EAGLE INTERNATIONAL ASSOCIATES

Presents

HOT TOPICS IN *HOTSDALE*

Mastering Claims Handling in Tough Cases

May 8, 2025
Royal Palms Resort
Scottsdale

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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 and Canada. 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.

HOT TOPICS IN *HOTS*DALE
Mastering Claims Handling in Tough Cases

PROGRAM

8:30 am **Welcoming Remarks – Eagle Chair**
Matthew Schrader, Esq., Reminger Co.

Program Introduction – Co-Chairs
Davis Reilly, Bledsoe Diestel Trepper & Crane
Debra Stafford, Hudgins Law Firm

8:40 am **Food for Thought – How to Successfully Defend a Foodborne Illness Claim**
Co-Moderators
Gene Backus, Esq., Backus | Burden
Debra Stafford, Esq., Hudgins Law Firm

Panelists
Joe Emling, Chief Operating Officer, Florida's Natural Growers, Inc.
Jacqueline Hilton, Liability Claims Adjuster, Tyson Foods, Inc.
Vickie Story, Litigation Specialist, Soundview Claims Solutions
Jody Wood, Retired - Risk Management, Safety Director, Albertsons/Safeway

9:40 am **Walking the Tightrope: Real-World Lessons from the Edge of Bad Faith**
Co-Moderators
John Egan, Esq., Rubin and Rudman
William McKenzie, Esq., McKenzie PLLC

Panelists
John Buckley, Senior Vice President, Western National Insurance Co.
Debbie David, Commercial Claims Manager, Accredited Surety & Casualty Company
Dorthel Jelks, Vice President, Claims Division, General Star

10:40 am **Break**

11:00 am **Hot Trial Issues and Effective Defense Tactics**
Co-Moderators
Peder Rigsby, Esq., Bullivant Houser Bailey
Lindsey Woodrow, Esq., Waldeck & Woodrow

Panelists
Kelly Bradley, Claims Specialist, Major Case Unit, West Bend Insurance
Rich Dethlefs, President, YA Engineering Services
Misti Ramirez, Co-Founder, Chief Operating Officer, EMA Risk Services
Jeff Trueman, Mediator and Arbitrator

12:00 pm **Closing Remarks**
Lunch

APPROVED CE / CLE CREDIT HOURS

General Adjuster - Florida (3.0) and Texas (3.0)
Legal – Illinois (3.0) and Wisconsin (3.5)

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

HOT TOPICS IN *HOTS*DALE
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HOT TOPICS IN *HOTS*DALE
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PRESENTERS

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Gene Backus is a native Nevadan and graduate of UCLA School of Law. He has been chief trial counsel or regional counsel on some of the largest complex cases in the country from the MGM Fire Litigation where he was appointed Liaison Counsel to the Federal Court and other mass tort cases including Agent Orange, asbestos, Dupont Hotel Fire Litigation, Pepcon Plant Explosion, Bone Screw Litigation, Yellow Brass Litigation, tobacco, diet drug and City Center Litigation. Mr. Backus has authored several articles in the field of litigation, including DRI and ABA. He has lectured on litigation and insurance topics throughout the country. He has helped educate judges and lawyers on civil rule practice. Mr. Backus has been selected as a Super Lawyer in general litigation, as well as Best Attorneys in America. U.S. News & World Report has his firm as one of the Best Law Firms in Nevada. In 2025, Mr. Backus was awarded the Edward P. Meyerson Lifetime Achievement Award by Construction Lawyers Society of America. The award recognizes excellence and commitment at the highest level over one's career. Candidates are generally lawyers who have been leaders in construction law. The award honors visionaries who have created constituencies and inspired, mobilized and/or unified others in expanding and developing the specialty of construction law within the justice system and in furtherance of the common good. Recipients are those whose leadership has had national or international impact, who practice the art of advocacy at a preeminent standing and who are committed to those they represent in the pursuits to which they are assigned. He is the founding shareholder of Backus | Burden whose law office is located in Las Vegas, Nevada.

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Kelly Bradley is a Claims Specialist with the Major Case Unit for West Bend Insurance. She manages large exposure and specialty coverage claims. Kelly has 25 years of experience as an insurance professional which includes personal lines, commercial, and excess surplus specialty carriers. Beginning with managing simple auto PD claims, liability disputes, total loss teams and subrogation teams she eventually transitioned into a large trucking with general liability specialist, construction defects, specializing in EPL and child daycare matters. Kelly participated in the Arbitration Forum as a panelist and as a trainer. As a specialist, Kelly consulted with the Arizona Department of Insurance to rewrite and design the adjuster licensing test. She strives for reasonable evaluations and resolution, with a strong passion for virtuous ethics. Kelly enjoys her family, grandchildren, traveling and giving back to her community.

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John Buckley is a graduate of Carleton College, Northfield, MN, and William Mitchell College of Law. He is admitted to practice in Minnesota and Wisconsin, U.S. District Court and the Eighth Circuit Court of Appeals. He practiced for five years with Bassford, Lockhart, Truesdell and Briggs, focusing on insurance agent E & O defense and insurance coverage work. In 1995 he joined Western National Insurance Group, a Super Regional Property and Casualty insurer comprised of seven companies doing business in 31 states. He now serves as Senior Vice President - Claims where he leads a team of attorneys and claim representatives handling property, casualty and workers compensation claims nationwide. In 2010, he earned his CPCU. His work involves advising the company in all areas of insurance matters, including underwriting, claims, reinsurance and insurance coverage issues. He teaches CPCU courses and has presented at DRI, CLE and at the PLRB conferences. He has represented Western National in legislative initiatives and is active in the Insurance Federation of Minnesota, NAMIC, Minnesota Defense Lawyers Association and the Defense Research Institute. His team partners with outside counsel across the country to provide Western National policyholders with exceptional legal representation.

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Debbie David is a Commercial Transportation Claims Manager for Accredited Surety and Casualty Company. Her career spans over 30 years in the insurance industry with experience in varying lines of business with the vast amount of that experience in Transportation and Trucking litigation for commercial excess and surplus claims. In addition to claims, Debbie's insurance experience includes Compliance oversight and Claims Process Management. Debbie works remotely from Phoenix, Arizona.

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Richard A. Dethlefs, PE, SE is a licensed Professional Engineer and Structural Engineer in thirty-three states with thirty years of experience performing structural damage investigations, collapse cause investigations, repair and rehabilitation designs, and code upgrade analyses. His experience includes the analysis and conceptual design of seismic upgrades to a historic steel frame high-rise building in Seattle, Washington; detailed modeling and load testing of post-tensioned concrete beams at a parking garage in Miami, Florida; fatigue and failure analysis of a 210-foot tall tower crane in downtown Bellevue, Washington; failure analysis of an elevated bridge span in Nampa, Idaho; non-destructive testing of concrete bridge piers on the Seoul-to-Pusan high speed rail system in South Korea; and over 100 condominium construction defect and progressive rot claims.

Richard is an experienced expert witness who has provided litigation support services and witness testimony on over 100 projects, many of which have included trial testimony, testimony at arbitrations and presentations to dispute review boards.

In addition to teaching a course on special inspections of wood-framed lateral force resisting systems, Richard has presented publications at numerous professional conferences and has taught courses on forensic evaluation of structural failures to graduate-level students at the University of Washington.

In 2019, Richard started YA Engineering Services (YAES), which provides a broad spectrum of forensic engineering, architecture and materials science services to the insurance and legal communities across all fifty states. YAES also has a national group of experts dedicated to accident reconstruction, biomechanics and forensic animation services.

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John Egan is a partner with Rubin and Rudman, LLP, a 90-lawyer general practice firm in Boston, Massachusetts. He is a trial attorney with 40+ years experience in a wide variety of product liability, toxic tort, asbestos, personal injury, property damage, fire, professional liability, housing and employment discrimination, insurance coverage and bad faith, and other claims. Has tried over 75 cases to verdict and has briefed and argued over 30 appeals. He received his B.A. from Bates College in Lewiston, Maine, and his J.D. from the Catholic University of America in Washington, DC. He is a member of the Massachusetts and District of Columbia bars, as well as the bars of the U.S. District Court for the District of Massachusetts, the First Circuit Court of Appeals and the United States Supreme Court. He is a member of the American, Massachusetts, and Boston Bar Associations, the Defense Research Institute, and is a founding member of Eagle International Associates.

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Joe Emling serves as Chief Operating Officer at Florida's Natural Growers, Inc., bringing over three decades of leadership in the food and beverage industry. With 31 years of global experience spanning R&D, Quality, Supply Chain, Agribusiness, Sustainability, and General Management, Joe offers a comprehensive perspective on the complexities and processes involved in food production and safety.

Throughout his career, Joe has been at the forefront of operational excellence, driving strategic initiatives that prioritize quality, safety, and innovation across the supply chain. His multidisciplinary background makes him a valuable voice in discussions surrounding risk management and its application to various industry practices. As a panelist, Joe brings both practical insight and executive-level experience to the evolving legal landscape around food safety.

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Jaquie Hilton has been a Casualty Claims Adjuster with Tyson Foods, Inc. since 2021. Born and raised in Southern California, she moved to Northwest Arkansas in 1996 where she began her career in the insurance industry with Nationwide Insurance. Throughout her nearly 30-year career, Jaquie has cultivated her expertise across several fields. Her current position focuses on product liability, including foreign object complaints and foodborne illness claims.

Jaquie is a mother of three, grandmother of 6 (three boys, two cats, and one dog). Her housemate is her 86-year-old mother who keeps Jaquie busy keeping her shenanigans at bay.

