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Presents

GAINING NEW PERSPECTIVES FROM A MILE HIGH VIEW

October 11, 2022

Hotel Clio
Denver, Colorado

EAGLE INTERNATIONAL ASSOCIATES

MISSION STATEMENT

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

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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.

GAINING NEW PERSPECTIVES FROM A MILE HIGH VIEW

PROGRAM

11:45 am **Registration/Sign-In**

12:15 pm **Welcoming Remarks**
Alison M. Crane, Esq., Bledsoe Diestel Treppa & Crane LLP, Eagle Chair

Program Introduction
Tiffaney A. Norton, Esq., SGR, LLC, Program Chair

12:30 pm **Effective Investigation and Reconstruction Analysis in Commercial Trucking Accidents**
Moderator:
Art Kutzer, Esq., SGR, LLC
Panel:
Daniel J. Ripper, Esq., Luther-Anderson PLLP
Dana E. Thornton, M.S., Senior Engineer II, J.S. Held LLC
Michael Woodson, Esq., Edmonds Cole Law Firm

1:30 pm **How We Think Wrong: Bias and Ethics Related to Evaluating Cases**
Co-Moderators:
Megan Cook, Esq., Bullivant Houser Bailey
Mitchell A. Orpett, Esq., Tribler Orpett & Meyer, PC
Panel:
Steven Anderson, Senior Staff Attorney/Western Region, American Family Insurance
Amanda Byrd, Owl.co

2:30 pm **BREAK**

2:50 pm **Avoiding Bad Faith—And How to Defend When Something Goes Wrong**
Moderator:
Billy-George Hertzke, Esq., SGR, LLC
Panel:
Stephen J. Fields, Esq., Brinker & Doyen
Jeremy D. Hawk, Esq., Taylor Wellons Politz Duhe
James Peterson MBA, CPCU, Complex Claims Adjuster-Auto, American Family Insurance Claims Services
Jessica Schultz, Esq., SGR, LLC

3:50 pm **The Blame Game: Liability for the Criminal Acts of Another**
Co-Moderators:
Gene Backus, Esq., Backus / Burden
Tiffaney A. Norton, Esq., SGR, LLC
Panel:
Julie Richards, VP of Legal Services, HSS
Vickie Story, Litigation Specialist, Allianz Global Corporate & Specialty Insurance

4:50 pm **Closing Remarks**

5:00 pm **Cocktail Reception**

6:00 pm **Dinner**

GAINING NEW PERSPECTIVES FROM A MILE HIGH VIEW

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Steven Anderson is the Supervisory Senior Staff Attorney for American Family Mutual Insurance Company. Steven works with Claims and outside counsel to provide American Family with risk assessment, risk management and resolution strategy for responding to high-exposure litigation. Steven is licensed to practice law in Texas, Wyoming and Colorado. Prior to joining American Family in 2015, Steven was in private practice with a focus on insurance defense, including professional liability, directors and officers' liability, insurance coverage, commercial property damage and bad faith. He has defended insurers and their insureds in civil litigation in state and federal courts through trial and appeal.

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Leland Eugene (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. He is the founding shareholder of Backus, Carranza & Burden whose law office is located in Las Vegas, Nevada.

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Amanda Byrd spent 20 years in distribution leadership at large disability carriers before moving recently into the insurtech space. She likes insurance and loves people, yoga, travel and spending time in nature. She holds a Master's degree in Adult Learning & Organizational Change from Northwestern University and is a certified executive coach. To keep life interesting, she is also now pursuing a Master's in Divinity degree.

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Megan Cook's Oregon and Washington litigation practice focuses on defending personal and catastrophic injury claims in state and federal court. She has defended a wide variety of businesses and individuals in personal injury, construction defect, product liability and professional liability cases. In addition, she has experience in environmental, insurance, business, real estate, and land use law. She enjoys working with each client to develop a defense strategy that reflects their individual needs and goals and move a matter toward resolution as efficiently as possible.

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

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Stephen J. Fields is a partner in the law firm of Brinker & Doyen, L.L.P. He is a graduate of the University of Illinois at Champaign-Urbana and The John Marshall Law School. He is licensed to practice law in Missouri and Illinois. He practices in the areas of personal injury defense, professional liability, restaurant liability, medical malpractice, products liability, securities liability and insurance fraud. He has tried cases in Missouri and Illinois. He has completed several arbitrations in various matters. He has provided numerous presentations to clients and industry professionals on a variety of topics. He is a member of the Missouri Bar Association, the Illinois State Bar Association, the Bar Association of Metropolitan St. Louis, Defense Research Institute, Claims Litigation Management (board member), The Risk and Insurance Management Society, Inc., Eagle International Associates (board member) and the Missouri Organization of Defense Lawyers (board member). When Steve is not working, he enjoys spending time with his wife and two boys riding bikes, hiking, and golfing.

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Jeremy D. Hawk is a partner with the Mississippi office of Taylor, Wellons, Politz & Duhe, APLC. There are over 50 attorneys practicing with his firm in Mississippi and Louisiana.

Following law school, Jeremy was a partner at a regional law firm gaining 16 years of experience in Mississippi practice.

Jeremy is a trial attorney who handles a variety of legal matters in both state and federal courts throughout Mississippi. Jeremy is a AV Preeminent Rated and a Silver Client Champion with Martindale Hubbell and Lawyers.com.

Jeremy's practice focuses on the defense of general personal injury matters for individuals, companies and insurance carriers. Jeremy's practice also includes the defense of motor vehicle accidents, premises liability, professional liability and E&0 claims, insurance coverage disputes, bad faith litigation, trucking defense, employment and labor defense and other general insurance defense matters.

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Billy-George Hertzke is a partner at SGR, LLC. His practice focuses on the defense of premises liability, auto accident, uninsured/underinsured, and bad faith claims. He is a member of the American Board of Trial Advocates (ABOTA) and is the Professionalism & Education Director for the Colorado Defense Lawyers Association. When not practicing law, he lives with his husband and two English Mastiffs near Steamboat Springs, Colorado.

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Art Kutzer is the managing partner of SGR, LLC and has been with the firm since 1987. Mr. Kutzer has been awarded the AV Preeminent rating by Martindale Hubbell, its highest level, has been repeatedly named a Super Lawyer, named to Best Lawyers in America and a Top Rated Lawyer in Personal Injury by American Lawyer. He has handled thousands of lawsuits involving most types of civil claims and advises clients how to avoid litigation. Mr. Kutzer's recent focus of practice has been in the areas of personal injury, fleet vehicle accidents, insurance coverage disputes and bad faith. He has handled numerous cases in these areas at every level of both the Colorado State and Federal courts (including the U.S. Supreme Court). He regularly provides training seminars for attorneys, insurance companies and their adjusters regarding handling Colorado claims, and has acted as an arbiter and expert witness. He has lectured to the Colorado Claims Association, Colorado Bar Association and for Continuing Legal Education programs for lawyers and paralegals. Art earned a B.S., Accounting from Colorado State University and a J.D. from the University of Denver.

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Tiffaney A. Norton is a partner and co-owner at SGR, LLC, Ms. Norton joined the firm in 1997 after serving as a judicial law clerk to the Honorable Harlan Bockman, Chief Judge of the Seventeenth Judicial District. She attended the University of Denver law school, receiving a J.D. in 1996. She has successfully tried a number of civil jury trials and has published appellate cases. Ms. Norton's practice focuses on defense of civil cases with an emphasis on professional liability, serious and catastrophic injury cases, complex and multi-party cases related to auto, tucking, products and premises liability. She is a lecturer on topics of interest to both her clients and attorneys at the firm including continuing legal education presentations on discovery, case evaluation, medical information, voir dire, claimed brain injuries and care facility claims. Ms. Norton has attained an AV Preeminent Rating with Martindale Hubbell. She has been named a Colorado *Super Lawyer* since 2017, a *5280* Top Lawyer in Civil Litigation Defense since 2018 and a *Best Lawyer in America* since 2019. Ms. Norton belongs to several professional organizations including the Defense Research Institute (DRI), Colorado Defense Lawyers Association (CLDA), Council on Litigation Management (CLM), Faculty of Federal Advocates (FFA) and the Colorado and Denver Bar Associations. She has served as a trial mentor for the CDLA.

SGR, LLC is a full-service defense litigation firm established in 1974. The firm has defense clients ranging from insurance carriers, third party claims administrators, public entities and private companies. In addition to civil defense, the firm also provides workers compensation defense, construction defect defense, employment defense and administrative practice representation.

