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Coverage Nightmares

I. Coverage Position Letter Nightmares

Drafting and issuing a thorough and clear coverage position letter is essential for handling all types of claims where potential coverage issues are present. However, there are a number of jurisdictions that present uniquely challenging coverage concerns based on state-specific case law. While many of these issues are relevant in handling all types of claims, we will discuss some state-specific issues that present particular challenges in the construction litigation context.

A. South Carolina – Clarity in Reservation of Rights Letters

Recently, the South Carolina Supreme Court set forth certain strict requirements for an insurer when issuing of reservation of rights letter it in *Harleysville Group Insurance v. Heritage Communities, Inc.*, Appellate Case Nos. 2013-001281 and 2013-001291, 2017 WL 105021 (S.C. Jan. 11, 2017). Although the Court's guidance on effective reservations appears to apply to all insurers and all coverage issues, the Court's decision is particularly informative for those handling construction defect claims because the case involved a construction defect case, and accordingly addressed two common coverage issues in the construction defect context - (1) what constitutes covered "property damage" under a commercial general liability (CGL) policy; and (2) time-on-risk allocation for damages awarded under a general verdict.

By way of background, the *Harleysville* case involved claims for damages stemming from defective construction and resulting water intrusion at two condominium complexes. Condo owners and the condo owners' associations sued the developer/general contractor, who then tendered the claims to its CGL carrier, Harleysville, for defense and indemnification under multiple primary and excess CGL policies. Harleysville agreed to provide a defense subject to a "full reservation of rights" in what the Court described as a "generic statements of potential non-coverage" that "(through a cut-and-paste approach) incorporated a nine- or ten-page excerpt of various policy terms, including the provisions relating to the insuring agreement, [the insurer's] duty to defend, and numerous policy exclusions and definitions." The Court further explained that the letters "included no discussion of [the insurer's] position as to the various provisions or explanation of its reasons for relying thereon."

After trials on the nature and extent of the damages (liability was stipulated), the juries returned multi-million dollar verdicts in favor of the condo owners and associations and against the insured developer. Harleysville then filed a declaratory judgment action against the developer, seeking a

declaration that it had no duty to indemnify the developer or, in the alternative, an allocation of which portion of the juries' verdicts constituted covered damages and whether those portions were subject to a time-on-risk allocation. Although the Court acknowledged that the general verdicts in the underlying actions likely included some covered and some non-covered damages (e.g., costs for removing, repairing, or replacing faulty workmanship) the Court, found that Harleysville had waived the right to contest its liability for actual damages because Harleysville's reservations in this regard were too generic and insufficient to preserve its rights to do so. The court stated that "[i]n general, the letters didn't state the particular grounds on which Harleysville might dispute coverage; didn't advise the policyholder of the need to allocate between covered and non-covered losses; and didn't reference a possible conflict of interest or Harleysville's intent to pursue a declaratory judgment action."

While the Court's decision contains a number of important rulings that pertain to construction defect coverage issues, the main take-away is that a reservation of rights letter cannot serve as a mere formality upon providing a defense to an insured. Rather, a reservation of rights letter must specifically articulate the insurer's coverage positions and to notify a policyholder of potential conflicts. Failure to do so may function as a waiver of any such coverage defenses. Therefore, as a matter of best practices in all states, coverage position letters should not be so broad as to cover all potential coverage issues under the policy, but should be limited to the potential coverage issues in the matter at hand, and should clearly articulate how those potential coverage issues pertain to the present matter.

B. Missouri – Reservation of Rights Letters

1. Requirements for a Reservation of Rights Letter

In *Western Heritage Ins. Co. v. Love*, 24 F.Supp.3d 866 (W.D. Mo. 2014) *aff'd sub nom. W. Heritage Ins. Co. v. Asphalt Wizards*, 795 F.3d 832 (8th Cir. 2015), the federal court discussed insurance coverage for a TCPA/junk fax case. The insurer agreed to defend its insured under a reservation of rights, and initially issued a letter that contained a brief description of the underlying Complaint, the name of defense counsel and the policy's limit of liability and deductible. Then, four years later, coverage counsel for the insurer sent the insured a twelve-page reservation of rights letter that contained what the Court characterized as a lengthy, detailed explanation of the insurer's coverage position.