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Dorthel Jelks is a Senior Claims Executive at General Star Indemnity Co., located in Chicago where she handles an array of professional liability claims. With over 20 years of experience in claims handling, Dorthel has been instrumental in driving the company's growth and profitability. Dorthel holds a Liberal Arts Degree from Olvie Harvey College and a Senior Claim Law Associates Degree from the American Education Institute. When Dorthel is not investigating claims, you can find her experimenting with new recipes in the kitchen.

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William McKenzie is a nationally sought-after trial attorney and results-based strategist who runs a cutting-edge national litigation practice out of his Alabama office, with litigation experience in over 29 states and over 50 federal cases. He serves as trusted counsel to several Fortune 100 and 500 companies, including industry leaders in transportation, food, media, hospitality, and insurance.

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Misti Ramirez is the Co-Founder of EMA Risk Services, along with Erika Anderson. Misti's 18-year journey in the transportation claims industry has been marked by her dedication to advocating for the interests of her clients. Through her extensive experience, she has honed her skills in navigating complex legal landscapes and understanding the intricate nuances of the transportation defense industry. Her deep-rooted passion for defending trucking companies, drivers, and insurance carriers has been the driving force behind her unwavering advocacy. She is committed to working with her partners in the industry to achieve fair and reasonable outcomes of all claims, both within and outside the realm of litigation.

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Peder Rigsby is a shareholder at Bullivant Houser Bailey. He defends businesses, entities, and individuals facing complex casualty and commercial litigation in both state and federal courts in the Pacific Northwest. He has over two decades of combined experience in business and litigation. Peder has built a strong practice defending clients in litigation involving wrongful death and catastrophic injury, professional malpractice, employment issues, products liability, and multi-party construction defects. Before becoming an attorney, Peder spent over a decade with Costco in various management roles. This experience has helped shape Peder's client-centric approach that he brings to the practice of law.

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Matthew L. Schrader is a shareholder in Reminger Co., L.P.A.'s Columbus office. He has litigated and tried cases involving professional liability, medical malpractice, wrongful death, products liability and copyright infringement. Matthew has tried cases in both the state and federal courts throughout Ohio. He has also argued and briefed appeals in Ohio's appellate courts and the Fourth and Sixth Circuits. Matthew earned his B.A. from Xavier University, University Scholar in 1998 and his J.D. from the University of Dayton School of Law in 2001.

For nearly 10 years, Matthew served as the Coach of and Advisor to the Mock Trial Team of the Capital University School of Law, where he also served as Adjunct Professor teaching second and third year law students trial advocacy and evidence. Matthew has acted as general counsel to one of central-Ohio's largest non-profit organizations, a health, wellness and addiction treatment facility, and a large auto parts distributor. He has spoken to audiences throughout the country on issues dealing with trial practice, jury selection, medical negligence, professional liability, claims management and employment issues. He is Rated AV® Preeminent™: Very Highly Rated in Both Legal Ability and Ethical Standards by Martindale Hubbell Peer Review and has been recognized as a Rising Star by Ohio Super Lawyers Magazine in 2011, 2014-2016 and as a Super Lawyer from 2017-2021. Matthew has also been selected as one of the Top Lawyers in Central Ohio by Columbus CEO Magazine from 2016-2021. Matthew is the current Chair of Eagle International Associates.

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Deb Stafford is a partner at Hudgins Law Firm, P.C., a litigation, business, and insurance practice in Alexandria, Virginia. Deb is licensed in state and federal courts in Virginia and Washington, D.C. She earned her B.A. cum laude in Classics & Political Science from Randolph-Macon College in 1994 and was inducted into Phi Beta Kappa. During college, she studied archaeology and classics in Rome, Italy for four months. Deb earned her J.D. in 1998 from the University of Richmond, where she was also a member, web editor, and note author for the Richmond Public Interest Law Review. During law school, Deb served as a summer law clerk/intern at the U.S. House of Representatives Commerce Committee (Majority) and at the U.S. Department of Justice, Environmental Enforcement Section. After graduation, she became a staff attorney for the prosecutor training affiliate of the National District Attorneys Association. Deb joined Hudgins Law Firm as an associate in 1999 and became a partner in 2006. Over the years, she has successfully represented many businesses, individuals, and insureds. Her current practice focuses on defending professional and general liability matters, including defending claims against Virginia constitutional officers and employees, and advising individuals and businesses on transactional matters. Deb is a member of FDCC and is rated AV-Preeminent by Martindale. She lives in Fairfax County with her two children in the Liberty neighborhood, which is a unique adaptive reuse of the former D.C. prison site.

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Vickie Lynn Story is a litigation specialist with Arch Insurance Company/Soundview Claims Solutions Inc. She is a graduate of Jacksonville State University, where she received a BS in Criminal Justice/Social Work. After graduation, Vickie launched her career in Birmingham, Alabama, where she began working with a plaintiff firm specializing in auto accidents. That eventually led Vickie into attending Miles Law School where she graduated cum laude. Vickie is a silver star member of Alpha Kappa Alpha Sorority, Inc. Over the last 25 years she has dedicated her time to mentoring young at-risk kids with foster parents of Jefferson County, Alabama. She currently resides in Atlanta, Georgia.

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Jeff Trueman is a full-time mediator and arbitrator with twenty years of experience helping parties resolve litigated and pre-suit disputes concerning wrongful death, catastrophic injuries, professional malpractice, employment, and business dissolutions. He is a Distinguished Fellow of the International Academy of Mediators and the National Association of Distinguished Neutrals, invitation-only membership organizations consisting of some of the most successful commercial mediators in the country and the world. His writings have appeared in the Washington University Journal of Law and Policy, the International Institute for Conflict Prevention and Resolution, Claims Litigation Management Alliance Magazine, the Maryland Daily Record, the Maryland State Bar Journal, the University of Baltimore Law Review, and elsewhere. He holds an LL.M in dispute resolution from the Stratus Institute for Dispute Resolution at the Pepperdine Caruso School of Law. He is an adjunct professor at the University of Maryland Francis King Carey School of Law and Pepperdine Caruso School of Law.

Jody K. Wood
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Recently retired in December 2023 after more than 30 plus years, **Jody Wood** was Risk Management/ Safety Director for Albertsons/Safeway Southwest Division. Jody had 15 years of retail operations with a unique blend of industry knowledge that provided the skill set to develop and execute safety programs and hands-on experience with WC & GL claims management knowledge and expertise. She managed Risk Management functions, including self-insured/self-administered Workers' Compensation, General Liability & third-party property losses. Jody was responsible for the safety of approximately 22,000 employees in 5 states. (AZ, NV, TX, NM & UT). She developed and executed cost effective risk management/safety programs and processes for employee and customers safety and accident reduction. She also represented the company in multiple depositions, small claims court, mediations and trials.

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Lindsey Woodrow of Waldeck & Woodrow P.A., located in Minneapolis, Minnesota, is licensed and practices law in Minnesota State and Federal Courts. She received her B.A. in 2004 from Gustavus Adolphus College and received her J.D. in 2008 from Hamline University School of Law. Prior to joining Waldeck Law Firm, she was a Judicial Law Clerk for the Honorable Chief Judge John H. Guthmann in Minnesota's Second Judicial District, Ramsey County, Minnesota. She is a member of the Hennepin County and Minnesota State Bar Associations, the Minnesota Defense Lawyers Association (MDLA), the Minnesota State Bar Association (MSBA), and is admitted to practice law in the Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community. She is also admitted to practice and is a member of the State Bar of Wisconsin and the State Bar Association of North Dakota. She is a member of Eagle International Associates, Inc., Twin Cities Claims Association and the Claims and Litigation Management Alliance. Lindsey practices exclusively in insurance defense matters, including construction law, product liability, insurance coverage, no-fault, UM/UIM, auto liability, SIU/EUO, professional liability, employment law and liquor liability. This includes all phases of litigation from pre-suit through trial and appeals.

How to Successfully Defend a Foodborne Illness Claim

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FOOD FOR THOUGHT
How to Successfully Defend a Foodborne Illness Claim

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The U.S. is not making enough progress in reducing these preventable diseases. Wider use of effective strategies to decrease pathogenic contamination throughout the supply chain can substantially improve the safety of our food. Pew worked to modernize food safety approaches used by federal agencies and businesses so that they reflect current risks to human health as well as employ scientific and technological advancements. The project concluded in 2021.

The Foodborne Disease Active Surveillance Network of the CDC investigates foodborne diseases cause approximately 76 million illnesses, 325,000 hospitalizations, and 5,000 deaths in the United States each year.

Food contaminated with pathogens such as *E. coli* O157:H7 and *Salmonella* cause an estimated 48 million illnesses, 128,000 hospitalizations, and 3,000 deaths annually in the United States, according to the Centers for Disease Control and Prevention.[1] There are over 30 pathogens we know can cause foodborne illnesses. The cost and adverse impact to the food industry and the insurance industry is major. According to the U.S. Centers for Disease Control ("CDC"), medical costs and lost wages due to foodborne salmonellosis, only one of many foodborne infections, have been estimated to be more than $1 billion per year.

Consumers becoming sick by foodborne illnesses may be entitled to monetary damages to compensate them for their injuries, which may range anywhere from stomach ache to death. Since older folksy and young children tend to be the most adversely affected by certain strains of bacterial and viral contaminations, lawsuits can be emotionally charged, thereby increasing the risk of substantial jury awards.

Recall is another big issue. Enormous financial losses can result from any significant food recall. Once a recall is issued, the recalled food product may have to be removed from shelves, transported and destroyed. The insured will have to issue notices informing the public of the recall. The insured may also have to refund consumers. We know from Wendy's fight on the thumb in chili case, costs may be incurred to rehabilitate a brand's reputation. Distributors may lose anticipated profits.