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

Mitch has devoted more than 40 years of service to the profession, holding numerous leadership positions in the American Bar Association, among others. He was elected to the ABA's Board of Governors and served for many years on its policy-making body, the House of Delegates. He was the chair of the ABA's Section Officers Conference, in which capacity he represented the approximately 240,000 members of the sections and divisions of the American Bar Association. Previously, he was chair of the ABA's 30,000 member Tort Trial and Insurance Practice Section and of the ABA's Standing Committee on Continuing Education of the

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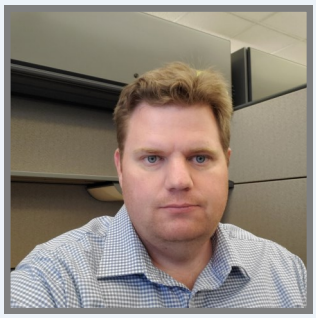

Jim Peterson has more than 15 years of experience handling claims in the Western states for American Family. Jim has specialized in first-party injury claims, particularly Colorado losses with bad faith allegations and corporate discovery requests.

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Vickie Lynn Story is a litigation specialist for Allianz Global Corporate and Specialty Insurance Company. 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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With 13 years of experience in forensic engineering, Dana has investigated and reconstructed accidents involving bicycles, motorcycles, passenger cars, buses and commercial vehicles including articulated truck and trailer combinations. Dana has focused on product liability regarding rollover crashes that were preceded by tire disablements, occupant protection, fuel-fed fires, and other crashworthiness claims including component specific issues such as seat back yielding/failure. He has also worked with premises liability and negligence cases, many of which incorporate his training in Human Factors, covering topics such as nighttime visibility and perception response time. Dana has conducted testing and analysis of motorcycle dynamics, motorcycle acoustics and passenger vehicle dynamics relating to tire tread separation. He has a passion for teaching and is available to provide a Continuing Legal Education presentation on any of the topics involved in Accident Reconstruction.

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Michael Woodson is the managing partner of Edmonds Cole Law Firm with offices in Oklahoma City and Tulsa. Mike has successfully represented various insurance companies, manufacturers, business organizations, and individuals addressing a wide variety of insurance disputes, coverage disputes, multi-district litigation, and class action litigation. In addition, he lectures on various topics in the fields of insurance, products liability, and electronic discovery issues. Mike earned his B.S. from Northwestern Oklahoma State University in 1991, and his J.D. from the University of Oklahoma, J.D. in 1994.

Beating Back Bias in Insurance Claims Before it Beats on You:

A Discussion of Implicit Bias in the Settlement of Claims and the Dangers Faced if Unresolved

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Beating Back Bias in Insurance Claims Before it Beats on You: A Discussion of Implicit Bias in the Settlement of Claims and the Dangers Faced if Unresolved

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Although it may seem as though notions of "implicit bias" have come to our collective consciousness only in the last several months, scholars, social scientists and human behaviorists have, in fact, been grappling with this challenging issue for decades. Even the United States Supreme Court has noted the existence and potentially significant role of implicit bias in society and matters of law. As Justice Kennedy wrote for the majority in 2015:

> Recognition of disparate impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping. (*Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc.,* 576 U.S. __, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015).

Likewise, during that same year, President Obama, in eulogizing the victims of the Mother Emmanuel shooting in Charleston, South Carolina, stated:

> Maybe we now realize the way racial bias can infect us even when we don't realize it, so that we're guarding against not just racial slurs, but we're also guarding against the subtle impulse to call Johnny back for a job interview but not Jamal.

But, one might well note, this is a legal and insurance claims conference. Why should we care or pay attention? What does implicit bias have to do with my job and what I do? Just what is it that you're accusing me of? The answer is that there are no accusations and no judgment. Unchecked implicit bias may, however, already be costing insurance companies and corporations significant legal and defense dollars. It may even pose a threat to regulatory scrutiny and open insurers up to claims of bad faith. Especially as society and

the business world move to more overtly embracing diversity and the value of all individuals and all lives, claim professionals and defense lawyers who fail to do so may find themselves misjudging their claims, misjudging their juries and engaging in patterns of practice that open the door to allegations of discriminatory and unreasonable conduct.

One headline from the insurance world trumpets: "GEICO pays $6mn to settle insurance bias charges."[1] As the result of an investigation by the California Department of Insurance, GEICO, in 2016, settled claims that it improperly and in violation of California law discriminated based on gender, educational attainment and occupation when quoting auto insurance rates online. Under the settlement, GEICO agreed to no longer consider education and occupation when determining coverage limits for people who otherwise qualify as "good drivers." According to the article, the use of underwriting factors like gender, marital status, occupation and credit score has been under fire in the wake of a report released by the Consumer Federation of America. The report detailed the proliferation of the use of non-driving rating factors by insurers, including rate increases as much as 115% for those with poor credit scores. Other work by the CFA revealed that GEICO would charge 19% more for a bank teller with a high school degree than for a bank executive with a college degree, and 41% more for a high school graduate in retail than the same bank executive.

Clearly, there are differences between implicit bias and the presumably deliberate adoption of underwriting criteria with a discriminatory impact. Nevertheless, it would not seem too great a stretch to imagine similar theories and arguments being applied to the claims departments of insurance companies and not just to underwriters, especially as the body of available research grows and increasingly supports the notion that implicit bias impacts claims resolution, trials and the valuation of minorities' damages. It is also not too big a leap to envision a civil complaint seeking recovery of damages for such alleged practices, based not only on a company's consideration of an individual claim but also on how claims in general are handled and how they may reflect an implicit bias.

What is Implicit Bias?

According to the Kirwan Institute for the Study of Race and Ethnicity,[2] implicit bias refers to "the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner." Implicit biases involve both favorable and unfavorable perceptions and can be triggered involuntarily, without an individual's awareness or deliberate control. Importantly and in contrast to overt bias, unconscious biases are not revealed through introspection and often exist without the individual even recognizing them. Research on

[1] https://www.insurancebusinessmag.com/us/news/breaking-news/geico-pays-6mn-to-settle-insurance-bias-charges-24134.aspx.
[2] http://kirwaninstitute.osu.edu/implicit-bias-training/resources/2016-implicit-bias-review.pdf.

unconscious bias suggests, for example, that race influences cognitive judgments and decision making without any material awareness.[3]

As the name suggests, implicit bias operates at the subconscious level, making it difficult (but not impossible) to avoid or neutralize. Hence, there should be no surprise that we all are affected by implicit bias. As one judge coming to grips with his own unconscious bias after having taken the Implicit Association Test from Project Implicit[4] observed:

> My own introduction to implicit bias was deeply unnerving. . .I knew nothing about the IAT, but as a former civil rights lawyer and seasoned federal district court judge—one with a lifelong commitment to egalitarian and anti-discrimination values—I was eager to take the test. I knew I would "pass" with flying colors. I didn't. Strongly sensing that my test performance must be due to the quackery of this obviously invalid test, I set out to learn as much as I could about both the IAT and what it purported to measure: implicit bias. After much research, I ultimately realized that the problem of implicit bias is a little recognized and even less addressed flaw in our legal system, particularly in our jury system. I have discovered that we unconsciously act on implicit biases even though we abhor them when they come to our attention.[5]

Nevertheless, in order to avoid unfairness and exposure to the types of potential claims identified above, companies and lawyers would be well advised to take steps to ensure that their evaluation of claims and their settlement decisions must somehow be free of bias and discriminatory impact. Harvard's well-known and well-regarded Project Implicit is a helpful resource for explaining and understanding implicit bias, and the Implicit Association Tests (IAT) (available free online) are helpful at uncovering the test-taker's hidden biases involving race, gender, disability, age, and other characteristics, through word-picture association. What we learn may surprise us but, by becoming aware, we can all take better care that our conduct does not reflect what we now know may indeed be unknowingly impacting the judgments we reach and the decisions we make.

Implicit Bias and Claims Evaluation

Insurance claims professionals and defense lawyers evaluate claims and make recommendations as to amounts of settlement and expected jury verdicts on a daily basis.

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[3] For a thorough discussion and a mixed set of conclusions in answer to the question posed, *see* "Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases," 93 SOUTHERN CALIFORNIA L.REV. 507 (2020).

[4] *Supra*, n. 11.

[5] Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions,* 4 HARVARD LAW & POLICY REVIEW 149, 149-50 (2010).

Are, as suggested here, implicit biases impacting those evaluations and recommendations? If so, how?

