including business transactions, corporate governance, mergers & acquisitions, compliance and employment law and serves as her company's risk manager. She has a "Secret" Security Clearance with the U.S. Department of Defense. Ms. Thomas received her Juris Doctorate from The Ohio State University Moritz College of Law and received a Bachelor of Arts degree, summa cum laude, from the University of Akron. She is admitted to practice law in Ohio and Texas (inactive).

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Kirk Wolf attained his Bachelor of Science degree in Civil Engineering from Michigan State University and his Master of Science degree in Engineering Management from Old Dominion University. Kirk began his career in Colorado as a project engineer as a structural engineering consultant designing residential and commercial structures. He comes to S-E-A from Jacobs Technology where he was the Senior Civil/Structural Engineer at NASA Langley Research Center. Kirk is currently licensed as a Professional Engineer in 17 states and performs examinations and evaluations of existing structures to determine the presence, extent, and/or cause of damage to building components as a result of partial or full collapse, storm damage, water intrusion, fire, vibration, blasting, or other phenomena. Kirk provides investigation and consultation for a variety of projects, including, but not limited to, structure, roof, and building envelope/fenestration failures, means of ingress/egress, code compliance, workplace accidents, underground utilities (storm/sanitary sewer, steam, and potable water), and potentially defective construction and/or design.

THE FIRST 90 DAYS –

Triaging A New Construction Claim or Lawsuit

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THE FIRST 90 DAYS - TRIAGING A NEW CONSTRUCTION CLAIM OR LAWSUIT

I. First Notice: Assessing How the Claim is Presented:

II. Getting the Defense File Up and Running

A. Reporting – How was the file referred to you?

a. Insurance Defense

If the file was referred through an insurance carrier then the first thing a defense attorney will need to do is identify the insured. Identify who the applicable policyholder is so you can properly assess the liability, if any, of the insured and strategize accordingly. After you've identified the relevant policyholder, see if they are properly addressed in the complaint.

When beginning a new defense lawsuit, find out what's happened in the claim before your involvement. Find out what witnesses have been spoken with, have any motions been filed, what type of money has already been paid out from the insurance company etc. That way you can move forward knowing full well what work has already been done and better proceed in the case.

b. Private Client

When a private client refers you a case, it's important to determine if there is insurance coverage in the first place. It may be that an insurance policy has not yet been triggered to activate the duty to defend, or alternatively, a different insurer may be responsible for the claim. The answer will depend in part on what trigger theory your jurisdiction uses. There are a few different trigger theories that courts will use in determining coverage. If coverage is triggered when property damage becomes known to the owner, it is referred to as the manifestation trigger theory. When coverage is triggered when damage first occurs, it's known as the injury-in-fact trigger. If coverage is triggered when the first injury-causing condition occurred, then its known as the exposure trigger. Lastly, if the damage occurs over a period of time, and multiple polices were in effect over that time, its referred to as the continuous trigger.[1]

Under the manifestation trigger theory, an insurer has the duty to defend and is liable under a policy only for damages that manifested during the policy period. For example, if a home has had water damage for ten years due to faulty construction, but the damages only *manifested* or became apparent until year eight, coverage is only triggered against the insurer who insured the builder of the home during year eight. In contrast, under a continuous trigger theory, liability coverage is spread out evenly to any

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[1] *Westfield Ins. Co. v. Milwaukee Ins. Co.,* 12th Dist., No. CA2004-12-298, 2005-Ohio-4746, ¶ 10 (Sept. 12, 2005).

insurer who has covered the insured when the damage itself occurred, regardless of when it manifested itself. So, any insurer who insured the builder over the last ten years would be equally responsible for the continuous damage to the home caused by their negligent building. If insurer A covered the builder for the first three years, and insurer B covered the builder during the next seven years, they both are responsible for the insured's water damage liability and must cooperate in the duty to defend. The point being, it's important to determine if and which insurance coverage applies before getting too far into the defense of an insurance construction claim. Keep in mind, under a continuous trigger approach multiple policy might be in play that you will need to account for.

Once that's taken care of, develop a scope of work timeline for the insurer. This should include an estimated budget for case assessment, pre-trial pleading and motions, discovery, and trial preparation. The scope of work should also an initial summary and reaction to the case including the client's risk of liability and some basic principles that will likely apply to the facts of the case.

c. Contractor or Design Professional

If a claim referral comes to you straight from the allegedly liable contractor or design professional, the first thing you should do is contact their insurance company's in-house counsel or any other attorney the insurance company may be using. The insurer is in charge of choosing counsel when they have a duty to defend so it is essential to check with them to see if they have another idea in mind and to make sure everyone is on the same page. Once you've received the go ahead from them, the next step is to contact the insurance agent. The insurance agent will help get the ball rolling as far as the scope of the insurance coverage, the basic facts of the case, policy limits, settlement caps, and initial witnesses to look into for more information. Also, be weary of what information you relay to opposing counsel. Much of what an insurance agent tells you will be covered as attorney-client communications. In that same vein, be careful what you write, email, or promise to a potentially adverse entity because it may become binding, or at least expected, as the case moves along. Lastly, it's time to identify employees, subcontractors, and third-party representatives (i.e., building inspectors) with knowledge of the facts surrounding the claim. These individuals will become your well for information on the facts of the case and some of them will potentially be witnesses in a trial if it goes that far.

d. Conclusion

Getting a new defense file started off on the right foot is crucial to effectively representing an insurance client. By first determining the scope of the applicable insurance policy and the potentially liable policyholders you can ensure you know exactly what to look out for. After contacting the insurance agent and any other relevant individual from the insurer, draft up a scope of work for the insurer to give them an idea on how you think the claim will proceed. Remember to always be careful with your communications to an opposing party and not to agree to anything you're not fully prepared to get behind.

Finally, you're ready to identify and potentially reach out to employees and other witnesses who might have knowledge of the facts making up the claim.

B. Duty to Cooperate: Significance of insureds duty to cooperate and the risks of prejudice associated with late notice of a claim.

a. Ohio: *Ferrando v. Auto-Owners Mut. Ins. Co.*

Generally, an insured has the duty to cooperate with its insurer in dealing with a claim and defense. A pivotal part of the duty to cooperate is giving timely notice of a claim or potential claim to the insurer. The duty to give timely notice will be contained in the policy provisions and may include a specific time limit for notice and information that must be provided. The impact of an insured's breach of notice provision will be the denial of coverage under the policy. However, courts deciding whether there has been a breach of a notice provision look at more than just the policy language.

In *Ferrando v. Auto-Owners Mut. Ins. Co.,* the Supreme Court of Ohio adopted the majority approach to the question of when a breach of a notice provision has occurred.[2] Ohio courts look at: 1) whether the notice provision is valid, 2) whether the provision was actually breached, and 3) whether the breach was material.[3] "In situations involving a breach of a requirement of prompt notice, most states find that the provision is valid, that the provision has been breached when notice was not reasonably given in the circumstances, but that the failure of notice will serve as a material breach of the insurance contract only when the unreasonable notice is prejudicial to the insurer."[4]

The Court in *Ferrando* ultimately held that when an "insurer's denial of [ ] coverage is premised on the insured's breach of a prompt-notice provision in a policy of insurance, the insurer is relieved of the obligation to provide coverage if it is prejudiced by the insured's unreasonable delay in giving notice. An insured's unreasonable delay in giving notice is presumed prejudicial to the insurer absent evidence to the contrary."[5] Therefore, in Ohio, the insured has the burden to show the insurer was not prejudiced by a delay in notice that violates a prompt-notice provision.

b. Kentucky: *Jones v. Bituminous Cas. Corp.*

In *Jones v. Bituminous Cas. Corp*., the Supreme Court of Kentucky reversed two lower court decisions that found breach of a prompt-notice provision was fatal to coverage without regard to whether the insurer was prejudiced.[6] In *Jones*, the Court explicitly adopted the modern trend regarding prompt-notice provisions and requiring an insurer to be prejudiced before allowing a denial of coverage.[7]

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[2] *Ferrando v. Auto-Owners Mut. Ins. Co.*, 2002-Ohio-7217, ¶ 28, 98 Ohio St. 3d 186, 191, 781 N.E.2d 927, 945
[3] *Id*., at 933
[4] *Id*.
[5] *Id*., at 945.
[6] *Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798, 800 (Ky. 1991).
[7] *Id*. at 803.

The Court then decided that the burden should be on the insurer to prove prejudice. The Court reasoned that it is almost impossible for an insured to prove a negative that the insurer was no prejudiced, and that insurers are in a vastly superior position to show if prejudice exists.[8]

However, the Court determined that an insurer only need prove probable prejudice, stating that an actual prejudice standard would be an unreasonable burden.[9] Therefore, an insurer need only prove prejudice based on whether it is reasonably probable that the insurer suffered prejudice from the delay in notice. Any dispute is a question for the trier of fact.[10]

c. Indiana*: Ind. Ins. Co. v. Williams*

In *Ind. Ins. Co. v. Williams*, the Supreme Court of Indiana confirmed an earlier ruling and held that there is a difference between a breach of a duty to cooperate provision and breach of a prompt-notice provision.**[11]**

The Court concluded that:

> notice provisions in insurance policies are not equivalent to the cooperation clauses and do not serve the same objectives. Failure to cooperate can come about in many ways, some of which may be technical and inconsequential, thereby resulting in no prejudice to the insurance company. An insurance company must show actual prejudice from an insured's noncompliance with the policy's cooperation clause before it can avoid liability under the policy."[12] However, "notice is a threshold requirement which must be met before an insurer is even aware that a controversy or matter exists which requires the cooperation of the insured. The notice requirement is 'material, and of the essence of the contract' [. . .] The requirement of prompt notice gives the insurer an opportunity to make a timely and adequate investigation of all the circumstances surrounding the accident or loss. This adequate investigation is often frustrated by a delayed notice. Prejudice to the insurance company's ability to prepare an adequate defense can therefore be presumed by an unreasonable delay in notifying the company about the accident or about the filing of the lawsuit."[13]

The Court went on to state that where the insured can present at least some evidence that there was no prejudice to the insurer the question of prejudice then

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[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Ind. Ins. Co. v. Williams*, 463 N.E.2d 257, 261 (Ind. 1984).
[12] *Id*., at 265
[13] *Id*.

becomes one for the trier of fact.[14] This protects both an innocent insured from denial of liability based on insignificant non-compliance, and the insurer's interests.[15]

III. Expert Support

a. Consulting Experts

A consulting expert is an expert that *will not* be called to testify at trial. Generally, a consulting expert's analysis, opinions, and communications are not discoverable under the work-product doctrine. An exception applies where the other party can show extreme hardship or other exceptional circumstances. If you decide that the consulting expert will testify at trial, then the details of your initial consultation are discoverable.

When a complaint first comes across your desk, one of the first questions in your mind is, "what is my client's exposure?" When it comes to construction defect claims, an expert that is a professional engineer in the forensic engineering field can best help you understand the who, what, where, when, and why of the case.

Who is making this claim and exactly what are they claiming? Is the damage being identified by another expert, is the damage being identified in a building turnover report, or building occupants/building association? Some claims can have far reaching implications, your expert should help you identify those and how to nip them in the bud. Depending on the role of your client in the case, the expert can also help with identifying other potential parties that may need to be put on notice. Having the expert perform a site visit and assess the damages reported by the claimant helps provide context to the damage and understand specifically where the reported damage occurs. Site inspections should be made prior to a repair, along with inspection of repair drawings, during repairs, and after repairs are completed.

When should the expert get involved? As early as possible to help with answering questions and assist in obtaining key technical information during the discovery process. Getting involved early also allows the expert to be able to see the damage before, during, and after repairs are made. Rule 11 of the Rules of Civil Procedure in Indiana, Ohio, and Kentucky require that there are good grounds to support your allegations or defenses. If your case requires an expert to determine whether the standard of care was breached or not breached, Rule 11 would require you seek a consulting expert to determine whether you have a good faith claim or dispute. An expert can also help interpret building codes, answer technical questions related to the construction, and can advise if another expert is needed.

[14] *Id*., at 265-266.
[15] *Id*.

If the expert is not able to be present during these stages, they will be "hamstrung" by having to either use photos taken by others, which likely will not provide adequate context that would have been available had the expert been present before and/or during the repair process, or, worse yet, force the expert to attempt to make an assessment with no photos at all.

Why is your expert asking for so much information from the defendant? Being able to review the documents prior to being on site will help understand the claim and the client's scope of work. If a filter is applied to the documents provided to the expert, documents that are seemingly innocuous or irrelevant may turn out to be key pieces of information for the expert. Design drawings can provide key pieces of information that are difficult to find because of the way the information is presented. Additionally, the design drawings may NOT provide key pieces of information that are vital to the construction of the structure and/or understanding the case. The missing information may not be apparent without the education, training, experience, and skills of an expert to bring it to light. Lastly, the following should be given to the expert for review if they are available, the contract, permitted construction drawings, project specifications, claimant report, product information, discovery documents, and all RFI/RFC.