[1] The Trump administration is slashing about 1,300 employees, or 10% of the workforce, at the Centers for Disease Control and Prevention. And as many as 1,500 employees at the National Institutes of Health were also laid off. What impact RFK Jr. and President Trump has on foodborne illnesses remains to be seen.

A lawsuit was filed against affinitylifestyles.com, the company behind Real Water, a brand of bottled water that was recalled in 2021 after the U.S. Food and Drug Administration (FDA) was notified of cases of acute liver failure allegedly associated with its consumption. Numerous lawsuits have been filed against the company in the years since it was recalled, with the product still being offered at some retail stores despite the recall being classified as a Class 1, the most serious of FDA recalls in which there is risk of serious health impacts or death. One of the lawsuits against the company resulted in a $3 billion court ruling. Five children and three adults sued Real Water, a Nevada-based water company, alleging that the company's alkaline water contained a toxic chemical known as hydrazine that ultimately led to liver damage for all plaintiffs.

I. Insurance Coverage

A. Who to Insure?

The scope of potential insureds is vast including large grocery chains, bakers, bartenders, caterers, commercial kitchens, farmers markets, food festivals, food trailers and food trucks, home food businesses, personal chefs, restaurant chains, vendors, distributors, and manufacturers.

B. Types of Coverage

There are many different insurance packages available from companies like Crum & Forster that provides a capacity/limit of $15,000,000 with a Food Borne Illness Insurance standard policy which includes: loss of gross profit, rehabilitation expenses, consultant costs, pre-incident costs, and additional endorsements can be chosen to customize and tailor coverage. The Food Liability Insurance Program (FLIP) provides the following coverage:

General Liability Aggregate Limit: $2,000,000

Products-Completed Operations Aggregate Limit: $2,000,000

Personal and Advertising Injury Limit: $1,000,000

General Each Occurrence Limit: $1,000,000

Damage to Premises Rented to You (Any One Premises): $300,000

Liability Deductible: No Deductible

Business Property / Inland Marine Limit (Any One Article / Aggregate): $5,000/$10,000

Business Property / Inland Marine Limit (Per Occurrence) – Deductible: $250

Medical Expense Limit: $5,000

Axon Crisis Management provides foodborne illness and contamination coverage for Restaurants, Grocery Stores, Country clubs with food service exposure, and Hotels with food service exposure as follows:

Foodborne illness: Consumption of food or sanitary conditions at your restaurant has, would or resulted in or is alleged to have caused bodily injury to one or more customers#

Sanitary Conditions: Bodily Injury has, would have or is alleged to have occurred to a customer attributable to sanitary conditions at an Insured Location

Contaminated supplied products: one or more patrons become ill or you are required to destroy/return a product or ingredient to one of your suppliers because it was contaminated before you received it

Extortion demand: someone threatens to destroy your property or contaminate your product if you don't pay them extortion monies (cash, monetary instruments, services or similar)

Government recall: The government recalls a product supplied to you requiring you to destroy/return product

Health scare event : You are forced to close your restaurant by the competent authorities because a Contagious Person was present in the location (a Contagious Person is one that is infected with a pathogen, or mutation or variation of such, from a total of 24 pathogens covered under the policy)

Malicious product tampering: someone tampers with your products causing them to be unfit or dangerous to serve to your customers

Security crisis event : someone takes hostages at your restaurant

Workplace violence event : someone threatens or actually physically harms someone at your restaurant

Public notification: any news or report stating an actual, alleged, or the potential for health risk to humans at your Electronic Data Recreation and restaurant due to Foodborne Illness, Contaminated Supplied Products, Governmental Recall, or Malicious Product Tampering.

Reimbursement will include :

- Lost profits for a period up to 18 months
- Cost to replace product that cannot be served to patron
- Cost to cleanup/sanitize the restaurant to allow for reopening
- Reimbursement of extortion money paid
- 24/7 ad hoc access for the Named Insured to Crisis Response Consultant

- 24/7 access to food safety/security experts to assist you in navigating and responding when coverage is triggered
- Access to an exclusive call center in the e vent public outreach is needed. This is in partnership with Crisis

Management specialized companies RQA, Inc. and Callzilla.

Other insurance companies also provide foodborne illness coverages as well as other more traditional types of coverages.

II. Claims Handling Techniques

A. Coverage Issues

1. Commercial General Liability Coverage

The standard Commercial General Liability ("CGL") insurance policy provides that an insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."

a. Property Damage

The insured may sustain an economic loss and the question arises whether this is "property damage." Depending on the underlying facts, these claims may fall within a third-party liability policy's "property damage" coverage. In other words, the economic loss claims may include allegations of "physical injury to tangible property" or "loss of use of tangible property that has not been physically injured."

One court has held in the third-party liability context that the "physical injury" requirement is met where the food product is only in technical violation of U.S. Food and Drug Administration ("FDA") regulations, but is still fit for human consumption. *United Sugars Corp. v. St. Paul Fire & Marine Ins. Co.*, No. A06-1933, 2007 WL 1816412 (Minn. Ct. App. June 26, 2007). *See also General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147 (Minn. Ct. App. 2001(The insurer argued that there was no "physical damage" because the cereal could be safely consumed, the court disagreed, reasoning that "direct physical loss can exist without actual destruction of property . . . it is sufficient to show that the insured property is injured in some way.")

Where the policyholder's defective product has been incorporated into another product, the majority of jurisdictions have held that the mere incorporation does not amount to "property damage" under a CGL policy. *See e.g.* Diamond State Ins. Co. v. Chester-Jensen Co., 611 N.E.2d 1083 (Ill. App. Ct. 1993); *New Hampshire Ins. Co. v. Vieira*, 930 F.2d 696 (9th Cir. 1991); *Aetna Life and Cas. Co. v.Patrick Indus. Inc.*, 645 N.E.2d 656 (Ind. Ct. App. 1995). However, one California appellate court held that the incorporation of a

defective product into a separate uncontaminated product may result in "physical injury" to the product into which the defective product is incorporated. *Shade Foods Inc. v. Innovative Prods. Sales & Marketing Inc.*, 93 Cal. Rptr. 2d 364 (Cal. Ct. App. 2000)(The court rejected the insurer's argument that General Mills' claims were limited to economic loss claims, and held that the presence of wood splinters in the almonds caused "property damage" to the nut clusters and cereals into which they were incorporated.)

b. Bodily Injury

Standard liability policies often define the term "bodily injury" as "bodily injury, sickness or disease." The majority of courts have interpreted this definition as requiring that the claimant suffer actual physical injury before coverage is triggered. *Aim Ins. Co. v. Culcasi*, 280 Cal. Rptr. 2d 766 (Cal. Ct. App. 1991). In examining the insurance policy applicable to the claim, the physical injury requirement is most likely inapplicable where the policy defines "bodily injury" as "injury, sickness or disease" instead of "bodily injury, sickness or disease." Also, the claims handler should note that the physical injury requirement is inapplicable where "bodily injury" is defined by the policy, in part, as emotional distress or mental anguish. Some courts have held that a company's potential liability for bodily injury extends not only to present injury claims, but to claimants' concerns about the risk of future injury. *Norfolk & W.Ry.Co. v. Ayers*, 538 U.S. 135 (2003); *Redland Soccer Club v. Dep't of the Army*, 55 F.3d 827 (3rd Cir. 1995). One insurance coverage opinion has found "bodily injury" liability coverage for "fear of injury" or medical monitoring damages. This court reasoned that as long as the insured faces bona fide tort liability for claims for "fear of injury" damages or medical monitoring, a liability policy's bodily injury coverage will apply. *Techalloy Co., Inc. v. Reliance Ins. Co.*, 487 A.2d 820 (Pa. Super. Ct. 1984).

c. Occurrence

i. Accident definition

In *Atlantic Mutual Ins. Co. v. Hillside Bottling Co.*, 903 A.2d 513, 518-520 (N.J. Super. Ct. App. Div. 2006), the court concluded that a bottling company's faulty work in the preparation of carbonated beverages contaminated with ammonia did not fall within the coverage provided to the bottling company. However, *see Naumes, Inc. v. Chubb Custom Ins. Co.*, No. 05-1327-HA, 2007 U.S. Dist. LEXIS 1292 at *13-14. (D. Or. Jan. 5, 2007), where the court concluded that an insured's "erroneous introduction of a premix containing substances banned in the market for which the product was intended" was an occurrence that led to the destruction, and loss of use, of tangible property. In *International Flavors & Fragrances, Inc. v. Royal Ins. Co. of America*, 844 N.Y.S.2d 257 (NY App. Div. 2007), the issue presented was whether under New York's unfortunate-event standard thirty separate personal injury claims constituted one "occurrence" or whether each claim constituted a separate "occurrence." The court rejected International Flavors' argument, concluding that the sale and "shipment of butter flavoring . . . presented only the potential for injury; it was the exposure to diacetyl and other volatile compounds, though

gradual and continuing over the course of years, that precipitated the actual harm, comprising the occasion giving rise to liability . . . ." In reaching its conclusion, the court reasoned that: "Occurrence is not defined by the injury sustained but rather in terms of its cause." Because thirty different people were continuously exposed to diacetyl on different occasions and extending over different time periods, the court held that there were thirty separate occurrences.