One litigator related her experience with implicit bias and the manner in which it played out in evaluating the case:

> Several years ago, I had a case where I was asked to provide a settlement analysis for my client, which was a large third-party administrator. I went through the standard process of evaluating the case and considered the age of the plaintiff and her life expectancy, as well as the extent of her injury, the permanency of that injury, the cost of her medical treatment, what future treatment she would need, her ability to work, her loss of earnings and her level of pain and suffering. My settlement recommendation was neither high, nor low, from my perspective. However, the client dismissed my analysis immediately. What was interesting was that the dismissal was done using terms that could be classified as "buzz phrases," such as "people like her don't need that kind of money" and "she's just not a quality human being. I don't want her to get a large settlement. Let's make her sweat it out." What was the plaintiff like? Where did she live? What made her not a quality human being? I'm not sure of all of the answers to these questions, but she was a middle-aged African-American woman who lived in a working class neighborhood that was primarily African-American and Latino. She had an Associate's degree and had been working for a number of years when she sustained her injury. There was nothing to outwardly suggest that she was not "a quality human being." The claims adjuster refused to settle the case, and it dragged on for another year.
>
> The result of the failure to settle this case early was that by the time it did settle, my client paid $50,000 more than the original settlement recommendation. This case has always resonated with me because it is emblematic of the many reasons why diversity and inclusion should be important to the insurance industry. Was the adjuster in this case a racist? Probably not. Did his unconscious biases about African-Americans impact the value that he placed on the case? Probably.[6]

It is easy to understand that our case evaluations are based on a number of assumptions about the circumstances surrounding the claim, among the most significant of those being about the claimant himself or herself. To the extent that those evaluations may differ solely because of gender, race, sexual orientation, nationality or the like and to the extent that those differences are not backed by evidence supporting the different values associated with them, we have most likely landed on implicit bias. If implicit bias is similarly impacting

[6] https://marshalldennehey.com/sites/default/files/pdf-articles/O%20416%20by%20N.%20Ingram%20%2805.06.16%29%20DRI%20Diversity%20Insider.pdf

the judge and jury that hears the case, the disparate evaluations and case value projections may indeed be legitimate. Who, however, can understand the implicit biases of the judge and jury, especially when those same biases are not recognized in ourselves? Moreover, how many case evaluations identify those biases and consider or discuss their impact on the case. What is the likely result, for example, if the biases of the jury are different than those of the evaluating lawyer or claims professional ?

The author relating her experience goes on to conclude that it might be more helpful and effective to emphasize the fact that "the case could have settled more quickly and more cheaply had the adjuster been able to recognize and appreciate the value of a non-white life. . . All cases need to be evaluated as accurately as possible. This starts with the first-line adjuster. These adjusters need to recognize and overcome any inherent biases they have. As a case proceeds into the litigation process, it is incumbent upon defense counsel to do the same. The recognition that unconscious biases may play into analysis will not only help improve accuracies in setting reserves and settlements."[7]

It will come as no great surprise that implicit bias is perhaps most influential in the evaluation and award of pain and suffering. One author studying this phenomenon has argued that the severity of a plaintiff's injury, while commonly considered to be the best indicator for measuring pain and suffering, is also the "loophole through which racial bias infiltrates the calculation of these damages."[8] This is said to happen at two levels: first, when health care providers underestimate the severity or seriousness of Black patients' injuries; and, second, when juror or claims professionals and attorneys attempting to put a value on claims for those injuries, rely on the opinions of those health providers. The implicit biases of the jurors, claims professionals and attorneys, when consistent with those of the health care providers, further exacerbate the impact of implicit racial bias and serve to potentially further devalue claims.

Claims, whether or not litigated, are rife with similar opportunities for implicit biases to play an oversized and unrecognized role. We lawyers are typically asked how a given witness will present to the jury? How will the judge and jury like the plaintiff or the plaintiff's attorney? What is the value of a facial scar? Is it different if it's suffered by a 30-year-old male construction worker as opposed to a 30-year-old female cashier (or construction worker)? Is an injury suffered by Johnny worth more than the same injury suffered by Jamal? How do our evaluations and our settlement authorizations answer those questions? One author notes that racial bias plays a key role in settlement discussions, perhaps by

[7] *Id.*
[8] Maytal Gilboa, *The Color of Pain: Racial Bias in Pain and Suffering Damages*, BAR ILAN UNIVERSITY FACULTY OF LAW RESEARCH PAPER NO. 21-15 (2021).

impacting the opposition's view of the legitimacy of the injured party's claims and the perceived likelihood of success were the case tried in court.[9]

The significance of these potential biases plays out at trial as well as in how we value the claim in before the case ever gets to the jury. One study of the impact of race and gender in tort law concludes rather unequivocally that our unconscious cognitive biases infuse our legal reasoning in tor cases. The authors also claim that our entire system for measuring human suffering and damages tends to devalue the injuries of women and minorities.[10]

How Can Implicit Bias Be Eliminated or Reduced?

Reduction of implicit bias may be as easy as (and certainly begins with) the individual being made aware of and coming to grips with his or her own subconscious biases. It certainly appears that awareness of unconscious bias helps limit its effect on one's decision-making. One 2007 study, involving the NBA, for example, looked at games from 1991 through 2004 and showed that referees called more fouls against players that were of a different race than the referee.[11] The release of the study results triggered extensive media coverage and criticism of the NBA. Following the extensive media coverage, the researchers repeated the study and found no significant disparity in the number of fouls called based upon race. While clearly too small a sampling to draw overly broad conclusions, the study certainly suggests that self-awareness of bias may be an effective antibody to implicit bias. As Justice Sotomayor has noted in a 2014 dissenting opinion:

> The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.[12]

A group called the Intellectual Property Owners Association identified certain strategies available to increase our awareness of our own implicit biases:

> Implicit Association Test (IAT). [T]hese tests, from Project Implicit and sponsored by Harvard University, seek to measure implicit attitudes by measuring the strength of associations between concepts (e.g., gender, race, age, sexual orientation, religion, weight, mental health) and evaluations (e.g., good, bad) or stereotypes (e.g., nurturing, athletic). Scoring is based upon how quickly or slowly concepts are

[9] *See* Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L.REV. 761 (1996).
[10] Martha Chamallas & Jennifer B. Wriggins, THE MEASURE OF INJURY: RACE, GENDER AND TORT LAW 21 (2010).
[11] Devin G. Pope et al., Awareness Reduces Racial Bias, ECONOMIC STUDIES AT BROOKINGS, ES WORKING PAPER SERIES (Feb. 2014), www.brookings.edu/~/media/research/files/papers/2014/02/awareness-reduces-racialbias/awareness_reduces_racial_bias_wolfers.pdf.
[12] *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (Sotomayor, J., dissenting)

> associated with evaluations or stereotypes.[13] For example, if a person on average more quickly sorts the concept/stereotype of women being in the home than the concept/stereotype of women being leaders in the workplace, then that person]would be said to have an implicit preference for women in the home. [citation omitted] Because these tests measure unconscious attitudes, the results can be surprising and uncomfortable.173 However, they assist in awareness of personal implicit biases. [citation omitted]
>
> ▪ Learn from surprises. Someone behaving in a way that surprises you can present an opportunity for examining your implicit biases. [citation omitted] For example, have you ever worked with someone for a period via email or phone and then been surprised upon meeting them to learn that their appearance (gender, race, etc.) was different from what you had imagined? Examining why you were surprised and what that says about your unconscious biases will help you become aware of those biases and how they may be influencing your decisions.[14]

The authors of that white paper do, however, also conclude that there are constructive steps to be taken beyond mere awareness. In particular, they recommend a series of straightforward behavioral changes that they believe will effectively stand as barriers so as "interrupt" or help prevent implicit bias from impacting decisions and behavior:

> • Find motivation. Motivation to reduce implicit bias aids a person's ability to do so. [citation omitted]
>
> ▪ Be self-observant and self-critical. Pay attention to your thinking and your decision making. Be comfortable doubting your objectivity and critically examining the reasons for your decisions. Catch yourself applying stereotypes and actively redirect your thinking.
>
> ▪ Remind yourself of your own unconscious biases. People who believe that they are unbiased or color/gender/status blind are more biased than people who acknowledge the existence of their bias. [citation omitted] Several studies demonstrate this. For example, in one study, participants were taught about either multiculturalism or "color blindness" and then given a black/white IAT.[citation omitted] Those participants who had been taught about multiculturalism showed less implicit bias than those taught about color blindness.