During the construction process, a lot of technical information is created by a lot of different parties. An expert can take all the information and piece together which are important to the claim to help you frame and understand the amount of exposure your client has sooner rather than later.

b. Defense Experts

Construction cases typically require an expert witness to testify as to the standard of conduct customary in the profession under the circumstances.[16] However, an exception applies where the negligence is so apparent that even a layperson could recognize it.[17]

An expert may be qualified to testify by his or her experience, training, or education. The experts background need only be significant enough to provide reliable testimony that will assist the trier of fact. For example, an engineer expert is generally qualified to offer standard of care opinions if the engineer is a licensed professional engineer and has some level of experience in the particular engineering specialty. These are the not the requirements per se and, in any particular circumstance, an engineering expert can be qualified with less credentials. Frankly, if an engineer has a professional license, the threshold to be qualified as an expert is very low.

Generally, an expert can offer opinions on a particular topic when:

[16] *Boland-Maloney Lumber Co. v. Burnett*, 302 S.W.3d 680, 686 (Ky. Ct. App. 2009); *Troutwine Estates Dev. Co., LLC v. Comsub Design & Eng'g, Inc*., 854 N.E.2d 890, 902 (Ind. Ct. App. 2006); *Moore v. Covenant Care Ohio, Inc*., 2014-Ohio-4113, 18 N.E.3d 1260, ¶ 45 (6th Dist.).
[17] *Id*.; *Widmeyer v. Faulk*, 612 N.E.2d 1119, 1122 (Ind. Ct. App. 1993); *Moore*, 2014-Ohio-4113, ¶ 45.

(A) The testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; and

(C) The witness' testimony is based on reliable scientific, technical or other specialized information.

In summary, everything in the consulting expert's section also applies in this section, however, two main differences are key. First, whether you need an expert (is the negligence so apparent that an expert is not needed?). And second, whether that expert is needed to testify (will this case go to trial?).

When an expert is providing standard of care opinions in any particular case, the expert will frequently derive the standard of care in any particular circumstance from written standards, codes, commonly accepted specifications and professional journals. The following are common sources of the standard of care: Department of Transportation Specifications and Design Manuals, manuals or articles developed by professional organizations, Building Codes, and the design professional's contract.

In those circumstances where an expert can point to a clearly written and relevant standard that was violated by the engineer, defending violations of the standard of care are much more difficult. In those circumstances where there is no written standard that can be referenced by the expert in establishing the standard of care, the expert can still offer an opinion on the standard of care. The expert will offer his opinions simply based upon his training, education and experience. However, standard of care opinions based merely upon training, education and experience are much easier to defend because frequently it becomes apparent to the jury that the expert's standard of care opinion is merely his personal opinion as opposed to a widely accepted and understood standard of care. In summary, an expert is vital key to success in construction litigation.

c. Client Representative as the Best Fact Witness

The client representative is likely the best fact witness to provide context and help build your defense. For example, a project manager, foreman, design professional, or laborer. He or she will already be acquainted with the facts and issues at hand. And he or she will also likely know the proper standard of care or industry custom based on training, education or experience. In summary, the client representative will help guide you on what kind of expert is needed, if any, and give you an overlay of the claim.

VI. Insurance Coverage – The "Occurrence" Analysis:

a. Ohio: *Westfield Insurance Company v. Custom Agri Sys.*

In *Westfield Insurance Company v. Custom Agri Sys*.,[18] the Supreme Court of Ohio held that "… claims of defective construction or workmanship are not claims for 'property damage' caused by an 'occurrence' under a commercial general liability policy […]."[19] The facts of *Westfield Insurance Company* involved a contract between Younglove Construction, LLC ("Younglove") and PSD Development, LLC ("PSD") for the construction of a feed-manufacturing plant in Sandusky, Ohio.[20] Younglove ultimately sued PSD in federal court under breach of contract and related theories when PSD withheld payment for the project.[21] In its answer, PSD alleged that it had sustained damages as a result of defects in a steel grain bin.[22] The bin had been constructed by a subcontractor, Custom Agri Systems, Inc. ("Custom").

This prompted Younglove to file a third-party complaint against Custom for contribution and indemnity.[23] Custom, in turn, filed similar third-party complaints against the subcontractors it used to construct the bin.[24] Custom also presented the claim to Westfield seeking coverage, both a defense and indemnification.[25]

Westfield intervened in the proceedings to pursue a judgment declaring that it had no duty to defend or indemnify under the terms of its CGL policy with Custom.[26] Specifically, Westfield argued that none of the claims against Custom sought compensation for "property damage" caused by an "occurrence" and therefore, no coverage was owed.[27] In the alternative, Westfield argued that if the claim constituted an "occurrence," exclusions applied that would preclude coverage.[28]

The Court framed the coverage issue as whether Custom's alleged defective construction of and workmanship on the steel grain bin constituted property damage caused by an "occurrence."[29] Westfield's policy defined the word "occurrence" as "[…] an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[30] The term "accident" was not defined.[31] Therefore, "accident" was given is "natural and commonly accepted meaning," which the court previously defined as "[…] unexpected, as well as unintended."[32]

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[18] 133 Ohio St. 3d 476, 2012-Ohio-4712, 979 N.E.2d 269.
[19] *Id*., ¶ 19.
[20] See *id*., ¶ 2.
[21] See *id*.
[22] See *id*.
[23] See *id*.
[24] See *id*.
[25] See *id*., ¶ 3.
[26] See *id*.
[27] See *id*.
[28] See *id*.
[29] See *id*., ¶ 11.
[30] See *id*., ¶ 12.
[31] See *id*.
[32] *Id*., ¶13.

In support, the court relied on the Supreme Court of Kentucky's decision in *Cincinnati Insurance Company v. Motorists Mutual Insurance Company*[33] addressing an identical coverage issue which held that "[…] [i]nherent in the plain meaning of "accident" is the doctrine of fortuity. Indeed, [t]he fortuity principle is central to the notion of what constitutes insurance […]."[34] Acknowledging that insurance coverage is bottomed in the concept of fortuity, the court insightfully noted that when "[a]pplying this rule in the construction context, truly accidental property damage generally is covered because such claims and risks fit within the statistical abstract."[35] Accordingly, the court held that the CGL policy does not provide coverage to Custom for its alleged defective construction of and workmanship on the steel grain bin.[36]

b. Kentucky: *Martin/Elias Props., LLC v. Acuity*

In *Martin/Elias Props., LLC v. Acuity*,[37] the Kentucky Supreme Court held that where a contractor had both intent and full control when conducting his work, and his workmanship results in damage, the resulting damage to the property is not an accident triggering coverage under a CGL policy.[38] In support, the Court emphasized that the legal analysis is bottomed in the doctrine of fortuity, which has two key aspects – intent and control:

> […] in determining whether an event constitutes an *accident* so as to afford the insured CGL policy coverage, courts must analyze this issue according to the doctrine of fortuity: 1) whether the insured intended the event to occur; and 2) whether the event was a 'chance event' beyond the control of the insured. If the insured did not intend the event or result to occur, and the event or result that occurred was a chance event beyond the control of the insured, then CGL coverage covering *accidents* will apply to the benefit of the insured.[39]

The Court held that the occurrence analysis in the context of a faulty workmanship claim should be focused on both intent, *i.e.*, did the contractor intend to do what he did, and control, *i.e.*, did the contractor have complete control over the work.[40] Put another way, if the contractor intended the event or result to occur when performing his work, and that event or result was not a chance event beyond the contractor's control, then the faulty

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[33] 306 S.W.3d 69 (Ky. 2010).
[34] *Id*., ¶ 13, *citing Cincinnati Insurance Company v. Motorists Mutual Insurance Company*, 306 S.W.3d 69 (Ky. 2010).
[35] *Id*., ¶ 14 *citing JTO, Inc. v. State Auto Mut. Ins. Co*., 194 Ohio App.3d 319, 2011-Ohio-1452, 956 N.E.2d 328, ¶¶ 32-33 (11th Dist.).
[36] See *id*., ¶ 14.
[37] 544 S.W.3d 639 (Ky. 2018).
[38] See *id*., at 640, 644.
[39] *Id*., at 643, citing *Cincinnati Insurance Company v. Motorists Mutual Insurance* Company, 306 S.W.3d 69, 76 (Ky. 2010).
[40] See *id*., at 644.

workmanship does not trigger an occurrence.[41]

Notably, the *Martin/Elias Props., LLC* decision distinguishes the Court's earlier decision in *Cincinnati Insurance Company v. Motorists Mutual Insurance Company*,[42] which held that "[…] resulting damage to the home was not of an accidental nature creating a fortuitous event, but rather an unintended consequence of poor workmanship."[43] In other words, the concept of fortuity also includes an element of control, which point is consistently made by the Court in both the *Martin/Elias Props., LLC* and *Cincinnati Insurance Company* cases. Where the Court pivots in its analysis is on the resulting damage analysis. In *Martin/Elias Props., LLC*, the Court noted:

> A factual distinction between *Cincinnati* and the case before us today is that the damage alleged to have been done by the homebuilders in *Cincinnati* was the result of poor workmanship on parts of the home on which they had directly worked or of which they had direct control. As for Gosney, he was contracted to work on the basement and foundation exclusively, while work above the basement was done by others. Although his work was to be done in the basement, Gosney's poor workmanship resulted in damage throughout the entire property, making it structurally unsound.[44]

The *Martin/Elias Props., LLC* decision moves past the rhetorical question raised in Footnote 45 of the *Cincinnati Insurance Company* decision, *i.e*., the court suggested in a footnote that there may be coverage where faulty construction causes bodily injury or property damage to something other than the insured's faulty work.[45] Consistent with this, the Kentucky Supreme Court held that the Court of Appeals correctly applied the principles of *Cincinnati Insurance Company* in finding that damage due to a contractor's faulty workmanship was not an accident and thus does not constitute an occurrence covered under the contractor's CGL insurance policy.[46] In so doing, and while appreciative of the trial court's Solomonic approach to split the loss, *i.e.*, workmanship direct versus residual damages, the Kentucky Supreme Court held that the trial court's decision failed to focus on the proper elements from *Cincinnati Insurance Company*, *i.e.*, intent and control.[47]

c. Indiana: *Sheehan Construction Company, Inc. v. Continental Casualty Company*:

In *Sheehan Construction Company, Inc. v. Continental Casualty Company*,[48] the

[41] See *id*.
[42] 306 S.W.3d 69 (Ky. 2010).
[43] *Id*., at 643.
[44] *Martin/Elias Props., LLC*, at 643-44.
[45] See *id*.; *cf. Cincinnati Insurance Company*, at 73-76, f.n. 45.
[46] See *Martin/Elias Props., LLC*, at 644.
[47] See *id., LLC*, at 641, 644.
[48] 935 N.E.2d 160 (Ind. 2010).

Indiana Supreme Court held that "… improper or faulty workmanship does constitute an accident so long as the resulting damage is an event that occurs without expectation or foresight."[49] *Sheehan Construction Company* clarifies an earlier Indiana case that relied solely on exclusions to determine that no coverage was owed for faulty workmanship claims where the damage is confined to the insured's own product or work.[50] Stated differently, the Indiana Supreme Court acknowledged that prior court precedent did not did not address the insurer's duty to defend "[…] based on the insuring provisions or the definition of 'property damage' or 'occurrence."[51]

In analyzing *Sheehan Construction Company*, the Indiana Supreme Court acknowledged that CGL insurance policies, like the policies that were issued to Sheehan, insure against "bodily injury" or "property damage" caused by an "occurrence."[52] An "occurrence" was defined, in part, to mean an accident in Sheehan's policies.[53] Since CGL policies do not define the term accident, the Court cited case law that defined that term to mean "[…] an unexpected happening without an intention or design."[54] Consistent with this, the Court noted that "[i]mplicit in the meaning of 'accident' is the lack of intentionality."[55]

Ultimately, the Court held that "[…] faulty workmanship may constitute an accident and thus an "occurrence" depending on the facts. More specifically, if the defective work of the subcontractors were done intentionally instead of 'without intention or design', then it is not an accident. Otherwise, the opposite is true."[56]

The Indiana Supreme Court's decision in *Sheehan Construction Company* provides the following guidance when analyzing coverage for faulty workmanship claims. First, the issue of whether faulty workmanship is an accident it is a highly factual determination. Second, there is no accident inherent in a situation where a contractor intentionally completes poor work. Third, faulty workmanship that, without expectation or foresight, causes resulting damage to real or personal property outside of the contractor's scope of work triggers an occurrence.