However, the *Asphalt Wizards* court held that the insurer waived its coverage defenses because it undertook the insured's defense without any reservation of rights. The Court found that the initial letter issued at the time that the insurer appointed defense counsel did not constitute a "reservation of rights letter" as it did not provide any information beyond basic claim and policy information. Further, the subsequent letter, although substantively sufficient, was untimely and, therefore, ineffective. The Court found that, because the insurer knew or should have known from the initial pleadings that there were a number of applicable coverage defenses, yet waited several years before issuing a reservation of rights letter, the insurer "waived its ability to deny coverage under the Policies."

In ruling so, the *Asphalt Wizards* court stated that "[a] typical reservation of rights letter does most, if not all, of the following: (1) identifies the policy at issue; (2) quotes, or at least refers to, the relevant policy provisions and identify any terms, conditions, or exclusions which may bar coverage; (3) refers to specific, relevant allegations in the complaint; (4) identifies which claims may not be covered; (5) explains in detail the basis for the insurer's coverage position; (6) sets forth the proposed arrangement for providing a defense and, depending on the law of the jurisdiction, advises the insured

of its right to independent defense counsel; (7) advises the insured of any actual or potential conflicts of interest between the insurer and the insured; (8) reserves the right to withdraw from the defense; (9) contains a general reservation of rights, including the right to assert other defenses the insurer may subsequently learn to exist during further investigation; and (10) uses the words 'reservation of rights.'" (citations omitted).

Of note, however, the insurer did not waive its $1,000 per-claim deductible and the Court found that no class member involved in the suit had more than $1,000 in damages.

2. Bad Faith Due to Ineffective Reservation of Rights

In the construction defect context, the Missouri Court of Appeals has ruled that a CGL carrier was estopped from denying coverage for a multi-million dollar construction defect suit against its insured because its coverage position letters were ineffective to preserve the insurer's right to deny coverage because the letter were neither timely nor clear. The Court explained that the letters failed to "clearly and unambiguously explain" how certain provisions of the applicable CGL policy triggered coverage issues with respect to the claims asserted against the insured and, in fact, did not actually explain anything or identify what coverage issues might exist. *Advantage Buildings & Exteriors, Inc. v. Mid-Continent Cas. Co.*, 449 S.W.3rd 16 (Mo. Ct. App. 2014). Accordingly, the Court upheld the submission of a bad faith claim to the jury, even though the Court had previously found that the CGL policy at issue did not cover the claims in the underlying lawsuit.

By way of background, the insured, Advantage Buildings tendered its defense and indemnity to its CGL carrier after it was sued for property damage arising out of construction defects. The insurer sent its first coverage letter to its insured shortly after receiving notice, and stated that it "would investigate the claim and perform a coverage analysis" but "was reserving its right to assert that there may be no duty to defend or indemnify" against the claims asserted. Subsequently, the insurer sent a second purported reservation of rights letter, stating that it would conditionally defend the insured while reserving its rights.

About two years into the litigation, the insurer declined to settle the claims against its insured even though defense counsel recommended settlement. Then, only a few days before trial, the insurer sent a letter informing its insured for the first time that most of the $3M claim was not covered, and commenced declaratory judgment action on these newly-articulated coverage issues. The insured then settled with the third party plaintiff for only $500 and agreed to give it the proceeds of any award Advantage Buildings received from its Bad Faith claims against its insurer for failing to settle the underlying action within policy limits.

In a declaratory judgment action, it was determined that the insurer's coverage position was correct in that most of the claims were not covered by the applicable policy. However, the bad faith claim proceeded to trial, and the insured obtained a judgment for $3M in actual damages and $2M in punitive damages. The insurer argued that there could be no bad faith because it defended the case and reserved its rights. The Court rejected this argument and found that the insurer's initial coverage letter was not a "proper" reservation of rights, which must be both clear and timely, and the insured must fully understand the insurer's position. "Defending an action with knowledge of non-coverage under a policy of liability insurance without a proper and effective reservation of rights in place will preclude the insurer from later denying liability due to non-coverage." There is a duty of good faith to settle claims against an insured. The elements to prove such a claim of bad faith failure to settle are:

(1) the liability insurer has assumed control over negotiation, settlement, and legal proceedings brought against the insured; (2) the insured has demanded that the insurer settle the claim brought against the insured; (3) the insurer refuses to settle the claim within the liability limits of the policy; and (4) in so refusing, the insurer acts in bad faith, rather than negligently.