[13] PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/iatdetails.html.
[14] https://ipo.org/wp-content/uploads/2017/11/Implicit-Bias-White-Paper-2.pdf

> [citation omitted] Acknowledge differences and seek them out to improve your decision-making. [citation omitted]
>
> ▪ Make yourself uncomfortable. Seek out situations and relationships that require you to spend time with people who are different from you. Doing so will give you an opportunity to learn and grow. In fact, the more uncomfortable you are, the more you will learn. [citation omitted] Consider joining groups in which you are the minority. Be the male ally in a female group.
>
> ▪ Expose yourself to counter-stereotypical situations. If you have a bias toward thinking of leaders as men, read about successful female leaders.

Danger Ahead? A Glimpse Into the Future

If I were in the business of managing an insurance company's risk or predicting an emerging type of claim, I would take a very close look at the question of how implicit bias impacts the settlement of claims. The decisions made by claims professionals and the factors relied upon in making those decisions can be cast in a suspect light, especially in an age of social concern with discrimination and bias. This can even be true only because of disparate impacts caused not by the insurance company or claims professional themselves but by what evidence is allowed or how the jury is instructed.

For example, when an economist projects the future income of a minority child, what factors are considered? Is that income predicted to be less because there exists evidence demonstrating that minorities earn less money than whites? One author argues against that kind of evidence:

> We should not replicate the discriminatory patterns of the past by projecting them into the future. Indeed, for many other identities (notably, religion), no economist, court or jury would reason that because certain religious groups have higher incomes than others, we should take a plaintiff's religion into account when calculating damages.[15]

What about the likelihood of seeking and obtaining medical treatment? May (or should) one consider that African-Americans typically receive less medical care in the United States than whites in similar circumstances?

The questions surrounding implicit bias and its impact in the claims industry are far more numerous than the answers. The future is unclear. However, where "doing the right thing"

[15] https://www.enjuris.com/blog/news/race-gender-injury-settlement/

increasingly means trying to make our institutions more egalitarian in their work and in their treatment of all people, failing to take steps to reduce potential implicit bias may be viewed as discriminatory and perhaps in bad faith. Lawyers who fail to take their own implicit biases into consideration in their work may be doing a disservice to their clients and may be making themselves less effective as litigators and trial counsel.

By suggesting that there are economic reasons to come to understand and eradicate implicit bias in the performance of legal and claims work, I do not wish to suggest that these are somehow more important or should be more compelling than the multitude of ethical, professional and moral reasons for doing so. To the contrary, by becoming aware of our implicit biases, taking the time to understand how and when they play a role in our work and in our lives and by making behavioral changes to eliminate or reduce them, we can all do our part in making our world – as well as our company or law firm – a better and more just place for everyone.

~ Mitchell A Orpett
May 10, 2022

DON'T BE THE ONE TO PAY THE PRICE:

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Updated

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

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

I. INTRODUCTION

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

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

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

[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 Perry W. Oxley, Esq. of the law firm Oxley Rich Sammons 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. §§ 58-12-35, -36 (2014). In addition to the issuance of an order for the carrier to cease and desist from engaging in conduct that violates the unfair claims act, states have set forth varying penalties beyond those specified in the Model Act (e.g. revocation of license or imposition of fines). *See e.g.* CAL. INS. CODE § 790.035(a), §790.08; S.D.C.L. §§ 58-12-36. 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:

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

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

Recently, Nevada Supreme Court considered whether an insurer could be liable for damages in excess of the policy limit plus defense costs when the carrier has not

acted in bad faith. The court answered affirmatively that the insurer may be liable for any consequential damages caused by the breach of the insurance contract for failing to defend its insured. *Century Surety Co. v. Andrew*, 432 P.3d 180, 182 (Nev. 2018).

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

Jurisdictions are split as to whether or not an insured can recover in excess of the policy limits when an insurer fails to defend absent bad faith. The majority view limits the liability of the insurer to the amount of the policy plus attorneys' fees and costs when the carrier fails to provide a defense and there is no opportunity to compromise the claim. *See e.g. Afcan v. Mutual Fire, Marine and Inland Ins. Co*., 595 P.2d 638, 647 (Alaska 1979); *Alabama Farm Bureau Mut. Cas. Ins. Co., Inc. v. Moore*, 349 So.2d 1113 (Ala.

1977*); Allen v. Bryers*, 512 S.W.3d 17, 38-39 (Mo. 2016); *Comunale v. Traders & Gen. Ins. Co.,* 328 P.2d 198, 201 (Ca. 1958); *Emp'rs Nat'l Ins. Corp. v. Zurich Am. Ins. Co. of Ill.,* 792 F.2d 517, 520 (5th Cir. (Texas) 1986); *George R. Winchell, Inc. v. Norris,* 633 P.2d 1174, 1177 (Kan. App. 1981); *Hirst v. St. Paul Fire & Marine Ins. Co*., 683 P.2d 440, 447 (Idaho 1984). The minority view does not limit damages to policy limits plus the cost of defense. See *Delatorre v. Safeway Ins. Co*., 989 N.W.2d 268, 274 (Ill. 2013); *Khan v. Landmark American Ins. Co.,* 757 S.E.2d 151 (Ga. App. 2014); *Newhouse v. Citizens Security Mut. Ins., Co*., 501 N.W.2d 1 (Wisc. 1993).

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

IV. KNOW WHEN TO RETAIN INDEPENDENT COUNSEL

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

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

Several states have adopted or modified California's *Cumis* counsel rule. Nevada held that an insurer was required to satisfy its duty to defend by permitting insured to select and pay reasonable costs for independent counsel when an actual conflict of interest exists; however, the court noted that an insurer sending its insured a reservation

of rights letter did not create a per se conflict of interest. *State Farm Mutual Automobile Insurance Company v. Hansen*, 357 P.3d 338 (Nev. 2015). Consistent with Nevada, Minnesota has made it clear that there must be an actual conflict of interest as opposed to an appearance of a conflict, including an insured requesting to be informed of the insured's litigation while maintaining a declaratory judgment action against the insured. *See Mutual Service Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365, 368-69 (Minn. App. 1991). Other jurisdictions have applied a per se rule that defending under a reservation of rights is a conflict of interest. *See* ALASKA STAT. ANN. § 21.96.100(c) (2014); *Armstrong Cleaners, Inc. v. Erie Ins. Exchange*, 364 F. Supp. 2d 797, 806 (S.D. Ind. 2005); *Pueblo Santa Fe Townhomes Owners' Ass'n v. Transcon. Ins. Co.,* 178 P.3d 485, 491 (Ariz. App.2008); *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.,* 788 N.E.2d 522, 539 (Mass. 2003); *Patrons Oxford Ins. Co. v. Harris,* 905 A.2d 819, 825–26 (Me. 2006).

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

The California Supreme Court recently ruled that an insurance carrier could bring an action against its insured's independent counsel under unjust enrichment for reimbursement of unreasonable and unnecessary fees that it had paid to the *Cumis* counsel. *Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C.*, 353 P.3d 319 (Cal. 2015). In *Hartford Casualty Ins. Co*., the trial court issued an order, which was drafted by *Cumis* counsel, requiring "the insurer to pay all 'reasonable and necessary defense costs,' but expressly preserved the insurer's right to later challenge and recover payments for 'unreasonable and unnecessary' charges by counsel" in a case where Hartford was defending the insured against covered and non-covered claims. *Id*. at 321-22. Due to Hartford being in breach of its duty to defend prior to this court order, Hartford was not able to benefit from California Civil Code limiting the rates charged by independent counsel to be limited to that actually paid by the insurer to attorneys retained in the defense of similar suits. *Id*. at 323 (citing CAL. CIV. CODE § 2860). Hartford incurred $15

million in defense fees and costs. *Id*. In California, where the doctrine of unjust enrichment applies, "the law implies a restitutionary obligation, even if no contract between the parties itself expresses or implies such duty." *Id*. at 326 (citation omitted). In prior case law, the California Supreme Court allowed a carrier to restitution from the insurer for fees paid to independent counsel to defend non-covered claims. *Id*. While the California Supreme Court "emphasiz[ed] that [its] conclusion hinges on the particular facts and procedural history of [the underlying litigation]," including the order providing that Hartford could pursue anyone for the overpayments, the Court held that the carrier was entitled to seek reimbursement directly from *cumis* counsel. *Id*. at 327, 331-32.