ii. Number of occurrences

On the other side of this issue, in *Fireman's Fund Ins. Co. v. Scottsdale Ins. Co.*, 968 F.Supp. 444 (E.D. Ark. 1997), the insured operator of a Taco Bell franchise was sued after several of its customers were infected with the Hepatitis A virus after eating contaminated meat. Scottsdale Insurance, the primary insurer, argued that the accident causing the resulting injuries was the improper preparation and/or storage, handling, etc. of the food, and that this should have been regarded as having "occurred" once and that it was irrelevant how many customers became ill upon consuming the food. A finding of a single occurrence would have limited Scottsdale's exposure to a single per occurrence limit of $1 million. The excess insurer, Fireman's Fund, argued that each sale of the contaminated meat was a separate occurrence and that the improper handling, preparation, or storage of food, by itself, was not injurious to anyone and thereby did not subject the insured to potential liability until the meat was actually served to the public. According to Fireman's Fund's argument, it was the sale of the meat which potentially triggered the insured's liability and, therefore, every sale resulting in injury constituted a separate occurrence. The court held that multiple sales of contaminated meat at one restaurant was the result of a single occurrence.

d. Pollution exclusion

Once the claims handler notes that there is bodily injury or property damage, then he or she must look at applicable exclusions in the policy. Courts are divided on the applicability of the pollution exclusion outside of industrial pollution context. There are few cases addressing the pollution exclusion in the food contamination setting. However, it should be noted that at least one state court has rejected the application of the pollution exclusion in the food contamination setting. *See Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 13 P.3d 785 (Ariz. Ct. App. 2000). To the contrary *The Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 635 N.W.2d 112 (Neb. 2001) rejected the application of the pollution exclusion where claimants' food products were contaminated by xylene fumes from a concrete floor sealant.

e. Work/product exclusion

In *Olympic Steamship Co. v. Centennial Ins. Co.*, 811 P.2d 673 (Wash. 1991) (product exclusion inapplicable where the insured warehouser simply affixed packer supplied labels to cans of salmon and boxed the cans using its own casing equipment – court held that exclusion was inapplicable since the insured simply

provided a service and was not the "manufacturer" of the product). However, other courts noted that the costs associated with repairing or replacing a product manufactured or grown by the insured are excluded from coverage. *Nu-Pak, Inc. v. Wine Specialties Int'l Ltd.*, 642 N.W.2d 848 (Wis. Ct. App. 2002); see also *Hartog Rahal P'ship v. American Motorists Ins. Co.*, 359 F. Supp. 2d 331 (S.D.N.Y 2005) (juice concentrate adulterated with a safe, but artificial, sweetener constituted the insured's product, and was, therefore, excluded from coverage through application of the "your product" exclusion).

f. Impaired property exclusion

The impaired property exclusion reflects the principle that the risk of replacing or repairing a defective product is considered a commercial risk that is not passed on to a liability insurer. *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, 78 Cal. App. 4th 847 (Cal. Ct. App. 2000).

The impaired property exclusion is inapplicable when there was no evidence that the claimant's product could be restored to use by the repair or replacement of the insured's defective product or work. *Naumes*, 2007 U.S. Dist. LEXIS 1292 at *14-15, supra.

Additionally, the impaired property exclusion will not apply to exclude coverage if the "impaired product" is physically injured. *See Mullins' Whey, Inc. v. McShares, Inc.*, No. 04-C-0130, 2005 WL 1154281 at *3 (E.D. Wis. 2005) (coverage for damages to the claimant's food product, which was ruined as the result of using the insured's benzene-contaminated whey protein, was not excluded through application of the impaired property exclusion).

g. Product Recall or Sistership exclusion

Most courts hold that the product recall exclusion applies exclusively to claims involving recalls by the named insured. *U.S. Fire Ins. Co. v. Good Humor Corp.*, 496 N.W.2d 730, 738 (Wis. Ct. App. 1993) (sistership exclusion did not apply when the manufacturer of ice cream contaminated with Listeria monocytogenes was sued by retailer of the contaminated ice cream where the retailer, not the manufacturer, had recalled the product).

In most courts, the product recall or sistership exclusion applies exclusively to market-wide recalls. Moreover, these courts have held that the repair and replacement of products that have actually failed in use, with no attempt to prevent future failures by the removal of other similar products, does not constitute a withdrawal under the exclusion. In other words, the sistership exclusion only applies to market-wide recalls, not to the partial withdrawal of individual or partial groups of defective products. *See e.g.Travelers Ind. Co. v. Dammann & Co., Inc.*, 2008 WL 370914 (D.N.J. Feb. 11, 2008).

2. First Party Coverage

a. All risk versus named peril policies

All-risk policies extend to risks not usually covered under other insurance. Recovery under an all-risk policy will generally be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage. Named-peril policies on the otherhand restrict coverage to claims stemming from certain enumerated risks.

b. Physical damage requirement

Both all-risk and named peril policies limit coverage to risks that result in physical property damage. In the contamination setting, the majority of courts have held that the contamination of food products meets the requirement for physical damage. *See e.g. Blaine Richards & Co. v. Marine Indem. Ins. Co.*, 635 F.2d 1051 (2d Cir. 1980) (fumigation of beans with pesticide not approved for use in the United States resulted in physical damage covered by the policy). In contrast, where recalls impact products that are not contaminated, the physical damage or physical loss requirement in first-party policies has not been met as was the case with mad cow disease. The court found that the insured was not entitled to coverage for its lost business income as its beef products, which were not infected with mad cow disease, did not satisfy the policy's physical damage requirement. *See Source Food Tech., Inc.v. United States Fid. & Guar. Co.*, 465 F.3d 834 (8th Cir. 2006).

c. Damages covered under first party policy

Damages may be covered under first party policy provisions covering business interruption costs; replacement costs/product refunds; lost profits; costs associated with recall of product (expenses for issuing warnings, checking the recalled product, etc.); costs to destroy contaminated product; and expenses to rehabilitate the product's brand reputation.

d. Contamination exclusion

Cases addressing the contamination exclusion are set forth in these examples. *American Produce & Vegetable Co. v. Phoenix Assurance Co. of New York*, 408 S.W.2d 954 (Tex. 1996) (contamination exclusion precluded coverage for claim where the insured's product was contaminated by the leakage of ammonia from refrigeration units); *Richland Valley Products, Inc. v. St. Paul Fire & Cas. Co.*, 548 N.W.2d 127 (Wis. Ct. App. 1996), *review denied*, 204 Wis. 2d 318, 555 N.W.2d 123 (1996) (although refrigeration system malfunctioned soon after mixing occurred, contamination within meaning of policy exclusion could be quick and did not need to be slow process); and *The Pillsbury Co. v. Zurich American Ins. Co.*, No. 03-6560, 2005 WL 2778752 (D. Minn. Oct. 25, 2005)(the court ruled that the contamination exclusion does not exclude coverage for losses associated with biscuit mix containing pieces of plastic, concluding that the definition of "contaminate" implies that impurities are particulate or chemical in nature and that plastic screen pieces don't constitute "contamination").

e. Pollution exclusion

A first-party policy pollution exclusion may exclude coverage for pollutants where pollutants are defined as, "any solid, liquid, gaseous, or thermal irritant or contaminant . . . ." *See Landshire Fast Foods v. Employers Mut. Cas. Co.*, 676 N.W.2d 528 (Wis. Ct. App. 2004). Courts analyzing whether bacteria fits under similar pollution exclusions are divided. *Compare Keggi v. Northbrook Prop. and Cas. Ins. Co.*, 13 P.3d 785 (Ariz. Ct. App. 2000) (holding that bacteria does not constitute a pollutant under an identical pollution exclusion clause) and *E. Mut. Ins. Co. v. Kleinke*, Index # 2123-00, RJI # 0100062478 (N.Y. Super. Ct. Jan. 17, 2001) (holding that similar pollution exclusion is ambiguous on whether E. coli bacteria falls within the policy's definition of pollutant) with *Landshire, supra* ("bacteria, when it renders a product impaired or impure" falls within "the ordinary, unambiguous definition of 'contaminant'").

f. Governmental action exclusion

When examining whether the governmental action exclusion applies, courts generally require that the governmental body specifically order the seizure or destruction of property. *See Stanley Duensing v. The Traveler's Companies*, 849 P.2d 203 (Mont. 1993) (where exclusion applied to loss or damage caused by seizure or destruction of property by order of governmental authority, a government-ordered embargo was not the equivalent of a seizure of property and, as such, the exclusion did not apply).

g. Faulty workmanship exclusion

In one case, the insurer asserted that losses resulting from contaminated oats intended for cereal products were excluded because the oats were faulty materials. The court in rejecting this approach, held that the exclusion refers to materials for construction of property, not raw stock for making cereals products. It reached this conclusion by noting that "faulty materials," when grouped with "design" and "faulty workmanship," implies material for the construction of property. *General Mills Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. 2001). But note the case cited previously, *Shade Foods, Inc. v.Innovative Products Sales & Marketing, Inc.*, 93 Cal. Rptr. 2d 364, 377 (Cal. Ct. App. 2000) (holding that the presence of wood splinters in the diced roasted almonds caused property damage to the nut clusters and cereal products in which the almonds were incorporated, noting that "we see no difficulty in finding property damage where a potentially injurious material in a product causes loss to other products with which it is incorporated.").

h. Virus or bacteria exclusion

The AAIS (American Association of Insurance Services) has recently approved a "Virus or Bacteria" exclusion CL 0700 10 06 for its Agricultural Output Program ("AgOP"). This mandatory countrywide exclusion states that there is no first-party property coverage under AAIS forms for loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium or other microorganism that causes or is capable of causing disease, illness or physical distress. The exclusion was developed in light of the possibility of a pandemic of avian flu, but it

may have applicability to contamination claims from any disease-causing agent, including, but not limited to, SARS, rotavirus, listeria, legionella and anthrax.

3. Directors and Officers Coverage

The claims handler may be presented with the possibility that food manufacturers and their directors or officers could be targeted by their own shareholders in instances where the company's stock is adversely affected by mass food contamination situations, in which cases the company's D&O coverage may be implicated.

