Strafford

Presenting a live 90-minute webinar with interactive Q&A

Insurer's Duty to Defend: Navigating the "Eight Corners" Rule, Withdrawal From an Ongoing Defense and More

Advocating Complex Defense Duty Issues From Insurer and Policyholder Perspectives

TUESDAY, MARCH 19, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Eliot M. Harris, Member, **Williams Kastner**, Seattle

Kirsten C. Jackson, Partner, **Kasowitz Benson Torres**, Los Angeles

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1**.

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-570-7602** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

INSURER'S DUTY TO DEFEND: NAVIGATING FLEXIBILITY IN THE "EIGHT CORNERS" RULE, WITHDRAWAL FROM AN ONGOING DEFENSE, AND MORE

Tuesday, March 19, 2019 1:00 pm-2:30 pm EDT

Kirsten C. Jackson and Eliot M. Harris

STRAFFORD PUBLICATIONS

WILLIAMS KASTNER™

KASOWITZ BENSON TORRES

Presenters

Kirsten C. Jackson, Esq.
Kasowitz Benson Torres, Los Angeles, California

- Kirsten C. Jackson is a commercial litigator and primarily focuses her practice on insurance matters. She has significant experience with a variety of business and contractual disputes, as well as insurance litigation involving commercial general liability, directors and officers liability, cyber liability, professional liability and life insurance. Kirsten's practice also includes captive insurance and reinsurance. She is regularly recognized as a Southern California "Rising Star" by Super Lawyers and was named as a "Top 40 under 40" Lawyer by the National Bar Association.
- Kirsten is actively engaged in promoting diversity in the legal profession. She is the Diversity Subcommittee Co-Chair for the American Bar Association's Insurance Coverage Litigation Section, and was previously on the board of the California Minority Counsel Program's Annual Business Conference.

WILLIAMS KASTNER™

KASOWITZ BENSON TORRES

Presenters

Eliot M. Harris, Esq.
Williams Kastner & Gibbs, Seattle, Washington

- Eliot Harris advises and represents primarily insurers in pre-litigation claim and coverage analysis, as well as litigating coverage disputes and defending insurance bad faith claims. He has advised clients in claims involving various lines of coverage, including CGL, EPLI, E&O, D&O, homeowners, commercial property, personal and commercial auto, and marine insurance. He is licensed to practice law in Washington, Oregon, and Alaska.

WILLIAMS KASTNER™

KASOWITZ BENSON TORRES

Introduction to the Topics

- Overview of the duty to defend.
- Three main topics.
  - Determining when a defense is owed (the “eight corners” rule and beyond).
  - An insurer’s withdrawal from an ongoing defense.
  - Collusion and the duty to defend.

Why These Topics Are Important

- Value of the defense. "The insured's right to representation and the insurer's correlative duty to defend suits, however groundless, false or fraudulent, are in a sense 'litigation insurance' expressly provided by the insurance contract . . . ." *Servidone Const. Corp. v. Sec. Ins. Co. of Hartford*, 64 N.Y.2d 419, 423-424, 477 N.E.2d 441, 444 (1985).
- Defending insurer may have a tougher time getting out after assuming the defense.
- Risk to the insurer: violating duty to settle based on an "implied duty on the part of the insurer to accept reasonable settlement demands on such claims within the policy limits." *Hamilton v. Maryland Cas. Co.*, 27 Cal. 4th 718, 724 (2002). In states like Texas, automatic statutory penalties for failure to defend.
- Risk to insured: jeopardizing coverage. *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815 (1993), *reh'g denied and opinion modified* (Feb. 22, 1993).

Duty to Defend Basics

- Typically liability policies (commercial general liability, automobile, professional liability, D&O etc.).
- Litigation insurance.
- The insurer has a duty to defend if at least one claim is *potentially* covered. *Buss v. Superior Court (Transam. Ins. Co.)*, 16 Cal. 4th 35, 47, 939 P.2d 766, 774, 65 Cal. Rptr. 2d 366, 374 (1997)
- Pleadings taken literally. "[T]he duty to defend does not turn on the truth or falsity of the plaintiff's allegations." *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 311 (Tex. 2006).
- Distinguished from the duty to indemnify. "A plaintiff's factual allegations that potentially support a covered claim is all that is needed to invoke the insurer's duty to defend . . . whereas, the facts actually established in the underlying suit control the duty to indemnify." *GuideOne*, 197 S.W.3d at 310.