VII. Walking the Tightrope: The Construction Defect and Coverage Litigation Intertwined

An attorney paid by an Insurer to defend the Insured must emphatically monitor the tripartite relationship. While neighboring states, such as Indiana, follow the majority Two-Client rule (as in both Insurer and Insured are considered clients of the defense attorney), Kentucky follows the "only-the-insured" is the client rule. Regardless, it is crucial

[49] *Id.*, at 169.
[50] See *id.*, at 166-67, citing *Indiana Insurance Company v. DeZutti*, 408 N.E.2d 1275 (Ind. 1980).
[51] *Id.*, at 166.
[52] See *id.*, at 169-70.
[53] See *id.*
[54] *Id.*, at 170 citing *Tri-Etch, Inc., v. Cincinnati Ins. Co.*, 909 N.E.2d 997, 1002 (Ind. 2009) (*quoting Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1283 (Ind. 2006)).
[55] *Id.*
[56] *Id.*

that the attorney's ability to independently judge is not impaired; it is also important that the client's confidences are protected.[57]

From the beginning of the client-lawyer relationship, the attorney should explain to the insured/client the nature and requirements of the insurance contract, which would entail the attorney having to communicate with the Insurer about the defense.[58] After the Insured has been informed, the attorney must gain their consent to the arrangement. Unlike most states, Ohio addresses this ethical dilemma directly in Ohio Rule of Professional Conduct 1.8(f)(4), which states: "if the lawyer is compensated by an insurer to represent an insured, the lawyer delivers a copy of the following Statement of Insured Client's Rights to the client in person at the first meeting or by mail within ten days after lawyer receives notice of retention by the insurer."[59]

In many insurance defense cases, conflicting interests between the Insurer and the Insured may not be presented, which in turn makes it substantially easier for cooperation and consent between both all three parties. However, in cases where conflicting interests are in fact presented, it is crucial that an attorney defending an Insured does not reveal information "related to the representation" that would be detrimental to the Insured if it were to be subsequently disclosed to the Insurer.[60] Accordingly, an attorney in Kentucky must abide by KRPC 1.1 and KPRC 1.3, upholding competency and diligence in representation, in order to protect the Insured's rights and identifying information.[61]

Within this, be aware that a defense attorney cannot sit idly by in the scenario where Insurer and Insured are in dispute over coverage.[62] The attorney must defend Insured unless the representation of the Insured would be "directly adverse," which, in such a circumstance, the defense attorney must withdraw, pursuant to KPRC 1.7.[63]

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[57] Opinion KBA E-410 (1999) (Kentucky Bench & Bar, Fall 1999).
[58] See *Id.*; KPRC 1.6(a)
[59] Prof.Cond.R. 1.8(f)(4)
[60] Opinion KBA E-410 (1999) (Kentucky Bench & Bar, Fall 1999).
[61] See *Id.*
[62] See *Indiana Insurance Company v. Demetre*, 527 S.W.3d 12 (Ky. 2017).
[63] Opinion KBA E-410 (1999) (Kentucky Bench & Bar, Fall 1999).

UNMANNED AIRCRAFT SYSTEMS

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UNMANNED AIRCRAFT SYSTEMS

Innovative technologies are entering the tried-and-true design and construction environment daily and routinely challenge long-held presumptions and traditional practices. Unmanned Aerial Systems (UAS) or drones are just one example. At a recent engineering/technology conference, the blurred lines were apparent everywhere, but so too was the blurred functionality and effectiveness. Though well-intended, many examples were (to at least one man's eyes) thin with real substance and too heavy with fluff. Before any built environment stakeholder decides to implement UAS for construction administration (CA), there are important components to consider. Beyond typical scope confusion, creep and purpose, built environment stakeholders interested in meaningful deployment of UAS must move into the weeds to drive value and assure compliance. Failing to do so invites foreseeable project delivery issues and interjects unfamiliar compliance concerns.

Some examples follow and will help interested stakeholders fully consider and implement a robust, compliant solution. Failure to achieve these criteria in some meaningful and understood matter opens a Pandora's Box to a typical deficiency indicated or identified during the construction phase.

- Insurance: Many Owners (especially Fortune 100 companies and sophisticated REITS) require specific insurance language and coverage before allowing, authorizing, or approving UAS-related services and deliverables. For example, "XX dollars of coverage with XX manufacturer device." The boring insurance stuff must be covered before doing the fun stuff, AND there is likely a unallocated cost that runs with the boring stuff.
- Crew coordination: Notification to "participants" on a construction site is cumbersome, but important. Ensuring the UAS does not distract trades and forces in the field is a critical path concern. This JSA (Job Safety Analysis) must be thought out before someone gets the cool idea to fly a UAS over the construction site. In addition, notification is likely owed to neighbors of the site because unintended imagery may capture conditions neighbors would prefer to avoid. Allow your mind to wander.
- Accuracy: UAS will collect all kinds of pretty pictures and datasets, but if the Owner or other project stakeholder wants to monitor progress **with certainty, an understanding of accuracy must be addressed.** Specific attention needs to run with the X/Y (horizontal measurements) and the more complicated Z (vertical measurements). Permissible accuracy variance and necessary controls (and the related cost) must be factored to assure expectation alignment is achieved.
- Data formats: UAS can generate all kinds of formats (video, image mesh, point clouds, images, vector, surfaces, etc.). There is a lot of confusion and misinformation on what you can and cannot with these datasets. Users should

consider at least the following: What is intended? How much budget? What is the purpose and function? What is the scale or schedule?

- Approach and Processing: Related to the above, just about anyone can fly a UAS and procure data, but the acquisition approach and processing specifics matter. Flight authorization, layout, coverage, over/side lap, which software is used to process and visualize data all matters and keys regulatory compliance. Solving for these criteria lends to a successful, and lawful, collect.
- IT/Cyber Security: Many UAS systems have an associated "platform" for data view/processing. This means UAS data *may* be automatically shared with the Cloud and other Entities during processing. This is a big concern for federal and energy related clients.

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#METOO AND THE NEED TO BECOME #NOTYOUTOO

With increased media coverage and people behaving poorly in the workplace, the need for employers to be vigilant in enforcing sexual harassment policies cannot be overstressed. While employment lawyers could address these issues in a variety of topics, this portion of the paper is intended to focus on sexual harassment. By now, most everyone is familiar with the #MeToo movement. This paper is meant to start a new movement, the #NotYouToo movement, for employers and those training them to become proactive to spot problems before they fester into claims and to scrutinize practices before they become the subject to expert reports on disparate treatment. The Equal Employment Opportunity Commission ("EEOC") has published some "promising practices" that employers can adopt to avoid liability.

Since 2017, the #MeToo movement has swept the country. From high profile cases involving Hollywood movie companies, television networks, Fortune 500 companies to politics, and continuing to spill to small business. The EEOC reported that in 2018 sexual harassment charges increased by over 12%. As a result of the movement, more claims can be expected.

While the #MeToo movement is a recent occurrence, sexual harassment cases are nothing new. The EEOC defines sexual harassment as follows:

- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature;
- Submission to the conduct is either explicitly or implicitly made a term or condition of the employment;
- Submission to or rejection of the conduct is used as a basis for employment decisions affecting the individual; or
- The conduct has the purpose or effect of substantially interfering with the person's work performance or creates a hostile, intimidating, or offensive work environment.

An actionable hostile work environment exists if the following elements are proven:

1. Member of protected class;

2. Unwelcome harassment;

3. Based on sex or gender;

4. The harassment is sufficiently severe or pervasive to affect a term, condition or privilege of employment;

5. A reasonable person would find the environment hostile or abusive; and

6. The victim subjectively regards the environment as hostile or abusive.

Certainly, gender-based discrimination takes many forms, but the prevention of discrimination starts with management, which sets the tone for intolerance, and trickles down to front-line supervisors, who are the boots on the ground to observe employee interactions that can serve as the inception of claims.

I. Developments After #MeToo

Since the #MeToo movement started, federal agencies and federal, state and local legislatures have gone into overdrive in the areas of settlement disclosure, arbitration agreements, deducibility of sexual harassment and discrimination settlements and required anti-harassment policies and training. Employers are cautioned to review these changes carefully and ensure compliance. In 2018, the EEOC announced that it was reconvening its Select Task Force of Study of Harassment in the Workplace on its webpage:

https://content.govdelivery.com/accounts/USEEOC/bulletins/1f51e2f

EEOC

The EEOC is still finalizing a 75-page document of a draft Enforcement Guidance ("Guidance") on unlawful harassment, which was issued in January 2017. When eventually issued in its final form, the Guidance will supersede several previously issued EEOC documents:

- Section 615: Harassment EEOC Compliance Manual, Volume 2;
- Policy Guidance on Employer Liability for Sexual Favoritism (1990);
- Enforcement Guidance on *Harris v Forklift Sys., Inc.* (1994); and
- Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999)

In its draft form, the Guidance provides some guidelines for employers on the definitions of harassment and recommendations for prevention. The Guidance is comprehensive in terms of covered bases of discrimination, the definitions of "severe" and "pervasive," the scope of hostile work environment claims, and promising practices which outline recommendations on how to reduce potential liability.

Protected classifications are outlined in the draft Guidance. Please note that included in this category are gender identity, sexual orientation, and associational discrimination. Inclusion of these categories has drawn some criticism from commentators, who have noted that the EEOC should clarify that the courts have not uniformly upheld that either gender identity or sexual orientation is protected by Title VII.

The Guidance then explains what is required to establish causation and makes it clear that the complainant must be subjected to harassment creating a hostile work environment because of his or her protective class. According to the Guidance, investigators must examine whether the conduct is facially discriminatory or discriminatory based upon the context under which the conduct occurs. The Guidance clarifies that a single serious incident of harassment can result in a hostile work environment. Examples provided include sexual assault, sexual touching of an intimate body part, and threats to deny benefits for rejecting sexual advances. In terms of defining "pervasive," the Guidance notes that there is no magic number of harassing incidents that automatically give rise to liability, but considerations include frequency of the conduct and whether the actions occurred close in time. In what appears to be a departure from the analysis of conduct in many court decisions, the Guidance states that it "disagrees with courts that have analyzed unwelcomeness as an element in the plaintiff's *prima facie* harassment case separate from the subjectively and objectively hostile work environment analysis." The Guidance notes that in the Commission's view "conduct that is subjectively and objectively hostile is also necessarily unwelcome." Obviously, this statement has drawn some scrutiny. The Guidance also provides an in-depth discussion on supervisory liability, non-supervisory liability, as well as detailed instructions on how to establish the *Faragher-Ellerth* defense.

The final part of the Guidance outlines promising practices that employers can adopt to shield them from claims. There are four core principles of the promising practices, which include: leadership and accountability, comprehensive and effective harassment policy, effective and accessible harassment complaint system, and effective harassment training. The EEOC has provided more specific examples under these principles, including training. For example, live training about harassment and discrimination is recommended unless not feasible and there is reference in the Guidance that a business must allocate sufficient resources and staff to address harassment issues in the workplace. The Guidance also recommends that leaders conduct anonymous employee surveys on a regular basis to assess whether harassment is occurring or perceived to be tolerated. The Guidance further emphasizes the need for regularly updated and revised harassment trainings customized to the workplace. In terms of investigations, the Guidance outlines how each complaint should be documented and indicates that each investigation should be capped off with a written report of the findings; disciplinary action imposed, if any; and corrective and preventative action taken, if any. It should be noted that this Guidance was issued well before the #MeToo movement and may be revised in light of this movement.

<u>Federal Legislation</u>

The Tax Cuts and Jobs Act, which was enacted in December 2017, has a new Section 13307 entitled "Denial of Reduction for Settlement, subject to non-disclosure agreements paid in connection with sexual harassment or sexual abuse." This provision amends Section 162 of the

Tax Code, which previously permitted deduction of unnecessary expenses paid or incurred as part of running a business, to prohibit any deductions for payment, including settlements, involving sexual harassment or abuse, that have confidentiality or non-disclosure agreements. Attorney's fees are no longer deductible if they relate to the same topics and agreements.

Proposed state and federal legislation has generally focused on arbitration agreements and settlement disclosures. In late May, the Supreme Court of the United States issued its opinion in *Epic Systems Corp. v. Lewis*, which included two companion cases, in which the court upheld the use of arbitration agreements and class action waivers in employment agreements and held that such agreements do not violate the National Labor Relations Act.

State and Local Legislation

According to the National Conference of State Legislatures, 2018 brought an unprecedented amount of legislation on sexual harassment and sexual harassment policies. 32 states introduced over 125 pieces of legislation, including legislation to expel members, criminalize sexual harassment in legislatures, and mandate harassment training within the legislature, among other topics.

According to Inspired eLearning, as of June 29, 2019, several states have mandated sexual harassment training, including California, Connecticut, Delaware, Washington, D.C. (for tipped employees), Hawaii, Idaho (not required but recommended), Illinois (public employees), Kansas (executive agency employees and interns), Kentucky (state employees), Louisiana (state employees), Maine, Maryland (limited categories), Massachusetts, Mississippi (state employees by executive order), Nevada (state employees), New Jersey (state employees), New York, North Carolina (state employees), Ohio (not required but recommended), Oregon (not required but recommended), Pennsylvania (state employees), Rhode Island (not required but recommended), South Dakota (not required but recommended), Tennessee (state employees), Texas (state employees), Utah (state employees), Vermont (not required but recommended), Virginia (Executive Branch employees), Washington (state employees by executive order), West Virginia (model policy encouraging training for state employees), and Wisconsin (not required but recommended).

With this heightened emphasis on training, is it possible for employers, whether covered by the new laws or not, to fail to provide training on the prevention of sexual harassment? It would seem that the standard of care requires training, and the failure to do so could prevent employers from getting summary judgment in the future.

State legislatures also have been acting to prevent arbitration of sexual harassment complaints. By way of example, Maryland passed the Disclosing Sexual Harassment in the Workplace Act of 2018, which requires certain reporting, but more significantly prohibits mandatory arbitration of sexual harassment or retaliation claims. This legislation is similar to those in other states. In addition to Maryland, New York, New Jersey and other states such as Delaware, California, Massachusetts and Pennsylvania also have #MeToo legislation pending.