In sum, an insurer can still be found liable for bad faith for failure to settle a claim, even where coverage would not exist had the insurer properly reserved its rights under the applicable policy.

C. New York – Coverage Disclaimers

1. Reasonable Time to Disclaim

NY Ins. Law § 3420(d) requires that, an insurer disclaiming coverage for death or bodily injury claim must provide written notice of the disclaimer to the insured and any claimants "as soon as reasonably possible." However, reasonableness under this provision is not set further articulated in the law.

In *First Financial Ins. Co. v. Jetco Contracting Corp*., 801 N.E.2d 459 (N.Y. 2003), the NY Court of Appeals addressed whether an insurer's 48-day delay in notifying an insured in a labor law case of its disclaimer of coverage is unreasonable as a matter of law, even though, during that period, the insurer was investigating the whether other applicable insurance existed. About a week after the insurer received the notice of claim, it authorized agent advised that "late notice" was an issue, and that the insurer should issue a denial letter "as soon as practicable." However, it did not do so until about 48 days after its agent recommended the disclaimer.

The Court found that the timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for the disclaimer or from when it should have been readily apparent to the insurer that the disclaimer should be issued. The Court also held that, although an investigation into issues affecting an insurer's decision to disclaim may be a reasonable excuse for delay, an insurer has the burden of justifying the delay. An investigation into a possible basis for disclaiming coverage will justify any further delay in issuing a disclaimer on a known basis to disclaim coverage.

2. Waiver of Coverage Defenses due to Deficiencies and Untimeliness

Recently, the Second Department issued a decision in *Unified Window Systems, Inc. v. Endurance American Specialty Ins. Co.*, 149 A.D. 3d 1009 (N.Y. App. Div. 2017), finding that an insurer's deficiencies in its coverage disclaimer effectively waived its coverage defenses; as such, the insurer was required to provide coverage for its insured.

The Court explained that the insurer "…waived its right to disclaim coverage based upon the Employer's Liability and Designated Ongoing Operations exclusions because it failed to include these grounds for disclaimer in the original disclaimer letter[,]" and, "[i]n any event, its disclaimer based on these exclusions was untimely as a matter of law."

In sum, an insurer cannot later assert a coverage defense in a declaratory judgment action that it did not properly and timely disclose in its coverage positon letter.

II. Legislation Nightmares

A. “Occurrence”

Typically in response to a court opinion determining that defective construction does not constitute an “occurrence” under a CGL policy, a handful of states passed statutes to ensure the opposite result. Hawaii[1], Colorado[2], South Carolina[3] and Arkansas have all passed legislation, with varying language, to define “occurrence” to include damage resulting from faulty workmanship.

For example, Arkansas Code § 23-79-155 provides:

(a) A commercial general liability insurance policy offered for sale in tis state shall contain a definition of “occurrence” that includes:
  (1) Accidents, including continuous or repeated exposure to substantially the same general harmful conditions; and
  (2) Property damage or bodily injury resulting from faulty workmanship.

(b) This section is not intended to restrict or limit the nature or types of exclusions from coverage that an insurer may include in a commercial general liability insurance policy.

B. Continuous or Progressive Damage

Colorado has gone one step further and C.R.S.A. §10-4-110.4 has made void and unenforceable as against public policy any provision in a liability insurance policy issued to a construction professional for liability arising at from construction-related work that excludes or limits coverage for claims “arising from … property damage … that occurs before the policy’s inception and that continues, worsens, or progresses when the policy is in effect … if the exclusion or limitation applies to damage that was unknown to the insured at the policy’s inception date.”