Duty to Defend Basics

- Broader and distinct from duty to indemnify.
- Triggered under pleadings test.
  - Washington finds that duty to defend exists if policy "conceivably covers the allegations in the complaint"
    - *National Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 878, 297 P.3d 688 (2013).

Duty to Defend Basics

- Insurer must defend both covered and non-covered claims stated in a complaint until such time as the claims triggering a defense under the pleading test are resolved.
- An insurer is not relieved of its duty to defend simply because another insurer may already be defending a mutual insured
  - *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 7, 206 P.3d 1255 (2009).
- Any ambiguity must be resolved in favor of coverage.

Duty to Defend (cont.)

- Arises when the policy could *conceivably* cover allegations in a complaint.
  - *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 64 P.3d 454 (2007).
- "[I]f there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend."
  - *Am. Best Food*, 168 Wn.2d at 413.
- An insurer is required to defend a complaint against its insured until it is clear that the claim is not covered.
  - *Id.* at 405.
- An insurer takes a great risk when it refuses to defend on the basis that there is no reasonable interpretation of the facts or the law that could result in coverage.
  - *Xia v. Probuilders Specialty Ins. Co.*, 188 Wn.2d 171, 182, 400 P.3d 1234 (2017).

Eight Corners Rule

- 4 corners of complaint + 4 corners of the policy.
- Jurisdictions differ, however, about an insurance company's right or duty to consider facts outside the 4 corners of the complaint in deciding whether it has a duty to defend.
- For example, Texas is known for having a relatively strict 8 corners rule.

Eight Corners Rule

- "When determining whether an insurer has a duty to defend, we follow the eight corners rule by looking at the four corners of the complaint for alleged facts that could possibly come within the scope of coverage in the four corners of the insurance policy. Our precedent favors insureds when examining both the complaint and the policy. As to the complaint, if it includes even one covered claim, the insurer must defend the entire suit., we only defer to a complaint's characterization of factual allegations, not legal theories or conclusions. As to the policy, if a term is susceptible to more than one reasonable interpretation, we must resolve that uncertainty in favor of the insured."

  Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377, 380 (Tex. 2012) (notes and citations omitted).

Eight Corners Rule

- "In deciding the duty to defend, the court should not consider extrinsic evidence from either the insurer or the insured that contradicts the allegations of the underlying petition. The duty to defend depends on the language of the policy setting out the contractual agreement between insurer and insured. A defense of third-party claims provided by the insurer is a valuable benefit granted to the insured by the policy, separate from the duty to indemnify. But the insurer's duty to defend is limited to those claims actually asserted in an underlying suit. [. . . .] The policy imposes no duty to defend a claim that might have been alleged but was not, or a claim that more closely tracks the true factual circumstances surrounding the third-party claimant's injuries but which, for whatever reason, has not been asserted. To hold otherwise would impose a duty on the insurer that is not found in the language of the policy. Such a construction would subject an insurer to common-law and statutory liability for failing to defend the insured against a third-party claim that has not been alleged, despite policy language limiting the duty to defend to claims that have been alleged."

  Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co., 279 S.W.3d 650, 655-656 (Tex. 2009) (notes omitted).

Eight Corners Rule

- But even in Texas, there is some flexibility in the Eight Corners Rule:
  - "Courts may consider evidence where the petition does not allege facts sufficient for a determination of whether those facts, even if true, are covered by the policy." *Weingarten Realty Mgmt. Co. v. Liberty Mut. Fire Ins. Co.,* 343 S.W.3d 859 (Tex. App. 2011).
  - "Under this exception, the extrinsic evidence must go strictly to an issue of coverage without contradicting any allegation in the third-party claimant's pleadings material to the merits of that underlying claim." *Id.*
  - Example: extrinsic evidence has been admitted to determine whether the party seeking coverage is in fact an insured.