4. Specialty Policies

a. Product recall coverage

Policies may not provide adequate coverage for certain types of risks, such as the cost of voluntary product recalls, which are becoming increasingly common following passage of the Food Safety Modernization Act (FSMA) which is transforming the nation's food safety system by shifting the focus from responding to foodborne illness to preventing it. Congress enacted FSMA in response to dramatic changes in the global food system and in our understanding of foodborne illness and its consequences, including the realization that preventable foodborne illness is both a significant public health problem and a threat to the economic well-being of the food system.

The FDA has finalized several rules to implement FSMA, recognizing that ensuring the safety of the food supply is a shared responsibility among many different points in the global supply chain for both human and animal food. The FSMA rules are designed to make clear specific actions that must be taken at each of these points to prevent contamination.

The product recall policy is a specialized policy underwritten to meet the unique needs of insureds who are in the food distribution process. Policies designed to cover the costs associated with a product recall, product tampering, product rehabilitation, and related expenses are available. Most product recall policies are not standard ISO forms and, as such, the terms of the policies can vary widely from policy to policy. In general, however, the product recall policies cover the costs of inspecting, withdrawing, destroying, and replacing contaminated products. In addition, product recall policies may provide coverage for related expenses for product rehabilitation, crisis management and lost profits.

In a HoneyBaked case, the insurer denied coverage that HoneyBaked made for property damage and business interruption loss under an all risk policy after the company discovered listeria in several production runs of its meat that were introduced by contaminated equipment. The company did a recall notice and destroyed nearly one million pounds of product. However, the U.S. District Court in the Northern District of Ohio held that the insurer properly denied coverage under the contamination exclusion.

In a Chipolte experienced multiple instances of foodborne illness from *E.coli* in their meat and many customers were fearful and Chipolte had a major decline in sales, a reputation loss. These types of economic loss may trigger exclusions in CGL polices

B. Claims Handling

Jumping on the claim early is essential! Understanding the type of agent that caused the illness is vital. For a claimant to successfully prosecute a foodborne illness products liability claim, her or she must establish a causal connection between the ingestion of contaminated food and the illness claimed. See *Thacker v. Kroger Co.*, 155 Fed. Appx. 946, 947 (8th Cir. 2005)(Plaintiffs, a child and her parents, sued defendants, a meat company and a grocery store, alleging that the child ate contaminated ground beef that was subject to recall which caused her to suffer from Hemolytic Uremic Syndrome (HUS), a disease commonly associated with E. coli. The U.S. District Court for the Western District of Missouri granted summary judgment to defendants for lack of proof of causation. Any meat produced on May 31 - the only production day that the USDA detected E. coli in meat that was actually distributed - would have been removed from the shelves by June 18, long before Ms. Thacker purchased the beef consumed.). A human specimen (a stool or blood sample) that matches what is found in the food product at issue is the most optimal proof. While specimen testing can be difficult to dispute, it is fairly uncommon. More often, the symptoms of foodborne illness are self-evident, and medical professionals will not submit samples to be tested. In those instances, plaintiffs will attempt to use circumstantial evidence and/or testimony of a treating provider to prove causation by showing that the symptoms correlate to typical symptoms of foodborne illness. See *Heller v. Schwan's Sales Enter*., 548 N.W.2d 287, 290 (Minn. Ct. App. 1996). Sudden illness alone may be insufficient. In *Payano v. Hempstead Union Free Sch. Dist*., 2007 N.Y. Misc. LEXIS 873, at *7 (Feb. 16, 2007), a student became ill after eating chicken nuggets in the school lunchroom. She was diagnosed with salmonella about two weeks later. The court found that she did not offer sufficient proof that the chicken nuggets were contaminated with salmonella. *See also, Achkar v. Wis. Cheese Grp., LLC*, 2019 U.S. Dist. LEXIS 99245, at *3 (E.D. Pa. June 12, 2019) (plaintiff became ill within an hour of eating the cheese, but the incubation period for listeriosis is at least one-to-four weeks).

Symptoms commonly include fever, abdominal cramps, headache, and diarrhea, however without biologic testing, a claimant's burden of proof becomes significantly higher as these types of common and nonspecific symptoms can be attributed to multiple causes or pre-existing illness. The above symptoms could indicate a viral gastroenteritis (stomach flu), irritable bowel syndrome (IBS) or traveler's diarrhea.

From a claims perspective, unless there is undisputed biologic testing showing a specific pathogen, a claimant should face a difficult task of tying the specific product to the claimed injury by reliable evidence.

Maybe an equally important investigative concept for the claims handler is the time that elapses between ingesting a pathogen and the appearance of first symptoms is called the "incubation period." Most foodborne pathogens have well-recognized incubation and duration periods. The "incubation period" of different pathogens ranges from a few hours to several weeks. The incubation period for E. coli infection typically ranges from 3 to 8 days, with a median of 3 to 4 days. However, However, the incubation period can vary depending on the strain of E. coli and the individual's immune system. For example:

- Shiga toxin-producing E. coli (STEC): Incubation period can range from 1 to 10 days.
- Enterohemorrhagic E. coli (EHEC): Incubation period is usually 3 to 4 days.
- Enterotoxigenic E. coli (ETEC): Incubation period can range from 2 to 72 hours.

Another common pathogen is salmonella. The incubation period for salmonella infection, the time between exposure to the bacteria and the onset of symptoms, typically ranges from 6 to 72 hours. However, the incubation period can vary depending on factors such as:

- Dose of bacteria: Higher doses may result in shorter incubation periods.
- Serotype of bacteria: Different serotypes of salmonella may have different incubation periods.
- Individual immune system: People with weakened immune systems may experience a longer incubation period.

In rare cases, the incubation period can be longer than 72 hours, up to 16 days. Culture from stool, urine or blood is the gold standard for diagnosis.

In order to have a credible defense, the claims handler should consult with an infectious disease doctor or gastroenterologist (digestive system specialist). It is important in investigating this type of claim to reference a known pathogen's incubation period, as it may act as a basis for denial of a claim if the time of consumption of the alleged product does not reflect the proper incubation period.

Also, the claims handler should look at the duration period for the illness. In otherwise healthy people, symptoms should go away in 2 to 5 days, but they may last for one to two weeks. People who have been treated for Salmonella may continue to shed the bacteria in their stool for months to a year after the infection. If the duration of the illness is inconsistent with what would be expected from the particular pathogen, then the pathogen likely did not cause the illness.

If the onset of a claimant's symptoms do not correlate to the specific known incubation period and duration period of the pathogen, the claimant will be unable to prove that the food product at issue proximately caused the foodborne illness, and thus a legitimate basis for denial of the claim. An incubation defense is often the most successful in defeating claims where biologic sample testing was not taken at the time of illness.

Different foodborne pathogens also spread and manifest illness in different ways. For e.g., the preparation or storage of a food product can cause contamination. In instances where an insured is responsible for production or packing of the product, contamination can be caused by the storage or preparation of the product. Point in time analysis should be considered by the claims handler. If scientific evidence does not point to contamination at the time the product leaves the control of a manufacture or producer, the claims handler can challenge causation with expert testimony that the organism is spread from person to person, and is a result of the food preparation and sanitation of the facility where the product was actually consumed by the

claimant. If the insured is a restaurant, grocery, or food preparation facility, a defense is improved where handling, preparation, and sanitation procedures can be demonstrated. McDonald's Corporation prioritizes food safety through strict hygiene and food handling practices, including staff training, color-coded utensils, frequent handwashing, and regular cleaning and sanitizing procedures. Some of McDonald's food safety procedures are as follows and this is a good list for a claims handler looking at another insured's operations and procedures to see if such safety procedures were in place:

Food Handling and Preparation:

- Staff Training:

  Employees receive thorough training on food safety, hygiene, and sanitation standards, including proper food handling techniques.

- Temperature Control:

  McDonald's emphasizes proper temperature control throughout the food preparation process, ensuring food is cooked to safe internal temperatures and stored at appropriate temperatures.

- Cross-Contamination Prevention:
  - Color-Coded Utensils: Dedicated color-coded utensils are used for handling different types of food (e.g., cooked meat, eggs, vegetables) to prevent cross-contamination.
  - Separate Work Areas: Raw and cooked foods are handled in separate areas to minimize the risk of cross-contamination.
  - Clean Surfaces: Surfaces that come into contact with food are cleaned and sanitized frequently to prevent the spread of bacteria.
- Safe Food Storage:

  Food is stored properly, with raw meats and cooked foods separated to prevent cross-contamination.

- Ingredients:

  McDonald's has strict control over ingredients, supplier oversight, and stringent hygiene practices within its restaurants.

- Hands-free operations:

  Ingredients are mixed by fully automatic machines to help ensure that stringent food safety and quality standards are adhered to.

- Pasteurization:

  All dairy products are pasteurized to retain freshness.

- Temperature-controlled storage:

  All dairy products are stored in temperature-controlled storage, then delivered to McDonald's Restaurants in refrigerated trucks.

Sanitation and Cleanliness:

- Handwashing: Restaurant staff wash their hands frequently, at least every 30 minutes, with soap and water.
- Cleaning and Sanitizing:
  - Surface Cleanliness: Food prep areas, counters, and dining areas are cleaned and sanitized regularly.
  - Utensil and Equipment Cleaning: Knives, cutting boards, grills, fryers, and other equipment are cleaned and sanitized using appropriate solutions.
  - Sanitizer Solution: Sanitizer solution is used at the correct concentration.
- Pest Control: Restaurants have pest control measures in place to prevent infestations.
- Maintenance and Repairs: McDonald's maintains their facilities by addressing any maintenance or repair needs promptly.
- Waste Disposal: Waste is disposed of properly and trash bins are emptied regularly.