III. Policy Interpretation Nightmares

A. “Ongoing operations”

The phrase "ongoing operations" has caused litigation throughout the nation. Two examples include *Tri-Star Theme Builders, Inc. v. OneBeacon Ins. Co.*, 426 Fed. Appx 506 (9th Cir. 2011) and *Wausau Underwriters Ins. Co. v. Cincinnati Ins. Co.*, 198 Fed. Appx 148 (2nd Cir. 2006).

1. *Tri-Star Theme Builders, Inc. v. OneBeacon Ins. Co.,* 426 Fed.Appx. 506 (9th Cir. 2011)

In *Tri-Star Theme Builders, Inc.*, the Ninth Circuit Court of Appeals, interpreting Arizona insurance law, held that the phrase "ongoing operations" in the context of an additional insured endorsement, was ambiguous. Tri Star, a purported additional insured under its plumbing and HVAC subcontractor’s insurance policy, sued the plumbing subcontractor's insurer, OneBeacon, for failure to defend and indemnify Tri Star when it was sued by the owner of a project for purported design and construction defects, some of which stemmed from the HVAC and plumbing work. *Id.* at 508. The “Who

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[1] H.R.S. § 431:1-217

[2] C.R.S.A. § 13-20-808

[3] S.C. Code Ann. § 38-61-70

Is An Insured" section of the policy included Tri-Star, but only with respect to liability arising out of the subcontractor's ongoing operations performed for Tri-Star on the project, and only to the extent of liability resulting from occurrences arising out the subcontractor's negligence. *Id.* OneBeacon contended that the damage alleged in the underlying lawsuit was not covered by the additional insured endorsement to the subcontractor's policy, because it was only required to cover damages suffered while the subcontractor was performing work on the project. *Id.* The Ninth Circuit held that the key phrase, "arising out of the Named Insured's ongoing operations," in its plain meaning, addresses only the type of activity from which coverage may arise, not when the injury or damage must occur. *Id.* at 510. In other words, the provision did not state that injury must occur during the subcontractor's operations, but rather must merely arise out of the subcontractor's ongoing operations. *Id.* Because the court understood the provision to be ambiguous in that it could reasonably be construed in more than one sense, it determined the scope of coverage by considering the legislative goals, social policy, and the transaction as a whole. *Id.* at 513. It ultimately held that requiring coverage was consistent with the provision's ordinary, plain meaning, the transaction as a whole, and the state's policy of requiring insurers to utilize language that clearly and distinctly communicates to the insured the nature of the limitation. *Id.* at 514. Accordingly, the court concluded that OneBeacon was under a duty to defend and indemnify Tri-Star. *Id.*

2. ***Wausau Underwriters Ins. Co. v. Cincinnati Ins. Co.,*** **198 Fed.Appx 148 (2nd Cir. 2006)**

In Wausau Underwriters Ins. Co. v. Cincinnati Ins. Co., 198 Fed. Appx 148 (2nd Cir. 2006) (New York), Town Square, LLC and its insurer, Wausau Underwriters, Inc., sued Cincinnati Insurance Company, alleging that it had a duty to defend and indemnify Town Square as an additional insured under its policy with Masciarelli Construction, a construction company hired to plow and salt the Town Square's parking lot during the winter of 2003, when it was sued by a patron that slipped and fell on ice in its parking lot. *Id.* at 149. The insurance contract provided coverage for an additional insured, such as Town Square, but only with respect to liability arising out of the construction company's ongoing operations performed for Town Square. *Id.* Cincinnati argued that Town Square was not entitled to coverage as an additional insured under Cincinnati's policy with Masciarelli because the slip-and-fall did not arise out of Masciarelli's "ongoing operations," but rather occurred after Masciarelli had plowed and salted the lot. *Id.* 149. The court rejected this narrow definition that "ongoing operations" only connotes actions currently in progress, such as active work. *Id.* at 150. Relying on Town Square's contract with Masciarelli, which required Masciarelli to prevent standing water from freezing, the court concluded that the district court did not error in finding that the slip-and-fall accident qualified as a covered loss and that Town Square was an additional insured under Cincinnati's policy with Masciarelli. *Id.* Accordingly, it held that Cincinnati was under a duty to indemnify Town Square and Wausau. *Id.*