A recent decision out of the Southern District of New York, *Latif v. Morgan Stanley & Co., 18cv11528* (June 26, 2019), held that a recently enacted New York law prohibiting mandatory arbitration clauses, hailed as "sweeping legislation that deals with the scourge of sexual harassment," was preempted by the Federal Arbitration Act, relying on *Epic Systems,* among other Supreme Court precedent. The question then becomes whether other state and federal courts will follow this same precedent to address the legion of new state laws addressing this same topic.

LGBTQ: WHAT DOES IT MEAN AND HOW DOES IT AFFECT EMPLOYERS?

Many of us have seen the acronym, but how many of us are truly familiar with the terminologies that describe each group.

Definitions

When analyzing the LGBTQ community, it is important to have an understanding of the terminology.

Sex	Biological differences between male and female
Gender	Attitudes, feelings and behaviors that a given culture associates with a person's biological sex
LGBTQ	Stands for lesbian, gay, bisexual, transgender and queer or questioning
Orientation	Refers to the gender of those to whom one is sexually and romantically attracted
Gender Identity	Someone's internal sense of feeling male or female.
Expression	External manifestations of gender through name, pronouns, clothing, haircut, behavior, voice and/or body characteristics.
Transgender	An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth
Cisgender	A person whose gender identity aligns with the sex assigned at birth

"Because of" sex

The Supreme Court has recognized that Title VII protects against stereotypes regarding gender. As early as 1989, the court recognized that there were stereotypes that were actionable. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the court reviewed the issue raised by Ann Hopkins, a female candidate for partnership in the large accounting firm, Price Waterhouse, who contended that she was qualified for partnership. While she had overall positive evaluations, she had traits that were described as "aggressive" or "abrasive," and suffered from negative perceptions based upon her use of profanity as a female. She was told that to improve her chances for partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The Court held that this type of stereotyping was prohibited by Title VII because it was based on gender.

The Supreme Court has also recognized that same sex sexual harassment violates Title VII. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 76 (1998), the court held that same-sex harassment violates Title VII, stating that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* 523 U.S. at 79.

The Supreme Court has also held that gender discrimination can occur when stereotypes mandate the outcome. For example, the court held that Title VII protected women from a policy of not hiring women with preschool-aged children while simultaneously hiring men with such children in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). The same result occurred in the context of refusal to hire women of child-bearing age in *Int'l Union, United Auto, Aerospace and Agr. Workers of America, UAW v. Johnson Controls, Inc*., 499 U.S. 187 (1991) as well as child care responsibilities in *Chadwick v. WellPoint, Inc*., 561 F.3d 38, 44–45 (1st Cir. 2009).

More recently, sexual orientation cases have been litigated. In *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017), the Seventh Circuit held that Title VII prohibits sexual orientation discrimination because "actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex." The circuits have split on this issue, which will ultimately require resolution by the Supreme Court.

TITLE IX AND THE DELIBERATE INDIFFERENCE STANDARD

Title IX governs the obligations of educational institutions with respect to sex and gender discrimination, which includes sexual harassment and sexual assault. The statute and the Department of Education's implementing regulations prohibit discrimination on the basis of sex in a school's "education program or activity," which includes "all" of the school's operations. 20 U.S.C. §§ 1681(a), 1687. Title IX applies to every public and private school that receives federal funds, including elementary and secondary schools, as well as colleges and universities. Id. § 1681(c). A school specifically agrees, as a condition for receiving federal funds, to operate all of its programs and activities in compliance with Title IX and the Department of Education's Title IX regulations. 34 C.F.R. § 106.4(a)-(c).

Since regulations were first promulgated under Title IX in 1975, there has been a requirement that a school "adopt and publish grievance procedures providing for the prompt and equitable resolution of student . . . complaints alleging any action which would be prohibited by" Title IX or its regulations. 34 C.F.R. § 106.8(b).

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…." In order to establish a Title IX claim, a Plaintiff must prove: "(1) [P]laintiff was a student at an educational institution receiving federal funds; (2) [Plaintiff] was subjected to harassment based on [his or her] sex; (3) the harassment was sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity; and (4) there is a basis for imputing liability to the institution." *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007).

The first element a Plaintiff must show is whether the institution where the alleged Title IX violation happened receive federal funding. If the answer is yes, then Title IX applies. However, this point of law comes with a caveat. Title IX "does not apply to an educational institution which is controlled by a religious organization to the extent application of [Title IX] would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12.

The second element requires a Plaintiff to be subjected to harassment based on sex. Sexual harassment includes everything from repeated sexual innuendos, name calling, and off-color jokes to unwanted physical contact, obscene gestures, and rape. For example, in *Jennings,* the court found that sexual harassment occurs when the victim is "subjected to sex-specific language that is aimed to humiliate, ridicule, or intimidate." 482 F.3d at 695. In that case, an athletic coach's sexually charged comments in a team setting, even though they were said in a joking or teasing nature, were enough to represent sexual harassment. Unfortunately, if this element is in dispute, a Title IX trial will likely mean that the sexual assault or harassment will have to be re-litigated in front of a jury.

The next question that must be answered when analyzing a Title IX case if there was harassment based on sex, is whether that harassment was so sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity. The Supreme Court has stated that this "depends on a constellation of surrounding circumstances, expectations, and relationships." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998). In these situations, all the circumstances are examined, including the positions and ages of the harasser and victim, whether the harassment was frequent, severe, humiliating, or physically threatening, and whether it effectively deprived the victim of educational opportunities or benefits. *Jennings*, 482 F.3d at 695. In other words, this element focuses heavily on the individual facts of the case. In the end, harassment reaches the sufficiently severe or pervasive level when it creates "an environment that

a reasonable person would find hostile or abusive" and that the victim "subjectively perceive[s] ... to be abusive." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

Lastly, a Plaintiff must show that there is a basis for imputing liability to the institution. "Under Title IX, an imputation of liability to an educational institution has two pertinent aspects: (1) whether the institution had actual knowledge of the student-on-student sexual harassment; and (2) whether the institution was deliberately indifferent to that harassment." *Doe v. Bd. of Educ.*, 605 F. App'x 159, 167 (4th Cir. 2015). While determining whether an institution had knowledge of the alleged sexual harassment should be easy, showing that an institution was deliberately indifferent in its response is much harder.

The leading Supreme Court cases impacting school liability under Title IX are *Gebser v. Lago Vista*, 524 U.S. 274 (1998) and *Davis v. Monroe County*, 526 U.S. 629 (1999). Liability via a private right of action under Title IX exists when "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the [accused party's] misconduct." *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, p. 285 (1998). The *Gebser* decision continues: "Thus, a damages remedy will not lie unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination and fails adequately to respond." *Id*. at p. 276.

Furthermore, courts have held that "deliberate indifference is a high bar," and "neither negligence nor mere unreasonableness is enough." *Qayumi v. Duke Univ.*, 2018 U.S. Dist. LEXIS 64876 (M.D.N.C. April 18, 2018); *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 167 (5th Cir. 2011). "Deliberate indifference" has been defined as a response by a school that is "clearly unreasonable in light of the known circumstances." *Porto v. Town of Tewksbury*, 488 F.3d 67, 72 (1st Cir. 2007) (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999)).

In *Davis*, the Supreme Court specifically stated:

> We stress that our conclusion here—that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment—does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action. We thus disagree with respondents' contention that, if Title IX provides a cause of action for student-on-student harassment, "nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages." [Citations omitted]. Likewise, the dissent erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands. [Citations omitted]. *In fact, as we have previously noted, courts should refrain from second-guessing the disciplinary decisions made by school administrators.* [Citations omitted]. School

> administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.

Davis v. Monroe County Board of Education, 526 U.S. 629, 648 (1999)(emphasis added).

Moreover, the courts have specifically held that "deliberate indifference" requires a pattern of evidence demonstrating that the school knew or should have known the approach would cause harm and that they were therefore choosing to cause that harm by continuing the approach. *Doe v. Russell County School Board*, 292 F.Supp.3d 690 (2018). This essentially means that the institution has to know their solution to the harassment did not solve the problem, but it chooses to pursue that course of action anyway. With that being said, schools are not responsible for responding to sexual harassment committed by individuals that the college or university has no control over. In a recent case in New Jersey, a Plaintiff asserted a Title IX claim against a university because the university failed to investigate an alleged sexual assault that occurred in an off-campus fraternity house by an unknown assailant. *S.U. v. Stockton Univ*, 2019 WL 3417324, at 5 (D.N.J. July 29, 2019). However, the court reasoned that because the fraternity was operating off campus without university recognition and that the Plaintiff did not allege the assailant was a university student, the university lacked control over the alleged perpetrator and could not be held liable for its inactions. *Id*.

Additionally, the Fourth Circuit has emphasized that the high standard of "deliberate indifference" "precludes a finding of deliberate indifference in all but limited circumstances." *Doe v. Board of Education*, 982 F.Supp.2d 641 (2013). The Fourth Circuit has affirmed that liability does not attach when the defendant "responds to reports of student-on-student sexual harassment, but simply does not do enough to stop the problem." *Facchetti v. Bridgewater College*, 175 F.Supp.3d 627 (2016), citing *Doe v. Bd. Of Educ*., 982 F.Supp.2d 641 (2013). Furthermore, "if a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subjects' its students to harassment. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." *Davis*, 526 U.S. at 644-45. Moreover, the "failure to follow sexual harassment grievance procedures does not prove deliberate indifference under Title IX" in the Fourth Circuit. *Doe v. Board of Education*, 982 F.Supp.2d 641 (2013). Thus, institutions do not necessarily have to follow their own Title IX procedures as long as the action it does take is not clearly unreasonable under the known circumstances.

As a result of the case law above, colleges or other institutions that receive federal funding need to ensure that they respond in a quick and effective manner to protect students from sexual harassment on campus. Colleges should actively monitor their campus for sexual harassment and complaints of the same and tackle those situations head on. The deliberate indifference standard is a lenient one, but it is meant to ensure that institutions do not sit idly by while sexual harassment

and discrimination occurs in their backyard. Accordingly, these institutions need to respond immediately and in a way that take the allegations of sexual harassment seriously. Failing to act at all, or acting in a way that is not calculated to bring the alleged harassment to an end, can be a fatal mistake if a lawsuit is filed.

Recently, Perry's firm, Oxley Rich Sammons, successfully defended Marshall University in a Title IX case. The case was named *Alicia Gonzales v. Marshall University*, and it primarily focused on whether Marshall was deliberately indifferent in its response to an allegation of sexual assault on its campus. WL 3432533 (S.D.W. Va. July 30, 2019). In that case, Alicia Gonzales alleged that Joseph Chase Hardin raped her in her dorm room on February 1, 2016. As a result of her allegations, Marshall University initially expelled Mr. Hardin. Mr. Hardin appealed, and during this appeal process, he was permitted to remain on campus. Subsequently, a review panel found Mr. Hardin not to be at fault and issued no sanctions. Then, the Dean of Student Affairs issued a recommendation, which the University President adopted, that Mr. Hardin be removed from campus until the conclusion of his criminal trial, but be permitted to take online courses. Ultimately, this ruling was upheld by Marshall's Title IX Coordinator, until the conclusion of Mr. Hardin's criminal trial in January 2017. Ms. Gonzales had an issue with Marshall University allowing Mr. Hardin to remain on campus during the appeal process, and subsequently allowing Mr. Hardin to return to campus after this criminal matter was closed. Ms. Gonzales also asserted that she was discriminated against because Marshall University had botched their Title IX hearing procedures by not following them. As a result, she claimed she was forced to leave Marshall University because of their failure to protect her rights under Title IX.

However, Judge Robert Chambers of the United States District Court for the Southern District of West Virginia disagreed, and the case was dismissed after our firm filed and argued a Motion for Summary Judgement. *Id*. In his Memorandum Opinion, the Judge explained that despite the fact that Hardin was eventually allowed to return to campus, Marshall University's response to the allegation was not deliberately indifferent because Marshall took multiple steps to remove Hardin from campus and keep him away from Ms. Gonzalez. *Id*. The Judge held that Marshall's attempts to keep Hardin off campus and away from Ms. Gonzales were "reasonably calculated to end the harassment," and, as a result, Marshall University had not acted with deliberate indifference. *Id*. Additionally, the Judge stated that even though there may have been flaws in Marshall University's Title IX hearing process, these mistakes, if any, were only evidence of negligence and not enough to demonstrate deliberate indifference. *Id*. In fact, the Judge took the stance that even if the mistakes in Marshall University's Title IX hearing represented deliberate indifference, Marshall University had remedied those mistakes by subsequently banning Hardin from campus after the hearing panel found him not responsible. *Id*.

As you can see, the deliberate indifference standard can be difficult for plaintiffs to overcome. As long as the institution responds to complaints of sexual harassment in a way that is reasonably calculated to end the harassment, you can likely successfully litigate a Title IX lawsuit. As shown by the *Gonzales* case, even if the result is not exactly what the Plaintiff wanted or expected, Title IX actions that question an institution's response can still be defeated.