Food Safety Culture:

- Employee Training:

  McDonald's invests in ongoing training programs for employees on food safety, hygiene, and sanitation standards.
- Internal Resources:

  McDonald's provides internal resources, such as a food safety website and webinars, to educate employees on food safety best practices.
- Food Safety Week:

  McDonald's celebrates Food Safety Week globally to share key stakeholder messages and best practices on different food safety topics.
- Supplier Oversight:

  The company's suppliers are required to conduct food safety culture assessments and participate in ongoing programs to educate employees on safe food handling.
- Global Food Safety Strategy:

  McDonald's Global Food Safety Strategy centers on three operating principles: Customer obsessed, One McDonald's way, and Committed to lead.

Conducting internal audits and recognizing non-compliance with food safety standards will gauge eligibility for third-party certification. Here are some sample internal audit checklists to help determine if your food safety processes align with existing industry standards:

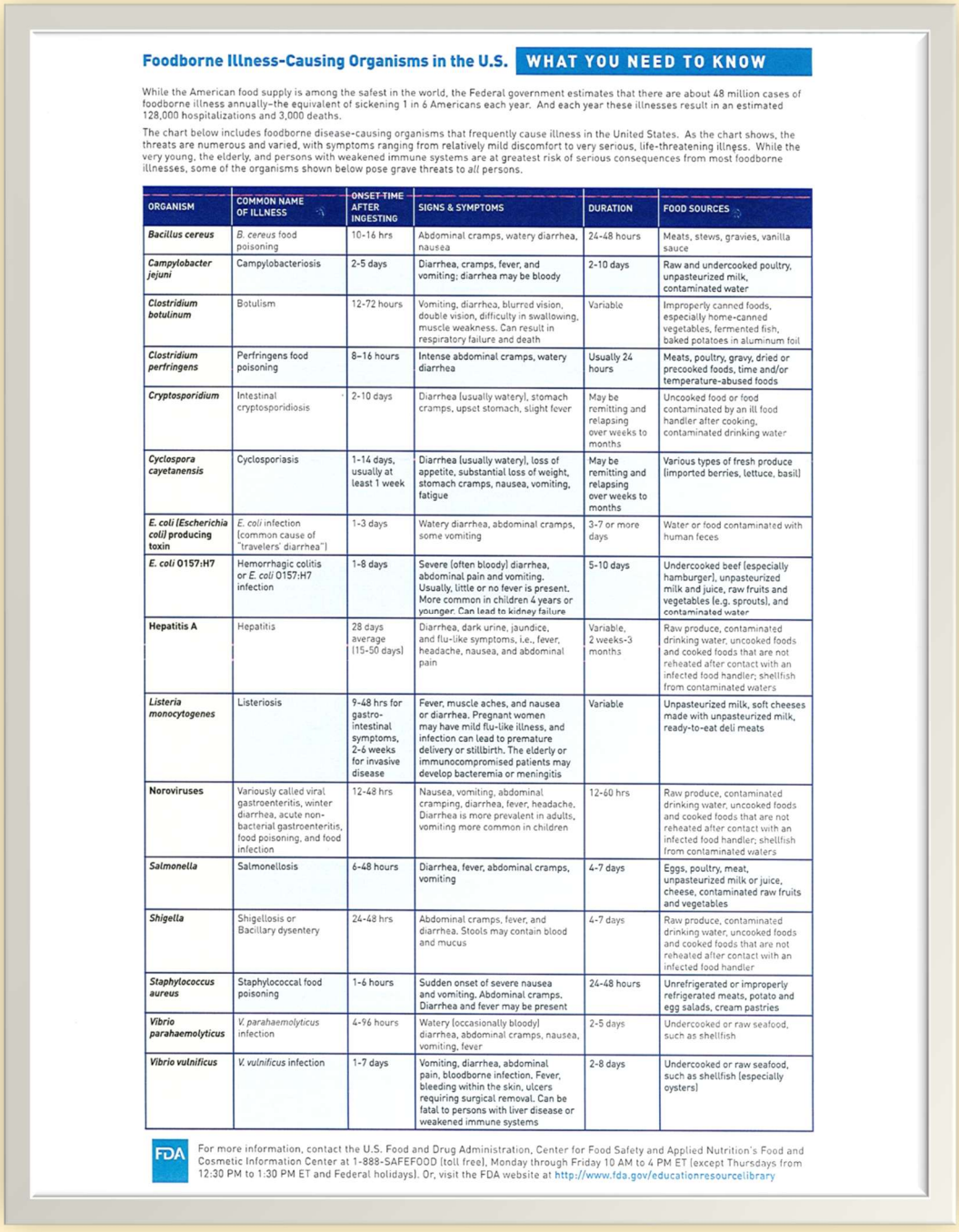
- HACCP
- ISO 22000
- FSSC 22000 other requirements
- IFS Food v7

Food safety standards are a set of rules and regulations established by governments, international organizations, and industry bodies to ensure the safety and quality of the food supply chain. The standards aim to reduce the risk of contamination, reduce the chances of foodborne illnesses, and protect the workers and customers who come into contact with the product. Typically, food safety standards cover all aspects of food production, from gathering ingredients and materials and processing to packing and distribution. That way, customers and workers have comprehensive protections and controls in place to prevent the risks that come with preparing and manufacturing food products.That said, food safety standards are varied. There are international standards like those by the World Health Organization (WHO) and the Global Food Safety Initiative (GFSI), while there are also local ones that may be unique to your insured's location. So, it's important for the claims handler to read up on both local and international standards before he or she commences a review of the insured's operations.

Elements of root cause analysis (RCA)—commonly used to investigate air traffic accidents, patient safety issues, and other problems in various industries—have been included in many investigations of foodborne illness, where the technique can identify opportunities for improvement in the food safety system and strategies to solve them. See A Guide for Conducting a Food Safety Root Cause Analysis - Approaches for investigating contamination incidents and preventing recurrence, March 24, 2020. https://www.pewtrusts.org/en/research-and-analysis/reports/2020/03/a-guide-for-conducting-a-food-safety-root-cause-analysis.

ADDENDUM

How to Successfully Defend a Foodborne Illness Claim



Foodborne Illness-Causing Organisms in the U.S. WHAT YOU NEED TO KNOW

While the American food supply is among the safest in the world, the Federal government estimates that there are about 48 million cases of foodborne illness annually–the equivalent of sickening 1 in 6 Americans each year. And each year these illnesses result in an estimated 128,000 hospitalizations and 3,000 deaths.

The chart below includes foodborne disease-causing organisms that frequently cause illness in the United States. As the chart shows, the threats are numerous and varied, with symptoms ranging from relatively mild discomfort to very serious, life-threatening illness. While the very young, the elderly, and persons with weakened immune systems are at greatest risk of serious consequences from most foodborne illnesses, some of the organisms shown below pose grave threats to *all* persons.

ORGANISM	COMMON NAME OF ILLNESS	ONSET TIME AFTER INGESTING	SIGNS & SYMPTOMS	DURATION	FOOD SOURCES
Bacillus cereus	*B. cereus* food poisoning	10-16 hrs	Abdominal cramps, watery diarrhea, nausea	24-48 hours	Meats, stews, gravies, vanilla sauce
Campylobacter jejuni	Campylobacteriosis	2-5 days	Diarrhea, cramps, fever, and vomiting; diarrhea may be bloody	2-10 days	Raw and undercooked poultry, unpasteurized milk, contaminated water
Clostridium botulinum	Botulism	12-72 hours	Vomiting, diarrhea, blurred vision, double vision, difficulty in swallowing, muscle weakness. Can result in respiratory failure and death	Variable	Improperly canned foods, especially home-canned vegetables, fermented fish, baked potatoes in aluminum foil
Clostridium perfringens	Perfringens food poisoning	8–16 hours	Intense abdominal cramps, watery diarrhea	Usually 24 hours	Meats, poultry, gravy, dried or precooked foods, time and/or temperature-abused foods
Cryptosporidium	Intestinal cryptosporidiosis	2-10 days	Diarrhea (usually watery), stomach cramps, upset stomach, slight fever	May be remitting and relapsing over weeks to months	Uncooked food or food contaminated by an ill food handler after cooking, contaminated drinking water
Cyclospora cayetanensis	Cyclosporiasis	1-14 days, usually at least 1 week	Diarrhea (usually watery), loss of appetite, substantial loss of weight, stomach cramps, nausea, vomiting, fatigue	May be remitting and relapsing over weeks to months	Various types of fresh produce (imported berries, lettuce, basil)
***E. coli* (*Escherichia coli*) producing toxin**	*E. coli* infection (common cause of "travelers' diarrhea")	1-3 days	Watery diarrhea, abdominal cramps, some vomiting	3-7 or more days	Water or food contaminated with human feces
***E. coli* O157:H7**	Hemorrhagic colitis or *E. coli* O157:H7 infection	1-8 days	Severe (often bloody) diarrhea, abdominal pain and vomiting. Usually, little or no fever is present. More common in children 4 years or younger. Can lead to kidney failure	5-10 days	Undercooked beef (especially hamburger), unpasteurized milk and juice, raw fruits and vegetables (e.g. sprouts), and contaminated water
Hepatitis A	Hepatitis	28 days average (15-50 days)	Diarrhea, dark urine, jaundice, and flu-like symptoms, i.e., fever, headache, nausea, and abdominal pain	Variable, 2 weeks-3 months	Raw produce, contaminated drinking water, uncooked foods and cooked foods that are not reheated after contact with an infected food handler; shellfish from contaminated waters
Listeria monocytogenes	Listeriosis	9-48 hrs for gastro-intestinal symptoms, 2-6 weeks for invasive disease	Fever, muscle aches, and nausea or diarrhea. Pregnant women may have mild flu-like illness, and infection can lead to premature delivery or stillbirth. The elderly or immunocompromised patients may develop bacteremia or meningitis	Variable	Unpasteurized milk, soft cheeses made with unpasteurized milk, ready-to-eat deli meats
Noroviruses	Variously called viral gastroenteritis, winter diarrhea, acute non-bacterial gastroenteritis, food poisoning, and food infection	12-48 hrs	Nausea, vomiting, abdominal cramping, diarrhea, fever, headache. Diarrhea is more prevalent in adults, vomiting more common in children	12-60 hrs	Raw produce, contaminated drinking water, uncooked foods and cooked foods that are not reheated after contact with an infected food handler; shellfish from contaminated waters
Salmonella	Salmonellosis	6-48 hours	Diarrhea, fever, abdominal cramps, vomiting	4-7 days	Eggs, poultry, meat, unpasteurized milk or juice, cheese, contaminated raw fruits and vegetables
Shigella	Shigellosis or Bacillary dysentery	24-48 hrs	Abdominal cramps, fever, and diarrhea. Stools may contain blood and mucus	4-7 days	Raw produce, contaminated drinking water, uncooked foods and cooked foods that are not reheated after contact with an infected food handler
Staphylococcus aureus	Staphylococcal food poisoning	1-6 hours	Sudden onset of severe nausea and vomiting. Abdominal cramps. Diarrhea and fever may be present	24-48 hours	Unrefrigerated or improperly refrigerated meats, potato and egg salads, cream pastries
Vibrio parahaemolyticus	*V. parahaemolyticus* infection	4-96 hours	Watery (occasionally bloody) diarrhea, abdominal cramps, nausea, vomiting, fever	2-5 days	Undercooked or raw seafood, such as shellfish
Vibrio vulnificus	*V. vulnificus* infection	1-7 days	Vomiting, diarrhea, abdominal pain, bloodborne infection. Fever, bleeding within the skin, ulcers requiring surgical removal. Can be fatal to persons with liver disease or weakened immune systems	2-8 days	Undercooked or raw seafood, such as shellfish (especially oysters)