B. "Caused in whole or in part"

Other coverage interpretation nightmares include the interpretation of the phrase "caused in whole or in part". In *James G. Davis Const. Corp. v. Erie Ins. Exchange,* 126 A.3d 753 (Md. Ct. Sp. App. 2015), the Maryland Court of Special Appeals held that the phrase "caused in whole or in part" extended additional insured coverage beyond vicarious liability. The court explained that it was unreasonable to interpret the term "liability" as used in the 2004 version of the ISO standard form additional insured endorsement as referring to "vicarious liability" because vicarious liability is an all or nothing proposition and thus a party could not be vicariously liable 'in part' for [the named insured's] acts.

In *Burlington Ins. Co. v. NYC Transit Authority,* 2017 WL 2427300 (N.Y. June 6, 2017), the New York Court of Appeals held that where an additional insured endorsement applies to bodily injury "caused, in whole or in part" by the "acts or omissions" of the named insured, the coverage applies to injury "proximately caused by the named insured." The court rejected the notion that liability "caused in whole or in part" was the equivalent to "but for" causation.

C. "Known loss"

Most primary level CGL policies contain an exclusion for coverage for known losses. The scope of this provision continues to be debated in the courts. In *Arnett v. Mid-Continent Cas. Co.,* 2010 WL 2821981 (M.D. Fla. July 16, 2010), the policy's known loss provision barred coverage for damage known to the contractor but not damage unknown to the contractor. In *Alkemade v. Quanta Indemnity Co.,* 2017 WL 1404708 (9th Cir. April 20, 2017), the Ninth Circuit Court of Appeals, applying Oregon law on a matter of first impression, determined the question of whether damage sustained after a repair is a continuation, change or resumption of known damage. The Court of Appeals found that where there were two possible reasons damage occurred after a repair (original construction or negligent repair), it was "plausible" to treat the new damage as distinct from – rather than a continuation, change or resumption of – the form damage.

IV. Everyone's Nightmare Jurisdiction: Florida

A. The Anti-Contribution Rule

Under Florida law, because each primary insurer's duty to defend is a personal contractual obligation that does not inure to the benefit of another insurer, there is no right of contribution or equitable subrogation between primary insurers to recover the costs of defending a mutual insured. *Continental Cas. Co. v. United Pacific Ins. Co.,* 637 So. 2d 270 (Fla. 5th DCA 1994).

"The rationale for [the anti-contribution rule] is rooted n public policy: if insurers could sue each other for reimbursement, they 'would have no incentive to settle and protect the interest of the insured, since another lawsuit would be forthcoming to resolve the coverage dispute between the insurance companies.'" *Zurich American Ins. Co. v. Amerisure Ins. Co.,* 2017 WL 366232, *5 (M.D. Fla. January 19, 2017)(citing *Argonaut Ins. Co. v. Maryland Cas. Co.,* 372 So. 2d 960, 964 (Fla. 3rd DCA 1979)). The anti-contribution rule was designed to de-incentive insurers from shirking their obligations to their insureds. *Id.,* at *5, n.9 (*citing Pennsylvania Lumbermens Mut. Ins. Co. v. Indiana Lumbermens Mut. Ins. Co.,* 43 So.3d 182 (Fla. 4th DCA 2010)).

In *Pennsylvania Lumbermens,* one co-primary insurer defended its insured and reserved its rights to reimbursement of defense costs. Once a court determined that the insurer's policy did not provide coverage, the insurer, through an assignment from the insured, sought to collect its defense costs from the co-primary insurer. The court refused to allow the first insurer to collect because it still had an independent contractual duty to defend their mutual insured. That purpose of the anti-contribution rule "would be frustrated if carriers could reopen the door to litigation through the legal fiction of obtaining their insureds' rights." *Zurich American* at *5, n.9.

B. Decisional Nightmares

1. Rip & Tear

Carithers v. Mid-Continent Cas. Co., 782 F.3d 1240 (11th Cir. 2015) is the first decision applying Florida law to hold that the costs associated with removing and replacing purely defective work is covered under a CGL policy when doing so is required to repair covered property damage. *See also Mid-Continent Cas. Co. v. Treace,* 186 So. 3d 11 (Fla. 5th DCA 2015)(upholding damages awarded for the cost to access and repair water damage caused by faulty construction).