DON'T BE THE ONE TO PAY THE PRICE:

Avoiding Bad Faith

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DON'T BE THE ONE TO PAY THE PRICE:
Avoiding Bad Faith[1]

"We hate to lose, but when we do, rest assured we'll be back, and someone will pay the price." - Woody Hayes, Ohio State University, Football Coach 1951-1978

I. INTRODUCTION

Ohio State University's former football coach Woody Hayes was famous for his quotes; including: "we hate to lose, but when we do, rest assured we'll be back, and someone will pay the price." In the world of handling claims, insurers do not want to be the ones to "pay the price" when there is a loss.

Like all football teams having a playbook, almost all states have statutory or regulatory provisions governing fair claims handling. These laws are mostly a product of the model legislation drafted by the National Association of Insurance Commissioners ("NAIC"). "The purpose of this [Model Act] is to set forth standards for the investigation and disposition of claims arising under policies or certificates of insurances." UNFAIR CLAIMS SETTLEMENT PRACTICES ACT § 1 (1997). The Model Act was not drafted to be construed to create a private cause of action; instead, the Model Act includes proposed language providing for state insurance commissioners to investigate conduct of insurance carriers and issue sanctions if warranted. While most states have adopted the Model Act, there is a split between the states as to whether a particular state's laws permit a private cause of action as opposed to simply implementing administrative penalties. Insurer liability also exits under common law; to which, insured can pursue claims for breach of the insurance contract, breach of good faith duty, breach of fiduciary duty, or negligence arising out of improper claims handling.

This paper will focus primarily on statutory and extra-contractual liability; specifically, addressing extra-contractual liability for failing to defend an insured when there is no bad faith. It will also address when independent counsel is required and provide some best practices.

II. PAYING THE PRICE – FAILING TO ADHERE TO STATUTORY OR REGULATORY PROVISIONS GOVERNING FAIR CLAIMS HANDLING

The Model Act provides the following unfair claims practices when such is committed

[1] A majority of this paper incorporates written materials previously prepared for an Eagle Seminar held in Philadelphia, PA and drafted by Shea Backus, Esq. of the law firm Backus, Carranza & Burden and Lindsay J. Woodrow Esq. of the law firm Waldeck Law Firm, P.A. Ms. Woodrow has granted permission for Ms. Backus to update this paper.

"flagrantly and in conscious disregard of [the Act] or any rules promulgated hereunder" or "with such frequency to indicate a general business practice to engage in that type of conduct":

A. Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverage at issue;
B. Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;
C. Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies;
D. Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear;
E. Compelling insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them;
F. Refusing to pay claims without conducting a reasonable investigation;
G. Failing to affirm or deny coverage of claims within a reasonable time after having completed its investigation related to such claim or claims;
H. Attempting to settle or settling claims for less than the amount that is reasonable person would believe the insured or beneficiary was entitled by reference to written or printed advertising material accompanying or made part of an application;
I. Attempting to settle or settling claims on the basis of an application that was materially altered without notice to, or knowledge or consent of, the insured;
J. Making claims payments to an insured or beneficiary without indicating the coverage under which each payment is being made;
K. Unreasonably delaying the investigation or payment of claims by requiring both a formal proof of loss form and subsequent verification that would result in duplication of information and verification appearing in the formal proof of loss form;
L. Failing in the case of claims denials or offers of compromise settlement to promptly provide a reasonable and accurate explanation of the basis for such actions;
M. Failing to provide forms necessary to present claims within fifteen (15) calendar days of a request with reasonable explanations regarding their use;
N. Failing to adopt and implement reasonable standards to assure that the repairs of a repairer owned by or required to be used by the insurer are performed in a workmanlike manner.

UNFAIR CLAIMS SETTLEMENT PRACTICES ACT at §§ 3-4. While the Model Act explicitly provides that it is not intended to create a private cause of action, it provides administrative procedures for the insurance commissioner to determine whether the insurance carrier has engaged in unfair claims practices and sets penalties varying from $1,000 for each violation to revocation of the insurer's license. *Id*. at § 5-7.

Although most states have adopted the Unfair Claims Settlement Practices Act, many states have varying statutory and regulatory laws to govern fair claims practices. *See* EAGLE INT'L ASSOC., INC., FAIR CLAIMS HANDLING STATUTES A 50 STATE SURVEY (Sept. 2015). The

following states and territories have adopted the most recent version of the NAIC Model Act in a substantially similar manner: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Northern Marianas, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. While District of Columbia, Iowa, Nevada and Oklahoma have not adopted the Model Code, these states and territories have enacted statutory and regulatory provisions to govern unfair practices. *See* D.C. ST. § 31-2231.17; IOWA CODE § 507B.4(9) (Am. 2018); N.R.S. 686A.310 (Am. 1991); NAC 686A.600-690; 36 O.S. §§ 1250.1 et. seq.; OKLA. ADMIN. CODE 365:15-3-5, -7. While Alabama has not adopted any statutory law, it has regulatory law providing for fair claims practices. *See* ALA. ADMIN. CODE. r. 482-1-124-482-1-125 (2003/2014); 482-12-24 (1971). The only state that does not have any statutory or regulatory provisions governing fair claims handling is Mississippi. Mississippi has, however, codified certain guidelines for insurers. *See* MISS. CODE ANN. § 83-9-5.

A. AVOID THE LOSS: KNOW HOW TO HANDLE FIRST PARTY CLAIMS

A first party insurance claim is one where the policyholder makes a claim to its insurance company for damages that are covered by the insurance company's policy. An example of such first party claim would be where a homeowner suffers from a fire at his residence and submits a claim for the fire damage to its carrier under his homeowner's insurance policy. In responding to such first party claim, the carrier should be cognizant of the governing state's laws and regulations in handling the claim and investigation and any pertinent timeframes that must be complied with.

The clock starts ticking when the carrier gets notice of the claim. It is key for the adjuster handling the claim to be aware of any deadlines set by the governing state laws. The following provides a chart summarizing each state's timeframes for initial response to the claim and issuance of any disclaimer of coverage or reservation of rights:

State (Statute/ Regulation)	Contacting Insured Upon Initial Receipt of Claim	Issuing Disclaimer of Coverage from Proof of Loss	Issuing Reservation of Rights from Proof of Loss
Alabama (ALA. ADMIN. CODE r. 482-1-125)	15 days, unless payment is made prior	30 days or number of days set forth in policy	30 days or number of days set forth in policy
Alaska (ALASKA STAT. § 21.36.125; ALASKA ADMIN. CODE tit. 3 § 26.040, § 26.070)	10 days	15 days	15 days
Arizona (ARIZ. REV. STAT. § 20-461, ARIZ. ADMIN. CODE R20-6-801)	10 working days	15 working days	15 days
Arkansas (ARK. CODE ANN. § 23-66-201; 054-00-043 Ark. Reg. § 1)	15 days	15 days	15 days
California (CAL. INS. CODE § 790.03(h); CAL. CODE REGS. tit. 10, § 2695)	15 days	40 days; 80 days if fraud suspected; N/A for certain policies	40 days
Colorado (C.R.S. §§ 10-3-1101 to 10-3-1116)	Reasonably promptly	60 days	60 days
Connecticut (CONN. GEN. STAT. ANN. §§ 38a-815 to 38a-832)	Reasonable time	Reasonable time	Reasonable time
Delaware (DEL. CODE ANN. Tit. 18, § 2304, 18-900-902 DEL. CODE REGS. 1.2.1.2-1.2.1.5)	15 days; Must investigate claim within 10 days of notice of loss	30 days	30 days
District of Columbia (D.C. ST § 31-2231.17)	Reasonably Promptly	Reasonable Time	
Florida (F.S. 624.155, 627.426 & 626.9541; FLA. ADMIN. CODE ANN. r. 690-166.024)	14 calendar days; Must investigate claim within 10 working days of proof of loss	60 days of giving reservation of rights or of receipt of summons & complaint	30 days from knowing or should have known of coverage defense
Georgia (GA. CODE ANN. 33-6-34, GA. COMP. R. & REGS. r. 120-2-52-.03)	15 days	15 days; 30 days after receiving notice if proof of loss form not required	Timely notice
Hawaii (HAW. REV. STAT. § 431:13-103(11))	15 days	Reasonable time after investigation completed	Reasonable time after investigation completed
Idaho (IDAHO CODE § 41-1329)	Promptly	None	None

State (Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Illinois (215 ILL. COMP. STAT. ANN. 5/154.6; ILL. ADMIN. CODE tit. 50, § 919.50)	Reasonable promptness	Reasonable time to determine coverage and notify insured within 30 days of determination	Reasonable time to determine coverage and notify insured within 30 days of determination
Indiana (IND. CODE § 27-4-1-4.5)	Reasonable promptness	Promptly	Promptly
Iowa (IOWA CODE § 507B.4; IOWA ADMIN. CODE 191 – Ch. 15)	15 days	30 days	30 days
Kansas (KAN. STAT. ANN. § 40-2404)	Reasonably promptly	Promptly	Promptly
Kentucky (K.R.S. 304-12-230; 806 KY. ADMIN. REGS. 12:095)	15 working days	Reasonable time	Reasonable time
Louisiana (LA. REV. STAT. ANN. § 22:1892)	Initiate loss adjustment within 14 days after notification; 30 days for catastrophic losses	30 days (*lawsuit can be considered a proof of loss*)	30 days
Maine (ME. REV. STAT. 24-A, §2164-D)	Reasonably promptly	Reasonable time after investigation completed	Reasonable time after investigation completed
Maryland (MD. CODE ANN. §27-303, § 27-1001; MD. CODE REGS. 31.15.07.03, .04)	15 working days	15 working days or policy	15 working days or policy
Massachusetts (MASS. GEN. LAWS ch. 176D)	Reasonably promptly	Reasonable time; Promptly	Reasonably promptly
Michigan (Michigan's Uniform Trade Practices Act, MCL 500.2001, et. seq.)	30 days to provide materials that constitute a satisfactory proof of loss	None.	Reasonable time. ***Caution*** of waiving disclaimer of coverage when defending without ROR within reasonable time.
Minnesota (MINN. STAT. § 72A.201)	10 business days	60 days; 30 days after investigation is completed	60 days; 30 days after investigation is completed
Mississippi (None)			

State (Statute/ Regulation)	Contacting Insured Upon Initial Receipt of Claim	Issuing Disclaimer of Coverage from Proof of Loss	Issuing Reservation of Rights from Proof of Loss
Missouri (MO. ANN. STAT. § 375.1000; MO. CODE REGS. ANN. tit. 20, §100-1.030, 1.050)	10 working days	15 working days following all necessary forms	15 working days following all necessary forms
Montana (MONT. CODE ANN. § 33-18-101, et. seq.)	Reasonably promptly	30 days unless request add'l info, then 60 days to pay or deny	None
Nebraska (NEB. REV. STAT. ANN. § 44-1540; NEB. ADMIN. CODE tit. 210, ch. 60 §6-006 to -008)	15 days	15 days	15 days
Nevada (N.R.S. 686A.310; NAC 686A.600-690)	20 working days	30 working days	30 working days
New Hampshire (N.H. REV. STAT. ANN. 417:4 XV; N.H. ADMIN. RULES, Ins. §1001.01)	10 working days	10 working days; 30 days for health insurance claims	10 working days
New Jersey (NJSA 17:29B-4; NJSA 17B:30-13.1; NJ ADMIN CODE 11:2-17)	10 working days	Reasonable period of time	Reasonable period of time
New Mexico (N.M. STAT. ANN. §59A-16-20)	Reasonably promptly	Reasonable time	Reasonable time
New York (N.Y. INS. § 3420; N.Y. COMP. CODES R. & REGS. tit. 11,§ 216)	15 business days	15 business days	15 business days
North Carolina (N.C. GEN. STAT. ANN. § 58-63 et. seq.)	Reasonably promptly	Reasonable time	Reasonable time
North Dakota (ND CENT. CODE. § 26.1-04-03)	Reasonable promptness	Reasonable time	Reasonable time
Ohio (OHIO ADMIN. CODE § 3901-1-54, OHIO REV. CODE §§ 3901.19-3901.26)	15 days, but no time limit if suit is filed	21 days	21 days
Oklahoma (36 O.S. §§ 1250.1 et. seq.; OKLA. ADMIN. CODE 365:15-3-5, -7)	30 business days	45 days; 60 days for investigation for property & casualty to be completed	45 days
Oregon (OR. REV. STAT. § 746.230; OR. ADMIN. R. § 836-080-0225 to 235)	30 days	30 days	30 days
Pennsylvania (40 PA. STAT. ANN. § 1171.5; 31 PA. CODE §§ 146.1-146.9)	10 working days	15 working days	15 working days

State (Statute/ Regulation)	Contacting Insured Upon Initial Receipt of Claim	Issuing Disclaimer of Coverage from Proof of Loss	Issuing Reservation of Rights from Proof of Loss
Rhode Island (R.I. GEN. LAWS §§ 27-9.1-1 et. seq.; 230-RICR-20-40-1.4 (life, accident & health); 230-RICR-20-40-2.6 to 2.7 (property & casualty)	15 days (property/ casualty); 15 days (accident, health & life)	21 days (property / casualty); Reasonable Time (accident, health & life)	21 days (property / casualty) Reasonable Time (accident, health & life)
South Carolina (S.C. CODE ANN. § 38-59-20)	Reasonable promptness	Prompt investigation	Prompt investigation
South Dakota (S.D.C.L. § 58-33 et. seq.)	At least 30 days	30 days	Not specific, but 30 days could be interpreted from statute
Tennessee (TENN. CODE ANN § 56-8-105)	Reasonably promptly	Reasonable time	Reasonable time
Texas (TEX. INS. CODE Chs. 541, 542)	15 days; 30 days if insurer is an eligible surplus-lines insurer	15 days	Reasonable time
Utah (UTAH ADMIN. CODE R590-190-9 & 10; UCA 31A-26-303)	Promptly acknowledge – within 15 calendar days	Promptly – 30 calendar days	Promptly – 30 calendar days
Vermont (8 V.S.A. § 4724; 21-020-008 VT. CODE R. §§ 5-6)	10 working days	15 working days	15 working days[2]
Virginia (VA. CODE ANN. § 38.2-510; 14 VA. ADMIN. CODE § 5-400-50, -60, -70)	10 working days	15 working days	15 working days
Washington (WASH. REV. CODE § 48.30.010 et. seq.; WASH. ADMIN. CODE § 284-30-360, -380)	10 working days; 15 days (group insurance)	15 working days from proof of loss	15 days
West Virginia (W. VA. CODE § 33-11-1, et. seq.; W. VA. CODE R. § 114-14-5, -6)	15 working days	10 working days after completion of investigation; investigation to be commenced within 15 days of claim; reasonable time to complete investigation	10 working days after completion of investigation; investigation to be commenced within 15 days of claim; reasonable time to complete investigation

[2] Insurer must obtain its insured's consent when reserving its rights. *American Fiduciary Co. v. Kerr*, 416 A.2d 163 (Vt. 1980) (providing that insurer controlling the defense of the case with knowledge of the facts and without consent of the insured constitutes an election to stand by the terms of the policy).