V. BEST SETTLEMENT PRACTICES

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

Various factors are considered in determining whether a failure to settle a case was "reasonable." *Brown v. Guarantee Insurance Co.,* 319 P.2d 69 (Cal. App. 1958), *Commercial Union Insurance Co. v. Liberty Mutual Insurance Co.,* 393 N.W.2d 161 (Mich. 1986). California courts have weighed the following: (1) the strength of the claimant's

case on both liability and damages; (2) the attempts by the insurer to induce the insured to contribute to the settlement (in third party claims); (3) the failure of the insurer to properly investigate so as to fully consider the evidence that exists against the insured; (4) any rejection of settlement advice from the insurer's own attorney or agent; (5) the failure of an insurer to inform its insured of a demand or offer; (6) a failure to consider the amount of financial risk to which each party is exposed if there is a refusal to settle; (7) the fault of the insured in inducing the insurer to reject a demand by misleading the insurer as to the facts; and (8) other evidence that would establish or negate bad faith on the part of the insurer. *Brown*, 319 P.2d at 74. Michigan considers additional procedural items such as: (1) a failure to inform the insured of any relevant litigation developments; (2) a failure to keep the insured informed of all demands outside of policy limits; (3) a failure to solicit a demand or extend an offer when the facts warrant; (4) a failure to accept a reasonable compromise when the liability is evident and the damages are high; (5) a rejection of a reasonable settlement offer that is within policy limits; (6) an attempt to coerce the insured into contributing to a settlement that is within policy limits; and (7) creating undue delay in accepting a settlement demand that is within policy limits where a potential verdict is high. *Commercial Union Insurance Co.,* 393 N.W.2d at 165. Failing to inexcusably meet a deadline placed on a policy limit demand or failing to timely pay policy limits where liability is extreme and damages are high may also result in a finding of bad faith. *Berges v. Infinity Ins. Co.,* 896 So.2d 665 (Fla. 2004).

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

In handling demands, whether within policy limits or above, the insurer must do more than just act reasonably—it must be able to prove that all steps taken in either negotiating a settlement or denying settlement was done reasonably. Documenting the

claim file and keeping accurate and complete records of all communications and decisions within the claim analysis is essential. All materials should be date stamped in order for the file to be reconstructed at a later date. Bad faith claims with regard to settlement decisions are often determined by looking at all of the evidence and conducting an analysis of what was available at the time the settlement decisions were made. In addition to file stamping documents, all phone communications should be documented in writing and in as much detail as possible, including attempts to contact an insured or others integral to an investigation, even where the person called is not reached. All activity including investigations in to damages should be noted by date within the file. Dilatory behavior on behalf of an insurer can be the foundation upon which a bad faith claim is structured.

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

VI. CONCLUSION

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

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THE BLAME GAME

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The Blame Game: Liability for Criminal Acts of Another

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I. Overview and a Few Examples of Case Facts

A. Facts From Recent Cases

Andrews v. Marriott: In Nashville, Tennessee, owners of hotels were sued related to a stalker who posted video online related to Erin Andrews in her private hotel room while filming her through a peep hole and/or a hole in the wall. The hotel was negligent for letting the stalker book the room next to Andrews without her permission resulting in an invasion of her privacy. Defendants asserted that the stalker was solely responsible, and that the hotel could not have anticipated the events. The hotel Defendants were 49% liable for $27M in awarded damages. The stalker was found 51% liable and was liable for $28M. The verdict was about safety, security and privacy.

Lucero: The son of a tenant who lives at a complex opened fire on another family, killing the grandmother and shooting the father multiple times in front of his wife and numerous small children. A premises liability claim was pursued against the property owner and the property manager asserting the shooter was a known danger so reasonable steps should have been taken prevent the incident. Outcome: the property manager accepted the tender of the property owner and resolved the claim at mediation.

Aurora Movie Theater Shooting: A man opened fire in a movie theater, killing numerous patrons and seriously wounding many others. The owner of the property was sued for allowing access through the exit door. The State Court case resulted in a defense verdict. The Federal Court case was dismissed on a dispositive motion due to a lack of causation.

Klucik: Two masked men use the back stairwell of a building to access an apartment. The tenant opened the door and was hit in the head with a hatchet then the intruders stole a bag of marijuana belonging to another tenant. The property owner was sued for improper security. Outcome: the case was resolved due to known problems with the swipe card access, including the failure to have card access in the back stairwell.

II. What is Foreseeable, What Are the Limitations on Liability and How are the Limitations Defined

A. Are Random Acts of Violence Foreseeable?

There are so many mass shootings in America that there is now a website called massshootingtracker.site. Per the site, there have been 604 total U.S. mass shootings in 2022 as of October 4, 2022. This amounts to 2.23 shootings per day resulting in 920 people being killed and 3,141 people being wounded.

The general principle that a business owner is not an insurer of the premises exists across jurisdictions. Given the violent attacks in this country, are all criminal acts foreseeable? Should every business where a criminal act occurs be liable, and, if not, what are the parameters of liability? As detailed in this article, state laws have created a menagerie of legal standards related to whether a property owner is liable for the criminal acts of another.

B. Overarching Test: Could the Property Owner Have Reasonably Anticipated the Criminal Act

When looking at liability for a foreseeable criminal act, some factors that may make a criminal act foreseeable include:

- the same thing has repeatedly happened before
- a high crime area
- a history of previous similar occurrences where measures could have been taken to prevent similar attacks

III. Previous Tests Regarding Liability for the Criminal Acts of Another Used in a Minority of States

A. The "Prior Similar Incidents" Test

A few states, including Texas and New York, still use the "prior similar incident" test where foreseeability is predicated on the property owner's reasonable knowledge of previous similar crimes. Similarity, frequency, location, and proximity in time to the previous incidents are the key elements to be considered.

In Texas, a business owner has a duty to patrons if the proprietor knows or has reason to know of an unreasonable and foreseeable risk of harm based on prior similar incidents. *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 12 (Tex. 2008); *Lefmark Mgmt.Co. v. Old*, 946 S.W.2d 52, 53 (Tex. 1997); *Restatement (Second) of Torts* § 344. Reasonableness and foreseeability are determined based on the "the risk and likelihood of injury" viewed from the standpoint of what the business owner knew or should have known. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 770 (Tex. 2010).

Factors regarding foreseeability of criminal conduct include: (1) proximity of the crime to the business; (2) recency of prior crimes; (3) frequency of prior crimes, (4) similarity of prior crimes; and (5) media coverage or other publicity of prior crimes. *Timberwalk Apart. Partners, Inc. v. Cain,* 972 S.W.2d 749, 756 (1999)) (a sexual assault was not foreseeable where there was only one sexual assault on the premises in the previous year and only six assault-type crimes in neighboring complexes, with none being reported in the media or to the defendant). A significant number of previous crimes results in a finding that the crime was foreseeable, while few previous crimes does not. *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 657 (Tex. 1999) (concluding 190 violent crimes in the vicinity is some evidence of foreseeability).

New York also follows the prior similar incident test based on the business owner's knowledge of previous criminal activities on the premises predicated on the location, nature and extent of the previous criminal activities and the similarity, proximity or other relationship to the crime in question. *Lauersdorf v. Supermarket Gen. Corp.*, 657 N.Y.S.2d 732, 733 (1997); *Jacqueline S. v. City of New York,* 598 N.Y.S.2d 160, 163 (1993); *Huyler v. Rose*, 451 N.Y.S.2d 478, 478 (4th Dep't 1982).

Many jurisdictions have moved away from the prior similar incident test due to arbitrary outcomes and inconsistent rulings regarding the many factors, including the requisite number of previous crimes, the similarity of the crimes (violent versus property crimes), and the temporal and geographic scope of the previous crimes. *Krier v. Safeway Stores 46, Inc*., 943 P.2d 405, 413-15 (Wyo. 1997). Courts have criticized the prior similar incident test because it contravenes public policy and notions of fundamental fairness by essentially allowing one 'free' crime while providing no incentives to take preventative measures. *Id.* at 414.

B. The "Specific Imminent Harm" Test

Some courts apply a "specific harm" test where liability is limited to situations where the business owner is aware of the imminent probability of specific harm to a customer or an invitee on the property.