FDA For more information, contact the U.S. Food and Drug Administration, Center for Food Safety and Applied Nutrition's Food and Cosmetic Information Center at 1-888-SAFEFOOD (toll free), Monday through Friday 10 AM to 4 PM ET (except Thursdays from 12:30 PM to 1:30 PM ET and Federal holidays). Or, visit the FDA website at http://www.fda.gov/educationresourcelibrary

BEST PRACTICES FOR CLAIMS HANDLING:

Steering Clear of Bad Faith Hazards

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Best Practices for Claims Handling:
Steering Clear of Bad Faith Hazards[1]

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.

[1] This paper consists of 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., both individuals have given permission to update this paper.

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 "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 working days	15 working days	15 working days
Arizona (ARIZ. REV. STAT. § 20-461, ARIZ. ADMIN. CODE R20-6-801)	10 working days	15 working days	15 working days
Arkansas (ARK. CODE ANN. § 23-66-201; 054-00-043 Ark. Reg. § 1)	15 working days	15 working days	15 working days
California (CAL. INS. CODE § 790.03(h); CAL. CODE REGS. tit. 10, § 2695)	15 calendar days unless suit has already been filed	40 calendar days; 80 days if fraud suspected; N/A for certain policies	40 calendar 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

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
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
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; If more time is needed to investigate, must notify within 30 calendar days	30 calendar days; update every 45 calendar days thereafter until investigation is complete

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
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)			
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

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
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 time	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

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
Pennsylvania (40 PA. STAT. ANN. § 1171.5; 31 PA. CODE §§ 146.1-146.9)	10 working days	15 working days	15 working 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.)	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)	15 calendar days	15 calendar days	15 calendar days; Every 45 days thereafter until investigation is complete

[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
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
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

[3] The cited statutes and regulations have been reviewed as of February 12, 2020.

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. *See* 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 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 FOR 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; S.D.C.L. §§ 5812-35, -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. §§ 58-1236. Virginia, for example, has adopted the following penalties for violation of its Unfair and Deceptive Acts or Practices in Business of Insurance:

> A. Any person who knowingly or willfully violates any provision of this title or any regulation issued pursuant to this title shall be punished for each violation by a penalty of not more than $5,000.
> B. Any person who violates without knowledge or intent any provision of this title or any rule, regulation, or order issued pursuant to this title may be punished for each violation by a penalty of not more than $1,000. For the purpose of this subsection, a series of similar violations resulting from the same act shall be limited to a penalty in the aggregate of not more than $10,000.
> C. Any violation resulting solely from a malfunction of mechanical or electronic equipment shall not be subject to a penalty.
> D. 1. The Commission may require a person to make restitution in the amount of the direct actual financial loss:
> a. For charging a rate in excess of that provided by statute or by the rates filed with the Commission by the insurer;
> b. For charging a premium that is determined by the Commission to be unfairly discriminatory, such restitution being limited to a period of one year from the date of determination;
> c. For failing to pay amounts explicitly required by the terms of the insurance contract where no aspect of the claim is disputed by the insurer; and
> d. For improperly withholding, misappropriating, or converting any money or property received in the course of doing business.

> 2. The Commission shall have no jurisdiction to adjudicate controversies growing out of this subsection regarding restitution among insurers, insureds, agents, claimants and beneficiaries.
> E. The provisions provided under this section may be imposed in addition to or without imposing any other penalties or actions provided by law.

VA. CODE ANN. § 38.2-218 (2010). What is interesting about the Virginia penalties is that any violation resulting solely from a malfunction of mechanical or electronic equipment shall not be subject to penalty. *Id*. at (C).

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: PROPERLY 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
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

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
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

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
Kentucky (K.R.S. 304-12-230; 806 KY. ADMIN. REGS. 12:095)	15 working days	Reasonable time; If more time is needed to investigate, must notify within 30 calendar days	30 calendar days; update every 45 calendar days thereafter until investigation is complete
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

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
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
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	Reasonable time	Reasonable time
North Dakota (ND CENT. CODE. § 26.1-04-03)	Reasonable promptness	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
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
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

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
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)	15 calendar days	15 calendar days	15 calendar days; Every 45 days thereafter until investigation is complete
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, and for the most party mirrors first party claims, 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).

[4] The cited statutes and regulations have been reviewed as of February 12, 2020.

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

- v' Understand the governing law's requirements for investigating and handling claims
- v' Maintain diligent log notes
- v' Manage the massive onslaught of daily activities
- v' Accurately represent relevant facts and policy provisions
- v' Timely affirm or deny coverage
  - > Provide adequate explanations for claim denials
- v' Review of Settlement Values
- v' Update evaluations regularly
- v' Monitor cases appropriately
- v' 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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HOT TRIAL ISSUES AND EFFECTIVE DEFENSE TACTICS

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HOT TRIAL ISSUES AND EFFECTIVE DEFENSE TACTICS

I. Experts

Expect selection and retention is a critical element of many varied types of cases. Select the wrong expert, or at the wrong time and you could be looking at a nuclear verdict or, what has come to be now known as, a nuclear settlement. Similarly, retaining he right expert early on can aid not only in an actual trial, but can be critical in the investigation and discovery phase of claims and litigated cases.

a. When to Use Experts?

Experts should be used in cases where specialized knowledge is necessary to understand important evidence, prepare a defense, or rebut the opposing party's case. Experts can assist in various ways, including consulting on technical matters, reviewing case facts, formulating trial strategies, preparing for cross-examination of opposing experts, and providing testimony at trial.

b. Types of Experts

There are many different types of experts, whose specialized knowledge will be useful in different defense scenarios depending on the issues of the case. These include accident reconstructionists, medical professionals, meteorologists, vocational rehabilitation experts, financial and insurance industry specialists, and various kinds of engineers. It is common for attorneys to retain multiple experts, especially in complex matters, to address different specialized issues in a single case.

c. Disclosures and Challenges

To strategically handle expert disclosures and challenges, attorneys should prioritize compliance with the applicable jurisdiction's rule of civil procedure pertaining to disclosure of experts to ensure a fair, and smooth, trial process. The rules require a timely and complete disclosure of all experts, including detailed reports for retained experts, to permit sufficient time to challenge or depose opposing experts if desired. Additionally, an attorney may consider using a rebuttal expert to challenge an opposing expert, as this may be a more effective way to challenge an opposing expert than through cross-examination alone.

II. IMEs

While Independent Medical Examinations generally fall under the expert umbrella, they are unique in their process under the Rules of Civil Procedure and thus deserve special attention.

a. When to Use IMEs?

An Independent Medical Examination (IME) should be used when there is a need to independently verify the medical necessity of treatment, causation, or extent of injuries claimed by a plaintiff. IMEs provide an opportunity to counter a plaintiff's own medical expert as to the

true extent of the plaintiff's injuries and can lead to reduced damages if the IME determines that further medical treatment is unnecessary.

b. Tactics for Combating Unreasonable Conditions Placed on the Exam

Attorneys have several ways of combating unreasonable conditions placed on IMEs. Courts generally have discretion to determine IME conditions and attorneys can leverage this discretion to avoid unnecessary difficulty and challenge unreasonable conditions. Attorneys can specifically challenge preconditions not explicitly stated in contracts or rules governing IMEs. Further, it may also be effective to challenge unreasonable conditions through a protective order or emphasizing the statutory and procedural requirements of an IME.