State (Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Wisconsin (WIS. ADMIN. CODE INS. § 6.11)	10 consecutive days	Reasonable time	Reasonable time
Wyoming (WYO. STAT. 26-13-124, 26-25-124)	Reasonably promptly	Reasonable time; 45 days (UIM, property, casualty, life, accident or health)	Reasonable time

While the above chart is intended to provide a quick resource,[3] it is strongly recommended that the policy and the governing state's statutes and regulations are reviewed for more information pertaining to these timeframes, as well as other pertinent timelines (e.g. providing response to written request, providing forms, tendering payment), and case law for any other mandates.

Various states provide differing timeframes to communicate with the insured when additional time is needed to investigate the claim. These timeframes vary from 15 days to 45 days, with specific timeframes for additional communications to be sent setting forth that there is an ongoing investigation and justification for the additional time needed to evaluate the claim. *See* EAGLE INT'L ASSOC., INC., FAIR CLAIMS HANDLING STATUTES A 50 STATE SURVEY (Sept. 2015).

Numerous states have statutory provisions setting forth timelines that are "reasonable" or "prompt" for the insurer to communicate to the insured. Some states provide regulations to define a period of time that is "reasonable" or "prompt." The Model Act provides the following unfair claims practice: "Failing to acknowledge with ***reasonable promptness*** pertinent communications with respect to claims arising under its policies" when done so "flagrantly and in conscious disregard of [the Act] or any rules promulgated [thereunder]" or "with such frequency to indicate a general business practice to engage in that type of conduct." (emphasis supplied). Since "reasonable promptness" was not defined in the Model Act, New Jersey promulgated regulations setting forth a specific timeframe for the insurer to respond. S*ee* N.J.S.A. 17B:30-13.1(b) (2013). Specifically, "[e]very insurer, upon receiving notification of claim shall, ***within 10 working days***, acknowledge receipt of such notice unless payment is made within such period of time." N.J.A.C. 11:2-17.6(b) (emphasis supplied). Several states have similar regulations that provide specific timeframes to comport with the terminology of the

[3] The cited statutes and regulations have been reviewed as of August 5, 2019.

adopted Model Act's defined unfair claims practices: "reasonable time" or "reasonable promptness." *See e.g.* ALASKA STAT. § 21.36.125; ALASKA ADMIN. CODE tit. 3 § 26.040, § 26.070; ARIZ. REV. STAT. § 20-461; ARIZ. ADMIN. CODE R20-6-801; GA. CODE ANN. 33-6-34; GA. COMP. R. & REGS. r. 120-2-52-.03(2)-(3); UCA 31A-26-303; UAC r. 590-190-9 and -10.

Michigan's adoption of the Model Act does not provide for any regulatory framework for specified time periods for the insurance carriers to provide denial of coverage or to provide the insured with a letter setting forth its reservation of rights. The Michigan Supreme Court has held that an insurer who has knowledge of facts which may preclude coverage must give notice of potential defenses within a "reasonable time;" otherwise, the insurer may be estopped from later denying coverage. *Kirschner v. Process Design Assoc., Inc*., 592 N.W.2d 707 (Mich. 1999). In determining what constitutes "reasonable time", the Michigan courts have held that waiting two years to issue a reservation of rights letter is unreasonable, while a reservation of rights letter issued four months after the carrier has provided a defense to the insured is reasonable. *See Meirthew v. Last,* 135 N.W.2d 353 (Mich. 1965); *Fire Insurance Exchange v. Fox*., 423 N.W.2d 325 (Mich. App. 1988).

Flagrant or repetitive failure of the insurer to meet the statutory or regulatory deadlines or to properly handle claims could constitute in (1) administrative penalties and (2) private cause of action.

1. PENALTIES FLAGRANT FIRST PARTY CLAIM HANDLING

Most states adopting the Model Act have adopted substantially similar procedures for the state administrative agency overseeing insurance carriers in enforcing the Act through administrative penalties. *See* UNFAIR CLAIMS SETTLEMENT PRACTICES ACT §§ 5-7. Like the Model Act, the adopted statutory or regulatory law provides for notice of a hearing, a hearing, and a ruling. *See e.g.* CAL. INS. CODE § 790.04-.06; OHIO REV. CODE § 3901.22(A)-(D) (also providing for any person to intervene in the proceeding); S.D.C.L. §§ 58-12-35, -36 (2014). In addition to the issuance of an order for the carrier to cease and desist from engaging in conduct that violates the unfair claims act, states have set forth varying penalties beyond those specified in the Model Act (e.g. revocation of license or imposition of fines). *See e.g.* CAL. INS. CODE § 790.035(a), §790.08; S.D.C.L. §§ 58-12-36. Ohio, for example, has adopted the following penalties for violation of its Unfair and Deceptive Acts or Practices in Business of Insurance:

> (1) The superintendent may suspend or revoke the person's license to engage in the business of insurance;
> (2) The superintendent may order that an insurance company or insurance agency not employ the person or permit the person to serve as a director, consultant, or in any other capacity for such time as the superintendent determines would serve the public interest. No application for termination of such an order for an indefinite time shall be filed within two years of its effective date.
> (3) The superintendent may order the person to return any payments received by the person as a result of the violation;
> (4) If the superintendent issues an order pursuant to division (D)(3) of this section, the superintendent shall order the person to pay statutory interest on such payments.
> If the superintendent does not issue orders pursuant to divisions (D)(3) and (4) of this section, the superintendent shall expressly state in the cease-and-desist order the reasons for not issuing such orders.
> (5) The superintendent may order the person to pay to the state treasury for credit to the department's operating fund an amount, not in excess of one hundred thousand dollars, equal to one-half of the expenses reasonably incurred by the superintendent to retain attorneys, actuaries, accountants, and other experts not otherwise a part of the superintendent's staff to assist directly in the conduct of any investigations and hearings conducted with respect to violations committed by the person.

OHIO REV. CODE § 3901.22(D) (2002). What is interesting about the Ohio penalties is that if the superintendent does not order the return of any payments received or statutory interest, then the superintendent has to express in its order the reason for not ordering such. *Id*. at (D)(3)-(4).

2. IS THERE A PRIVATE CAUSE OF ACTION FOR FIRST PARTY CLAIMS HANDLING?

While the Model Act explicitly provides that it is not intended to create a private cause of action, some states have either statutorily provided for a private cause of action or the state courts have interpreted the act to provide for a private cause of action. Nevada's unfair practices in settling claims act explicitly provides for a private cause of action by providing:

> In addition to any rights or remedies available to the Commissioner, an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice.

NRS 686A.310(2) (1991). *See also*, *Pioneer Chlor Alkali Co., Inc. v. Nat'l Union Fire Ins. Co.*

of Pittsburgh, Penn., 863 F. Supp. 1237 (D. Nev. 1994) (recognizing two different causes of action for actions arising under NRS 686A.310 and for bad faith). The Arizona Supreme Court has concluded that ARS § 20-443(C), which provides that "no order of the director pursuant to this section or order of court to enforce it, or holding of a hearing, may in any manner relieve or absolve any person affected by the order or hearing from any other liability, penalty or forfeiture under law," "contemplates a private suit to impose civil liability irrespective of governmental action against the insurer." *Sparks v. Republic Nat. Life Ins. Co*., 647 P.2d 1127, 1139 (Ariz. 1982). *See also, Farmer's Union Cent. Exch. v. Reliance Ins. Co*., 626 F. Supp. 583, 590 (D.N.D. 1985) (providing that N.D. Cent. Code § 26.1-04 may be the basis for an action sounding in tort); *Jenkins v. J.C. Penney Casualty Ins. Co*., 280 S.E.2d 252, 255-56, (W.Va. 1981), *overruled on other grounds by State ex. rel. State Farm Fire & Cas. Co. v. Madden*, 451 S.E.2d 721, 724-25 (W. Va. 1994). On the other hand, California overturned prior case law finding a private cause of action arising under CAL. INS. CODE §§ 790.03(h) and 790.09 in favor of the insured by following the majority approach holding that the Model Act does not provide a private cause of action. *See Moradi-Shalal v. Fireman's Fund Ins. Companies*, 758 P.2d 58, 64 (Cal. 1988) (providing that 17 out of 19 states having been faced with the issue of whether the Model Act created a private cause of action rejected such interpretation).

Although Mississippi has not adopted the Model Act, it allows first-party claimants to sue insurers for bad faith. *See Chapman v. Coca-Cola Bottling Co*., 180 So. 3d 676, 681 (Miss. Ct. App. 2015). The Mississippi Court of Appeals provided that for an insured to prevail on its claim for bad faith, it must prove any of the following: (1) insurer lacked an arguable or legitimate basis for denying the claim; (2) insurer committed a willful or malicious wrong; or (3) insurer acted with gross and reckless disregard for insured's rights. *Id*. The carrier is not in bad faith for denying or delaying payment of a valid claim if there is reasonable cause. *Id*. Under Mississippi law, coverage must be proved to predicate bringing a bad faith claim. *See Sobley v. S. Nat. Gas Co.*, 210 F.3d 561, 564 (5th Cir. (Miss.) 2000).

While some states' laws provide for a private right of action for an insurance carrier's violation of the Act, numerous states that have adopted the Model Act do not provide for such private cause of action. *Compare* 215 ILL. COMP. STAT. ANN. 5/155 (providing that an insured may recover damages, including extracontractual damages and attorney's fees, for the insurer's unreasonable and vexatious delay in the handling and settling a claim); MASS. GEN. LAWS. Ch.

93A, § 9(1) (providing that any person whose rights are affected by another person violating Ch. 176D, §3(9) governing unfair claim settlement practices may bring an action for damages and such equitable relief) *with* GA. CODE. ANN. § 33-6-37 (providing for no private cause of action for violation of the Fair Claims Settlement Act); *Bates v. Allied Mut. Ins. Co*., 467 N.W.2d 255, 259-60 (Iowa 1991) (Iowa does not recognize private cause of action under its statute governing fair claims practices). Some states do allow violations of the Act to be admissible in insurance bad faith cases. *See e.g. Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 233 P.3d 1221 (2010). For those states where the Act does not provide for a private cause of action, the insured still may maintain a cause of action for bad faith against the carrier for failing to treat its policyholders fairly during its investigation of the claim. *See e.g. Klepper v. ACE American Ins. Co*., 999 N.E.2d 86 (Ind. Ct. App. 2013). *See also*, Hamilton Mut. Ins. Co. of Cincinnati v. Buttery, 220 S.W.3d 287, (Ken. Ct. App. 2007) (providing that "a cause of action for violation of [Kentucky's Unfair Claims Settlement Practices Act] may be maintained only where there is proof of bad faith of an outrageous nature").

B. GO FOR THE WIN: PROPOPERLY HANDLE THIRD PARTY CLAIMS

A third party insurance claim is made by a person who is not the policyholder. The most common example of a third party claim would be a car accident caused by the policyholder; whereby, the third party suffered damages as a result of the accident.