Eight Corners Rule

- Upon receipt of a complaint against its insured, the insurer is permitted to utilize the "'eight corners'" rule to determine whether, on the face of the complaint and the insurance policy, there is an issue of fact or law that could conceivably result in coverage under the policy.
  - *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 803, 329 P.3d 59 (2014).
- Duty to defend is broader than the duty to indemnify.
  - *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010).

Eight Corners Rule - Extrinsic Evidence

- There are two exceptions to this rule, and both favor the insured.
  - *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 64 P.3d 454 (2007).
- First, if coverage is not clear from the face of the complaint but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt on the duty to defend.
  - *Id.*
- Second, if the allegations in the complaint conflict with facts known to the insurer or if the allegations are ambiguous, facts outside the complaint may be considered.
  - *Id.* at 54, 164 P.3d 454.
- Extrinsic facts may only be used to trigger the duty to defend; the insurer may not rely on such facts to deny its defense duty.
  - *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 804, 329 P.3d 59 (2014).

Duty to Investigate?

- Many jurisdictions impose on the insurer a duty to investigate beyond the pleadings:
  - New York: Any insurance company must consider facts outside the pleadings which trigger defense coverage, but may not look beyond the face of the complaint to avoid its duty to defend. *See, e.g., Fitzpatrick v. American Honda Motor Co*., 571 N.Y.S.2d 672, 675 (1991).
  - California: "Facts known to the [insurance company] and extrinsic to the third party complaint can generate a duty to defend, even though the face of the complaint does not reflect a potential for liability under the policy." *Montrose Chem. Corp. v. Superior Court*, 861 P.2d 1153 (Cal. 1993).
  - Hawaii: Forbids an insurance company from relying on extrinsic evidence to disclaim coverage. *See Dairy Road Partners v. Island Ins. Co.*, 992 P.2d 93 (Hawaii 2000).

Duty to Investigate?

- Many jurisdictions hold that an insurer cannot ignore facts beyond the complaint supporting the potential for coverage, if it is actually aware of them.
  - Minnesota: *Garvis v. Employers Mut. Cas. Co.*, 497 N.W. 254, 258 (Minn. 1993).
  - North Dakota: *Pennzoil Co. v. United States Fidelity and Guaranty Co.*, 50 F.3d 580, 583 (8th Cir. 1995).
  - New Jersey: *SL Indus., Inc. v. American Motorists Ins. Co.*, 607 A.2d 1266 (NJ 1992).

Flexibility in the Eight Corners Rule (Pro-Insured Cases)

- "[T]he duty to defend should be fixed by the facts which the insurer learns from the complaint, ***the insured, or other sources***." *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 276, 419 P.2d 168, 177, 54 Cal. Rptr. 104, 113 (1966).
- *Saylin v. California Ins. Guarantee Assn.*, 179 Cal. App. 3d 256, 263, 224 Cal. Rptr. 493, 497 (1986) (emphasis added).

Flexibility in the Eight Corners Rule (Pro-Insurer Cases)

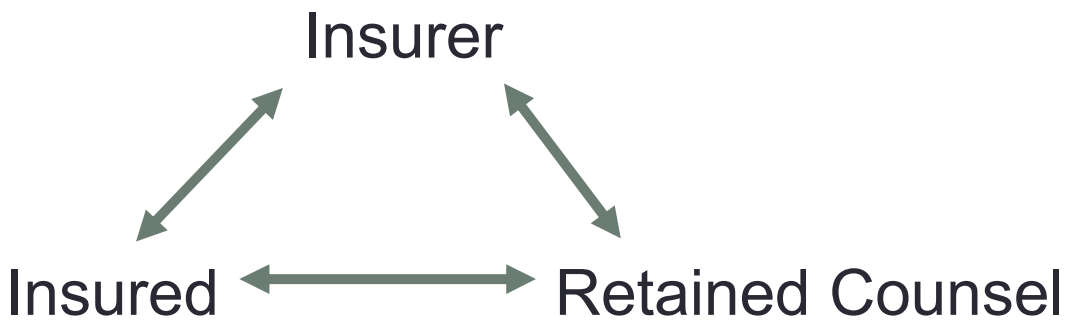
- *Composite Structures, Inc. v. Cont'l Ins. Co.*, 560 F. App'x 861 (11th Cir. 2014).
- *Voeller Const., Inc. v. S.-Owners Ins. Co.*, 2014 WL 1779289 (M.D. Fla. May 5, 2014).
- *Canopius US Ins., Inc. v. A1 Home Repair & Constr.*, 2016 WL 7650619, at *3 (S.D. Tex. Dec. 2, 2016).
- *Sentry Select Ins. Co. v. Drought Transportation, LLC*, 2016 WL 6236375, at *6 (W.D. Tex. Oct. 24, 2016).
- *Illinois State Bar Ass'n Mut. Ins. Co. v. The Rex Carr Law Firm, LLC*, 2017 IL App (4th) 160365-U, ¶ 34.