Two states have modified versions of the "specific harm" test. Arkansas applies *both* the specific harm test and the prior similar incident test. *Boren v. Worthen Nat'l Bank*, 921 S.W.2d 934 (Ark. 1996); *Willmon v. Wal-Mart Stores*, 957 F. Supp. 1074 (E.D. Ark. 1997). Alabama adopted the specific harm analysis in conjunction with a three-part test to show duty: (1) the particular criminal conduct must have been foreseeable; (2) the defendant must have possessed "specialized knowledge" of the criminal activity; and (3) the criminal conduct must have been a probability. *Carroll v. Shoney's, Inc.*, 775 So. 2d 753 (Ala. 2000). There is case law in Alabama imposing exceptions to the duty if there is a special relationship. *Young v. Huntsville Hosp.*, 595 So. 2d 1386 (Ala. 1992) (comatose patient in hospital).

Washington rejected the notion that a business owner owes a duty to invitees by simply operating in a high crime area because imposition of a duty could result in the departure of businesses from the area. *Boren v. Worthen Nat'l Bank of Ark*., 921 S.W.2d

934 (1996) (it is inappropriate as a matter of policy to impose a higher duty on business owners providing services in high crime areas); *McNeal v. Henry*, 266 N.W.2d 469 (1978) (imposing liability for unforeseeable crimes would drive companies out of business); *Stafford v. Church's Fried Chicken, Inc.*, 629 F. Supp. 1109 (E.D. Mich. 1986).

The few states following the specific imminent harm test acknowledge the reality that business owners are not police and cannot control random acts of violence. A business owner is not the insurer of the premises. These jurisdictions recognize that it is entirely speculative whether additional security measures can prevent random crime, particularly when law enforcement with police powers cannot stem the tide. Shifting liability for third-party crimes to business owners in high crime areas may ultimately drive companies out of business and result in fewer businesses in low-income neighborhoods.

C. The "Imminent Probably of Injury" Standard

In the state where the Virginia Tech massacre occurred in 2007, a property owner generally does not have a duty to warn or protect another from the criminal acts of a third person because criminal acts are not reasonably foreseeable. *Burdette v. Marks*, 421 S.E.2d 419, 420 (1992); *Thompson v. Skate America, Inc.*, 540 S.E.2d 123, 127 (2001). Virginia courts have imposed a duty to protect or warn of third-party criminal acts only where there was "an imminent probability of injury" from a third-party criminal act. *Commonwealth v. Peterson*, 749 S.E.2d 307 (Va. 2013) (Virginia Tech had no duty to lockdown the school after the first shots were fired because it did not know the subsequent shooting was "imminent").

There is no duty to warn or protect invitees even where there were previous incidents of crime. *Dudas v. Glenwood Golf Club, Inc.*, 540 S.E.2d 129, 133 (2001) (two robberies within the month before the attack do not give rise to imminent danger of criminal assault). An "imminent probability of harm" is a heightened degree of foreseeability arises when the defendant knows that criminal assaults are occurring or are about to occur. *Id.* The analysis is fact specific. *Blackwell v. Abercrombie & Fitch Stores, Inc.*, 3 F. Supp. 3d 545, 547 (W.D. Va. 2014) (notice of imminent harm based on evidence the employees observed that the perpetrator was intoxicated, was acting suspiciously, and observed the perpetrator entering a particular location of the premises without any specific purpose); *Taboada v. Daly Seven, Inc.*, 626 S.E.2d 428 (Va. 2006) (criminal act was imminent where the employees of an innkeeper had contacted police 96 times to report criminal conduct including robberies, assaults, and shootings, and the police had actually advised the innkeeper that "its guests were at a specific imminent risk for harm to their persons from uninvited persons coming into or upon its property.").

Like Virginia, in Michigan there is no general duty to prevent criminal activity even where there have been prior incidents. The duty is limited to responding reasonably to situations posing a risk of imminent and foreseeable harm to identifiable

invitees. *Graves v. Warner Bros.*, 656 N.W.2d 195, 202 (Mich. Ct. App. 2002). There is no duty to provide security guards to deter criminal acts of third parties because crime prevention is a police power vested in the government. Shifting policing to the private sector would amount to advocating that citizens resort to self-help, contrary to public policy. *Williams v. Cunningham Drug Stores, Inc.*, 418 N.W.2d 381, 384 (Mich. 1988). Criminal activity is irrational, unpredictable, and arbitrary. *MacDonald v. PKT Inc.*, 628 N.W.2d 33, 39 (Mich. 2001). Given the realities of criminal acts, it is unjustifiable to hold property owners, who are not experienced in policing, and who have no authority to police, vicariously liable for the criminal acts of third parties. *Id.* Like in Virginia, there are exceptions to the limited duty rule when the perpetrator was an employee and the employer had notice of the employee's propensity to commit a crime. *Brown v. Brown*, 739 N.W.2d 313 (2007) (employer's knowledge of past acts of violence was sufficient to warn the employer).

IV. The Prevailing and Emerging Tests Regarding Liability for the Criminal Acts of Another

A. Test #1: The "Totality of Circumstances" Test.

The modern trend is to allow the jury to view the totality of circumstances. *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 1100, 864 P.2d 796, 798 (1993). The totality of the circumstances test expands the determination of foreseeability beyond previous similar events to include the "character of the business", the nature, condition, and location of the premises, in addition to any previous similar incidents. Restatement (Second) of Torts § 344. A duty can be found without any previous similar incidents. *Id.*

"[U]nlawful conduct can interrupt and supersede the causation between a negligent act and injury, [but] an unlawful act will not supersede causation if it was foreseeable." *Anderson v. Mandalay Corp.*, 358 P.3d 242, 248 (2015); *Bower v. Harrah's Laughlin, Inc.*, 215 P.3d 709, 725 (2009) (citing Restatement (Second) of Torts § 442 (1965)).

Courts adopting the "totality of the circumstances" test include Kansas, Iowa, Missouri, Minnesota, Idaho, Nevada, South Dakota, Hawaii, Florida, Indiana, Wyoming, Colorado (although the law is changing in Colorado as detailed below), and Massachusetts. In these jurisdictions, a business owner has a duty to take preventive measures where the business owner could reasonably foresee that its customers have a risk of peril above and beyond the ordinary. *Seibert v. Vic Regnier Builders*, 856 P.2d 1332, 1338-40 (Kan. 1993).

The "totality of the circumstances" courts consider are case-specific, vary by court and by jurisdiction, but typically include:

(1) the precise location of the crime, including a review of previous criminal incidents, and whether the crime occurred on or near the premises;

(2) the design and construction of the premises, including the adequacy of lighting and other measures ensuring visibility and/or security;

(3) the type of business and its hours of operation;

(4) the nature of the security measures taken by the owner such as a safe, guards, locks, alarms or surveillance;

(5) the business owner's knowledge of the consistent use of alcohol and drugs on the premises;

(6) the business owner's knowledge of the display of weapons or unruly behavior of the criminal;

(7) previous warnings from law enforcement or employees regarding a threat on the premises;

(8) the company's security policies, including whether the policies were applied consistently or violated; and

(9) industry standards regarding security measures. *Axelrod v. Cinemark Holdings, Inc.*, 65 F. Supp. 3d 1093 (D. Colo. 2014) (issue of fact existed regarding whether a theater was liable for Aurora mass theater shooting at midnight showing of *Dark Knight* because some Cinemark theaters were concerned enough to hire extra security, the United States Department of Homeland Security had warned theater chains about potential terrorist attacks, and the shooter used rear exit door that was propped open in contravention of the company policy regarding exit doors).

In jurisdictions following the totality of circumstances test, the duty to provide security and the level of security must be reasonable. Typically, the plaintiff will assert that no matter what was done it was not enough. However, reasonableness sometimes includes a consideration of the economic feasibility regarding the level of security.

In states applying the totality of circumstances test, it is important to consider the type of business and whether there are state specific statutory requirements or limitations on liability. For example, Florida Statute §768.0705 has created a statutory presumption against liability for the criminal acts of a third person if the owner or operator of a convenience business substantially implements certain security measures. Additionally, Nevada protects innkeepers and bars who have fulfilled a duty to reasonably eject patrons. *Rodriguez v. Primadonna Co., LLC,* 216 P.3d 793 (Nev. 2009) (commercial liquor vendors, including hotel proprietors, cannot be held liable for damages related to any injuries caused by the intoxicated patron to third parties).

The question of what safety precautions may reasonably be required is generally a question of fact to be determined by the jury by taking into account factors including

the seriousness of the risk, the severity of potential injuries and the cost or burden imposed on the landowner. *Kazanoff v. United States*, 945 F.2d 32, 39 (2d Cir. 1991).