Similar to first party claims, adjusters should be aware of pertinent timeframes surrounding the investigation and handling of the claim. The following chart provides a summary of deadlines for initial response, denial of coverage and reservations of rights for third party claims:

State (Unfair Claims Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Alabama (ALA. ADMIN. CODE r. 482-1-125)	No time limit	No time limit	No time limit
Alaska (ALASKA STAT. § 21.36.125; ALASKA ADMIN. CODE tit. 3 § 26.040)	10 days	15 days	15 days
Arizona (ARIZ. REV. STAT. § 20-461)	N/A	N/A	N/A
Arkansas (ARK. CODE ANN. § 23-66-201; 054-00-043 Ark. Reg. § 1)	N/A	N/A	N/A

State (Unfair Claims Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
California (CAL. INS. CODE § 790.03(h); CAL. CODE REGS. tit. 10, § 2695)	15 days	40 days; 80 days if fraud; N/A for certain policies	40 days
Colorado (C.R.S. § 10-3-1101-1116)	Reasonably promptly	60 days after a valid & complete claim	Reasonably promptly
Connecticut (CONN. GEN. STAT. ANN. §§ 38a-815 to 38a-832)	Reasonable time	Reasonable time	Reasonable time
Delaware (DEL. CODE ANN. Tit. 18, § 2304, 18-900-902 DEL. CODE REGS. 1.2.1.2-1.2.1.5)	15 days; Must investigate claims within 10 days of notice of loss	30 days	30 days
District of Columbia (D.C. ST § 31-2231.17)	Reasonably promptly	Reasonable time	
Florida (F.S. 624.155, 627.426 & 626.9541; FLA. ADMIN. CODE ANN. r. 690-166.024)	14 calendar days; Must begin investigation within 10 working days of proof of loss	60 days of giving reservation of rights or of receipt of summons & complaint	30 days from knowing or should have known of coverage defense
Georgia (GA. CODE ANN. 33-6-34, 33-4-7; GA. COMP. R. & REGS. r. 120-2-52-.03)	60 days of receiving written request	None	None but must give its insured timely notice
Hawaii (HAW. REV. STAT. § 431:13-103(11))	15 days	Reasonable time after investigation completed	Reasonable time after investigation completed
Idaho (IDAHO CODE § 41-1329)	None	None	None
Illinois (215 ILL. COMP. STAT. ANN. 5/154.6; ILL. ADMIN. CODE tit. 50, § 919.50)	Reasonable promptness	Reasonable time	Reasonable time
Indiana (IND. CODE § 27-4-1-4.5)	Reasonable promptness	Promptly	Promptly
Iowa (IOWA CODE § 507B.4)	Reasonably promptly	Reasonable time	Reasonable time
Kansas (KAN. STAT. ANN. § 40-2404)	Reasonably promptly	Promptly	Promptly
Kentucky (K.R.S. 304-12-230; 806 KY. ADMIN. REGS. 12:095)	15 working days	Reasonable time	Reasonable time

State (Unfair Claims Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Louisiana (LA. REV. STAT. ANN. § 22:1892)	None, 30 days suggested	30 days to settle property damage claim	30 days recommended
Maine (ME. REV. STAT. 24-A, §2164-D)	Reasonably Promptly	Promptly	Reasonable time after investigation complete
Maryland (MD. CODE ANN. §27-303; MD. CODE REGS. 31.15.07.03, .04)	15 working days	15 working days or policy	15 working days or policy
Massachusetts (MASS. GEN. LAWS ch. 176D)	Reasonably promptly	Reasonable time; Promptly	Reasonably promptly; Reasonable time; Promptly; Reasonable time after completion of investigation
Michigan (Michigan's Uniform Trade Practices Act, MCL 500.2001, et. seq.)	30 days to provide materials that constitute a satisfactory proof of loss	None.	Reasonable time to policyholder and not to claimant. ***Caution*** of waiving disclaimer of coverage when defending without ROR within reasonable time
Minnesota (MINN. STAT. § 72A.201)	10 business days	60 days; 30 days after investigation is completed	60 days; 30 days after investigation is completed
Mississippi (None)	N/A	N/A	N/A
Missouri (MO. ANN. STAT. § 375.1000; MO. CODE REGS. ANN. tit. 20, §100-1.030, 1.050)	10 working days	15 working days following all necessary forms	15 working days following all necessary forms
Montana (MONT. CODE ANN. § 33-18-101, et. seq.)	Reasonable promptly	Reasonable time	Reasonable time
Nebraska (NEB. REV. STAT. ANN. § 44-1540; NEB. ADMIN. CODE tit. 210, ch. 60 §6-006 to -008)	15 days	15 days	15 days
Nevada (N.R.S. 686A.310; NAC 686A.600-690)	20 working days	30 working days	30 working days

State (Unfair Claims Statute/ Regulation)	Contacting Insured Upon Initial Receipt of Claim	Issuing Disclaimer of Coverage from Proof of Loss	Issuing Reservation of Rights from Proof of Loss
New Hampshire (N.H. REV. STAT. ANN. 417:4 XV; N.H. ADMIN. RULES, INS. §1001.01)	10 working days	10 working days	10 working days
New Jersey (NJSA 17:29B-4; NJSA 17B:30-13.1; NJ ADMIN CODE 11:2-17)	10 working days	Reasonable period of time	Reasonable period of time; ***Caution*** waives coverage defense if defend lawsuit without ROR
New Mexico (N.M. STAT. ANN. §59A-16-20)	Reasonably promptly	Reasonable time	Reasonable time
New York (N.Y. COMP. CODES R. & REGS. tit. 11,§ 216; N.Y. INS. § 3420)	15 days	15 days	15 days
North Carolina (N.C. GEN. STAT. ANN. § 58-63 et. seq.)	Reasonably promptly	Reasonably promptly	Reasonably promptly
North Dakota (ND CENT. CODE. § 26.1-04-03)	Reasonable promptness	Reasonable time	Reasonable time
Ohio (OHIO ADMIN. CODE § 3901-1-54; OHIO REV. CODE §§ 3901.19-3901.26)	15 days, but no time limit if suit is filed	21 days	21 days
Oklahoma (36 O.S. §§ 1250.1 et. seq.; OKLA. ADMIN. CODE 365:15-3-5, -7)	30 days	45 days; 60 days for investigation for property & casualty to be completed	No specific time, but presumed 45 days
Oregon (OR. REV. STAT. § 746.230; OR. ADMIN. R. § 836-080-0225 to 235)	30 days	30 days	30 days
Pennsylvania (40 PA. STAT. ANN. § 1171.5; 31 PA. CODE §§ 146.1-146.9)	10 days	15 days	15 days
Rhode Island (R.I. GEN. LAWS §§ 27-9.1-1 et. seq.; 230-RICR-20-40-1.4 (life, accident & health); 230-RICR-20-40-2.6 to 2.7 (property & casualty)	15 days (property/ casualty); 15 days (accident, health & life)	21 days (property / casualty); Reasonable Time (accident, health & life)	21 days (property / casualty) Reasonable Time (accident, health & life)
South Carolina (S.C. CODE ANN. § 38-59-20)	Reasonable promptness	Prompt investigation	Prompt investigation
South Dakota (S.D.C.L. § 58-33 et. seq.)	None specified, but 30 days per S.D.C.L. would be appropriate	None specified, but 30 days per S.D.C.L. would be appropriate	None specified, but 30 days per S.D.C.L. would be appropriate

State (Unfair Claims Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Tennessee (TENN. CODE ANN § 56-8-105)	Reasonably promptly	Reasonable time	Reasonable time
Texas (TEX. INS. CODE Chs. 541)	Reasonable promptly	Reasonable time	Reasonable time
Utah (UTAH ADMIN. CODE R590-190-9 & 10; UCA 31A-26-303)	Promptly acknowledge – within 15 calendar days	Promptly – 30 calendar days	Promptly – 30 calendar days
Vermont (8 V.S.A. § 4724; 21-020-008 VT. CODE R. §§ 5-6)	10 days	30 days	30 days
Virginia (VA. CODE ANN. § 38.2-510; 14 VA. ADMIN. CODE § 5-400-50, -60, -70)	10 working days	None	None
Washington (WASH. REV. CODE § 48.30.010 et. seq.; WASH. ADMIN. CODE § 284-30-360, -380)	10 days	15 days	15 days
West Virginia (W. VA. CODE § 33-11-1, et. seq.; W. VA. CODE R. § 114-14-5, -6)	15 days	10 days after completion of investigation; investigation to be commenced within 15 days of claim; reasonable time to complete investigation	10 days after completion of investigation; investigation to be commenced within 15 days of claim; reasonable time to complete investigation
Wisconsin (WIS. ADMIN. CODE INS. § 6.11)	10 consecutive days	Reasonable time	Reasonable time
Wyoming (WYO. STAT. 26-13-124, 26-25-124)	Reasonably promptly	Reasonable time	Reasonable time

See EAGLE INT'L ASSOC., INC., FAIR CLAIMS HANDLING STATUTES A 50 STATE SURVEY (Sept. 2015) [4]. While this chart is intended to provide a quick resource, it is strongly recommended that the policy and the governing state's statutes, regulations and case law are reviewed for more information pertaining to these timeframes, as well as other pertinent timelines (e.g. providing response to written request, providing forms, tendering payment, communicating about ongoing investigation).

Similar to first party claims, a carrier's frequent or flagrant failure to timely and properly

[4] The cited statutes and regulations have been reviewed as of August 5, 2019.

handle claims could constitute in (1) administrative penalties, (2) private cause of action or (3) waiver of disclaimer of coverage.

1. WHEN DO PRIVATE CAUSES OF ACTION EXIST FOR THIRD PARTY CLAIMS HANDLING?

Most states do not recognize a third party claimants' private cause of action arising under governing unfair claims acts; however, some states do. *See e.g.* W. VA. CODE ANN. § 33-11-4a(a), 33-11-4a(b) (prohibiting a third party claimant from pursuing a private cause of action and only permitting a third party claimant to file an administrative complaint). *But see, Goff v. Penn. Mut. Life Ins. Co*., 729 S.E.2d 890 (W.Va. 2012) (holding that upon the death of the insured, a primary beneficiary to a life insurance policy has standing to bring a statutory bad faith claim against the insurer pursuant to the unfair claim settlement practices section). Massachusetts has enacted legislation specifically providing a private cause of action by third party claimants. *See* MASS. GEN. LAWS. Ch. 93A, § 9(1) (providing that any person whose rights are affected by another person violating Ch. 176D, §3(9), governing unfair claim settlement practices, may bring an action for damages and such equitable relief). In New Mexico, a private cause of action against an insurer for unfair and deceptive practices is available to third party claimants in some circumstances (e.g. failure to settle) but not in other circumstances (e.g. declination of providing non-mandatory excess liability insurance coverage). *Hovet v. Allstate Ins. Co*., 89 P.3d 69, 73 (N.M. 2004); *Jolley v. Associated Elec. & Gas Ins. Servs*., 237 P.3d 738, 739 (N.M. 2010). However, the third-party claimant cannot bring an action against the insurance carrier until the underlying action between the claimant and the insured is concluded. *Hovet,* 89 P.3d at 76-77. The Kentucky Supreme Court has concluded that its unfair claims provision provides for a private cause of action by third party claimants by reasoning that "KRS 446.070 and KRS 304.12–230 read together create a statutory bad faith cause of action" and "that private citizens are not specifically excluded by the statute from maintaining a private right of action against an insurer by third party claimants." *State Farm Mutual Automobile Insurance Company v. Reeder*, 763 S.W.2d 116, 118 (Ky. 1988).

Delays in informing the insured that there may be no coverage under the policy while providing a defense may later result in waiver of the carrier's right to disclaim coverage under the policy. *See Centennial Ins. Co. v. Tom Gustafson Industries, Inc*., 401 So.2d 1143, 1144 (Fl. Ct. App. 4th dist. 1981) (providing that "a delay in informing the insured of a dispute as to

coverage may result in estoppels of the insurer from contesting coverage if the insured can show that he has been prejudiced"); *Merchants Indemnity Corp. of New York v. Eggleston*, 179 A.2d 5050 (N.J. 1962) (holding that an insurer waiting nine months to issue a reservation of rights after having knowledge of all facts giving rise to possible right of disclaimer after defending the insured constituted a waiver of its right to disclaim). *See also*, *World Harvest Church, Inc. v. GuideOne Mut. Ins. Co.*, 695 S.E.2d 6 (Ga. 2010) (holding that insurer was estopped from asserting defense of noncoverage regardless of whether insured could show prejudice).

C. TIPS TO AVOID FOULS FOR VIOLATIONS OF THE UNFAIR CLAIMS SETTLEMENT PRACTICES ACT

The following highlights some pointers that adjusters can do to avoid violating the Unfair Claims Settlement Practices Act:

- ✓ Understand the governing law's requirements for investigating and handling claims
- ✓ Maintain diligent log notes
- ✓ Manage the massive onslaught of daily activities
- ✓ Accurately represent relevant facts and policy provisions
- ✓ Timely affirm or deny coverage
    - ➢ Provide adequate explanations for claim denials
- ✓ Review of Settlement Values
- ✓ Update evaluations regularly
- ✓ Monitor cases appropriately
- ✓ Single point of contact with the State Agency

III. PAYING THE PRICE – EXTRA-CONTRACTUAL LIABILITY WHEN INSURER BREACHES DUTY TO DEFEND ABSENT BAD FAITH

Recently, Nevada Supreme Court considered whether an insurer could be liable for damages in excess of the policy limit plus defense costs when the carrier has not acted in bad faith. The court answered affirmatively that the insurer may be liable for any consequential damages caused by the breach of the insurance contract for failing to defend its insured. *Century Surety Co. v. Andrew*, 432 P.3d 180, 182 (Nev. 2018).