If Coverage Is Denied

- Insured controls its own defense
- Insured is responsible for payment of defense costs
- Insurer has no right to control defense
- If coverage is later found, may be required to pay all defense costs…regardless of rate, but possibly subject to reasonableness finding

If Coverage is Accepted Without Reservation

- Generally, insurer has complete control of defense
  - Exceptions can apply, *e.g.*, potential for excess exposure
- Conflict in "Tripartite Relationship."



- Insurer responsible to choose and pay for defense counsel
- "Common interest" throughout litigation
- Communications protected by privilege
- Relationship between counsel and insured
- Limitations of retained counsel's representation

Tri-Partite Relationship

- Tri = Three
- Partite = Partite

WILLIAMS KASTNER™

If Coverage Is Accepted With Reservation

- Who controls (and selects) the defense for defense under ROR depends on jurisdiction
  - Insurer retains control over defense under ROR, *e.g.,* Washington State
  - Right to independent counsel – *e.g.*, Indiana
  - Potential right to independent counsel when conflict arises – *e.g.*, California

- When independent counsel is required, there are other issues to consider
  - Statutory or other limitations on rates?
  - Who chooses independent counsel?
    - Varies by state
    - Some states require mutual agreement by insured and insurer – *e.g.*, Florida

Impact of Coverage Issues on Defense - ROR

- Insured perspective:
  - Phrasing of discovery
    - Decision to develop evidence in underlying case that may relate to coverage issues
  - Summary judgment considerations
    - Decision to move (or not move) for summary judgment on potentially covered claims that would leave only uncovered claims remaining
  - Trial strategy
    - Jury instruction and jury interrogatories
    - Potential that verdict may have implications on coverage depending on how the verdict form is worded

Impact of Coverage Issues on Settlement - ROR

- Ability to settle when defended under ROR
  - Varies by State
    - In some states, insured must obtain insurer consent to settle when defended under ROR – *e.g.*, Washington
    - In other states, insured has right to settle without insurer's consent if notice is provided - *e.g.*, Arizona
- Impact of policy limits (or less) settlement demand on insurer
  - Insurer must decide to accept demand
  - Personal contribution by insured?
  - If rejected, insurer risks potential waiver of policy limits for excess judgment against insured
  - Potential bad faith/punitive damage exposure
    - Insured may have right to assignment of claim without insurer's consent upon rejection of policy limits demand

Withdrawing from the Defense

- If there is a duty to defend, how and when is it extinguished?
- Some possible scenarios:
  - Discovery reveals new facts showing that the underlying action is not potentially covered.
  - Potentially covered causes of action are dismissed/settled.
  - An insured appeals an adverse ruling or judgment—when is determination of the issue final?
  - The Policy is Exhausted
  - The insured fails to cooperate
  - The insurer tenders policy limits

Withdrawing from the Defense

- Upon “final determination.” *Fireman's Fund Ins. Co. v. Chasson*, 207 Cal. App. 2d 801, 24 Cal. Rptr. 726 (1962).
- Final on appeal. *CNA Cas. of California v. Seaboard Sur. Co.*, 176 Cal. App. 3d 598, 222 Cal. Rptr. 276 (Ct. App. 1986).
- Summary judgment in declaratory judgment action.
  - *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Seagate Tech., Inc.*, 2013 WL 1282971 (N.D. Cal. Mar. 27, 2013).
  - *Auto-Owners Ins. Co. v. Potter*, 242 F. App'x 94 (4th Cir. 2007).