Some argue that *Pavarini Construction Co. (Se) Inc. v. Ace American Ins. Co.,* 161 F.Supp.3d 1227 (S.D. Fla. 2015) may have expanded the scope of an insurer's obligation for rip and tear damages. The court relied on *Carithers* and noted that "in order to adequately repair the non-defective project components, the building had to be stabilized. Even if the predominant objective … was to fix the instability caused by the defective subcontractor work, it is undisputed hat the same effort was required to put an end to ongoing damage to otherwise non-defective property; e.g. damage to stucco, penthouse enclosure, and critical concrete structural elements." *Pavarini* at 1234. In a footnote, citing *U.S. Fire Ins. Co. v. J.S.U.B., Inc.,* 979 So. 2d 871 (Fla. 2007), the court posts that a "natural corollary" to the proposition that coverage may exist for repairing structural damage caused by the defective work of subcontractors, is that coverage may also exist for "costs to repair defective work in order to prevent further structural damage and covered loss." *Id.* at n.6.

2. Pleading for Policyholders

a. Four Corners

In *Voeller Const., Inc. v. S.-Owners Ins. Co.,* No. 8:13-CV-3169-T-30MAP, 2014 WL 1779289 (M.D. Fla. May 5, 2014), the Middle District refused to consider extrinsic evidence (an affidavit) to create a duty to defend. The Middle District reasoned that cases discussing exceptions to the four corners rule "involve uncontroverted facts outside the allegations in the underlying complaint that refer to facts that take the case outside of the policy coverage, not those that bring the case within coverage." *Id.* at *5.

Composite Structures, Inc. v. Cont'l Ins. Co., 560 Fed. App'x 861 (11th Cir. 2014) exemplifies the *Voeller* Court's distinction that extrinsic evidence can only be used to negate a duty to defend, not to create one. In *Composite Structures*, the policy contained a Pollution Buy Back Endorsement which excluded coverage but contained an exception that applied if five conditions were met, including that the occurrence be reported in writing to the insurer within 30 days after having become known to the insured. *Id.* at 865. The Complaint was silent as to when the occurrence was reported in writing to the insurer, however, neither the insured not the insurer disputed that notice was untimely under the exception to the pollution exclusion. *Id.* at 866. Relying on *Higgins v. State Farm Fire & Cas. Co.,* 894 So. 2d 5 (Fla. 2004), the 11th Circuit held that it was proper to consider the uncontroverted date of written notice when determining its duty to defend because the date of written notice to the insurer was not a fact that would normally be alleged in the complaint and therefore, there was no duty to defend. *Id.* at 866. Additionally, the 11th Circuit held that Continental was not required to file a declaratory judgment action to rely on facts outside of the underlying complaint as a basis to deny coverage because doing so is permissive not compulsory and there were no facts in dispute. *Id.* at 866-7.

b. Pleading "Property Damage"

In *Auto-Owners Insurance Company v. Elite Homes, Inc.,* 160 F.Supp.3d 1307 (M.D. Fla. 2016), *aff'd,* 676 Fed.Appx. 951 (11th Cir. 2017), the court found that the allegations of damage pertained solely to the home built by the insured and therefore were excluded under the Damage to Your Work Exclusion and Auto-Owners had no duty to defend the insured in the underlying action. Auto-Owners insured Elite Homes, Inc., the builder of the single-family residence. After the house was completed the windows leaked and after several failed repair attempts, the homeowners filed suit. *Elite Homes* at 1308. Auto-Owners defended and filed a declaratory judgment action. The underlying amended complaint alleged, in relevant part, that the water intrusion due to leaky windows caused:

- "extensive damage to other property includ[ing] the frame subsurface, sheathing, insulation, drywall, and interior finishes";
- "damage to interior portions of the home"; and
- damage to other property including, but not limited to, exterior wood framing, wood substrate, vapor barriers, insulation, drywall, and interior finishes. *Id.* at 1312.