The underlying pertinent facts in *Century Surety Co. v. Andrew* include an insured who had automobile coverage under a personal policy and a commercial general liability policy for business use. When the matter was initially tendered to the CGL carrier, the insurer determined that the automobile was not being used in the scope of insured's business and denied coverage. After the denial of coverage, the insured notified the insurer of the filing of a complaint that alleged that the insured was within the scope of his employment at the time of the accident. Since an answer was not filed, a default was taken against the insured. Default judgment was entered in the sum of $18,050,183 as the plaintiff suffered significant brain injuries as result of the accident. Insured entered an agreement with plaintiff that judgement would not be executed in exchange for an assignment of rights against the insurance carrier. Nevada law does provide that the duty to defend arises "if facts [in a lawsuit] are alleged which if proved would give rise to the duty to indemnify," which then "the insurer must defend." *Id*. at 184 (citing *Rockwood Ins. Co. v. Federated Capital Corp.,* 694 F.Supp. 772, 776 (D. Nev. 1988)).

Jurisdictions are split as to whether or not an insured can recover in excess of the policy limits when an insurer fails to defend absent bad faith. The majority view limits the liability of the insurer to the amount of the policy plus attorneys' fees and costs when the carrier fails to provide a defense and there is no opportunity to compromise the claim. *See e.g. Afcan v. Mutual Fire, Marine and Inland Ins. Co*., 595 P.2d 638, 647 (Alaska 1979); *Alabama Farm Bureau Mut. Cas. Ins. Co., Inc. v. Moore*, 349 So.2d 1113 (Ala. 1977*); Allen v. Bryers*, 512 S.W.3d 17, 38-39 (Mo. 2016); *Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 201 (Ca. 1958); *Emp'rs Nat'l Ins. Corp. v. Zurich Am. Ins. Co. of Ill.,* 792 F.2d 517, 520 (5th Cir. (Texas) 1986); *George R. Winchell, Inc. v. Norris,* 633 P.2d 1174, 1177 (Kan. App. 1981); *Hirst v. St. Paul Fire & Marine Ins. Co*., 683 P.2d 440, 447 (Idaho 1984). The minority view does not limit damages to policy

limits plus the cost of defense. See *Delatorre v. Safeway Ins. Co*., 989 N.W.2d 268, 274 (Ill. 2013); *Khan v. Landmark American Ins. Co.*, 757 S.E.2d 151 (Ga. App. 2014); *Newhouse v. Citizens Security Mut. Ins., Co*., 501 N.W.2d 1 (Wisc. 1993).

For those jurisdictions following the minority view, the best practice is to defend the insured under a reservation of rights that it is not waiving any right to later deny coverage based on the terms of the insurance policy and to seek declaratory judgment as to coverage. *See e.g. Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454, 460 (Wa. 2007).

IV. KNOW WHEN TO RETAIN INDEPENDENT COUNSEL

The jurisdictions are split as to whether a carrier has to retain independent counsel for the insured when coverage is at issue.

The *Cumis* counsel originated from the California Court of Appeals' holding that when there is a potential conflict of interest between an insurer and its insured requiring the insured to retain independent counsel, the insurer is to pay for the independent counsel. *See San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc.*, 162 Cal.App.3d 358, 208 Cal. Rptr. 494, 50 A.L.R.4th 913 (Ct. App. 1984), *superseded by* CAL. CIV. CODE § 2860. *See also, Nandorf, Inc. v. CNA Ins. Companies*, 479 N.E.2d 988 (Ill. App. 1985); *Belanger v. Gabriel Chemicals, Inc*., 787 So.2d 559 (La.App. 1 Cir. 2001); *Parker v. Agric. Ins. Co.* 109 Misc.2d 678, 440 N.Y.S.2d 964 (Sup. Ct. 1981).

Several states have adopted or modified California's *Cumis* counsel rule. Nevada held that an insurer was required to satisfy its duty to defend by permitting insured to select and pay reasonable costs for independent counsel when an actual conflict of interest exists; however, the court noted that an insurer sending its insured a reservation of rights letter did not create a per se conflict of interest. *State Farm Mutual Automobile Insurance Company v. Hansen*, 357 P.3d 338 (Nev. 2015). Consistent with Nevada, Minnesota has made it clear that there must be an actual conflict of interest as opposed to an appearance of a conflict, including an insured requesting to be informed of the insured's litigation while maintaining a declaratory judgment action against the insured. *See Mutual Service Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365, 368-69 (Minn. App. 1991). Other jurisdictions have applied a per se rule that defending under a reservation of rights

is a conflict of interest. *See* ALASKA STAT. ANN. § 21.96.100(c) (2014); *Armstrong Cleaners, Inc. v. Erie Ins. Exchange*, 364 F. Supp. 2d 797, 806 (S.D. Ind. 2005); *Pueblo Santa Fe Townhomes Owners' Ass'n v. Transcon. Ins. Co.*, 178 P.3d 485, 491 (Ariz. App.2008); *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 788 N.E.2d 522, 539 (Mass. 2003); *Patrons Oxford Ins. Co. v. Harris*, 905 A.2d 819, 825–26 (Me. 2006).

Other states have rejected the *Cumis* rule by reasoning that the insured is the sole client. *See e.g. Point Pleasant Canoe Rental Inc. v. Tinicum Twp*., 110 F.R.D. 166, 170 (E.D. Pa. 1986); *L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So.2d 1298, 1303–04 (Ala.1987); *Higgins v. Karp*, 687 A.2d 539, 543 (Conn. 1997); *Finley v. Home Ins. Co*., 975 P.2d 1145, 1152-53 (Haw. 1998); *In re Youngblood*, 895 S.W.2d 322, 328 (Tenn.1995); *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1137 (Wash. 1986).

The California Supreme Court recently ruled that an insurance carrier could bring an action against its insured's independent counsel under unjust enrichment for reimbursement of unreasonable and unnecessary fees that it had paid to the *Cumis* counsel. *Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C.*, 353 P.3d 319 (Cal. 2015). In *Hartford Casualty Ins. Co*., the trial court issued an order, which was drafted by *Cumis* counsel, requiring "the insurer to pay all 'reasonable and necessary defense costs,' but expressly preserved the insurer's right to later challenge and recover payments for 'unreasonable and unnecessary' charges by counsel" in a case where Hartford was defending the insured against covered and non-covered claims. *Id*. at 321-22. Due to Hartford being in breach of its duty to defend prior to this court order, Hartford was not able to benefit from California Civil Code limiting the rates charged by independent counsel to be limited to that actually paid by the insurer to attorneys retained in the defense of similar suits. *Id*. at 323 (citing CAL. CIV. CODE § 2860). Hartford incurred $15 million in defense fees and costs. *Id*. In California, where the doctrine of unjust enrichment applies, "the law implies a restitutionary obligation, even if no contract between the parties itself expresses or implies such duty." *Id*. at 326 (citation omitted). In prior case law, the California Supreme Court allowed a carrier to restitution from the insurer for fees paid to independent counsel to defend non-covered claims. *Id*. While the California Supreme Court "emphasiz[ed] that [its] conclusion hinges on the particular facts and procedural history of [the underlying litigation]," including the order providing that Hartford could pursue anyone for the overpayments, the Court held that the carrier was entitled to seek reimbursement directly from *cumis* counsel. *Id*. at 327,

331-32.

V. BEST SETTLEMENT PRACTICES

Most states require that insurers "devise a litigation strategy (and make settlement offers within the policy limits) as if the insurer bore the full exposure." *Transport Ins. Co. v. Post Express Co.,* 138 F.3d 1189, 1192 (7th Cir. (Ill.) 1998). An insurer must give its insured's interests "at least equal consideration with its own when the insured is a defendant in a suit in which the recovery may exceed the policy limits." *See Adduci v. Vigilant Ins. Co.,* 424 N.E.2d 645, 648 (Ill. App. 1981); *Kavanaugh v. Interstate Fire & Casualty Co.,* 342 N.E.2d 116, 120 (Ill. App. 1975); *McKinley v. Guar. Nat'l Ins. Co.,* 159 P.3d 884 (Idaho 2007). Negligent failure to settle typically requires the insured establish (1) the claim is within the scope of coverage, (2) a demand was made that was within policy limits, and (3) the demand was such that an ordinary prudent insurer would have accepted it, considering the likelihood and degree of the insured's potential exposure. *See Twin City Fire Ins. Co. v. Country Mut'l Ins. Co.,* 23 F.3d 1175 (7th Cir. (Ill.) 1994); *Yorkshire Ins. Co. v. Seger,* 279 S.W.3d 755, 768 (Tex. App. 2007); *G.A. Stowers Furniture Co. v. Am. Indem. Co.,* 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929). An insurer must settle, if possible, "where a reasonably prudent person faced with the prospect of paying the total recovery would do so." *Robinson v. State Farm Fire & Casualty Co.,* 583 So.2d 1063, 1067 (Fla. App. 1991).

Various factors are considered in determining whether a failure to settle a case was "reasonable." *Brown v. Guarantee Insurance Co.,* 319 P.2d 69 (Cal. App. 1958), *Commercial Union Insurance Co. v. Liberty Mutual Insurance Co.,* 393 N.W.2d 161 (Mich. 1986). California courts have weighed the following: (1) the strength of the claimant's case on both liability and damages; (2) the attempts by the insurer to induce the insured to contribute to the settlement (in third party claims); (3) the failure of the insurer to properly investigate so as to fully consider the evidence that exists against the insured; (4) any rejection of settlement advice from the insurer's own attorney or agent; (5) the failure of an insurer to inform its insured of a demand or offer; (6) a failure to consider the amount of financial risk to which each party is exposed if there is a refusal to settle; (7) the fault of the insured in inducing the insurer to reject a demand by misleading the insurer as to the facts; and (8) other evidence that would establish or negate bad faith on the part of the insurer. *Brown*, 319 P.2d at 74. Michigan considers additional procedural items such as: (1) a failure to inform the insured of any relevant litigation

developments; (2) a failure to keep the insured informed of all demands outside of policy limits; (3) a failure to solicit a demand or extend an offer when the facts warrant; (4) a failure to accept a reasonable compromise when the liability is evident and the damages are high; (5) a rejection of a reasonable settlement offer that is within policy limits; (6) an attempt to coerce the insured into contributing to a settlement that is within policy limits; and (7) creating undue delay in accepting a settlement demand that is within policy limits where a potential verdict is high. *Commercial Union Insurance Co.,* 393 N.W.2d at 165. Failing to inexcusably meet a deadline placed on a policy limit demand or failing to timely pay policy limits where liability is extreme and damages are high may also result in a finding of bad faith. *Berges v. Infinity Ins. Co.,* 896 So.2d 665 (Fla. 2004).

A claim for bad faith based on an alleged wrongful refusal to settle for an amount within policy limits generally requires a reasonable offer where (1) the terms have been made clear enough to have created an enforceable contract resolving all claims at issue; (2) all third party claimants (if any) have joined in the demand; (3) the demand provides for a complete release of all insureds; and (4) and the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate the insured's exposure. *Critz v. Farmers Ins. Group*, 230 Cal.App.2d 788, 798 (1964) (citations omitted).

In handling demands, whether within policy limits or above, the insurer must do more than just act reasonably—it must be able to prove that all steps taken in either negotiating a settlement or denying settlement was done reasonably. Documenting the claim file and keeping accurate and complete records of all communications and decisions within the claim analysis is essential. All materials should be date stamped in order for the file to be reconstructed at a later date. Bad faith claims with regard to settlement decisions are often determined by looking at all of the evidence and conducting an analysis of what was available at the time the settlement decisions were made. In addition to file stamping documents, all phone communications should be documented in writing and in as much detail as possible, including attempts to contact an insured or others integral to an investigation, even where the person called is not reached. All activity including investigations in to damages should be noted by date within the file. Dilatory behavior on behalf of an insurer can be the foundation upon which a bad faith claim is structured.

Notwithstanding the requirement to fully and completely document the claim file, the insurer must assume that everything within that file will be discovered by the party making a bad

faith claim. *Brown v. Superior Court In and For Maricopa County*, 670 P.2d 725, 734 (Ariz. 1983). Gratuitous comments in correspondence or memoranda should be avoided. This is true for both those handling the claim on behalf of the insurance company as well as any counsel or experts retained by the insurance company. Comments such as "this lady is such a liar" or "I'm sick of this guy" should never be included in any portion of the claim file. However, it is important to document any difficulties that arise in dealing with the insured or claimant. For example, an insured's failure to timely respond to a demand for proof of loss, an unreasonable restriction on medical authorizations or failure to timely provide medical authorizations, a claimant or insured's dishonesty relaying essential facts or where the claimant has otherwise delayed the investigation should all be things noted in detail within the file.

VI. CONCLUSION

In conclusion, Coach Hayes said: "Paralyze resistance with persistence." Instead of standing on the defense in claims handling, understand the governing law and persist with successful and prompt claims handling.

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