Withdrawing from the Defense (Continued)

- Summary judgment in liability action dismissing potentially covered claims.
  - *Harrington Haley LLP v. Nutmeg Ins. Co.*, 39 F. Supp. 2d 403 (S.D.N.Y. 1999).
  - *Wells' Dairy, Inc. v. Travelers Indem. Co. of Illinois*, 336 F. Supp. 2d 906 (N.D. Iowa 2004).
  - *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411 (Minn. 1997).

- Strict "8 Corners" States often hold that the duty continues until the dismissal of all potentially covered claims is final and non appealable.

Withdrawing from the Defense - Finality?

- Mixed Actions: What happens when potentially covered claim dismissed, but no final judgment?
  - Examples
- Duty to defend = Duty to fund on appeal?
  - Examples

Withdrawing from Defense

- ROR?
- Waiver and Estoppel?
  - Where an insurer, without reservation and with actual or presumed knowledge, assumes the exclusive control of the defense of claims against the insured, it cannot thereafter withdraw and deny liability under the policy on the ground of noncoverage, prejudice to the insured by virtue of the insurer's assumption of the defense being, in this situation, conclusively presumed.
    - *Transamerica Ins. Group v. Chubb & Son, Inc.*,16 Wn. App. 247, 249 554 P.2d 1080 (1976).

Withdrawing from Defense

- An insurer's duty to defend an insured ends when it is determined that a claim is not covered.
  - *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 405, 229 P.3d 693 (2010).
- The procedure to follow when coverage is uncertain is to defend under reservation of rights and seek a declaratory judgment regarding the issue of coverage. Where the declaratory judgment action determines there is no coverage, the insurer may withdraw from the defense of the insured.
  - *Farmers Ins. Group v. Johnson*, 43 Wn. App. 39, 44, 715 P.2d 144 (1986).
- If the facts necessary to determine coverage are at issue in the underlying case, the insurer must maintain a defense throughout the underlying litigation.
  - *Canal Indem. Co. v. Adair Homes, Inc.*, 37 F.Supp.2d 1294, 1303 (W.D. Wash, 2010).

Is a Declaratory Relief Action Required to Withdraw from the Defense?

- "When an insurer is presented with notice of a claim and demand for a defense, the proper and safe course of action . . . is to enter upon a defense under a reservation of rights and then proceed to seek a declaratory judgment in its favor." *Hoover v. Maxum Indem. Co.*, 730 S.E.2d 413, 417 (Ga. 2012).
- Obvious benefit to insurer – avoids bad faith.
- *Montrose* Stay?

Collusion, or Something Like It

- Some Possible Scenarios:
  - The insurer colludes with panel defense counsel to defeat coverage.
  - One insured sues another insured: must an insurer defend if the suit is non-collusive?
  - The insurer refuses to defend, and so the insured colludes with the underlying claimant to negotiate an outsized settlement with a covenant not to execute against the insured.

Collusion, or Something Like It

- Insurer colluding with the claimant (itself). *Nationwide Mut. Ins. Co. v. Mortensen*, 2009 WL 2710264 (D. Conn. Aug. 24, 2009), *on reconsideration in part*, 2009 WL 5066783 (D. Conn. Dec. 16, 2009).
- Insurer colluding with claimant. *Lockwood Int'l, B.V. v. Volm Bag Co.*, 273 F.3d 741 (7th Cir. 2001).
- Insured colluding with claimant. *United Fire & Cas. Co. v. Civil Constructors, Inc.*, 2014 IL App (3d) 130888-U (Dec. 19, 2014).

Independent Counsel

- Collusion between the insurer and defense counsel can be avoided by allowing the insured to select its own counsel where there is a conflict of interest
- *San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc.*, 162 Cal.App.3d 358 (1984).
- Example: insurer reserves rights to deny coverage based on willful conduct, and if allowed to control the defense could steer underlying case towards non-coverage.

Collusion Between Insureds

- Insured v. Insured Exclusion: oftentimes found in D&O policies.
- Broad v. Narrow IvI Exclusion
- Can IvI Exclusion be avoided by showing no collusion?