III. Pre-Trial Motions

All good attorneys and claims professionals know that preparation is the key to success. Pretrial filings and motions are critical to streamlining cases, educating your judge and culling out potential tactics of opposing counsel.

a. Effective Motions in Limine – Beyond the Basic

An effective Motion in Limine will be clear and concise and will also ideally be tailored to the individual judge who will be ruling on it. Generally, it is beneficial to avoid broad language and make specific and precise requests. However, it is also wise for an attorney to research the specific judge's prior rulings to ascertain the judge's preferences, and tailor the motion accordingly.

b. Other Types of Pre-Trial Motions

Pre-trial motions are some of the most useful tools for an attorney to reach a quick, efficient resolution to a matter. Specifically, Motions to Dismiss and Motions for Summary Judgment are often a worthwhile endeavor, even with less than ideal evidence and facts, as they promote an extremely quick means of resolving a case if they are granted. Even if they are not granted however, they may still be useful as a way to evaluate the strength of the opposing attorney's arguments and positions. Motions to suppress and motions to compel discovery are also useful when handling challenges that arise during the discovery period.

c. Presentation and Timing

The presentation and timing of pre-trial motions must be strategically evaluated so that the motion can have the optimal effect. For motions that may impact pre-trial disclosures, exhibit lists, and deposition designations, it may be best to present them earlier rather than closer to trial. For motions dealing with trial procedure, jury instructions, and verdict forms, it will be more effective to present these close to the trial date, often in line with the court's scheduling orders. Further, it may be useful to research the judge's preferences and past rulings to gain an understanding of how and when pre-trial motions should be presented for maximum impact.

IV. Focus Groups and Mock Trials

While it can be expensive and time consuming to conduct focus groups and mock trials, elements learned from these processes can be invaluable and aid in avoiding the dreaded nuclear verdict. Revealing the results from these endeavors during settlement discussions has also become more of the "norm" in large loss claims in an effort to either downplay or increase settlement perspectives.

a. When to Use Focus Groups and Mock Trials?

Focus groups should be used earlier in the pre-trial timeline to allow for adjustments to discovery and trial preparation. Mock trials on the other hand should be held closer to trial but still allow enough time for the attorney to refine their strategy and address any unfavorable findings, amend any pleadings, or employ new experts.

b. Key Takeaways

After a focus group, an attorney should be able to identify persuasive evidence, harmful issues, and effective case theories that jurors will find compelling at trial. After a mock trial, an attorney should be able to know what presentation styles are most likely to persuade jurors at trial and have some insight into how the jurors who will decide the case feel about the important issues and how they respond to the attorney's arguments.

V. Jury Consultants

a. Ideal Jury Profile

Jury consultants are frequently used by attorneys to create an ideal juror profile. This profile often includes demographic information such as age, gender, employment status, ethnicity, education level, and occupation, and can help determine what demographics are often found in the jurors most sympathetic to the attorney's arguments and positions.

b. Voir Dire

Jury consultants also assist in the voir dire process by using high-risk juror profiles to determine what jurors should be struck with or without cause. Based on the demographic information in the profiles and other answers to screening questionnaires, jury consultants help determine what potential jurors would be least receptive to the attorney's positions and arguments and ensure that those who would be the most challenging to win over can be removed from the finalized jury.

VI. Trial

Trial can be risky. Knowing how to handle and respond to the new tactics—and even some longstanding ones—of the Plaintiffs' bar is imperative in successfully trying cases. Below are some issues to consider and strategies to implement.

a. Negative Facts

An effective defense attorney will minimize any negative or harmful facts without outright ignoring them. It is important to both decrease the impact of the negative fact while also maintaining credibility in the eyes to the jury. This can be achieved through proactive disclosure of the fact as a part of the defenses affirmative case, which may reduce the shock value and take control of the narrative surrounding the fact. However, in certain circumstances this strategy can backfire and put more emphasis on the fact than if the defense had not discussed it at all. Either way, the decision of how to handle a negative fact at trial must be made carefully and strategically to minimize the facts impact on the defense's case.

b. Reptile Theory

Reptile theory is a concept frequently employed by plaintiff's attorneys where they attempt to appeal to jurors knee-jerk, instinctual reactions to get larger, less reasonable verdicts. This is usually accomplished by emphasizing safety and security concerns to evoke a feeling of danger and a need for protection.

i. Pre-Trial Motions

One of the most effective means of combating reptile theory arguments are pre-trial motions, specifically motions in limine. An effective defense attorney will use motions in limine to argue that use of reptile theory tactics improperly appeals to jurors' emotions and self-interest, rather than focusing on the evidence and applicable legal standards.

ii. Prepared Witnesses

Additionally, another effective strategy for defense attorneys to combat reptile theory is to thoroughly prepare witnesses to handle reptile theory-based arguments and questions during depositions and at trial. Witnesses should be trained to recognize and respond appropriately to questions attempting to establish broad, nonspecific safety rules on the specific facts of the case and avoid agreeing to generalized safety principles.

c. Admitting Liability Versus Taking Responsibility

The strategic decision of whether to admit liability or take responsibility is an important one for a defense attorney to decide. Admitting liability can be a tactical decision to focus the jury's attention on minimizing damages rather than debating fault, especially when the evidence strongly supports the plaintiff's claims. Taking responsibility on the other hand can be done in many ways short of admitting full liability and leaves a defense attorney with more room to argue over whether the client should be legally 'on the hook' for the plaintiff's alleged injuries. Taking some amount of responsibility for an occurrence without admitting full liability can be useful to garner some goodwill amongst the jurors, as they may see this as the defendant being held accountable in some meaningful respect without causing them to award huge, unreasonable damages.

d. Pre-Trial Stipulations

Pre-trial stipulations offer several advantages that can streamline the trial process and potentially secure favorable outcomes. Pre-trial stipulations can narrow the issues and simplify arguments made at trial. These stipulations are also binding on both the parties and the court, so they can neatly button up certain issues, so they do not need to be decided during an already complicated trial process. Further, defense attorneys may also use stipulations to avoid having certain negative information introduced at trial and can offer greater security and control of the factual narrative.

e. Damages

Damages are a common sticking-point at trial, however they present a great opportunity for civil defense attorneys to limit their clients' exposure and costs, even if they receive an adverse verdict.

i. What Damages Should be Contested?

At trial, defense attorneys may contest the calculation, causation, or reasonableness of damages, particularly when they are subjective and lack clear evidence. This is especially important to consider when damages are non-economic in nature, such as pain and suffering or emotional distress, which are especially prone to exaggeration by plaintiffs. Claims of special or consequential damages may also be effectively countered by defense attorneys if the causal link between the conduct and the damages is suspect or insufficient.

ii. Anchoring

Defense attorneys that effectively counter a plaintiffs' attorney's anchoring techniques may reduce damage awards to a more palatable total. Anchoring is a practice frequently employed by plaintiffs' attorneys whereby the attorney presents a large dollar amount as a specific reference point, often a high number, to influence jurors' decision-making regarding damages.

1. Should the defense introduce a number?

To counter anchoring, an effective defense attorney will introduce a number, even while also contesting underlying liability for the damages. This will interrupt the plaintiffs' attorney's attempt to 'set' the anchor amount at an exceedingly large dollar amount without losing credibility with the jury.

2. When should the defense's number be introduced?

Ideally, the defense's number will be introduced early, around the same time that the plaintiffs' attorney attempts to present the anchor amount. Again, the purpose of this is to distract and interrupt the anchor setting by not allowing the jury to become fixated on the plaintiff's number alone.

3. What makes a defense's number fair and reasonable?

A defense's number is fair and reasonable if it is supported by the underlying facts of the case. Often, the anchor number presented by the plaintiffs' attorney is unduly large and not supported by the actual damages suffered by the plaintiff. This is where the defense's offer can shine, because it can offer jurors much-needed direction when determining damages. By offering a clear and logical framework, and breaking down the specific components of damages, for the jurors to calculate damages, an effective defense attorney can guide the jury to a reasonable damage award.

4. Make it a range?

Another excellent strategy for defense attorneys to reduce damage awards is to present a range of acceptable damages to the jury and allow them to select within the range. This both provides the guidance and reassurance often desired by jurors, while also allowing the jurors to make their own decision. If the jurors feel pushed by the defense to a certain number in particular, and that they do not actually have a say, the defense may lose credibility, and the jurors may award a larger, less reasonable amount. The best strategy is a balance between jury independence and guidance from the defense.

f. Handling Difficult Plaintiff's Lawyers

Difficult plaintiffs' attorneys have the potential to turn a simple, straightforward case into a circus. However, it is important to have reliable strategies to respectfully and professionally handle conflict-prone and challenging opposition.

i. Anger and Jury Manipulation

Generally, it is best for a defense attorney to avoid becoming angry with the opposing counsel, because it may serve to prejudice the jury against the client. Many potential jurors enter the courthouse for jury selection with pre-conceived notions about defense attorneys, and these are not remedied when a defense attorney becomes visibly angry at trial. Keeping a cool head and maintaining professional decorum will show jurors that the defense attorney, and by extension the defendant, is reasonable and calm, and may not be liable for what the plaintiff claims. This positive impact is amplified if the defense attorney is calm while the plaintiffs' attorney becomes angry in the alternative.

ii. Pick Your Battles

Additionally, not all battles are worth fighting with a difficult opposing counsel. Petty disputes and disrespect are never warranted or excusable, but when dealing with a plaintiffs' attorney who lacks this understanding, it can sometimes be in the client's best interest to let it slide and pick battles strategically. It may not be worth the effort to bring a motion for sanctions each time a rule is broken by plaintiff's counsel, purposeful or otherwise, especially if the effect on the case is negligible. Not to mention the increased expense to the client for all the added work by the

defense attorney. Generally, it is beneficial for a defense attorney to pick and choose battles with difficult plaintiffs' attorneys strategically, keeping their clients' best interest front of mind.

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