A plaintiff's own conduct "demonstrating a lack of reasonable regard for his own safety" can serve as an intervening cause absolving the defendant of liability. *Ruggerio v. Bd. of Educ.*, 31 A.D.2d 884 (4th Dep't 1969) (granting summary judgment on a failure to supervise claim because the plaintiff voluntarily engaged in a physical altercation); *Benitez v. Paxton Realty Corp.*, 223 A.D.2d 431 (1st Dep't 1996) (plaintiff opening of door after dark without checking the peephole to see who was at the door was an intervening cause); *Elie v. Kraus*, 218 A.D.2d 629 (1st Dep't 1995).

The totality of the circumstances tests places a significant duty on property owners to foresee the risk of criminal attacks and has been criticized for essentially "imposing an unqualified duty to protect customers in areas experiencing any significant level of criminal activity." *Posecai v. Wal-Mart Stores*, 752 So. 2d 762, 767 (La. 1999).

B. Test #2: Balancing Test - Business Owners Have a Duty to Protect Patrons if the Foreseeability and Gravity of the Harm Outweighs the Burden to Protects Its Customers.

California was the first state to adopt a balancing test. The determination of a duty of care to protect against criminal conduct requires "balancing the foreseeability of the harm against the burden of the duty to be imposed." Where the burden of preventing future harm is great, a high degree of foreseeability may be required. "Duty is determined by a balancing of 'foreseeability' of the criminal acts against the 'burdensomeness, vagueness, and efficacy' of the proposed security measures." *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal.4th 666, 678-79 (1993); *Wiener v. Southcoast Childcare Centers, Inc.*, 88 P.3d 517, 522 (Cal. 2004) (business owner was not responsible for a premeditated murder when the criminal conduct was so outrageous and bizarre that it could not have been anticipated). Whether business owners have a duty to employ security personnel is demonstrated by prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults. *Ann M.*, *supra*.; *Sharon P. v. Arman*, 989 P.2d 121 (Cal. 1999). The requirement to retain security personnel is rarely satisfied in the absence of previous similar incidents of violent crime on the premises or in the immediate proximity. *Id.*

California and other "balancing" courts may still grant summary judgment based on causation. Causation is an entirely separate and independent element of the tort of negligence. A plaintiff must show that the business owner's omissions were a substantial factor in causing the injury. It is often speculative to prove that additional security measures would have prevented a random, violent crime, even with expert testimony. *Saelzler v. Advanced Group,* 781, 23 P.3d 1143 (Cal. 2001).

Following California, Louisiana adopted a balancing test recognizing that business owners have a duty to implement reasonable measures to protect patrons from foreseeable criminal acts. *Posecai v. Wal-Mart Stores*, 752 So. 2d 762, 766 (1999). Louisiana weighs the foreseeability of the risk of crime with the gravity of the risk

to determine the existence and the extent of the defendant's duty. The greater the foreseeability and gravity of the harm, the greater the duty of care that will be imposed on the business. A high degree of foreseeability is required to give rise to a duty to post security guards, but a lower degree of foreseeability may support a duty to implement lesser security measures such as using surveillance cameras, installing improved lighting or fencing, or trimming shrubbery. *Id.*

Foreseeability and the gravity of the harm are determined by the facts and circumstances of each case with the most important factors being the existence, frequency, and similarity of previous criminal incidents. Under the balancing approach, it is unlikely that the risk of crime will be sufficiently foreseeable for the imposition of a duty to provide security guards without previous instances of crime. *Pinsonneault v. Merchs. & Farmers Bank & Trust Co.*, 816 So. 2d 270, 276 (2002).

Tennessee adopted a balancing test imposing a duty to protect customers from foreseeable criminal acts. *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 899-02 (Tenn. 1996). The test evaluates whether the risks are unreasonable and imposes a duty to act with reasonable care when the gravity of harm and the foreseeability of the harm posed by the defendant's conduct outweighs the burden on the defendant to "engage in alternate conduct that would have prevented the harm". *Cullum v. McCool*, 432 S.W.3d 829, 834 (Tenn. 2013).

The balancing test is essentially the middle ground between the "prior incident test" and "totality of the circumstances" test and seeks to weigh the degree of foreseeability of harm against the burden of preventing crime.

C. Test #3: **The "Predominant Cause" or "Substantial Factor" Test: Was the Criminal Act of the Third-Party was the Predominant Cause of the Claimed Injuries and Damages or a Substantial Factor Causing the Harm.**

Colorado is changing the tide related to a recent amendment to the Colorado Premises Liability Act limiting liability for the criminal acts of another.

Finding a duty when there is no reason to foresee physical harm inappropriately makes property owners virtual insurers of the safety of all persons legitimately on the premises. *Observatory Corp. v. Daly*, 780 P.2d 462, 468 (Colo. 1989) (as a matter of law that a bar patron's injury stemming from an assault by another patron was unforeseeable and, thus, no duty was owed). Without objective evidence that other patrons constituted an unreasonable risk, property owners would be unfairly and inappropriately required to "divine future violence". *Id.* at 469.

In limited situations in Colorado, a landowner has a duty to protect invitees from the foreseeable criminal acts of third parties. *Taco Bell, Inc. v. Lannon,* 744 P.2d 43, 43 (Colo. 1987) (evidence of ten armed robberies at the same store in the three years before the incident sufficiently established that harm to customers from criminal acts

was foreseeable). Generally, whether a landowner owes a duty to an invitee depends on a variety of factors, including the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the defendant's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden on the defendant." *Id.*

After the Colorado Supreme Court determined that Planned Parenthood should have known such an event could occur due to giving employees bulletproof vests, the Colorado legislature, upon pressure from Planned Parenthood and the Catholic Church, working together, effectuated a change to the Colorado Premises Liability Statute to make it more difficult to pursue claims related to criminal acts.

Wagner involved a lawsuit related to a mass shooting at a Planned Parenthood location in Colorado Springs where three people died and nine people were seriously injured. *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 467 P.3d 287 (Colo. 2020). The Plaintiffs asserted a premises liability claim arguing that Planned Parenthood had a duty to provide them with a safe and secure environment that was free from unreasonable risks and dangers. Plaintiffs asserted the attack was foreseeable given the long history of violent, direct attacks, killings and threats against Planned Parenthood facilities. Plaintiffs asserted the entity did not inspect operations, did not develop guidelines, did not communicate, did not warn, and did not provide proper security. Summary judgment was granted in favor of defendants for not causing the mass shooting and due to a lack of any previous similar criminal events. The Court of Appeals reversed.

The Colorado Supreme Court determined that Plaintiff had to show that the entity was a substantial factor related to causation. Because causation is an issue for the jury, the Supreme Court determined the jury should determine if causation was established due to the risk of violence that was known for many years, including providing bulletproof vests for physicians. Plaintiffs asserted that adequate precautions were not taken and that hiring a part-time security person was insufficient. The jury was asked to determine if the actions or inactions of the local entity constituted a substantial factor related to the incident. The Colorado Supreme Court brushed aside other cases determining that perpetrators of crimes were the substantial cause of mass shootings because the cases involved random and extreme acts of violence committed without warning or foreseeable motive, unlike the Planned Parenthood shooting where threats of violence were well known.

The three dissenting *Wagner* justices noted the majority was making landowners liable for the irrational actions of a mass murderer to make any business receiving threats of violence uninsurable and/or requiring fortifications. Proximate cause requires a showing that the plaintiff's injuries were foreseeable, and that the defendant's negligence was a "substantial factor" in producing the harm. But-for causation would expose landowners to virtually unlimited liability. Per the dissent, proximate cause

ensures that unsubstantial causes do not become actionable. If an event other than the defendant's negligence appears predominant, the defendant's negligence cannot be a substantial factor. The failure to provide additional security measures does not create liability for the defendant unless the negligence is a proximate cause of the injuries. *Id.* at ¶73. The only substantial factor in a mass shooting is the shooter. Any extra security measures pale in comparison to the conduct of actors bent on inflicting mass casualties who do not employ a rational cost/benefit calculus. Weighing what security measures a landowner might adopt to protect against mass shooters is not bounded by reasonableness. *Wagner,* 471 P.3d 1089. Because mass shooters are not animated by reason or a cost/benefit analysis, it is irrational to ask businesses, or jurors, to engage in a cost/benefit analysis to determine what sort of preventative measures are sufficient to prevent or mitigate the harm caused by a shooter's senseless acts of violence. *Id.*

The Colorado Legislature agreed with the dissent in *Wagner*. *Wagner* was overturned by the Colorado legislature in April of 2022 by amending the Colorado Premises Liability Statute, C.R.S. § 13-21-115, to state that *Wagner* did not accurately reflect the intent of the general assembly regarding landowner liability to the extent the opinion determined that foreseeability hinged on whether the goods or services offered by the landowner were controversial or that the landowner could be held liable as a substantial factor in causing the harm without considering whether a third-party criminal act was the predominant cause of the harm as noted in the *Wagner* dissent**.** The legislature specifically determined that *Wagner* was contrary to the stated purpose of the PLA and would not create a legal climate promoting private property right and fostering the availability of affordable insurance.