Auto-Owners argued that the allegations of damage relate solely to the home, all of which was the insured's work as the builder. The court agreed. Specifically, the court found that, while the allegations include language such as "damage to other property," "damage to interior portions of the home," and "damage to other property including, but not limited to," the claims related solely to the home's structure itself, all constructed by the insured builder. Id. The underlying amended "contains no allegations of damage to personal property or property other than the home itself. Id. A complaint seeking damages for the repair and replacement of defective materials and/or defective work does not constitute "property damage" and therefore does not fall within the insuring agreement of the CGL policy and non defense is required. *Bradfield v. Mid-Continent Cas. Co.,* 143 F.Supp.3d 1215, 1237 (M.D. Fla. 2015).

In addition, the allegation of "damage to the interior portions of the home" is, on its face, an allegation of damage to the <u>home</u>. *Elite Homes* at 1312 (underlining in original). Such "buzz words" and conclusory allegations are insufficient to trigger the duty to defend. Id. *See also J.B.D. Const., Inc. v. Mid-Continent Cas. Co.,* 571 Fed. Appx. 918 (11th Cir. 2014) (concluding that absent evidence of actual damage to the building, the vague reference to water intrusion points, not water damage, in the engineering reports is insufficient to create a genuine dispute that the work caused damage to other property).

V. And Then You Woke Up

A. Bad Faith

The term "bad faith" has become symbolic with causing trauma for in-house counsel, headaches for defense attorneys and nightmares for claims professionals. Claims for bad faith involve hindsight and the question of whether a claim could have been handled better, faster, more efficiently or differently, all decided by Monday morning quarterbacks and is not where any insurer wants to find itself. Bad faith claims can be asserted in a variety of forms ranging from codified or statutory claims to common law tort and or breach of contract claims. It is jurisdiction dependent form your nightmare will manifest itself.

1. Statutory actions

Several states have recognized and codified actions of bad faith in the first-party sense. Other states have adopted a model wherein claims can be asserted pursuant to Unfair Claims Settlement Practices codification. Lastly, a variety of states have developed consumer protection and unfair competitions statutes and codes that can be utilized to create a statutory action.

2. Common Law

Common law has developed to the extent that even if there is not a statutory or codified cause of action, a party can certainly assert bad faith claims as part of a tort claim with or without legislative assistance. Multiple states began in the last century adopting language in the common law that permitted the tort of bad faith to move forward as its own creature of the night.

3. Standard of care

The negligence standard speaks for itself and an insurer will be exposed for bad faith liability if it is found to have acted negligently or tortuously. Multiple jurisdictions, however, have adopted an insurer friendly standard such that the standard is whether an insurer position was one on which reasonable minds could differ then the insurer will not be liable for bad faith as a matter of law. While many states have adopted language equal or similar to this standard, not all have used the exact language and therefore you may find yourself searching for similar terms to locate the cases in your particular dreamscape.

4. Third-party bad faith

At this time all states recognize claims for third party bad faith or claims brought by the non-party to the insurance contract who asserts damage has been done either to property or body.

The standard of care is going to be determined by whether the claim was handled with the same degree of care as a reasonably prudent person would exercise in the handling of one's own business.

As with anything else in the world of bad faith, the issue will likely be resolved as a question of fact by a jury. Bright line tests have not been proctored by any court of ultimate authority, rather every instance is fact determinative. What is too short and unreasonable a time in a hotly disputed factual circumstance may be ultimately found acceptable and reasonable in an instance involving clear facts and lability.

Recent trends have indicated that insurers are actively required to attempt to resolve a case for the benefit of their insured regardless of the financial condition of the insured. Whether an insured is able to meet its deductible is irrelevant to the duties of the carrier.

B. Just a Bad Dream

What are the warning signs of a bad dream ahead? The claims generally are serious and high dollar claims, clear liability and often are accompanied by low limits of coverage. The insured's responsiveness, or lack thereof, can also be a sign of bad days to come, such as failure to report the claim by the insured, failure of the insured to assist in the investigation or to provide documents and witness information. The aggressive nature of claimant counsel in seeking unreasonable terms, time demands or policy limits demands.