Collusion Between Insured and Claimant

- If insurer breaches its duty to defend, it loses its right to control defense and settlement.
- The insured may enter into a non-collusive settlement with the claimant.
- Burden generally on insurer to prove collusion.
- Settlement + Covenant not to Execute?

Covenant Judgments

- Enforceable in most states, including WA
- If an insurer acts in bad faith, an insured can recover from the insurer the amount of a judgment rendered against the insured, even if the judgment exceeds contractual policy limits
  - *Besel v. Viking Ins. Co.*, 146 Wn.2d 730 (2002).
- The principles apply whenever an insurer acts in bad faith, whether by poorly defending a claim under a reservation of rights, refusing to defend a claim, or failing to properly investigate a claim
- Most Commonly Occur When Insurer Breached Duty to Defend or Duty to Settle

Covenant Judgments - Procedure

- Bad Faith by Insurer
- Agreement between Insured and Plaintiff
  - Common Components
    - Settlement Amount
    - Assignment of Claims
    - Stipulated Judgment
    - Covenant to Not Execute on Judgment Against Insured
    - Cooperation of Insured
    - Hold Harmless of Insured

Covenant Judgments - Procedure

- Motion for Court Approval of Settlement
- Motion to Intervene by Insurer
- Motion for Reasonableness Hearing - RCW 4.22.060
- *Chaussee* Factors
    1. Plaintiff's damages;
    2. Merits of Plaintiff's liability theory;
    3. Merits of Insured's defense theory;
    4. Insured's relative faults;
    5. Risks and expenses of continued litigation;
    6. Insured's ability to pay;
    7. Evidence of bad faith, collusion, or fraud;
    8. Plaintiff's investigation/ preparation of the case; and
    9. Interests of the parties not being released.

Covenant Judgments - Procedure

- In enacting chapter 4.22 RCW, legislature was addressing contribution among joint tortfeasors not assignment of insurance bad faith claims
- It is the Washington Supreme Court, not the legislature, that has "approve[d] the application of RCW 4.22.060" to covenant judgments assigning insurance bad faith claims, to which the statute would otherwise not apply
- In the insurance bad faith assignment context, then, we apply RCW 4.22.060, but with the Supreme Court's purpose in approving its application in mind.
    - *Hidalgo v. Barker*, 176 Wn. App. 527 (2013).

Covenant Judgments – Reasonableness Hearing Discovery

- RCW 4.22.060(1) = "A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence."

- Insurer must have a "meaningful opportunity to be heard" at the reasonableness hearing.
  - *Howard v. Royal Spec. Underwriting*, 121 Wn. App. 372 (2004).

- Insurer able to conduct limited discovery regarding liability and damages in the underlying case prior to hearing
  - *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572 (2009).

Covenant Judgments - Procedure

- Water's Edge
  - CD case
  - Homeowners Association Entered into $8.75M settlement agreement with stipulated judgement
  - Insurers intervened in the action and were permitted to conduct limited discovery prior to the reasonableness hearing.
  - After the trial court reviewed testimony, documents, and briefing, and heard argument at the reasonableness hearing, it concluded that a $400K settlement would have been reasonable.

- Court Discretion to Set Reasonable Amount of Settlement

Covenant Judgments - Risk

- The Washington Supreme Court has repeatedly acknowledged the danger of collusive or fraudulent settlements in cases involving covenant judgments.

- *"Because a covenant not to execute raises the specter of collusive or fraudulent settlements, the limitation on an insurer's liability for settlement amounts is all the more important. A carrier is liable only for reasonable settlements that are paid in good faith."*

    - *Bird v. Best Plumbing Grp., LLC*, 175 Wn. 2d 756, 765-66 (2012); *Besel v. Viking Ins. Co.*, 146 Wn. 2d 730, 738, (2002).

Covenant Judgements – After Judgment is Entered

- Plaintiffs, as Assignee of Bad Faith Claims, Must Establish Bad Faith by Insurer
  - The amount that the court determines to be reasonable following reasonableness hearing constitutes a presumptive measure of damages in the bad faith action

Thank You

Kirsten C. Jackson, Esq.
Kasowitz Benson Torres
kjackson@kasowitz.com

Eliot M. Harris
Williams Kastner
eharris@williamskastner.com