The dissent in *Wagner* dovetails with the Colorado Premises Liability Act requiring "proximate cause". *Moore v. Western Forge Corp.*, 192 P.3d 427, 436 (Colo. App. 2007). To meet the burden of establishing proximate cause, a plaintiff must prove the alleged tortious conduct was a substantial factor in producing the injury. *North Colo. Medical Ctr. v. Comm. on Anticompetitive Conduct*, 914 P.2d 902, 908 (Colo. 1996) (proximate cause is intended to ensure that unsubstantiated causes do not become actionable). One cause may be so predominant related to causing a harm that other factors are not substantial. *Smith v. State Compensation Ins. Fund*, 749 P.2d 462, 464 (Colo. App 1987). The Court can determine as a matter of law whether a predominant cause exists.

Other cases applying Colorado law have determined where the shooter was the predominant cause, the property owner is not liable. In a case against a property owner related to alleged deficient security, the owner of a movie theater was not liable for the criminal acts of a shooter on the property related to alleged safety and security measures because the property owner was not a predominant cause of the plaintiffs' losses. *Nowlan v. Cinemark Holdings, Inc.*, 2016 WL 4092468, *3 (D. Colo. 2016) (unpublished)*; Sanders v. Acclaim Entm't, Inc.*, 188 F.Supp.2d 1264, 1275 (D. Colo. 2002) (defendant was the not the proximate cause of the plaintiff's injuries due to the

superseding criminal acts of a third-party); *Castaldo v. Stone*, 192 F.Supp.2d 112, 1171 (D. Colo. 2001) (the criminal acts of the Columbine school shooters were the predominant, if not the sole cause, of the plaintiff's injuries to bar claims against others); *Ireland v. Jefferson County Sheriff's Dep't*, 193 F.Supp.2d 1201, 1231-32 (D. Colo. 2002) (a company organizing a gun show related to a gun used in the Columbine school shooting rampage could not be sued because the shooters' actions were the sole or predominant cause of the injuries even if the actions of the gun show organizers contributed in some way to plaintiff's injuries); *Phillips v. Lucky Gunner, LLC*, 84 F.Supp.3d 1216, 1228 (D. Colo. 2015) (gun shops selling guns and ammunition did not proximately cause injuries related to the Aurora Movie Theater shooting because the criminal acts of the shooter caused the injuries and deaths).

V. Potential Claims Related to Criminal Acts of Another

Essentially, any argument to shift liability from the criminal to the property owner should be expected because recovery is rarely available from the shooter. The commonly asserted claims are as follows:

A. Premises Liability

In some states, like Colorado a premises liability claim is the sole and exclusive remedy for people injured on real property.

B. Negligent Security: Access, Personnel, Lighting, Technology, Training

- inadequate lighting
- inadequate security: what measures are taken to prevent wrongful criminal acts regarding security personnel, guards, cameras, alarms, security hardware.
- ways around security devices that were known or should have been known.
- improper/failed background checks.
- unfollowed security protocol.
- physical security measures not functioning properly.
- insufficient training or retention, a lack of security staffing.

VI. Responsive Arguments and Potential Defenses and Limits of Liability for the Criminal Acts of Third Parties

Although some of the elements of the claim are plaintiff's burden to demonstrate, a defendant should actively develop defenses and responsive arguments. Some potential responsive arguments and defenses include the following:

A. Lack of Foreseeability

- is the first criminal conduct committed?
- are there other similar instances to provide notice?
- was this a random, unforeseeable course of events?

B. Lack of Proximate Cause and/or Lack of Causation

- who was the substantial factor is causing the harm
- the criminal act of the third-party was the predominant cause of the claimed injuries and damages.
- additional security measures would not have prevented the harm that was not caused by the property owner.

C. Reasonable Care

- what reasonable steps were taken: there is a difference between reasonable care and extraordinary measures and doing “everything possible”.
- retaining security or contracting for services can show reasonable care.

D. Pro Rata Liability: if the state has pro rata liability, you can designate responsible non-parties, including the criminal/shooter to decrease the liability of your client. Focus on who was the substantial cause of the claimed injuries and damages, the criminal.

E. Comparative Negligence and Assumption of Risk: did the plaintiff cause or contribute to the criminal act by doing something risky or precipitating the chain of events.

F. Agreements: Indemnity, defense and hold harmless contractual provisions related to tendering or pursuing claims, including potential cross claims related to property manager or other responsible contractors per the terms of the contract and as an additional insured, if applicable.

VI. Investigation Issues Following a Criminal Act Claim

When a criminal act occurs, response time is critical related to obtaining and preserving salient information and documentation as well as developing a defense plan.

The plaintiff will frequently appeal to emotions related to the plaintiff being the victim of a criminal attack. To counter the emotion, the defense should rely on the facts and the law. The only way to learn all the facts is to investigate the incident immediately. Quick and thoroughly investigation leads to better grasp of the facts, witnesses and

potential strengths and weaknesses to develop an initial defense plan even in advance of plaintiff's counsel being retained.

An initial response plan should include preserving all videos, photos, documents and identifying all persons with information. Quickly engaging defense counsel can assist with these measures. In addition, a security expert or other liability expert can assist regarding the scope of preservation and potential issues to address. Gathering immediate information and documentation can typically be accomplished in a matter of days instead of the length of time it will take when there is a significant delay between the incident and a claim or a lawsuit.

A. Investigation Protocols Following an Attack

Criminal act claims should be reported immediately to trigger a swift response, including retaining defense counsel to oversee the events and to gather salient information and documentation in the context of the applicable legal standards.

During the first 24-48 hours following the incident, the investigation protocol should include the following steps:

- Secure all surveillance footage covering a long period before and after the actual incident. If the incident is significant, preserve all the available footage and provide it to legal counsel to preserve. Examine if other nearby businesses may have footage and if the police have looked into this issue.

- Cooperate with the authorities and police. Establishing a positive relationship with the investigating authorities from the outset will pay off throughout the case and can prevent the police from delving into irrelevant areas or using bullying tactics.

- Identify all employees working at the time of the incident or responsible for the situation for interviews.

- Identify all contactors and agreements related to the incident related for potential tenders, additional information, documentation and interviews.

- For any employees who are directly involved in the incident, obtain proof of any relevant security training or other training.

- Collect all incident and witness reports relating to the event from the police or any other third-parties.

- Collect all security/crime-related incident reports connected to the property going back at last three years.

- Determine if any physical security equipment was not operating at the time of the incident in any relevant area and if so, obtain full repair history and repair requests for that equipment.

- Obtain a drawing, showing where all security cameras were located on the property and determine if they were fixed or moveable and identify whether a vendor placed the cameras and if there is any agreement related to the same.

- Obtain a copy of all security policies, procedures, protocols and manuals applicable to the property.

- Gather and review any security vendor contracts and communications and put the security vendor on notice regarding the incident.

Examine the crime history of the specific property as well as the surrounding area. Throughout the country, the law is somewhat consistent in that a property owner can be found liable for the criminal act of a third-party if the crime was reasonably foreseeable. In addition, liability will be determined based on whether it was reasonably foreseeable that the third party was likely to be a security threat based on past knowledge of that individual or if there is a history of a similar crime at the location making it foreseeable that another crime might occur.

B. Consider Retaining a Premises Security Risk Professional

Plaintiff's counsel will frequently engage an expert witness related to inadequate security. To counter such an expert, a security management expert should be considered and engaged as soon as possible at the outset of the investigation. The expert should physically visit the location of the incident. The role of the expert is to render opinions but also to advise clients regarding potential exposure, to devise a rational defense strategy, and to shape the narrative. A security expert can also help establish that reasonable measures were taken. The expert can also identify steps to preclude future claims.

C. Risk Mitigation

There can never be a 100% guarantee that a crime will not occur. Statistics demonstrate that violent crimes can and will occur anywhere, and at any time. Thus, clients should apply safeguards that are reasonably necessary to protect the welfare of the people who live in, work at, or visit the property.